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

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Contents

Hard Facts Make Bad Law; And Bad Payors Make Hard Facts

***Boucher v. Boucher* (2025), 16 R.F.L. (9th) 50 (Man. C.A.) — Rivoalen, C.J. and leMaistre and Turner, JJ.A.**

Issues: Manitoba — Support — Corporate Financial Disclosure

The husband and wife separated in 2013 after a 16-year marriage. They entered into a comprehensive Separation Agreement in 2015 that resolved all issues except whether the husband was obligated to provide corporate financial disclosure from MBK Enterprises Ltd. ("MBK"), in which he was a 24.5% shareholder (notice the minority interest). MBK wholly owned Marrbeck Construction Ltd. ("Marrbeck"), where the husband worked as a general contractor and served as Secretary, Treasurer, and one of two Directors. Despite their dispute about corporate disclosure, the Separation Agreement permitted the wife to seek it through court proceedings and acknowledged the husband could oppose it.

The Separation Agreement required annual financial disclosure from both parties, including tax returns and Notices of Assessment. But while the wife consistently complied, it seems the husband was not that interested in providing annual financial disclosure; so he did not.

Between 2016 and 2022, the wife made repeated, informal and then formal requests for his income tax information. Only after she retained counsel a second time and served him (by way of an order for substituted service, no less) did he produce his personal tax returns for 2016 to 2021. These revealed substantial dividend income from MBK, totaling over $600,000, previously undisclosed to the wife. Surprise, surprise, surprise.

In 2023, the wife moved under ss. 18 and 21 of the Manitoba *Child Support Guidelines*, Man Reg 52/2023 (identical to ss. 18 and 21 of the Federal *Child Support Guidelines*), and Rule 30 of the King's Bench Rules, Man Reg 553/88, seeking corporate financial disclosure from MBK and Marrbeck for 2016-2023. At the direction of a Case Conference Judge, she served the companies, and corporate counsel for both opposed the motion, citing privacy concerns. They stated they would "never" release financial information to the wife. The husband's request to the MBK shareholders to authorize disclosure was refused.

The motion judge dismissed the wife's motion and awarded costs against her. He accepted that the requested documents — corporate financial statements, tax returns, breakdowns of salaries and benefits paid to non-arm's length parties, and minute books — would be captured by s. 21(1)(f) of the *Guidelines*, which applies where a parent "controls" a corporation:

> **Obligation to provide financial information**

> 21(1) Subject to subsection (2), a parent who is a party to an application for a child support order or a variation order and whose income information is necessary to determine an amount of child support must file with the court a sworn Financial Statement in the form required by the court and the following information at the same time as the parent files their application, answer or reply, as the case may be:
>
> . . . . .
>
> (f) **where the parent controls a corporation**, for its three most recent taxation years
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> (i) the financial statements of the corporation and its subsidiaries, and
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> (ii) a statement showing a breakdown of all salaries, wages, management fees or other payments or benefits paid to, or on behalf of, persons or corporations with whom the corporation, and every related corporation, does not deal at arm's length; [**emphasis** added]
>
> . . . . .

The motion judge focused exclusively on s. 21(f) and found that control had not been established. The husband was only a minority shareholder of MBK, and he was not a shareholder of Marrbeck or the entities that owned MBK and Marrbeck. The husband's operational role at Marrbeck, even as its Secretary, Treasurer, and being one of two Directors, did not amount to control.

The court accepted an affidavit from corporate counsel that the husband could not unilaterally authorize or require disclosure of corporate documents, did not control dividend decisions, and was not related to the other shareholders.

And, finally, he rejected the wife's argument that an adverse inference should be drawn from the refusal to disclose; in *Bates v. Welcher* (2001), 17 R.F.L. (5th) 255 (Man. C.A.), the Manitoba Court of Appeal confirmed that control must be established before the privacy interests of third parties may be overridden:

> [63] However, financial disclosure is by its nature an invasive process. There must be a balancing of the interests of all parties and that balancing is accomplished by requiring the applicant to satisfy the court that the information requested is relevant and reasonably necessary to the facts as opposed to a fishing expedition.

