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— Franks & Zalev - This Week in Family Law

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So There Can Be "Fair" Forum Shopping?

Vyazemskaya v. Safin, 2024 CarswellOnt 2419 (C.A.) — Doherty, Lauwers and George JJ.A.

This is the third time we've had the opportunity to deal with this case — see the February 13, 2023 (2023-06) and February 24, 2020 (2020-07) editions of *TWFL*. And for the third time, we say "bad facts make bad law" and question why the Ontario Provincial Government has not stepped in to remedy this situation.

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

Well, it seems that life in Canada ain't entirely as advertised, and on November 17, 2019 — only about $1\,^{1}/_{2}$ years after moving to Canada — the parties separated. 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 seven 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.

In her first Ontario case, in an effort to have Ontario not recognize the Russian divorce (for the reasons described below), the wife tried to argue 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 the fact that the wife clearly *had* notice of the Russian divorce proceeding and had received the documents. In fact, she contested the Russian proceeding (and it is remarkably hard to contest a proceeding you do not know about). The wife also did not appeal the Russian divorce.

Therefore, this motion by the wife was dismissed: *V. v. S.*, 2021 CarswellOnt 20824 (S.C.J.). Importantly, as part of that first motion, *the Ontario Court determined that the parties had a real and substantial connection to Russia*:

> [20] Applying the test to this case, the [wife] has not convinced me that the connection with Russia is minimal or non-existent. Although the parties are both now permanent residents of Canada, the parties were married in Russia, had their child in Russia, still have Russian citizenship, have extended family in Russia and own property in Russia.

As we will see, this will turn out to be a problem . . .

After that failed, the wife argued that the Russian divorce should not be recognized because it violated Ontario's public policy (*Vyazemskaya v. Safin*, 2022 CarswellOnt 19030 (S.C.J.)). The trial judge (who had also been the motions judge) held that *while the parties had a real and substantial connection to Russia* (including both being Russian citizens) [see para. 12 of the decision] the Russian divorce order "should not be recognized in Ontario." The trial judge referenced s. 22 of the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp) and ss. (3) in particular:

> **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.
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> **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.
>
> **Other recognition rules preserved**
>
> (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.

The trial judge found that *as the parties had a real and substantial connection to Russia*, the Russian divorce was presumed to be valid under ss. (3). The onus was then with the wife to convince the court to not recognize the Russian divorce. The consequence of recognizing the Russian Divorce would be that the wife would not be able to claim spousal support in Ontario. This is because of what we have previously referred to as the "*Rothgiesser* Problem." For those who missed our previous discussions about it, 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."
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> 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 is *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 (Ont. 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.); *R.N.S. v. K.S.* (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: *G.M. v. M.A.F.*, 2003 CarswellQue 1969 (Que.)].

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 ss. 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).

Against this background, the trial judge considered whether there was any reason not to recognize the Russian divorce citing, in particular, the decision of *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] S.C.J. No. 66 (S.C.C.); *Martinez v. Basail*, 2010 ONSC 2038 (S.C.J.); *Janes v. Pardo, Supra*.) 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]

The trial judge made the following findings of fact:

1. The husband knew that the wife intended to start divorce proceedings in Ontario;

2. The husband knew that if proceedings were brought in Ontario, he would have to pay the wife spousal support; and

3. The husband obtained the divorce in Russia pre-emptively so that the wife could not obtain spousal support in Ontario.

The trial judge determined that *while the parties had a real and substantial connection to Russia*, the public policy exception applied because the husband had "unfairly forum shopped." The trial judge found that the driving factor behind the husband's actions was to avoid a spousal support obligation under Ontario law. The trial judge determined that the Russian divorce should not be recognized in Ontario.

This was the husband's appeal.

The Court of Appeal noted that s. 22(3) of the *Divorce Act* has been interpreted consistently such that a foreign divorce **will** be recognized in Canada where there is a real and substantial connection between one of the parties and the granting jurisdiction, unless an exception applies (*R.S. v. P.R.* (2019), 31 R.F.L. (8th) 1 (S.C.C.) at para. 181).

