When Is A Family Arbitration An Arbitration? Judicial Treatment of the 2007 Changes to Ontario's *Arbitration Act* & *Family Law Act*[1]

Remember 2007? In some respects, it seems so long ago. The iPhone was just introduced[2], *Keeping Up With the Kardashians* made their first appearance on television,[3] and Ron Kaufman was just another family lawyer in Durham Region, three years away from being appointed to the Family Court in Newmarket.[4] In other ways however, very little has changed. Vladimir Putin was firmly in charge in Russia, Nancy Pelosi was speaker of the US House of Representatives, and Stan Sherr was writing seminal and thorough decisions for all to consume.[5]

Regardless of your perspective, one significant change that year occurred right here at home in Ontario. On April 30, 2007, sections 1, 4 and 5 of the *Family Statute Law Amendment Act, 2006,* c. 1, ("*FSLAA*") were proclaimed into force with the passing of Regulation O. Reg. 134/07, which amended parts of the *Family Law Act* ("*FLA*") and *Arbitration Act ("AA").*[6] These provisions, for the very first time in Ontario, defined a family arbitration, codified what was necessary to constitute it, and set out the steps required to have an award made thereunder enforced in a court of law.

---

[1] Brahm D. Siegel, C.S. and Denniel Duong, Nathens, Siegel LLP, December 1, 2020, The Six-Minute Family Lawyer 2020.

[2] June 29, 2007

[3] October 14, 2007

[4] Justice Kaufman was appointed to the bench on February 10, 2010.

[5] He was appointed to the bench on October 31, 2005.

[6] The *FSLAA* was actually proclaimed in 2006 but nothing interesting happened that year.

How the Changes Came About

Concern about women being pressured by their spouses and community members to enter "faith-based" arbitrations where religious law would be applied to their detriment led to the "Boyd Report", authored by then provincial attorney general Marion Boyd.[7] The report made 36 recommendations, the highlights of which were:

(i) Arbitrations to resolve family matters including religious law *should* be allowed to continue subject to the safeguards and recommendations in the report;

(ii) The *FLA* should be amended to add mediation agreements and arbitration agreements to the definition of "domestic contracts" to bring these agreements into the general protections of Part IV of the Act, thus requiring them be in writing, signed by the parties and witnessed;

(iii) Regulation to the *AA* or the *FLA* should require that arbitration agreements in family law must be in writing and set out a detailed list of issues that are submitted to arbitration, whether the arbitration is binding or advisory, the form of law if not Ontario law which will be used to decide the dispute, and in the case of religious law, which form of religious law;

[7] Marion Boyd, *Dispute Resolution in Family Law: Protecting Choice, Promoting Inclusion* [Boyd report] (Toronto: A.G., 2004), online: http://www.attorneygeneral.jus.gov.on.ca/English/about/pubs/boyd.

(iv) Regulations should require arbitration agreements in family law to contain either a certificate of independent legal advice or an explicit waiver of independent legal advice;

(v) Regulations should require mediators and arbitrators in family law to be members of voluntary professional organizations or fall into an excluded class defined by the regulation, in order to have their decisions enforced by Ontario courts;

(vi) Regulations should define the concept of a fair and equal process in the context of family law arbitrations;

(vii) Regulations should require that arbitrators who apply religious law in family law arbitrations develop a statement of principles of faith-based arbitration that explains the parties' rights and obligations and available processes under the particular form of religious law;

(viii) Regulations should require religiously-based arbitrators to distribute their statement of principles of faith-based arbitrations to all prospective clients;

(ix) Regulations should require mediators and arbitrators in family law to screen the parties separately about issues of power imbalance and domestic violence prior to entering into an arbitration agreement, using a standardized screening process and to certify they have done so; and

(x) The Ministry of the Attorney-General, the Law Society of Upper Canada and LawPro should strike a joint task force to examine the use of arbitration in family law.

FSLAA

In a surprising turn, the Provincial Government adopted some, but not all, of the Boyd report recommendations. They voted not to allow litigants to have arbitrations determined by religious law[8] and although arbitration in family law was preserved, it was forever changed. A new term, "family arbitrations", was developed, and new rules with regulation were passed as to how they would be created and decisions therefrom enforced.

These new rules and regulations, now 13 years old, resulted in wholesale changes in how arbitrations in family law are constituted. Or have they? This paper examines caselaw since 2007 with respect to when an arbitration is properly constituted. In short, when can it be said that an arbitration is properly a family arbitration under Ontario family law?

[8] For a discussion as to why that happened, see Shelley McGill's excellent paper "Family Arbitration: One Step Forward, Two Steps Back." *Journal of Law and Social Policy* 21. (2007): 49-62. https://digitalcommons.osgoode.yorku.ca/jlsp/vol21/iss 1/3.

It Seems Simple Enough

Prior to the coming into force of the *FSLAA*, an arbitration could be constituted in different ways. Courts could and did find that parties were bound to the arbitration process based on correspondence, terms in a order or separation agreement.[9] That changed forever on April 30, 2007. No longer could arbitrations be constituted based on such events. As a result of changes brought about by the *FSLAA*, the new regime for Ontario family arbitrations featured:

- The new term "family arbitration" applied only to processes conducted exclusively in accordance with the law of Ontario or another Canadian jurisdiction. Other third-party decision-making processes in family matters were not considered family arbitrations and have no legal effect (*AA*, ss. 1, 2.2, and 32(4); *FLA*, s. 59.2).

