SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: Foster-Jacques v. Jacques, 2011 NSSC 174

Date: 20110504
Docket: 1201-064463, SFHD-069582
Registry: Halifax

Between:

Sharon Foster-Jacques
Petitioner

v.

Hector Jacques
Respondent

Judge: The Honourable Justice Beryl MacDonald

Heard: April 28, 2011, in Halifax, Nova Scotia

Counsel: Gordon R. Kelly, for Sharon Foster-Jacques;
William L. Ryan, Q.C., for Hector Jacques;
Alan V. Parish, Q.C., for Coltsfoot Publishing Limited

By the Court:

[1] The Petitioner and the Respondent in this Divorce proceeding have both requested an order to seal the contents of their divorce file. They have done so after receiving a request from the media to examine that file. The media request was made according to the provisions of Civil Procedure Rule 59.60 (4). The provisions of Rule 59:60 are:

> 59.60 (1) A proceeding under this Rule 59 shall be held in public, except that the judge who is satisfied on either of the following may exclude members of the public from all or part of the proceeding:
>
> (a) the presence of the public could cause emotional harm to a child who is a witness or a participant in the hearing, or is the subject of the hearing;
>
> (b) it is in the interest of the proper administration of justice.
>
> (2) A judge may make an order prohibiting the publication of the identity of a child, or the name of a party or witness, or of any other information that would identify the child.
>
> (3) A judge may order that a court file or any part of the file or any document contained in the file be sealed, treated as confidential, and not made available to the public.
>
> (4) A person, other than a party or counsel for a party, who requests access to a court file must give written notice to the parties no less than 20 days before obtaining access.

> (5) A party may make a motion for an order sealing all or part of the court file after delivery of written notice of the request for access.
>
> (6) The person requesting access to the court file must be granted access, subject to any terms or conditions the judge specifies, unless a party makes a motion within the required time.

[2] During a conference with the parties I questioned whether the provisions of Civil Procedure Rule 85.04 and 85.05 applied to their Motion to Seal the court file. The hearing today resulted from that question.

The Motion before me requires me to decide:

1) Do the provisions of Civil Procedure Rule 85.04 and 85.05 apply to a Family Division proceeding in which there is a request for a sealing order ?

2) If these provisions do apply, should I exercise my discretion, recognized in Rule 85.05, to require notice to be given to the media?

[3] Rule 85.04 and 85.05 read as follows:

85.04 (1) A judge may order that a court record be kept confidential only if the judge is satisfied that it is in accordance with law to do so, including the freedom of the press and other media under section 2 of the Canadian Charter of Rights and Freedoms and the open courts principle.

2) An order that provides for any of the following is an example of an order for confidentiality

(a) sealing a court document or an exhibit in a proceeding;

(b) requiring the prothonotary to block access to a recording of all or part of the proceeding;

(c) banning publication of part or all of the proceeding;

(d) permitting a party, or a person who is referred to in a court document but is not a party, to be identified by his pseudonym, including a heading.

(3) A judge who is satisfied that it is in accordance with law to make an order excluding the public from a courtroom, under Section 37 of the *Judicature Act*, may make an order for confidentiality to aid the purpose of the exclusion.

85.05 (1) A party who makes a motion for an order for confidentiality, or to exclude the public from a courtroom, must give reasonable notice to representatives of the media, unless a judge orders otherwise.

(2) The notice to media representatives may be given by using the service provided by all courts in Nova Scotia for giving notice to the media through the internet.

(3) A judge who excepts a party from having to give notice to media representatives must file a report of the decision with the prothonotary at Halifax.

(4) The prothonotary at Halifax must do both of the following with judges' reports of a decision to except notice to media representatives:

(a) make the reports available for inspection and provide a copy on demand, unless the report itself is sealed;

(b) respond to a person who asks about the number of reports that are sealed in a calendar year.

[4] Both parties to this divorce proceeding argue that the provisions of Civil Procedure Rule 85.04 and 85.05 do not apply to Family Division Proceedings and in particular to sealing orders granted pursuant to Rule 59.60. They have suggested a number of reasons why this should be so.

[5] Their primary argument is that Rule 59.60 provides a complete framework for granting confidentiality orders in the Family Division. They come to this determination by highlighting:

- the different wording contained in Rule 59.60 compared to the wording in Rule 85.05.

- the comment in *A.B. v. Bragg Communications Inc*., 2011 NSCA 26 in paragraph 71 that " the protections embedded in Part 13 of the Rules apply only to family proceedings."

- the scope of Rule 85 expressly provides that Part 13 (which contains Rule 59) prevails over Rule 85, albeit with reference only to the "protection of children".

- the sensitivity of the issues litigated in the Family Division and the distress parties will suffer if information of an intimate and financial nature was subject to media scrutiny.

