FAMLNWS 2021-32
Family Law Newsletters
August 23, 2021

— Franks & Zalev - This Week in Family Law

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Contents

• Of "Legal Heresy" and "Deplorable Tendencies" and Business Records

• The Sting of $250

• One Must Still *Prove* Foreign Law to Prove Foreign Law

Of "Legal Heresy" and "Deplorable Tendencies" and Business Records

Bruno v. Dacosta, 2020 CarswellOnt 13621 (C.A.) — Lauwers, Brown and Nordheimer JJ.A.

This is not a family law case. But when an appellate court refers to conduct in a civil case as "deplorable" and "legal heresy", it is probably worth knowing about.

The first question the Court of Appeal addressed was when, and to what extent, an appellate court can salvage a judgment when a trial judge gives insufficient or conclusory reasons.

Appellate courts are generally reluctant to order a new trial in civil matters. A new trial "should not be ordered unless the interests of justice plainly require that to be done": *Brochu v. Pond*, 2002 CarswellOnt 4334 (C.A.) at para. 68; *Nemchin v. Green*, 2019 CarswellOnt 12377 (C.A.) at para. 71. The court must find a real prospect "that a substantial wrong or miscarriage of justice has occurred": *Vokes Estate v. Palmer (Litigation Guardian)*, 2012 CarswellOnt 9186 (C.A.) at para. 7; *Iannarella v. Corbett*, 2015 CarswellOnt 2150 (C.A.) at para. 23.

Insufficient reasons necessitate a new trial where an appellate court is unable to salvage the decision based on the available record. On what basis is that determination made?

As written by Justice Lauwers (forgive the extensive quote — footnotes omitted and emphasis in original — but it's helpful):

> [22] In [*R. v. Sheppard*, 2002 CarswellNfld 73 (S.C.C.)], Binnie J. wrote, at para. 55: "Where the trial decision is deficient in explaining the result to the parties, **but the appeal court considers itself able to do so**, the appeal court's explanation in its own reasons is sufficient. There is no need in such a case for a new trial" (emphasis added). But the converse is also true. To paraphrase: Where the trial decision is deficient in explaining the result to the parties, and the appeal court does not consider itself able to do so, a new trial may be needed. This is a case-specific assessment.
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> [23] In assessing the trial judge's reasons for sufficiency, "the reviewing court must examine the evidence and determine whether the reasons [for judgment] are, in fact, patent on the record": *R. c. Dinardo*, 2008 SCC 24, [2008] 1 S.C.R. 788 (S.C.C.), at para. 32, per Charron J., who ordered a new trial. An appellate court must review the record to determine whether the trial decision can be rendered more comprehensible when read in the context of the record: see *Maple Ridge Community Management Ltd. v. Peel Condominium Corporation Corp. No. 231*, 2015 ONCA 520, 389 D.L.R. (4th) 711 (Ont. C.A.), at para. 30, per Hourigan J.A., citing *Hill v. Hamilton-Wentworth (Regional Municipality) Police Services Board*, 2007 SCC 41, [2007] 3 S.C.R. 129 (S.C.C.) at para. 101.

[24] However, there are limits on the appellate court's ability to fairly and justly salvage a trial decision: "Where the trial judge's reasoning is not apparent from the reasons or the record . . . the appeal court ought not to substitute its own analysis for that of the trial judge": *Dinardo*, per Charron J., at para. 32. She added that the need to review the record is "not an invitation to appellate courts to engage in a reassessment of aspects of the case not resolved by the trial judge."

[25] This court usually declines to dig into the record in order to salvage a decision where the trial decision turns on instances of conflicting evidence, evaluations of credibility and reliability, and exercises of discretion that are properly within the purview of a trial judge. I discuss each situation in turn.