However, the motion judge did not consider s. 18 of the *Guidelines*, which addresses pretax corporate income and income for support purposes where a parent is a shareholder, officer, or director. The motion judge was also of the view that Rule 30.02(4) of the King's Bench Rules required proof of control before disclosure could be ordered. Without the requisite control, the requested disclosure was neither relevant nor justifiable.

The Court of Appeal saw things slightly differently. The Court of Appeal set aside the order, allowed the wife's motion for disclosure, and awarded her costs in both courts. Writing for the Court of Appeal, Justice Rivoalen held that the motion judge had committed several errors of law and fact.

First, according to the Court of Appeal, relevance does not depend on control. Therefore, the motion judge had erred in law by treating corporate control as a prerequisite for relevance. Relying on *Anthony v. Anthony* (2024), 1 R.F.L. (9th) 418 (N.S. S.C.), the court emphasized that the test for disclosure is whether the information sought has any tendency to prove or disprove a material fact — in this case, the husband's income. Disclosure may be ordered even if the payor does not control the corporation.

While this does make some sense with respect to s. 18 of the *Child Support Guidelines* (where control is not a prerequisite), we do note that s. 21(1)(f) specifically applies where the payor "controls" a corporation. So, are we just ignoring that word, "control"? We're not disputing that corporate disclosure is important; but we do suggest that the word "control" must mean either de jure or de facto control?

Second, the Court of Appeal noted that the court below did not consider ss. 18 and 21(1)(e) of the *Guidelines*. As noted above, s. 18(1) allows courts to include corporate pretax income in a parent's income if their line 150 income does not fairly reflect their available resources, even where the parent is merely a shareholder, director, or officer. But, where a parent truly (or, shall we say, acting *bona fides*) only owns a minority position in a corporate entity, s/he is not in a legal position to influence the payout of corporate income in any case.

According to the Court of Appeal, the motion judge also neglected consideration of s. 21(1)(e) — which contemplates additional disclosure where a parent is a *partner in a partnership*. But it does not appear that the Husband was a partner in a partnership; he was a minority *shareholder* taking the husband out of s. 21(1)(e). At least the Court of Appeal did acknowledge that the question of whether, as a partner in a partnership, the husband would be required to disclose further information as set out in s. 21(1)(e) of the *Guidelines* "may have to be fleshed out at the trial as we are not satisfied that this issue can be resolved on the available record."

Third, according to the Court of Appeal, as a shareholder (even a minority one) of MBK, the husband had a statutory right under ss. 149 and 153 of *The Corporations Act*, CCSM c C225, to receive its financial statements, auditor's reports, and shareholder agreements. Pursaunt to *Verwey v. Verwey* (2007), 41 R.F.L. (6th) 29 (Man. C.A.), a payor cannot rely on corporate privacy to avoid disclosure when they have a legal right to the documents.

We agree — but as noted by the court, the husband has a statutory right to only certain documents — and, here, the wife was asking for much more.

Fourth, the Court of Appeal noted that procedural rules support disclosure. Specifically, Rule 30.02(1) requires a party to disclose any relevant document in their possession, control, or power. The Court of Appeal found that the husband had the power to obtain the corporate documents, whether or not MBK or Marrbeck were parties.

Need we point out that, as a minority shareholder, the Husband may not, in fact, have the extensive requested documents in his possession, control or power?

As a result, the Court of Appeal set aside the motion judge's Order and ordered the husband to produce the following for MBK and Marrbeck, for the years 2016-2024: financial statements; Auditor reports; dividend breakdowns and non-arm's length payments; and any unanimous shareholder agreements (for MBK only).

So, while the Court of Appeal does appear to dispense with the need to show corporate control before s. 21(1)(f) of the *Guidelines* can be used to force corporate disclosure, based on the words of s. 21(1)(f) we have some trouble understanding how. It would appear that, at least in Manitoba, corporate control is no longer a precondition to corporate disclosure.

