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

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Contents

Breaking News

Reference re An Act respecting First Nations, Inuit and Métis children, youth and families, 2024 SCC 5 (S.C.C.)

On Friday, February 9, 2024, after a 14-month reserve, the Supreme Court of Canada released a long-awaited *per curiam* decision about the constitutionality of *An Act respecting First Nations, Inuit and Métis children, youth and families*, S.C. 2019, c. 24 (the "*Act*"), a federal statute that deals with the provision of child welfare services for Indigenous children.

For those of you who may not have been following the case, the *Act* was enacted in 2019 in order to:

> a) affirm the inherent right of self-government, which includes jurisdiction in relation to child and family services;
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> b) set out principles applicable, on a national level, to the provision of child and family services in relation to Indigenous children; and
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> c) contribute to the implementation of the United Nations Declaration on the Rights of Indigenous Peoples.

As the Supreme Court explained in its decision, to accomplish these purposes:

> • Sections 9 to 17 of the *Act* "establish a normative framework for the provision of culturally appropriate child and family services that applies across the country."
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> • Section 18 of the *Act* affirms that "[t]he inherent right of self-government recognized and affirmed by section 35 of the *Constitution Act, 1982* includes jurisdiction in relation to child and family services, including legislative authority in relation to those services and authority to administer and enforce laws made under that legislative authority."
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> • Sections 20 to 24 of the *Act* set out "various mechanisms to facilitate the exercise of Indigenous peoples' right of self government", including confirming that "an Indigenous governing body may enter into a coordination agreement with the federal and provincial governments", and "that an Indigenous group, community or people may exercise its 'legislative authority in relation to child . . . services' without having entered into a coordination agreement."

The Attorney General of Quebec challenged the authority of the Federal Government to enact child welfare legislation, and referred the question of whether the *Act* was *ultra vires* to the Quebec Court of Appeal.

In early 2022, the Quebec Court of Appeal found that, with the exception of a limited number of provisions, the *Act* was not *ultra vires*, as it fell within the legislative authority granted to the Federal Government pursuant to s. 91(24) of the *Constitution Act, 1867*, which permits the federal Government to legislate with respect to "Indians, and Lands reserved for the Indians."

The Attorneys General of Quebec and Canada both appealed the Quebec Court of Appeal's decision to the Supreme Court of Canada and, after a very lengthy reserve, the Court released comprehensive reasons confirming that the entire *Act* was constitutional, and reversed the Quebec Court of Appeal's decision that certain provisions of the statute were *ultra vires*. As a result, the Court dismissed the Quebec Attorney General's appeal, and granted the Attorney General of Canada's appeal.

Who Wants Some of My Cake?

Hamadanizadeh v. Haydarian, 2023 CarswellOnt 14002 (S.C.J.), 2023 CarswellOnt 14002 (S.C.J.) — Brownstone J.

Hamadanizadeh was about whether the court in Ontario should recognize an Iranian divorce.

The parties were originally from Iran, but both immigrated to Canada in the 1980s. They married in Canada in 1998, and had four children together. The marriage was conducted under both Canadian civil law and Islamic religious law.

As part of the religious marriage, the parties signed a Mahr, which, as we explained in the November 20, 2023 (2023-44) edition of *TWFL*, is a Muslim tradition where the groom agrees to pay the bride a sum of money in the event of a marriage breakdown or death. The Mahr in this case required the husband to provide the wife with "1000 gold coins (full Bahar Azadi)," which, according to Wikipedia (the next best source to Buzzfeed), is "an Iranian bullion gold coin minted by the Security Printing and Minting Organization of the Central Bank of the Islamic Republic of Iran (CBI), replacing the Pahlavi Coin after the Iranian Revolution."

During the marriage, the parties registered the Mahr and the religious marriage with the Iranian embassy in Ottawa.

The parties separated in 2018, and the wife commenced an Application in Ontario for a divorce, support, and an equalization payment. The husband filed an Answer to the wife's claims, and made various claims of his own.

Now things get a bit interesting. Shortly after the wife commenced her Application in Ontario, she started another proceeding in Iran to enforce the Mahr, and obtained judgment against the husband for the gold coins which, at that point, were worth a significant amount of money (according to an earlier decision in the case that can be found at 2022 CarswellOnt 678 (S.C.J.), by the time of the judgment in Iran the gold coins were worth approximately $565,000 CAD).

It is not clear whether or when the husband was ever served with the Iranian proceeding, as the motion judge's reasons indicate that the husband did not find out about it until *after* the wife had already obtained judgment against him. However, there is no question that the husband eventually found out about it and attempted to set it aside in Iran, but that his attempts were unsuccessful.