(a) Conflicting Evidence

[26] This court does not attempt to reconcile critical conflicting evidence that could affect the outcome. In *R. v. Prokofiew*, 2008 ONCA 585 (Ont. C.A.), Borins J.A. reviewed the reasons of a trial judge following a trial for conspiracy, fraud, and theft over $5,000. The trial had taken place intermittently over seven months. Nearly one year later, the trial judge released very extensive reasons for conviction. Borins J.A. noted, at para. 30: "My main problem with the trial judge's reasons is that she made so few findings of fact on her way to the conclusory finding that each appellant was guilty as charged." He added: "Because reasons for conviction were not patent on the record, I am unable to determine the analytical path she followed in convicting the appellants."

[27] Similarly, *R. v. Capano*, 2014 ONCA 599 (Ont. C.A.) concerned a trial judge's consideration of the test for finding an accused to be "not criminally responsible" ("NCR"). The trial judge had not specifically articulated whether the accused's mental disorder rendered the accused incapable of appreciating the nature and quality of the criminal act, on the one hand, or whether it rendered the accused incapable of knowing that the act was wrong, on the other hand. Faced with conflicting evidence in the trial record and the trial judge's failure to expressly resolve this conflict in the evidence, this court ordered a new trial. Epstein J.A. noted, at para. 73: "Given the two possible ways in which Mr. Capano's mental disorder may have affected his ability to understand that failing to report to CAMH was wrong, it was critical that the trial judge analyze and resolve how he found Mr. Capano NCR." She stated, at para. 74, relying on *Dinardo*, that "it is not appropriate for this court to attempt to discern that route and explain it."

(b) Credibility and Reliability

[28] This same appellate reluctance applies to critical determinations of credibility and reliability. A trial judge's failure to "sufficiently articulate how credibility and reliability concerns are resolved may constitute reversible error": *R. v. M. (A.)*, 2014 ONCA 769, 123 O.R. (3d) 536 (Ont. C.A.), at para. 18, citing *R. v. Vuradin*, 2013 SCC 38, [2013] 2 SCR 639 (S.C.C.), at para. 11, and *Dinardo*, at para. 26.

[29] In *R. v. Slatter*, 2019 ONCA 807, 148 O.R. (3d) 81 (Ont. C.A.), Trotter J.A. commented on a trial judge's reliability findings, at para. 66:

> Although the trial judge relied on Dr. Jones' evidence in this context, he failed to mention her evidence concerning J.M.'s suggestibility. The issue was clearly grounded in the evidentiary record. It was emphasized in defence counsel's closing submissions. **Yet, because there is no attempt to address or reconcile this evidence in the trial judge's reasons, we are left to speculate whether the trial judge appreciated the significance of this evidence and the role (if any) that it played in his ultimate findings.**

(c) Discretionary Decisions

[30] Finally, this court is reluctant to make discretionary decisions that are properly within the purview of the trial judge. In *R. v. Sahdev*, 2017 ONCA 900, 356 C.C.C. (3d) 137 (Ont. C.A.), per Trotter J.A., the trial judge did not provide adequate reasons for refusing to sever counts in a criminal indictment. This court rejected the Crown's request to decide the issue. The severance issue was complicated by a similar fact issue and required a trial judge's exercise of discretion in a new trial.

After dealing with the issue of insufficient reasons, Justice Lauwers then offered some "trial practice notes" for counsel, following up on his similar advice in *Girao v. Cunningham*, 2020 CarswellOnt 5363 (C.A.) with respect to the proper considerations when using joint document briefs. Again, we quote Justice Lauwers (this time, emphasis added):

