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Family Law Newsletters

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

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For Those That Just Don't Want That Trial to End

J.M. v. B.M., 2025 CarswellNB 39 (C.K.B.) — Doucet J.

Issues: New Brunswick — Re-Opening a Trial to Admit New Evidence

You argue a motion. Or you finish a trial. And after the motion has been argued or submissions have been made at trial — you come across that one piece of evidence you did not previously know about. What to do?

If you are not familiar with how to deal with a situation where new evidence comes to your attention after a trial or motion is complete — but before judgment has been issued — then do read on; that is the interesting procedural issue Justice Doucet recently faced in *J.M.* (And if you are familiar with the issue, well, do us a favour and read on anyway.)

The parties in *J.M.* separated in 2020 and consented to a final order in 2023 that resolved all issues arising from their marriage and its breakdown. Despite consenting to the final order, the husband failed to comply with several of its provisions, including discharging a mortgage, paying off joint debts, transferring \$40,000 from his RRSP to the wife's RRSP, and paying the wife an additional \$25,000. As a result, the wife brought a motion to have the husband found in contempt of court.

Contempt is not uniformly available across Canada as a remedy for enforcing monetary judgments. In Ontario, for instance, Rule 31(1) of the *Family Law Rules*, O. Reg. 114/99, explicitly prohibits the use of contempt to enforce payment orders. By contrast, Rule 76 of New Brunswick's *Rules of Court* (N.B. Reg. 82-73) contains no such restriction, allowing contempt to be used where a party willfully fails to comply with a family law order, including one involving the payment of money.

In addition to seeking a finding of contempt, the wife asked the court to impose a fine and to suspend the husband's passport as consequences for his non-compliance — though notably, she did not seek incarceration.

The contempt trial was heard over several days in the summer of 2024. It concluded on September 4, 2024, after which Justice Doucet reserved his decision.

Before reasons were released, the wife moved to re-open the trial to admit fresh evidence. She had just discovered that, just days before the consent order was signed, the husband had locked his RRSPs into a private mortgage investment through Olympia Trust. According to the wife, had she known this at the time, she would never have agreed to the settlement — particularly the provision requiring the RRSP rollover.

Justice Doucet began with a helpful summary of the legal framework for re-opening a trial to admit new evidence:

1. **The Two-Part Test:** The moving party must establish that (a) the evidence, if presented at trial, would probably have changed the result; and (b) the evidence could not have been obtained with reasonable diligence prior to trial: *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2001 CarswellOnt 3358 (S.C.C.) at paras. 20 and 65; *Paftali v. Paftali* (2020), 46 R.F.L. (8th) 1 (Ont. S.C.J.) at para. 180; *P.M. v. S.M.*, 2023 CarswellNB 416 (C.K.B.) at para. 9.
2. **Timing Matters:** Where the judge's reasons have not yet been released, the test is more flexibly applied, and fairness may take precedence over finality: *Carleton Condominium Corporation No. 116 v. Sennek*, 2017 CarswellOnt 13066 (S.C.J.); *P.M. v. S.M.*, 2023 CarswellNB 416 (C.K.B.) at para. 9.
3. **Caution Post-Reasons:** If reasons have already been released but judgment not yet entered, courts apply the test with greater caution to guard against tactical and strategic abuse: *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2001 CarswellOnt 3357 (S.C.C.) at para. 61; *Brasseur v. York*, 2019 CarswellOnt 10838 (S.C.J.) at paras. 37-49.

To these we would add:

4. **After Judgment Entered:** Once judgment has been formally entered, a far more strict test applies. Exceptional circumstances must justify setting aside finality: *Tsaoussis (Litigation Guardian of) v. Baetz*, 1998 CarswellOnt 3409 (C.A.) at para. 20.
5. **Other Considerations:** When applying the two-part test, courts should also consider the apparent cogency of the evidence, delay, prejudice, and the broader principle of finality: *Mehedi v. 2057161 Ontario Inc.*, 2015 CarswellOnt 15056 (C.A.) at para. 20.

Applying this framework, Justice Doucet found that the wife met both branches of the test. On the first part, the evidence would likely have changed the result. Locking RRSPs into a mortgage days before consenting to the Order — without disclosing that fact — raised serious questions as to whether the husband had *ever* intended to comply with that part of the order. And this was a fair consideration for contempt.

On the second branch, the court accepted that while the wife knew the husband sometimes invested in mortgages and/or made investments that were secured by mortgages, there was nothing in his sworn Financial Statement to indicate that his RRSPs were illiquid. She had also tried to obtain documentation about the RRSPs before and during the trial, but the husband refused to produce it or allow the investment company to provide it to the wife.