The wife claimed that she started a separate proceeding to enforce the Mahr in Iran instead of pursuing a claim for that relief in Ontario because she believed the husband had undisclosed assets in Iran, and trying to enforce the Mahr in Iran was the only way she might be able to discover the true extent of his assets in that jurisdiction.

We can't possibly know whether there is any merit to the wife's allegations of non-disclosure by the husband. However, her decision to commence a separate proceeding in Iran almost immediately after starting a family law proceeding in Ontario for the collateral purpose of trying to obtain financial disclosure from the husband certainly smacks of forum shopping.

Instead of taking the high road and dealing with the situation on the merits in Ontario, the husband responded in kind by commencing a divorce proceeding in Iran. Undoubtedly, he did this because, as we have discussed in prior editions of *TWFL*, including "How Do You Solve a Problem Like *Rothgiesser*?" in the May 11, 2020 (2020-18) and May 18, 2020 (2020-19) editions, if the Iranian divorce was granted and recognized in Ontario, the wife would have been unable to proceed with her claim for spousal support against him in Ontario (not necessarily so for other provinces that have extended the ability to claim support to "former spouses" — but definitely so in Ontario).

The wife was served with the husband's Iranian claim for divorce and did not oppose the husband's claim for a divorce in Iran on the merits. Instead, she advised the court in Iran that the property and support issues were being dealt with in Ontario, and that Iran was not the appropriate place to deal with those issues. She also asked the Iranian court to make her position clear in its decision. However, she did not specifically ask the Iranian court to decline jurisdiction or to otherwise stay or dismiss the proceeding.

Although the Iranian court granted the divorce, it did not address the wife's position that her property and support rights should be determined in Ontario — perhaps on account of her starting the Mahr claim in Iran.

After the husband obtained the divorce in Iran, he brought a motion before the motion judge to have the Iranian divorce recognized in Ontario pursuant to s. 22 of the *Divorce Act*, R.S.C., 1985, c. 3 (2nd Supp.), which states as follows:

> **Recognition of foreign divorce**
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> 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.
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> **Recognition of foreign divorce**
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> 22(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.
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> **Other recognition rules preserved**
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> 22(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.

Since neither s. 22(1) nor s. 22(2) of the *Divorce Act* were applicable in this case, the motion judge turned to the common law rules with respect to recognizing a foreign divorce pursuant to s. 22(3). As we explained in the November 21, 2022 (2022-44) edition of *TWFL*, the common law allows Canadian courts to recognize foreign divorces in a variety of situations, including "where the circumstances in the foreign jurisdiction would have conferred jurisdiction on a Canadian court had they occurred in Canada", and "where either the petitioner or respondent had a real and substantial connection with the foreign jurisdiction wherein the divorce was granted": See *Indyka v. Indyka*, [1967] 2 All E.R. 689 (U.K. H.L.); *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 February 24, 2020 (2020-07) edition of *TWFL*.

The husband argued that the circumstances in Iran would have conferred jurisdiction on a Canadian court had they occurred in Canada because: (a) the wife had attorned to Iran when she sued to enforce the Mahr in that jurisdiction; and (b) she had notice of, and participated in, the divorce proceeding. He also argued that the wife had waived her property and support claims by not asking for that relief in the Iranian divorce proceedings (notwithstanding her position that those issues should be dealt with in Canada). And let's face it — the wife having started an action to enforce the Mahr in Iran, the husband certainly had a reasonable argument.

Somewhat surprisingly, however, the motion judge rejected the husband's arguments — for two reasons.

First, based on the expert evidence before her, the motion judge determined that the Mahr was a separate and distinct issue from the divorce, as it was "a contract that exists separately, and is enforceable separately, from any proceedings that may be taken on marriage breakdown", and as "the wife did not need to seek a divorce to bring enforcement proceedings, nor was the husband obliged to commence divorce proceedings once the [Mahr] proceedings had been undertaken."

Second, as the Ontario Court of Appeal explained in *Lilydale Cooperative Limited v. Meyn Canada Inc.*, 2019 CarswellOnt 15224 (C.A.), "[a]ttornment to a court's jurisdiction by a defendant signifies acquiescence to the jurisdiction of the court", and occurs "[w]hen a party takes steps beyond merely contesting the jurisdiction of a court[.]" Since the wife had clearly advised the Iranian court that her property and support claims in Ontario were outstanding, and that Iran was not the appropriate place to deal with those issues, she could not be said to have acquiesced to the Iranian court's jurisdiction.

