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

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The Case That Keeps on Givin'

***Mehralian v. Dunmore*, 2025 CarswellOnt 1567 (S.C.J.) — Mathen J.**

Issues: Ontario — Constitutionality of the Definition of "Spouse" in Section 29 of the Ontario *Family Law Act*

Do you recognize these familiar players? We first discussed Ms. Mehralian and Mr. Dunmore in the February 26, 2024 (2024-08) edition of *TWFL,* where the Ontario Court of Appeal upheld Justice Brownstone's determination of the parties' child's habitual residence as Ontario (2023 ONCA 806). In the same decision, the Ontario Court of Appeal also upheld Justice Myers' decision to recognize the validity of the Omani foreign divorce. Then, in the January 13, 2025 (2025-01) edition of *TWFL*, we discussed *Dunmore v. Mehralian*, 2024 CarswellOnt 19158 (S.C.C.), where the Supreme Court of Canada dismissed Mr. Dunmore's appeal concerning the determination of habitual residence of the parties' child allegedly abducted from or withheld in Canada from a non-*Hague Convention* signatory state.

But wait! There's more!

In this instalment, Ms. Mehralian was back before the court, this time arguing the *Charter*. The definition of "spouse" in s. 29 of the *Family Law Act*, R.S.O. 1990, c. F.3, does not include a *former* spouse, such that a spouse that is party to a foreign divorce (a former spouse) cannot claim spousal support under the *Family Law Act* in Ontario. Ms. Mehralian argued this was discrimination on the basis of marital status contrary to s. 15 of the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act* 1982 (UK), 1982, c 11.

This problem — one that we have written about often — also plagues other provinces that have yet to amend their provincial legislation to allow "former spouses" to claim spousal support, including Saskatchewan, Nova Scotia, New Brunswick, Newfoundland and Labrador, the Yukon, the Northwest Territories and Nunavut. Combined with the fact that courts have held that, to claim spousal support under the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.) a party must be party to a Canadian divorce, this situation, argued Ms. Mehralian, left her, and those in her position, unable to claim support in Ontario under either the *Family Law Act* or the *Divorce Act*.

The constitutional challenge was supported by the Canadian Council of Muslim Women and the Barbra Schlifer Commemorative Clinic. The Attorney General of Ontario ("Ontario") intervened in opposition.

Justice Mathen dismissed the s. 15 challenge, concluding that Ms. Mehralian's motion was a collateral attack on prior rulings, that Ms. Mehralian's arguments extended beyond her pleadings, and that there was insufficient evidentiary foundation to prove the alleged discrimination.

As a reminder, Mr. Dunmore is Canadian, and Ms. Mehralian is Iranian. The parties married in 2015 and moved between *multiple* jurisdictions. In March 2020, they travelled from their home in Oman to visit Mr. Dunmore's family in Ontario. The pandemic extended their stay until January 2021, during which time Ms. Mehralian gave birth to the parties' first and only child. After a brief return to Oman in January 2021, the parties moved to Ontario, where they separated in May 2021 after a domestic "incident." Mr. Dunmore returned to Oman, while Ms. Mehralian remained in Ontario with their son. Mr. Dunmore later obtained a religious divorce in Oman in 2022, in which Ms. Mehralian participated, subsequently recognized as valid in Ontario.

Mr. Dunmore argued that Ms. Mehralian's motion was a collateral attack on prior court rulings (including the Ontario Order recognizing the foreign divorce), and *particularly* on the stay of the previous order for temporary spousal support given the recognized foreign divorce. He also argued that Ms. Mehralian had not established a sufficient evidentiary basis for her claim, and disagreed that the impugned provisions were contrary to the *Charter*. Ontario adopted a similar position and further argued that Ontario's decision to exclude spousal support claims by foreign divorcees respected the constitutional division of powers and could not be challenged. There was also an issue with the remedy requested by Ms. Mehralian, as the only available remedy for a successful *Charter* challenge would have been a declaration of invalidity pursuant to s. 52 of the *Charter*.

Justice Mathen found that the motion was an impermissible collateral attack on the court's final decision recognizing the Omani divorce and stayed Ms. Mehralian's spousal support claim. Her Honour describes a collateral attack as follows:

> [58] The collateral attack rule provides that "a judicial order pronounced by a court of competent jurisdiction should not be brought into question in subsequent proceedings except those provided by law for the express purpose of attacking it.": *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460 *per* Binnie J. at para. 20.

