NOVA SCOTIA COURT OF APPEAL
Citation: *MacKinnon v. Richards*, 2020 NSCA 44

Date: 20200603
Docket: CA 489442
Registry: Halifax

Between:

John MacKinnon

Appellant

v.

Denise Richards

Respondent

Judge:	The Honourable Justice Cindy A. Bourgeois
Appeal Heard:	March 16, 2020, in Halifax, Nova Scotia
Subject:	Consequences of failure to abide by order for costs and to make full disclosure
Summary:	Mr. MacKinnon attended without his counsel. The hearing judge declined to hear his *viva voce* evidence as to his current financial situation. He was invited to stay to hear and challenge the evidence of Ms. Richards via cross-examination. He chose to leave. The hearing proceeded. Mr. MacKinnon's application to vary was dismissed, and the hearing judge made determinations on the evidence before her in relation to Ms. Richards' application.
Issues:	Did the trial judge err in limiting the appellant from calling evidence in the applications before the court due to his failure to pay costs as ordered and to provide complete financial disclosure as required?

Result: Appeal dismissed with costs.

Contrary to Mr. MacKinnon's assertion, the hearing judge had jurisdiction to preclude Mr. MacKinnon from presenting *viva voce* evidence in the circumstances before her.

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Respondent

Judges:	Bourgeois, Saunders and Scanlan JJ.A.
Appeal Heard:	March 16, 2020 in Halifax, Nova Scotia
Held:	Appeal dismissed with costs, per reasons for judgment of Bourgeois J.A.; Saunders and Scanlan JJ.A. concurring
Counsel:	David I. Iannetti, for the appellant Derek Sonnichsen, for the respondent

Reasons for judgment:

[1] John MacKinnon appeals an order relating to the calculation of retroactive child support owing to his former spouse, Denise Richards. After having heard oral submissions on March 16, 2020, the parties were advised the panel was of the unanimous view the appeal ought to be dismissed, with written reasons to follow. As promised, I will now explain why Mr. MacKinnon's appeal is without merit.

Background

[2] The parties were divorced in 2005. The Corollary Relief Judgment required Mr. MacKinnon to pay child support to Ms. Richards for their four daughters.

[3] In 2014, Mr. MacKinnon applied to vary the Corollary Relief Judgment to lower the quantum of ongoing child support and to re-calculate what, by that time, was a significant amount of child support arrears. Ms. Richards filed a response and later her own application to vary. For reasons not apparent from the record before us, the applications were not scheduled to be heard until June 11, 2018. On that day, Ms. Richards, self-represented, was present with her witnesses and prepared to proceed. She had filed all requested affidavits and financial statements, albeit later than the filing dates earlier directed by the court.

[4] Through his counsel, Mr. MacKinnon sought an adjournment. He had not filed complete financial information for the last two taxation years, and also had not secured the attendance of at least one of his witnesses. Despite Ms. Richards' stated desire to proceed notwithstanding the incomplete information, the trial judge, Justice Lee Anne MacLeod-Archer, granted the adjournment request. Costs in the amount of $1,000.00 were awarded against Mr. MacKinnon, the trial judge having found "the main impediment to proceeding lay with him." These costs were made payable prior to the hearing date, then scheduled for October 1, 2018.

[5] Mr. MacKinnon has not appealed the above-noted costs order. Before this Court, his counsel acknowledges the trial judge had the discretion to make it. As will be explained below, it is what she did in light of Mr. MacKinnon's continued failure to pay the ordered costs which is central to the appeal.

[6] The October 1, 2018 date was adjourned due to Mr. MacKinnon's counsel being ill. At that time, the costs were still outstanding. Ms. Richards asserts during that appearance, the trial judge made clear she would not permit Mr.

MacKinnon's application to vary to proceed if he did not comply with the order. This assertion was not contested by Mr. MacKinnon. (The Appeal Book does not contain transcripts of what appears to be a number of relevant appearances before the trial judge in which she addressed the outstanding costs and the status of Mr. MacKinnon's financial disclosure). The hearing was re-scheduled to December 21, 2018.