Now, again: bad facts can make bad law. And it is clear that the motion judge was trying to allow the wife to claim support in Ontario. But respectfully, these reasons are hard to accept. First — of course the husband was not "obliged" to start his claim for divorce in Iran. But that is not the right question. The right questions were whether there was a real and substantial connection to Iran, and whether the wife had attorned to the jurisdiction of Iran. Furthermore, the wife either had attorned to the Iranian jurisdiction, or she had not. But she could not attorn to Iran for her own claim, participate in the husband's divorce claim, and at the same time, say she did not attorn for other clearly related purposes. That, respectfully, is the very definition of forum shopping. As noted by the Ontario Court of Appeal in *Mehralian v. Dunmore*, 2023 CarswellOnt 18892 (C.A.) (at para. 32), " . . . consent to the jurisdiction of the foreign court necessarily involves consent to the laws applicable in that jurisdiction."

Attornment occurs where "a party to an action appears in court and goes beyond challenging the jurisdiction of the court based on jurisdiction *simpliciter* and *forum non conveniens*" (see e.g. *Wolfe v. Wolfe*, 2011 CarswellOnt 2996 (C.A.) at para. 44). We agree that the wife did not attorn to Iran by responding to the divorce proceeding in Iran by merely advising the Iranian court that Ontario was the proper forum for dealing with property and support issues. However, we have some difficulty with the idea that the wife did not attorn or acquiesce to Iran having jurisdiction over the family law issues when: (a) she had already taken steps to enforce the Mahr in Iran (to say nothing of the fact that she could have sought that relief in Ontario (especially since she had already started a proceeding in Ontario for family law relief when she brought a proceeding in Iran to enforce the Mahr); (b) she essentially admitted that she brought the proceeding in Iran for the collateral purpose of trying to obtain evidence that the husband had not disclosed all of his assets in that jurisdiction; and (c) she does not appear to have asked the Iranian court to decline to exercise jurisdiction and/or to stay the Iranan divorce proceeding in favour of the Ontario proceeding. All of this amounts to having one's cake; eating it too; and then having a piece of someone else's cake as well.

The husband also argued that even if the wife had not attorned to Iran, the court in Ontario should nevertheless recognize the Iranian divorce because the parties had a real and substantial connection to Iran for a variety of reasons, including that they were both born there, had registered their marriage and the Mahr with the Iranian government, retained their Iranian citizenship and passports, the husband returned to Iran regularly, and they owned property in Iran.

Despite these connections to Iran, the motion judge concluded that the parties did not have a real and substantial connection to Iran because: their "real home is in Ontario"; she was not satisfied that "the connection to Iran is substantial"; and "[t]he husband was not entitled to 'forum shop' by commencing divorce proceedings in Iran." She also "rejected [the husband's] argument that the wife 'started it' by enforcing the [Mahr] there", because that "was a separate contract, payable at any time after marriage, and not intrinsically bound up with the divorce."

As a result, the motion judge dismissed the husband's motion to recognize the Iranian divorce. But, again, we take some issue with this. **First**, the notion of "where the real home is" is not a determinative factor in the real and substantial connection analysis. Rather, the location of the "real home" is just one of several possible presumptive connecting factors in the real and substantial connection analysis: *Van Breda v. Village Resorts Ltd.* (2012), 10 R.F.L. (7th) 1 (S.C.C.), at para. 82; *Wang v. Lin* (2013), 29 R.F.L. (7th) 1 (Ont. C.A.). A real and substantial connection is not restricted to *current* connections: *Wilson v. Kovalev* (2016), 72 R.F.L. (7th) 362 (Ont. S.C.J.). For a slightly different spin, see *Abraham v. Gallo* (2022), 81 R.F.L. (8th) 278 (Ont. C.A.), where the Ontario Court of Appeal noted that while past connections to a jurisdiction may be considered, the focus of the real and substantial connection analysis should be more on the parties' real circumstances at the time of the divorce, and not on historical or transitory factors. Second, her Honour's analysis suggests that there can only be one jurisdiction with which the parties have a real and substantial connection.

Respectfully, based on her reasons, it appears that the motion judge may have conflated the concept of jurisdiction *simpliciter* — which deals with ***whether*** the court has jurisdiction — with that of *forum non conveniens* — which deals with ***whether the court should exercise*** its jurisdiction. As the Supreme Court of Canada explained in *Haaretz.com v. Goldhar*, 2018 CarswellOnt 8884 (S.C.C.):