In *Beals v. Saldanha*, 2003 CarswellOnt 5101 (S.C.C.) at para. 71, the Supreme Court stated that the "public policy defence turns on whether the foreign ***law*** is contrary to our view of basic morality." The Supreme Court went on to state that an argument based on public policy should not succeed "for the sole reason that [the] foreign jurisdiction would not yield [the same result as Ontario or Canada]." The public policy exception is **not** to be used lightly and focuses on "repugnant laws" and not "repugnant facts" (or repugnant behaviour).

The husband emphasized this part of *Beals* in his submissions. He argued that the laws in Russia were not fundamentally different than in Ontario. He denied that he went to Russia for a divorce with the specific intention of avoiding spousal support, but argued that even if he *was* trying to avoid his spousal support obligations, that would be "at most a repugnant fact and not a repugnant law." The determinative question, according to the husband, was whether the Russian law governing divorce was repugnant.

The Court of Appeal disagreed with the husband's position. The court reasoned that the husband "overlooked" the existence of other "nominate defences" to the recognition of foreign divorces established in *Beals*. These include allegations of fraud and a breach of natural justice. While these defences could be subsumed within the general concept of public policy, the Supreme Court also emphasized (at para. 221) the importance of keeping them "analytically distinct":

> [221] . . . Public policy is potentially an expansive enough concept to subsume the other two defences [of fraud and natural justice]; it is, of course, contrary to public policy in a broad sense to enforce a judgment that was fraudulently or unfairly obtained. But it is useful to maintain an analytical distinction between the three defences [of fraud, natural justice, and public policy]. Furthermore, **the defence of public policy has long been associated with condemnation of the foreign jurisdiction's law**. To extend it to cover situations where there is nothing objectionable about the foreign law but, rather, a defect in the way the law was applied might send the wrong message, one that conflicts with the norms of international cooperation and respect for other legal systems underlying the doctrine of comity. [**emphasis** added]

The Court of Appeal then identified what it considered to be a "fourth potential defence" supported by *Beals* — the defence of "*unfair forum-shopping*" — even while admitting the Supreme Court only referred to the notion "in passing."

To support their position, the Court of Appeal refers to para. 191 of *Beals*:

> It follows that the assumption of jurisdiction by a sister province, provided that it does not exceed the province's constitutional authority over property, civil rights and the administration of justice in the province **and is not prompted by unfair forum-shopping tactics** on the plaintiff's part, should be entitled to full recognition and enforcement throughout Canada. A connection to the subject matter of the action should usually suffice to meet the "real and substantial connection" test. [**emphasis** added]

However, in this excerpt, the Supreme Court (in *Beals*) was discussing the fact that a *Canadian* defendant compelled to litigate in another *province* had certain protections inherent throughout Canadian law — specifically that the legal system of another province was unlikely to treat them unfairly and that the Canadian legal system should be considered as an "integrated whole."

However, the Court of Appeal then concluded that *Beals* had "left open" the "unfair forum-shopping tactics" exception. Like fraud and natural justice, it is a category that is "analytically distinct" from the public policy defence. This defence is to apply in situations that fall below the public policy standard of "violating" our principles of morality and extend to decisions taken by litigants to avoid the application of domestic laws. The Court of Appeal noted that if the Supreme Court was concerned about unfair forum shopping tactics in a purely commercial context, such as *Beals*, the concern must be even more relevant in a family law context.

The Court of Appeal also cited several other appellate level decisions to support the proposition that a foreign divorce should *not* be recognized where it had been obtained through unfair forum-shopping tactics or for other "improper reasons": *Abraham v. Gallo* (2022), 81 R.F.L. (8th) 278 (Ont. C.A.), at paras. 33-34; *Orabi v. Qaoud* (2005), 12 R.F.L. (6th) 296 (N.S. C.A.) at para. 17; *R.N.S. v. K.S.* (2013), 42 R.F.L. (7th) 35 (B.C. C.A.) at para. 29.