- Both the *AA* and the *FLA* now applied to family arbitrations, with the latter governing in case of a conflict between the two statutes (*AA*, s. 2.1(2); *FLA*, s. 59.1).

[9] See *Dormer v. McJanet*, 2006 CanLII 42670 (ON SC) and *Kay v. Korakianitis*, 2007 CanLII 29278 (ON SC) (arbitration agreement only in draft format); *S.A. v. G.J.*, 2008 CanLII 63190 (ON SC) (arbitration agreed to in separation agreement only); *Owers v. Owers*, 2009 ONCA 296 (CanLII) (consent to mediation-arbitration signed by counsel and incorporated into court order prior to April 30, 2007); *Puigbonet-Crawford v. Crawford,* 2006 CanLII 38881 (ON SC) (parties agreeing to settle all differences via mediation-arbitration in separation agreement); and *Marchese v. Marchese*, 2007 ONCA 34 (CanLII) (agreement to mediate-arbitrate term in court order).

- Family arbitrations must be conducted pursuant to a "family arbitration agreement," which must contain a confirmation of independent legal advice, be signed by both parties, and be witnessed. A mediation-arbitration agreement is a family arbitration agreement that provides for mediation before arbitration and, if the mediation fails, the mediator arbitrating the dispute (*AA*, O. Reg. 134/07, s. 1).

- Family arbitration agreements were, for the first time, classified as "domestic contracts" under Part IV of the *FLA*, meaning they must comply with s. 56(4) of that legislation. Consequently, a court may, on application, set it aside if a party failed to disclose significant assets and liabilities, if a party did not understand the nature and consequences of the agreement, or otherwise in accordance with the law of contract (*FLA*, s. 51).

- The concept of a "secondary arbitration" was introduced where an arbitration is conducted in accordance with a separation agreement, court order, or previous arbitration award that provides for the arbitration of possible *future* disputes relating to the ongoing management or implementation of the agreement, order, or award (*FLA*, s. 59.7(2)). Secondary arbitrations still require a written family arbitration agreement, but it is not necessary for

the parties to receive independent legal advice before participating (*FLA*, s. 59.7(1).2).

- Parties to a family arbitration agreement may agree, expressly or by implication, to vary or exclude any provision of the *AA* except certain procedural requirements, including the right to appeal on a question of law with leave from the court (*AA*, s. 3.2). In other words, parties may opt out of the right to appeal on a question of fact and/or a question of mixed fact and law but they may not opt out of the right to appeal on a question of law with leave.

- Arbitration awards were now enforceable under the *FLA* by way of motion or application to the Family Court of the Superior Court of Justice or Superior Court of Justice, as the case may be, on notice to the opposing party. Provided the materials set out in the *FLA* are filed and the criteria fulfilled, the court shall make an order pursuant to its terms (*FLA*, s. 59.8; *AA*, s. 50.1).

Most importantly, family arbitration*, for the first time,* required every mediation/arbitration agreement made on or after September 1, 2007 to contain clauses confirming the arbitration will be conducted in accordance with Ontario law and detailing the routes of appeal from an award, as well as a certificate signed by the arbitrator confirming that the arbitrator will treat the parties fairly and equally, the arbitrator has received the appropriate training approved by the Attorney General, and the parties were screened for power imbalances and domestic violence[10]. The regulation also, for the first time, required arbitrators to receive training approved by the Attorney General, keep a record of the arbitration, and file reports about all final awards twice a year to the government for statistical purposes.[11]

The Caselaw

Since the above-noted changes in 2007, there have been seven noteworthy cases on the subject of when an arbitration is properly constituted. The first case came eight years after the amendments, in May 2015. Since then we've had one each year, with two in 2016 and the last arriving a few months ago, in July 2020.

The essential facts of each, with commentary, follows.

[10] Regulation, s. 2.

[11] Regulation, ss. 3 to 5.

Case #1 – *McFarland v. McFarland,* 2015 ONSC 2355 and 2015 ONSC 3379

(April/May 2015 – Minnema, J.)

The parties settled their affairs and submitted a consent order to the court. Among the terms was one that required them to follow through and sign an agreement to retain a parenting coordinator. On his own initiative, Justice Minnema asked whether such a clause should or could be made.

The court started with the definition of 'secondary arbitration' in s. 59.7 of the *Family Law Ac*t, a "family arbitration conducted in accordance with a separation agreement, court order or family arbitration award that provides for the arbitration of possible future disputes relating to the ongoing management or implementation of the agreement, order or award". Lamenting the lack of "guidance" about precisely which terms must be included in such an order, he noted, at a minimum, s. 2(2) of the Regulation required the following "mandatory standard provisions": (1) a statement of which provincial law applies, (2) a statement of the appeal process, (3) the name of the arbitrator, and (4) the signature of the arbitrator whereby he or she undertakes to treat the parties fairly and equally, confirms having screened the parties for power imbalances, and confirms having taken the required training. After commenting that the Minutes were "well drafted and appropriate", he nonetheless sent the file back to counsel, posing the following questions he wanted answered before deciding whether he would make the order:

1. The Schedule to the Minutes of Settlement refers only to "parenting coordination" and the "parenting coordinator". The legislation refers to "arbitration" and an "arbitrator." Do those terms have the exact same meaning?

