

CITATION: Elgner v. Elgner, 2011 ONCA 483

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COURT OF APPEAL FOR ONTARIO

Cronk, Gillese and MacFarland JJ.A.

BETWEEN

Carol Ann Elgner

Applicant (Respondent)

and

Claude Frederick Elgner

Respondent (Appellant)

IN THE MATTER OF an Application under the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.)

Charles E. Beall and Karon C. Bales, for the appellant

Julie K. Hannaford, Golnaz S. Simaei, Harold Niman and Vanessa Amyot, for the respondent

Daniel Guttman, for the intervener, the Attorney General of Ontario

Heard: April 13, 2011

On appeal from the order of the Divisional Court (Casimir N. Herold, John R. R. Jennings and Sidney N. Lederman J.J.), dated September 9, 2010.

Gillese J.A.:

[1] An interim spousal support order is made. Can the order be appealed as of right or only with leave?

[2] This question lies at the heart of this appeal. Its resolution involves a significant constitutional challenge based on the doctrine of federal paramountcy. Conflicting caselaw from across Canada tells us that there is no easy answer to it.

OVERVIEW

[3] Claude Frederick Elgner, the appellant, and Carol Ann Elgner, the respondent, separated in June 2007 after thirty-three years of marriage. Mr. Elgner is now 63 years old; Ms. Elgner is 62. They have three adult children, none of whom is a child of the marriage for support purposes.

[4] On December 2, 2009, pursuant to s. 15.2 of the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.), Greer J. ordered Mr. Elgner to pay interim spousal support of \$110,000 per month, and retroactive spousal support of \$3,360,000 for the period from January 2008 to December 2009 (the interim order).

[5] Mr. Elgner wishes to appeal the interim order. He moved to file a notice of appeal as of right or, if leave to appeal is required, that leave be granted. Justice Sachs, sitting as a single judge of the Divisional Court, dismissed the motion by order dated March 17, 2010 (the first Divisional Court order).

[6] Mr. Elgner then moved for a review of the first Divisional Court order by a full panel of the Divisional Court. He sought only a review of that part of the order dismissing his motion for an order permitting him to file his appeal as of right. He did not seek a review of Sachs J.'s refusal to grant leave to appeal.

[7] By order dated September 9, 2010, a panel of the Divisional Court dismissed the motion (the order under appeal), holding that leave to appeal the interim order was required. The Divisional Court gave two sets of reasons for dismissing the appeal. Justice Herold wrote reasons with which Lederman J. concurred (the majority or the majority decision). Justice Jennings wrote concurring reasons (the minority or the minority decision).

[8] With leave of this court, Mr. Elgner brings this appeal. He argues that he is entitled to appeal the interim order as of right – that leave to appeal is not required. He bases his appeal on s. 21(1) of the *Divorce Act*, which provides that, with two exceptions that do not apply in the present case, “... an appeal lies to the appellate court from any judgment or order, whether final or interim, rendered or made by a court under this Act”.

[9] Mr. Elgner contends that s. 21(1) of the *Divorce Act* gives the right of appeal for all orders, interim and final, made under the *Divorce Act*. As the *Divorce Act* is federal legislation, he says that right is paramount over s. 19(1)(b) of the *Courts of Justice Act*, R.S.O. 1990, c. C. 43 (the *CJA*), which requires leave to appeal from interlocutory orders of judges of the Superior Court of Justice.

[10] Because the appeal raises a constitutional question and the principle of paramountcy, notice was given to both the Attorneys General of Ontario and Canada. Only the Attorney General of Ontario intervened. It took the position that s. 19(1)(b) of the *CJA* is not rendered constitutionally inoperative by virtue of s. 21 of the *Divorce Act* and the doctrine of paramountcy. Thus, like Ms. Elgner, the Attorney General of Ontario submitted that leave to appeal is required and the appeal should be dismissed.

[11] As I explain below, I agree with the majority decision of the Divisional Court. Accordingly, I would dismiss the appeal.

THE DECISIONS BELOW

The First Divisional Court Order

[12] Based on the decision in *Kral v. Kral* (1994), 68 O.A.C. 188 (Div. Ct.), Sachs J., sitting as a single judge of the Divisional Court, held that Mr. Elgner required leave to appeal the interim order.

[13] In *Kral*, the Divisional Court observed that s. 21(6) of the *Divorce Act* provides that appeals are to be asserted in accordance with the ordinary procedure governing appeals. Section 21(6) of the *Divorce Act* reads as follows:

Except as otherwise provided by this Act or the rules or regulations, an appeal under this section shall be asserted, heard and decided according to the ordinary procedure governing appeals to the appellate court from the court rendering the judgment or making the order being appealed.

