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— Franks & Zalev - This Week in Family Law

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COVID-19 Update

Droit de la famille - 211637, 2021 CarswellQue 13454 (C.S.) — Quach J.S.C.

When the Pfizer-BioNTech vaccine was approved for children age 12 and up in May, we knew it was just a matter of time until a court had to determine whether a child should be vaccinated against COVID-19 against the wishes of one of the parents.

That time has now come and, not surprisingly, the Court deferred (rightfully in our view) to the recommendations of the government and public health authorities. As Justice Akbarali noted in *Zinati v. Spence* (2020), 47 R.F.L. (8th) 70 (Ont. S.C.J.), albeit in the context of deciding whether to send a child to school in person or online, "[t]he court is not in a position, especially without expert evidence, to second-guess the government's decision-making." (See the 2020-35 edition of *TWFL* - September 14, 2020).

The parties in this case had a 12-year-old son. The mother wanted to have the child vaccinated. The child's lawyer confirmed that the child wanted to be vaccinated so that he could participate in activities and sports and see his grandparents. The child's pediatrician confirmed that "the vaccine was appropriate for everyone and that he recommended it to all of his patients."

The father, however, opposed vaccinating the child against COVID-19 for a number of reasons, including that the vaccine was still experimental, and could possibly cause major side effects and harm to the child. In support of his position, the father tried to file expert evidence from a scientist in Texas, Dr. Janci Chunn Lindsay. Although the details of Dr. Lindsay's evidence are not discussed in the reasons, Justice Quach did describe her as "a scientist who 'makes inaccurate claims on Covid-19 vaccine safety'."

In rejecting the father's arguments, Justice Quach started by noting that the Quebec government had urged all "citizens aged 12 years and over to get their two doses of vaccine against Covid-19", and that Quebec Public Health had recommended vaccinating children 12 and up for a number of reasons, including:

> Vaccinating young people will restrict the virus from spreading and help control the pandemic by stopping transmission in the youth's immediate circle.
>
> Vaccinating young people makes it possible to loosen other hygiene measures that control the spread of the virus and severely impact teaching, academic success, and student retention and overall well-being.

> Vaccinating young people caps outbreaks and limits classroom closures, which also facilitates student success and retention.
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> Vaccinating young people means that sports and extracurricular activities can resume. These activities have a major positive effect on the mental and physical health of adolescents.

With respect to Dr. Lindsay's proposed evidence, Justice Quach refused to admit it because she determined that it was based on inaccuracies, it was subjective, and it could not be taken seriously. It is unfortunate that Justice Quach did not provide any details of the specific problems with Dr. Lindsay's evidence, as that would certainly have been useful information to have on hand in other cases about whether a child should be vaccinated.

As the father failed to adduce any admissible evidence to establish that vaccinating the child would put his health at risk, Justice Quach was satisfied that vaccinating the child was in his best interests. Accordingly, she authorized the mother to allow the child to receive his first and second doses of the vaccine without the father's consent.

This will not be the last case to deal with whether a child should be vaccinated against COVID-19. But hopefully it will be the first in a series of cases where our family courts make it clear that when it comes to COVID-19, they are almost always going to follow the recommendations of the relevant public health authorities.

Something to Discover

Grant Thornton LLP v. New Brunswick, 2021 CarswellNB 373 (S.C.C.)

Dass v. Kay, 2021 CarswellOnt 11471 (C.A.) — Strathy C.J.O., Brown and Miller JJ.A.

While these two cases are not family law cases, they do deal with an issue that should be of interest to family lawyers — limitation periods and the discoverability doctrine. In *Grant Thornton*, the Supreme Court of Canada confirmed and restated the general discoverability doctrine, and in *Dass* the Ontario Court of Appeal applied *Grant Thornton*, which dealt with the New Brunswick *Limitations of Actions Act*, S.N.B. 2009, c. L-8.5, to the Ontario *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B. The last time the Supremes dealt with the discoverability doctrine was 35 years ago in *Central & Eastern Trust Co. v. Rafuse*, 1986 CarswellNS 40 (S.C.C.).

While *Grant Thornton* dealt with the New Brunswick limitations statute, that *Act* is similar to limitations statutes across the country (Alberta, Saskatchewan and Ontario, for example). Accordingly, *Grant Thornton* will be applicable across the country with some minor province-specific modifications, as suggested in *Dass* for Ontario.

The underlying facts are not terribly important for our purpose except to show how discoverability is applied in the case. Basically, New Brunswick was prepared to support a provincial company by guaranteeing a $50 million loan. Before offering the guarantee, the province insisted that the corporate auditors, Grant Thornton, advise that the corporate financial statements fairly presented the company's finances — which it did.

