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

Aaron Franks & Michael Zalev

Contents

Proportionality Lost

Ward v. Murphy (2024), 5 R.F.L. (9th) 247 (N.S. C.A.) — Van den Eynden, J.A.

Issues: Nova Scotia — Proportionality in Family Proceedings

This case may sound familiar, because it's not the first time we've reviewed it. In our previous comment ("With Great Appellate Power Comes Great Access to Justice Responsibility" in the October 31, 2022 (2022-40) edition of *TWFL*), we reviewed the Nova Scotia Court of Appeal decision in 2022 to direct a re-hearing to determine an issue about the amount of corporate pre-tax income that should be attributed to the father for child support purposes under s. 18 of the *Child Support Guidelines*.

We agreed with most of the majority's analysis and its conclusion that since the income in question was being earned through a corporation, the trial judge had erred by resorting to s. 19(1)(g) of the *Guidelines* (which allows a court to impute income to a spouse who unreasonably deducts personal expenses), without first conducting the analysis required by s. 18. However, as the parties were not wealthy, and as they were fighting about, at most, a few hundred dollars a month in child support, we also expressed serious concerns about whether the court's decision to order a re-hearing was proportionate or fair to the parties or the child:

> The *Guidelines* specifically state in s. 1 that their objectives include, among other things, "to reduce conflict and tension between parents by making the calculation of child support orders more objective", and "to improve the efficiency of the legal process by giving courts and parents guidance in setting the levels of child support orders and encouraging settlement". Sending this matter back for yet another hearing is, in our view, wholly inconsistent with these objectives.
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> Requiring the parties to have yet another court hearing to finalize their child support arrangements was, in our view, unnecessary given the nature of the issues, and the amounts of money that were actually in dispute. The end cannot possibly justify the means.
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> The initial decision from 2017, where the father failed to comply with his disclosure obligations, required him to pay the mother just under $1,000 a month in child support. The trial judge's decision to give him a second chance during the course of a six-day variation proceeding in 2021 nominally reduced his child support payments to approximately $875 a month. The majority's decision reduced the child support payments to just over $500 a month, but left it open to the mother to seek additional support at the rehearing. Whatever amount of child support ultimately turns out to be "right" at the re-hearing, the difference cannot possibly justify requiring the parties (particularly the mother who appears to simply be trying to get the father to comply with his child support obligations), to spend even more time and money trying to bring an end to what ought to have been a straightforward child support case.

> Respectfully, an order for a re-hearing in these circumstances was unfair to the parties (particularly the mother) who were left without finality despite already having gone through a six-day trial and an appeal, and inconsistent with the Supreme Court of Canada's exhortation in *Hryniak v. Mauldin*, 2014 CarswellOnt 640 (S.C.C.) for courts to ensure that "[t]he balance between procedure and access struck by our justice system must come to reflect modern reality and recognize that new models of adjudication can be fair and just", and its warning that "when court costs and delays become too great, people look for alternatives or simply give up on justice."

While we're not always as right as we could be, based on what has happened since the Court of Appeal ordered the re-hearing in 2022, it appears that this is one of the cases where we just might have been right, and it would have been better for all involved had the Court of Appeal just done its best to decide the case on the record before it.

Although the Court of Appeal released its decision on March 16, 2022, the re-hearing did not take place until June 2023. Although the re-hearing was only supposed to address the narrow issue of what amount of corporate pre-tax income, if any, should be attributed to the father, the trial took four days to complete, and the decision was not released until November 2023 — over $1\ ^{1}/_{2}$ years after the original Court of Appeal decision (to say nothing of the original trial decision rendered in **2017**).

And what was the result? After conducting the analysis under s. 18 of the *Guidelines* as directed by the Court of Appeal, the re-hearing judge concluded that the father should have paid the mother $786 a month in child support in 2018 based on an income of $91,490, $845 a month in 2019 based on an income of $98,998, $611 a month in 2020 based on an income of $71,414, and $1,105 a month in 2021 based on an income of $132,105.

In comparison, the original Order that was made in 2017 required the father to pay the mother $994 a month based on an imputed income of $120,000, and the trial judge who heard the variation proceeding in 2021 made an order that required the father to pay $862 a month in child support in 2018 based on an income of $101,000, $876 a month in 2019 based on an income of $103,000, and $883 a month in 2020 and 2021 based on an income of $104,000.