[14] Thus, the Divisional Court reasoned in *Kral*, s. 21(6) of the *Divorce Act* authorizes the requirement for leave set out in s. 19(1)(b) of the *CJA*. Consequently, there is no conflict between the two provisions.

[15] Justice Sachs considered *Kral* to be binding upon her. She noted that in deciding *Kral*, the Divisional Court relied on the statement of Finlayson J.A. in *Colletta v. Colletta* (1992), 10 O.R. (3d) 464 (C.A.), at para. 5, that leave to appeal is required in respect of interim orders under the *Divorce Act*. She further noted that in *Kral*, the Divisional Court adopted the reasoning of Carruthers J., sitting as a single judge, in *Potts v. Potts* (1993), 13 O.R. (3d) 284 (Div. Ct.), to the same effect. Justice Sachs concluded by observing that the ruling in *Kral* furthers the legitimate policy objective of discouraging appeals from interim orders in family law matters, which cause additional expense, emotional anguish and delay to the parties.

[16] Justice Sachs refused to grant leave to appeal the interim order because the proposed appeal raises no issues that transcend the private interests of the parties or questions of law requiring resolution by a higher judicial authority. Any issues that are raised require resolution by the trial judge, who will have a full opportunity to assess the parties' credibility and the evidence.

The Order under Appeal

[17] The Divisional Court gave two sets of reasons for dismissing the appeal. It is instructive to consider both.

The Majority Decision

[18] The majority endorsed the reasons of Sachs J. They stated that ss. 21(1) and (6) of the *Divorce Act* must be read together. In light of the conflicting interpretations that these provisions have been given, they viewed them to be ambiguous. Consequently, they stated that policy considerations – as well as context – could inform their interpretation. The majority quoted with approval the policy considerations that Sach J. identified and which are set out at para. 15 above.

[19] The majority went on to note the anomalous situation that would result if a judge dealt with a motion for interim support under the *Divorce Act* and for interim exclusive possession under the *Family Law Act*, R.S.O. 1990, c. F.3. If Mr. Elgner’s position is correct, leave would not be required to appeal the interim support part of any order that was made but it would be required for the interim order in respect of possession of the matrimonial home.

[20] The majority opined that s. 21 must be interpreted within the context of the “gatekeeper” function played by the courts, which is becoming more necessary and acceptable in our judicial system, in order to prevent the situation where the person with the deepest pockets or the inclination and ability to argue motions and appeals can wear down his or her opponent.

[21] When read in context, the majority concluded that s. 19(1) of the *CJA* is not inconsistent with s. 21 of the *Divorce Act*. Section 19(1) does not take away a

substantive right to appeal – it merely sets out the procedure for asserting and enforcing that right.

[22] The majority acknowledged the Supreme Court of Canada's decision in *Kelvin Energy v. Lee*, [1992] 3 S.C.R. 235 (*Kelvin Energy*), which held that wording similar to that in s. 21(1) of the *Divorce Act* gave an absolute right of appeal from an order made under the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 (*CBCA*). However, it did not find *Kelvin Energy* to be significant because there is no comparable section in the *CBCA* to s. 21(6) of the *Divorce Act*.

The Minority Decision

[23] The minority would have dismissed the appeal solely on the ground that the panel was bound by *Kral*. However, he expressed serious reservations about the correctness of *Kral*. He analysed Ontario lower court decisions and decisions of the Saskatchewan, British Columbia, and Quebec courts of appeal, all of which have held that leave is not required to appeal interim orders made under the *Divorce Act*. He concluded that the weight of judicial authority on the interpretation of s. 21 is contrary to the conclusion reached in *Potts*. In his view, these contrary authorities are consistent with the plain language of s. 21(1).

[24] The minority also differed from the majority in finding it incompatible for legislation to grant an absolute right of appeal but require that leave be granted. He

observed, at para. 40 of the reasons, that “a right to apply for a right to appeal is not a right of appeal as provided in s. 21.”

[25] Finally, the minority expressed reservations about whether admittedly sound policy considerations should affect the court’s interpretation of s. 21, saying that if Parliament has granted an absolute right of appeal, courts cannot do other than permit that right to be exercised.

THE ISSUE AND STANDARD OF REVIEW

[26] There is a single issue to be decided on this appeal: can an interim order made under the *Divorce Act* be appealed as of right or only with leave?

[27] The parties agree that because the court is reviewing a decision on a question of law, the applicable standard of review is correctness.

THE RELEVANT STATUTORY PROVISIONS

[28] The relevant parts of s. 21 of the *Divorce Act* read as follows:

21. (1) Subject to subsections (2) and (3), an appeal lies to the appellate court from any judgment or order, whether final or interim, rendered or made by a court under this Act.