Only a few months after New Brunswick provided the guarantee, the company became insolvent, and the province was called on to repay the loan.

The province then hired another accounting firm to review the company's position. The second accounting firm released a draft report in 2011 and a functionally identical final report in November 2012. Both reports showed that the corporate financial statements materially overstated the company's assets and earnings.

New Brunswick sued Grant Thornton for negligence in 2014. Grant Thornton responded with a motion for summary judgment seeking to dismiss the claim as statute-barred. Grant Thornton was initially successful, and the claim was summarily dismissed. The key question, of course, was when New Brunswick "discovered" its claim, and the motion judge determined that the province had the requisite knowledge at least by the time it received the draft report in 2011.

The New Brunswick Court of Appeal overturned the decision, opining that the province could not have discovered the claim until Grant Thornton produced its files.

The Supreme Court of Canada reversed the New Brunswick Court of Appeal decision, concluding that New Brunswick had, in fact, "discovered" its claim in 2011 when it received the draft report.

Justice Moldaver, for a unanimous 7-member Supreme Court, clarified/revised the test for discoverability, and determined that a claim is discovered when a plaintiff has knowledge, actual or constructive, of the material facts upon which a plausible inference of liability on the defendant's part can be drawn. This will undoubtedly come to be known as the "plausible inference test."

Prospectively, a plaintiff need only "know" (actually or constructively) the material facts upon which it can draw a plausible inference of liability. In turn, a "plausible inference is one which gives rise to a 'permissible fact inference'." Furthermore, circumstantial evidence can be used to show the state of the plaintiff's knowledge.

And what is "constructive knowledge"? That is where the plaintiff, through the exercise of reasonable diligence, could have discovered the material facts giving rise to the claim. More is required than mere suspicion or speculation; but certainty is not required.

In this case, once New Brunswick knew the guarantee was called upon and that the audited financial statements overstated the company's financial position, a plausible inference of liability could have been drawn. New Brunswick did not have to know whether or not Grant Thornton was actually at fault, as the test does not require certainty.

No sooner was *Grant Thornton* decided than the Ontario Court of Appeal had the chance to apply it to Ontario's *Limitations Act, 2002* in *Dass*.

Again, the underlying facts of the claim are not particularly important. What is important is the following quote from the Ontario Court of Appeal, which combines the new discoverability doctrine from Grant Thornton with the Ontario-specific provision of the Ontario *Limitations Act, 2002*:

> [35] The motion judge did not err in her articulation or application of the discoverability principle as codified in s. 5(1). As recently restated by the Supreme Court, a claim is discovered when the material facts that are actually or constructively known by a plaintiff enable the plaintiff to determine that it has *prima facie* grounds to infer liability on the part of the defendant or, equivalently, enable the plaintiff "to draw a plausible inference of liability on the part of the defendant": *Grant Thornton*, para. 45 . . .
>
> [36] Section 5(1)(a)(iv), as the appellants note, postpones the start of the limitation period until a claimant knows that "a proceeding would be an appropriate means to seek to remedy" an injury, loss, or damage.
>
> [37] The appellants argue that the motion judge erred by rejecting the proposition that an assessment of the appropriateness of litigation, within the meaning of 5(1)(a)(iv), includes an assessment of the prospect of the success of litigation, particularly where the party has relied on an assessment of merits by legal counsel.
>
> [38] For the reasons given below, I do not agree that the motion judge erred.
>
> [39] First, as explained above, the case law interpreting s. 5(1)(a)(iv) has, to date, recognized two situations delaying the start of the limitation period: (i) where a plaintiff relied on a defendant's superior knowledge and expertise, especially where the defendant took steps to ameliorate the loss; and (ii) where the parties have engaged an alternative dispute resolution process offering an adequate remedy and it has not been completed. The appellants do not come within either situation.
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> [40] Claimants such as the appellants who have relied on the advice of their legal counsel are not in an analogous position to claimants who have relied on the assessment of their situation provided by defendants . . . Here, the appellants have been in

> no way dependent on the respondents for information, an understanding of their position . . . or any other lender, or efforts to remedy the damage they claim to have suffered. The appellants accordingly never delayed bringing an action on that basis.
>
> [41] Neither have the appellants engaged in an alternative dispute resolution process with the respondents, such that it would be unfair not to take that process into account under s. 5(1)(a)(iv) . . .
>
> [42] The appellants are not, of course, restricted to the two categories of cases identified to date that delay the start of the limitation period. But if they cannot bring themselves within those two categories they must propose another set of circumstances in which it could be said, on a principled basis, that a person with a claim could not have known that an action would be an appropriate means to remedy the injury, loss, or damage.