> [53] There were errors made in the admission and use of the joint document book that further frustrated appellate review and that should not happen in other cases. I laid out some elements of acceptable trial practice in *Girao v. Cunningham*, 2020 ONCA 260 (Ont. C.A.), at paras. 21-35. At paras. 33 and 34, I said:
>
> > In my view, counsel and the court should have addressed the following questions, which arise in every case, in considering how the documents in the joint book of documents are to be treated for trial purposes:
> >
> > 1. Are the documents, if they are not originals, admitted to be true copies of the originals? Are they admissible without proof of the original documents?
> >
> > 2. Is it to be taken that all correspondence and other documents in the document book are admitted to have been prepared, sent and received on or about the dates set out in the documents, unless otherwise shown in evidence at the trial?
> >
> > 3. Is the content of a document admitted for the truth of its contents, or must the truth of the contents be separately established in the evidence at trial?
> >
> > 4. Are the parties able to introduce into evidence additional documents not mentioned in the document book?
> >
> > 5. Are there any documents in the joint book that a party wishes to treat as exceptions to the general agreement on the treatment of the documents in the document book?
> >
> > 6. Does any party object to a document in the document book, if it has not been prepared jointly?
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> > It would be preferable if a written agreement between counsel addressing these matters were attached to the book of documents in all civil cases. In addition, it would be preferable if the trial judge and counsel went through the agreement line by line on the record to ensure that there are no misunderstandings.
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> [54] Even though *Girao* was released after the trial decision in this case, this situation presents an opportunity for further reflection on trial practice.
>
> [55] The most obvious point, which nonetheless bears emphasis, is that any agreement between counsel as to the admissibility of documents is not automatically binding on the trial judge, who remains at all times the gatekeeper of the evidence. I now turn to the problems experienced in this case.
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> [56] At the opening of the trial, Mr. McKenna read the parties' initial agreement with respect to evidence into the record:
>
> > The documents contained in the Joint Document Brief are relevant, authentic and the dates of the documents are accurately reflected on their face. Neither of the parties are to be considered as having accepted the truth of the contents of all of the documents. Further, both parties reserve their rights to challenge what is stated in the documents, lead further evidence which may or may not be inconsistent with the documents and argue as to the interpretation and weight to be given to the documents.
>
> [57] This agreement was not helpful to the trial judge because of its ambiguity, which he should have probed immediately and carefully with some obvious questions, among them: If a document is not challenged, is its hearsay content deemed to be admitted? If not "all" documents, then which?

[58] The approach taken by counsel and permitted by the trial judge only invited further contention, which inevitably emerged. On the second day of trial, counsel for the Crown, Mr. MacLeod, attempted to enter a Niagara Regional Police Service Supplementary Report into evidence, leading to the following exchange:

> Mr. McKenna: Just maybe my friend can clear — is this going in as a business record, is that sort of the basis of the admissibility of it?
>
> Mr. MacLeod: Your Honour, this is one our productions. I don't intend to have this marked as, and go in as, a business record as an exception to the hearsay rule. It is a document. I don't think there's any issue between the parties as to its authenticity. I don't think there's any issue as to its relevance. The witness has been questioned about these events, but it does provide evidence of some objective things that were happening at this time.
>
> Mr. McKenna: . . . It's the officer's document, it's not Mr. Bruno's document. It probably sounds like I'm trying to be difficult, but if we're going to deal with this piece by piece and lead to a bigger problem later on, then I'd like to deal with this issue, you know, as a whole if we can. **I just don't want to be seen to be agreeing to letting records just go in and then I'm going to be faced with some argument that I didn't dispute it at this time and I'm going to be faced with the opposite argument with their actual Ministry documents**. [emphasis in original]

[59] After seven days of trial, and at the beginning of the Crown's evidence, Mr. MacLeod stated that the parties wished to make a "further stipulation with respect to some documents" and that this new stipulation would be "in addition to what was already stipulated as the agreement between the parties." Mr. MacLeod then read the following statement into the record:

> The parties agree that the records of the Ministry of Community Safety and Correctional Services contained in the joint document brief (Exhibit 1), as well as exhibits A, B, C, F, and G are business records pursuant to Section 35 of the *Evidence Act*. However there is no agreement that statements recorded in these records are admissible for the truth of their contents. [. . .] For example, for an occurrence report that states that inmate X said Y, is evidence of the fact that the statement Y made was made by inmate X, [but it is not evidence that it is true.] The standing orders of the Niagara Detention Centre and the adult institutions policies and procedures are not technically business records, but are in evidence and can be referred to by the parties when examining witnesses and in argument.