Mathen J. offered the following reasons in support of her conclusion:

> • Ms. Mehralian did not bring her Application or frame her pleadings to challenge the impact of the recognition of her foreign divorce despite its impact on her spousal support being readily foreseeable.
>
> • Ms. Mehralian sought unusual remedies on her motion, including reinstating a temporary spousal support order. She did so despite the Court of Appeal's final decision upholding the validity of her foreign divorce. She did not seek leave to appeal to the Supreme Court of Canada.
>
> • Ms. Mehralian provided no authority for the proposition that a court can reinstate a prior order using the remedial tool outlined in s. 52(1) of the *Constitution Act*. She also did not offer assistance about the effect a declaration of invalidity would have in Ontario. (As noted above, the standard remedy would have been a declaration of invalidity.)

We must respectfully disagree with her Honour's conclusion that this motion was a collateral attack on the previous Order recognizing the Omani divorce or the order staying the temporary award of spousal support.

First and foremost, Ms. Mehralian's constitutional challenge was not challenging prior Orders — she accepted the court's finding regarding the validity of the Omani divorce. What she *was* challenging was the *impact* on her in Ontario of recognizing the foreign divorce given the exclusion of "former spouse" from the definition of "spouse" in Ontario. That is not a collateral attack.

Second, although collateral attack falls under the general Doctrine of *Res Judicata*, meant to prevent litigation of issues that *should have* been previously decided or re-litigation of issues that were already decided, the decision does not analyze collateral attack as a form of *Res Judicata*. Here, her Honour adopts the "should have been decided previously" approach (pursuant to the Cause of Action Estoppel branch of the *Res Judicata*). But while the individual parties ("the parties or their privies" in the language of Cause of Action Estoppel) were the same, a new party — the Attorney General for Ontario — was the one raising the issue of collateral attack.

Furthermore, when considering *Res Judicata*, the court must also consider the ability of the court to relieve against the strict application of *Res Judicata*: *Danyluk v. Ainsworth Technologies Inc.*, 2001 CarswellOnt 2434 (S.C.C.) — and the fact that *Res Judicata* is often applied with less force in the family law context: *G.L. v. C.E.* (2002), 25 R.F.L. (5th) 323 (Ont. S.C.J.);

Danylkiw v. Danylkiw (2004), 9 R.F.L. (6th) 93 (Ont. C.A.); *Wong v. Wong*, 2006 CarswellOnt 8823 (S.C.J.). Generally, courts dealing with family law issues will not be bound by a rigid adherence to principles such as *Res Judicata* and collateral attack where that rigid adherence would lead to an injustice: *Tokaleh v. Hassan*, 2014 CarswellOnt 1449 (C.J.); *Weaver v. Weaver*, 2015 CarswellNS 207 (N.S. S.C.).

Having had her appeal dismissed by the Ontario Court of Appeal and, likely aware of the clear authority from this court that a valid foreign divorce precludes a foreign divorcee from claiming spousal support in Ontario, Ms. Mehralian chose not to seek leave to appeal to the Supreme Court of Canada on the point. However, she was certainly entitled to claim that barring a foreign divorcee from claiming spousal support in Ontario is contrary to s. 15 of the *Charter* and unconstitutional. And she did not have to attack the recognition order to do so.

Despite Justice Mathen's finding being sufficient to dismiss the motion, she then considered the substantive constitutional claims.

Unfortunately, Ms. Mehralian's pleadings were a problem. Ms. Mehralian framed her *argument* in support of discriminatory treatment around sex, religion, and migrant status. However, her original Notice of Constitutional Question was based only on *marital* status. Justice Mathen recognized that although various grounds of discrimination can intersect, this was not pleaded. Justice Mathen was clear that, in the context of a s. 15 challenge, "the obligation to provide adequate notice requires the moving party to include the specific ground, or grounds, of prohibited discrimination" so that other parties can adequately respond and contribute to the record.

Justice Mathen recognized that Mr. Dunmore and Ontario would have been aware that the case would feature arguments as to the effects of the impugned provisions on women — and Muslim women — when intervener status was granted. However, Justice Mathen concluded that it would be inconsistent with s. 109 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43. to grant the relief requested by Ms. Mehralian if she did not first prove a *prima facie* case of discrimination on the ground she specifically pleaded — marital status.

