

SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: *McDonald v. McDonald (Mombourquette)*, 2023 NSSC 153

Date: 20230516

Docket: 1206-007581

Registry: Sydney

Between:

Jeffrey Garland McDonald

Petitioner

v.

Tracey Marie McDonald (Mombourquette)

Respondent

LIBRARY HEADING

Judge: Associate Chief Justice Lawrence I. O’Neil

Heard: June 9 and November 23, 2022 in Sydney, Nova Scotia
Disclosure; waiver; separation agreement; set aside

Subject:

Summary:

The parties executed a separation agreement that *inter alia* provided that the parties’ disclosure obligations were satisfied. The Respondent now seeks to set aside the separation agreement on the basis *inter alia* of non-disclosure and she seeks a wide range of information about the current financial circumstances of the Petitioner. The Court held the enforceability of the separation agreement should be decided before the disclosure issue is addressed

Issues:

(1) What is the Petitioner’s disclosure obligation after conclusion of a separation agreement??

(2) Should the parties’ separation agreement be set aside??

Legislation:

Civil Procedure Rules 1.01; 59.38; 59A; 14.08; 59.19 - 59.25

Cases Considered: *Park Place Centre Limited, a Body Corporate v. Kevin MacKie and Manga Hotels (Dartmouth) Inc. c.o.b. as Doubletree Dartmouth*, 2022 NSSC 143

Laushway v. Messervey & Sobeys Group Inc., 2014 NSCA 7

Rick v. Brandsema, 2009 SCC 10
Collucci v. Colucci, 2021 SCC 24
Anderson v. Anderson, 2023 SCC 13
Bezanson, 2021 NSSC 126

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Counsel: Christine Doucet for Jeffrey McDonald
Elaine Gibney for Tracey McDonald (Mombourquette)

Overview

[1] On June 18, 2020, approximately eighteen (18) months after the parties' execution of a separation agreement, Mr. McDonald filed an application for a divorce by agreement as contemplated by clause 10 of the separation agreement.

[2] Ms. Mombourquette filed a Notice of Motion on October 26, 2021 seeking financial disclosure from Mr. MacDonald for the period after January 1, 2019.

[3] In her affidavit accompanying her Notice of Motion Ms. Mombourquette states at paragraph 8 , “ I signed the separation agreement without any disclosure” and at paragraph 9 she stated her intention to “contest all issues arising from the separation agreement”.

[4] She said a settlement conference scheduled for October 14, 2021 was adjourned to permit discoveries but the discoveries did not proceed and the subject motion was made necessary as a consequence.

[5] In the subject motion she seeks an order to compel Mr. McDonald to disclose his personal and business bank accounts and credit card statements since January 1, 2019 and further that he disclose any personal debt in his name.

[6] Counsel for Ms. Mombourquette says Mr. MacDonald had agreed to provide the requested information to a jointly – retained expert but one week before the discoveries were scheduled to begin, i.e., October 1. 2021, he advised he was no longer prepared to do so.

[7] Multiple days of court time were subsequently requested for an all-encompassing hearing to resolve the disputes concerning the extent of Mr. McDonald's current disclosure obligations; whether the separation agreement is enforceable and the order in which issues should be addressed by the court. The matter was referred to case management with the Court's objective being to streamline the proceeding.

[8] The parties were before the Court on June 9, 2022. Subsequent to that appearance (by telephone) the Court asked the parties to provide written submissions on the scheduling of issues to be decided or potentially needing the Court's decision. The Court has received those submissions and heard further from the parties.

Disclosure Obligations Generally

[9] Rule 59.19 and forward outline the disclosure obligations of parties involved in matrimonial litigation. Rule 59.19-59.25 outline disclosure obligations and the notice requirements when filing documents.

[10] Similarly, Rule 14.08(1) and (2) presumptively require full disclosure and discovery of relevant information. They provide:

14.08 Presumption for full disclosure

(1) Making full disclosure of relevant documents, electronic information, and other things is presumed to be necessary for justice in a proceeding.

