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

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**God Bless Us, Everyone!**

Welcome to the final edition of *TWFL* for 2023. For the final edition, we've decided to not delve into any specific cases, but rather to discuss the precarious state of the family justice system in Canada — something light and fluffy.

In last year's final edition of *TWFL*, we expressed concern that we were seeing "signs that our already backlogged family justice system is in serious crisis," and called on the "Federal government and their provincial counterparts to finally provide the family justice system with the resources it desperately needs to be able to provide timely, efficient, and fair access to justice for families across Canada."

Unfortunately, over the past year, both levels of government have continued to ignore and neglect the problem; and as a result, the system may be on the precipice of collapse.

At the Federal level, the government has failed to appoint enough judges, and there are now 57 judicial vacancies across Canada at the Superior Court level, including 26 in Ontario, 10 in British Columbia, 7 in Quebec, 4 in Alberta, 4 in Nova Scotia, and 3 in Saskatchewan. To be clear, one extra appointment makes a world of difference, and in Ontario, we are short 26.

At the provincial level, there are serious infrastructure problems with courthouses across the country that are being totally ignored like the white crayon in a box of Crayolas. As but one example, this year we saw the return of toxic mould to the courthouse in Milton, Ontario. This courthouse ought to have been replaced years ago (or more), and would have been replaced by now had the Ontario government not inexplicably decided to cancel the project in 2020. For more information, see "Asbestos, mould, gas leaks in Milton courthouse force closure of in-person hearings," which is available online at <https://globalnews.ca/news/9960967/milton-courthouse-building-asbestos-mould-gas-leaks/>, although the title of the article really speaks for itself. If the COVID don't get ya, the toxic mould will.

We are also regularly hearing about extreme delays in the system as a result of the failure to adequately staff courthouses across Canada. Just this month, the Globe and Mail published an article under the headline "More than 300 criminal cases stayed or dropped in Quebec due to court delays, documents reveal", which is available online at <https://www.theglobeandmail.com/canada/article-quebec-criminal-cases-court-delays/>. If our courts don't have the resources to deal with serious criminal cases, then what chance does family law have — notwithstanding that more people engage with the law by way of family law than any other area?

There are far too many stories about various court sites being unable to provide dates within reasonable periods of time and hearings for which parties have been waiting for months being cancelled at the last minute for want of judges. In Ontario, where we practice, it is becoming increasingly common to hear that dates for long motions or settlement conferences are not available for 10 to 12 months. At one of our own recent attendances, the Registrar told us that no trials were available until 2026 (although we were subsequently told that we might be able to get a trial date at the end of 2024 as long as the trial was short).

And these delays are occurring despite the fact that our judges have been working *extremely* long hours just to try to keep up with never ending backlogs. Judges are turning themselves into pretzels, fixing early morning and late afternoon attendances just to keep matters moving forward.

The problems we are seeing may still be fixable. Legal advocacy groups across Canada are pressing our politicians to deal with the situation. Earlier this year, for example, the Advocates' Society Task Force on Civil Justice Delay issued a report called "DELAY NO LONGER. THE TIME TO ACT IS NOW — A CALL FOR ACTION ON DELAY IN THE CIVIL JUSTICE SYSTEM." This report, which is available online at [https://www.advocates.ca/Upload/Files/PDF/Advocacy/CivilJustice/2023/The\\_Advocates\\_Society\\_Delay\\_No\\_Longer\\_Final\\_Published\\_June\\_29\\_2023.pdf](https://www.advocates.ca/Upload/Files/PDF/Advocacy/CivilJustice/2023/The_Advocates_Society_Delay_No_Longer_Final_Published_June_29_2023.pdf), "calls on the Federal, Provincial and Territorial governments to urgently dedicate additional resources to the civil and family justice system, and calls on all stakeholders in the justice system, including governments, the courts, the bar and the public, to take immediate and concerted action to solve the endemic delays plaguing the delivery of civil and family justice across Canada."