2. As the proposal is to defer the choice of the arbitrator or parenting coordinator, how can the court know that the person who ultimately takes on that role will have the required training?

3. If the Minutes of Settlement were a 'secondary arbitration agreement' pursuant to the legislation, then certain assurances from the actual arbitrator would be required as touched on in paragraph 4 above. Is it appropriate to allow an order to issue without those confirmations?

4. There is a process proposed in the Minutes of Settlement for determining how the parenting coordinator is to be chosen: "Failing agreement as to the Parenting Coordinator, each shall designate a person who is a Parenting Coordinator, and those Parenting Coordinators shall chose as between themselves, the Parenting Coordinator." Should that choice be delegated? What is the process for breaking a tie?

5. The Minutes of Settlement indicate: "The parties shall execute an Agreement in the form and manner acceptable to the Parenting Coordinator, and which shall conform with the provisions of the Arbitration Act and the Family Law Act, and the regulations thereunder." Can the court order parties to agree? Can the court order the parties to sign a document dictated by a third person before they have seen it?

6. The Minutes of Settlement state that the involvement of the parenting coordinator will be "subject to" the parties being screened regarding domestic violence and power imbalances and that if the parenting coordinator determines, as a result of the screening, that the arbitration process is not suitable for these parties, then the issue of the process is to be put to the court for determination. What is the purpose of remitting that issue to the court?

In the follow up case[12], after reviewing counsel's responses he concluded that if and when the time comes the PC would have the parties review a "Stand-alone Agreement" which, in order to constitute a family arbitration agreement under the *Family Law Act*, needed to comply with the various requirements of the AA and Regulation. As the actual agreement would be "individualized" by the PC[13], he observed the parties were thus essentially "consenting to an order requiring them to sign an agreement having a general understanding of its operation and provisions but before knowing all that it will contain". Accordingly, and this is the key part:

> If a party thereafter refused to sign – it is critical to note that independent legal advice is mandatory before doing so – the actual issue or issues in dispute would be remitted back to the court. It would result in a "failure in the first instance of the alternate dispute resolution process" and the court can assume jurisdiction.[14]

[12] 2015 ONSC 3379 (CanLII).

[13] Ibid, at 4.

[14] Ibid, at 4. Unfortunately, His Honour did not get the part right about secondary agreements requiring independent legal advice. They do not. Section 2(2)(b) of the Regulation says every secondary arbitration made after April 30, 2008 must comply with 2(4).1, 2(4).2, 2(4).3 and 2(5)(i),(ii) and (iii) of the Regulation. Noticeably missing is the obligation to comply with 2(4).4 of the Regulation which requires the parties obtain independent legal advice.

On this bases he found the requested order was not enforceable. However, he also found that insofar as it set out what was expected from the parties and having regard to the fact the law is clear that the court can make an order requiring the parties to attend mediation/arbitration where they consent[15], he nonetheless signed the order as requested, finding that it sufficiently addressed the process the parties agree to follow in the event of a future dispute, provided them with the means by which the secondary arbitration is to be implemented and – and this is key - the parties understood its limitations.

It is this last part – understanding the limitations of a clause requiring litigants to follow through with an ADR process without all the requirements that that entails be complied with at the time – that begun the trial of the various judicial approaches and interpretations covered in this paper.

It is evident that Minnema J. was clearly uncomfortable about making the order but wanted to find a way to accommodate the parties' joint request. It is clear from his ruling that absent a signed arbitration agreement, the court could – and should – assume jurisdiction in the context of a secondary arbitration. However, subsequent caselaw - starting with the next case *Amid v. Houdi* - reveals a completely opposite approach on essentially identical facts.

[15] In this regard he cited *M. v. F.,* 2015 ONCA 227 (CanLII) at 43.

Case #2 -*Amid v. Houdi,* 2016 ONSC 2849 (April 2016 – Charney, J.)

High-conflict cases tend to return to court, like perennials, year after year; *Amid* is one such case. The parties entered into a separation agreement and incorporated the terms into a final order. Similar to *McFarland*, there was a clause requiring they would retain the services of a senior member of the family bar to arbitrate if they could not resolve a dispute. The wording of their agreement, incorporated into a consent order, was that the mother would have final say, subject to an appeal of the father which would be heard by said arbitrator.

After a dispute emerged the parties could not agree on the identity of the arbitrator. By subsequent order, Kaufman J. ordered the mother to select one from a list of qualified individuals, which she did.[16] The problem ensued however when the father refused to pay the arbitrator's retainer or sign the arbitration agreement. The mother responded by filing for contempt of court.