As a result, the motion to reopen was granted, and the court scheduled an additional half-day hearing for further evidence.

This is a helpful authority to have on hand when dealing with post-hearing developments prior to judgment. It also provide us with an opportunity to suggest a few practical tips:

- **Confirm Liquidity of Assets Before Settlement:** When a settlement involves transfers of RRSPs or other investment vehicles or funds, never assume they are readily available for transfer. Request full details and supporting documents, and ensure the settlement instrument explicitly states that the investments or RRSPs are available for immediate transfer. You do not want your client to end up in a situation where they receive assets they cannot realize on without incurring significant costs or at all.
- **Be Proactive on Disclosure:** If key financial information is being withheld, bring a motion for disclosure early. Courts are far more inclined to compel production before trial than to allow a case to be reopened after the fact.
- **Document Diligence:** For a variety of reasons, including if you ever need to seek the admission of fresh evidence post-hearing where you must demonstrate that you acted with reasonable diligence, keep a clear and dated paper trail of all requests, refusals, and follow-up efforts.

And for those that "read on" — should you wish some further light bedtime reading on the topic, might we suggest: *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2001 CarswellOnt 3357 (S.C.C.) — from the folks in Ottawa; and *Fan v. Chana*, 2011 CarswellBC 3402 (C.A.); *Hansra v. Hansra* (2017), 92 R.F.L. (7th) 1 (B.C. C.A.); and *Hellberg v. Netherclift* (2017), 97 R.F.L. (7th) 33 (B.C. C.A.) — from some folks in British Columbia.

This Ain't Elvis' Jailhouse Rock

Ontario (Director, Family Responsibility Office) v. Martinez (2024), 11 R.F.L. (9th) 447 (Ont. C.J.) — Sherr J.

Issues: Ontario — Imprisonment for Failure to Pay Child Support

Martinez is a decision about a default hearing initiated by the Director of the Family Responsibility Office, who sought to enforce support arrears owed by Mr. Martinez that had accumulated under an order from February 2014. Justice Sherr was tasked with considering and selecting the appropriate mechanism to enforce the support arrears. Ultimately, Justice Sherr found that it was appropriate to order that Mr. Martinez spend some time wearing orange at His Majesty's pleasure if he did not comply with the payment plan specified in the default order.

Mr. Martinez (the support debtor) was the father of two children, ages 18 and 15, who lived with the support recipient. In 2012, Mr. Martinez married his current wife and had three more children. His second wife lived in El Salvador with their three children until Mr. Martinez brought them all to Canada in July 2024. (Why this was allowed to happen given the below is anyone's guess.)

Mr. Martinez testified that he worked in construction and managed his own business. He said his business operated in cash, and some weeks he earned \$500 and others \$2,000. He also swore he owed \$247,000 to the Canada Revenue Agency, but he could not explain why.

On February 26, 2014, Justice Cohen made final orders on an uncontested basis. She granted custody of the subject children to the support recipient and ordered Mr. Martinez to pay child support in the amount of \$892 each month (being the *Child Support Guidelines* Table amount for a payor earning \$60,000, as was imputed to Mr. Martinez).

Although Mr. Martinez took no steps to appeal or to change or set aside the Order, he also made no support payments until March 2023, when the Director issued its Notice of Default Hearing. At the time, the arrears totalled about \$94,800. Mr. Martinez filed a Default Dispute and sworn Financial Statement on May 19, 2023. He was represented by counsel at the time. In his Default Dispute, Mr. Martinez indicated that he was going to move to change Justice Cohen's Order.

On July 6, 2023, on consent, a temporary default order was made. Mr. Martinez was required to pay ongoing child support of \$892 each month and to pay a lump sum towards the support arrears of \$15,000 by August 31, 2023, and a further \$15,000 by October 31, 2023, failing which he would be incarcerated for five days for each default.

Mr. Martinez made the required ongoing monthly payments in the first temporary default order until December 2023. He paid nothing towards the required lump sum payments. On December 21, 2023, the Director asked that Mr. Martinez be committed to jail for his failure to comply with the first temporary default order. Merry Christmas. The court gave Mr. Martinez another opportunity to comply with the order.

But Mr. Martinez did not attend at court on March 12, 2024, as he was supposed to. A Bench Warrant with discretion was issued. Mr. Martinez testified that he had gone to El Salvador for six months to make the necessary arrangements to bring his second family to Canada. Mr. Martinez made no ongoing payments under the first temporary default order while he was in El Salvador. He resumed making them when he returned to Canada in July 2024.