Join your local Bar associations, the OBA/CBA, the Advocates' Society, the Association of Family and Conciliation Courts — whatever legal organization is of interest to you — and work with them to pressure our politicians to *deal with the problem*. Write to your MPs and MPPs to tell them that the current situation is unacceptable, and send them the Advocates' Society's report.

Another thing we can do to try and deal with the situation is start ensuring compliance with ss. 7.3 and 7.7(2)(a) of the *Divorce Act* in *every single case*. As you will recall, s. 7.3 states that "[t]o the extent that it is appropriate to do so, the parties to a proceeding **shall** try to resolve the matters that may be the subject of an order under this *Act* through a family dispute resolution process", which is defined as "a process outside of court that is used by parties to a family law dispute to attempt to resolve any matters in dispute, including negotiation, mediation and collaborative law[.]" Furthermore, s. 7.7(2)(a) imposes an express **duty** on lawyers to encourage clients "to attempt to resolve the matters that may be the subject of an order under this *Act* through a family dispute resolution process, unless the circumstances of the case are of such a nature that it would clearly not be appropriate to do so[.]"

The vast majority of family law cases can and should be resolved without the need for litigation. Since s. 7.3 expressly requires parties to try and resolve family law cases out of court and s. 7.7(2)(a) requires lawyers to encourage clients to do so, perhaps the time has come for judges to start insisting that parties either explain what efforts they have made to use a family dispute resolution process or, if they have not done so, why a family dispute resolution process is not appropriate, *before* a non-urgent hearing can proceed. Absent a satisfactory answer, serious consideration should then be given to adjourning the hearing until the parties have complied with s. 7.3, and ordering costs to make it clear that compliance with s. 7.3 is not optional, and that litigation in family law is a process of last resort.

In any case, if more parties start resolving family law cases through family dispute resolution processes instead of court, we will significantly reduce the number of cases that enter the system in the first place, and resolve the cases that require litigation earlier. This will reduce at least some of the crippling caseload our courts are currently struggling with. Our only issue with this is that it is letting the government off-the-hook, once again essentially asking the family law bar to "step up" to try to fix a broken system.

And now with that off our chests, thank you to John Bossy, our editor at Westlaw, and to Kristy Warren, the Epstein Cole Knowledge Management Lawyer, for the hours you've spent over the past year helping us get *TWFL* out, legible and typo-free each week. We are grateful.

Thank you to the judges, for the countless hours and hard work — and for giving us something to write about every week.

Thank you to the court staff and lawyers for all of the hard work you've done to ensure that family law cases can either be resolved or adjudicated as quickly and fairly as possible despite the failure of both levels of government to provide even close to the resources they should be providing to continue doing your important work.

And thank you to those lawyers that send us cases of interest that might otherwise escape our attention, and to those that offer comments or constructive criticism on the *Newsletter*. It is all very much appreciated.

We'll be off for a much-needed break for the next two weeks, but will be back with the next edition of *TWFL* on January 8<sup>th</sup>. In the meantime, please make sure you all get some time off. The work we do can often be beyond stressful, and you **will** burnout if you don't take advantage of the holidays to get a break, ignore work for a week or two, and focus on other, more important things (like who the Blue Jays can sign now that they lost out on the Shohei Ohtani sweepstakes). As Chief Justice Strathy (as he then was) put it in his excellent article, "The Litigator and Mental Health", which is available on the Ontario Court of Appeal's website at <https://www.ontariocourts.ca/coa/about-the-court/publications-speeches/the-litigator-and-mental-health/> — definitely worth reading if you haven't yet done so:

Lawyers should be **required** to take vacations, guilt-free.

Everyone who does litigation knows that there are emergencies or times when everyone has to work full-out for days on end, particularly in trials. But in my view, people can get through that, and even enjoy it, if they know that when the crisis is over, their need to refresh and re-charge, and get back to their families and lives, will be respected. [emphasis in original]

Happy holidays to all, and our best wishes to all for a safe and healthy 2024.

God bless us, every one!

Franks & Zalev

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