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— Franks & Zalev - This Week in Family Law

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How to Be the Quintessential Frivolous and Vexatious Litigant

Bell v. Fishka, 2022 CarswellOnt 14457 (C.A.) — Lauwers, Roberts and Miller JJ.A.

This was a motion (in writing) to dismiss two appeals under Rule 2.1 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, as frivolous, vexatious and an abuse of process. Such motions are not often successful. But sometimes . . .

Rule 2.1 of the *Rules of Civil Procedure* empowers a court to stay or dismiss a proceeding if it appears on its face to be frivolous, vexatious, or an abuse of the process of the court. A "proceeding" includes an appeal.

The parties were never married or in a relationship, but they had a child together. They had been litigating for years chewing up judicial resources in every level of court in Ontario: the Ontario Court of Justice, the Superior Court of Justice, the Divisional Court, and the Court of Appeal. The appellant had brought many unsuccessful proceedings, and had been the subject of several unpaid costs orders.

One such order was the August 5, 2021 Order of Justice Horkins of the Ontario Superior Court of Justice. Pursuant to that Order, the appellant was required to pay $24,000 into court as security for costs in relation to her appeals from two other Orders. The appellant was also required to pay $7,000 in costs for the motion for security for costs, and was precluded from bringing any further motions or from seeking any further relief until she complied with the orders, unless leave was granted by the court. Not surprisingly, she did not comply.

The appellant then appealed Justice Horkins' Orders, but her appeal was dismissed by the Divisional Court. However, despite losing the appeal, she still refused to pay the ordered security or costs. Instead, she brought a motion for leave to continue with two other appeals despite not having paid the security or the costs. That motion was heard by Justice Shore of the Superior Court.

Justice Shore noted the lengthy history of the matter and the appellant's tendency to continuously roll matters forward and to appeal decisions against her. She also noted that the appellant remained in default of Justice Horkins' Orders.

Justice Shore also detailed the numerous unsuccessful proceedings brought by the appellant, and her failure to comply with her disclosure obligations and numerous cost orders. There had been numerous negative findings made about the appellant by previous judges, including that the litigation was wholly disproportionate to the steps and positions that the appellant wanted to take. The appellant had also engaged in abusive behaviour towards the respondent's counsel, and declared that she would not pay the respondent his costs under any circumstances. In the words of Justice Shore:

> The Appellant has caused the respondent to incur significant costs and has not paid the costs ordered against her. The appellant had a chance to meet the conditions set out in Justice Horkins's orders. She failed to do so. The appellant has no intention of paying the costs owing and is thus deliberately in breach of court orders. The appellant also has wasted considerable amount of court time and resources in fruitless endeavours. To allow her to continue in these circumstances would not only be grossly unfair to the respondent but would bring the administration of justice into disrepute. The appropriate remedy here is to not allow the Appellant to continue with her appeals.

There are two words to describe the conduct of the person Justice Shore is speaking about: frivolous and vexatious.

Justice Shore dismissed the appellant's appeals. Unsurprisingly, the appellant appealed Justice Shore's Order. The respondent then brought this motion before the Ontario Court of Appeal to dismiss the appellant's appeals from Justice Shore's Order.

Based on the record before it, the panel easily found that the appeals were frivolous, vexatious and an abuse of process. The appellant had repeatedly litigated issues that had already been decided, engaged in abusive behaviour, and failed to comply with court orders. These two appeals were found to be the last "in a long series of fruitless proceedings" pursued by the appellant.

To allow the appellant to continue with her appeals would bless/ignore the consequences of her breaches of numerous court orders and to allow the appellant to continue to abuse the process of the court. The respondent was entitled to finality, and the Court of Appeal was very prepared to give it to him.

The appeals were dismissed.

The Pot Calling the Kettle "Repugnant"

Charapovich v. Charapovich (2022), 73 R.F.L. (8th) 502 (N.S. S.C.) — Jollimore J.

The parties were married in 2007, and had two children together. The wife took two long maternity leaves and was the children's primary caregiver, while the husband worked full time to support the family.

The husband and wife separated in 2019 after 12 years of marriage, and the wife started an Application in Nova Scotia for the usual family law relief, including a divorce, spousal support, and property division.

