

DOCKET: FKMCA-047205

IN THE FAMILY COURT FOR THE PROVINCE OF NOVA SCOTIA

[Cite as: S.S. v. B.S., 2006 NSFC 35]

BETWEEN:

S. S.
-APPLICANT

AND

B. S.
-RESPONDENT

BEFORE THE HONOURABLE JUDGE BOB LEVY

DECISION

(MOTION FOR DISCLOSURE - CHILD MAINTENANCE GUIDELINES)

HEARD AT: KENTVILLE

DECISION DATE: SEPTEMBER 13, 2006

COUNSEL: THOMAS MACEWAN FOR THE APPLICANT
ROBERT STEWART, Q.C. FOR THE RESPONDENT

ISSUE: Mother with care of the couple's two children seeks child maintenance and disclosure from the father of company records in which he is a one-third shareholder (along with his father and brother), an officer and director, and an employee. She offers no evidence that would incline the court to view her request as anything other than a 'fishing expedition'.

RESULT: It does not appear that there is any provision in the Nova Scotia Child Maintenance Guidelines or in any Rule of Court that gives the court the authority to order such disclosure in this instance. If however there is a discretion in the court to make such an order, evidence and not merely suspicion or supposition is necessary to justify the invasion of the privacy interests of other shareholders and the company itself. Application for disclosure dismissed.

By the Court:

THE ISSUE

1. The parties are married and recently separated. The Applicant mother, S. S., seeks primary care of the couple's two children, aged fifteen years and approximately ten years. She also seeks child and spousal maintenance. She has only a very modest income from part time employment.

2. Mr. S. is employed by, is a director and secretary-treasurer of, and is a one-third owner of an incorporated agricultural enterprise here in the Valley. His father and brother each also own a one-third interest. The brother resides in Alberta and the extent, if any, of his actual involvement with or income from the company is unknown. The father, according to Mr. S., is still "actively involved in all aspects of the Company". The father has preferred shares and the company has also issued him a promissory note. The Respondent has filed his financial statement and copies of summaries of his Income Tax Returns for the past three years each of which show a fairly consistent annual income in the vicinity of \$21,000.

3. Ms. S., through her counsel urges that they may want to argue that his reported income does not truly represent the money he has available to pay child

maintenance and that therefore the court should order disclosure of the financial statements of the company. Mr. MacEwan argues that unless I order this disclosure he is effectively hamstrung, being unable to argue that the Respondent's reported income is not a fair measure of his ability to pay maintenance as he is blocked from getting the evidence that might prove it.

4. There is no evidence before the court of a life style inconsistent with his reported income or that gives rise to any suspicion of money being improperly or unjustifiably withheld or diverted, or that the Respondent is in a position to do so if he so chose.

5. Mr. Stewart, counsel for Mr. S., argues simply that there is no evidence that Mr. S. is "controls" of the company, that the only evidence there is would suggest that he is not in control,(i.e., that he owns only one-third of the shares), and that there is therefore no basis upon which corporate financial disclosure can be ordered.

DISCUSSION/ANALYSIS

6. The applicable sections of the Child Maintenance Guidelines, (and I remind counsel, although the differences are minor, that we are dealing with the provincial Child Maintenance Guidelines and not the Federal Child Support Guidelines), are:

Determination of annual income

15 (1) Subject to subsection (2), a parent's annual income is determined by the court in accordance with Sections 16 to 20.

Agreement

(2) Where the parents agree in writing on the annual income of a parent, the court may consider that amount to be the parent's income for the purposes of these Guidelines if the court thinks that the amount is reasonable having regard to the income information provided under Section 21.

Calculation of annual income

16 Subject to Sections 17 to 20, a parent's annual income is determined using the sources of income set out under the heading "(Total Income)" in the T1 General form issued by the Canada Customs and Revenue Agency and is adjusted in accordance with Schedule III.

Section 16 replaced: O.I.C. 2000-554, N.S. Reg. 187/2000.

Pattern of income

17 (1) If the court is of the opinion that the determination of a parent's annual income under Section 16 would not be the fairest determination of that income, the court may have regard to the parent's income over the last 3 years and determine an amount that is fair and reasonable in light of any pattern of income, fluctuation in income or receipt of a non-recurring amount during those years.