Therefore, at least in Ontario, the first consideration is when the plaintiff had actual or constructive knowledge of the material facts that would allow him or her to draw a plausible inference of liability on the part of the defendant. The second consideration is whether, under the *Limitations Act, 2002*, the plaintiff falls within the two categories recognized by the case law that delay the start of the limitations period: (i) where a plaintiff relied on a defendant's superior knowledge and expertise; and (ii) where the parties have engaged an alternative dispute resolution process for an adequate remedy that has not been completed.

As civil claims are often joined with family claims, this new regime is of critical importance. It may also be important where a party is considering asking to set aside a Marriage Contract or Separation Agreement.

What's In a Name? That Which We Call a Rose by Any Other Name Would Smell as Sweet — But Not in Parenting Litigation

Bova v. Vandervliet (2021), 55 R.F.L. (8th) 167 (Ont. S.C.J.) — Horkins J.

The father brought a motion for an order to change the last name of the parties' child to a hyphenated last name.

The parties had a child in 2012 during their short relationship. The mother disputed the father's claim that he was the father, and she registered the child's last name as "Vandervliet" on the Statement of Live Birth. The father's access was very limited.

In 2015, the father issued an Application seeking custody, access, a declaration of parentage and an order that the child's last name be changed to "Bova."

The issue of parentage was resolved in 2016 through DNA testing which confirmed that the father was the child's birth father. However, the conflict continued. The mother continued to restrict the father's access. The father did not have unsupervised access until the summer of 2018.

On October 29, 2018, Justice Vallee issued a final *Consent* Order that gave the mother sole custody of the child (the "Vallee Order") — pay attention here — this Order, on consent, would prove to be the father's undoing. The Vallee Order gave the father unsupervised access, but all exchanges had to be supervised. No overnight access was provided. The Vallee Order directed that in January 2020, there would be a "full review" of the access, including overnights.

The parties subsequently settled all remaining parenting issues except the name change. However, the father had to fight for all the access he could get. Eventually, after fighting for six years, the father's access increased to the point that he had regular overnights with the child, and there was evidence that the child had bonded with the father and his family. To further that bond, the father wanted to hyphenate the child's last name. He did not care which name went first.

Specifically, the father asked for:

> 1. An Order requiring the mother "to submit an application to the Registrar General to change" the child's last name to Vandervliet-Bova or Bova-Vandervliet;

2. In the alternative or in addition, an Order directing the Registrar General to change the child's surname to one of the hyphenated options;

3. In the alternative, an Order permitting the father to make an Application directly to the Registrar General under the *Change of Name Act*, R.S.O. 1990, c. C.7 and dispensing with the mother's consent to the proposed name change; and

4. If necessary, an Order issuing a declaration that there has been a material change in circumstances permitting the father to bring this motion.

The *Change of Name Act* allows a person with "lawful custody" to apply to the Registrar General to change the name of a child. Subsection 5(2) sets out who must consent to the application. Then, if the required consent cannot be obtained or is refused, the person seeking the change can apply to the court for an order dispensing with that consent:

5 (1) Unless a court order or separation agreement prohibits the change, a person described in subsection (1.1) may apply to the Registrar General in accordance with section 6 to change,

(a) the child's forename or surname or both; or

(b) the child's single name, if the child has a single name.

5 (1.1) Subsection (1) applies to a person with lawful custody of,

(a) a child whose birth was registered in Ontario and who is ordinarily resident there; or

(b) a child who has been ordinarily resident in Ontario for at least one year immediately before the application is made.

5 (2) The application under subsection (1) requires the written consent of,

(a) **any other person with lawful custody of the child**;

(b) any person whose consent is necessary in accordance with a court order or separation agreement; and

(c) the child, if the child is twelve years of age or older.

. . . . .

5 (4) If the required consent cannot be obtained or is refused, the person seeking to change the child's name may apply to the court for an order dispensing with that consent.

5 (4.1) If the consent that cannot be obtained or is refused is the consent required under subsection (2.1), the application under subsection (4) may be made to the Ontario Court of Justice, the Family Court or the Superior Court of Justice.

5 (5) The court shall determine an application under subsection (4) in accordance with the best interests of the child.

5 (6) The applicant under subsection (1) **shall give notice** of the application to every person who is lawfully entitled to access to the child. [emphasis added]

While not apparent at first reading, a careful review of s. 5 shows that the *Change of Name Act* did not actually give the father a statutory route to change the child's surname — because under the Vallee Order, the mother had sole custody of the child (and the father was not asking to change the Vallee Order).