In response to the wife's Application, the husband claimed that the parties had already been divorced in Belarus, and he asked the court in Nova Scotia to recognize the foreign divorce.

We have previously discussed some of the problems that foreign divorces can create for family law claimants in Canada (particularly Ontario). See, for example, "*Recognizing a Foreign Divorce — From Russia (Without Love or Notice)*" in the 2020-07 (February 24, 2020) edition of *TWFL*, and "*How Do You Solve a Problem Like Rothgiesser?*" in the 2020-18 (May 11, 2020) and 2020-19 (May 18, 2020) editions of *TWFL*.

As you may recall, the Ontario Court of Appeal held in *Rothgiesser v. Rothgiesser* (2000), 2 R.F.L. (5th) 266 (Ont. C.A.) that a Canadian court ***cannot*** vary a foreign divorce Order under s. 17 of the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.), and ***cannot*** grant spousal support where parties were already divorced outside of Canada under s. 15.2. That is, under the *Divorce Act*, a Canadian court can only award spousal support *corollary* to a Canadian divorce. Furthermore, as a "former spouse" is not eligible to apply for spousal support under Ontario's provincial support legislation — the *Family Law Act*, R.S.O. 1990 c. F.3 — *Rothgiesser* effectively means that in Ontario, a valid foreign divorce is a complete bar to a claim for spousal support.

Rothgiesser, however, is not a problem for *spousal support* claimants in Nova Scotia because, as the Court explained in *Charapovich*, even after a foreign divorce, a claimant in Nova Scotia would still be able to make claims for parenting, child support and spousal support under the *Parenting and Support Act*, R.S.N.S. 1989, c. 160, because those claims are not dependent on marital status, and because support can be claimed by a former spouse.

However, somewhat ironically, a valid foreign divorce in Nova Scotia is highly prejudicial to claimants seeking property relief, because s. 12 of Nova Scotia's *Matrimonial Property Act*, R.S.N.S. 1989, c. 275, specifies the circumstances where a spouse can apply for a division of property, and those circumstances do not include after spouses have been divorced. Accordingly, as the Court explained in *Charapovich*, recognizing the Belarusian divorce would deprive the wife of the ability to claim a division of property. (As an aside, this is not a problem in Ontario because s. 7 of the *Family Law Act* expressly permits a "spouse" or a "former spouse" to apply for an Equalization Payment.)

It was not clear in this case whether it was still open to the wife to claim property relief in Belarus, because neither party provided the court with any evidence of Belarusian law. However, the Nova Scotia Court proceeded on the assumption that the wife would *not* be able to pursue property relief in Belarus, because that was how the law worked in Nova Scotia, and Rule 54.04(2) of the *Civil Procedure Rules*, N.S. Civ. Pro. Rules 2009 provides that "the law of a foreign state is presumed to be the same as the law of Nova Scotia, unless a party gives notice by a pleading that the foreign law is in issue and proves that the foreign law is not the same." This is merely a codification of the common law; where foreign law is not proven, it is assumed that the foreign law mirrors domestic law: *Ali v. Ahmad*, 2002 CarswellOnt 354 (S.C.J.); *C. (M.S.) v. J. (C.F.)* (2017), 97 R.F.L. (7th) 179 (Ont. S.C.J.); *Funk v. Funk* (2016), 78 R.F.L. (7th) 360 (Alta. Q.B.); *Hunt v. T & N plc*, 1993 CarswellBC 1271 (S.C.C.); *Best v. Best* (2016), 84 R.F.L. (7th) 22 (N.L. C.A.); *Lalonde v. Agha* (2021), 62 R.F.L. (8th) 268 (Ont. C.A.).

After briefly summarizing the facts, the Court turned to the question of whether to grant the husband's request to recognize the Belarusian divorce.

The starting point for determining whether to recognize a foreign divorce is s. 22 of the *Divorce Act*, which permits Canadian courts to recognize foreign divorces in certain circumstances, including where one of the spouses was habitually resident in the foreign jurisdiction for at least one year before the divorce was granted:

> 22(1) A divorce granted, on or after the coming into force of this *Act*, by a competent authority shall be recognized for the purpose of determining the marital status in Canada of any person, if either former spouse was habitually resident in the country or subdivision of the competent authority for at least one year immediately preceding the commencement of proceedings for the divorce.