[6] The media counsel who has participated in this motion argued that Rule 59.60 is not intended to be exclusive of the provisions of Rule 85.04 and Rule 85.05. These provisions are to be read together and in support of this interpretation are the provisions of Rule 59.02 (2):

> (2) The Rules outside of Part 13- Family Proceedings, with any necessary changes, apply to practice or procedure in the Supreme Court(Family Division) that is not governed by Part 13.

Because Part 13 is silent in respect to the question of whether the media should receive notice of a Motion for Sealing a file the provisions of rule 85.05 provide the answer to that question.

[7] I am satisfied that the differences in wording between the relevant provisions of rule 85 and Rule 59 are not contradictory but can and must be read as complementary. Because of the concern about privacy issues relating to children, Family Division files cannot be accessed without prior notice unlike the procedure provided for all other files. However I do not read the provisions of rule 59 to suggest it is to be interpreted without considering the direction provided in Rule 85.04(1) and the direction to consider notice to the media. How the Family Division will respond to a Motion to Seal a divorce file is an issue of interest to the public and to the proper administration of justice. The balance to be achieved between protecting rights to privacy and confidentiality and respecting the open courts principle and freedom of the press should be a transparent process. It is of assistance to the court, when considering how best to achieve the appropriate balance to have representations from those who would argue against the imposition of a sealing order. This is particularly so in this case because both parties are seeking that order and the court would be left to its own devices to apply the

appropriate principles without the benefit of prepared argument expressing a contrary viewpoint.

[8] The provisions of Rule 85.04 and Rule 85.05 do apply to this proceeding. I now must determine whether I should order notice to the media.

[9] Rule 85.04 (1) directs that a court record may be kept confidential "only if the judge is satisfied that it is in accordance with law to do so, including the freedom of the press and other media under section 2 of the *Canadian Charter of Rights and Freedoms* and the open courts principle."

[10] Most of the "law" developed around the issue before me has resulted from a number of Supreme Court of Canada decisions none of which directly dealt with media notice in family matters. However, these decisions form the foundation that guides judicial discretion whether to grant that notice.

[11] In *Dagenais v. Canadian Broadcasting Corp*., [1994] 3 S.C.R. 835 the Supreme Court of Canada reformulated the common law rules on publication bans

to reflect the principles of the *Canadian Charter of Rights and Freedoms*. In paragraph 73, Lamer C.J. said:

> A publication ban should only be ordered when:
>
> (a) Such a ban is necessary in order to prevent a real and substantial risk to the fairness of the trial, because reasonably available alternative measures will not prevent the risk; and
>
> (b) The salutary effects of the publication ban outweigh the deleterious effects to the free expression of those affected by the ban.

[12] In *R. v. Mentuck*, [2001] 3 S.C.R. 442 the Court restated the test "in terms that more plainly recognize...that publication bans may invoke more interests and rights than the rights to trial fairness and freedom of expression." (at para.33). The result was this broader formulation:

> [32] A publication ban should only be ordered when:
>
> (a) such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk; and
>
> (b) the salutary effects of the publication ban outweigh the deleterious effects on the rights and interests of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.

[13] In the *Sierra Club of Canada v. Canada (Minister of Finance),* [2002] 2 S.C.R. 522 this test was applied to a non-criminal matter resulting in an additional reformulation as follows:

> [53] A shielding order should only be granted when:
>
> (a) such an order is necessary in order to prevent a serious risk to an important interest in the context of litigation, because reasonable alternative measures will not prevent the risk. The important interest need not be constitutionally protected, and may be the protection of the administration of justice, or a private interest that has a public aspect, including a commercial interest, or a privacy or reputational interest; and
>
> (b) the salutary effects of the sealing order, including the effects on the interest being protected, outweigh its deleterious effects, including the effect on rights of free expression and accessibility to open court proceedings.

[14] While the Supreme Court of Canada did not mandate notice to the media, its remarks are supportive of this intervention. Thus in *Dagenais,,* supra, at para.49 Lamer C.J.C. said:

> The judge hearing the application thus has the discretion to direct that third parties (e.g., the media) be given notice. Exactly who is to be given notice and how notice is to be given should remain in the discretion of the judge to be exercised in accordance with the provincial rules of criminal procedure and the relevant case law.

[15] Counsel for the Petitioner and the Respondent have made several arguments before me that were relevant to the question whether the sealing order should be

granted, but were of limited assistance in determining whether it would be inappropriate for the media to be represented at that hearing. I recognize the parties, at that hearing, will likely make reference to the type of information that is in the divorce file which each considers too private and sensitive for media view. However, the exact detail about that information need not be provided during the motion hearing. There are no children involved in this proceeding. Because the request to view the file came from the media it will not be excluded from the motion hearing. However, I do not consider this to be a reason to refuse notice to other media. Notice is to be given pursuant to the provisions of Rule 85.05.

Beryl MacDonald, J.