Much ado about not much. If you do the math, the result of all of this extra litigation (the initial variation proceeding, the appeal, and the re-hearing) was to reduce the father's total child support obligation between 2018 to 2021 from a total of $47,712 under the original Order in 2017, to a total of $42,048 that was ordered by the judge who heard the initial variation proceeding, to a total of $40,164 that was ordered by the re-hearing judge.

This works out to an average monthly reduction in the father's child support of just $157.25 for the 48 month period in question, and does not come close to justifying the amount of time, money, and effort it took to arrive at this result, including the 11-day trial in 2017 where the trial judge fixed the father's income for child support purposes at $120,000 a year (the trial also dealt with a number of other issues, including the parenting arrangements for the parties' son), the six-day variation proceeding in 2021 that resulted in a nominal reduction in the father's child support payments, the appeal in 2022 from the variation proceeding, and the four-day re-hearing in 2023.

But there's more.

After the re-hearing, the father launched yet another appeal. And, when he found out one of the judges who heard his previous appeal had been assigned to the case (Justice Van den Eynden), he brought a motion to disqualify her from hearing the matter on the basis that she had sat on the Panel that heard his appeal in 2022, and that "he was 'hurt' and personally 'offended' by [her] concurrence in reasons authored by Justice Beaton." Or, to use some legal jargon, he believed that her hearing the appeal would give rise to a reasonable apprehension of bias.

Justice Van den Eynden started her analysis by summarizing the principles that apply when dealing with allegations of bias, including the following:

> • The test for reasonable apprehension of bias requires the court to determine "what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude. Would he think that it is

more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly." [*Liberty v. Canada (National Energy Board)*, 1976 CarswellNat 434 (S.C.C.) at para. 19]

• In applying the test for reasonable apprehension of bias, there is "a strong presumption of judicial impartiality", and the moving party "must lead evidence establishing 'serious grounds' sufficient to justify that a decision maker should be disqualified owing to an apprehension of bias." [*R. v. K.J.M.J.*, 2023 CarswellNS 997 (C.A.) at para. 56]

• "True impartiality does not require that the judge have no sympathies or opinions; it requires that the judge nevertheless be free to entertain and act upon different points of view with an open mind." [*R. v. S. (R.D.)*, 1997 CarswellNS 301 (S.C.C.) at para. 34]

• "Fairness and impartiality must be both subjectively present and objectively demonstrated to the informed and reasonable observer." [*R. v. S. (R.D.)*, 1997 CarswellNS 301 (S.C.C.) at para. 94]

After considering these principles, Justice Van den Eynden dismissed the father's claims of bias, as she was not satisfied that "his hurt feelings and/or offence taken to a prior ruling (and in this case an unrelated ruling to the pending appeal)" were sufficient to meet the threshold of "serious grounds" to warrant disqualification on the grounds of reasonable apprehension of bias or otherwise.

Next step? The appeal from the re-hearing. For the sake of the parties and the court system in Nova Scotia, hopefully that will be the end of the matter once and for all, although probably not given that the child is only 10-years-old and the father seems quite litigious.

Over a decade ago in *Hryniak v. Mauldin*, 2014 CarswellOnt 640 (S.C.C.), the Supreme Court of Canada warned us that it was critical to preserving the rule of law that "[t]he balance between procedure and access struck by our justice system must come to reflect modern reality and recognize that new models of adjudication can be fair and just."

Unfortunately, what has happened, and is continuing to happen, in *Ward* is indicative of one of the most significant problems currently facing our family courts. Because the system funnels all family law cases — no matter how simple and no matter how little money is in dispute — into a process designed to deal with complex disputes where both parties are represented by counsel, it allows (some might say encourages) certain types of litigants to turn small disputes (e.g. the nominal amount of child support in this case) into much larger ones (e.g. the multiple trials and appeals that have already occurred in this case). It is turning a molehill of an issue into a mountain of litigation.

The system can and must do better.

