NOVA SCOTIA COURT OF APPEAL
Citation: *Waterman v. Waterman*, 2014 NSCA 110

Date: 20141211
Docket: CA 422372
Registry: Halifax

Between:

Wayne Waterman

Appellant

v.

Paulette Waterman

Respondent

Judges:	Beveridge, Hamilton, and Bryson, JJ.A.
Appeal Heard:	April 15, 2014, in Halifax, Nova Scotia
Written Release	December 11, 2014
Held:	Appeal allowed without costs, per reasons for judgment of Beveridge, J.A.; Bryson, J.A. concurring; Hamilton, J.A. dissenting
Counsel:	Wayne Waterman, appellant in person, not present C. LouAnn Chiasson, Q.C., for the respondent

Reasons for judgment:

INTRODUCTION

[1] In this case, the apparent desire for quick access to justice to permit uncomplicated amendment of family support orders collides with the fundamental requirement that a party to a proceeding must, absent statutory authority, have a meaningful opportunity to be heard.

[2] The essential facts are relatively simple, and are uncontested. The respondent obtained an order from a judge in Ontario for spousal support. She then moved to Nova Scotia. The appellant filed an application in Ontario under the *Interjurisdictional Support Orders Act*, S.O. 2002, c. 13 to vary the award and for forgiveness of all spousal support arrears.

[3] Officials in Ontario processed the application and sent it to the proper authorities here in Nova Scotia. The documents making up the application were served on the respondent along with notice of a hearing date before the Honourable Justice L. Dellapinna of the Nova Scotia Supreme Court (Family Division).

[4] The respondent retained counsel. Documentation and a brief were filed. The respondent, with counsel, appeared at the hearing before Justice Dellapinna. The appellant did not appear. He was not given any notice by anyone that his application was to be heard on the scheduled date; nor was he given a copy of the materials filed by the respondent that were before the application judge.

[5] Justice Dellapinna dismissed the appellant's variation application, finding that information was missing that would impact on the issue of quantum of support, and the appellant had not met his onus to establish a material change of circumstances since the making of the Ontario order.

[6] The appellant appeals as of right to this Court pursuant to s. 42 of the *Interjurisdictional Support Orders Act*, S.N.S. 2002, c. 2. He advances three grounds of appeal. In essence, they are: the application judge was wrong to find that the applicant had not established a material change in circumstances; if the application judge was hampered by a lack of information supplied by the appellant, he was required by the *Act* to adjourn the hearing and request the desired details; and, that the appellant was denied natural justice.

[7] I find no merit in the first two grounds of appeal. However, I agree with the appellant that the dictates of natural justice were not followed. I would remit the application back to the Nova Scotia Supreme Court (Family Division) for a hearing on proper notice to both parties.

[8] To understand the complaints of the appellant, and my reasons, further details about the history of the proceedings are necessary.

HISTORY OF THE PROCEEDINGS

[9] The appellant and respondent separated in March 2010 after almost 20 years of marriage. At the time of separation, both were living in Ontario. Ms. Waterman, relying on the *Family Law Act*, R.S.O. 1990, c. F.3, applied for spousal support. On October 19, 2010, the Ontario Court of Justice ordered Mr. Waterman to pay spousal support in the amount of $2,050 per month, commencing May 1, 2010. The record does not disclose the evidence that was before the Ontario Court to justify that award.

[10] Ms. Waterman moved to Nova Scotia, and Mr. Waterman continued to live in Ontario. Effective July 1, 2011, 50% of Mr. Waterman's pension was garnisheed.

[11] In accordance with s. 27 of the Ontario *Interjurisdictional Support Orders Act*, Mr. Waterman filed a support variation application with the designated authority in Ontario on January 28, 2013. He sought a reduction in spousal support to $0, and a reduction of the arrears of spousal support to $0 as of April 30, 2012.

[12] The Ontario *Act* and *Regulations* mandate that detailed financial information be included in such an application. The information that should have been included was absent. Nonetheless, the Ontario designated authority processed the application and sent it to the designated authority in Nova Scotia (the Nova Scotia Supreme Court (Family Division)), where it arrived on June 20, 2013.

[13] Ms. Waterman was served with Mr. Waterman's application on August 19, 2013 by an official from the Supreme Court. Ms. Waterman was told she needed to complete the "Respondent's Answer to Application" along with forms concerning her finances, with supporting documents. Legal advice and representation were recommended.

[14] Ms. Waterman was also given notice that the application would be heard on October 1, 2013.

[15] Ms. Waterman retained counsel. The "Respondent's Answer to Application" was filed with the Supreme Court on September 16, 2013, along with some of the required financial documentation. She also filed an Affidavit sworn September 13, 2013 that set out details of her personal circumstances in Nova Scotia as compared to those of the appellant.

[16] Counsel for Ms. Waterman filed a brief with the Supreme Court dated September 26, 2013. The respondent's materials and brief were not sent to the appellant.

[17] On October 1, 2013, Ms. Waterman attended the hearing along with counsel. Mr. Waterman did not attend. He had no notice when and where the hearing was to take place.

[18] The hearing was relatively short. It lasted sixteen minutes. The judge invited counsel for the respondent to make submissions and call the respondent to give evidence. No *viva voce* evidence was heard. Counsel made submissions about the content of the appellant's materials and those of the respondent.

[19] Justice Dellapinna dismissed the variation application, finding that Mr. Waterman had not met his onus to demonstrate a material change of circumstances since the October 2010 Ontario order.

[20] In due course, the appellant received the Order issued November 1, 2013 that dismissed his application. He retained a lawyer in Nova Scotia who launched this appeal. Prior to the hearing of the appeal, counsel for the appellant withdrew. The appellant requested his appeal proceed as scheduled; he would not appear personally or by counsel, but would rely on the factum and authorities already filed.

STANDARD OF REVIEW

[21] The complaints of error advanced by the appellant attract different standards of review. Where a judge makes a decision to award or vary spousal support, he or she is required to make a discretionary decision, balancing a variety of factors and guided by the particular facts of the case at hand. Appellate courts owe deference to such a decision, and will not intervene unless satisfied that the judge erred in

principle, significantly misapprehended the evidence or made an award that is clearly wrong. (See *Hickey v. Hickey*, [1999] 2 S.C.R. 518 at ¶ 10-12; *Saunders v. Saunders*, 2011 NSCA 81 at ¶ 17.)

[22] The second ground of appeal claims an error in law by the application judge in not following the process mandated by the *ISO Act*. Interpreting and complying with statutes are questions of law. These are reviewed on the standard of correctness. (See *B.H. v. Nova Scotia (Minister of Community Services*), 2009 NSCA 67 at ¶ 12.) However, decisions resulting from the application of legal principles or the exercise of judicial discretion are afforded deference. An appeal court has no role to overrule such decisions, absent palpable and overriding error or patent injustice.

[23] The third ground of appeal argues there was a breach of the rules of natural justice or procedural fairness. This is a question of law. Our review does not engage concerns associated with the concept of a standard of review. (See *Bellefontaine v. Slawter*, 2012 NSCA 48 at ¶ 18.) The adjudicator either fulfilled the duty required or did not (See *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12 at ¶ 43; *Nova Scotia (Community Services) v. N.N.M.*, 2008 NSCA 69 at ¶ 39). In other words, either there was a breach of the principles of natural justice, or there was not.

