

FAMLNWS 2020-27
Family Law Newsletters
July 13, 2020

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

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COVID-19 Update

With courts in most provinces approaching something that may possibly, maybe, perhaps (hopefully?) be getting closer to "normal" this is going to be the last COVID-19 Update, barring some unforeseen developments. We hope the weekly updates have been useful. Therefore, as a final word, we wanted to make sure you are aware of Justice Conlan's recent comments in *Atkinson v. Wilton*, [2020 CarswellOnt 7421](#) (S.C.J.), where he made it clear that it is absolutely critical to ensure that family law litigants can start having their cases heard, whether they are "urgent" or not:

[11] Further, on this business of "urgency", I would be remiss if I did not add something to the conversation, for what it is worth. Judges are not elected in Canada, but we are public servants. **The Courts are an essential service**, in my opinion. **Access to justice and the accountability of judges to the public that we serve demand that the Courts, in my humble view, not be too quick to slam the door shut on a request to be heard** on the basis that the matter is not important, or "urgent", enough at this time. The gulf between judges and the public at large has never been as wide as it is currently, during this extraordinary health crisis. **I, for one, do not intend to exacerbate that by being overly discriminating in the determination of what constitutes an "urgent" matter, especially in family law proceedings involving the custody of and access with children.** [emphasis added]

And now, for some cases that have absolutely nothing to do with COVID-19.

Refusing the Right of First Refusal - Again

Barry v. Barry, [2020 CarswellOnt 7283](#) (Ont. C.A.) - Feldman, Lauwers and Huscroft JJ.A.

In *Barry v. Barry*, the Ontario Court of Appeal reminds us that *Martin v. Martin* (1992), [38 R.F.L. \(3d\) 217](#) (Ont. C.A.) and *Laurignano v. Laurignano* (2009), [65 R.F.L. \(6th\) 15](#) (Ont. C.A.) remain good law. A right of first refusal is a substantive right that has economic value. Such a right distorts the market for the sale of a property by eliminating competition among prospective purchasers, and thereby risks potentially devaluing the property. Absent consent, a court cannot simply grant one spouse a right of first refusal to purchase the matrimonial home. The spouse must bid on the property along with other prospective purchasers.

Albeit with good intentions, that is what the trial judge did in this case. The Appellant wanted to sell the matrimonial home and divide the net proceeds of sale, while the Respondent wanted to purchase the Appellant's interest. The current value of the home was not established at trial, but the trial judge still granted the Respondent the right to purchase the matrimonial home within 30 days from the release of the trial decision, after obtaining a fair market value assessment.

This was no different than granting the Respondent a right of first refusal, and the appeal was, therefore, allowed.

While it could not be clearer that a court cannot order a right of first refusal (absent consent), there are a few caveats or "carve outs" to this rule that we wanted to bring to your attention.

A right of first refusal may be permitted where the parties agree on the current value of the home: *Willemze-Davidson v. Davidson*, 1997 CarswellOnt 700, [1997] O.J. No. 856 (C.A.). It was also a factor in *Davidson* that the best interests of the children were linked to the continued occupation of the home. See also *Watson v. Watson*, 2015 CarswellOnt 4510 (S.C.J.) and *Silver v. Clow*, 2014 CarswellOnt 8555 (S.C.J.). The theory is that if the parties agree on the value of the property, then no one is prejudiced.

In addition, an owner can be ordered to accept a buyout where that party is frustrating a previously court-ordered sale: *Jeffrey v. McNab* (2019), 35 R.F.L. (8th) 135 (Ont. S.C.J.).

To try to get around the rule regarding rights of first refusal, some spouses choose to "lie in the weeds", wait for an offer the other spouse wants to accept, and then make a marginally better offer. This tactic was not allowed in *Murchison v. Sheriff*, 2011 CarswellOnt 11501 (S.C.J.). In that case, the Court noted that the obligation (in a previous court order) was to accept the "first reasonable offer". If the conniving spouse only offered marginally more, then the previous third-party offer was, by definition, the first reasonable offer.

The Start of a Long and Winding (and Bumpy) Road that Likely Leads to Ottawa - Part 2

Neshkiwe v. Hare, 2020 CarswellOnt 8295 (C.J.) - Finlayson J.

This is the second, but likely not the last time, that we will discuss this interesting constitutional case (for our earlier discussion, see the May 4, 2020 edition of *TWFL*).