(2) Making full disclosure of documents or electronic information includes taking all reasonable steps to become knowledgeable of what relevant documents or electronic information exist and are in the control of the party, and to preserve the documents and electronic information.

[11] This is a case where counsel for Ms. Mombourquette and it appears Ms. Mombourquette herself turned her mind to the extent of disclosure provided by Mr. MacDonald prior to the execution of their separation agreement. She did so with the assistance of counsel. Ms. Mombourquette decided to not request disclosure beyond that which she had, and it appears offered that decision as a concession in the parties' negotiation of a settlement. On its face, this is not a case of omission by her or her counsel to request additional disclosure (see Exhibit A to Mr. McDonald's affidavit filed May 5, 2022 at paragraph 8).

[12] Justice Denise Boudreau recently discussed a party's disclosure obligation.

[13] In *Park Place Centre Limited, a Body Corporate v. Kevin MacKie and Manga Hotels (Dartmouth) Inc. c.o.b. as Doubletree Dartmouth* 2022 NSSC 143 at paragraphs 16-19 she wrote:

[16] In *Hatfield v. Intact Insurance Company*, 2014 NSSC 232, the court stated:

[37] Confidentiality, sensitivity, privacy or lack of consent are not sufficient grounds, in and of themselves, to rebut the presumption of full disclosure. The general rule is that all relevant documents must be disclosed in a civil proceeding so long as they are not covered by privilege.

[17] The presumption, of course, only relates to “relevant” evidence. Therefore, while the obligations are stated clearly, the issue of relevance is entirely case-specific and can be prone to dispute, as in the present case.

[18] Further, the Rules (as they presently exist) tell us that the test to be applied when considering relevance is “trial relevance”. Trial relevance is not always easy to determine at a pretrial stage. In *Saturley v. CIBC World Markets Inc.*, 2011 NSSC 4, the court spelled out the test for relevance in the present Rules:

[46] This examination of the legislative history, the recent jurisprudence, and the text of rule 14.01 leads to the following conclusions:

- The semblance of relevancy test for disclosure and discovery has been abolished.
- The underlying reasoning, that it is too difficult to assess relevancy before trial, has been replaced by a requirement that judges do just that. Chambers judges are required to assess relevancy from the vantage of a trial, as best it can be constructed.
- The determination of relevancy for disclosure of relevant documents, discovery of relevant evidence, or discovery of information likely to lead to relevant evidence must be made according to the meaning of relevance in evidence law generally. The rule does not permit a watered-down version.
- Just as at trial, the determination is made on the pleadings and evidence known to the judge when the ruling is made.

In my opinion, these conclusions follow from, and are enlightened by, the principle that disclosure of relevant, rather than irrelevant, information is fundamental to justice and the recognition that an overly broad requirement worked injustices in the past.

[19] I also note a subsequent *Saturley v. CIBC World Markets Inc.* case (2012 NSSC 57), wherein the court made the following comments:

[9] In my view, the court should take a somewhat more liberal view of the scope of relevance in the context of disclosure than they might at trial. This is subject, of course, to concerns with respect to confidentiality, privilege, cost of production, timing and probative value.

[10] At the disclosure and discovery stage of litigation, it is better to err on the side of requiring disclosure of material that, with the benefit of hindsight, is determined to be irrelevant rather than refusing disclosure of material that subsequently appears to have been relevant. In the latter

situation, there is a risk that the fairness of the trial could be adversely affected.

[14] Justice Boudreau took guidance from the decision of the Court in *Laushway v. Messervey & Sobeys Group Inc.*, 2014 NSCA 7 to assess the production request before her by reference to relevance, allegations of “sensitive material, and proportionality”.