ANALYSIS

Error not to order a change in support

[24] The application judge was required to determine whether the appellant had established on a balance of probabilities that there had been a change in circumstances since the original order was made, and if so, what would be an appropriate quantum for spousal support.

[25] There was conflicting evidence about the appellant's income, and a number of other factors that could impact on the issue of spousal support. Those included, amongst other things, the appellant's ability to earn income and his female partner's income. The application judge concluded that: he was not satisfied that the appellant could not work; his actual current income; and what was his actual ability to pay support in light of his new relationship. The judge expressed his reasons as follows:

> The onus is on Mr. Waterman to show a change in circumstance since the granting of the previous order. That change must be material. For the most part it must be outside of his control. It is his responsibility to provide to this Court proof of his current income. His position is that he can't afford the support payments and cannot return to work. He has not established his current income to my satisfaction and he has not convinced me that he cannot work. The reasonableness of a support payment should not be measured against what he says his income is, but rather against his actual ability to pay, which I can't quantify with the information that he has provided.
>
> I don't know for certain what his real income is. I don't know for certain that he cannot work. I don't know what he could earn if he was to return to work. He is of an age where ordinarily one could expect him to work. I don't know his partner's income. I don't know what she could or should reasonably contribute to their household expenses and therefore I have no way of calculating what Mr. Waterman could reasonably afford to pay to Ms. Waterman.

[26] The appellant does not suggest that the application judge committed any error in principle or significantly misapprehended the evidence. He simply argues that the evidence at the hearing justifies our disagreement with the conclusion of the application judge and obliges us to arrive at a different result. That is not our function. I would not give effect to this ground of appeal.

Failure to follow the ISO Act procedure

[27] The nub of the appellant's argument is that since the application judge thought that he did not have the necessary information to make a variation of the support order, he was required by the *ISO Act* to adjourn the hearing and ask for the information he needed. The appellant relies on s. 36, which provides:

> 36 (1) In dealing with a support-variation application, the Nova Scotia court shall consider
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> (a) the evidence provided to the Nova Scotia court; and
>
> (b) the documents sent from the reciprocating jurisdiction.
>
> (2) Where the Nova Scotia court needs further information or documents from the applicant to consider making a support variation order, the Nova Scotia court shall
>
> (a) send the designated authority a direction to request the information or documents from the applicant or the appropriate authority in the reciprocating jurisdiction; and
>
> (b) adjourn the hearing.

[28] The appellant urges us to interpret s. 36(2) as being a mandatory direction to judges to always adjourn the hearing and request the missing information from the applicant via the designated authority. For this proposition, he cites what he says is the clear direction in s. 9(3) of the *Interpretation Act*, R.S.N.S. 1989, c. 235, which contains the usual provision in Interpretation Acts: "shall" is imperative and "may" is permissive. Hence, he submits that the application judge erred in law in failing to comply with this statutory direction.

[29] With respect, I disagree. Words are not given meaning in a vacuum. The *Interpretation Act* sets out the general principles that guide courts in the interpretative process. It provides:

> 9 (5) Every enactment shall be deemed remedial and interpreted to insure the attainment of its objects by considering among other matters
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> (a) the occasion and necessity for the enactment;
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> (b) the circumstances existing at the time it was passed;
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> (c) the mischief to be remedied;
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> (d) the object to be attained;
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> (e) the former law, including other enactments upon the same or similar subjects;
>
> (f) the consequences of a particular interpretation; and
>
> (g) the history of legislation on the subject.

[30] There is symmetry and harmony between the common law principles of statutory interpretation and statutes such as the *Interpretation Act* (See *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42; *Municipal Enterprises Ltd. v. Nova Scotia (Attorney General)*, 2003 NSCA 10.)

[31] In *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27 the Supreme Court gave clear direction that the starting point for statutory interpretation is the "modern rule" espoused by Professor Driedger. Iacobucci J., for the Court, wrote:

> [21] Although much has been written about the interpretation of legislation (see, e.g., Ruth Sullivan, Statutory Interpretation (1997); Ruth Sullivan, Driedger on the Construction of Statutes (3rd ed. 1994) (hereinafter "Construction of Statutes"); Pierre-André Côté, The Interpretation of Legislation in Canada (2nd ed. 1991)), Elmer Driedger in Construction of Statutes (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:
>
> > Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[32] Iacobucci J., again writing for the Court, in *Bell Express- Vu*, elaborated:

> [26] …Driedger's modern approach has been repeatedly cited by this Court as the preferred approach to statutory interpretation across a wide range of interpretive settings: see, for example, *Stubart Investments Ltd. v. The Queen*, [1984] 1 S.C.R. 536, at p. 578, per Estey J.; *Québec (Communauté urbaine) v. Corp. Notre-Dame de Bon-Secours*, [1994] 3 S.C.R. 3, at p. 17; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21; *R. v. Gladue*, [1999] 1 S.C.R. 688, at para. 25; *R. v. Araujo*, [2000] 2 S.C.R. 992, 2000 SCC 65, at para. 26; *R. v. Sharpe*, [2001] 1 S.C.R. 45, 2001 SCC 2, at para. 33, per McLachlin C.J.; *Chieu v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 84, 2002 SCC 3, at para. 27. I note as well that, in the federal legislative context, this Court's preferred approach is buttressed by s. 12 of the Interpretation Act, R.S.C. 1985, c. I-21, which provides that every enactment "is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects".
>
> [27] The preferred approach recognizes the important role that context must inevitably play when a court construes the written words of a statute: as Professor John Willis incisively noted in his seminal article "Statute Interpretation in a Nutshell" (1938), 16 *Can. Bar Rev*. 1, at p. 6, "words, like people, take their colour from their surroundings". This being the case, where the provision under consideration is found in an Act that is itself a component of a larger statutory scheme, the surroundings that colour the words and the scheme of the Act are more expansive. In such an instance, the application of Driedger's principle gives rise to what was described in *R. v. Ulybel Enterprises Ltd.*, [2001] 2 S.C.R. 867, 2001 SCC 56, at para. 52, as "the principle of interpretation that presumes a

> harmony, coherence, and consistency between statutes dealing with the same subject matter". (See also *Stoddard v. Watson*, [1993] 2 S.C.R. 1069, at p. 1079; *Pointe-Claire (City) v. Quebec (Labour Court)*, [1997] 1 S.C.R. 1015, at para. 61, per Lamer C.J.)