Charney, J. did not find the father in contempt on the grounds the order to retain Ms. Goldhart was a "payment order" which the *Family Law Rules* provide cannot form the basis for a contempt order[17]. However, his failure to obey the process was not without consequence. Since he never followed through with retaining the arbitrator the mother had final authority to make the decision in question and there was no avenue of appeal. His failure to follow through with the agreed-upon process as supplemented by Kaufman J.'s order resulted in the mother having a clear path to the solution she wanted.

[16] Cheryl Goldhart.

[17] See Rules 31(1) and 26(4).

Simple in its effectiveness, the key here to Charney's decision is that he honoured the process the parties had previously agreed to. He could have easily assumed jurisdiction, and in so doing let the parties slip out of the agreed-upon ADR process they chose but he wisely chose not to, thus forcing the father with a Hobson's choice: either follow through with the ADR process or let the mother have her way.[18]

This decision is both consistent and inconsistent with *McFarland*. It is consistent insofar as the court in *McFarland* made the order that the parties would retain a PC in the event of a dispute, reflecting the court's willingness to enforce parties' agreements and expectations with the ADR process. It is inconsistent however, in that in *McFarland* the court said that a failure to complete the requirements to get a secondary arbitration agreement signed up would result in the court assuming jurisdiction, while in *Amid v. Houdi*, Charney J. does the opposite. By refusing to enter the fray he honours the ADR process and leaves the father with two equally unappealing options: either sign the retainer for Ms. Goldhart and follow through with secondary arbitration process or allow mother to have final say.

[18] Hobson's choice: a free choice in which only one thing is offered. Because a person may refuse to accept what is offered, the two options are taking it or taking nothing. In other words, one may "take it or leave it": Wikipedia.

Case #3 – *Michelon v. Ryder*, 2016 ONCJ 327 (May 2016 – Kurz, J.)

Michelon is very similar in facts to *McFarland*. The parties settle all their issues and submit a draft order for execution which has a term compelling them to appoint a parenting coordinator in the event of a future dispute – clearly a secondary arbitration. Unlike in *McFarland* however, here the court refuses to give effect to the clause.

Kurz, J., a former specialist in family law, takes time to analyze the situation. He observes the courts have no power to delegate its power to determine custody/access decisions to a third party[19], notes there is nothing in the law authorizing courts to force parties to determine parenting issues in arbitration, and highlights that for a secondary arbitration to be constituted, a proper arbitration agreement needs to be prepared, completed and signed.

> In considering all of the above, it is clear that the Ontario statutory framework for the use of arbitration to settle family law disputes requires consent, as expressed in an arbitration agreement, in order to commence the process. That agreement can call for further reference to secondary arbitration to settle disputes that may arise from time to time down the road. However, absent statutory change, the gateway to the arbitration process can only be traversed voluntarily. Court orders, even those on consent, do not contain a shortcut across the arbitration gateway.

[19] As per *C.A.M. v. D.M.,* (2003), 2003 CanLII 18880 (ON CA) at 22, and *D.D. v. H.D.*, [2015] O.J. No. 2959 ONCA at 92-93.

> That being said, nothing prevents the parties to this proceeding from signing the arbitration agreement contemplated in par. 44 of the draft order. They have already agreed to do so. It just means that the court cannot order them to do so.[20]

Michelon makes it clear that there is no getting around the statutory formalities required to give effect to an arbitrator's award, which include a signed arbitration agreement, provisions on rights of appeal and domestic violence screening requirements. But by refusing to make the order as requested, Kurz J. reflects the primacy and importance of these provisions and ensures the dangers of making such an order without them all being in place - dangers seen in *Amid v. Houdi* – do not occur. Kurz J. could have done what Minnema J. did in *McFarland* and simply make the order as requested, leaving to another day – and another judge – what happens if one party doesn't follow through with any of the number of things that need to happen to give force and effect to a secondary arbitration, precisely the situation Charney J. encountered in *Amid v. Houdi*.

These three decisions reflect the tension and uncertainty between the courts' role in assisting parties with ADR clauses. Clearly, Minnema J. was simply trying to give effect to the parties' intentions while Kurz J. was unwilling to do so unless all of the required boxes set out in the legislation were ticked.

[20] Paras 20-21.

It is submitted that one approach the bench may want to consider when faced with consent orders like this is to make it clear that while the order can be made, it is only being made only insofar as expressing the parties' expectations and intentions and that failure to comply with "follow through" does not result in a free pathway to the court assuming jurisdiction over the merits of the dispute when a litigant changes his/her mind about the attractiveness of the ADR process. Charney J. makes this clear enough in *Amid v. Houdi* that the court's role in such instances is limited to assisting the parties in proceeding with – not substituting its own process and judgment for – arbitration.

This leads to another question. Should this deference to the ADR process in respect of secondary arbitrations apply equally in cases of first instance? In other words, where the case is not a secondary arbitration, do the same considerations apply? In the next case, Justice Nelson shows us they do not.

Case #4 – *Horowitz v. Nightingale*, 2017 ONSC 2168 (April 2017 – Nelson, J.)

In the midst of a high-conflict case which had not yet reached trial, the parties, each represented by experienced counsel, signed Minutes agreeing to arbitrate certain outstanding issues with an arbitrator[21]. Weeks later, the wife changed her mind and refused to sign the arbitration agreement prepared by Mr. Grant and signed by the husband. In response, he moved to stay the court proceeding on grounds she was bound by Minutes, and hence, the arbitration process.