Subsection 17(1) replaced: O.I.C. 2000-554, N.S. Reg. 187/2000.

Non-recurring losses

(2) Where a parent has incurred a non-recurring capital or business investment loss, the court may, if it is of the opinion that the determination of the parent's annual income under Section 16 would not provide the fairest determination of the annual income, choose not to apply Sections 6 and 7 of Schedule III, Adjustments to Income, as adopted herein, and adjust the amount of the loss, including related expenses and carrying charges and interest expenses, to arrive at such amount as the court considers appropriate.

Shareholder, director or officer

18 (1) Where a parent is a shareholder, director or officer of a corporation and the court is of the opinion that the amount of the parent's annual income as determined under Section 16 does not fairly reflect all the money available to the parent for the payment of child maintenance, the court may consider the situations described in Section 17 and determine the parent's annual income to include

(a) all or part of the pre-tax income of the corporation, and of any corporation that is related to that corporation, for the most recent taxation year; or

(b) an amount commensurate with the services that the parent provides to the corporation, provided that the amount does not exceed the corporation's pre-tax income.

Adjustment to corporation's pre-tax income

(2) In determining the pre-tax income of a corporation for the purposes of subsection (1), all amounts paid by the corporation as salaries, wages or management fees, or other payments or benefits, to or on behalf of persons with whom the corporation does not deal at arm's length must be added to the pre-tax income, unless the parent establishes that the payments were reasonable in the circumstances.

Imputing income

19 (1) The court may impute such amount of income to a parent as it considers appropriate in the circumstances, which circumstances include the following:

- (a) the parent is intentionally under-employed or unemployed, other than where the under-employment or unemployment is required by the needs of a child to whom the order relates or any child under the age of majority or by the reasonable educational or health needs of the parent;
- (b) the parent is exempt from paying federal or provincial income tax;
- (c) the parent lives in a country that has effective rates of income tax that are significantly lower than those in Canada;
- (d) it appears that income has been diverted which would affect the level of child maintenance to be determined under these Guidelines;
- (e) the parent's property is not reasonably utilized to generate income;
- (f) the parent has failed to provide income information when under a legal obligation to do so;
- (g) the parent unreasonably deducts expenses from income;
- (h) the parent derives a significant portion of income from dividends, capital gains or other sources that are taxed at a lower rate than employment or business income or that are exempt from tax; and

Clause 19(1)(h) replaced: O.I.C. 2000-554, N.S. Reg. 187/2000.

(i) the parent is a beneficiary under a trust and is or will be in receipt of income or other benefits from the trust.

Reasonableness of expenses

(2) For the purpose of clause (1)(g), the reasonableness of an expense deduction is not solely governed by whether the deduction is permitted under the *Income Tax Act* (Canada).

Income Information

Obligation of applicant

21 (1) A parent who is applying for a child maintenance order and whose income information is necessary to determine the amount of the order must file the following:

- (a) a copy of every personal income tax return filed by the parent for each of the

three most recent taxation years;

(b) a copy of every notice of assessment and re-assessment issued to the parent for each of the 3 most recent taxation years;

Clause 21(1)(b) replaced: O.I.C. 2000-554, N.S. Reg. 187/2000.

(c) where the parent is an employee, the most recent statement of earnings indicating the total earnings paid in the year to date, including overtime or, where such a statement is not provided by the employer, a letter from the parent's employer setting out that information including the parent's rate of annual salary or remuneration;

...

(f) where the parent controls a corporation, for its three most recent taxation years

(i) the financial statements of the corporation and its subsidiaries, and

(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;

...

Obligation of respondent

(2) A parent who is served with an application for a child maintenance order and whose income information is necessary to determine the amount of the order, must, within 20 days if the application is served in Nova Scotia, 40 days if served elsewhere in Canada or the United States, or within 60 days if served in any other place, or such other time limit as the court or rules of the court specify, provide the court, as well as the other parent or the order assignee, as the case may be, with the documents referred to in subsection (1).