[60] This agreement is more specific than the first, but it raises problems of its own concerning the proper application and reach of s. 35 of the *Evidence Act*, R.S.O. 1990, c. E.23, which should have been canvassed and resolved at the outset of the trial. This last agreement came too late; it implies that the statements had to be proved by other means but, by this point, the plaintiffs had referenced and relied on numerous documents involving various degrees of hearsay.

[61] A party properly invoking s. 35 of the *Evidence Act* is entitled to introduce certain limited forms of double hearsay contained in business records, such as statements made and recorded by two people who are each acting in the ordinary course of business, even if those statements are ultimately accorded little weight: *Evidence Act*, s. 35(4); *Parliament et al v. Conley and Park*, 2019 ONSC 2951 (Ont. S.C.J.), at para. 36; *Setak Computer Services Corp. v. Burroughs Business Machines Ltd.* (1977), 15 O.R. (2d) 750; [1977] O.J. No. 2226 (Ont. H.C.), at para. 63. **In dealing with police reports and occurrence reports, however, trial judges have generally refused to admit business records in which a person, acting in the course of their duty, records *unreliable* third-party statements or other forms of hearsay**: see for example *DeGiorgio v. DeGiorgio*, 2020 ONSC 1674 (Ont. S.C.J.), at paras. 50 and 54. The parties' agreement simply stipulated that double hearsay is not admissible for the truth of its content. **In my view this issue required argument and an evidentiary ruling**.

[62] I add an observation about the respondents' s. 35 *Evidence Act* notice. It seriously overreached and, in so doing, created the uncertainty that set the context for uncertainty about the permissible use of documents. The s. 35 notice, a copy of which this court requested after oral argument, ends with the following description under the heading "Liability Documentation": "All other business and medical records listed in the parties' affidavits of documents and produced subsequently in this proceeding in response to undertaking or production requests". **The idea seems to have been to extend the s. 35 cloak**

> **to other documents as yet unidentified. As convenient as this might be, it is unacceptable trial practice and invites contention at trial over the status of individual documents, as transpired here. The rigorous approach set out in *Girao* as modified in these reasons is a good way to avoid such problems**.
>
> [63] As a matter of ordinary trial practice, the parties' agreement should be entered with the joint book of documents at the earliest opportunity. In this case, the need for a timely agreement or resolution of the issues regarding documentary evidence was greater because of the unusually heavy role played by the documents. The fact that the parties felt the need to clarify their agreement so late in the game simply illustrates the inadequacy of the initial agreement and the effect of the absence of judicial scrutiny.
>
> [64] This was a case of **far too little, far too late**, which left the trial judge in a quandary about the admissibility and use of the business records. This became apparent when he dealt with the factual issue of who assaulted Bruno. The appellant takes issue with the trial judge's factual finding on the assault, at para. 36 of the decision, where he stated: "Having reviewed all the evidence including the photos of the other inmates, the video, and the records of the NDC including the report prepared by CO Tom Bradley, I am satisfied that DaCosta, Gibson, Ashenden and Empey undertook the assault." Despite the parties' reservation in their agreement on the hearsay value of statements in the documents, the trial judge effectively accepted the hearsay content of what was known in the trial as the "Bradley Report," which the Crown produced. CO Bradley did not testify.
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> [65] **This case highlights the *deplorable tendency* in civil cases of admitting evidence subject only to the weight to be afforded by the trial judge: "Seduced by this trend towards [evidentiary] flexibility, some judges in various jurisdictions have been tempted to rule all relevant evidence as admissible, subject to their later assessment of weight"**: *Pfizer Canada Inc. v. Teva Canada Ltd.*, 2016 FCA 161 (F.C.A.), per Stratas J.A. at para. 83. ***This is legal heresy***, as Stratas J.A. noted, citing *R. v. Khelawon*, 2006 SCC 57, [2006] 2 S.C.R. 787 (S.C.C.), at para. 59. I agree with his trenchant comments.
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> [66] Finally, as I noted in *Girao*, at para. 22: "The goal of a trial judge in supervising the assembly of a trial record is completeness and accuracy, so that the panel of this court sitting on the appeal can discern without difficulty exactly what was before [the trial judge] at any moment in the course of the trial." In this case it was necessary for this court to look at the written closing submissions of counsel to the trial judge, but they were not in the trial record. They were sent after oral argument on the appeal at our request. **In my view, good trial practice is to include any written arguments in the trial record as lettered exhibits to which the appeal court can have access if necessary.**