In thinking and reading about ways to improve the system, we are reminded of a paper authored by Justice David M. Brown in 2014. Justice Brown recently retired from the Ontario Court of Appeal after many years on the Bench. His paper is called "A 5-Point Action Plan to Get the Civil Justice System Moving Back in the Direction of Achieving its Fundamental Goal — The Fair, Timely and Cost-Effective Determinations of Civil Cases on their Merits". Notwithstanding the less-than-pithy title, the paper, which is available on CanLII at 2014 CanLIIDocs 33405, offers a number of suggestions about how to improve the justice system. But one in particular caught our attention as especially relevant for family law — the adoption of a "front-end-assignment-of-trial-dates system" that provides fixed trial dates that cannot be moved absent exceptional circumstances, but that also recognizes that different types of family law cases will take longer to prepare for trial than others.

While the family court's current focus of encouraging settlements and avoiding trials is certainly laudable, nothing focuses a party's attention on settlement more than a looming-and-rapidly-approaching-fixed-trial date — and nothing makes it harder to get parties to make the necessary concessions to get cases settled than knowing that the *status quo* is simply going to continue indefinitely because the case won't be tried until some unknown date in the distant future. As Justice Brown explained in his article:

> [8] **For most civil litigants what matters most is not the length of time they have to wait to bring a motion or how long they have to wait for trial once all the pre-trial steps have been completed, but how long they have to remain in the court system. Time is money.** The longer a case remains alive in the court system and the greater the number of steps which are taken in the case, the higher the cost of litigation to the parties involved. In routine cases, a party stuck in our civil system for four years more likely than not will end up paying more in legal fees than one who is in-and-out in two years.
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> [11] What can our Court do to promote the timely passage of a civil case through our system from start to finish? In a word, **we need to move the assignment of trial dates from the back-end of a civil proceeding to its front-end.** Trial dates are, after all, the end-point for either a final determination on the merits or the settlement of the case. **At present, we give out trial dates at the back-end of the proceeding after all pre-trial work has been completed. We need to flip that around** and, instead, develop a case management process — one which is ultimately controlled and directed by the judiciary and not by court administrators — which sees trial dates assigned to cases upon the close or deemed close of pleadings.
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> [14] To make a "front-end-assignment-of-trial-date" system work would require two key decisions. First, **the judiciary — both at the trial level and at the appellate level — would have to resolve firmly that trial dates, once assigned, would be carved in stone.** That would be a major cultural shift from the present situation. Sadly, at present, most parties and counsel in Ontario regard assigned hearing dates as mere "suggestions", and the judiciary by and large has acceded to that lax approach to trial dates. If, in a "front-end-assignment-of-trial-date" system, assigned trial dates were not rigorously enforced, the system would collapse under its own weight and delays to justice would sprout anew.
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> [15] Second, **reasonable start-to-finish time periods would need to be established for various categories of civil cases.** Different types of civil cases possess different litigation characteristics. The ripeness of a matter for trial usually is tied to the ability to ascertain the scope of the damages claimed. For example, in most commercial/breach of contract cases more often than not damages can be assessed with reasonable certainty shortly after the commencement of the action. By contrast, in personal injury or medical malpractice cases involving catastrophic injuries it often takes several years before the true extent of the claimed damages are known. [**emphasis** added]

At the very least, something to seriously think about.

There But for the Grace of God Go All of Us Lawyers

Ramdoo v. Houlden, 2024 CarswellOnt 16847 (S.C.J.) — Sharma J

Bah v. Diallo, 2024 CarswellOnt 18157 (S.C.J.) — Sharma J.

Issues: Ontario — Compliance with Court Page Limits

All those "Rules" and "Practice Directions" and "Notices to the Profession" about the length of affidavits and facta? Remember those? Well, you'd better . . .

In *Ramdoo v. Houlden*, on September 19, 2024, Justice Sharma heard the father's motion for graduated increases in parenting time with the parties' son. The father was successful on the motion, and costs of $7,500 were ordered payable from the mother to the father.

In that endorsement, his Honour offered the following comments and concerns with respect to issues family court judges hearing family matters regularly face when lawyers, in preparing motion material, do not comply with the Consolidated Provincial Practice Direction for Family Proceedings at the Superior Court:

Practice Concern

12. At the commencement of my motion list, I expressed concern with what may appear to be a trivial problem. But for reasons I explain, it is a vexing problem that negatively impacts the administration of justice in this province and can result in unfairness.