[33] These same principles govern the question whether the use of the seemingly imperative "shall" was meant to be mandatory or merely directive. In *British Columbia (Attorney General) v. Canada (Attorney General)* [1994] 2 S.C.R. 41, Iacubocci J., commented on this issue:

> [148] …the manipulation of mandate and direction is, for the most part, the manipulation of an end and not a means. In this sense, to quote again from Reference re Manitoba Language Rights, supra, the principle is "vague and expedient" (p. 742). **This means that the court which decides what is mandatory, and what is directory, brings no special tools to bear upon the decision. The decision is informed by the usual process of statutory interpretation. But the process perhaps evokes a special concern for "inconvenient" effects, both public and private, which will emanate from the interpretive result.**
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> [Emphasis added]

[34] The Supreme Court, in the subsequent case of *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 S.C.R. 344, affirmed the role that the object of the statute and the consequences play in the interpretative exercise. Gonthier J., for the majority, wrote:

> [42] This raises the question of whether the ss. 51(3) and 51(4) are mandatory or merely directory. Addy J. and Stone J.A. below held that despite the use of the word "shall", the provisions were directory rather than mandatory, relying on *Montreal Street Railway Co. v. Normandin*, [1917] A.C. 170 (P.C.), which summarized the factors relevant to determining whether a statutory direction is mandatory or directory as follows (at p. 175):
>
> > When the provisions of a statute relate to the performance of a public duty and the case is such that to hold null and void acts done in neglect of this duty would work serious general inconvenience, or injustice to persons who have no control over those entrusted with the duty, and at the same time would not promote the main object of the Legislature, it has been the practice to hold such provisions to be directory only . . . .
>
> Addy J. concluded that to read the provisions in a mandatory way would not promote the main object of the legislation, which is to ensure that the sale of the reserve is made pursuant to the wishes of the Band. Stone J.A. agreed. **This Court has since held that the object of the statute, and the effect of ruling one**

> **way or the other, are the most important considerations in determining whether a directive is mandatory or directory:** *British Columbia (Attorney General) v. Canada (Attorney General)*, [1994] 2 S.C.R. 41.
>
> [Emphasis added]

[35] With these principles in mind, I turn to the objectives of the *ISO Act*, and the consequences of the contended for interpretation.

[36] There is little public information about the mischief the *Act* was designed to remedy, and what was hoped to be achieved. As I will show, what information there is points to a desire to streamline the process by generally dispensing with a two hearing process, thereby reducing delays in obtaining and varying support orders. The previous regime was apparently plagued with delay. Provisional support orders were obtained in one jurisdiction; before they would become effective, a second hearing in the reciprocating jurisdiction was needed to confirm the order.

[37] In *Mathers v. Bruce*, 2005 BCCA 410, Smith J.A., commented on the origins and intent of the ISO legislation:

> [4] The *ISO Act* is based on model uniform legislation which was developed by a standing committee of officials from the federal, provincial, and territorial governments for the purpose of facilitating the interjurisdictional recognition, variation, and enforcement of support orders made in family proceedings. It repealed and replaced Part 8 of the *Family Relations Act*, which was entitled "Reciprocal Enforcement of Maintenance Orders".
>
> [5] An important procedural change enacted by the *ISO Act* eliminates the need for two hearings in situations where the reciprocating jurisdictions have both adopted the ISO scheme. Under the old scheme involving the reciprocal enforcement of maintenance orders, a party was required to obtain a provisional order in his or her jurisdiction which would not be effective until it was confirmed at a second hearing in the reciprocating jurisdiction in which the other party resided. Under the ISO scheme, an order made in one jurisdiction is given full faith and credit in the reciprocating jurisdiction and is enforceable immediately upon registration there without the necessity of a confirmation hearing.

[38] The Nova Scotia *Interjurisdictional Support Orders Act* received Royal Assent on May 30, 2002, and came into force on March 31, 2003. The *ISO Act* (s. 61) repealed and replaced the *Maintenance Orders Enforcement Act*, R.S.N.S. 1989, c. 268. Under the old Act, it was necessary to obtain a provisional order in the applicant's jurisdiction and a confirmation order in the respondent's

jurisdiction. As I will discuss later, this remains the basic structure under the *Divorce Act*, R.S.C., 1985, c. 3 (2nd Supp.).

[39] During the legislative process, The Honourable Michael Baker, then Minister of Justice, made similar comments to those of Justice Smith in *Mathers v. Bruce* about the legislative scheme. At the time of the Bill's second reading in the Nova Scotia Legislature, the Minister said:

> This legislation really is about protecting the rights and needs of children. The Interjurisdictional Support Orders Act is designed to streamline the process which recognizes, establishes and enforces support orders in interjurisdictional cases. The legislation is part of a national effort to streamline and simplify the process to obtain and enforce support orders. In fact, all Premiers agreed to adopt this type of legislation at their meeting in British Columbia last summer. We are pleased to fulfill that commitment by bringing forward this bill in this session. This Act was developed by the Federal-Provincial-Territorial Family Law Committee
>
> The uniform legislation is designed to streamline procedures regarding enforcement and to minimize delays in obtaining or varying support orders. In adopting this legislation we follow Manitoba, the Yukon and Ontario. It is our strong understanding that other provinces will follow shortly with their own uniform style legislation. While there is existing legislation in all provinces to deal with reciprocal enforcement, present procedures can sometimes be cumbersome.
>
> In establishing support orders in interjurisdictional cases, a provisional hearing is required. That process may involve a number of court proceedings and a great deal of time and delay. In fact, it has been my experience that the need for multiple proceedings can cause undue delay and hardship to the applicant. The intent of this bill is to streamline the process, dispensing with the need of multiple hearings and making sure that orders are enforceable from other jurisdictions. The welfare of children must be first and in bringing forward this bill we are joining other Canadian provinces in supporting children.
>
> (Nova Scotia, House of Assembly, Hansard, 58th Assembly, 2nd Sess., (7 May, 2002) at 9717.)

[40] Each Canadian province and territory, except for Quebec, has enacted an *ISO Act*, and the ISO statutes in each province are very similar. The ISO regime only applies where one of the spouses lives in a "reciprocating jurisdiction". The *Interjurisdictional Support Orders Regulations*, N.S. Reg. 73/2003 as am. ("the *ISO Regulations*"), lists the reciprocating jurisdictions for the purposes of the Nova Scotia *ISO Act*. These include all Canadian provinces and territories and several countries, including the United States, the United Kingdom and Germany.

[41] In its relatively short existence, the ISO regime has not been warmly endorsed by the judiciary who must grapple with the problems that seem to be inherent in these applications. Apparently once an applicant fills out the basic legislative forms to commence the process, the application is simply sent on to the reciprocating jurisdiction to deal with as best they can.

[42] There does not appear to be any specific duty on the designated authority in the originating jurisdiction to examine or vet the applications for substance before they are forwarded to the reciprocating jurisdiction. For example, the Ontario *ISO Act*, S.O. 2002, c. 13 states, in part:

> **Submission of application to designated authority**
>
> 28. (1) The applicant shall submit the support variation application to the designated authority in Ontario. 2002, c. 13, s. 28 (1).
>
> **Duty of designated authority**
>
> (2) On receiving a support variation application, the designated authority shall promptly,
>
> (a) review the application to ensure that it is complete; and
>
> (b) send a copy of the completed application to the appropriate authority in the reciprocating jurisdiction in which the applicant believes the respondent ordinarily resides. 2002, c. 13, s. 28 (2).
>
> **Further information or documents**
>
> (3) On receiving a request for further information or documents from a reciprocating jurisdiction under an enactment in that jurisdiction that corresponds to clause 34 (2) (a), the applicant or the designated authority shall provide the further information or documents, within the time referred to in the request and in accordance with the regulations. 2002, c. 13, s. 28 (3).

