

IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: Jachimowicz v. Jachimowicz, 2008 NSSC 356

Date: 20080509

Docket: 1201-058994

Registry: Halifax

Between:

Cathy Loretta Jachimowicz

Applicant

v.

Jan Michael Jachimowicz

Respondent

Judge: The Honourable Justice Moira C. Legere Sers

Heard: May 9, 2008, in Halifax, Nova Scotia

Written Decision: December 1, 2008
(Oral decision rendered on May 9, 2008)

Counsel: Charles D. Lienaux, for the applicant
Deborah I. Conrad, for the respondent

By the Court:

[1] This decision on the respondent's motion to quash certain subpoenas was rendered orally on May 9, 2008. It was typed subsequently to provide a written record at the request of Mr. Lieneaux in his letter dated November 12, 2008.

[2] It has been edited for grammar and sentence structure only. No additional commentary or reasons have been added to this oral decision.

[3] This motion followed a contested application to strike the initiating application dated March 28, 2006, to overturn a corollary relief judgement.

[4] This is a motion to strike subpoenas issued to Mr. Shawn Scott, former counsel of the applicant, Mr. George, comptroller for the respondent's business, the respondent's tax advisor regarding several of his business interests, Mr. Michael Edwards and Mr. Michael Dockrill.

Oral Decision

[5] I have four subpoenas before me in the matter of *Jachimowicz* and *Jachimowicz* regarding an application issued on March 28, 2006, to overturn the corollary relief judgment between the parties as it relates to property matters.

[6] The allegations are well contained in this application. It alleges that Ms. Jachimowicz was under undue duress, or threat of injury or harm, if she sought disclosure. The allegations generally stated are that there was a failure to provide full disclosure; there were intentional misrepresentations equivalent to fraud to entice Ms. Jachimowicz into entering into a corollary relief judgment which was alleged to be contrary to her interests.

[7] We are now a month away from the hearing on that application. There have been multiple motions, one to strike the application, two to amend the statement of claim and this motion to quash the subpoenas.

[8] There is a prior extensive legal history.

[9] The subpoenas before me are to Mr. Shawn Scott, Barrister and Solicitor, former counsel for Ms. Jachimowicz; Mr. George, who has some involvement, the

extend of which will likely be part of the evidence in the application to overturn; Mr. Michael Edwards, chartered accountant; and Mr. Michael Dockrill who has some information with respect to the negotiations and the financial documentation that is relevant in this proceeding.

[10] First, I would like to make clear to counsel that the ruling I made earlier relating to the interrogatories did not relate to the compellability of these witnesses at trial; rather to the compellability of the witnesses to respond to interrogatories in a matter which was initiated subsequent to the divorce proceeding.

[11] That ought not to be taken to indicate whether they are compellable witnesses in the proceeding. The question that I have to determine here and the test used in the cases provided relate to the question of relevance with respect to the subpoenas.

[12] The test is whether there is a link of relevance that would relate to the upcoming proceeding respecting non-disclosure, fraud and the allegations of duress. The test as described in *Family and Children's Services of Kings County v. M.S.*, 2002 NSFC 16, [2002] N.S.J. No. 393, as taken from *Children's Aid Society of Algoma v. H.(L.)*, [1996] O.J. No. 1978, 1996 CarswellOnt 1970, relates to the "likelihood of material evidence" test.

[13] There is no objection to the subpoena to Mr. Scott and Mr. Dockrill. I am left to consider the objection to the requirement to produce and to appear served on Mr. Jim George and Mr. Michael Edwards. Before I go further, I should indicate that you are not a party to the proceeding but do you wish to say anything?

MR. EDWARDS: If I may My Lady.

THE COURT: Would you identify yourself for the record please?