(2) No appeal lies from a judgment granting a divorce on or after the day on which the divorce takes effect.

(3) No appeal lies from an order made under this Act more than thirty days after the day on which the order was made.

...

(6) Except as otherwise provided by this Act or the rules or regulations, an appeal under this section shall be asserted,

heard and decided according to the ordinary procedure governing appeals to the appellate court from the court rendering the judgment or making the order being appealed.

[29] Section 25 of the *Divorce Act* reads as follows:

25. (1) In this section, “competent authority”, in respect of a court, or appellate court, in a province means the body, person or group of persons ordinarily competent under the laws of that province to make rules regulating the practice and procedure of that court.

(2) Subject to subsection (3), the competent authority may make rules applicable to any proceedings under this Act in a court, or appellate court, in a province, including, without limiting the generality of the foregoing, rules

(a) regulating the practice and procedure in the court, including the addition of persons as parties to the proceedings;

(b) respecting the conduct and disposition of any proceedings under this Act without an oral hearing;

(b.1) respecting the application of section 17.1 in respect of proceedings for a variation order;

(c) regulating the sittings of the court;

(d) respecting the fixing and awarding of costs;

(e) prescribing and regulating the duties of officers of this court;

(f) respecting the transfer of proceedings under this Act to or from the court; and

(g) prescribing and regulating any other matter considered expedient to attain the ends of justice and carry into effect the purposes and provisions of this Act.

(3) The power to make rules for a court or appellate court conferred by subsection (2) on a competent authority shall be exercised in the like manner and subject to the like terms and conditions, if any, as the power to make rules for that court conferred on that authority by the laws of the province.

(4) Rules made pursuant to this section by a competent authority that is not a judicial or quasi-judicial body shall be deemed not to be statutory instruments within the meaning and for the purposes of the *Statutory Instruments Act*.

[30] Section 19(1) of the *Courts of Justice Act* reads as follows:

19. (1) An appeal lies to the Divisional Court from,

(a) a final order of a judge of the Superior Court of Justice, as described in subsections (1.1) and (1.2);

(b) an interlocutory order of a judge of the Superior Court of Justice, with leave as provided in the rules of court;

(c) a final order of a master or case management master.

ANALYSIS

[31] Mr. Elgner contends that s. 21(1) of the *Divorce Act* provides a direct right of appeal of all orders, interim and final, made under the *Divorce Act*. Consequently, he argues, s. 19(1)(b) of the *CJA* conflicts with s. 21(1) because it stipulates that an appeal from an interlocutory order of a Superior Court judge lies to the Divisional Court only with leave. Mr. Elgner argues that a provincial law cannot derogate from the right of appeal specifically created by a federal statute. Therefore, because the *Divorce Act* is federal legislation, he says that the doctrine of paramountcy applies to render s. 19(1)(b) of the *CJA* inoperative to the extent of the conflict. He also argues that the Divisional

Court erred in relying on policy considerations to interpret appeal rights created by s. 21(1) of the *Divorce Act*, given that the language of s. 21(1) is clear and unambiguous.

[32] Mr. Elgner founds his submission on: (1) the wording of s. 21(1) of the *Divorce Act*; (2) the reasoning in *Kelvin Energy*; and, (3) decisions of the courts of appeal for British Columbia, Saskatchewan and Quebec rendered since *Kelvin Energy*, all of which have held that pursuant to the *Divorce Act*, leave is not required to appeal interim orders made under that Act, notwithstanding any leave requirement under the provincial rules of court. The decisions he relies on are *G.M. v. F.L.* [2009] QCCA 649; *Farden v. Farden* (1996), 141 Sask. R. 178 (C.A.); *Rimmer v. Adshead* (2003), 224 D.L.R. (4th) 372 (Sask. C.A.); *Huculak v. Huculak*, 1999 BCCA 715; *De Fehr v. De Fehr*, (2002) BCCA 577.

[33] I do not accept this submission. In my view, the Divisional Court correctly held that by virtue of s. 21(6) of the *Divorce Act*, an appeal from an interlocutory order made under the *Divorce Act* is subject to the leave requirement in s. 19(1) of the *CJA*. To conclude that s. 21(1) creates a direct right of appeal, without leave, is to ignore ss. 21(6) and 25 of the *Divorce Act*, and the constitutional analysis that must be undertaken before applying the doctrine of paramountcy.