Subsection 22(3) of the *Divorce Act* confirms that the common law rules for recognizing foreign divorces still continue to apply. These rules allow Canadian courts to recognize foreign divorces in a number of circumstances, including:

- "where jurisdiction was assumed on the basis of the domicile of the spouses;"
- "where the foreign divorce, though granted on a non-domiciliary jurisdictional basis, is recognized by the law of the domicile of the parties;"
- "where the foreign jurisdictional rule corresponds to the Canadian jurisdictional rule in divorce proceedings;"
- "where the circumstances in the foreign jurisdiction would have conferred jurisdiction on a Canadian court had they occurred in Canada;"
- "where either the petitioner or respondent had a real and substantial connection with the foreign jurisdiction wherein the divorce was granted;" and
- "where the foreign divorce is recognized in another foreign jurisdiction with which the petitioner or respondent has a real and substantial connection."

See *El Qaoud v. Orabi* (2005), 12 R.F.L. (6th) 296 (N.S. C.A.) at para. 14, and *Novikova v. Lyzo* (2019), 31 R.F.L. (8th) 140 (Ont. C.A.) at para. 14 (as well as our discussion of *Novikova* in the 2020-07 (February 24, 2020) edition of *TWFL*).

Common law principles also give Canadian courts discretion to *refuse* to recognize a foreign divorce where there are concerns of fraud, issues of natural justice, and/or for public policy reasons: *Novikova v. Lyzo* (2019), 31 R.F.L. (8th) 140 (Ont. C.A.) at para. 14.

It is not clear from the Court's reasons in *Charapovich* whether the husband met the test for recognizing the divorce under s. 22(1) of the *Divorce Act*, or at common law, as the Court did not address this issue beyond noting that there was a disagreement between the parties about whether either one of them had a real and substantial connection to Belarus. Instead, as discussed further below, the Court found that it did not have to decide this issue, because even if the Order met the test under s. 22(1) or at common law, it would still not be appropriate to recognize it on public policy grounds.

After discussing the roles that the parties played during the marriage, including the wife's role as the children's primary caregiver, the Court ultimately declined the husband's request to recognize the Belarusian divorce on the basis that "[t]he circumstances of the marriage are such that it would be contrary to public policy to deprive [the wife] of a claim to the matrimonial property."

Respectfully, we cannot agree with the Court's approach in this case. The public policy defence to recognizing a foreign judgment, whether for a divorce or otherwise, is purposely very narrow. As the Supreme Court of Canada explained in *Beals v. Saldanha*, 2003 CarswellOnt 5101 (S.C.C.):

> [71] The third and final defence is that of public policy. This defence prevents the enforcement of a foreign judgment which is contrary to the Canadian concept of justice. **The public policy defence turns on whether the foreign law is contrary to our view of basic morality.** As stated in Castel and Walker, *supra*, at p. 14-28:
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> > . . . the traditional public policy defence appears to be directed at the concept of repugnant laws and not repugnant facts . . .
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> . . .
>
> [75] **The use of the defence of public policy to challenge the enforcement of a foreign judgment involves impeachment of that judgment by condemning the foreign law on which the judgment is based. It is not a remedy to be used lightly.** The expansion of this defence to include perceived injustices that do not offend our sense of morality is unwarranted. **The defence of public policy should continue to have a narrow application.** [emphasis added]

Here the foreign law could not possibly have been "contrary to our view of basic morality." First, the wife's problem was the law of Nova Scotia, not the law of Belarus. And second, as there was no proof of foreign law, the law of Belarus was presumed to be the same as the law of Nova Scotia. Surely the Court was not suggesting that the provisions of the Nova Scotia *Matrimonial Property Act* were repugnant? The Nova Scotia legislature may have something to say about that.