Her Honour then considered the applicable law for a s. 15 *Charter* challenge. To successfully make out a s. 15 *Charter* challenge, a claimant must show that the impugned law (1) creates a distinction based on an enumerated or analogous ground; and (2) imposes a burden/denies a benefit in a manner that perpetuates disadvantage: *R. v. Sharma*, 2022 CarswellOnt 15715 (S.C.C.).

Justice Mathen acknowledged that the law does treat foreign-divorced spouses differently from those divorced in Canada — or common-law partners — because they cannot claim spousal support, and that this distinction results from the *Family Law Act* and the interpretation of the *Divorce Act* in Ontario. Justice Mathen further noted that in *Vyazemskaya v. Safin* (2024), 99 R.F.L. (8th) 247 (Ont. C.A.), the Court of Appeal for Ontario noted that this exclusion can be a source of "significant hardship" for spouses party to a foreign divorce and that the jurisprudence supporting this exclusion may be due for "reconsideration."

However, Justice Mathen then went on to question whether the status of being "divorced" amounts to the enumerated ground of "marital status" under s. 15(1).

Ms. Mehralian argued that the reasons articulated by Justice Abella in *Quebec (A.G) v. A* (2013), 21 R.F.L. (7th) 1 (S.C.C.) recognizing marital status as an analogous ground apply to getting and the state of being divorced (a choice to divorce can be made by one party against another's wishes). Her Honour agreed that some of the elements relied upon in recognition of marital status as an analogous ground could apply to divorce.

Ontario and Mr. Dunmore relied on *Hodge v. Canada (Minister of Human Resources Development)*, 2004 CarswellNat 3695 (S.C.C.) and *Muggah v. Nova Scotia (Workers' Compensation Appeals Tribunal)*, 2015 CarswellNS 522 (C.A.), to argue that "courts have never recognized being divorced as a form of marital status."

Her Honour was not convinced, noting (quite correctly) that:

> [130] . . .

> a. *Hodge* focuses on the purpose of a benefit scheme that required an existing relationship at the time of someone's death. The motion before this court is about a framework for determining support obligations arising upon a relationship breakdown. It is not clear that *Hodge* stands for the proposition that, in all cases, "marital status" is limited to the distinction between existing married and common law relationships.
>
> b. It would be incongruent with section 15's animating purpose if a law that subjected persons to harsher treatment because they are divorced could escape all equality rights scrutiny.

Her Honour does not find that "divorced" can never be a marital status ground. So that door is left open; being divorced can be "marital status." To us, this does not seem to be much of a question: What is "marital status" other that the status of being single, married or divorced? It is not clear to us how being divorced could *not* constitute marital status. When one considers that marriage is a condition precedent to divorce and that divorce is a further distinction between married and common-law relationships, which initially grounded the recognition of marital status as an analogous ground, it is hard to conceive of divorce separately from "marital status", especially when the fact of divorce disentitles someone to a significant benefit under the law.

It is also notable that *Hodge* and *Muggah* were decided in wholly different contexts: both cases involved public benefits, CPP or Workers Compensation — not private family law remedies — and were about providing support to the spouses of a deceased at the time of their death.

Her Honour also suggests that the issue here is not the *fact* of the divorce, but the *location* of the divorce. However, it is undeniable that the ***only*** group excluded by s. 29 of the *Family Law Act* are those divorced in a foreign country. If divorced in Canada, a spouse can claim support under the *Divorce Act*. If separated, but not divorced, a spouse can claim under the *Family Law Act,* as can a common law spouse.

Ultimately, however, Justice Mathen concluded that the court did not have the benefit of full argument on this point and that, in any event, it was unnecessary to decide, given that Ms. Mehralian's case was "not really about marital status."

Justice Mathen did, however, agree with Mr. Dunmore and Ontario that "marital status" is too broad to capture the distinction at play here because the reason that Ms. Mehralian is (and others in her position are) treated differently is not merely on account of the divorce, but the circumstances of divorce, including the foreign *location* of the divorce.

Justice Mathen then turned to the final stage of the analysis, concluding that Ms. Mehralian could not establish that the distinction based on marital status rose to the level of perpetuating disadvantage because her arguments were not really about marital status. Having failed to establish both steps of the *Sharma* test, Ms. Mehralian could not establish a *prima facie* discrimination claim.