Ultimately, did the Court of Appeal use the evidence of past bad behavior on the part of the husband to "overlook" the niceties of the *Child Support Guidelines*? Hard facts do make interesting law.

How To Not Argue a Motion

***Wang v. He*, 2025 CarswellOnt 7997 (S.C.J.) — Kamal A.J.**

Issues: Ontario — Urgent Motions

This motion was with respect to a child, Jiamu, who was not quite one year old.

The Applicant, Ms. Wang, brought an "urgent" motion for parenting time, including primary care. Specifically, Ms. Wang sought — on an *urgent* basis:

a. An interim order that Jiamu shall be returned to Ms. Wang's primary care immediately;

b. An order that Jiamu shall be primarily living with Ms. Wang;

c. An interim parenting schedule for the child so Ms. Wang's parenting time will not be unreasonably denied or disrupted by the Respondent, Mr. He;

d. Immediate exclusive possession of the matrimonial home to Ms. Wang; and

e. A police enforcement clause to enforce the order if necessary.

This attendance, however, was only to determine whether the substantive motion was actually "urgent" such that it should be heard before a Case Conference as generally required pursuant to Rules 14(4) and 14(4.2) of the *Family Law Rules*, O. Reg. 114/99 (the "*Rules*").

Ms. Wang, of course, was of the view that there was nothing more important than this motion. According to her:

a. She recently left the home as a result of verbal and mental abuse and maltreatment from Mr. He and his parents;

b. Jiamu had remained with Mr. He in the matrimonial home;

c. Ms. Wang had been the primary caregiver and had been breastfeeding the child;

d. Mr. He would leave Ontario with Jiamu; and

e. Mr. He would take steps to jeopardize her relationship with Jiamu.

Mr. He felt differently. His position was that the motion was not urgent because, in his view:

a. Ms. Wang was not the primary caregiver because she left the home for days since the child was born and had withdrawn from care for Jiamu on multiple occasions;

b. At present, Jiamu was in the care of Mr. He and his parents, who have been a constant presence in the child's life;

c. Ms. Wang had not been consistently breastfeeding;

d. Jiamu's routine was currently the same as it was prior to the parties' separation;

e. Mr. He was prepared to work out a parenting arrangement with Ms. Wang; and

f. The family previously relied on a nanny — such that Ms. Wang was not the primary caregiver.

As noted above, Rules 14(4) and 14(4.2) generally require that a Case Conference must be held before a motion can be heard, with limited exceptions:

(4) No notice of motion or supporting evidence may be served and no motion may be heard before a conference dealing with the substantive issues in the case has been completed.

(4.2) Subrule (4) does not apply if the court is of the opinion that there is a situation of urgency or hardship or that a case conference is not required for some other reason in the interest of justice.

In Ontario, the seminal case on determining urgency is *Rosen v. Rosen*, 2005 CarswellOnt 68 (S.C.J.). The "Rosen Factors" were subsequently refined, considered and explained in *Yelle v. Scorobruh*, 2016 CarswellOnt 7861 (S.C.J.). Considerations include:

1. Whether the parties have canvassed earlier dates for a Case Conference with the court. If so, the dates available should be included in the materials before the court;

2. Whether the parties have explored the local practices for dealing with family law matters and for obtaining earlier dates to address matters of immediate importance;

> 3. Whether the parties have negotiated in an attempt to reach an interim without prejudice agreement;
>
> 4. Whether the best interests of the child are at stake including whether there is an abduction issue or other safety concern;
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> 5. Urgency must be established in accordance with the jurisprudence, which includes abduction, threats of harm, dire financial circumstances;
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> 6. Is there hardship? In considering whether there is hardship, the court will consider whether a party will be severely prejudiced or suffer irreparable or non-compensable harm; and/or
>
> 7. Other pressing issues such as domestic violence, mental health issues and/or substance issues, criminal activity or serious anger management issues.