Sections 21 and 25 of the Divorce Act

[34] Each province has enacted procedures for how appeals are ordinarily asserted. In Ontario, s. 19(1)(b) of the *CJA* stipulates that an appeal lies to the Divisional Court from an interlocutory order of the Superior Court in Ontario “with leave”. This was the

ordinary procedure for asserting an appeal from an interlocutory order when, in 1985, Parliament enacted s. 21(6) of the *Divorce Act*.

[35] Section 21(1) of the *Divorce Act* does not stand in isolation. It must be read in context. That context includes s. 21(6), which provides that:

Except as otherwise provided by this Act or the rules and regulations, *an appeal shall be asserted*, heard and decided *according to the ordinary procedure governing appeals* to the appellate court from the court rendering the judgment or making the order being appealed. [emphasis added]

[36] In my view, on a plain reading of s. 21(6), it stipulates that the appeal right given in s. 21(1) must be asserted in accordance with the ordinary procedure governing appeals in Ontario. That ordinary procedure is provided by s. 19(1) of the *CJA*, with its leave requirement.

[37] This is the conclusion that Finlayson J., for a unanimous panel of this court, reached in *Colletta* and which I would re-affirm. Counsel in *Colletta* were agreed that an appeal respecting interim relief in divorce matters would be to the Divisional Court, with leave. However, Finlayson J.A. did not simply accept this concession. At para. 5 of *Colletta*, he discusses ss. 21(1) and (6), albeit briefly, to explain why he is satisfied that counsel were correct on the point.

[38] Mr. Elgner makes two arguments against this interpretation of s. 21(6). First, he says that it reads out the words “except as otherwise provided by this Act” in s. 21(6). He submits that the *Divorce Act* “otherwise provides” for an unrestricted right of appeal

under s. 21(1). Therefore, the incorporation of provincial procedure by s. 21(6) is subject to the appeal right granted by s. 21(1). Second, relying on *792266 Ontario Ltd. v. Monarch Trust Co. (Liquidator of)* (1996), 94 O.A.C. 384 (C.A.), he argues that a right of appeal is a substantive right, not a matter of procedure. Therefore, the word “procedure” in s. 21(6) does not refer to, or have the effect of, incorporating into the *Divorce Act* the provincial rules governing leave to appeal.

[39] In my view, the first argument is circular. Section 21(1) does not “otherwise provide” for the way in which an appeal shall be asserted. Section 21(1) sets out the appeal right and s. 21(6) sets out how, among other things, that right is to be asserted.

[40] As for the second argument, while I agree that a right of appeal is a substantive right and not a mere procedural right, nothing turns on this point. A leave to appeal requirement for interim orders in divorce matters does not finally determine the rights of the parties. Interim orders are designed to be made quickly to meet the immediate needs of the claimant and allow the matter to proceed to trial. Any adjustments that must be made to interim orders can be done at the trial.

[41] Moreover, by spelling out in s. 21(6) that an appeal under s. 21(1) is to be “asserted, heard and decided according to the ordinary procedure governing appeals”, Parliament dictated that the provincial rules are to be followed when exercising the appeal right given by s. 21(1). As has been noted, s. 19(1) of the *CJA* was operative when s. 21(6) of the *Divorce Act* was enacted. It was the “ordinary procedure” in Ontario

for asserting an appeal from an interlocutory order. It can be assumed that Parliament, when enacting s. 21(6), was aware of the ordinary procedure in place in Ontario. It follows that Parliament could have inserted a provision that excluded the leave requirement. It did not. Instead, it chose to cede to the provinces the right to govern the procedure on appeal.

[42] Section 25 of the *Divorce Act* reinforces this point. It provides that the provinces may “make rules applicable to any proceedings under this Act in a court, or appellate court”. The power given to the provinces in s. 25 expressly includes regulating “practice and procedure” (s. 25(2)(a)) as well as regulating “any other matter considered expedient to attain the ends of justice and carry into effect the purposes and provisions of this Act” (s. 25(2)(g)).

[43] It is trite law that the modern approach to statutory interpretation requires the court to read the words of a provision in their entire context and in their grammatical and ordinary sense, harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament: see *Bell ExpressVu Ltd. Partnership v. Rex*, [2002] 2 S.C.R. 559, at para. 26. Thus, having considered the words of s. 21(1), in context, it is necessary to consider also the object of the *Divorce Act* and the intention of Parliament.

[44] The amendments that led to the 1985 *Divorce Act* were based on the Law Reform Commission of Canada’s Report on Family Law,¹ which recommended a fundamental rethinking of the divorce process through the introduction of a no-fault divorce regime.

¹ Law Reform Commission of Canada, *Report on Family Law*, (Ottawa: Information Canada, 1976).