Justice Mathen was quite critical of the lack of evidentiary foundation for the discrimination claims advanced by Ms. Mehralian and supporting interveners, emphasizing that *Charter* litigation cannot be decided on assumptions or instinct.

The key factual assertions underlying Ms. Mehralian's arguments (and of those supporting her), including that the impugned legislation and jurisprudence have a disproportionate impact on Muslim and immigrant women and that the problem is vast and persuasive, were just not sufficiently supported by evidence. This is understandable and certainly not meant as any sort of criticism of counsel. The case did not start out as a constitutional challenge. *Charter* challenges are very evidence-intensive and it is *extremely* challenging to mount such a challenge in the middle of a case. It is like starting to make hamburgers — and deciding to switch to Beef Wellington halfway through cooking the meal.

Her Honour noted:

> [144] It is not possible to read [Ms. Mehralian's] discrimination claim as focused primarily, or even to a significant degree, on the ground of marital status. The grounds of sex, religion, and immigrant status, among others, are not simply "add-ons" to marital status but central to her discrimination claim. The same observation applies to the interveners.

> [145] Even if the above discrimination arguments were properly captured under a marital status claim, or were otherwise within the Notice of Constitutional Question, [Ms. Mehralian] has not adduced the appropriate evidence to support them.

Ontario also argued that excluding foreign-divorced spouses from support was a specific policy choice by Ontario meant to respect the constitutional division of powers. Recall that nothing in the *Divorce Act* explicitly disentitles a person subject to a foreign divorce from applying for spousal support. However, Ontario (and other) courts have *interpreted* the *Divorce Act* as precluding a former spouse subject to a valid foreign divorce from seeking spousal support in Ontario (and elsewhere) because, as corollary relief, spousal support can only be awarded corollary to a Canadian divorce. It is open to provinces to include former spouses in their provincial legislation, which was done in Alberta, British Columbia, Manitoba and PEI, for example. But Ontario (and others) have not done so. Accordingly, the Ontario Court of Appeal has ruled that there is no jurisdiction under Ontario's *Family Law Act* or the *Divorce Act* to award spousal support to a former spouse (see *Rothgiesser v. Rothgiesser* (2000), 2 R.F.L. (5th) 266 (Ont. C.A.), at para. 26; *Okmyansky v. Okmyansky* (2007), 38 R.F.L. (6th) 291 (Ont. C.A.), at para. 42; and *Cheng v. Liu* (2017), 94 R.F.L. (7th) 23 (Ont. C.A.), at paras. 27-30). What Ms. Mehralian was challenging was more than just legislation, but the combination of Ontario's interpretation of the *Divorce Act* and Ontario's choice not include "former spouses" in the definition of "spouse." Justice Mathen did not actually determine this issue, finding it unnecessary given the dismissal of the s. 15 claim. However, Her Honour recognized it as a complex constitutional issue that deserves further consideration.

Ultimately, Ms. Mehralian's challenge failed due to a lack of evidentiary support, highlighting the need for future constitutional claimants to specifically plead all grounds of alleged discrimination and to support them with robust and detailed social science evidence.

However, this may not be the last word on the issue. Justice Mathen was careful to note that the following issues remain open to the court to consider on proper pleadings and evidence:

- whether a divorce is or can be discrimination based on marital status or another analogous ground;
- whether the discrimination reflects the intersection of sex, immigration status, and possibility of marital status; and
- whether Ontario's interpretation of federal jurisdiction represents a policy choice that is immune from constitutional challenge.

As things presently stand, however, a foreign divorce remains a bar to spousal support in Ontario, and the game of "recognize/don't recognize" a foreign divorce will continue. However, the door has been left ever-so-slightly ajar. Given comments from the Ontario Court of Appeal that the jurisprudence supporting this exclusion may be due for "reconsideration" and the clear intent of the Province of Ontario to defend the definition of "spouse" in the *Family Law Act*, a challenge with a full evidentiary record, arguing discrimination based on marital status, sex, and migrant status, could possibly be successful.

The Shortest *TWFL* Summary in the History of *TWFL*

Gee v. Gee, 2024 CarswellOnt 18151 (Div. Ct.) — McSweeney, Davies, Shore JJ

Issues: Ontario — Limits on the Children's Aid Society's Role

Can a Children's Aid Society conduct an assessment under s. 30 of the *Children's Law Reform Act*, R.S.O. 1990, c. C.12?

No. That ain't their job.

Move on. Nothing else to see here.

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