On July 3, 2024, on consent, another temporary default order was made. Mr. Martinez was required to pay the ongoing child support payments of \$892 each month plus \$608 each month towards the arrears, failing which he would be incarcerated for three days for each payment Mr. Martinez was in default. He was ordered to provide more financial disclosure, including his

complete income tax returns, proof of his self-employment income and expenses and copies of his bank statements since July 2023. This is not looking good for Mr. Martinez.

Mr. Martinez made the required payments under the second temporary default order — but he did not produce any of the ordered financial disclosure. At the default hearing, Justice Sherr confirmed that Mr. Martinez's arrears as of December 3, 2024 were \$92,060.68.

During the hearing, Mr. Martinez stated he had been going back-and-forth between Canada and El Salvador and that he did not work when outside Canada. Mr. Martinez said he had no assets and could not afford to pay a lump sum towards the arrears. He did not make the lump sum payments he was required to make in the first temporary default order because a contract he expected did not materialize, and he could not afford to bring a motion to change the support order.

The current statutory scheme governing default hearings is found in s. 41 of the *Family Responsibility and Support Arrears Enforcement Act, 1996*, S.O. 1996, c. 31 (the "*Act*") and Rule 30 of the *Family Law Rules*, O. Reg. 114/99 (the "*Family Law Rules*").

Pursuant to ss. 41(9) of the *Act*, Mr. Martinez was presumed to have the ability to pay the arrears unless he could demonstrate an inability to pay for a valid reason. A "valid reason" is an event over which Mr. Martinez had no control and which rendered Mr. Martinez totally without assets or income to meet his or her obligations, such as disabling illness or involuntary unemployment: *Ontario (Director, Family Responsibility Office) v. Carney*, 2004 CarswellOnt 1480 (C.J.). An inability to pay also cannot be self-induced unemployment or underemployment or the desire to pay other debts first: *Ontario (FRO) v. Chiang* (2014), 39 R.F.L. (7th) 239 (Ont. C.J.).

Evidence relating to Mr. Martinez' past and present circumstances, including his financial circumstances since the time of the first default under the order, the manner in which he had applied his available income and assets, and his efforts to secure employment or income during the time that the arrears had arisen would have some bearing on the determination of the legitimacy of the reasons Mr. Martinez put forward for his default: *Ontario (Director, Family Responsibility Office) v. De Francesco*, 2012 ONCJ 819 (Ont. C.J.).

Subsection 41(10) of the *Act* sets out the powers of the court on a default hearing. If not satisfied that Mr. Martinez had a valid reason not to pay the arrears, the court could order that Mr. Martinez:

1. Discharge the arrears in full by a specified date;
2. Comply with the order to the extent of his ability to pay;
3. Make a motion to change the support order;
4. Provide security for the arrears and subsequent payment;
5. Report periodically to the court, the Director or a person specified in the order;
6. Provide to the court, the Director or a person specified in the order particulars of any future change of address or employment as soon as they occur;
7. **Be imprisoned continuously or intermittently until the period specified in the order, which shall not be more than 180 days, has expired, or until the arrears are paid, whichever is sooner;** and
8. **On default in any payment ordered under this subsection, be imprisoned continuously or intermittently until the period specified in the order, which shall not be more than 180 days, has expired, or until the payment is made, whichever is sooner.**

Justice Sherr then summarized important factors from the case law that a court should consider when deciding how to exercise its power in a default proceeding:

1. The court must consider the interests of the children and the support recipient who are not before the court, and the consequences to them of Mr. Martinez's failure to meet his support obligations.
2. Mr. Martinez is responsible for showing that he has accepted responsibilities and placed the child's interests over his own and has provided frank disclosure to the court.
3. The court will usually draw an adverse inference against a party for his or her failure to comply with their disclosure obligations. The party must make full and complete financial disclosure to ensure that the information required to make a decision on the issue is before the court.
4. Enforcement legislation should be viewed as remedial rather than punitive.
5. **Imprisonment is a last resort.** Something more than non-payment is required. Mr. Martinez's conduct had to demonstrate a **willful and deliberate disregard** for the obligation to comply with court orders. It is meant as a mechanism to enforce support and not as a means of punishing Mr. Martinez. The maximum jail time should be reserved for the most severe cases.
6. Reconciliation of the objective to maximize the enforcement of an order while not unjustly imprisoning a payor for non-payment of a default order is a delicate balancing act for the court. This court prefers to err on the side of caution in balancing these considerations.
7. The court is not required to incorporate the payment terms of the existing support order in its default order.