[21] Stephen Grant

Nelson, J. did not agree and dismissed the husband's motion to stay on the grounds that Minutes of Settlement are not the same thing as an arbitration agreement. While not wanting to allow the wife to escape her obligations, he was clearly alive to the statutory requirements that need to be in place before an arbitration can be properly constituted:

> From a policy point of view, I am mindful of how important it is in family law to hold parties to their agreement. It is also important to have options such as arbitration and mediation/arbitration for parties who wish to opt out of the litigation process. Getting parties to agree on both process and substantive issues is, after all, an important function of case management. Had there been no formal requirements necessary, and had Justice McGee and the parties themselves not recognized the need for and importance of a formal arbitration agreement, I may have been persuaded to stay the court application or deal with the apparent breach of court order in some other manner.[22]

This well-written, concise case is correct in its conclusion that Minutes of Settlement, even when prepared by counsel and signed at a four-way meeting, do not qualify as a binding arbitration agreement. Without all of the statutory requirements or "formalities" as Justice Nelson labelled them, the court remains seized of all issues. It is an entirely different situation than the first three cases where all issues were resolved on a final basis and the parties were seeking assistance from the court in order to enforce ADR process via a secondary arbitration.

---

[22] At para 69. The reference above to Justice McGee is interesting. In an appearance before her after the Minutes were signed, she held and reflected in her endorsement that unless the arbitration agreement was completed and signed by all by a particular date the case would remain on the trial list, thus clearly conveying the notion embedded in the 2007 changes that unless all of the requirements are completed in a formal arbitration agreement, the court remains fully empowered to hear the case. It is submitted that even without this endorsement by McGee J., Justice Nelson was correct in dismissing the motion to stay; if anything it just gave him added facts with which to do so.

Case #5 – *Lopatowski v. Lopatowski*, 2018 ONSC 824 (February 2018 – Gray, J.)

The facts in *Lopatowski* are nearly identical to those in *Amid v. Houdi*.

Faced with a looming trial, the parties settle all of their issues on a final basis and, as part of their final settlement to be blessed by the court, ask for an order that for future disputes they would select one of three specified individuals to serve as parenting coordinator for two years.

As in *Amid v. Houdi*, they were unable to agree on the identity of the PC so a motion was needed and Gibson, J., as did Kaufman J. in *Amid*, appointed the PC[23], ordering them to sign her parenting coordinator agreement and pay her retainer forthwith. When the wife then refused to sign the PC's retainer agreement the husband moved for contempt of court, just like in *Amid v. Houdi.*

Unfortunately, although neither counsel nor the court referred to *Amid v. Houdi*, Gray J. arrives at the same conclusion as Charney J. He refuses to make the contempt order and makes it clear there is nothing inappropriate about the parties agreeing to a PC, nor with Gibson's order clarifying who it should be. He characterizes the wife's conduct in following through with Ms. Polak's retainer as being "consistent with a desire to escape from what she now regards as a bad deal than with any legitimate concern about the terms of the parenting coordinator agreement", finding that her actions were inconsistent with the principles of "good faith and honest contractual performance"[24], and gives her some time to reconsider, obviously hoping she will sign it in the interim.

[23] Shely Polak

[24] Para 60.

In reaching his decision, Gray J. (correctly) rejects the wife's arguments that the case is akin to *Horowitz v. Nightingale*. He was right to do so as the facts were very different. In *Lopatowski*, as in *Amid*, all of the issues in the case were resolved and the parties were simply fighting about the process for a secondary arbitration, with one party trying to slip out of them and one party trying to hold the other's feet to the previously agreed-upon bargain.

One very big difference however, between *Lopatowski* on one hand and *Amid* and *Michelon* on the other, is Gray J.'s comments about imbuing an ADR professional with jurisdiction they clearly do not have absent an arbitration agreement. While both Charney J. in *Amid* and Kurz J. in *Michelon* correctly refuse to empower an ADR professional with arbitral powers absent a properly signed arbitration agreement, Gray J. seems to have no issues doing so:

> Fundamentally, I think the basic agreement made by the parties was that parenting disputes would be dealt with by a parenting coordinator, and if necessary, arbitrated. Those were the essential terms that the parties agreed to. The mechanical terms of setting out the details of the process were not essential, in my view. At the time the matter came before Gibson J., as he noted, "The selection of a person who cannot fulfill one of the functions agreed between the parties (secondary arbitration) frustrates the original intent of the parties as reflected in Fitzpatrick J.'s order." There was no suggestion that the terms of a parenting coordinator agreement, whatever they may be, would be seen as an impediment. It must be recalled that both parties were represented by experienced counsel who would have an understanding of the terms of parenting coordinator agreements, which are widely used in Ontario.

