



Novel Coronavirus (COVID-19)

Family Law

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How the closed Canada-U.S. border affects binational families

By Adam N. Black

The COVID-19 curve continues to flatten in Canada, while the rate of infection is soaring in the United States. Over the past week, Canadians have seen an average of less than 300 new cases per day, while the U.S. faces new cases in excess of 60,000 per day. Currently, the border between the two countries remains closed until at least July 21.

In the pre-COVID era, Canadians and Americans enjoyed a relatively open border. Over the years, the ease with which residents of each country could travel cleared the way for the formation of binational families, in which one partner was born and raised in Canada and the other in the U.S. Whether that family chooses to reside in Canada or the U.S., there are inevitably enduring ties to friends and family members on the other side of the border.

The spirit of family reunification is at the core of border regulation in Canada, but the pandemic has unquestionably lessened the ease with which the border can be crossed, which impacts binational families.

The border remains open for Canadian citizens, permanent residents of Canada and Indigenous persons, while foreign nationals may enter the country in very limited circumstances, including essential purposes, which do not include tourism, recreation or entertainment.

But family members of a Canadian citizen or permanent resident who are not otherwise permitted to enter Canada may do so if they are an "immediate family member." This class of individuals includes a spouse or common-law partner, dependent child, dependent child of a dependent child (grandchild), parent or step-parent and guardian.

In order for an immediate family member to be permitted entry to Canada, he or she must prove they will be staying in the country for at least 15 days and have a plan to quarantine for 14 days upon arrival. The

mandatory quarantine plan must include a place to stay and details about how the family member will get to their destination, get groceries and access essential services and medical care.

Penalties for not following the quarantine plan include a fine of up to \$750,000, six months in jail and being banned from entering Canada for one year.

The Canada Border Services Agency is patrolling the border for families and so, too, are the Canadian courts. A recent case before Justice Palbinder Shergill of the Supreme Court of British Columbia involved a binational family resident in B.C. with significant ties to Virginia.

In the case, the parents were married in Virginia, two of three children were born there, the father's family and friends reside in Virginia and all three children spend holiday time with their father in Virginia throughout the year.

On March 12, the father travelled to Virginia with the children despite the mother's refusal to consent. The pandemic was in its nascent stage in mid-March, but concern quickly escalated. The mother demanded, on two occasions, that the father return the children to B.C. The father refused and did not return until March 22, as planned.

Two months later, the father travelled to Virginia with the children once again. By this time, the pandemic was sweeping the globe and the mother, not surprisingly, opposed the travel given her deeply held concerns for the children's health. Following the father's departure to the U.S. with the children, the mother commenced court proceedings to force the father to return the children to B.C.

In resisting the mother's claims, the father took the position that a May 2019 agreement between the parties, which permitted both parties to travel freely outside of Canada with the children, governed notwithstanding the pandemic. As a companion to that position, the father went on to say that he had "taken reasonable and necessary precautions and acted in the best interests of the children."

The judge disagreed, noting "there is ample evidence that the (father)'s actions by travelling across international barriers during this pandemic have put the children at real risk of harm." The judge pointed to various court decisions across Canada that have described international travel with children as "foolhardy" and travel to the U.S. in particular as unnecessarily placing children's health at risk.

The judge's criticism of the father's travel was not just focused on the destination, but also the mode of transport. Specifically, the judge noted that "travelling internationally or even on domestic flights, creates risks for children in airplanes, airports and dining facilities, even if precautions are taken."

The judge dismissed the father's argument that his compliance with government travel restrictions is sufficient to demonstrate there is no risk of harm to the children. The father's position "ignores the responsibility that (he) has towards protecting and promoting the best interests of the children. Deflecting his responsibility to health authorities flies in the face of the duty he has as a parent and guardian of the children to act in accordance with their best interests."

Ultimately, the judge ordered that both parents are prohibited from international travel with the children and from domestic travel with the children by airplane. In reaching this decision, the judge concluded that "maintaining the children's health and safety supersedes their need to maintain their connection to friends and family in Virginia."

As political pressure mounts to loosen government restrictions on border crossings, it remains to be seen how Canadian family court judges will continue to protect children's health and safety even if the restrictions are curtailed.

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