[15] At paragraph 32 she stated the following:

[32] At paragraph 86 of *Laushway*, the court provides ten considerations. The court specifically noted that this list can be refined/improved over time and adjusted to suit the circumstances of any given case:

1. Connection: What is the nature of the claim and how do the issues and circumstances relate to the information sought to be produced?
2. Proximity: How close is the connection between the sought-after information, and the matters that are in dispute? Demonstrating that there is a close connection would weigh in favour of its compelled disclosure, whereas a distant connection would weigh against its forced production.
3. Discoverability: What are the prospects that the sought-after information will be discoverable in the ordered search? A reasonable prospect or chance that it can be discovered will weigh in favour of its compelled disclosure.
4. Reliability: What are the prospects that if the sought-after information is discovered, the data will be reliable (for example, has not been adulterated by other unidentified non-party users)?
5. Proportionality: Will the anticipated time and expense required to discover the sought-after information [be] reasonable having regard to the importance of the sought-after information to the issues in dispute?
6. Alternative measures: Are there other, less intrusive means available to the applicant, to obtain the sought-after information?
7. Privacy: What safeguards have been put in place to ensure that the legitimate privacy interests of anyone affected by the sought-after order will be protected?
8. Balancing: What is the result when one weighs the privacy interests of the individual; the public interest in the search for truth; fairness to the litigants who have engaged the court’s process; and the court’s responsibility to ensure effective management of time and resources?
9. Objectivity: Will the proposed analysis of the information be conducted by an independent and duly qualified third-party expert?

10. Limits: What terms and conditions ought to be contained in the production order to achieve the object of the **Rules**, which is to ensure the just, speedy and inexpensive determination of every proceeding?

The Separation Agreement

[16] The parties entered a separation agreement on January 15, 2019. Clause 54 of the agreement provides:

54. The parties acknowledge that:
- a. The Wife has had independent legal advice;
 - b. The Husband has had independent legal advice;
 - c. Each party understand their respective rights and obligations under the Agreement;
 - d. Each party hereby warrants that he or she has given the other full and complete information about all his or her significant financial circumstances, prospects, assets and liabilities to the date of signature (hereinafter called “financial information”). By their signatures the parties confirm they have received sufficient financial information from the other and waive production of any further documents dealing with financial information to the date of this Agreement;
 - e. Each party has considered their respective probable costs of living expenses and the present and future costs associated with maintenance and support of the children of the marriage;
 - f. Each of them have entered into this Agreement without undue influence, fraud, misrepresentation or coercion, have read the entire Agreement and is signing it voluntarily;
 - g. This Agreement cancels all prior negotiations or Agreements (written or oral) between the parties and contains the entire Agreement between the parties. Neither party shall rely on any verbal or written communications or conduct which may suggest one party’s intent to hold any property in trust for the other or otherwise depart from the terms of this Agreement. This Agreement may be varied only by a written amendment executed by both parties.

[17] Both parties were represented by counsel when they entered the separation agreement and certificates of independent legal advice also dated January 15, 2019 appear as an attachment to the agreement.

[18] Mr. MacDonald is a business person with a network of small companies in the Sydney area and Ms. Mombourquette is a government employee. In the separation agreement they agreed their respective incomes were \$78,000 and \$120,000 with Mr. McDonald having the higher income.

[19] Clause 51 of the agreement provided for severance of any clause found to be unenforceable:

51. The invalidity or unenforceability of any provision of this Agreement will not affect the validity or enforceability of any other provision, and any invalid provision will be severable.

[20] Significantly, the agreement provided for a waiver of additional financial statements for both parties:

11. The Husband and the Wife hereby waive financial statements in respect of claims made in this action, and this waiver is made pursuant to Civil Procedure Rules 59.21(3) and 59.47(3). The parties intend for this section to be relied upon in lieu of Forms FD11 required in the Supreme Court of Nova Scotia, Family Division.

[21] The parties have a shared parenting arrangement governing their four (4) children. The agreement provided that neither party was required to pay child support. Special expenses for the children would be shared:

26. The parties acknowledge that they have exchanged financial information in compliance with S.17 of the Divorce Act (1985) (as amended). Based on this information, the parties agree that the Wife has an annual income of approximately \$78,000.00 and the Husband has an annual income of approximately \$120,000.00 as of the date of signing this agreement.

27. Based on the parenting arrangements and the financial circumstances of the parties, including the payments set out in paragraph 47, there shall be no table amount of child support payable by or to either party pursuant to the Child Support Guidelines.

