

October 22, 2013

## Disclosure of Foreign Assets in Matrimonial Property Actions

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Case commented on: *Chikonyora v Chikonyora*, [2013 ABCA 320](#)

Had the decision of the Court of Queen's Bench been allowed to stand in this case, the division of matrimonial property could have become much more difficult for many divorcing spouses in Alberta. They might have had to sue in every jurisdiction in which they held property, whether that was in a province other than Alberta or a country other than Canada. The lower court decision had held that spouses did not have to disclose information about their assets held outside Alberta because the Alberta superior courts had no jurisdiction over those assets. Fortunately an appeal was taken to the Alberta Court of Appeal, which applied the relevant provisions of the *Matrimonial Property Act*, [RSA 2000 c M-8 \(MPA\)](#), and required disclosure of assets held outside Alberta. In addition to the "potential crisis averted" aspect of this case, it is also an example of how frustrating access to justice can be for self-represented litigants.

The ex-husband and ex-wife in this case were married in Zimbabwe in 1994. Sometime after their marriage, they moved to Canada and both parties now live in Alberta. After separating early in 2009, the ex-wife filed for a divorce in the Court of Queen's Bench and a divorce was granted in October 2012.

The ex-husband had filed a Counterclaim seeking division of the couple's matrimonial property and a Notice to Disclose/Application in response to the ex-wife's divorce action. The ex-wife did not comply with that Notice and the property issues have not been resolved. The parties disagreed about the disclosure of information about matrimonial property in Zimbabwe. The ex-husband claims that there is a house in Zimbabwe owned by the parties that his ex-wife is collecting rent on.

Both parties were self-represented when they appeared before Justice Dallas K. Millar on the ex-husband's Notice to Disclose/Application for information about the property in Zimbabwe. The ex-wife took the position that the Court of Queen's Bench of Alberta did not have jurisdiction to deal with the property in Zimbabwe and that she did not therefore have to provide any information about it.

Justice Millar ordered the ex-wife to comply with the Notice to Disclose within 30 days. If she did not, the ex-husband could bring an application for an order for contempt of court. Justice Millar's order was for disclosure only and he did not deal with the jurisdictional issue regarding the property in Zimbabwe. He told the ex-wife that if she wanted to make an argument that certain assets should not be dealt with by the courts in Alberta, she could make that argument after disclosure.

The ex-wife filed a Reply to the ex-husband's Notice to Disclose in January 2013. Her Reply did not include any information about property in Zimbabwe. As a result of what he saw as incomplete disclosure, the ex-husband brought the contempt application which was heard by Justice Rodney A. Jerke in May 2013. Both parties were again self-represented. The ex-wife again argued that any information about Zimbabwe properties was irrelevant because the courts in Alberta had no jurisdiction to dispose of foreign property.

According to the Court of Appeal, Justice Jerke dismissed the ex-husband's contempt application on the basis that no court in Alberta would have jurisdiction over the Zimbabwe properties. He also refused to make an order for more complete disclosure by the ex-wife because he was not satisfied "that there is any issue between the parties in Alberta upon which any disclosure order beyond the disclosure of documents mentioned in the divorce judgment would apply" (as cited at para 10 of the ABCA decision).

As a result of Justice Jerke's order, the ex-husband retained a lawyer and appealed. He was represented by counsel before the Court of Appeal. Although the ex-wife continued to be self-represented, the Court of Appeal allowed a friend of hers to make certain submissions on her behalf as her agent.

There were two grounds of appeal and the ex-husband succeeded — easily — on both.

The first ground was whether Justice Jerke had erred in law when he held that the Court of Queen's Bench of Alberta did not have jurisdiction to compel the ex-wife to provide disclosure about the properties in Zimbabwe. The second ground was whether Justice Jerke erred in law when he failed to consider the prior ruling of Justice Millar about the need for disclosure. As both grounds of appeal were about whether or not a superior court has jurisdiction to decide a particular matter, both were questions of law. The standard of review was therefore correctness.

On the first ground — the one with the most far-reaching consequences for divorcing couples — the Court of Appeal held that the *MPA* gave Justice Millar jurisdiction to issue the order compelling disclosure of information about the Zimbabwe properties. They pointed out that section 31(1) of the *MPA* provides so explicitly:

31(1) If an application has been commenced under Part 1, each spouse shall file with the Court and serve on the other spouse a statement, verified by oath, disclosing particulars of all the property of that spouse, *whether it is situated in Alberta or elsewhere*.

(Emphasis added)

The Court of Appeal also noted that subsections 7(3) and 8(d) of the *MPA* direct a court to take into consideration "the income, earning capacity, liabilities, obligations, property and other financial resources" of each spouse both at the time of marriage and time of trial when making a property division. They held (at para 17) that if one spouse earns rental income from a property in a foreign jurisdiction, that income should be taken into consideration when the court is determining how to divide the property.

In addition, section 9(1) of the *MPA* is also explicit about property held outside of Canada:

9(1) If part of the property of the spouses is situated in Alberta *and part elsewhere*, the Court may distribute the property situated in Alberta in such a way as to give effect to the distribution under section 7 of all the property *wherever it is situated*.

(Emphasis added)

It authorizes Alberta courts to distribute the property that is located in Alberta in a way that equalizes the foreign-held assets of spouses. The Court of Appeal concluded (at para 18) that in order for a court to do so the court would require disclosure of information about property located outside the jurisdiction.

As the Court of Appeal noted (at paras 15 and 19), the question about the jurisdiction of the Court of Queen’s Bench of Alberta over assets held outside of Alberta was not before Justice Millar. He dealt with disclosure of information about those assets only. Thus the Court of Appeal concluded (at para 19) that “Justice Millar had jurisdiction to grant that order and Justice Jerke erred in law in holding otherwise.”

On the second ground of appeal, the Court of Appeal held (at para 21) in no uncertain terms that “Justice Jerke had no jurisdiction whatsoever to disregard the prior order of Justice Millar in this matter.” He had no authority to, in effect, vacate Justice Millar’s order.

The Court of Appeal thus allowed the ex-husband’s appeal and ordered the ex-wife to comply with the order of Justice Millar within 30 days. They made it clear that complying with Justice Millar’s order included listing any and all property located in Zimbabwe in which the ex-wife had or has an interest. They went on to order that, if the ex-wife failed to do so, the ex-husband could bring an application for an order holding the ex-wife in contempt of court before any justice of the Court of Queen’s Bench of Alberta other than Justice Jerke.

The Court of Appeal did not address the issue of the Court of Queen’s Bench of Alberta’s jurisdiction over property outside Alberta because it was not properly before them. It must be noted, however, that section 9 of the *MPA* does *not* purport to grant the Court of Queen’s Bench of Alberta’s jurisdiction over property outside Alberta. It gets around any need to do so by giving the court the discretion to distribute property that is situated in Alberta in such a way as to, in effect, distribute all the couple’s property regardless of its location. Presumably, in the jurisdictions outside Alberta, title to the property would determine which spouse retained it, in the absence of an action for distribution brought in that jurisdiction. Such a provision facilitates access to justice by allowing one court in one jurisdiction to effect a distribution that takes into account all of a couple’s assets.

In this particular case, access to justice was not facilitated. At the end of the day, after three hearings before the superior courts and after hiring a lawyer, the ex-husband was back where he started, wanting information about his ex-wife’s income from properties in Zimbabwe.

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