At p. 33, the Report recommended that the *Divorce Act* create an expeditious process that would avoid delay and enforce limits to prevent unreasonable delay. It is evident that the object of the reforms underlying the 1985 amendments was to simplify divorce proceedings, thereby rendering the divorce process less expensive and more timely. Interpreting ss. 21(1) and (6) as the Divisional Court did is consonant with Parliament's intention and the object of the amendments to the *Divorce Act*, which were designed to shorten and simplify the divorce process.

[45] Recognition of the object of the amendments also does away with Mr. Elgner's submission that the Divisional Court erred by relying on policy considerations. It will be recalled that those policy considerations, voiced by Sachs J. and endorsed by the majority, were to discourage appeals from interim orders in family law matters because they would cause the parties additional expense, emotional anguish and delay. Although referred to as a matter of policy, the Divisional Court was simply taking into consideration the object of the amendments to the 1985 *Divorce Act*. In light of the modern approach to statutory interpretation, set out above, it was entirely appropriate for the courts below to take into account this consideration.

The Constitutional Issue

[46] The doctrine of federal legislative paramountcy provides that where there is an incompatibility between validly enacted but overlapping provincial and federal

legislation, the provincial legislation is inoperative to the extent of the inconsistency: see *Canadian Western Bank v. Alberta*, [2007] 2 S.C.R. 3, at para. 69.

[47] Jurisdiction over marriage and divorce is federal but, pursuant to the double aspect doctrine, provincial legislatures can adopt valid legislation on the same subject, depending on the aspect from which the legislation is considered. No one disputes that s. 19 of the *CJA* is validly enacted legislation.

[48] In applying the doctrine of paramountcy, a conflict will not be found merely because of overlap in the subject matter of federal and provincial laws. The question is whether it is impossible to comply simultaneously with both laws or whether the operation of the provincial law will frustrate the purpose of the federal law: *Canadian Western Bank*, at para. 73.

[49] As I have explained above, compliance with both s. 21 of the *Divorce Act* and s. 19(1) of the *CJA* is possible. A party may comply with both by applying for leave to appeal pursuant to s. 19(1)(b) of the *CJA*. Furthermore, again for the reasons given above, s. 19(1) does not frustrate the federal purpose behind s. 21 of the *Divorce Act*. As the two provisions operate harmoniously, the doctrine of paramountcy is not engaged.

Two Final Arguments

[50] It remains to deal with two other arguments advanced by Mr. Elgner, the first based on *Kelvin Energy* and the second based on appellate decisions from outside Ontario.

[51] Mr. Elgner put much emphasis on the Supreme Court's decision in *Kelvin Energy*. However, like the majority in the Divisional Court, I find that decision to be of little assistance.

[52] In *Kelvin Energy*, the Supreme Court of Canada interpreted s. 249 of the *CBCA*, which at that time provided that "[a]n appeal lies to the court of appeal from any order made by a court under this Act". It held that under that section, any judgment – whether interlocutory or final – was appealable as of right, provided it was made pursuant to a power expressly conferred by the *CBCA*.

[53] However, there is an extremely significant distinction between the appeal right under consideration in *Kelvin Energy* and that under consideration in the current appeal. There was no comparable provision in the *CBCA* to s. 21(6) in the *Divorce Act*. As I have explained, it is the interplay between ss. 21(1) and (6) of the *Divorce Act*, considered within the context of the purpose of the provision and the underlying philosophy of the Act, that leads to the conclusion that in Ontario, the appeal of interlocutory orders under the *Divorce Act* requires leave to appeal from the Divisional Court.

[54] In relation to the appellate decisions from elsewhere in Canada that Mr. Elgner relies on, again I find them to be of limited value. Their analysis does not appear to have taken into consideration the relationship among ss. 21(1), (6) and 25 of the *Divorce Act*. Furthermore, I do not read them as having undertaken a constitutional analysis, including

a consideration of the jurisprudence on paramountcy, which is foundational to a determination of conflict.

Conclusion

[55] In conclusion, when ss. 21(1) and (6) of the *Divorce Act* are given their ordinary meaning and read in their entire context, harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament, it is clear that the right of appeal given by s. 21(1) is to be exercised in accordance with the ordinary procedures governing appeals of that nature. In Ontario, the ordinary procedure requires leave, if the matter to be appealed is an interlocutory order of a judge of the Superior Court of Justice.

DISPOSITION

[56] Accordingly, I would dismiss the appeal with costs to the respondent in the agreed on sum of \$30,000, all inclusive.

RELEASED: JUN 29 2011 ("E.E.G.")

"E.E. Gillese J.A."

"I agree. E.A. Cronk J.A."

"I agree. MacFarland J.A."