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**Family Law Newsletters**
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# — Franks & Zalev - This Week in Family Law

Aaron Franks & Michael Zalev



**Contents**



## This Russian Divorce is Borsht . . . But Should it Be???

*V. v. S.*, 2021 CarswellOnt 20824 (S.C.J.) — Steele J.

*V. v. S.*, 2022 CarswellOnt 19030 (S.C.J.) — Steele J.

Our apologies in advance, but this is going to get a bit technical. We might suggest reading this one with beverage in hand. But as technical as it is, it is also very interesting, and for some of us, very important.

We have discussed what we have called the "Rothgiesser Problem" numerous times in this Newsletter. 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*. The long-and-short of it is:

> a. Section 91(26) of *The Constitution Act*, 1867, 30 & 31 Vict, c. 3 (the "*Constitution*") gives Parliament jurisdiction to legislate over "marriage and divorce."
>
> b. Section 92(13) of the *Constitution* gives the provinces jurisdiction to legislate with respect to "property and civil rights" in a province.
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> c. To avoid impeding upon provincial powers, the Federal government can only legislate over matters of child support, spousal support and custody issues if doing so *corollary* to its power over divorce — hence the term "corollary relief." That is, the Federal government only has jurisdiction to legislate with respect to support and custody matters if doing so corollary to a divorce: *Papp v. Papp*, 1969 CarswellOnt 963 (C.A.); *Zacks v. Zacks* (1973), 10 R.F.L. 53 (S.C.C.); *Jackson v. Jackson* (1972), 8 R.F.L. 172 (S.C.C.). No divorce — no corollary relief. This is one of the reasons only married spouses can have resort to the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.).
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> d. Subsequently, it was clarified that the Federal government can only legislate with respect to support and custody issues (including variation of such issues) if doing so corollary to a *Canadian* divorce — and a Canadian court cannot vary a foreign divorce order: *Rothgiesser v. Rothgiesser* (2000), 2 R.F.L. (5th) 266 (Ont. C.A.); *Leonard v. Booker* (2007), 44 R.F.L. (6th) 237 (N.B. C.A.); *V. (L.R.) v. V. (A.A.)* (2006), 43 R.F.L. (6th) 59 (B.C. C.A.), add'l reasons at, (2006), 43 R.F.L. (6th) 91 (B.C. C.A.); *Harman v. Harman* (2009), 75 R.F.L. (6th) 50 (Alta. C.A.); *Okmyansky v. Okmyansky* (2007), 38 R.F.L. (6th) 291 (Ont. C.A.); *S. (R.N.) v. S. (K.)* (2013), 42 R.F.L. (7th) 35 (B.C. C.A.); *Cheng v. Liu* (2017), 94 R.F.L. (7th) 23 (Ont. C.A.). [Note: Quebec may not agree with this: *M. (G.) c. F. (M.A.)*, 2003 CarswellQue 1969 (C.A.).]
>
> e. In some provinces, provincial legislation only allows a "spouse" — as opposed to a "former spouse" — to claim spousal support. For example, see s. 30 of the Ontario *Family Law Act*, R.S.O. 1990, c. F.3. By way of further example,

> under the Nova Scotia *Matrimonial Property Act*, R.S.N.S. 1989, c. 275, only a *spouse* (as opposed to a *former* spouse) can claim property division. (The definition of spouses in subsection 2(g) of the *Matrimonial Property Act* doesn't include divorced spouses.)
>
> f. As a result, a spouse *validly* divorced in a foreign jurisdiction (i.e., a divorce that is recognized by Canadian courts) cannot claim support under the *Divorce Act* (and may not be able to claim support under the provincial Act — some provinces, such as British Columbia, have fixed the problem by legislating that a "former spouse" can claim spousal support).