13. When reviewing motion material, I immediately noticed that the [Father's] factum was not double-spaced as required by the Consolidated Provincial Practice Direction for Family Proceedings at the Superior Court of Justice (para. E.1.a). At most, it is a 1.5-space. This has real impacts.

a. **It is contrary to a Practice Direction of this Court**. Lawyers who seek to cram evidence and argument within the page restrictions without regard to what is clearly prescribed in the Practice Direction show disrespect for the administration of justice and the prescribed practices issued by the Chief Justice or Regional Senior Justice.

b. **It fails to appreciate the work judges must perform**. Judges hearing family matters must read hundreds of pages each day. With CaseLines, this reading is done almost entirely on screens. When material is crammed to fit within page restrictions, it becomes very difficult to read and creates real challenges for judges. It reflects a lack of appreciation for the work judges must perform in the exercise of their judicial duties.

c. **It can result in unfairness**. While I would rather not have had to do so, I found it necessary to do the following to demonstrate a point. I downloaded the parties' factums, cut and pasted the text in the .pdf documents into Word documents, and performed a word count. The [Father's] Factum totalled about 6,000 words. The [Mother's] was about 10,000 words. Procedurally, if gone unnoticed, this would not be fair to the [Father]. This court has an obligation to ensure that the process is fair for all parties who appear before it.

14. I find that the [Mother's] counsel did not follow the Practice Direction because her Factum was not double-spaced; at best, it was 1.5-spaced. This is a persistent and regular problem before this court. Scolding counsel appears to have no effect. I am of the view that it is necessary for the court to sanction such conduct within the tools it has available.

15. I considered adjourning this matter to require the [Mother] to refile material. This would not be fair to the [Father] who had been seeking relief. It would also not be fair to the [Mother] to have her redo her materials, at some cost. I had already read all the material.

16. I considered a cost sanction against the [Mother]. However, the [Mother] should not be penalized because her lawyer's breached this court's Practice Direction.

17. I am aware of authority from the Court of Appeal and the Supreme Court of Canada which suggests that the threshold to be met is high when courts consider costs against a lawyer personally. Nonetheless, I have advised [the Mother's] counsel that I am considering an order that she not charge her client for time spent on this motion, or that she pay an amount of costs personally. I also recognize that rule 24(9) of the *Family Law Rules* does not expressly deal with the situation in this case. However, rule 57.07(1) of the *Rules of Civil Procedure* is worded more broadly.

18. I directed [the Mother's] counsel to appear before me on October 29, 2024 at 9:00 a.m. via Zoom. She may wish to retain counsel to make submissions. [**emphasis** in original]

This was the resulting hearing for which the Mother's counsel had to retain counsel to argue against having costs awarded against her personally.

Ultimately, costs were not ordered against the Mother's counsel personally — but seemingly not for not wanting to do so. Rather, his Honour specifically declined to order the Mother's counsel to pay costs personally because he was not satisfied there was authority for him to do so on the facts of the case.

His Honour found that Rule 24(9) of the *Family Law Rules*, O. Reg. 114/99 and Rule 57.07(1) of the *Rules of Civil Procedure,* R.R.O. 1990, Reg. 194, are "ill-equipped" to address this situation. Those *Rules* require the court find that costs were incurred without reasonable cause or wasted by a lawyer. Under those *Rules*, a court cannot assess a cost incurred by the opposing party from having to read material that extends beyond what is prescribed in the Practice Direction. Furthermore, as noted by Justice Sharma, excess cost is not the harm that resulted. The harm or risk of harm here is/was different in nature:

> [4] Non-compliance with a page, spacing, or font requirement of the Practice Direction undermines the direction given by the Chief Justice of the Court, interferes with the administration of justice because of the workload problems it creates for judges, and can result in unfairness to an opposing party who does comply with the Practice Direction.