So, do yourself a favour, and stay clear of legal heresy and deplorable tendencies.

The Sting of $250

Nova Scotia (Community Services) v. J.P., 2021 CarswellNS 410 (C.A.) — Bryson, Van den Eynden, and Beaton JJ.A.

In the 2021-09 edition of *TWFL* (March 8, 2021), we commended Justice MacLeod-Archer for her decision to order $250 in costs against the Minister in a child protection case for delaying the matter by not serving its materials on time. As we said then, "if parties know that non-compliance will result in immediate and proportionate consequences, they will be far more likely to comply with their obligations in the first place."

In her written reasons for ordering costs against the Minister, Justice MacLeod-Archer discussed what she viewed as a chronic problem of delay by the Minister in child protection proceedings. As her Honour stated in her written reasons:

> [32] The late filing on August 4 demonstrates **a pattern which is evident in *CFSA* proceedings in this district generally. Late filings in child protection proceedings have become the norm.** Respondents' counsel are often left scrambling to review the documents with their clients, sometimes just minutes before the court appearance.

> [33] In addition, **the Minister's orders are often filed late**; in some cases the order isn't filed until immediately prior to the next docket date (up to 3 months later). The vast majority of files scheduled for appearance days to deal with overdue orders, belong to the Minister. In these circumstances, one might ask: without a timely court order, how are parties to know what their legal obligations are?
>
> [34] Finally, **late filings compound the problem of a busy court docket that is already dominated by child protection proceedings**. In addition to duplicate docket appearances due to adjournment requests, *CFSA* proceedings take priority over other family files scheduled for hearing, because they involve statutory time limits. **So when a party contests the Minister's position in a *CFSA* proceeding, civil family files are "bumped" from the docket to obtain trial time. Given the number of *CFSA* trials held in this district, this has become a regular occurrence.**
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> . . . . .
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> [39] Finally, as counsel for J.P. noted during her submissions, **it is not clear where fault lies for the delay at the Minister's end**. The filing delays cannot be attributed to the Covid-19 state of emergency, as they are chronic and long-standing. **It may be that institutional complacency has set in**, because courts have been reluctant to order costs in child protection proceedings in the past. **Or it may be that more resources are required**, in order for the department to meet its obligations under the legislation and the *Civil Procedure Rules*. **Either way, the problem must be addressed**. [emphasis added]

The Minister appealed Justice MacLeod-Archer's costs order to the Nova Scotia Court of Appeal, and argued that it had been denied procedural fairness. Although the Minister raised a number of specific procedural concerns, the thrust of its argument was that it had not been given an opportunity to make submissions or file evidence about the systemic problems that were discussed in the written reasons. The Minister also argued that her Honour misapplied the test for ordering costs against a child protection agency.

The Court of Appeal agreed that Justice MacLeod-Archer should have given the Minister a chance to make submissions and file evidence about the systemic issues that were discussed in her reasons. Judges are entitled to take judicial notice of the "context in which they perform the duties of their office", and a "judge's knowledge of her own docket, and the habitual breach of the Rules and court directions in her judicial district are things of which the judge can take notice". However, judges must also give parties an opportunity to respond before giving weight to local conditions in their decisions: *R. c. Lacasse*, 2015 CarswellQue 11715 (S.C.C.) at para. 94.