To understand what happened in this case, we also have to review the rules regarding the recognition of a foreign divorce in s. 22 of the *Divorce Act* [the emphasis and snarky comments in the brackets are ours]:

> **Recognition of foreign divorce**
>
> 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. [Nothing interesting here. If either former spouse was habitually resident in the foreign jurisdiction that granted the divorce, Canada will recognize it — assuming notice, natural justice, etc.]
>
> **Recognition of foreign divorce**
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> (2) A divorce granted after July 1, 1968 by a competent authority, on the basis of the domicile of the wife in the country or subdivision of the competent authority, determined as if she were unmarried and, if she was a minor, as if she had attained the age of majority, shall be recognized for the purpose of determining the marital status in Canada of any person. [This is historic, antiquated and of no interest to us right now. Distinguishing between "residence" and "domicile" is *so* European.]
>
> **Other recognition rules preserved**
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> (3) Nothing in this section abrogates or derogates from any other rule of law respecting the recognition of divorces granted otherwise than under this Act. [Ah! This is what we are interested in. This preserves the recognition of foreign divorce based on the "real and substantial" connection of either party to the jurisdiction that granted the divorce: *Indyka v. Indyka*, [1967] 2 All E.R. 689. See also *Powell v. Cockburn* (1976), 22 R.F.L. 155 (S.C.C.); *Wilson v. Kovalev* (2016), 72 R.F.L. (7th) 362 (Ont. S.C.J.); *Novikova v. Lyzo* (2019), 31 R.F.L. (8th) 140 (Ont. C.A.); *Abraham v. Gallo* (2022), 2022 ONCA 874 (Ont. C.A.); *S. (R.N.) v. S. (K.)* (2013), 42 R.F.L. (7th) 35 (B.C. C.A.); *El Qaoud v. Orabi* (2005), 12 R.F.L. (6th) 296 (N.S. C.A.).]

And there you have it: in *some* provinces, a foreign divorce recognized in Canada will prevent a former spouse from claiming support in that province. This situation is rather unsatisfactory, but "it is what it is", and results, primarily, from the Federal/provincial division of powers, resulting constitutional imperatives, and the fact that, in some Canadian jurisdictions, a "former spouse" cannot claim support under provincial acts. In our respectful view, the problem requires a legislative fix; not a judicial one. But we are growing old waiting.

This case saw the Court refuse to recognize a Russian divorce on the basis that to do so would be contrary to public policy. As one of our kids used to say — this is a "tricky bit."

The parties met in or around 2010 and started living together at the end of 2011. They were married in Russia in 2012 and had a child together. The parties immigrated to Canada in March of 2018 and were, at the time of the hearing, both permanent residents of Canada. They also both continued to be Russian citizens.

On November 17, 2019 — only about 1 $^{1}/_{2}$ years after moving to Canada — the parties separated (it must have been the Canadian air). The husband moved out of the matrimonial home and applied for a divorce in Russia. The wife filed an objection

  

with the courts in Russia, as was her right. She argued, among other things, that the proceedings ought to be determined in the parties' place of residence, Toronto, and in accordance with the laws of Ontario.

A Justice of the Peace in Russia granted the divorce on or about January 13, 2020.

Some six months later, on July 15, 2020, the wife commenced proceedings in the Ontario Court of Justice. The Ontario proceeding was subsequently transferred to the Superior Court of Justice.

The wife first tried to argue (in the first case) that she had no notice of the divorce proceedings in Russia and that, as a result, Canada should not recognize the divorce. This would have been an excellent argument [see *Novikova v. Lyzo* (2019), 31 R.F.L. (8th) 140 (Ont. C.A.)] save for one problem: the wife clearly had notice of the Russian divorce proceeding and had received the documents. In fact, she contested the Russian proceeding. Therefore, this motion by the wife was dismissed: *V. v. S.*, 2021 CarswellOnt 20824 (S.C.J.).

Importantly, her Honour *also* found that the parties had a real and substantial connection to Russia. She does so in both decisions. This becomes the essence of our issue with this case.

Section 22(3) of the *Divorce Act*, noted above, allows a court to use common law conflict of law principles to recognize (or to not recognize) a foreign divorce: *Wilson v. Kovalev* (2016), 72 R.F.L. (7th) 362 (Ont. S.C.J.) at para. 9; *Janes v. Pardo* (2002), 24 R.F.L. (5th) 44 (Nfld. T.D.). A divorce that is granted in a foreign jurisdiction enjoys a presumption of validity, and the onus is on the party seeking to not have the foreign divorce recognized in Canada: *Powell v. Cockburn* (1976), 22 R.F.L. 155 (S.C.C.).