7. There are several avenues to be explored. The first and most obvious is whether the Respondent “controls” the corporation such that he is obliged, pursuant to section 21 (1) (f) of the Guidelines (by way of section 21 (2)), to disclose the last three years financial statements and certain detailed expenses of the corporation.

8. There may be others, but the only Nova Scotia case on point that I know of

is **S.A.C. v. M.A.B.** (2002), 203 N.S.R. (2d) 15 (Fam. Ct., Comeau, C.J.). His Honour held in a situation where the Respondent and his brother each owned 49% of a company with their mother holding the remaining 2% , a company which was in the grips of a perhaps a fatal disharmony, that the Respondent's 49% did not give him "control" and thus he did not order corporate disclosure. He cited **Bates v. Welcher** [2001] MBCA No.33, **Breckerfield's Ltd. et al v. Minister of National Defence** (sic., should be Minister of National Revenue), [1964] 1 Ex. C.R. 299, and **Goerlitz v. Pacquette** (1998), 221 A.R. 182 (Q.B.).

9. Chief Justice Comeau might well have also cited the Ontario decisions of **Fielding v. Fielding** (1999), 45 R.F.L. (4th) 24 (Ont. Ct. Justice), (leave to appeal denied (1999), 45 R.F.L. (4th) 29, (Ont. Divisional Court)), which held in the case of a corporation owned equally by two brothers, that one brother, the Respondent, could not be "in control"). The **Breckerfield** case is a tax case and defined "control" for the purposes of a given section, seemingly for the whole of the Income Tax Act, as having the *de jure* controlling interest, (the majority of the voting shares), as opposed to *de facto* control.

10. The **Bates** and **Fielding** cases, noting that the Child Support Guidelines with

which they were dealing, while not defining “control” directly, did provide, as does the Nova Scotia Guidelines in section 2 (2), that in determining income and dealing with income and disclosure issues the Income Tax Act definitions apply if the word or expression is not otherwise defined in the Guidelines. In fact the Income Tax Act does not contain a definition of “control”, rather the courts have defined it.

11. The Manitoba Court of Appeal in **Bates** noted, paragraph 22, that where the Respondent does not have majority voting control that his ability to comply with a disclosure order may be compromised, which is a fair comment, and that there are privacy concerns of the corporation and other directors or shareholders. (One could of course observe that privacy issues of the corporation and of other players would be compromised just as much if the Respondent did have majority voting control.)

12. Interestingly, in the **Fielding** case, the lower court, while declining to order disclosure on the basis of the Respondent being in “control” of the corporation, nonetheless ordered disclosure because the Ontario Civil Procedure Rules specifically gave a court discretion to order disclosure if the application cannot be determined on the basis of the material filed. The court also held that section 18 of the Guidelines, and section 19 (1) (d), (provisions identical to those of Nova

Scotia), justify a disclosure order saying, “Thus it follows that the Court must be able to order disclosure of financial statements in order to make this determination”. This reasoning is similar to another Ontario decision in **Pastway v. Pastway** (1999), 49 R.F.L. (4th) 375 (Ont. Crt. of Justice, Gen. Div.), where disclosure was ordered in the case of Respondent with only a 25% ownership of the non-voting shares of the company. Lastly, in **Fielding**, the motions judge stated that. “...the overall spirit of the *Guidelines* is that financial disclosure should be given liberally.” In neither **Fielding** or **Pastway** is it apparent that any evidence was offered to raise a suspicion that income was in any way being improperly sheltered or diverted.

13. I am not entirely certain what the exact reasoning of the Ontario Divisional Court sitting on appeal was. The court stated simply:

“In my view the Court is not restricted to the documentation detailed in section 21 (of the Guidelines) or (Civil Procedure) Rule 69.24.1 (20). These provisions provide solely for the mandatory disclosure of the documents stipulated.”

I think it means that while certain things may be mandatory in every case, that does not mean the court does not have the authority to order disclosure on a case by case basis.

14. In **Bates** the Manitoba Court of Appeal took a different position: yes there is discretion to order the corporate disclosure, (per the Queen's Bench Rules), but there needs to be evidence warranting the court exercising its discretion to order it.