28. The parties agree:

- a. The parties shall equally share the net cost of any uninsured medical and dental costs for the children;
- b. The Husband shall pay the full amount of the children's agreed extracurricular activities;

- c. The Husband shall contribute to the children's RESPs;
- d. The parties shall equally share the cost of the children's clothing, personal items and other expenses as deemed necessary;
- e. The Husband shall maintain a cell phone plan for [...] and [...];
- f. The Husband shall purchase bedroom furniture for the children's bedrooms in the Wife's new residence; and
- g. The Husband shall maintain life insurance in the amount of \$200,000.00 for the benefit of the children of the marriage, and the Wife shall be named as Trustee for the children. This life insurance may be reduced by 25% each time there is one fewer child of the marriage, as defined by the Divorce Act.

[22] The parties also purported to resolve the spousal support and property issues. Clauses 30, 32 and 43 addressed these issues directly:

30. Upon having considered these objectives and the conditions, means, needs and other circumstances of each spouse, including the length of time the spouses cohabited and the functions performed by each spouse during the relationship, and the payments set out in paragraph 47, the parties agree to the following with regard to spousal support.

32. The parties agree to the division of their assets and their respective responsibilities for debts as outlined below.

.

43. The Wife hereby quits claim to any interest in the business assets of the Husband. The Husband shall have those business assets free and clear from any claim by the Wife.

[23] Many of the financial aspects of the separation agreement have been implemented and others continue to be implemented.

[24] Ms. Mombourquette now challenges the enforceability of the separation agreement. She seeks a ruling on the extent of Mr. McDonald's ongoing disclosure obligations prior to a determination of the enforceability of the separation agreement. Mr. McDonald argues the order of proceeding should be the reverse.

Issue

[25] As stated, Ms. Mombourquette has filed a motion and seeks extensive financial disclosure of Mr. McDonald's current personal and business financial circumstances, including all personal and business bank and credit card statements and proof of all personal debt held in Mr. McDonald's name after execution of the separation agreement that is from January 1, 2019 forward.

[26] In response, Mr. McDonald argues the disclosure of his private information is irrelevant to the main issue to be decided at this point, which is the efficacy of the separation agreement and in particular, the clause of the agreement which confirms a waiver of financial disclosure. He also says he has disclosed all relevant and current income information for the purpose of determining his child support obligation, if any. He has filed with the court and provided to the other side a bound book containing financial records for his small businesses for 2019 and 2020 and will do the same for subsequent years. He is also agreeable to having an expert prepare a report on his income from all sources for the purpose of determining his child support obligation.

[27] Mr. McDonald argues full disclosure of his financial circumstances, including his property and business holdings is premature. He argues the information sought includes information beyond what is discoverable, in any case, particularly if the issues to be eventually decided are limited by the Court to Mr. McDonald's ongoing child and spousal support obligations.

[28] Ms. Mombourquette claims additional "private" information sought is relevant to the quantification of Mr. McDonald's spousal and child support obligation. Ms. Mombourquette says she requires and is entitled to this information prior to the Court deciding whether the separation agreement is enforceable in whole or in part. She wants to have the Court determine whether the agreement is binding in whole or in part and if it is not binding to vary the spousal and child support obligations of Mr. McDonald. Given she challenges the enforceability of the separation agreement she wishes to revisit the property and debt division the parties agreed to following separation as well. At that point, she argues the additional disclosure sought will be relevant.

[29] The agreement has not yet been made an order of this Court. The parties remain married.

[30] As stated, Ms. Mombourquette wishes to have one (1) hearing to address both the efficacy of the party's separation agreement, and to determine Mr. McDonald's disclosure obligation.

Case Management Responsibility of the Court

[31] Rule 1.01 of this Court requires the Court to manage its proceedings to effect ‘the just, speedy and inexpensive determination of every proceeding’.

[32] Rule 59.38(3) is a general authority providing for case management of proceedings.