The court further opined on "urgency" in *Thomas v. Wohleber*, 2020 CarswellOnt 4494 (S.C.J.):

> a. The concern must be immediate; that is one that cannot await resolution at a later date;
>
> b. The concern must be serious in the sense that it significantly affects the health or safety or economic well-being of parties and/or their children;
>
> c. The concern must be a definite and material rather than a speculative one. It must relate to something tangible (a spouse or child's health, welfare, or dire financial circumstances) rather than theoretical; and
>
> d. It must be one that has been clearly particularized in evidence and examples that describes the manner in which the concern reaches the level of urgency.

And, again, in *Dyquiangco Jr. v. Tipay*, 2022 CarswellOnt 2668 (S.C.J.), at paragraph 6:

> The *Rosen* test for urgency involves a two-step inquiry and is generally related to situations involving abduction, threats of harm and dire financial circumstances. This list is not exhaustive. The first step requires an inquiry when a case conference date is available. Absence of a proximate date may elevate a situation to urgent. The second step before bringing a motion obligates the parties to engage in a good faith dialogue to ascertain whether some temporary, reasonable compromise can be achieved pending the conference. Context is important. In *Rosen*, Wildman J. contrasted the situation where support was desperately needed, but refused, with a less compelling situation where the amount of support offered was within a reasonable range of the request.

This is all part of the general philosophy of the Rules to discourage interim skirmishes and to encourage discussion and negotiation. Motions under *Rule* 14(4.2) are the exception, not the rule: *Tinsley v. Doherty*, 2018 CarswellOnt 4524 (S.C.J.) at para. 5; *Barrett v. Barrett*, 2019 CarswellOnt 17316 (S.C.J.) at para. 21; *Rooney v. Rooney*, 2004 CarswellOnt 1664 (C.J.) at paragraph 15.

Here, Associate Justice Kamal was of the view that the test for an urgent motion had not been met — specifically noting that "high conflict" does not equate to "urgency." In particular, there was no evidence that Mr. He had any plans to leave Ontario with the child and there was no evidence of immediate harm, or serious concerns regarding the health, safety, or economic well-being of the parties and/or their child.

The request for an urgent motion was dismissed.

But wait! There's more!

Associate Justice Kamal also availed of the opportunity to discuss the critical role of counsel in family law proceedings:

> [18] In family law proceedings, counsel plays a critical role. They carry weight and credibility with the clients. This privilege comes with responsibility — the responsibility to reduce conflict, to maintain the integrity of our system, and to ensure public confidence. Counsel should not use their role to fuel conflict or to gain an unfair advantage for their client.
>
> [19] In this matter, Counsel for the Applicant repeatedly made submissions of information that was not in evidence and attempted to give evidence from the counsel table. I stopped counsel on numerous occasions. This was simply not appropriate.

He also commented on the fact that, in the case before him, counsel had "completely disregarded the Consolidated Notice to the Profession for Family and Child Protection Matters in the Ottawa Family Court." Here, the materials filed exceeded the page limits and disregarded the directions in the Notice.

But wait! There's more!!

Here, counsel for Ms. Wang admitted to having rescinded the original Notice of Motion (made on notice) and then proceeding with a motion without notice — solely for the purpose of getting an earlier date. Uh-oh. That certainly did not go over well on several levels.

Getting an earlier date is not an acceptable reason for proceeding on a motion without notice. While Rule 14(12) does provide that a motion can proceed without notice if "the delay involved in serving a notice of motion would probably have serious consequences," the corollary to that is that those consequences must include some "immediate danger to the health or safety of a child or of the party making the motion". Rule 14(12) was not meant to allow counsel to create their own procedures to avoid the usual court process.

Here, trying to proceed with a "without notice" motion was inappropriate on many levels. Not only was the test in the *Rules* not met, but it was clear that Mr. He had counsel.

Associate Justice Kamal ended his ruling with words no counsel wants to be in an endorsement in which they are involved: "As officers of the court, counsel need to act with integrity. Counsel for the Applicant did not do so".

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