MR. EDWARDS: Thank you. My name is, ah, Michael Edwards. I'm a practising, ah, chartered accountant. I had retained Thomas Singleton as counsel but unfortunately he's out of province today and I was scheduled to be out of province today but, ah, changed those arrangements to be here, ah, unfortunately, I guess, for the second time concerning this matter. I just want to point out for the record, ah, My Lady, that I was served with interrogatories on November 3rd, 2006. I received an application from Mr. Lienaux on December 20th, 2006. I received a letter from Mr. Lienaux with a draft affidavit asking me to execute it on January 11th/08 and I received on January 23rd/08 a subpoena from Mr. Lienaux. I am, ah,

trying to carry on a public accounting practice and I certainly do appreciate that many issues that are taking place may have some relevance or that I may be superfluously involved with some of these matters, but it feels I'm in the middle of a landmine at times, ah, and I'm being told that if I don't show up I will be held in contempt of court and that I will be assessed fines and fees and all this stuff and I assure you, I fully intend to comply with any court requirements that are made on my behalf but at the same time I have rules of professional conduct that dictate that I cannot disclose client's confidential information without the appropriate disclosures. I have quite an extensive file and only brought part of it with me, but I feel I'm being inundated and distracted from my practice on a matter that, to a large degree at this point in time, I don't see how it should affect me or that it does affect me that I know of from the court, but at the same time I'm here to make sure I comply with the court may rule upon.

THE COURT: Ahm, when you say that you have, ah, you've been served with a subpoena?

MR. EDWARDS: Yes I have.

THE COURT: By?

MR. EDWARDS: By Mr., ah, Lienaux on January 23rd, 2008.

THE COURT: Ah, to appear and you have in fact appeared, or is that for this appearance?

MR. EDWARDS: Ah, the subpoena, ah, is actually, I think, part of this actual hearing with respect to whether I will have to appear at the next trial, if you will, but that's the subpoena that I believe Ms. Conrad is currently arguing that should be quashed at this point in time.

THE COURT: Well, ah, I was just wondering how...how you...you were served with notice of a subpoena to come here today?

MR. EDWARDS: I was served by a subpoena that Mr. Lienaux and I received a copy of Ms. Conrad's application for today's hearing to quash.

THE COURT: And, ah, you've indicated that, ah, you were told that if you didn't show up today, what would happen?

MR. EDWARDS: No that was not today Ma'am and I apologize if I gave that impression but back in, ah, December I believe it was, I was told by Mr. Lienaux

that if I did not appear that he would be making application to, ah, find...hold me in contempt and requesting an award of \$500.00 in nickel costs, that's his letter of December 20th, 2006. I have a copy of it if you would like it Ma'am?

THE COURT: Perhaps you would file a copy of that please?

MR. EDWARDS: Certainly. I apologize, I only brought one copy (...inaudible).

THE COURT: Ms. Conrad, if you haven't got a copy?

MS. CONRAD: I think Mr. Lienaus himself gave us that in June, 2007.

THE COURT: Alright, thank you. Alright, and so you're here today not because you were subpoenaed but because you wish to speak to the issue?

MR. EDWARDS: Yes, Ma'am, as I say I feel I'm being dragged into, or, ah, certainly getting the impression that I had better make an appearance or I may wind up in the court's displeasure, shall we say. And I certainly do not want to be in that position Ma'am.

THE COURT: And Mr. Singleton is your lawyer?

MR. EDWARDS: Mr. Singleton was my lawyer but he's out of province today.

THE COURT: But you will have an opportunity to consult with him before the next day?

MR. EDWARDS: If I have another day in court Ma'am, yes I will.

THE COURT: Alright, thank you. You may return to your seat.

MR. EDWARDS: Thank you.