[33] Rule 59A.02 and 59A.03 is more specific authority for the Court to manage proceedings. It provides as follows:

59A.02 Object of Rule 59A

The object of this Rule is to:

- (a) promote the proportional, just, timely, and cost-effective resolution of disputes;
- (b) minimize conflict and promote cooperation between the parties; and
- (c) reduce the negative impact that the Court's dispute resolution process(es) may have on the parties and their children.

59A.03 Dispute Resolution Processes

- (1) A judge may direct that the issues in dispute are to be resolved at a hearing, a trial, a focused hearing, or other appropriate process.
- (2) A focused hearing is a hearing that separates or prioritizes the issues to be heard within a dispute in accordance with Rule 59.65(9).

[34] It is agreed the obligation of parties to make full and honest disclosure of all relevant information is fundamental to protecting the integrity of agreements negotiated (*Rick v. Brandsema*, 2009 SCC 10, *Collucci v. Colucci*, 2021 SCC 24 and most recently, *Anderson v. Anderson*, 2023 SCC 13). As earlier stated, this Court’s Civil Procedure Rules require full disclosure of relevant information.

[35] I have weighed the connection or lack thereof to the issues before the Court. In the absence of a decision as to the issues which are alive, establishing a connection is difficult.

[36] It is important that orders for production be proportional. It appears Ms. Mombourquette’s disclosure request is all encompassing. To satisfy such a

request on these facts, a significant cost can be incurred. It is also important to achieve a balance between ordering production and the privacy interest of the parties. Relevance will always determine whether disclosure should be ordered. However, until the issues before the Court are known, relevance is difficult to determine.

[37] The first question is whether all the sought-after information is relevant at this time.

[38] I turn to the circumstances of the case before me and apply the ‘Laushway’ criteria.

[39] Parties must be free to make agreements settling their marital issues and the Court must carefully consider applications to go behind agreements (*Anderson supra*). It is well recognized that individuals agree to clauses in separation agreements for non-financial reasons.

[40] A party may simply want to ‘get it over with’ or protect their privacy and for these reasons, pay more in a financial settlement than they ‘are required to’ or accept less than they ‘are entitled to’. The Court is reluctant to embark upon a process of mind reading.

[41] Consequently, the Courts consider applications to set aside separation agreements very carefully. This is particularly true when both parties were represented by counsel when the agreement was concluded.

[42] Herein, the application by Ms. Mombourquette for wide ranging disclosure of Mr. McDonald’s present day personal and financial circumstances is a direct challenge to a significant aspect of the parties’ separation agreement. The parties presumably achieved a *quid pro quo* for the clause dealing with a waiver of further financial disclosure at the time their agreement was reached.

[43] The Court does not wish to sanction the use of Court processes to circumvent separation agreements arrived at in good faith. Ms. Mombourquette’s counsel in 2019 proposed the waiver of further disclosure. Clearly, she understood this concession to be of value to Mr. McDonald and proposed to exact a benefit for her client in return.

[44] I have decided that this matter should proceed in two stages as permitted by

Rule 59A and other Rules of Court. That is a decision as to the efficacy of the parties' separation agreement should first be made. The outcome of that hearing will determine what subsequent proceedings will be required and the consequential extent of each party's disclosure obligation.

[45] It would be inefficient to proceed with a trial over multiple days and addressing many disclosure issues, issues that the Court could ultimately rule it is precluded from addressing because the parties had resolved the issues with the execution of a separation agreement. Similarly, ordering disclosure of personal and business financial information from both parties in the absence of a decision on what issues are before the Court makes a determination of relevancy impossible.

[46] Mr. McDonald's counsel concedes that the clause of the parties' separation agreement which limits the parties' child support obligation does not preclude a review of this obligation for both parties. The court is told the children continue in a shared parenting arrangement. That certainly has implications for the current disclosure obligations of both parties. Mr. McDonald argues the disclosure application by Ms. Mombourquette before the Court extends beyond a need to disclose information relevant to income determination so that both parties' ongoing child support obligation can be arrived at.

[47] However, the disclosure obligations when child and potentially spousal support are subject to a variation application are not necessarily as extensive as that claimed by Ms. Mombourquette. It appears she wishes to revisit all aspects of the parties' separation agreement and if she is successful in her argument to set aside the parties' separation agreement, the disclosure obligations of both parties will be much broader.