Furthermore, in a number of more recent family law cases, including *Hossein v. Nouh* (2018), 19 R.F.L. (8th) 124 (Alta. Q.B.) at paras. 11-14 and *Cao v. Chen* (2020), 43 R.F.L. (8th) 172 (B.C. S.C.) at paras. 205-211, Canadian family law judges have found that the public policy defence is incredibly narrow in scope, and that the mere fact that the result *might* have been different if one or more of the substantive issues had been decided under Canadian law instead of in a foreign jurisdiction is ***not*** a sufficient basis for refusing to recognize a foreign divorce. In *Cao*, for example, Justice Forth noted as follows:

> [207] The case law is clear that **it is insufficient to invoke the public policy defence only because the foreign law is based on different policies or leads to different outcomes than it would have had Canadian law been applied**. The issue is: is the Chinese law regarding spousal support so unjust as to offend Canadian sense of justice and basic morality?
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> [208] In my view, the high bar needed to invoke the public policy defence is not met in this case. Although the bases for awarding spousal support are different in Canadian and Chinese law, **the Chinese law is not so contrary to public policy as to offend basic Canadian standards of morality**. [emphasis added]

We assume the wife in *Charapovich* was given proper notice of the divorce proceeding in Belarus and an opportunity to respond, as otherwise she would have opposed recognition on those grounds instead of on public policy grounds. If that is correct, it is hard to see how the Court's assumption that the law in Belarus would preclude the wife from seeking property relief once a divorce was granted (because that was the state of the law in Nova Scotia) was "so contrary to public policy as to offend basic Canadian standards of morality" so as to justify refusing to recognize the Belarusian divorce on public policy grounds.

When it Comes to Arbitration, Is a "Resignation" a "Termination"?

Kubecka v. Novakovic (2022), 76 R.F.L. (8th) 370 (Ont. S.C.J.) — Pinto J.

Given the increasing popularity of arbitration, it is important to know what happens when an arbitrator resigns. Does the arbitration come to an end? Can the Court appoint a new arbitrator in the face of disagreement? Let's find out.

After about 60 years of marriage, Ingrid Kubecka and the late Josef Kubecka separated on or about September 12, 2015, when they were 84 and 82 years of age respectfully. High-conflict litigation ensued, and was still ongoing when Josef died on June 10, 2020 (when Ingrid was 91 years old).

After Josef died, Ingrid's and Josef's two daughters, Jacqueline Novakovic and Michele Kubecka, acted as Trustees of Josef's Estate. Their brother, Kenneth Kubecka, was not a Trustee, and was aligned with his mother, Ingrid. The entire family was in disharmony, and the litigation history was described as "tortured."

In the spring of 2021, Ingrid and the Estate agreed to mediate/arbitrate the remaining issues. During the mediation part of the process, the parties executed Partial Minutes of Settlement, but were not able to resolve all of the issues. As a result, the arbitration process began.

Unfortunately, the Arbitrator resigned on May 3, 2022. The question then became whether the arbitration was at an end, or whether the Court could appoint a replacement arbitrator. Ingrid specifically wanted to appoint (retired) Justice Kruzick as the replacement arbitrator.

Given that arbitration is a creature of statute and contract law, it is no surprise that Justice Pinto found the motion to largely turn on the interpretation of some specific provisions of the Mediation/Arbitration Agreement and the *Arbitration Act, 1991*, S.O. 1991, c. 17 (the "*Act*").

Section 12 of the Mediation/Arbitration Agreement stated as follows:

> **12. WITHDRAWAL FROM MEDIATION OR ARBITRATION**
>
> 12.1 Neither party may unilaterally withdraw from this Agreement at either the mediation or arbitration stage. However, **the parties may jointly terminate** this Agreement by their written agreement. Subject to paragraph 12.2, the Arbitrator shall proceed with an arbitration as provided for in this Agreement notwithstanding that the mediation has been unsuccessful or that one of the parties no longer wishes to participate in the arbitration.
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> 12.2 [The Arbitrator] **may at any time resign** from her appointment as arbitrator by providing written notice of her resignation to the parties.
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> 12.3 **In the event that [the Arbitrator's] appointment is terminated**, and the parties are unable to agree on a replacement, a court of competent jurisdiction shall appoint a replacement arbitrator on either party's application to the court.
>
> 12.4 In the event that [the Arbitrator's] **appointment is terminated**, the parties agree that any interim or interlocutory award(s) made by [the Arbitrator] will continue to bind the parties and will continue in full force and effect as the basis for the continuation of the arbitration with a replacement arbitrator. [emphasis added]

Notably, while paragraph 12.2 allowed the Arbitrator to resign, the Mediation/Arbitration Agreement did not go on to say what would happen next. And, as paragraph 12.3 of the Mediation/Arbitration Agreement specifically addressed "termination" and not "resignation", the Estate argued that paragraph 12.3 was not applicable.

