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— Franks & Zalev - This Week in Family Law

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Issues: Nova Scotia and Ontario — Disclosure — Proportionality and Relevance

In the January 15, 2024 (2024-02) edition of *TWFL*, we discussed Associate Chief Justice O'Neil's decision in *McDonald v. McDonald (Mombourquette)* (2023), 89 R.F.L. (8th) 108 (N.S. S.C.), which we wrote was "one of those rare decisions where a judge rejected a request for relatively basic financial disclosure (bank and credit card statements) on the basis that the requested information was not sufficiently relevant and proportionate to the issues in the case so as to warrant invading the other party's privacy or forcing them to spend time and money on producing it."

But perhaps we spoke too soon in characterizing *McDonald* as a "rare decision", because in both of this week's cases — *Anthony v. Anthony* (2024), 1 R.F.L. (9th) 418 (N.S. S.C.) and *Frost v. Frost*, 2024 CarswellOnt 6692 (S.C.J.) — two experienced family law jurists (Justice Forgeron in *Anthony* and Justice Jain in *Frost*) took the time to discuss some of the problems created by overly expansive disclosure requests in family law cases, and to carefully explain why they had decided to largely reject the requests for disclosure that were made in the particular cases before them.

Anthony v. Anthony (2024), 1 R.F.L. (9th) 418 (N.S. S.C.) — Forgeron J.

In *Anthony v. Anthony*, the parties married in 1990 and separated in 2021. They had two children together, both of whom were adults by the time their parents separated.

In 1998, the parties signed a marriage contract. It provided that most of the parties' assets would be shared equally, but it excluded the wife's pension and the shares in one of the husband's companies from property division.

After the parties separated, the wife commenced an Application for, among other things, division of matrimonial property and damages for the tort of conversion with respect to property that the wife alleged the husband had improperly moved into his excluded company during the marriage. The wife also sought extensive disclosure from the husband, including documentation from at least five companies in which she claimed the husband had an interest.

Rule 14.08 of the Nova Scotia *Civil Procedure Rules*, N.S. Civ. Pro. Rules 2009 creates a presumption that full disclosure is necessary for justice in a proceeding. This is a low threshold, and merely requires the moving party to establish that the documents would have "any tendency to prove or disprove a fact in issue" (*R. v. Grant*, 2015 CarswellMan 89 (S.C.C.) at para. 18), or that they tend to "increase or diminish the probability of the existence of a fact in issue" (*R. v. Arp*, 1998 CarswellBC 2545 (S.C.C.) at para. 38).

[For further discussion about the legal principles that apply when determining whether a particular piece of evidence is relevant, see our discussion of Justice Leonard's decision in *D(SJ) v. P(RD)* (2023), 87 R.F.L. (8th) 210 (Alta. K.B.) in the May 29, 2023

(2023-21) edition of *TWFL*, where her Honour reviewed, considered, and applied the principles of relevance that were laid out by the Supreme Court of Canada in *R. v. Schneider*, 2022 CarswellBC 2747 (S.C.C.)]

Although the threshold for establishing relevance is low, the moving party must do more than just rely on the pleadings. Rather, the motion **must** be supported by evidence (see e.g. *Intact Insurance Company v. Malloy*, 2020 CarswellNS 150 (C.A.) at para. 43). The need for evidence is essential to prevent parties from relying on broadly drafted pleadings to engage in fishing expeditions — or, as Justice Myers colourfully put it in *Bordin v. Iacobucci*, 2016 CarswellOnt 2674 (S.C.J.) at para. 21, "asking for a bunch of ostensibly minimally relevant material hoping to accidentally find something tasty."

If the moving party establishes that a particular document is relevant, that is not the end of the analysis. The presumption under Rule 14.08 that all relevant documents must be disclosed can be rebutted if the responding party shows that the cost, burden, and/or delay involved with production is disproportionate to the document's likely probative value, and its importance to the issues in the proceeding to the parties.

Accordingly, to decide the wife's motion, Justice Forgeron had to determine:

- a. Had the wife established that the requested information was relevant?
- b. If the information was relevant, had the husband established that it was disproportionate to its likely probative value and importance?