MR. LIENAUX: My Lady if (...inaudible) in response that, just so that we're clear for the record My Lady, Mr. Edwards was, ahm, initially served with a set of interrogatories. He refused to comply. I made an application to the court to compel his answer and I believe the letter which he gave you this morning relates to that application. In that letter, I advised him if you don't answer I will, and I indicated to him, by not answering the interrogatories the direction in the interrogatories states from the court you are required within 10 days of service of

these interrogatories to make answer and I told him you haven't made answer and you're contempt to that direction. And I said I am making application to the court to compel you to answer the interrogatories if you don't answer the interrogatories, I will be seeking \$500.00 costs against you. Now, in advance of preparation for this trial, I wrote to Mr. Edwards and I gave him the opportunity to depose an affidavit which I would tender and Mr. Edwards refused. Accordingly, I served him with a subpoena to attend at the trial.

THE COURT: Was this his evidence or your evidence that you wanted him to sign the...you, you gave him an affidavit?

MR. LIENAU: Which he would depose relating to the facts relating to the...confirming the income that he had prepared the income tax statements. The same evidence that I have to get from *viva voce*, but I gave him the opportunity to swear an affidavit corroborating that he had sworn or at least made those tax returns and filed them with CRA so that he wouldn't even have to come here. That was the purpose of giving him the affidavit and, as you indicated when we had the pre-trial, I should indicate if the witness wouldn't cooperate then I would file a will-say statement for what I was seeking from him at trial. So, I haven't been putting any pressure, so called, on Mr. Edwards, it might seem that he is getting inundated with documents but they're documents for a different purpose. He got served with the interrogatories, then he got served with the application to compel his answer to the interrogatories and so on and I also served him with notice of the hearing My Lady that we had last summer I guess it was, in July I think, that two-day hearing and he came to that and now he's been served, he was offered the opportunity to depose an affidavit which he refused and now he's been served with a subpoena.

THE COURT: Final comments Ms. Conrad.

MS. CONRAD: (...inaudible) my own comment My Lady is if you look at, ahm, the transcript of the, ah, pre-trial in front of the Honorable Justice Gass on November 21, 2006, Mr...this was a concern that we had that these witnesses would be confused by all the people that had been served with interrogatories and I wanted clarification on that and Her Ladyship's, ah, wanted clarification as well, and Mr. Lienaux, at page 3 of that document says "I won't put pressure on anybody other than the one. Well, I'm not going to put pressure on the one who's going to give me the answers but I wouldn't put pressure on the others until we could have Your Ladyship determine the application." And then we see that he...he did, in fact, put pressure on these people and...and told them that he wanted those answers even before the court made the ruling. Those are my only comments.

[Excerpt from unofficial transcript]

[14] Alright, we will move along then. With respect to Mr. George and Mr. Edwards, the question is...is, is there sufficient information before me to indicate that there is a link of relevance between their subpoena and the matter that is before me.

[15] I of course do not know what these individuals are going to say. I do not know the extent to which they were involved in the settlement conferences and the information that surrounded the exchange of documentation which is extremely relevant, in my view to a determination as to whether there was disclosure or an opportunity to discover information relating to the matters at hand. I presume that will come at the hearing of the matter.

[16] The issue before the court in June will be the very aspect of the application, the motion to overturn the corollary relief judgment as it relates to property matters. That has specifically survived the motion to strike. At the time the motion to strike was made by Ms. Conrad on behalf of Mr. Jachimowicz with respect to the other matters, there was sufficient information to strike those portions relating to the custody and access matter as well as the child support matter.

[17] As it relates to the property matters of the corollary relief judgment, I concluded that I did not have enough evidence to meet the test to strike that aspect of the motion to overturn the corollary relief judgment.

[18] I could not find, at that point, in accordance with the test that the court was required to apply; I could conclude at that time without more, that this was a frivolous or vexatious application.

[19] The concern I have with respect to the subpoenas is in fact, the request to provide information that was already provided. Secondly, there is a duplication of a request from witnesses. The other overriding concern I have about this matter is well stated in the authorities. If the purpose of the subpoena to these witnesses relates to more than eliciting evidence relevant to the main issue before me, that is the application to overturn the corollary relief judgment; if it is a fishing expedition or an attempt at discovery or reopening a matter which is not before me, then that attempt must not be permitted.