The Court of Appeal also cited trial decisions that refused to recognize foreign divorces specifically on the basis that the foreign jurisdiction provided either no, or in the view of the court, wholly inadequate, spousal support. In *Zhang v. Lin* (2010), 92 R.F.L. (6th) 138 (Alta. Q.B.) and *Marzara v. Marzara*, 2011 CarswellBC 742 (S.C.), the courts refused to recognize Texas and Iranian divorces, respectively. These cases cited the public policy defence and were discussed in our previous discussion of this case.

The Court of Appeal determined that the trial judge was correct in finding that the Russian divorce was valid and in refusing to recognize it. While the trial judge did not specifically describe the test as being the defence of unfair forum-shopping, she found all of the necessary parts of the test and was correct in her refusal to recognize the Russian divorce.

Again, this is an example of bad facts making bad law. Were Ontario to have recognized the Russian divorce, the wife would have been left without the ability to claim spousal support in Ontario, and this was not (for good reason) a situation the trial judge or Court of Appeal was prepared to countenance. However, to do so, the Court of Appeal had to agree that a divorce of which the wife had notice and did not appeal — in a jurisdiction in which both parties had been found to have a real and substantial connection — should not be recognized because the husband had been engaged in "unfair" forum-shopping. That, we respectfully suggest, is a bit of a stretch.

First, it is hard to accept that one can be accused of "unfair forum-shopping" in a jurisdiction in which both parties were found to have a real and substantial connection. And second, the suggestion that a foreign order will not be recognized in Ontario where there has been "unfair" forum-shopping infers that there is such thing as "fair" forum-shopping. And we don't think there is.

Rather than bring into question every foreign divorce ever granted by a foreign jurisdiction, surely the better "fix" — as we have been suggesting — would be for the Ontario government to simply provide that a "former spouse" can claim spousal support under the *Family Law Act* as have other Canadian provinces. That would end the problem once and for all.

Wasting Away Again (with Oppression Claims) in Margaritaville (R.I.P. Jimmy Buffet)

Huntly Investments Limited v. Casa Margarita Enterprises Ltd., 2024 CarswellBC 177 (C.A.) — MacKenzie, Fenlon and Voith, JJ.A.

The very astute amongst our readers will notice this is not a family law case. But, as regular readers will know, we here at *TWFL* scour the law reports to let you know about *all* cases — big and small, from every area of law — that might be of use to family law counsel and courts. And while this is, indeed, not a family law case, it details important principles with respect oppression claims in closely held corporations, something which is very common in family law cases, especially for professionals like doctors and lawyers that have professional corporations.

In this case, the British Columbia Court of Appeal upheld an order requiring the shareholder majority to purchase a minority shareholder's interest in the company pursuant to an oppression claim.

The primary company, Huntly Investments Ltd. ("Huntly"), had been started by two brothers in 1966. Over time, a small number of shares were sold or given to people outside of the brothers' families. One entity receiving these shares was the respondent, Casa Margarita Enterprises Ltd. ("Casa"), which was owned by Ms. Margaret Cowan. The Cowan family had business connections with the brothers in the 1960s and early 1970s.

As time marched on, the brothers died, and their families took over Huntly. Eventually, all of the smaller shareholders were bought out until only the Wolverton family and Casa remained as owners. Casa owned only 1.82% of the common shares of Huntly.

When Ms. Cowan passed away, the Administrator of her estate, understandably, wanted to sell Casa's shares to Huntly in order to wind up the estate. The Administrator tried to have one or more of the Wolverton family members buy the shares so it could distribute Ms. Cowan's estate to her 17 beneficiaries, but his efforts were unsuccessful. None of the Wolvertons were interested in buying the shares.

Casa commenced an action against the Wolvertons and Huntly, claiming oppression under s. 227 of the *Business Corporations Act*, S.B.C. 2002, c. 57 (which, for the interest of all, contains similar oppression provisions to similar provincial statutes):

> 227 (2) A shareholder may apply to the court for an order under this section on the ground
>
> (a) that the affairs of the company are being or have been conducted, or that the powers of the directors are being or have been exercised, in a manner oppressive to one or more of the shareholders, including the applicant, or
>
> (b) that some act of the company has been done or is threatened, or that some resolution of the shareholders or of the shareholders holding shares of a class or series of shares has been passed or is proposed, that is unfairly prejudicial to one or more of the shareholders, including the applicant.