As noted above, a valid foreign divorce prevents an individual from claiming spousal support in some provinces, including Ontario. As a result, if the Russian divorce was recognized as valid, then the wife would have no claim for spousal support in Ontario, and would have to claim support in Russia.

Here is where, to us, things may have gone a bit sideways. The wife argued that the husband had obtained the divorce in Russia for the sole purpose of, and with the specific intent to, limit his financial obligations to her. The evidence was that the wife was in dire financial straits in Ontario and that she was the primary caregiver of the parties' child. While she was a lawyer in Russia, she had not worked outside of the home since the child's birth. The wife did not speak English and required a Russian interpreter during the proceedings. In contrast, the husband had a Ph. D. in engineering and was employed as a manager earning approximately $85,000 per year. What's that saying about bad facts and bad law?

The evidence before the court established that the wife would not receive spousal support under Russian law. This was not disputed by the husband. (And it was an important piece of evidence before the Court — evidence that is often lacking in recognition of foreign divorce cases.)

Her Honour found that the husband had been on a website on which Russian nationals discussed issues about living in Canada, including methods to avoid paying spousal support. While the husband claimed that he had obtained the Russian divorce because the process in Russia was more simple and faster than the Ontario system (which he also claimed to not understand), the Court rejected this. The husband was intelligent and organized. The Court determined that he had obtained the divorce in Russia to avoid spousal support obligations.

There are several bases upon which a Canadian court will not recognize a foreign divorce: *Wilson v. Kovalev* (2016), 72 R.F.L. (7th) 362 (Ont. S.C.J.); *Ho v. Lau* (2019), 32 R.F.L. (8th) 292 (Ont. Div. Ct.); *Abraham v. Gallo*, 2022 CarswellOnt 17941 (C.A.). As set out in *Wilson v. Kovalev* (2016), 72 R.F.L. (7th) 362 (Ont. S.C.J.):

> [10] At common law, there are presumptions in favour of the validity of a foreign divorce decree. Accordingly, there is an onus on a party alleging that the divorce is invalid to adduce some evidence to establish that the divorce was not properly obtained (*Powell v. Cockburn*, 1976 CanLII 29 (SCC), [1976] S.C.J. No. 66 (S.C.C.); *Martinez v. Basail*, 2010 ONSC 2038 (S.C.J.); *Janes v. Pardo* (2002), 24 R.F.L. (5th) 44 (Nfld. S.C.). The grounds upon which the court will decline to recognize a foreign divorce are very limited, and include the following:

  

1. The Respondent did not receive notice of the Divorce Application;

**2. The foreign divorce is contrary to Canadian public policy;**

3. The foreign court or other authority that granted the divorce ("the granting authority") did not have the jurisdiction to do so under the law of the foreign country;

4. Where there is evidence of fraud going to the jurisdiction of the granting authority; or

5. There was a denial of natural justice by the granting authority in making the divorce order. [**emphasis** added]

It is the "contrary to public policy" angle that is of interest here, as that is the basis on which her Honour does not recognize the Russian divorce.

In considering whether the Russian divorce was contrary to Canadian public policy, the Court considered the history leading up to the parties' separation, the Russian Divorce, and the parties' behaviour following the order. It was critical to her Honour's decision that, in her view, the husband had intentionally obtained the Russian Divorce Order in an effort to avoid his spousal support obligations:

> [53] It is one thing if parties divorce in another jurisdiction and the by-product is that one spouse cannot obtain spousal support in Ontario. However, in my view, it is another thing altogether if one party races to another jurisdiction to obtain a foreign divorce to avoid paying spousal support under Ontario law, when the family resides in Ontario.

That is, her Honour determined that the *husband's actions* (as opposed to the *foreign law*) were contrary to Canadian public policy because it is a moral and fundamental value in Ontario that spouses are required to financially support dependent partners.