Under the *Act*, only a person with "lawful custody" — here the mother — could apply to the Registrar General for a change of name. As an access parent, the father could not rely on the *Act* for the requested name change. The law is clear that the right

to name a child, or to change the name of a child, is an incident of custody: *Felix v. Fratpietro* (2001), 13 R.F.L. (5th) 54 (Ont. S.C.J.). Notably, the *Act* requires *consent* from a *custodial* parent, but only *notice* to an *access* parent.

All this is to say that the father should have dealt with the change of name issue before consenting to the mother having sole custody.

Justice Horkins then systematically dismantled the father's claims.

First, the father sought an order that the mother apply for a name change. But the mother was not asking to change the child's name and did not consent to the father's request that the name be changed. As the mother had sole custody, that was the end of that.

Second, the father asked that the Registrar General be ordered to change the child's surname. However, as noted above, the *Act* does not give an access parent the right to seek such an order. The Court is to become involved only when a person with "lawful custody" cannot get the needed consent of any "person with lawful custody of the child." That was the end of that.

Finally, the father wanted permission to apply directly to the Registrar General under the *Act* and to dispense with the mother's consent for the proposed name change. But the *Act* does not give an access parent the right to make this Application: *Felix v. Fratpietro* at para. 13.

By our count, that was strike three en route to a "change of name no-hitter."

The father then tried to argue that the material change in circumstances (being his strengthened bond with the child) was a stand-alone basis for his claimed relief. He argued that he would never have consented to the mother having sole custody had he enjoyed the bond with the child at that point that he had now. However, the father had not asked to change the Vallee Order. That was a problem.

Section 29 of the *Children's Law Reform Act*, R.S.O. 1990, c. C.12 (the "*CLRA*") requires a material change before varying a parenting order:

> 29(1) A court shall not make an order under this Part that varies a parenting order or contact order unless there has been a material change in circumstances that affects or is likely to affect the best interests of the child who is the subject of the order.

In combination with s. 29 of the *CLRA* the father relied on the decision of *Roy-Bevington v. Rigden* (2017), 3 R.F.L. (8th) 229 (Ont. C.J.), wherein the Court summarized the legislation and case law pertaining to the change of a child's name (an excellent summary for those wanting a review). The father relied on point 3 in para. 19:

> 1. In cases where the custodial parent wishes to apply for the name change, no orders under s. 28(1)(b) are necessary. The sole custodial parent does not need the other parent's consent under the *Change of Name Act*;
>
> 2. Where there is an existing final order in favour of a custodial parent and that parent wishes to apply to change the child's name, the non-custodial parent's application to prohibit a name change under s. 28(1)(b) will fail unless he or she can establish there has been a material change in circumstances since the final custody order within the meaning of s. 29 of the *Children's Law Reform Act* such that the Court may then make an order under s. 28(1)(b);
>
> 3. **Where there is an existing custody final order in favour of a parent and the non-custodial parent wishes to apply to change the name, the non-custodial parent must establish there has been a material change in circumstances since the final custody order within the meaning of s. 29 of the *Children's Law Reform Act* before the Court may then make an order under s. 28(1)(b)**;

4. In cases of joint custody, no orders under s. 28(1)(b) are necessary. The parent wishing to apply for the name change can apply to dispense with consent of the other parent under s. 5(4) of the *Change of Name Act* if consent is not forthcoming. The other parent can resist the application and/or cross-apply to prohibit a name change under s. 28(1)(b);

5. In cases where custody is not finally resolved, the parent wishing to apply for a name change must have a claim for custody, or joint custody, or a claim relating to certain "incidents of custody" before the Court;

6. If there is a temporary custody order in place, any issues relating to the child's name can be dealt with at trial, or in appropriate circumstances, on a motion. However, the material change test may apply on an interim basis depending on who is the moving party; and

7. Once any threshold issues are determined, the governing test, either on applications to dispense with consent under the *Change of Name Act* or when claims under s. 28(1)(b) are advanced is the best interests of the child test. [emphasis added]

But point 3 did not assist the father. That point did not suggest that proof of a material change, on its own, entitles a non-custodial parent to seek a name change. It only spoke to a situation where one parent had sole custody and how the other parent might gain the *right to request* a name change. There first had to be a motion under s. 29 of the *CLRA* to vary the existing order — here, the Vallee Order.

The father *could have* brought a motion to vary the Vallee Order under s. 29 but he did not (or, we suppose he could have sought to amend his Application at the hearing to request such a change). But, instead, it appears that the father specifically did not seek a variation of the Vallee Order.

And that would be strike four. And the full change-of-name-no-hitter.

The lesson? If a future request for a name change is a possibility, consenting to an order for sole custody without specifically hiving off the name change issue will cut off one of few statutory routes to requesting a name change in the future.

Clearly, Shakespeare was never party to any parenting litigation.

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