The Court of Appeal also agreed with the Minister that Justice MacLeod-Archer's ***written*** reasons should be disregarded.

When Justice MacLeod-Archer initially made the costs order, she gave brief oral reasons. However, she subsequently released the much lengthier written reasons.

While judges can amend oral reasons for readability and to correct typographical errors, they should not change the substance of their decisions: *Nova Scotia (Minister of Community Services) v. Z. (C.K.)* (2016), 81 R.F.L. (7th) 1 (N.S. C.A.) at para. 61. In this case, however, the Court of Appeal was satisfied that the written reasons "transformed its oral predecessor", and considered factual and legal issues that went beyond the scope of what had been argued before her. Accordingly, the Court was satisfied that the written reasons should be disregarded.

That being said, the Court of Appeal was not persuaded that Justice MacLeod-Archer had made an error in ordering costs against the Minister. Her Honour's review of systemic issues without giving the Minister an opportunity to respond might give an "impression of unfairness". However, the Court was satisfied that there had been no ***actual*** unfairness in this case, because her Honour had not relied on those systemic issues as a basis for ordering costs against the Minister in this case. This was clear from her brief oral reasons, where she stated as follows:

> [. . .] Very often they come in as late as the materials on this one. And I will tell you, **I'm dealing only with the late filing of August 4th. The other issues that have been raised I'm not dealing with those today because they are larger issues**

> **and there's more information required** and it may come up at the end of a hearing at some point that someone wants me to deal with them but I am solely focusing on the late filing for the Pre-Trial to Disposition. Ms. Perry is asking the court to sanction the late filing, as well as the adjournment request, because she says **there's systemic delays, including disclosure, but as I said, I'm not dealing with that. I'm only dealing with the adjournment request**. But the chronic delays that we are seeing, particularly on the Minister's end in filing affidavits and motions, has impacted everybody in the system.
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> . . . . .
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> **So again, I'm making no comment on the allegations of late notes and the processes.** It is appropriate for all parties to follow the rules and in the case of Legal Aid, if there's new counsel on the file, they should be providing a notice of new counsel because that makes it easier for the court to understand who's going to be calling in on calls as well. But again, those are issues that are for another day. **The major problem here is the inconvenience to the parties who had to adjourn the Pre-Trial and try and try and seek instructions. So I am ordering costs of $250 payable by the Minister for the late filing on August 4th and the subsequent adjournment that is not (inaudible) against counsel personally.** And I can indicate that if the other issues I've very briefly highlighted and identified persist and counsel wish to address the problem at future appearances, a motion can be filed and counsel should be aware that all the Judges are concerned with the late filing from all parties and costs are likely going to be a new part of the equation going forward. [emphasis added]

The Court of Appeal also rejected the Minister's argument that Justice MacLeod-Archer applied the wrong test for ordering costs against a child protection agency. Although the Court agreed with the Minister that costs should only be awarded against a child protection agency in "exceptional circumstances" [*Children's Aid Society of Cape Breton-Victoria v. A. (L.L.)*, 2004 CarswellNS 506 (C.A.) at para. 6], it was satisfied that a "pattern of procedural errors" that "causes prejudice without reasonable excuse" is, in fact, the type of "exceptional circumstances" that can justify an award of costs against the Minister.

Accordingly, the Minister's appeal was dismissed. And despite the Court of Appeal's conclusion that Justice MacLeod-Archer's written reasons should be "disregarded", its decision makes it clear that costs can and should be ordered against a child protection agency if it fails to comply with its procedural obligations.

One Must Still *Prove* Foreign Law to Prove Foreign Law

X.W.L. v. J.L. (2021), 56 R.F.L. (8th) 405 (B.C. S.C.) — Veenstra J.