[43] This wording is very similar to the wording in s. 30 of the Nova Scotia *ISO Act*. The only obligation on the designated authority in Ontario before sending it to Nova Scotia is to "review the application to ensure that it is complete." This phrase has never been interpreted by a court. It likely means that the authority should determine if the application meets the requirements as defined by the legislation, which in the case of Ontario, are set out in s. 27 of their *Act*:

> **Support variation application**
>
> 27. (1) An applicant who ordinarily resides in Ontario and believes that the respondent ordinarily resides in a reciprocating jurisdiction may start a proceeding

in Ontario that could result in a variation order being made in the reciprocating jurisdiction. 2002, c. 13, s. 27 (1).

Same

(2) To start the proceeding, the applicant shall complete a support variation application that includes,

(a) the applicant's name and address for service;

(b) a copy of the support order;

(c) a copy of the specific statutory or other legal authority on which the application is based, unless the applicant is relying on the law of the jurisdiction where the respondent ordinarily resides;

(d) details of the variation applied for, which may include a termination of the support order; and

(e) the affidavit described in subsection (3). 2002, c. 13, s. 27 (2).

Affidavit

(3) The affidavit shall set out,

(a) the respondent's name and any information known to the applicant that can be used to locate or identify the respondent;

(b) the respondent's financial circumstances, to the extent known by the applicant, including whether the respondent is receiving social assistance;

(c) whether the support order was assigned, and any details of the assignment known to the applicant;

(d) the name of each person, to the extent known by the applicant, for whom support is payable or who would be affected by the variation;

(e) the evidence in support of the application, including,

(i) if support to the applicant or respondent is an issue, information about their relationship, and

(ii) if the variation would affect support for a child, information about the child's financial and other circumstances, including any extraordinary expenses;

(f) the prescribed information about the applicant's financial circumstances; and

(g) any other prescribed information. 2002, c. 13, s. 27 (3).[1]

[44] Once received in Nova Scotia, there is no mandated vetting or review. The clerk of the court is directed to serve the support variation application on the

[1] The corresponding section in Nova Scotia's *ISO Act* is s. 29.

respondent, in accordance with the regulations, and give notice of the hearing date, and the information that the respondent is to supply to the court. Section 35 of the *ISO Act* provides:

> **Notice of hearing**
>
> 35 When the Nova Scotia court receives a support-variation application under Section 34, the clerk shall serve on the respondent, in accordance with the regulations,
>
> a) a copy of the support-variation application; and
>
> (b) a notice requiring the respondent to appear at a place and time set out in the notice and to provide the prescribed information or documents. 2002, c. 9, s. 35.

[45] The *Interjurisdictional Support Orders Regulations* describe how service is to be effected. Regulation 8(1) provides: "For the purposes of subsections 10(1) and 34(1) and Section 35 of the *Act*, service on a respondent may be by personal service or by regular or registered mail to the respondent's last known address".

[46] Regulation 9 sets out the details that the respondent is required to provide to the court.

[47] I do not see anything in the object, structure or language of the *ISO Act* that points to an imposition of a mandatory obligation on a Nova Scotia judge to seek further information or documents that he or she may feel are necessary to "consider making a support variation order." If the parties to the proceedings have complied with the legislative scheme, and if the designated authority has reviewed the application to ensure it is complete, the judge should have all of the basic information required.

[48] To interpret s. 36(2) as mandatory, in the sense suggested by the appellant, risks turning the judge into an advocate for the applicant. He or she would no longer fill the role of an independent and impartial arbitrator of the dispute being heard. Instead, after combing through the applicant's materials, the judge must determine if there are missing documents or materials from the applicant, adjourn the hearing and request the designated authority obtain them from the applicant. As Justice Pazarataz observed in *Dale v. Lockley*, 2014 ONSC 1402 (at ¶ 21):

> I could adjourn the hearing to a specified date without making a temporary support order. I see no purpose in simply adjourning the matter. If it returns to court with the same paucity of evidence, nothing will have been accomplished.

> And, as stated, it is not my place to provide either party with legal advice or a checklist of additional evidence they might wish to present.

[49] Sometimes a judge may not even know if he or she needs further information or documents. Assume the following hypothetical: both the application and answer are complete. The respondent attends the hearing and gives *viva voce* evidence that the information about the applicant's income is seriously misstated—his income is actually double what he has claimed. The applicant does not attend as he has no notice of the hearing. The respondent's testimony is untested by cross-examination. Leaving aside the natural justice concerns, does the judge need further information? Is he or she obliged to seek further information or documentation?

[50] Requests for further information or documents instigated by the judge has at least the potential for unfairness to one or perhaps both of the parties, and detracts from the courts dealing with interjurisdictional applications with the minimum of delay. In *M.I. v. A.T.*, 2004 BCPC 391, Davis Prov. Ct. J., referred to some of these difficulties:

> [8] Section 10(2) provides:
>
> > (2) If the British Columbia court needs further information or documents from the claimant to consider making a support order, that court
> >
> > > (a) must direct the designated authority to contact the claimant or the appropriate authority in the reciprocating jurisdiction to request the information or documents,
> > >
> > > (b) must adjourn the hearing, and
> > >
> > > (c) may make an interim support order.
>
> [9] The difficulty with applying s. 10 is when this matter (and the others) come before me I am at a loss to determine if I need further information or documentation. When the Respondent says something that appears to put the lie to what the Applicant set out in the affidavit or material or information or documentation, at the end of the Respondent's case, am I to send for more documents and information (s. 10(2)(a))? This no doubt could be kept going until finally I say, "Aha! They've got you now." That seems to me to simply be unfair.

[51] In my opinion, there are pragmatic and juristic concerns that militate against a mandatory obligation. These are helpfully canvassed in *Leduc v. Leduc*, 2013 BCSC 78.

[52] In that case, Justice McEwan was scheduled to hear an application to vary a support obligation. He refused to do so without the applicant making an appearance.

[53] The application materials were deficient. The respondent attended court. Rather than take on the task of pointing out the deficiencies and requesting the missing information or documents, McEwan J. declined to hear the matter unless the applicant attended to present his case in open court.

[54] In the course of giving reasons for his refusal, Justice McEwan pointed out the pragmatic and juristic drawbacks to doing what the appellant here argues the application judge is obliged to do. Amongst other things, he explained his concerns as follows:

> [13] The reason people attend court is that the judicial branch of government is a public forum, that is, a *place* of audience, and its in-person characteristic underlies everything judges do. Even those processes that may be heard without viva voce evidence take place in a context where it is possible for the court to insist upon it. Where evidence is not given orally but by affidavit, the court still requires the party or counsel to speak in person to the matters they have brought to court.
>
> [14] Appearances ensure the bedrock principle of openness and the elemental accountability of the parties to each other and to the court, and keep the responsibilities of each of the participants clear and distinct. They also govern the way the court allocates its time and priorities. The work of the court is entirely taken up with what begins in the courtroom and ends with the preparation of reasons consequential upon what has occurred there. The only class of work performed by judges out of court is so-called "desk orders". These are uncontested matters granted as of right to those who fulfil the necessary requirements. Trained personnel assess compliance, freeing judges from the clerical aspect of the work, and maximizing the time available to preside in court. This matters because the court's capacity to meet its adjudicative responsibilities is already strained by the demands on its time.
>
> [15] It is simply not possible to accommodate a mail-in stream of files requiring judicial investigation (often, as in Walker, fruitlessly), even if the practice were otherwise unobjectionable. As it is, any upward delegation of clerical or preparatory work or research to the judiciary to avoid spending money on trained staff or lawyers can only come at the expense of time that should be devoted to the things *only* judges can do.