[7] In her factum, Ms. Richards says there was a pre-trial conference with the trial judge on December 18, 2018. The following description of what transpired was not challenged by Mr. MacKinnon:

> 12. The matter returned for a pretrial conference on December 18, 2018 to discuss the issue of the Appellant's outstanding Costs Order. The Court maintained their position that the application would be dismissed if costs were not paid prior to the start of trial.
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> 13. Counsel for the Appellant suggested that in the event his client's application was not heard, the outcome would be that child support would remain the same and costs would be payable. The trial judge reminded counsel for the Appellant of the Respondent's Response application which would proceed in any event.
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> 14. The Court reiterated that the Appellant or the Appellant's counsel would still be permitted to cross-examine and challenge the case of the Respondent.
>
> 15. Counsel for the Appellant advised that he had instructions to withdraw his client's application to vary.

[8] We have been provided with a transcript of the December 21st hearing. Mr. MacKinnon appeared without his counsel. The trial judge advised Mr. MacKinnon, as he had been warned previously, that because he had failed to comply with the court's earlier directions, he was precluded from calling evidence but he could cross-examine Ms. Richards and her witnesses in relation to her application. Mr. MacKinnon did not accept the trial judge's offer, instead choosing to leave. As is apparent from the transcript, the trial judge then proceeded to hear the evidence presented by Ms. Richards.

[9] The trial judge dismissed Mr. MacKinnon's application. With respect to Ms. Richards' application to vary, the trial judge addressed the quantum of retroactive child support owing and ordered that ongoing periodic support would terminate as of December 31, 2018. Mr. MacKinnon was ordered to pay the outstanding arrears, calculated at $99,525.49, at the rate of $750.00 per month.

[10] In her written reasons (2019 NSSC 163) the trial judge provided additional background which place Mr. MacKinnon's complaints of error in context. I note the following:

> 3. Mr. MacKinnon failed to file income information in support of his Application from the outset. Despite this, an initial hearing date was set. At the same time, deadlines were set for disclosure and affidavits.
>
> 4. At a subsequent pretrial conference, by which time Mr. MacKinnon had still failed to make disclosure, Ms. Richards advised that, irrespective of what happened with Mr. MacKinnon's Application, she intended to proceed with her application to vary (as contained in her Response). Mr. MacKinnon's counsel was advised to communicate this information to Mr. MacKinnon, who was not present at the pretrial.
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> …
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> 7. New dates were set for December 20 and 21, 2018. Mr. MacKinnon was advised that unless he paid the costs awarded against him by the rescheduled date, his application to vary would not be considered. At a pre-trial conference held just days before the hearing at the request of his counsel, I was advised that Mr. MacKinnon had not paid the costs, nor would he be able to do so before the hearing.
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> 8. Given that information and the fact that financial disclosure was still incomplete, I confirmed that I would not be considering Mr. MacKinnon's variation Application. I also confirmed that Ms. Richards' Application would be heard, and that Mr. MacKinnon's right to participate in that hearing was limited to cross-examination of witnesses and making submissions.
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> …
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> 21. Next, I must look at whether there's blameworthy conduct on Mr. MacKinnon's part. He and Ms. Richards signed a separation agreement in March, 2004 which was incorporated into the C.R.O. issued on June 14, 2005. Mr. MacKinnon subsequently applied (twice) to vary the C.R.O., but he failed to file the appropriate financial information, so his applications were dismissed.
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> 22. Mr. MacKinnon was obliged under the C.R.O. to make annual disclosure of his income information to Ms. Richards, which he failed to do. He also failed to pay increased support when his income increased.
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> 23. Ms. Richards' affidavit recites in great detail the history of collection and enforcement attempts made by M.E.P. She notes that Mr. MacKinnon has made a number of payment arrangements with M.E.P. over the years (usually to have a garnishee lifted) but then he reneged. I accept Ms. Richards' evidence that Mr. MacKinnon has quit jobs through the years when M.E.P. caught up with him.

> 24. To add "salt to the wound", she calculates (from his bank statements which were provided) that in 2012, Mr. MacKinnon spent $1,807.35 at the liquor store, which is more than he paid in child support that year. In 2013, the bank statements show that he paid more for a dog sitter than he paid in child support.
>
> 25. Mr. MacKinnon owes a significant amount of arrears. His failure to pursue two earlier variation applications, his failure to comply with deadlines set by this court, and his failure to pay the costs awarded against him compound his blameworthy conduct.