> In my view, there is nothing in the draft parenting coordinator agreements presented by the parenting coordinator that would be inconsistent with the basic understanding, that the parties had agreed to, that the parenting coordinator was to mediate disputes and, if necessary, arbitrate them. It would be understood, particularly by experienced counsel, that broad authority would need to be conferred in order to effectively mediate. They would also understand that if arbitration proved to be necessary, the proceedings would be governed by the *Arbitration Act*, which ensures a high degree of natural justice. Neither would the statutory terms, including the provision of independent legal advice and inquiry by the arbitrator as to the power imbalances in play, be an impediment. Once again, the parties were represented by counsel who would understand these requirements and they obviously did not cause enough concern to prevent the agreement resulting in the order of Fitzpatrick J. from being entered into.
>
> I am assisted in this analysis by a consideration of the unanimous judgment of the Supreme Court of Canada in *Bhasin v. Hrynew*, 2014 SCC 71, [2014] 3 S.C.R. 494. In that case, the Court recognized a general organizing principle of good faith contractual performance, and particularly that there is a common law duty which applies to all contracts to act honestly in the performance of contractual obligations: see the reasons of Cromwell J. at paras. 33, 60, 62, 63 and 93.
>
> The Court made it clear that these principles apply to all types of contractual relationships. I see no reason why they should not apply to family law contractual relationships, and indeed in some ways they perhaps should be applied even more strongly to family law contractual relationships.[25]

In case the Regulation to the *Arbitration Act* wasn't clear enough, one would think that after *Amid, Michelon* and *Horowitz*, there would be no more questions about this issue – every secondary arbitration agreement *shall* contain provisions confirming the law of Ontario applies, what the appeal provisions are, the name of the arbitrator and a signature of the arbitrator confirming their obligation to treat the parties equally and fairly, confirming s/he has received the appropriate training approved by the Attorney-General and that the parties were separately screened for power imbalances and domestic violence. Absent these there can be no valid empowering of the ADR professional.

[25] Paras 54-57.

Did Gray J. need to go down this road? Clearly not. It is submitted he should have followed the same course as Charney J. in *Amid*, dismissed the motion for contempt but made it clear the court has no jurisdiction to assist other than to help give life to the ADR process. To the extent that his comments above can be taken as *obiter dicta*, it is submitted they are simply commentary as to the ability of the court to empower an ADR professional absent a properly constituted arbitration agreement. As Nelson J. points out in *Horowitz*, "the legislature has chosen to make certain formal requirements necessary in order to have a legal and binding arbitration."[26]

We can all understand the court's frustration when a litigant fails to comply with a court order as the wife did in *Lopatowski.* Gray, J., like Charney J. in *Amid*, reminds us that contempt will rarely be the appropriate remedy for such behaviour; however, it is *never* the appropriate remedy to interpret Minutes or a subsequent court Order as constituting an arbitration agreement when the statutory formalities are absent. The correct statement of law is set out in *Horowitz.* Whether we are talking about a secondary arbitration or not, in order to imbue the ADR professional with arbitral powers, an agreement with all of the proper formalities as required and established in the *FSLAA* must be complied with. Therefore, interpreting *Lopatowski* as standing for the proposition that an arbitration can be properly constituted without such requirements is, respectfully, misguided.

[26] Para 45.

Case #6 – *Giddings v. Giddings,* 2019 ONSC 7203 (December 2019, Gray, J.)

In *Giddings*, the parties agreed to final Minutes of Settlement. The problem was that not all of the terms were adequately fleshed out.

Fortunately, they provided that any unresolved equalization issues would be "summarily arbitrated" by an arbitrator.[27] Unfortunately, they proceeded without domestic violence screening and failed to sign an arbitration agreement.[28] Compounding the problem, the parties and counsel moved forward with the case despite no arbitration agreement in place and no screening having been done. The arbitrator hosted conference calls, appointed a property appraiser in order to help him determine the value of various properties in dispute, and issued various rulings as to the process with respect to said appraiser.

As can be expected, when one party – in this case, the husband – did not like a ruling, he refused to comply. Realizing then the procedural snafu created as a result of the agreement not having been signed at the outset, the wife's lawyer had her sign the arbitration agreement and forwarded it to the husband who naturally, refused to sign because he disagreed with the arbitrator's decision, thus leading Justice Gray to sort out the mess.

[27] Stephen Grant

[28] Unlike in *Horowitz*, this was not a case where one party had second thoughts about the process. Rather, it was a combination of inadvertence on the part of the arbitrator combined with counsel's inattention to ensuring the arbitration agreement was signed prior to any work being commenced.

As he did in *Lopatowksi*, Justice Gray had little empathy for the non-complying spouse, in this case the husband who tried to use the inadvertent failure to have the arbitration agreement signed as a basis for extricating himself from the process. Justice Gray agreed an arbitrator has no power to proceed in the absence of a family arbitration agreement and called the legislation in that respect "crystal clear", noting there are certain formalities that must be observed before it can be said that there is a valid family arbitration agreement in place which had not been observed.[29] However, instead of finding the husband now had a clear pathway to court, he ordered the husband to "forthwith" execute the arbitration agreement. According to His Honour, the parties clearly agreed to execute a formal, enforceable family law arbitration agreement and, in his view:

> …it does not lie in the mouth of the appellant, having asked Mr. Grant to decide the scope of his authority, to then use Mr. Grant's answer as the only reason to decline to execute an arbitration agreement when he had agreed, in writing, that he would execute such an agreement. His refusal to execute a family arbitration agreement is not consistent with his obligation of good faith contractual performance. The court must have the power, in these circumstances, to require him to live up to his obligation.[30]

[29] Para 29.