To briefly recap the facts thus far:

- The parties and their two young children lived in Toronto. When they separated, the mother was pregnant with their third child.
- The mother is a member of the M'Chigeeng First Nation. After the parties separated, she took the children to the M'Chigeeng First Nation without the father's consent.
- The father obtained an *ex parte* order from the Ontario Court of Justice that required the mother to return the children to Toronto.
- When the mother did not comply with the *ex parte* order, the father brought a motion for contempt and a police enforcement clause.
- The mother responded to the father's contempt motion by challenging the Court's jurisdiction under s. 35 of the *Constitution Act, 1982*, which provides that "[t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."
- Before the father's motion was heard, the parties were able to agree on arrangements to allow the children to resume seeing the father.
- Although Justice Finlayson found that some of the mother's conduct met the test for contempt and that he had jurisdiction to grant a police enforcement clause, he exercised his discretion not to find the mother in contempt, and he declined to order the police to intervene (at least not yet).

The M'Chigeeng First Nation initially advised Justice Finlayson that it would only be challenging the constitutionality of certain parts of Ontario's family law legislation, and asking the Court to decline jurisdiction over the parties' children. However, it subsequently changed its position, and advised the Court that it would be seeking "a declaration that all 'Ontario Provincial and Canadian Federal legislation is of no force and effect' as they pertain to *all* M'Chigeeng children."

After it changed its position, the M'Chigeeng First Nation brought a motion to transfer the case to the Superior Court of Justice on a number of grounds, but the main one was that the Ontario Court of Justice has no authority to grant declaratory relief.

In dismissing the M'Chigeeng First Nation's motion, Justice Finlayson wrote what is now the leading decision about transferring family law proceedings between the two levels of trial courts in Ontario. The decision includes a comprehensive analysis of the court's inherent jurisdiction to transfer cases, as well as the various provisions of the *Courts of Justice Act*, the *Children's Law Reform Act*, and the *Family Law Act* that allow cases to be transferred from the Provincial Court to the Superior Court (and *vice versa*), including:

The *Courts of Justice Act*

Consolidation of proceedings in different courts

107 (1) **Where two or more proceedings are pending in two or more different courts**, and the proceedings,

- (a) have a question of law or fact in common;
- (b) claim relief arising out of the same transaction or occurrence or series of transactions or occurrences; or
- (c) for any other reason ought to be the subject of an order under this section, **an order may, on motion, be made**,
- (d) **transferring any of the proceedings to another court** and requiring the proceedings to be consolidated, or to be heard at the same time, or one immediately after the other; or
- (e) requiring any of the proceedings to be,
 - (i) stayed until after the determination of any other of them, or
 - (ii) asserted by way of counterclaim in any other of them.

.....

Proceeding in wrong forum

110 (1) **Where a proceeding or a step in a proceeding is brought or taken before the wrong court, judge or officer, it may be transferred or adjourned to the proper court**, judge or officer.

.....

Multiplicity of proceedings

138 As far as possible, multiplicity of legal proceedings shall be avoided.

The *Family Law Act*

All proceedings in one court

66 Except as otherwise provided, where an application is made to a court under this Part, no person who is a party to the proceeding shall make an application under this Part to any other court in respect of a matter in issue in the proceeding, but

the court may order that the proceeding be transferred to a court having other jurisdiction where, in the opinion of the court, the court having other jurisdiction is more appropriate to determine the matters in issue that should be determined at the same time. [emphasis added]

Justice Finlayson ultimately concluded that he did not have jurisdiction to transfer the case to the Superior Court of Justice. He determined that none of the statutory provisions that were raised by the parties applied in this case because:

- There was no other proceeding pending in the Superior Court of Justice for the purposes of s. 107 of the *Courts of Justice Act*;
- He was not satisfied that the case was in the "wrong court" for the purposes of s. 110 of the *Courts of Justice Act*; and
- None of the parties were seeking to add any new claims for the purposes of s. 2(2) of the *Family Law Act* and s. 66 of the *Children's Law Reform Act* that the Ontario Court of Justice did not already have jurisdiction to make.