While the Court suggests, with reference to *Sonia v. Ratan*, 2022 CarswellOnt 17387 (S.C.J.) (at paras. 213 and 214) and *Essa v. Mekawi* (2014), 56 R.F.L. (7th) 133 (Ont. S.C.J.), that there are cases where a party's actions have been determined to be contrary to Canadian public policy, respectfully, neither of those cases stands for the proposition that a foreign order may not be recognized because of the *behaviour* of one of the parties, as opposed to because of the foreign law itself being contrary to public policy (of course, we are not referring to behaviour such as no notice, fraud, etc.). In *Essa*, the Court did *not* refuse to recognize an Egyptian divorce on grounds of public policy partially due to the *applicant's* own actions (she had wrongfully removed the children from Egypt to Canada against an Egyptian court order). Similarly, in *Sonia*, in recognizing the foreign divorce, Justice Monahan finds that a party trying to invoke Canadian public policy as a ground for refusing to recognize the validity of a foreign divorce cannot themselves have conducted the litigation in a manner contrary to principles of Canadian public policy. That is, in both *Essa* and *Sonia*, the behaviour of the party asking the Court to not recognize the foreign divorce was under scrutiny — not the party supporting the foreign divorce.

Her Honour also noted that in *Zhang v. Lin* (2010), 92 R.F.L. (6th) 138 (Alta. Q.B.) and in *Marzara v. Marzara*, 2011 CarswellBC 742 (S.C.), the Alberta Court of Queen's Bench and the British Columbia Supreme Court, respectively, refused to recognize foreign divorces from Texas and Iran, because of how those jurisdictions dealt with spousal support. But neither *Zhang* nor *Marzara* have a terribly significant following, and *most* cases that cite either case (on the public policy issue that does not involve issues of lack of notice or a breach of natural justice in the foreign hearing) go on to distinguish them, and recognize the foreign divorce: *Essa v. Mekawi* (2014), 56 R.F.L. (7th) 133 (Ont. S.C.J.); *Hossein v. Nouh* (2018), 19 R.F.L. (8th) 124 (Alta. Q.B.); *Pontes v. Viana* (2017), 98 R.F.L. (7th) 343 (N.B. Q.B.); *Cao v. Chen* (2020), 43 R.F.L. (8th) 172 (B.C. S.C.); *S. (R.N.) v. S. (K.)* (2013), 42 R.F.L. (7th) 35 (B.C. C.A.).

In any case, relying on these cases, her Honour found that the Russian Divorce should not be recognized:

> [58] Similar to *Marzara*, [the husband] raced to court in Russia to obtain a divorce in order to circumvent the adjudication of spousal support under Ontario law. As noted above, he filed for divorce in Russia three days after leaving the matrimonial home, having previously secured the marriage certificate. From a policy perspective, Ontario law recognizes the obligation

  

> to provide support to a spouse. The *Family Law Act*, R.S.O. 1990, c. F.3 (the "*FLA*") recognizes, in s. 30, that spouses have an obligation to provide support for the other spouse "in accordance with need, to the extent that he or she is capable of doing so." The *FLA* builds in other protections, including the ability of the court to set aside a provision for support or a waiver of the right to support in a domestic contract, if the provision for support or the waiver of the right to support results in unconscionable circumstances: *FLA*, s. 33(4). The *FLA* also contemplates the purposes of a spousal support order, in s. 33(8), including to make fair provision to assist the spouse to become able to contribute to his or her own support; and to relieve financial hardship. [The husband] sought to circumvent this obligation.
>
> . . .
>
> [60] In addition, it would not be possible in Ontario for these parties to be divorced two months after [the husband] walked out, as there was not yet a breakdown in marriage as defined in the *Divorce Act*. However, the parties were divorced in Russia within two months of separating.
>
> [61] This case involves exactly the sort of "moral" and "fundamental values" that underlie the public policy defense. The Russian divorce, which was obtained less than two months after separation, gives [the husband] a back-door with which to escape his legal responsibilities, and runs counter to the four spousal support objectives set out in s. 15.2(6) of the *Divorce Act*.