To answer these questions, Justice Forgeron turned to the Nova Scotia Court of Appeal's decision in *Laushway v. Messervey*, 2014 CarswellNS 45 (C.A.). As we discussed in the January 15, 2024 (2024-02) edition of *TWFL*, *Laushway* includes a helpful and non-exhaustive list of ten considerations that courts should consider when deciding whether to order a particular document or category of documents to be produced:

1. **Connection**: what is the link between the information sought and the nature of the claim/issues?
2. **Proximity**: what is the strength of the connection between the information sought and the matters in dispute?
3. **Discoverability**: how likely is the information being sought to be found in the requested document(s)?
4. **Reliability**: how likely is it that the information can be relied upon?
5. **Proportionality**: how important is the information in comparison to the time and expense required to obtain it?
6. **Alternative measures**: are there less obtrusive ways to obtain the information?
7. **Privacy**: how would producing the information impact on the privacy interests of the parties or any third parties?
8. **Balancing**: what is the appropriate balance between privacy, the search for the truth, fairness to the litigants, and the use of scarce judicial resources?
9. **Objectivity**: will the information be reviewed and analyzed by an independent and properly qualified expert?
10. **Limits**: what terms and conditions should be imposed to ensure the just, speedy and inexpensive determination of the proceeding?

While the *Laushway* factors emanate from Nova Scotia, they are definitely worth reviewing and considering whenever you are bringing or responding to a motion for expanded disclosure no matter where you are in Canada. The factors will help to structure your arguments and increase the chances that you will be able to persuade the decision-maker of the merits of your client's position.

After reviewing the *Laushway* factors, Justice Forgeron was satisfied that the husband should be required to produce the disclosure the wife had requested about his personal circumstances and for one of his companies because:

- The evidence established that the requested information was "relevant, from a trial relevancy perspective, as it may assist to prove or disprove contested facts related to the property and spousal support issues, as the information relates to the valuation of the company, property division, the tort of conversion, and [the husband's] income and expenses for support purposes"; and
- The husband had not persuaded her that the cost, burden, and delay of disclosing the requested documents was disproportionate to its likely probative value.

However, Justice Forgeron dismissed the wife's requests for disclosure about the other companies because, among other things, she had not led sufficient evidence to establish that the husband had an interest in all of them, and the husband had established that "[t]he cost, burden, and delay involved in producing the documents [requested by the wife] is disproportionate to the likely probative value and to the overall importance of the issues to the parties."

***Frost v. Frost*, 2024 CarswellOnt 6692 (S.C.J.) — Jain J.**

Moving right along, in *Frost*, Justice Jain also dealt with extensive disclosure requests. The parties in *Frost* were married in 2005 and separated in 2022. The wife sought spousal support and an unequal division of net family property in her favour because of the husband's alleged stock losses, while the husband sought to exclude certain assets from his net family property.

Although the issues in the case were relatively straightforward, the husband requested very extensive financial disclosure from the wife, including documents relating to the wife's divorce from her first husband some 20 years earlier. The wife tried to satisfy the husband's disclosure requests, but he continued alleging non-disclosure, and he eventually brought a motion for extensive disclosure and an Affidavit of Documents (unlike in some jurisdictions, Affidavits of Documents are not always produced in family law cases in Ontario).

In support of his motion, the husband prepared a 15-page chart that listed all of the disclosure he claimed remained outstanding. However, other than a bald statement that he wanted to ensure he was not somehow ambushed at trial, the husband did not produce any evidence or explanation for why he needed the additional disclosure he had requested. In contrast, the wife's evidence showed that she had provided significant financial disclosure, provided reasonable responses to the husband's numerous disclosure requests, and answered the undertakings she had given during her questioning.