Justice Finlayson also suggested, without deciding, "that an inherent power in [the Provincial Court] to transfer a case to the Superior Court does not exist." Not being a Superior Court of Record, the jurisdiction of the Ontario Court of Justice is wholly based in statute. It does not have inherent jurisdiction - the reserve or fund of powers which a Superior Court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure due process and to do justice between the parties: *Endean v. British Columbia*, 2016 CarswellBC 2891 (S.C.C.).

Nevertheless, and in case he was mistaken that he did not have authority to transfer the case, Justice Finlayson went on to consider whether it would be appropriate to transfer the case to the Superior Court of Justice in the circumstances of this particular case. In considering this issue, Justice Finlayson set out eight factors that courts should consider when dealing with these types of motions:

- 1) The parties' positions;
- 2) The timing of the transfer motion;
- 3) The merit of the claim(s);
- 4) Complexity and procedural advantage;
- 5) Prejudice;
- 6) Bad faith;
- 7) Access to justice generally; and
- 8) Access to justice in relation to a multiplicity of proceedings.

Although Justice Finlayson determined that almost all of these factors weighed against transferring the case, it appears that the most important ones in the circumstances were that: (a) the motion to transfer the case was not brought until nine months after the case began and after more than ten court attendances had already taken place; and (b) the significant delay associated with transferring the case at this point would prejudice both the parents and the children by further delaying the matter and significantly increasing costs.

The decision also includes a detailed discussion about a Provincial Court's jurisdiction to grant constitutional remedies. While the M'Chigeeng First Nation was correct that the Ontario Court of Justice cannot make declarations (see s. 97 of the *Courts of Justice Act*), that did not mean that the Provincial Court could not grant a meaningful remedy if the First Nation and the mother's constitutional arguments were ultimately successful:

[146] I accept that M'Chigeeng First Nation may not be satisfied with a constitutional exemption, or other type of constitutional remedy, alone, and that it wants a declaration. As M'Chigeeng First Nation argues, **declarations are an important, and even a primary remedy used in the pursuit of aboriginal rights**. See *Newfoundland and Labrador (Attorney General) v. Uashaunnaut (Innu of Uashat and of Mani-Utenam)*, 2020 SCC 4 §247-249. In "Constitutional Remedies in Canada", 2nd ed., Toronto: Canada Law Book, pages 15-62 and 15-63, Professor Roach writes, declarations are significant because they " . . . may be able to establish legal entitlements in a manner that facilitates negotiation and consensual resolution of disputes between governments and Aboriginal peoples, but in a manner that counteracts Aboriginal people's unequal bargaining power with governments".

[147] **Yet, the declaration, while an important one, is still not the only constitutional remedy that will be available**. I have already discussed **constitutional exemptions**. And in *Schachter v. Canada*, 1992 CarswellNat 1006 (and in other cases), the Supreme Court sets out several other remedies available in under section 52 of the *Constitution Act, 1982*, including **reading into the legislation, and reading it down**.

[148] There are a number of cases in which statutory courts, including this Court have granted such remedies. See for example *Coates v. Watson*, 2017 ONCJ 454; *Esquega v. Canada (Attorney General)*, 2008 FCA 182; *Nishri v. R.*, 1997 CarswellNat 2586 (F.C.A.); *Re K.*, 1995 CanLII 10080 (Ont. C.J.). In fact, **counsel for M'Chigeeng First Nation was unable to point the Court to a single other constitutional remedy that it might pursue, which this Court may not grant in this case, and which only a Superior Court may**. [emphasis added]

As both the Federal and Ontario Governments have declined to intervene, Justice Finlayson relied on the Ontario Court of Appeal's recent decision in *Morwald-Benevides v. Benevides*, 2019 CarswellOnt 20949 (C.A.), which was discussed in the February 17, 2020 edition of *TWFL*, to appoint *amicus curiae*. It is surprising, to say the least, that neither level of government is prepared to take a position or assist the Court in deciding the important constitutional issues that have been raised in this case.

Notwithstanding the complicated issues that this case raises and the ongoing COVID-19 pandemic, Justice Finlayson also warned the parties that they "should be prepared for a trial on the December, 2020 sittings." He also ordered that the mother and the M'Chigeeng First Nation to pay the father a total of \$20,379.64 in costs.

Hopefully, an early trial date combined with the significant costs that Justice Finlayson ordered the mother and the M'Chigeeng First Nation to pay will encourage the parties to find a way to resolve this matter. We suspect not given the importance of the issues and the significant costs that must have already been incurred, but we will keep you apprised either way.