[30] Para 44.

As he did in *Lopatowski*, Gray, J. relies on the common law principles of good faith and honesty in contractual performance in binding the husband to the process he agreed to and ordering the parties to forthwith execute Mr. Grant's arbitration agreement. While there is nothing wrong in so doing, another basis for the order would have been to rely on section 6 of the *Arbitration Act* which allows the court to intervene in order to "assist the conducting of arbitrations".[31]

Case #7 – *Magotiaux v. Stanton*, 2020 ONSC 4049 (July 2020, Mackinnon, J.)

Just when things seemed relatively settled, along comes *Magotiaux v. Stanton*.

The facts couldn't be simpler. The parties sign a parenting agreement in September 2019 in which they agree to retain a "mediator/arbitrator/parenting coordinator" in the event of a dispute. The ADR professional is even named[32] and the agreement provides they are to share all upfront costs, with the professional having the power to apportion costs. The agreement further provides that her decision(s) would bind the parties and if she needed to conduct an arbitration, it would constitute a secondary arbitration as that term is understood under the *AA* and *FLA*.

A parenting dispute emerged (we are not provided with the details). The mother refuses to proceed with retaining Ms. Guindon (again, no details) and instead launches a court action.

[31] *Arbitration Act*, s. 6.1.

[32] Julie Guindon

The father, quite rightly, brings a motion for a stay under section 7 of the *Arbitration Act*. Quite wrongly, he argues the clause in the parenting agreement requiring ADR is an "arbitration agreement". And he loses. Justice Mackinnon sides with the mother and rules the court proceeding may proceed.

With all due respect to father's counsel, the mistake here was the argument the parenting agreement was a binding arbitration agreement, which of course it is not. There is now no dispute (since 2007) as to what needs to occur in order for a document to be a valid arbitration agreement.

Had the case been before Gray, J., he surely would have found sufficient consensus from the wording in the agreement to enable him to do what he did in *Giddings* and *Lopatowski*, namely, refuse to allow the parties to fight in a different sandbox and make orders requiring them to comply with the terms of their agreement and complete the necessary work to sign a secondary arbitration agreement and proceed with Ms. Guindon. But Justice Mackinnon takes a different route. She goes into a fair and accurate summary of all that is required in order to make an arbitration award enforceable, which is understandable given the husband's argument that the parenting agreement in fact constituted an arbitration agreement.

The part about the ruling however that rankles is there is no discussion about whether a stay is appropriate in other respects. Section 6 of the *Arbitration Act* requires courts to stay a matter in court when the issue at hand is subject to an arbitration. Her Honour follows the logic in *Horowitz v. Nightingale* finding that without all of the statutory formalities and requirements the parties could not be bound to a process. The facts of that case however, were entirely different. *Horowitz* is not a secondary arbitration case. No court has jurisdiction to require the parties to arbitrate when the statutory formalities

have not been met. In this case however, the parties had already agreed to arbitration in a valid separation agreement, the precise conditions required for a secondary arbitration. All that was required was the follow-through, just as in *Lopatowski* and *Giddings*. It is submitted the proper approach was to grant the stay on the grounds the parties had not completed the follow-through, and as a result, force them to do so.

Justice Mackinnon distinguishes *Lopatowski* on various grounds. She notes the parenting agreement stipulates Ms. Guindon's decision would be "binding" whereas the law provides for a choice to be made on appeals, subject to there always being an appeal permitted on a question of law with leave. She points out that various arguments advanced in *Lopatowski* were not raised in the case at bar. Above all, she disagrees with Gray J.'s view that the parties would know that certain formalities would be required in order to give life to the secondary arbitration agreement.

Again, the major problem here is it appears this is nothing more than one person trying to avoid clearly agreed upon terms and seeking to avail themselves of the court process when a different set of rules were previously agreed upon in a binding and valid separation agreement. In this regard, the case is no different (and in fact much simpler) than *Thomson v. Thomson.*[33]

[33] 2012 ONCJ 141 (CanLII).

In *Thomson*, a final separation agreement was signed in October 2005 providing that in the event any financial issues arose Phil Epstein would mediate/arbitrate and if any parenting issues arose Dr. Irwin Butkowsky would mediate/arbitrate. The parties then bickered for years about various issues with the mother seeking financial disclosure from the father who refused to provide same; he in turn sought to re-open all parenting issues.

Eventually the father called for mediation/arbitration but by that point the mother refused to attend. Mr. Epstein (correctly) said he had no jurisdiction to act without an executed med-arb agreement which the mother refused to sign. The father then unilaterally reduced his child support payments, triggering the mother to start an application in court for sole custody, child support and other relief. The father then filed an answer asserting the court did not have jurisdiction due to the dispute resolution clause in the separation agreement.

The issue, identical to *Margotiaux*, was whether the mother's application should be stayed under s. 7(1) of the *Arbitration Act*.