To decide the motion, Justice Jain turned to Rules 13(3.1) and 13(3.3) of the *Family Law Rules*, O.Reg. 114/99, which provide that in property and support cases, both parties are required to serve a sworn financial statement along with extensive supporting documentation, including:

- The income and financial information referred to in subsection 21 (1) of the *Child Support Guidelines*.
- The statement issued closest to the valuation date for each bank account or other account in a financial institution, pension, registered retirement or other savings plan, and any other savings or investments in which the party had an interest on that date.
- Financial statements and tax returns for any businesses, professional practices, partnerships, and trusts.
- Documentation to support any claimed exclusions.
- The statements or invoices issued closest to the valuation date in relation to any mortgage, line of credit, credit card balance or other debt owed by the party on that date.

- Any available documentation showing the value, on the date of marriage, of property that the party owned or in which he or she had an interest on that date, and the amount of any debts owed by the party on that date.

Rule 13(11) also provides that if a party believes further disclosure is required, s/he can request the information in writing. If the request is not answered, the requesting party can then ask the court for an Order to have the information produced.

In the oft-cited case of *Boyd v. Fields*, 2006 CarswellOnt 8675 (S.C.J.) at para. 11 (which was approved by the Ontario Court of Appeal in *Kovachis v. Kovachis* (2013), 36 R.F.L. (7th) 1 (Ont. C.A.) at para. 34), Justice Perell explained that when dealing with a request for disclosure under Rule 13(11), "[t]he fundamental question is whether the various items of information are relevant or whether they have a semblance of relevance having regard to the material issues in [the] case." However, Justice Perell also explained that a mere semblance of relevance is not sufficient to automatically justify production. Rather, the court must also be satisfied that the information being sought is proportionate and genuinely relevant to the issues in dispute:

[12] Full and frank disclosure is a fundamental tenant of the *Family Law Rules*. However, **there is also an element of proportionality, common sense, and fairness built into these rules.** A party's understandable aspiration for the utmost disclosure is not the standard. **Fairness and some degree of genuine relevance, which is the ability of the evidence to contribute to the fact-finding process are factors.** I also observe that just as non-disclosure can be harmful to a fair trial, so can excessive disclosure be harmful because it can confuse, mislead or distract the trier of fact's attention to the main issues and unduly occupy the trier of fact's time and ultimately impair a fair trial. [emphasis added]

To this we would add that, as Justice Mesbur explained in *Crescent (1952) Unlimited v. Jones*, 2017 CarswellOnt 12394 (S.C.J. [Commercial List]), when assessing proportionality, the parties and the court should consider, among other things:

- (a) the time required to produce the information;
- (b) the expense associated with the production;
- (c) whether there is any prejudice that would be caused through production (e.g. whether the information is confidential);
- (d) whether production would interfere with the orderly progress of the litigation; and
- (e) whether the requested document is available.

These factors are similar, but not identical, to the *Laushway* factors, but they deal only with the question of proportionality and come into play only once the court is satisfied that the requested information is relevant. In contrast, the *Laushway* factors consider relevance and proportionality simultaneously. But at the end of the day, both approaches *should* (famous last words) lead to similar results, as they both require courts to carefully consider whether the information being sought is relevant and proportionate to the issues in the case.

So, had the husband in *Frost* established that the extensive disclosure he was seeking was relevant and proportionate?

Not. Even. Close.

In addition to dismissing the husband's motion in its entirety with costs, Justice Jain found that the husband was engaging in an improper fishing expedition, and that his additional requests for disclosure were "excessive, unnecessary, and/or irrelevant and/or disproportionate." She also admonished the husband for having requested information about the wife's divorce from 20 years earlier, which she found to be a "complete waste of the parties' time and the court's resources."

Definitely not the type of findings you ever want to be made against your client.

Finally, since it's now been almost 20 years since *Boyd v. Fields* was released, Justice Jain took the opportunity to remind us all that while full and frank disclosure is mandatory in all family law cases, so too is proportionality:

[8] **The rules serve to provide consistency in the production of financial disclosure and to curtail demands that are unreasonable and disproportionate.** There is no question that full and frank financial disclosure is required in family law matters. However, with ever-expanding requests for disclosure in family law matters, proportionality has become a fundamental principle that cannot be ignored. **No procedural decisions should be made without specifically addressing the principle of proportionality, and without first considering whether the request is a deviation from the requirements of r. 13 of the FLR.** [emphasis added]

We couldn't have said it better. We won't even try.

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