IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: Riding v. Nova Scotia (Attorney General) , 2008 NSSC 287

Date: 20080908
Docket: SFHCIV-058289
Registry: Halifax

Between:

Michael David Riding

Applicant

v.

The Attorney General of Nova Scotia

Respondent

Judge:	The Honourable Justice Leslie Dellapinna
Heard:	September 8, 2008, in Halifax, Nova Scotia
Written Release of Oral Decision:	September 24, 2008
Counsel:	Brian P. Casey, for the Applicant Glenn R. Anderson, for the Respondent Nicholas Dorrance, for Maintenance Enforcement Program

By the Court:

[1] The Plaintiff, Dr. Michael Riding, has applied to this Court for the following:

1. Relief in the form of an order of Certiorari to quash a Garnishment Notice dated March 11, 2008 obtained by an enforcement officer employed with the Maintenance Enforcement Program, which Notice was served on the Bank of Montreal, George Street, Halifax Branch, and which Notice required the Bank of Montreal to deduct from money the bank held for the Plaintiff funds to satisfy arrears of spousal support the Defendant alleges were then owing to the Plaintiff's former wife. The Plaintiff also seeks the return of all money obtained from the Respondent by way of the Garnishment Notice;

2. A Declaration that the spousal support provisions in paragraph 2 of the Plaintiff's Corollary Relief Judgment "ceased with the plaintiff's retirement in September 2007 in accordance with paragraph 3 of the Corollary Relief Judgment"; and

3. An order of Prohibition prohibiting the officials of the Maintenance Enforcement Program from enforcing the support provisions contained in the Plaintiff's Corollary Relief Judgment.

[2] The application is supported by an affidavit sworn by the Plaintiff's matrimonial lawyer, Ms. Conrad.

[3] The Attorney General opposes the application and submitted two affidavits sworn by an enforcement officer employed by the Maintenance Enforcement Program who has been primarily responsible for enforcing the support order between the Plaintiff and his former spouse. The Attorney General has also applied for an order dismissing the Plaintiff's application pursuant to Civil Procedure Rule 14.25 (1) (d) on the grounds that the application is an abuse of the process of the Court and to strike out the affidavit of the Plaintiff's lawyer pursuant to Civil Procedure Rules 14.25 and 38.11. At the Pre-Hearing Conference I indicated I would hear all of the applications at the

same time.

[4] The Plaintiff and his former wife were divorced in February 2003. With the parties' consent a Corollary Relief Judgment was granted at that time to which was attached Minutes of Settlement signed by both parties on the 30th of January, 2003. Among other things the Minutes of Settlement contained provisions for the payment of spousal support by the Plaintiff to his former wife which were incorporated into the Corollary Relief Judgment. The relevant provisions of the Corollary Relief Judgment are as follows:

1. Michael David Riding shall pay spousal support to Marie-Louise Annette Stening-Riding in the amount of $5,500.00 per month, payable on the first day of each month, commencing on the first day of February, 2003, and continuing to and including the first day of October, 2003.

2. Michael David Riding shall pay spousal support to Marie-Louise Annette Stening-Riding in the amount of $4,535.00 per month, payable on the first day of each month, commencing on the first day of November, 2003.

3. When Michael David Riding's gross professional and professional corporation income falls below $200,000.00 per annum, assessed on any three consecutive months of full time employment, the spousal support payment shall be prorated to 20% of his professional and professional corporation income. Spousal support payments to Mary Louise Annette Stening-Riding shall seize when Michael David Riding's gross professional and professional corporation income falls below $80,000.00 per annum.

[5] According to the affidavits before the Court, the Plaintiff wrote to Maintenance Enforcement in July 2007 advising of his pending retirement effective September 30, 2007. Thereafter there were numerous letters, phone conversations and emails involving the enforcement officer responsible for the Plaintiff's file, the Plaintiff's lawyer (Ms. Conrad), the Director of Maintenance Enforcement and Counsel for Maintenance Enforcement.

[6] It was the Plaintiff's position that the Corollary Relief Judgment was clear; once his income dropped below the rate of $80,000.00 per year his obligation to pay support ended. Ms. Conrad supplied a number of documents to demonstrate that the Plaintiff had retired at the end of September, 2007. Maintenance Enforcement's position was that whether he retired or not his income in 2007 was greater than $350,000.00 and, based on the enforcement officer's interpretation of the Corollary Relief Judgment, support continued to the be payable at least to the end of the year.

[7] The Plaintiff's lawyer wrote to the Plaintiff's former wife in August, 2007 and said that if she wouldn't consent to an order bringing the support payments to an end she would be making a Court application on behalf of the Plaintiff.