[55] From a jurisprudential point of view, he wrote:

> [29] Assuming a respondent attends court, there are essentially two ways a "hearing" can go. The court can try to preserve the vestige of an open process and an open mind by reading the material only in the presence of the respondent, and then asking him or her what he or she has to say, a rather time wasteful exercise in weighing confusing and unverifiable material against the viva voce presence of the respondent. This is thoroughly asymmetrical, and inevitably appears to reverse the onus of proof by calling the respondent to account for himself or herself based on the assertions of a person who has not borne the risk of attending.
>
> [30] The other alternative is worse. If the court actually behaves as the legislation anticipates, and reviews the material ahead of time, pointing out any deficiencies and offering advice to the applicant (through the Designated Authority) before confronting the other party, it becomes fully implicated in the applicant's case.
>
> [31] It is difficult to imagine how a court could maintain an appearance of impartiality either way. The court inevitably appears to have preconceptions based on its enlistment by the government as the legal advisor and researcher for the applicant, whose material apparently goes without saying.

[56] Justice McEwan was clear that he had no issue with the substantive content of the ISO legislation. His concern was over how the statute purports to direct the court on its role in adjudicating the applications. He summed up his concern:

> [50]… It enlists the court in the role of counsel and purports to oblige the court to conduct an asymmetrical proceeding, giving the appearance of pre-judgment, and of the application of different standards to the parties. It appears to effectively reverse the onus, and, in any practical sense, relieves the applicant of the responsibilities ordinarily imposed on litigants. It directly interferes with the court's adjudicative role in a manner that does not respect the court's independence or its responsibility to ensure impartiality, in appearance and in fact.

[57] I would share the pragmatic and jurisprudential concerns identified by McEwan J. if s. 36(2) were to be interpreted to impose on the application judge a duty to assess an applicant's case, hear from the respondent in the absence of the applicant, and essentially be required to patch up the problems he or she, with or without the assistance of the respondent, finds in the application.

[58] The object of the legislation would not be served by the rote application of the grammatical meaning of "shall" without regard to the consequences of such an interpretation. To do so, as pointed out by McEwan J., would amount to a significant and radical change to how judges adjudicate disputes. There is nothing in the background, structure or wording of the *Act* that points to an intention by the legislature to do so. I would not adopt such an interpretation.

[59] This interpretative issue was addressed in *Hann v. King*, 2013 NLTD (G) 62. The Ontario designated authority forwarded to Newfoundland an application for forgiveness of child support arrears. The application was served on the respondent who appeared and disputed a number of the facts contained in the applicant's materials. Stack J. heard the application.

[60] After reviewing the applicant's materials, Justice Stack concluded that it was possible that the applicant may be entitled to some relief from the arrears of child support, but that the necessary documents were missing from the applicant's materials to properly adjudicate the matter. Justice Stack identified the same issue: is the direction in s. 31(2) of the Newfoundland *ISO Act* (S.N.L. 2002, c. I-19.2) mandatory or directory? He found it was not mandatory, and dismissed the application pursuant to s. 33 of their *Act* (s. 38 of the Nova Scotia *ISO Act*).

[61] In my opinion, s. 36(2) of the Nova Scotia *ISO Act* gives an application judge the discretion to request further information or documents. There may be any number of cases where the circumstances may justify the judge, without any compromise of judicial impartiality, to do so. But it should not be seen as the mandated process for the Court to cure deficient applications to vary outstanding support obligations.

[62] I would therefore not give effect to this ground of appeal.

Denial of Natural Justice

[63] Natural justice has two important and distinct rules: an adjudicator must be impartial, and the parties must have adequate notice, and an opportunity to be heard. These rules have been historically described by the courts using Latin phrases. Gonthier J., in *Consolidated-Bathurst Packaging Ltd v. International Woodworkers of America, Local 2-69*, [1990] 1 S.C.R. 282, described the rules as follows:

> [66] …It has often been said that these rules can be separated in two categories, namely "that an adjudicator be disinterested and unbiased (*nemo judex in causa sua*) and that the parties be given adequate notice and opportunity to be heard (*audi alteram partem*)

[64] It is the absence of notice and the opportunity to be heard that the appellant asserts as the flaw that tainted the process in this case. The respondent does not

dispute that there was no notice given to the appellant, and he had no opportunity to be heard.

[65] Her position is that the appellant had other alternatives he could have pursued in his desire to change his support obligations where notice would be afforded; and since there is no notice of a constitutional challenge to the *ISO Act*, the issue is not properly before this Court. The respondent puts her argument as follows:

> 45. The Appellant did not choose to proceed by way of the *Divorce Act*, he chose to proceed by way of the *ISOA*. He cannot now complain that he was not notified of the hearing or given a chance to participate. Had the Appellant wished to avail himself of those procedures, it was open to him to apply to vary the order by way of the Divorce Act.
>
> 46. The Respondent submits that the Appellant has not properly raised the issue of whether the *ISOA* legislation is in accordance with the Constitution and, therefore, this issue ought to be disregarded. In the alternative, the Respondent submits that it was open to the Appellant to choose another procedure if he wished to be notified of the hearing and to participate in it.

[66] With respect, I am not persuaded by either of these contentions. At the time of the application to vary, there were no proceedings under the *Divorce Act* extant. The fact that the appellant could have started proceedings under that *Act* (or some other) is not relevant to the issue of whether he was denied natural justice in the proceedings that did take place under the *ISO Act*.

[67] Nor do I see the relevance of the absence of a constitutional challenge. Although not argued, I will take it as implicit in the respondent's suggestion that the ISO legislation does authorize a departure from the usual norms of the *audi alteram partem* rule. Hence, the respondent suggests, that absent a properly framed and successful constitutional challenge, the procedure authorized by the legislation must be respected.

[68] It is settled law that *audi alteram partem* is a common law rule. Legislation can exclude the normal presumed operation of such rules—provided of course the legislation is not found to impermissibly infringe rights guaranteed by the *Canadian Charter of Rights and Freedoms*. There is no suggestion of infringement of *Charter* rights in this case.

[69] The real issue that confronts this Court is whether the ISO legislative scheme authorized the application judge to hold a hearing without notice and a meaningful opportunity for the appellant to be heard.