> [27] Central to a proper understanding of the conflicts rules of Canadian private international law, and to the resolution of this appeal, is an appreciation of the distinct roles played by jurisdiction *simpliciter* and *forum non conveniens* (*Van Breda*, at paras. 46 and 56, affirming the reasoning of Sharpe J.A. in *Muscutt v. Courcelles* (2002), 60 O.R. (3d) 20 (Ont. C.A.), and *Van Breda v. Village Resorts Ltd.*, 2010 ONCA 84, 98 O.R. (3d) 721 (Ont. C.A.)). **The jurisdiction *simpliciter* analysis is meant to ensure that a court *has* jurisdiction. This will be the case where a "real and substantial connection" exists** between a chosen forum and the subject matter of the litigation. **The *forum non conveniens* analysis, on the other hand, is meant to guide courts in determining whether they should decline to exercise that jurisdiction in favour of a "clearly more appropriate" forum.**
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> [28] **The importance of maintaining this distinction flows from the discrete concerns underlying each analysis and the nature of the relevant factors at each stage.** The "real and substantial connection" test at **the jurisdiction *simpliciter* stage prioritizes order, stability and predictability by relying on objective connecting factors** for the assumption of jurisdiction. Conversely, **the *forum non conveniens* analysis emphasizes fairness and efficiency by adopting a case-by-case approach** to identify whether an alternative jurisdiction may be "clearly more appropriate" . . . [emphasis added]

When the parties' links to Iran that are discussed above (e.g. they had property in Iran; they both had Iranian citizenship; the husband travelled there regularly, etc.) are combined with the fact that the wife had already invoked and relied on the authority of the courts in Iran to obtain a judgement against the husband for more than $500,000, it is difficult to see how the parties did not have a "real and substantial connection" to that jurisdiction such that Iran would have jurisdiction *simpliciter*.

What we suspect what the motion judge meant to say was that *even if* Iran had a real and substantial connection, Ontario was clearly a more appropriate forum than Iran for dealing with the dispute for the purposes of a *forum non conveniens* analysis. We don't know whether that would be a correct factual statement, but that would be the more appropriate consideration.

Whether a court in Canada can decline to recognize a divorce granted by a foreign jurisdiction that *had* jurisdiction *simpliciter*, but should have declined to exercise that jurisdiction in favour of a "clearly more appropriate forum" is an interesting question, although it does not appear to fit into any of the existing categories that the caselaw has established for when a court can exercise its discretion not to recognize a foreign divorce (currently fraud, issues of natural justice, and/or for public policy reasons — see *Novikova v. Lyzo* (2019), 31 R.F.L. (8th) 140 (Ont. C.A.) at para. 14). It also seems unlikely that it would be appropriate for a court in Canada to decline to recognize a foreign divorce on this basis if, as in this case, the party opposing recognition did not take steps to ask the foreign court to decline jurisdiction *before* the foreign divorce was granted.

In any event, this situation likely could have been avoided entirely had the wife dealt with it differently than she did. The wife clearly should not have engaged in forum shopping by suing to enforce the Mahr in Iran almost immediately after starting the divorce proceeding in Ontario.

Furthermore, while we cannot comment on whether there was anything else the wife could have done in Iran to try and prevent the Iranian court from granting the divorce, given that the wife had notice of the foreign divorce proceeding and its potential impact on her support claim in Ontario, we would suggest that she should have tried to argue as vigorously as possible that the Iranian court should decline jurisdiction.

Had the wife been able to persuade the court in Iran to decline jurisdiction, she would have been able to avoid the potential *Rothgiesser*problem entirely. Alternatively, had she not succeeded, she would have then had an arguable case for an anti-suit injunction in Ontario to prohibit the husband from proceeding with his claim for a divorce in Iran.

As set out by the Supreme Court of Canada in *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*, 1993 CarswellBC 1257 (S.C.C.), which is the leading case in Canada about anti-suit injunctions, the party seeking an anti-suit injunction must establish that:

> (a) A foreign proceeding is pending;
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> (b) The applicant has failed to obtain a stay from the foreign court;
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> (c) The domestic court is a potentially appropriate forum;
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> (d) The domestic forum has the closest connection to the action and the parties and no other forum is clearly more appropriate; and
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> (e) There is no injustice to the parties if the foreign proceeding does or does not go forward and an injunction will not deprive the foreign plaintiff of advantages in the foreign jurisdiction which would be an unjust deprivation.

[For further discussion about anti-suit injunctions, see our comment on *Borschel v. Borschel* (2020), 43 R.F.L. (8th) 366 (S.C.J.) in the September 14, 2020 (2020-35) edition of *TWFL*.]

Whether the wife would have succeeded in obtaining injunctive relief on the facts of this case is not entirely clear, as there are factors that go both ways. However, since allowing the husband to proceed with his claim for a divorce in Iran would have prevented the wife from even trying to pursue her claim for spousal support in Ontario on the merits, we suspect it is more likely than not that a judge in Ontario would have been inclined to grant a request for injunctive relief had the wife applied for it *before* the Iranian divorce was granted. And, had the wife obtained an anti-suit injunction, she could then have used it to prevent the husband from proceeding with his claim for a divorce in Iran, including asking to have him held in contempt of court if he refused to abide by the injunction.

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