Paragraph 63 reads:

“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.”

And in paragraph 64:

“The Q.B. Rules pertaining to production and inspection of documents, examinations and interrogatories, all stand ready to ensure full and complete disclosure of relevant information before trial. The petitioner chose not to utilize any of these procedures before coming to court. While I can understand her skepticism with respect to the determination of the bonus in a family-run corporation, skepticism and speculation is not evidence. Proof of relevance is first required.”

Disclosure was not ordered.

15. The Nova Scotia Guidelines, section 21 (5) provides:

“Nothing in this section precludes the making of rules by the court respecting the disclosure of income information that is considered necessary for the purposes of the determination of an amount of a child maintenance order.”

Ontario and Manitoba have provisions that disclosure in the nature of the disclosure being sought here which is not provided for directly by the Guidelines can nonetheless be ordered in the court's discretion pursuant to provincial court rules, (i.e., Manitoba Civil Procedure Rule 30.02 (4) and Ontario Civil Procedure Rule 69.24). The Manitoba Court of Appeal in **Bates** also noted a British Columbia

case, **Chapman v Chapman** (September 24, 1998), Doc. Vernon D12630, B.C.

Master) saying that disclosure not provided for by the federal Guidelines could still be ordered pursuant to provincial rules of court.

16. In addition to the rules of court of Manitoba the province saw fit to enact section 20 (8) of its Guidelines. That section reads:

“20 (8) Nothing in these Guidelines shall be construed as limiting the obligation of a parent whose financial information is necessary to determine the amount of the order to provide all relevant current financial information to the other parent and the court at the time of the hearing of the application.”

Neither the federal of the Nova Scotia Guidelines have a similar provision.

17. Section 21 (5) of the Nova Scotia Guidelines do provide for the making of rules of court “considered necessary for the purposes of the determination of an amount of a child maintenance order”. There is no Family Court rule expanding the scope of disclosure beyond section 21 of the Guidelines. The Civil Procedure Rules, on the other hand, which may be applied to the Family Court if there is no provision in the Family Court Rules that covers the situation, do expand disclosure somewhat in Rule 70 (5), to require that other members of a party’s household on a section 10 “undue hardship” application to file a “the relevant income and other

information”. There is no broadly worded provision that I can find, comparable to either Manitoba, Ontario or British Columbia that can be said to authorize a court to require the disclosure of the corporate financial information being sought here.

18. One should note, if only in passing, section 1 (a) of the N. S. Guidelines which reads:

“The objective of these Guidelines are
(a) to establish a fair standard of maintenance for children that ensures that they benefit from the **financial means** of both parents;” (emphasis added)

“Means” has been taken over the years to include much more than just income including any assets enhancing or capable of enhancing one’s ability to pay child maintenance. That said, there does not seem to be any tool in place that specifically and unambiguously enables a party or the court to ferret out this information except section 21 of the Guidelines.

19. Even if it can be said the Guidelines themselves, be it section 1 (a), or section 18, or perhaps sections 19 (d) or (e), or any Rules of or inherent powers of court contemplate and enable a court to order financial disclosure of the type being sought here, I agree with the Manitoba Court of Appeal that some factual basis needs to be put before the court to justify such an order. That is so given the

intrusive invasion of the privacy of the other shareholders who are not parties to this proceeding, the privacy issues of the corporation itself, and the potential difficulty of the Respondent complying with the order. To quote the Court again, “...skepticism and speculation is not evidence”. I respectfully disagree with the reasoning in **Pastway** or **Fielding** that would appear to hold that no factual foundation needs to be laid for this disclosure to be ordered. Specifically, I do not accept that sections 18 or 19 in and of themselves throw the doors wide open to fishing expeditions merely because one is a shareholder or officer of a company.

20. In this case the Applicant has presented no evidence whatsoever in support of her application for this disclosure. There is nothing else before the court that warrants the court exercising any discretion that it might have to order the disclosure being sought.

DECISION

21. The application for corporate financial disclosure is dismissed.

Bob Levy, J.F.C.