[70] Before examining the legislative scheme in more detail, it is useful to be clear about the principles that inform the inquiry as to what is needed to oust the rules of natural justice. The normal operation and scope of these rules can only be ousted by constitutionally valid legislation containing express language or by necessary implication. In *Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch)*, [2001] 2 S.C.R. 781, Chief Justice McLachlin, when dealing with a claim that the legislation supported a lack of independence for tribunal members, wrote:

> [21] Confronted with silent or ambiguous legislation, courts generally infer that Parliament or the legislature intended the tribunal's process to comport with principles of natural justice: *Minister of National Revenue v. Coopers and Lybrand*, [1979] 1 S.C.R. 495, at p. 503; *Law Society of Upper Canada v. French*, [1975] 2 S.C.R. 767, at pp. 783-84. In such circumstances, administrative tribunals may be bound by the requirement of an independent and impartial decision maker, one of the fundamental principles of natural justice: *Matsqui, supra* (*per* Lamer C.J. and Sopinka J.); *Régie, supra*, at para. 39; *Katz v. Vancouver Stock Exchange*, [1996] 3 S.C.R. 405. Indeed, courts will not lightly assume that legislators intended to enact procedures that run contrary to this principle, although the precise standard of independence required will depend "on all the circumstances, and in particular on the language of the statute under which the agency acts, the nature of the task it performs and the type of decision it is required to make": *Régie*, at para. 39.
>
> [22] **However, like all principles of natural justice, the degree of independence required of tribunal members may be ousted by express statutory language or necessary implication**. See generally: *Innisfil (Corporation of the Township of) v. Corporation of the Township of Vespra*, [1981] 2 S.C.R. 145; *Brosseau v. Alberta Securities Commission*, [1989] 1 S.C.R. 301; *Ringrose v. College of Physicians and Surgeons* (Alberta), [1977] 1 S.C.R. 814; *Kane v. Board of Governors of the University of British Columbia*, [1980] 1 S.C.R. 1105. Ultimately, it is Parliament or the legislature that determines the nature of a tribunal's relationship to the executive. **It is not open to a court to apply a common law rule in the face of clear statutory direction. Courts engaged in judicial review of administrative decisions must defer to the legislator's intention in assessing the degree of independence required of the tribunal in question.**
>
> [Emphasis added]

[71] In this case, we are not considering an administrative tribunal but a court which held a hearing to determine the obligations of the applicant. Ordinarily, concerns about the rules of natural justice and procedural fairness are canvassed in administrative law cases. However, courts cannot be any less bound, absent legislative sanction, to comply with those tenets.

[72] This was emphasized by L'Heureux-Dube J. in *A.(L.L.) v. B.(A.)*, [1995] 4 S.C.R. 536[2] :

> [27] The one question that remains is whether both a complainant, a third party to the proceedings (whether or not an appellant, but here one of the appellants), and the Crown, a party to the proceedings, have standing in third party appeals. There is no doubt in my mind that they do. **The *audi alteram partem* principle, which is a rule of natural justice and one of the tenets of our legal system, requires that courts provide an opportunity to be heard to those who will be affected by the decisions.** The rules of natural justice or of procedural fairness are most often discussed in the context of judicial review of the decisions of administrative bodies, but they were originally developed in the criminal law context. In *Blackstone's Criminal Practice* (Murphy rev. 1993), the authors remark at p. 1529:
>
> > Traditionally, the rules of natural justice have been defined with a little more precision, and are said to involve two main principles - no man may be a judge in his own cause, and the tribunal must hear both sides of the case.
>
> [Bolded emphasis added; underlined emphasis in original]

[73] Procedural fairness is equally important in the family law context (see: *Bellfontaine v. Slawter, supra*; *Ferrara v. Trafford* (1987), 7 R.F.L. (3d) 151 (N.B.C.A.)). Its requirements may be influenced by the need to keep the best interests of the children paramount (see: *Bellefontaine* at ¶ 23-28).

[74] In this case, there were no children involved. The court held a hearing where the applicant had no opportunity to be heard, or even respond to what the respondent had filed with the court. What is there in the legislative scheme that would allow such a departure from the *audi alteram partem* rule?

[75] As *Ocean Port* directs, we must look to see if there is "express statutory language or necessary implication."

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[2] The companion case of *R. v. O'Connor*, [1995] 4 S.C.R. 411.

[76] The *Nova Scotia Civil Procedure Rules* offers no assistance. Rule 59.57 provides:

> **Proceedings under the Interjurisdictional Support Orders Act**
>
> 59.57 An application for a support order or a provisional order, including a variation order, under the *Interjurisdictional Support Orders Act* is made under the provisions of the Act and its regulations, including provisions about forms, notices, delivery or service of documents, disclosure from the respondent, evidence, proceedings, and orders.

[77] The *ISO Act* and *Regulations* therefore appear to comprise the entire legislative framework for ISO proceedings. I have earlier set out (at ¶ 44) the sole section of the *Act* (s. 35) that refers to what is to happen when the support variation application arrives in Nova Scotia.

[78] The clerk is to serve it on the respondent along with a notice requiring an appearance at a hearing, and to provide prescribed information or documentation. I also earlier (at ¶ 45, 46) identified the two regulations (ss. 8(1) and 9) that describe how service is to be effected on the respondent and the details he or she is to provide.

[79] The conclusion is inevitable: the *ISO Act* and *Regulations* are silent about if, when, and how, notice of the hearing and a copy of the respondent's materials are to be provided to the applicant.

[80] It is not as if the drafters were unaware of the need to excuse what might be seen as departures from the *audi alteram partem* rule. Two other sections in the *Act* specifically state that notice to the other party is not required - an applicant living in Nova Scotia commencing an initial application for support does not have to give notice to a respondent that he or she has started a proceeding (s.6 (3)). Neither does an applicant in Nova Scotia commencing an application to vary support (s. 29(4)).

[81] Moreover, where a claimant seeks to enforce an order made in a reciprocating jurisdiction that is outside Canada, it cannot be enforced against a party in Nova Scotia until notice is given to that party (s. 19(3)). If that party brings an application to resist enforcement by setting aside its registration in Nova Scotia, he or she must give notice to the designated authority in Nova Scotia and to the claimant of his application. On the hearing of that application, the Nova Scotia court can set aside the registration if it determines, amongst other grounds, that a

party to the order did not have proper notice or a reasonable opportunity to be heard (s. 20(3), (4)).

[82] If the Legislature intended to exclude one of the basic tenets of our legal system on an application to vary a support obligation, it would have been a simple matter for it to have done so.

[83] The parties submitted no cases that have directly addressed the issue of whether the ISO legislative scheme authorizes the hearing of a support variation application without notice to the applicant.

[84] However, it is instructive to compare the ISO procedure in Nova Scotia to the one in Ontario. In Nova Scotia, there is an oral hearing. In Ontario, absent a court order, the application is determined on the basis of the written documents filed by the applicant and respondent.

[85] Rule 37(7) of the Ontario *Family Law Rules* prescribes that "unless the court orders otherwise under subrule (9), the application shall be dealt with on the basis of written documents without the parties or their lawyers needing to come to court." Subrule (9) provides that the court may order an oral hearing on its own initiative or on the respondent's motion "if it is satisfied that an oral hearing is necessary to deal with the case justly."

[86] The Ontario scheme was examined in *Whelan v. O'Connor*, [2005] O.J. No. 5659 (Ont. S.C.J.). The applicant lived in Newfoundland with his two children. He sought retroactive and ongoing child support from the respondent, then living in Ottawa. The respondent filed materials. The Court directed a hearing be held. Counsel for the applicant appeared at the hearing. He cross-examined the respondent. The hearing was adjourned. On the return date, the respondent objected that the applicant ought not to be allowed to participate in the ISO hearing in Ontario because it was supposed to be a summary procedure—his rights were limited to filing his original application, and any additional information requested of him.