Justice Sherr also reviewed the factors set out by the court in *FRO v. Hennessy*, [2022 CarswellOnt 7458](#) (S.C.J.) at para. 17 (the "*Hennessy* factors") to consider when determining whether to order imprisonment:

1. **Pattern of accumulated arrears:** It is the pattern of a payor's non-payment that should be more compelling than the total amount of support arrears owing. At first instance, larger sums of support arrears might appear to reflect more blameworthy conduct. However, one must bear in mind that support arrears are relative to the monthly support award: sustained periods of non-payment, whether \$100 per month, or \$10,000 per month can be equally devastating to the recipient. As such, the period of non-compliance is likely more probative to the nature of a payor's non-compliance than the total quantum owing.
2. **Voluntary v. involuntary payments:** In reviewing the Director's Statement of Arrears filed, the court may consider whether the payor's historic contributions towards the support obligation were made by way of direct payment from the support payor, or by involuntary diversions (such as garnishment). Such information might be relevant to whether Mr. Martinez was making efforts to comply with the terms of the operative support order or playing a game of "catch me if you can".
3. **Income source disclosure:** Similarly, the court might consider the payor's history of income disclosure. In some cases, a payor will diligently and voluntarily disclose income sources to the Director or the Recipient, facilitating the prompt garnishment of income streams. In other cases, the payor will not disclose changes in employment, leaving the recipient and FRO caseworker to attempt to chase and locate income sources.
4. **Previous findings:** It is not inappropriate to review the historic court record, and in particular, any previous court endorsements which speak to a payor's willingness or unwillingness to accept their obligation to support recipients. For example, if income was imputed to a payor due to a finding of intentional unemployment or underemployment, or because the payor failed to produce the financial disclosure as required, the court may be more likely to find that any non-payment of support was wilful and deliberate in nature rather than as a result of unfortunate circumstance.

Likewise, where a default hearing continues after an operative support order has been changed (i.e. under s. 41(22) of the *Act*), the court may consider whether any of the periods of non-payment of support were mitigated, excused or forgiven for legitimate reason in the subsequent order.

5. Timeliness of actions of payor: It is not uncommon that a payor does not take steps to commence a Motion to Change proceeding until they have been brought before the court on default notice. However, once a payor indicates an intention to seek changes to the operative support order, the court may consider whether the payor then took *bona fide* steps to comply with court procedure and seek change on the merits, or whether the payor was simply engaging in further stall tactics to delay payment to the recipient.

6. Other evidence of prioritization of self over support: In some cases, there may be lifestyle or other financial information before the court which causes the court concern that the payor has prioritized other expenditures over compliance with the support order. It was appropriate to consider information relating to Mr. Martinez's assets or expenditures, if available, in assessing whether his non-payment is wilful and deliberate.

In considering the law and applying the *Hennessey* factors, Justice Sherr found that this was an appropriate case to impose a term of imprisonment. Mr. Martinez had a very poor payment history, resulting in significant arrears, and he only paid support when compelled to do so in enforcement proceedings. Justice Sherr also raised serious credibility issues. Historically, Mr. Martinez did not provide meaningful, timely or accurate financial disclosure, and Justice Sherr noted that it was likely intentional. Moreover, Mr. Martinez clearly prioritized his own interests and had not acted in good faith regarding his support obligations. His Honour sympathized with the support recipient and the two children residing with her. Mr. Martinez had badly failed them by consistently prioritizing the interests of his second family over those of his first family.

Justice Sherr also recognized that the court had given Mr. Martinez too many chances and that the order the court was going to make "must have teeth if it is to be effective and to achieve long-awaited justice." Mr. Martinez did not proceed with the many opportunities given to him to bring a motion to change Justice Cohen's order, and other attempts made to enforce Justice Cohen's order had failed. He was given several extensions to comply with it and failed to do so. It was apparent that Mr. Martinez would continue to avoid paying support *until compliance was a more favourable option to non-payment*.

Consequently, the Justice Sherr ordered that:

- Mr. Martinez be committed to jail immediately for 120 days, or until such earlier time he pays \$15,000 towards the support arrears.
- Mr. Martinez pay the balance of the arrears by making annual lump sum payments of \$10,000 by December 1st each year, starting in 2025. Mr. Martinez would be committed to jail for 60 days for each default of the lump sum payments or until such earlier time as the payments are made.
- Mr. Martinez pay the ongoing child support payments of \$892 each month. He would be committed to jail for three days, or until such earlier time as the outstanding amounts are paid in full, for each payment in default.

Justice Sherr also ordered other related terms, including that Mr. Martinez provide the Director with his income tax returns in June of each year, and that the maximum length of time, cumulatively, Mr. Martinez could be imprisoned under the default order was 180 days.

What rhymes with "orange"?