And, then, there is the admonition that the authority to award costs against counsel personally is to be used "sparingly" and with "extreme caution": *Young v. Young* (1993), [1993] 8 W.W.R. 513, 49 R.F.L. (3d) 117 (S.C.C.); *Quebec (Director of Criminal and Penal Prosecutions) v. Jodoin*, 2017 CarswellQue 3091 (S.C.C.) ["*Jodoin*"].

But a court need not rely on any specific Rule to award costs against counsel. A court can impose such costs relying on the inherent jurisdiction of the court to control its process and the control it exercises over all Officers of the court. The jurisdiction to do so flows from the right and duty of the courts to supervise the conduct of the lawyers who appear before them and to sometimes penalize any conduct that frustrates or interferes with the administration of justice: *Jodoin* at para. 18. But even then, a court should only do so where a lawyer's conduct has seriously undermined the authority of the court or seriously interfered with the administration of justice.

In this instance his Honour found that non-compliance with a Practice Direction issued by the Chief Justice undermines the authority of the court and interferes with the administration of justice. However, while a recurring and frustrating problem, he could not find that it *seriously* undermined the authority of the court or was a *serious* interference with the administration of justice.

Therefore, no costs award was made against the lawyer.

However, Justice Sharma did note, again, that this is a recurring problem without any sufficient remedial authority.

At the suggestion of counsel for the Mother's counsel, Justice Sharma considered that courts could just refuse to read materials in contravention of a Practice Direction. However, he was concerned this could result in unfairness to *litigants* when the problem is caused by a *lawyer*.

He also considered the idea of courts refusing to hear matters where the materials did not comply with the Practice Direction. This was also not satisfactory as the party asking for relief may not be the offending party. Furthermore, his Honour was concerned that courts not be turned into "word-count police."

Ultimately, Justice Sharma suggested that this was an issue for the Family Law Rules Committee to address by way of Rule amendment.

Now, we are not for a moment suggesting that costs should regularly be ordered against counsel that commit a minor breach of such Rules, Guidelines and Directions. Some discretion and "relief from forfeiture" seems appropriate. An affidavit that goes partly onto the next page or a factum that is a few paragraphs — or even a page — over is not going to bring the administration of justice to a screeching halt. Something more is required.

That said, there ***are*** rules and directions in place and there ***are*** unquestionably repeat *major* offenders. It is very frustrating when counsel sees that opposing counsel have "helped themselves" to an extra few pages by way of actual extra page or through font or line-spacing trickery. It is those *repeat* offenders that should be exemplified and subjected to the wrath of 1,000 suns.

If counsel is of the view that, due to the nature of the motion, they require a few extra pages for their client's affidavit or factum, they can bring a 14B motion asking for an extension.

But wait . . . there's more . . .

Justice Sharma dealt with a similar issue in *Bah v. Diallo*.

Bah was the Mother's motion to relocate with the parties' two children from Toronto to Winnipeg. The Father was asking for an adjournment to cross-examine the Mother. The Mother contested the adjournment for various reasons, including the claim that she had a job offer from an employer in Winnipeg for a job starting in December 2024.

Justice Sharma granted the adjournment.

However, in dealing with costs, Justice Sharma noted:

> (a) The Mother had not complied with a court order around the scheduling of the motion. On October 3, 2024, the court ordered that if the Mother's request for relocation was not resolved, the parties were to request an attendance at To Be Spoken To Court ("TBST") to have the hearing scheduled.
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> (b) The relocation issue was not resolved, but the Mother did not seek an attendance at TBST court. Instead, she just filed her motion. According to his Honour, "This Court will not reward a litigant who fails to comply with court orders."
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> (c) While the Father was successful in getting an adjournment, Justice Sharma declined to award costs to the Father even though he was presumptively entitled to costs. The Father's affidavit did not comply with the Consolidated Provincial Practice Direction for Family Proceedings in the Superior Court of Justice. It was not double-spaced. It also included argument with quotes and citations from caselaw. Affidavits are to contain facts, not argument or legal authorities.
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> (d) While it is unfortunate to penalize a party by denying costs when the party is presumptively entitled to costs — for the reasons given in *Ramdoo v. Houlden*, there appears to be no effective tool for the Court to sanction a lawyer in these circumstances. The limited tool to sanction such behaviour is through a cost order.

Costs to no one. Shame to all.