[87] Mackinnon J. rejected the respondent's objection on the basis that it would be a breach of natural justice if the applicant were not able to participate. She reasoned:

> [7] The Applicant submits that where the court has invited an oral hearing, then the Applicant must have standing to appear and to participate, in person or

> through counsel. I agree. This Court is clearly exercising adjudicative powers under ISO, including the ascertainment of facts, applying the law to the facts and making a decision which is binding upon the parties. As stated by Blair J.A. in *Re Downing and Graydon et al.* (1978), 92 D.L.R. (3d) 355 (Ont. C.A.) (QL), there are "specific and well established requirements of natural justice which govern the exercise of judicial powers". One such requirement is the rule *audi alteram partem*. Justice Blair goes on to state at p. 13:
>
> > *Audi alteram partem* is a pervading principle of our law, and is peculiarly applicable to the interpretation of statutes which delegate judicial action in any form to inferior tribunals: in making decisions of a judicial nature they must hear both sides, and there is nothing in the statute here qualifying the application of that principle.
> >
> > The authorities establish that the appellant was not only entitled to a full and fair opportunity to make out her own case but also to know the case against her and to meet and refute that case. In order to do so, she should have been informed of the information, on which the adverse decision was to be based, and have been given a fair opportunity to correct or contradict any which was unfavourable to her position: see *Re Knapman and Board of Health for Township of Saltfleet*, [1954] O.R. 360 at pp. 371-3, [1954] 3 D.L.R. 760 at pp. 770-2; affirmed [1955] O.W.N. 615, [1955] 3 D.L.R. 248 (C.A.); affirmed [1956] S.C.R. 877, 6 D.L.R. (2d) 81.
> >
> > ... **An express and unmistakable statement by the Legislature would be required before the exclusion of such a fundamental and deeply rooted concept as the right to be heard could be presumed**.
> >
> > [Emphasis added]

[88] Justice Mackinnon concluded that when an oral hearing takes place, the applicant may attend, be represented by a lawyer, and participate by cross-examination and make submissions (¶ 11).

[89] By way of *obiter dicta*, Mackinnon J. commented on the issue of entitlement to notice. She wrote:

> [15] In the case at bar, the Applicant became aware of the hearing and appeared through counsel. The issue of entitlement to notice was not raised or argued before me. It seems to me that notice should be given, in order to give effect to the statement by Blair J.A. in *Re Downing, supra*, quoted earlier in these reasons at para. 7. An Applicant would not be in a position to know, meet or refute the case against him or her, without prior notice of an oral hearing. However, this issue was not raised before me and these comments remain *obiter dicta*.

[90] I agree. An applicant has the right to know when and where the application is to be heard, and the opportunity to fully participate at that hearing. In Nova Scotia, there is no express statutory language that directs notice need not be given to the applicant, nor authorizing the Court to hear and determine the rights of the parties in the absence of an opportunity for the applicant to know of the case against him and respond.

[91] Nor, in my view, does the legislation by "necessary implication" exclude the provision of notice, and an opportunity for the applicant to be heard. In *Sullivan on the Construction of Statutes*, 5th ed. (Markham, ON: LexisNexis Canada, 2008), Ruth Sullivan describes the concept of necessary implication in this manner (at p. 183):

> Legislative silence with respect to a matter does not necessarily amount to a gap in the legislative scheme. A gap is a 'true' gap only if it [sic] the legislature's intention with respect to the matter cannot be established by necessary implication. **An intention is necessarily implied if (1) it can be established using ordinary interpretation techniques and (2) the implication is essential to make sense of the legislation or to implement its scheme**.
>
> [Emphasis added]

[92] This suggests that necessary implication comprises a two-part test. We must first determine that the Legislature's intention to oust the *audi alteram partem* principle in the *ISO Act* is necessarily implied using ordinary interpretation techniques. If so, that the implication is essential to make sense of the legislation or to implement its scheme.

[93] The respondent did not suggest, and I do not see how ordinary interpretative techniques imply, that the Legislature intended to exclude *audi alteram partem*. The converse is the case. The Legislature deliberately took the necessary steps to ensure that the requirements of that rule were excluded in certain circumstances, and provide relief from compliance with an order obtained in violation of it. If the Legislature intended to provide for a hearing at which the rights of the applicant were to be determined without notice or participation, surely it would have also done so.

[94] Furthermore, from what we can discern from the legislative scheme, it is not necessary to exclude *audi alteram partem* for the legislation to make sense, nor would the scheme be frustrated by the applicant having notice of the hearing and an opportunity to know, and respond to the case against him or her. It would be up

to the applicant to decide if he or she wished to attend - via video conference, in person, or by counsel.

[95] To vary an existing support order made in Canada under the ISO legislation, there is no provisional hearing in one jurisdiction which is not effective until confirmed. The one hearing in the reciprocating jurisdiction is a final determination of the support variation application. The giving of notice and an opportunity to be heard does not change or necessarily frustrate that process.

[96] Although not determinative, I am reinforced in my view by reference to the procedure for varying support obligations under the *Divorce Act*. The process is more fully described by the Prince Edward Island Court of Appeal in *R.Z. v. D.Z.*, 2013 PECA 2 at ¶ 26-30. For our purposes, it is sufficient to note that the applicant can bring an application in his or her province of residence. The respondent, who lives elsewhere, need not submit to the court's jurisdiction. In which case, the most relief the applicant can obtain is a provisional order, which must then be confirmed by the court in the province where the respondent lives. The respondent knows that he or she will have a full opportunity to respond at the confirmation hearing to the provisional support variation order.

[97] The *Divorce Act*, like the ISO legislation, provides that notice of the confirmation hearing must be served on the respondent. It goes on to say that the court "shall proceed with the hearing in the absence of the applicant". This clearly implies that notice need not be given to the applicant.

[98] Section 19(2) of the *Divorce Act* reads as follows:

> 2) Subject to subsection (3), where documents have been sent to a court pursuant to subsection (1), **the court shall serve on the respondent a copy of the documents and a notice of a hearing respecting confirmation of the provisional order and shall proceed with the hearing, in the absence of the applicant**, taking into consideration the certified or sworn document setting out or summarizing the evidence given to the court that made the provisional order.
>
> [Emphasis added]

[99] In *Albinet v. Albinet*, 2003 MBCA 22 the husband lived in British Columbia, and the wife in Manitoba. The husband applied in British Columbia for a variation of child support due to a claimed change in circumstances. The British Columbia court made a provisional order cancelling arrears and relieving him of his obligation to provide support.

[100] The documents and evidence from the provisional hearing were duly forwarded to Manitoba for confirmation of the provisional order. Counsel for the husband prepared additional affidavit evidence, and served it on the wife. He attended the confirmation hearing in an attempt to have the information in the affidavit introduced, and to make submissions.

[101] The motions court judge, relying on the language in s. 19(2), refused the applicant or his counsel standing at the hearing. The provisional order was varied at the confirmation hearing. The applicant appealed, claiming the judge erred in law in declining him the opportunity to participate. The Court of Appeal unanimously agreed.