Justice Zisman gets it right. She finds the relief claimed by the mother in her application falls within the scope of the dispute resolution provision in the parties' separation agreement which provision clearly provides that if a dispute arises with respect to the interpretation or the parties' obligations under the agreement all matters "shall" be referred to Mr. Epstein. Since the issues in the court application were the same or under the general umbrella as those Mr. Epstein was to mediate/arbitrate, the application should be stayed. In doing so, Her Honour formulates the following useful steps for counsel to follow:

> "The approach taken by the courts in determining whether to stay a claim pursuant to section 7(1) of the *Arbitration Act* is as follows:
>
> (a) The court must first interpret the arbitration provision. The court then analyses the claims to determine whether they must be decided by an arbitrator under the terms of the agreement as interpreted by the court.
>
> (b) In interpreting an arbitration clause, the court should not make a final determination about its scope. Where it is arguable whether a claim falls within the scope of the arbitration provision that issue should be left to the determination of the arbitrator.
>
> (c) If the answer to (a) is yes, then the court must stay the action and refer the claims to arbitration unless the person who commenced the court proceeding establishes that one of the exceptions to section 7(2) of the *Arbitration Act* applies."[34]

In holding the parties to the process they agreed to in their separation agreement, Justice Zisman notes their clear agreement to appoint Mr. Epstein, that med-arb "is utilized frequently in family law disputes", that both parties were represented by "experienced family law counsel" when the separation agreement was negotiated, and they both agreed to this form of dispute resolution.[35] In so doing she makes clear the role of the court in cases such as this is to support and help honour the dispute resolution process parties have agreed to:

[34] Para 44.

[35] Para 50.

> "For sound policy reasons, family law permits and encourages separating parties to work out their own agreements through separation agreements which include how to resolve future disputes. In this case, the parties were both represented by experienced family law counsel when they entered into a comprehensive separation agreement that provided for a contractual obligation to mediation/arbitration. Unless there are some exceptional circumstances, the parties should be required to abide by that agreement."[36]

Again, it is important to note that Justice Zisman did not find that the separation agreement *was* an arbitration agreement. All she did is use the tools at her disposal to ensure those requirements are put into place. By refusing to allow one side to use the courts, she forces the parties to honour the path they agreed to and, by doing so, steers them into proceeding with all of the statutory formalities and requirement necessary to give life to a secondary arbitration – no different than what Gray J. does in *Giddings* and *Lopatowski*. The only difference is she uses the *Arbitration Act* to do so while Gray J. uses the "good faith" principles at common law.

While it may not appear so at first blush, *Magotiaux* is dangerous because it allows every parent who has a med-arb clause in their agreement to opt out and proceed to court unless a signed secondary arbitration agreement is attached. Her Honour even says, so, at para 8:

[36] Para 66.

> Prudence dictates that family litigants wishing to provide for a potential future arbitration should append a detailed family arbitration agreement containing the mandatory terms to their settlement document and should agree to complete and execute the agreement in the form attached, at the appropriate time.

This is usually highly impractical; the last thing parties and counsel want to do following the end of a highly contested file is negotiate a new contract. An alternative suggested approach is to include a paragraph in the separation agreement making it crystal clear that the parties shall proceed with ADR, name the ADR provider (as in *Thomson*) and insert language confirming that if a party launches court that party immediately consents to a stay pursuant to sections 6 and 7 of the *Arbitration Act*.

Final Comments

Ultimately, while cases of first instance like *Horowitz* appear nicely settled, the Court of Appeal may have to determine which approach is correct in the face of a secondary arbitration. When the parties have a valid separation agreement or court order requiring them to arbitrate but the formalities of said secondary arbitration are not completed, should the court ignore them and allow one party to litigate as in *Margotiaux* or use the tools available to send them back and ensure an arbitration agreement is the only course of action as in *Giddings, Lopatowski* and *Thomson*?

If the parties have already signed a separation or agreed to a court order which very clearly spells out the parameters of an ADR process and then one person refuses to follow through with that process, sections 6 and 7 of the *Arbitration Act* are the proper sections for the court to grant a stay and send them back to the negotiating table so they complete the secondary arbitration agreement. The proper course of action is not, it is submitted, to throw one's hands up and welcome them to the courthouse. If, however, the case is of first instance, as was the case in *Horowitz v. Nightingale*, then in the absence of a signed arbitration agreement, the court does and should retain jurisdiction, even if there is correspondence or even a Consent or Minutes confirming the parties intend to follow through. This makes perfect sense given that with a secondary arbitration, the parties have already carefully thought through the process they want, would have had independent legal advice on the separation agreement, and had detailed discussions with their counsel as to the appropriateness of the process and who the ADR provider would be. There is also much greater focus on what the dispute is. In the first instance, there is no guarantee any of these things are completed.

One final matter: screening. Even in the case of a secondary arbitration the parties need to be screened for domestic violence and power imbalance. It should go without saying that if, for some reason, the screener finds the parties are not suitable at all for arbitration, the court should let them out and allow them to litigate in court.[37]

Brahm D. Siegel
November 11, 2020

[37] Although I am aware of a case where this occurred, it has not been (yet) reported. Stay tuned!