Casa successfully argued that it had a "reasonable expectation" that Huntly or another Huntly shareholder would purchase Casa's shares. ("Reasonable expectations" are the touchstone of an oppression claim: *BCE Inc. v. 1976 Debentureholders*, 2008 CarswellQue 12595 (S.C.C.) ("*BCE*"); *Wilson v. Alharayeri*, 2017 CarswellQue 5230 (S.C.C.)). The trial judge further found that Huntly had failed to meet those reasonable expectations by, among other things, refusing to facilitate a share purchase and failing to provide information allowing Casa to value its shares.

One of the key issues in the trial was the fact that Huntly refused to permit valuations of the underlying real estate assets which made up most of Huntly's portfolio — going so far as to block Casa's valuators from being able to enter buildings. At trial, Huntly argued that appraisals were not needed because Casa had access to property tax assessments and some informal internal valuations. The trial judge determined this to be insufficient, particularly given evidence that the assessments and internal valuations were not accurate indications of value.

The trial judge ordered that Casa's shares were to be purchased by Huntly or by two of the controlling shareholders and/or one of the other companies owned by the Wolvertons.

The Court of Appeal upheld this decision.

First, with respect to the standard of review, a finding of "reasonable expectations" is a finding of fact reviewable on the palpable and overriding standard. Whether a reasonable expectation was *violated* by oppressive or unfairly prejudicial conduct is a finding of mixed fact and law subject to review on the same deferential standard (absent an extricable question of law): *Radford v. MacMillan*, 2018 CarswellBC 2399 (C.A.) at para. 54.

The Wolvertons argued that Casa could have sold its shares on the open market as there was no shareholder agreement preventing this or requiring that the shares be purchased by another shareholder. At most, they argued, the head of the company could try to arrange a sale.

Oppression is established by first proving that the claimant had a reasonable expectation, and then proving that reasonable expectation was blocked through conduct "[falling] within the concepts of 'oppression', 'unfair prejudice' or 'unfair disregard' of the claimant's interest": *BCE* at para. 89. Further, it is no defence to an oppression claim to rely solely on the otherwise *lawfulness* of the conduct of the corporation and its directors. As noted by the B.C. Court of Appeal in *Canex Investment Corporation v. 0799701 B.C. Ltd.*, 2020 CarswellBC 2010 (C.A.) at para. 13:

> . . . [T]he remedy is available to address the objective and substantive reality of the manner in which the affairs of a company are conducted. It is not limited by mere formalities of corporate structure. **What matters is substance, not form**. Hence, courts are entitled to examine the realities of how a company is controlled and by whom, and the true nature of relationships within and between related companies. [**emphasis** added]

The Court of Appeal noted that the trial judge properly considered "what was actually happening in the company." There was also evidence that the Wolvertons has purchased other minority shareholder interests in the past. In fact, the Wolvertons had

bought some shares Ms. Cowan owned in another company owned by the family in 1990. This pattern created a reasonable expectation on the part of Ms. Cowan and the Administrator of her estate.

The Court of Appeal did, however, agree with the appellants that Huntly itself could not be required to purchase the shares. The order had to be against the *shareholders*, and not against the company itself.

The Court of Appeal also upheld the trial judge's finding that taking steps to prevent a proper valuation of Casa's shares was oppressive conduct. The majority shareholders were responsible for facilitating a reasonable buyout of Casa's interest in Huntly.

This case has clear and obvious implications in family law situations where professional spouses (again, doctors, lawyers, accountants, etc.) often create professional corporations where a spouse holds a minority interest or an interest in a separate class of common or preferred shares without voting rights — and without fair market value. Should the majority shareholder spouse not be willing to purchase the minority interest in such a situation? Well — who knows. But at least *Casa Margarita Enterprises Ltd.* offers the law you need if you can marshal the necessary facts. We suggest you give the matter the most serious contemplation and consideration — over a Margarita, of course.

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