The question of when a court should not recognize a foreign order on the basis of public policy was addressed by the Supreme Court of Canada in *Beals v. Saldanha*, 2003 CarswellOnt 5101 (S.C.C.) — and this is where, very respectfully, we may get into problems:

> [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:
>
> > . . . the traditional public policy defence appears to be directed at the concept of **repugnant laws and not repugnant facts**.
>
> [72] How is this defence of assistance to a defendant seeking to block the enforcement of a foreign judgment? It would, for example, prohibit the enforcement of a foreign judgment that is **founded on a law** contrary to the fundamental morality of the Canadian legal system. Similarly, the public policy defence guards against the enforcement of a judgment rendered by a foreign court proven to be corrupt or biased.
>
> [73] **The appellants submitted that the defence of public policy should be broadened to include the case where neither the defence of natural justice nor the current defence of public policy would apply but where the outcome is so egregious that it justifies a domestic court's refusal to enforce the foreign judgment.** The appellants argued that, as a matter of Canadian public policy, a foreign judgment should not be enforced if the award is excessive, **would shock the conscience of, or would be unacceptable to, reasonable Canadians**. The appellants claimed that the public policy defence provides a remedy where the judgment, by its amount alone, would shock the conscience of the reasonable Canadian. It was argued that, if the respondents and their witnesses were truthful in the Florida proceeding, it must follow that the laws in Florida permit a grossly excessive award for lost profits absent a causal connection between the acts giving rise to liability and the damages suffered. Such a result, the appellants submitted, would shock the conscience of the reasonable Canadian. **I do not agree.**
>
> [74] J. Blom, *supra*, predicted the appellants' request for the expansion of the public policy defence (at p. 400):
>
> > The only change that the *Morguard* approach to recognition may bring in its wake is a greater **temptation to expand the notion of public policy, so as to justify refusing a foreign default judgment that meets the *Morguard* criteria, but whose enforcement nevertheless appears to impose a severe hardship on the defendant.**

  

> [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.**
>
> [76] The award of damages by the Florida jury does not violate our principles of morality. The sums involved, although they have grown large, are not by themselves a basis to refuse enforcement of the foreign judgment in Canada. Even if it could be argued in another case that the arbitrariness of the award can properly fit into a public policy argument, the record here does not provide any basis allowing the Canadian court to re-evaluate the amount of the award. ***The public policy defence is not meant to bar enforcement of a judgment rendered by a foreign court with a real and substantial connection to the cause of action for the sole reason that the claim in that foreign jurisdiction would not yield comparable damages in Canada.*** [emphasis added]

In the emphasized portions of *Beals,* above, the Supreme Court makes a few points clear:

* The public policy 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.

> But, here, is it the foreign divorce that might be contrary to "our view of basic morality"? Or is it the impact of the foreign divorce in Canada where some provinces do not allow a "former spouse" to claim support or property relief?

* The traditional public policy defence appears to be directed at the concept of *repugnant laws and not repugnant facts*.

> But, here, the Court found it repugnant that the husband might have purposefully sought a divorce in Russia to avoid support. That is, at most, a "repugnant fact" not a "repugnant law." And, again, is it any less "repugnant" that the problem is not the foreign law, but the laws in some Canadian provinces?

* The *defence of public policy should not be broadened* to include cases where neither the defence of natural justice nor the current defence of public policy would apply but where the outcome is so egregious that it justifies a domestic court's refusal to enforce the foreign judgment.

> At the risk of repetition, again, the outcome is only egregious because of the impact of the foreign law in Canada. Arguably, it is the Ontario law that offends our notion of fairness; not the fact that a person with a real and substantial connection to Russia can be divorced in Russia.

* The notion of public policy (and the related defence) *should not be expanded* so as to justify refusing to recognize a foreign judgment only because recognition or enforcement might impose a severe hardship.

* 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.*

> Again, is it the law of Russia that is to be condemned? Or ours? This situation could be fixed easily by giving "former spouses" the right to claim support (and, in some cases, property) relief.

* The public policy defence is not meant to bar enforcement of a judgment rendered by a foreign court *with a real and substantial connection* to the cause of action *for the sole reason that the claim in that foreign jurisdiction would not yield comparable damages (or support?) in Canada*.

> There was a real and substantial connection to Russia. The wife had notice of the Russian divorce. She did not claim in Canada (under the *Family Law Act*, as she could have) before the Russian divorce was pronounced. It appears that

  

> in not recognizing the Russian divorce, the Court here did exactly what the Supreme Court of Canada admonished against.

Tough facts. Tough decision. We're glad we did not have to make it. The Court would not have been in the position of having to make this difficult decision on these difficult facts if the law of Ontario allowed former spouses to claim support. Again, this requires legislative action.

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