[102] Steel J.A., for the Court, referred to a number of trial level decisions that had concluded that a party to litigation should always be allowed to have his or her day in court, absent explicit language denying that right. She concluded:

> [20] I agree with the interpretation of s. 19(2) adopted in these cases. The provisional hearing and the confirmation hearing are fundamentally different. Rights are not affected by the provisional order, but they are by the confirmation order. **Therefore, the principles of natural justice, while always important, are especially so in the confirmation hearing, and the applicant should be allowed standing unless the language of the statute explicitly prohibits it.**
>
> [21] **The language in s. 19(2) does not explicitly prohibit it, but, rather, is permissive**. It allows the hearing to proceed in the absence of the applicant in order to fulfil the function of that section, which is to provide relief to litigants separated by distance who, for a variety of reasons, cannot or choose not to take advantage of s. 17.1. There is no reason to prevent an applicant from being heard on a confirmation hearing if he or she becomes aware of it and chooses to appear. An obvious advantage of hearing the applicant on a confirmation hearing is that it might well eliminate the necessity of referring the matter back to the court that made the provisional order for further evidence.
>
> [Emphasis added]

[103] Steel J.A. was careful to point out that the Court was not dealing with the issue of notice to the applicant or service of documents before the confirmation hearing could proceed (¶ 22).

[104] The converse was the subject of dispute in *Haig v. Whitmore*, 2012 ABQB 343. That is, a claimed lack of fairness in the initial process where the applicant obtains a provisional order. Ms. Haig learned that the respondent had enjoyed a drastic increase in his income. She successfully applied for a provisional order in

Ontario for retroactive child support. At the confirmation hearing in Alberta, the respondent argued the provisional order process in Ontario was flawed and unconstitutional because it violated the requirements of natural justice. Yamauchi J. dismissed the argument, reasoning:

> [15] The whole purpose of the *Divorce Act* provisions and those of the *Interjurisdictional Support Orders Act* of the various provinces are to inject an element of fairness into the process. For example, if, in this case, Kelly, J. could make a final order in Whitmore's absence, knowing that he resides in Alberta and has not received notice of the proceedings, he would have a better argument that he has been denied due process. However, Kelly, J.'s decision is provisional only; not final. Furthermore, the provisions in the *Divorce Act* are intended to be fair to a respondent because it does not "force" the respondent to return to the original jurisdiction. He has the right to await the results of the applicant's application, and then make his arguments in his home jurisdiction. To force him to accede to the Applicant's jurisdiction would be unfair. The respondent is not bound by any provisional order unless the respondent's home jurisdiction's court makes such an order after it gives the respondent a chance to make his case. This is what has happened in this case.

[105] Interestingly, Ms. Haig, the applicant from Ontario, was able to participate at the confirmation hearing in Alberta. She submitted supplementary affidavit evidence and her counsel made submissions via telephone to Justice Yamauchi.

[106] But in the case at bar, the applicant had no notice of the hearing in Nova Scotia, no opportunity to participate, nor any opportunity to respond to the respondent's submissions, either orally or in writing. As discussed earlier, this was not a provisional hearing, but a final hearing at which his application to vary would be determined. With respect, the process, absent statutory authority, was flawed.

[107] The respondent did not argue that if a breach of natural justice occurred, it was a harmless error. I decline to speculate as to what the outcome might have been had the appellant been afforded the usual guarantees of procedural fairness covered by the tenets of *audi alteram partem*.

[108] I would quash the order of the application judge and remit the appellant's application for determination before a different judge upon proper notice to both the appellant and respondent. Proper notice includes the date, time, and location of the hearing, along with a copy of any additional materials submitted to the court.

[109] Nothing in these reasons should be taken as precluding the appellant and respondent from submitting up to date information and documentation to the application judge.

[110] In the circumstances, there will be no order as to costs.

Beveridge, J.A.

Concurred in:

Bryson, J.A.

Hamilton, J.A.'s Dissenting Reasons:

[111] I am fortunate to have had the opportunity to read the reasons of Justice Beveridge. I agree with him that the first two grounds of appeal should be dismissed but disagree with his conclusion that when a court has a hearing in response to an application under the *ISO Act* from an applicant in another jurisdiction, the applicant must be given notice of the hearing and of the respondent's materials.

[112] In ¶ 70 of his reasons, Justice Beveridge sets out a quote from Chief Justice McLachlin in *Ocean Port*. The Chief Justice states: "It is not open to a court to apply a common law rule in the face of clear statutory direction ." The rule of procedural fairness that the applicant should be given notice of the hearing and of the respondent's materials, are such common law rules. It is only when faced with silent or ambiguous legislation that a court is to infer that the Legislature intended the process provided for in the statute to comport with principles of natural justice, ¶ 21 *Ocean Port*.

[113] The intention of the Legislature when it introduced the *ISO Act* was to implement the model uniform legislation that had been developed by a standing committee of officials from the federal, provincial, and territorial governments for the purpose of facilitating the interjurisdictional recognition, variation and enforcement of support orders made in family proceedings. It was part of a nationwide effort, with similar legislation enacted across the country except in Quebec. Its object was to reduce the delay that arose from the procedures in place at that time.

[114] The *ISO Act* provides, for variation applications made in another province and forwarded to Nova Scotia:

> **Variation application from another jurisdiction**
>
> **34 (1)** Where the designated authority receives a support-variation application from an appropriate authority in a reciprocating jurisdiction with information that the respondent habitually resides in the Province, **it shall serve on the respondent, in accordance with the regulations,**
>
> (a) a copy of the support-variation application; and
>
> **(b) a notice requiring the respondent to appear at a place and time set out in the notice and to provide the information or documents required by the regulations.**

...

Notice of hearing

35 When the Nova Scotia court receives a support-variation application under Section 34, **the clerk shall serve on the respondent, in accordance with the regulations,**

(a) a copy of the support-variation application; and

(b) a notice requiring the respondent to appear at a place and time set out in the notice and to provide the prescribed information or documents.

Information to be considered by court

36 (1) In dealing with a support-variation application, the Nova Scotia court shall consider

(a) the evidence provided to the Nova Scotia court; and

(b) the documents sent from the reciprocating jurisdiction.

(2) Where the Nova Scotia court needs further information or documents from the applicant to consider making a support variation order, the Nova Scotia court shall

(a) send the designated authority a direction to request the information or documents from the applicant or the appropriate authority in the reciprocating jurisdiction; and

(b) adjourn the hearing.

(3) When the Nova Scotia court acts under subsection (2), it may also make an interim support-variation order.

(4) Where the Nova Scotia court does not receive the information or documents requested under subsection (2) within twelve months after the request is made, it may dismiss the support-variation application and terminate any interim support-variation order made under subsection (3).

(5) The dismissal of the application under subsection (4) does not preclude the applicant from commencing a new support-variation application. (Emphasis mine)

[115] Considering the wording of ss. 34(1)(b) and 35(b) in the context of the whole statute, the intention of the Legislature and the object of the *ISO Act*, in my opinion the legislation is clear and unambiguous. It specifically addresses the issue of who is to be given notice of the hearing. It states that notice is to be given to the person responding to the application and makes no similar provision for notice to be given to the applicant. Had the Legislature intended that the applicant be given notice, it would have stated this requirement.

[116] I am satisfied the *ISO Act* provides clear and unambiguous statutory direction that no notice is required to be given to the applicant, Mr. Waterman in this case. The procedure specified by the Legislature must be respected (unless contrary to the *Charter*, which was not an issue raised in this appeal), even if contrary to the rules of procedural fairness that generally govern court procedures.

[117] I am of the opinion the judge did not err in adjudicating this matter without notice having been given to the appellant. I would dismiss the appeal.

Hamilton, J.A.