While Justice Pinto was not picking up what the Estate was laying down, respectfully, we're not sure we agree with his Honour on this one. As noted below, there is some room for doubt — but we may not have all the necessary information to know for sure.

First, his Honour thought it would be "surprising" if the mere resignation of an arbitrator could trigger the end of the arbitral process and a return to the court's jurisdiction. Justice Pinto thought this would fly in the face of the commitment of the parties to the Med/Arb process. However, the problem is that if that is what the parties intended and bargained for — which is a matter of interpretation — that is what the parties were entitled to. It is not such a radical idea that, if a specifically named arbitrator chooses to resign, the parties may have meant that the arbitration process would then be at an end. For example, this situation is contemplated in s. 16(5) of the *Act*:

> **Appointment of substitute arbitrator**
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> 16 (1) When an arbitrator's mandate terminates, a substitute arbitrator shall be appointed, following the procedure that was used in the appointment of the arbitrator being replaced.
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> . . . . .
>
> **Court appointment**
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> 16 (3) The court may appoint the substitute arbitrator, on a party's application, if,
>
> (a) the arbitration agreement provides no procedure for appointing the substitute arbitrator; or
>
> (b) a person with power to appoint the substitute arbitrator has not done so after a party has given the person seven days notice to do so.
>
> . . . . .
>
> **Exception**
>
> 16 (5) **This section does not apply if the arbitration agreement provides that the arbitration is to be conducted only by a named arbitrator.** [emphasis added]

We do not, however, know if the Mediation/Arbitration Agreement specified that the arbitration was to be conducted only by the named Arbitrator. If it did, the Court's reasoning on this point would not hold.

Second, his Honour did not see any reason why a "resignation" would not be treated as a "termination" for the purposes of paragraph 12.3 of the Mediation/Arbitration Agreement. The Estate did not provide any reason other than that "different words" were used as between paragraphs 12.2 and 12.3.

However, respectfully, where paragraph 12.2 speaks of "resignation" and paragraph 12.3 speaks of "termination", there must be an inference that different words were used for a reason. Otherwise, why use different words.

Third, Justice Pinto referred to s. 14 of the *Act*, which provides as follows:

> 14 (1) An arbitrator's mandate **terminates** when,
>
> (a) the arbitrator **resigns** or dies;
>
> (b) the parties **agree to terminate** it;

> (c) the arbitral tribunal upholds a challenge to the arbitrator, ten days elapse after all the parties are notified of the decision and no application is made to the court; or
>
> (d) the court removes the arbitrator under subsection 15 (1). [emphasis added]

Based on s. 14, his Honour was of the view that the *Act* considered a "resignation" to be a form of "termination". Therefore, this "strongly suggested" that when the parties entered into the Mediation/Arbitration Agreement and used the word "termination" in paragraph 12.3, they were *implicitly* including a scenario where their arbitrator resigned.

However, the very next section of the *Act*, s. 14(2), suggests that "resignation" and "termination" are different animals:

> **Significance of resignation *or* agreement to terminate**
>
> 14 (2) An arbitrator's resignation ***or*** a party's agreement to terminate an arbitrator's mandate does not imply acceptance of the validity of any reason advanced for challenging or removing him or her. [emphasis added]

In any case, his Honour found that he had the jurisdiction to appoint a replacement arbitrator, and that the matter could not return to court.

Notably, his Honour also emphasized that he would not have been persuaded that the matter should return to Court had the Arbitrator, herself, made that recommendation. (The parties could not agree whether or not the Arbitrator had made that specific recommendation in an interim ruling.)

So, in the end, without some additional information, we are not able to conclusively conclude either way. The lesson here? Have a look at your Arbitration Agreements. If you mean for a matter to be arbitrated only by the specific person — best to say so clearly.

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