[20] The place for me to determine relevance, actual relevance, is at the hearing. I have concluded, based on the submissions of counsel and the documentation and affidavits provided as well as the authorities, that with respect to Mr. George and Mr. Edwards, there is a link of relevance to the issue that I have to decide.

[21] Among other things, it will be my concern and focus at the hearing to consider the question of relevance. The questions asked of these witnesses must relate to the matter before the court. That is, ought the court to overturn the corollary relief judgment because of the allegations made by Ms. Jachimowicz that she was under duress, that there was material misrepresentation or fraud and that there was non-disclosure?

[22] I have to be concerned about costs as well. Mr. Edwards indicated he has been brought into court and involved in a proceeding against his will and perhaps contrary to his business interests. I suggest counsel would do very well to reread, L.R.F. v. D.M.H., 99 O.T.C. 21, [1999] O.J. No. 2757, because this confusion of issues that is happening in this proceeding is well articulated by Justice Campbell in the decision.

[23] With respect to that, the court has the ability at the end of the day to rule on costs. Until the court has the evidence as to the process of negotiations to determine whether the applicant can sustain her application on the balance of probabilities, I am not in a position to indicate or to make a judgment or conclusion as to whether a person ought to testify or not. That is up to counsel.

[24] But clearly the court has the right at the end of the day, if there is not sufficient evidence to sustain a motion, or if there is evidence on the issue of costs, to award not only party and party costs, but solicitor and client costs as well as costs against solicitors.

[25] The court has broad powers at the end of the day should either party argue that this matter has been unnecessarily prolonged, confused, or that excessive and unnecessary requests for information have been made. I reserve that right and both counsel have a right to argue that before me, but that will follow the trial.

[26] And, as well, the disbursements can be determined in terms of the loss or the costs to the parties. That is a matter that ought to be decided after the trial of the issue when the court will be in a better position to determine relevance.

[27] So, I will deny the motion to quash with respect to Mr. George and Mr. Edwards but I will put conditions on the subpoenas. There is to be no duplication, there is no need to re-file documentation that is already part of the court record and properly tendered. That documentation which has been already provided and is part of the ongoing requests in the subpoenas does not need to be filed twice and does not need to be provided twice.

[28] This leaves those documents which have not been provided for the purposes of the upcoming hearing. The documentation with respect to income tax returns will be provided as requested up to the date that the corollary relief judgment was incorporated into the divorce judgment. That ends the relevant period of time for the purposes of this application. This is not a prospective review by way of an application to vary.

[29] I leave it to counsel to confirm in your own minds what would constitute duplication and what documentation has already been provided. I will hear counsel on costs at the end of the day in the event there is an attempt to duplicate or demand duplication and require the filing of documentation already before the court. Anything further?

MR. LIENAUX: My Lady, I don't know how your time is today, but at the end of, ahm, the last day we didn't have time to talk about the pre, ahm, organization...

THE COURT: I have a 10 o'clock matter.

MR. LIENAUX: So do we have a few minutes.

THE COURT: I have a 10 o'clock matter (...inaudible).

MR. LIENAUX: Well I read it, oh, it's (...inaudible) it's like twenty to 11:00, ah, I'm sorry, a little slow. My lady, ahm, with your permission, I would, ah, like to write a letter to Ms. Conrad outlining what you proposed today and proposing how we can limit and avoid duplication of documents but there are a few other things, like I mentioned, I don't need to cross examine all these people she's filed affidavits for so there's no need for her to bring them. I'd like to know who I have to bring and that sort of thing.

THE COURT: Your first date is, I don't have the main file here.

MS. CONRAD: June 2nd.

MR. LIENAU: The hearing, June 2.