Issues

[11] In his Notice of Appeal, Mr. MacKinnon sets out his complaint of error as follows:

> The learned trial Justice erred in law by not permitting the appellant, John MacKinnon, to be heard, or any of his witnesses due to the fact that he was unable to pay an award of cost of One thousand dollars ($1,000.00) prior to the scheduled hearing date. That the learned trial Justice heard extensive evidence from the respondent, Denise Richards, and witnesses without any opportunity for the appellant to rebut any of the evidence given.

[12] In his factum, Mr. MacKinnon described the sole issue on appeal as "[w]hether the Trial Judge erred in law by not permitting the Appellant's Participation in his hearing because he was unable to pay costs previously awarded against him."

[13] Having reviewed the record, I am satisfied the trial judge's concern was broader than the outstanding costs order, but also included Mr. MacKinnon's failure to make complete financial disclosure as directed and, in particular, in advance of the hearing. As such, the issue on appeal is better stated as:

> Did the trial judge err in limiting Mr. MacKinnon from calling evidence in the applications before the court due to his failure to pay costs as ordered and to provide complete financial disclosure as required?

Analysis

[14] Before this Court, Mr. MacKinnon launched a two-pronged attack on the trial judge's management of the applications to vary. Firstly, he argues the trial judge did not have the jurisdiction to preclude him from calling evidence due to his failure to pay costs as directed. Secondly, he submits he had filed numerous affidavits in advance of the hearing that had satisfied his disclosure obligations,

which was not recognized by the trial judge. Mr. MacKinnon says the trial judge's errors in this regard gave rise to a denial of natural justice.

[15] Both of Mr. MacKinnon's complaints are easily dismissed. It is categorically incorrect that the trial judge lacked jurisdiction to preclude Mr. MacKinnon from presenting direct evidence at the hearing of the applications and, in particular, because of his failure to pay the costs as ordered. Her source of jurisdiction was two-fold: the *Nova Scotia Civil Procedure Rules* (see Rules 2.02 and 77.02) and the court's inherent jurisdiction to control its own processes. Mr. MacKinnon claims his impecuniosity prevented him from paying the costs. Given that he failed to make a motion under Rule 77.04 for relief in the six months between the costs being ordered and the commencement of the hearing, this argument rings hollow.

[16] Mr. MacKinnon's second prong of attack—that the trial judge was mistaken in finding he had not met his disclosure obligations—is, in my view, a novel argument. It did not appear as a ground of appeal in the Notice of Appeal, rather it was raised for the first time in Mr. MacKinnon's written submissions.

[17] This Court will generally not be easily persuaded to entertain allegations of error raised for the very first time in counsel's written or oral submissions. Even if we were so inclined, the paucity of the materials contained in the Appeal Book make that impossible. Despite wanting to now challenge the trial judge's unequivocal finding that he failed to file all of his required financial disclosure and arguing it was before her by way of numerous affidavits, the Appeal Book does not contain any such reference, nor did he attempt to have this material placed before us for consideration.

[18] Having reviewed the trial judge's written reasons and the record we have been provided, I am of the view that not only did she possess the discretion to preclude Mr. MacKinnon from calling evidence, she exercised it appropriately in the circumstances before her. We have been presented with nothing to support the bald assertion that Mr. MacKinnon had fully met his financial disclosure obligation and the trial judge was wrong in concluding otherwise. It was entirely reasonable, in light of Mr. MacKinnon's failure to follow the direction of the court with respect to costs and making complete financial disclosure (notably his most recent income), for the trial judge to prohibit him from presenting *viva voce* evidence at the hearing. To do otherwise would have placed Ms. Richards at a disadvantage and given Mr. MacKinnon a tactical advantage. The purpose of early and

complete financial disclosure is to avoid such unfair consequences, added expense and unnecessary adjournments.

Disposition

[19] The appeal is dismissed with costs payable to Ms. Richards in the amount of $2,000.00, inclusive of disbursements.

Bourgeois J.A.

Concurred in:

Saunders J.A.

Scanlan J.A.