[8] The Plaintiff's solicitor was advised of the position of the Maintenance Enforcement Program and it was also suggested that she make an application pursuant to subsection 15 (4) of the *Maintenance Enforcement Act*, which reads as follows:

> "15 (4) Where the payor or recipient disputes the amount of the arrears, the payor or recipient may apply to the court for an order to determine the amount of the arrears. "

[9] By March of 2008, no application to vary was made on behalf of the Plaintiff and no application was made pursuant to subsection 15 (4) of the *Maintenance Enforcement Act*, and the Plaintiff had cancelled his previously supplied support cheques for the months of October, November and December, 2007. As a consequence, in March, 2008, Maintenance Enforcement issued a Notice of Garnishment for the arrears that it alleged to be owing and served it on the Plaintiff's bank.

[10] Maintenance Enforcement says it's their position that the Respondent is in arrears for the months of October through December, 2007, totaling $18,140.00, excluding fees, and they collected $6,357.87 by way of the Garnishment Notice, which money is being held in trust pending the outcome of these proceedings. The Plaintiff has still not applied to vary the Corollary Relief Judgment.

[11] The Attorney General argues the Plaintiff's application should be dismissed as it is an abuse of process. The Attorney General submitted that this is an attempt to vary the Corollary Relief Judgment without the Plaintiff providing evidence, or financial disclosure, and without making himself available for cross-examination purposes.

[12] The Attorney General also objects to Ms. Conrad's affidavit on various grounds including that it is largely hearsay and the best evidence should come from the Plaintiff himself.

[13] On behalf of the Plaintiff it is argued that Rule 14.25 (1) cannot be relied upon to strike an application, but rather only a pleading, affidavits, statements of fact or anything therein, and further, that in any event, if necessary the Plaintiff's application could proceed based on the file materials supplied by Maintenance Enforcement.

[14] Finally, it is argued by the Plaintiff's counsel that there is no other remedy available to the Plaintiff since the Plaintiff is not seeking to vary the terms of the Corollary Relief Judgment. He is seeking to have its existing terms enforced.

[15] The Attorney General's application to strike Ms. Conrad's affidavit is granted. The Plaintiff's application is by way of an Originating Notice and Ms. Conrad's affidavit is largely hearsay. The bulk of the more relevant information, that is the circumstances surrounding the Plaintiff's alleged retirement and his income after September 30, 2007, is not within her personal knowledge. That evidence should come from the Plaintiff himself. What is not hearsay is largely irrelevant, opinion or argument.

[16] Counsel for the Plaintiff argues the application could still proceed on the Attorney General's return. There is no return.

[17] The Plaintiff's application was misconceived. The mandate of the Maintenance Enforcement Program is to enforce maintenance orders. The Plaintiff would not disagree with that . However, the Maintenance Enforcement Program is not a judicial body. It only enforces maintenance orders. It does not vary them and it does not or should not decide on the meaning of an order when that meaning depends on circumstances or

variables that do not appear on the face of the maintenance order itself.

[18] The Plaintiff's application assumes as accepted facts that not only has the Plaintiff retired from his previous position but that his gross professional and professional corporation income has fallen below the rate of $80,000.00 per annum. That has not been established. If one was to accept that the correct interpretation of the Corollary Relief Judgment was that the Plaintiff's support payments would end once his income, if expressed in annual terms, dropped below $80,000.00, there was still no way for Maintenance Enforcement to know if that was the case. It is not for the Maintenance Enforcement Program, its Director or staff to look beyond the face of the order and make what amounts to a judicial decision on factual issues to decide the effect of the maintenance order. That is to be done by the Court.

[19] Maintenance Enforcement was therefore acting within its mandate and acting appropriately by continuing to insist on compliance with the monthly payments required by the Corollary Relief Judgment.

[20] I agree with the Attorney General's argument that this application is a collateral attack on the Corollary Relief Judgment and is therefore an abuse of the Court's process. Another and more efficient, appropriate and effective remedy is available to the Plaintiff that is designed specifically for the purpose of determining the obligations of parties to a maintenance order. The correct course for the Plaintiff to pursue to determine his support obligation is an application to vary pursuant to section 17 of the *Divorce Act* by which he would seek a specific order in place of the conditional order that currently exists. That procedure would by necessity involve his former spouse. It would also require Dr. Riding to provide evidence, including full financial disclosure, and to make himself available for cross-examination. The Court would then rule on his application.

[21] Therefore in summary:

1. the affidavit of Ms. Conrad sworn March 13, 2008 is struck in its entirety;

2. The pleadings of the Plaintiff are struck and therefore the Plaintiff's application is dismissed;

3. Had the Attorney General not made it's cross application I would have dismissed the Plaintiff's application in any event. Certiorari and prohibition are forms of prerogative relief available, as said in *Martineau v. Matsqui*, [1980] 1 S.C.R. 602, "as a general remedy of supervision of the machinery of government decision-making". In the circumstances of this case Maintenance Enforcement acted within it's authority, appropriately and fairly in issuing the Garnishee Notice when it did.

[22] Michael David Riding shall pay costs in the sum of $1,000.00, inclusive of disbursements, to the Attorney General of Nova Scotia.

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Leslie J. Dellapinna, J.