THE COURT: June 2nd. Can you do...have that exchanged by the 15th and if you need to speak to me by phone, ah, we can arrange a telephone conference it will be on the record. That will deal with any final administrative matters. If you can exchange the documentation, advise each other who you don't need to call and give each other a schedule as to when you intend to call these people, give or take timing and provide me a copy of that. If after the 15th of May you decide that there are some matters that you wish to have a further telephone conference with we can...you can contact scheduling and they will alert Ms. Wells for the need of a telephone pre-trial.

MR. LIENAU: Thank you My Lady.

THE COURT: You're...you're looking puzzled.

MS. CONRAD: (laughs...) I just want clarification. From what I heard Mr. Lienau say throughout and what he told Justice Gass is that the only thing he doesn't have and we dispute that his client doesn't have it, but are the trust deeds. Is that what we are to provide, even though there was no order...is that...

THE COURT: I think he's going to give you a letter indicating what he has and what he needs and that...and by the 15th if you haven't resolved that, I'm presuming you will have resolved it because my order stands on that. You should draft the order Ms. Conrad.

MS. CONRAD: (...inaudible)

THE COURT: And by the 15th if you need to talk to me again about scheduling and you have some concerns because you don't know which witnesses need to be in attendance, then it's up to you to make sure that we can have a telephone conference before the June date. Otherwise, I'm not going to bring you back into court if there's no need of it.

MS. CONRAD: No, okay.

THE COURT: Alright.

MS. CONRAD: So schedule so that Mr. Edwards, for example, wouldn't have to wait 6 days (...inaudible).

THE COURT: Absolutely. I don't want people sitting outside waiting to be called.

MS. CONRAD: Yes, that would make...

THE COURT: Alright.

MS. CONRAD: Perfect sense.

THE COURT: Okay.

MR. LIENAU: My Lady I don't want to burden your time but we didn't mention costs and I did ask in the brief that costs be Ms. Jachimowicz's costs of the day in any event of the costs.

THE COURT: Costs at the end of the day.

MR. LIENAU: But in any...in any event, the cause. It's...if it were, if it were costs in the cause, then the costs would follow the cause. I'm asking that the costs of today be for Ms. Jachimowicz and at the end of the day even...

THE COURT: No.

MR. LIENAU: Well that's fine then, costs would be in the cause.

THE COURT: Costs will be determined at the end of the day, it may be that some of the applications, ah, included in costs will go one way or the other.

MR. LIENAU: All I wanted to know is what we were going to do. Thank you My Lady.

THE COURT: Alright. I'm staying.

MS. CONRAD: Yes, we're leaving. Thank you My Lady.

THE COURT: Ah, do you have any problems with that, you'll be contacted hopefully by a schedule by Mr. Lienau, I presume, or Ms. Conrad to try to specify when the time period is that you will have to be in attendance.

MR. EDWARDS: I...I am expecting a copy of correspondence from one of the counsels and if I don't receive it I will have to consult with my counsel to...

THE COURT: Excellent, because they will be able to expedite that.

MR. EDWARDS: Thank you.

THE COURT: It's not my intent that you stay outside and waste your time waiting to be called.

MR. EDWARDS: I appreciate that Ma'am.

THE COURT: Okay, thank you. I just advised counsel we've, ah, obviously got an extensive file on this matter so we've had, ah, ah, a bit of a conference on how we're going to manage the file. All materials that are filed now are...you should identify what motion or action they're on and make sure that, ah, they are highlighted, they will go to the ordinary person who is responsible for filing but we will have them move through Ms., ah, Joan Merlin to ensure that they are, ah, before the proper, ah, judge. There is another application ongoing as you know.

MS. CONRAD: Yes, on Tuesday, May 13th.

MR. LIENAUX: I don't have any part of that.

THE COURT: It just will help us to make sure that no documentation moves into the wrong file.

MS. CONRAD: That's ah...that's great My Lady (laughs...).

MR. LIENAUX: Thank you My Lady.

THE COURT: Thank you.

[Excerpt from unofficial transcript]

Legere Sers, J.

December 1, 2008
Halifax, Nova Scotia