The *Civil Marriage Act*, S.C. 2005, c. 33 was enacted in 2005 to enable same sex couples throughout Canada to get married. (It was subsequently amended when someone realized that the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.) did not apply to same sex spouses such that they could not be divorced!)

To deal with situations where same sex spouses live in a jurisdiction that does not recognize same sex marriage, Part II of the *Civil Marriage Act* gives courts in Canada jurisdiction to grant a divorce in certain circumstances. However, a divorce granted under the *Civil Marriage Act* does not allow a party to seek corollary relief under the *Divorce Act* (see s. 8). Such relief can only be claimed as part of a claim for a divorce pursuant to the *Divorce Act*, which requires at least one of the parties to have lived in a province for at least one year immediately prior to the start of the proceeding.

Subsection 7(1) of the *Civil Marriage Act* sets out three conditions that must be met before a court can grant a divorce to a non-resident couple:

> (a) there has been a breakdown of the marriage as established by the spouses having lived separate and apart for at least one year before the making of the application;
>
> (b) neither spouse resides in Canada at the time the application is made; and
>
> (c) each of the spouses is residing — and for at least one year immediately before the application is made, has resided — in a state where a divorce cannot be granted because that state does not recognize the validity of the marriage.

Subsection 7(2) also restricts who can apply for a divorce under the *Civil Marriage Act*, as it provides that such an application can only be brought jointly, on consent, or without consent if the court where one of the spouses resides makes a declaration confirming that one of the spouses "(a) is incapable of making decisions about his or her civil status because of a mental disability; (b) is unreasonably withholding consent; or (c) cannot be found."

Subsection 7(2) was not an issue in this particular case because the parties had applied for the divorce jointly. The only question for Justice Veenstra, therefore, was whether the parties had met the requirements of s. 7(1).

The parties' affidavit evidence established that they were married in British Columbia in 2010, had separated with no possibility of reconciliation in 2017, and had both been living in China for over a year (one party had been living there since 2016, and the other since 2018).

With respect to the issue of whether China did not recognize the validity of the marriage (such that they could not get divorced in China), the parties' affidavits merely stated as follows:

> A divorce cannot be granted in China because it does not recognize the validity of my marriage. Since I am not a Chinese citizen and was not married in China according to the Civil Procedural Law of the People's Republic of China foreign courts have jurisdiction over my divorce.

This was a big problem. As noted by Justice Veenstra, foreign law is a question of fact that must be established by admissible evidence: *Hunt v. T & N plc*, 1993 CarswellBC 294 (S.C.C.) at para. 27.

While the parties' evidence that China did not recognize the validity of their marriage may have been entirely correct, that evidence was inadmissible because neither party was qualified to give opinion evidence about the law of China. To prove Chinese law, the parties had to obtain evidence from a properly qualified expert that also complied with the requirements of Rule 13-2 of the *Supreme Court Family Rules*, B.C. Reg. 169/2009, which requires that the person giving the opinion certify that s/he is aware of his or her duties to the court, and that s/he is not an advocate for either party.

Although Justice Veenstra recognized that obtaining admissible evidence of Chinese law would impose an additional burden and cost on the parties, there was no way to avoid it given the clear wording of the s. 7(1)(c) of the *Civil Marriage Act*:

> [11] I recognize the additional burden it places on the parties to a proceeding such as this to obtain an opinion from a qualified lawyer in order to establish that, under the laws of the jurisdiction of current residence, a divorce cannot be granted because that jurisdiction does not recognize the validity of the marriage. However, given that such evidence is a statutorily required foundation for such an order, given the limited nature of a Canadian court's jurisdiction to deal with matters governing non-Canadian residents, and given the important principles of comity that are engaged, I conclude that proper expert evidence should be obtained to establish this requirement.

As a result, Justice Veenstra dismissed the parties' application for a divorce, but gave them leave to reapply with additional evidence if they wanted to do so.

Cases under the *Civil Marriage Act* do not come up that often, so this serves as a good reminder as to the evidentiary requirements.

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