[48] The extent of Mr. McDonald's current disclosure obligation will depend on what issues in the separation agreement are found to be unsettled. As commented upon by the court in *Bezanson* 2021 NSSC 126 at paragraph 32:

[32] Corporate disclosure (income tax returns and financial statements) for the previous three years is to be provided to counsel for Mari Bezanson. The request for the disclosure of T4's for all persons "related to Peter Bezanson" is denied. Timely and full disclosure of litigants in a matrimonial dispute is foundational. The requests for disclosure must be measured and must be grounded in relevance. To do otherwise will add to further costs and delay. The balancing of reasonable requests for disclosure with requests which are unreasonable is part of ensuring that the administration of justice and access to justice are advanced.

[49] A ruling as to relevance at this stage of the proceeding does not preclude a different conclusion on that issue at a later stage of a proceeding. Relevance of information can and often does change as additional issues emerge.

[50] Mr. McDonald has made substantial financial disclosure pertaining to his financial circumstances after the subject separation agreement was signed. He has provided extensive corporate and personal financial information to Ms. Mombourquette and he filed a copy of the same with the court on May 30, 2022. In the pre-hearing brief filed on behalf of Mr. MacDonald, his counsel says:

5. Mr. McDonald voluntarily provided his personal Income Tax Returns, and Notices of Assessment for 2018, 2019 and 2020. He has also voluntarily provided his business bank account and credit card statements for January 1, 2019 forward, as well as complete Income Tax Returns, Notices of Assessment, and corporate financial statements for 2019 and 2020 for the following companies:
 - a. Lorne AuCoin Renovations Limited (owner-operator);
 - b. 3069746 Nova Scotia Limited (shell company for Lorne AuCoin);
 - c. Quality Metal Works Limited (shell company for Lorne AuCoin); and
 - d. DC Auto Electric Limited (controlling interest).
6. The only information requested by Ms. Mombourquette that Mr. McDonald has not provided, is his personal bank account and credit card statements from January 1, 2019 forward; and proof of all personal debt held in his name. Mr. McDonald respectfully submits that what he has spent on his personal bank and credit cards post-separation is not relevant to the proceeding before the Court; and is not determinative of his income.
7. We understand that Ms. Mombourquette's Motion for production of Mr. McDonald's bank account and credit card statements relates to her request to overturn the parties' Separation Agreement – specifically, as it relates to child support and spousal support. Mr. McDonald respectfully submits that through this Motion, Ms. Mombourquette continues to take steps to usurp the waiver of financials contained within the parties' Separation Agreement, prior to discharging her burden to prove that the Separation Agreement should be overturned.
8. We do not dispute that this Honourable Court retains jurisdiction to review child support; however, we respectfully submit that until such time as the enforceability of the parties' Separation Agreement can be determined, a review of child support would be premature.
9. Accordingly, Mr. McDonald submits that Ms. Mombourquette's request for his personal bank account and credit card statements, and proof of all debt held in his personal name, must be considered within the framework of Ms. Mombourquette's

larger request that the parties' Separation Agreement be overturned. Following this, Mr. McDonald submits that Ms. Mombourquette's Motion should be dismissed, and the parties' Separation Agreement upheld.

[51] He says he will do the same for subsequent years as it becomes available.

[52] It appears Ms. Mombourquette does not seek production of Mr. McDonald's financial circumstances prior to the execution of the parties' separation agreement in January 2019, notwithstanding her complaint that non-disclosure by Mr. McDonald was a factor in her entering the subject separation agreement.

[53] I am satisfied with respect to the issue of the efficacy of the parties' separation agreement the sought-after information is not relevant. It pertains to a post-separation period in Mr. McDonald's life. He has disclosed some financial records for this period and has advised the court he would be agreeable to an expert being retained to report on his income sources and quantum for child support purposes.

[54] Balancing the evidence of relevancy with the privacy interests of Mr. McDonald, the need for proportionality and the costs and inconvenience of procuring the sought-after information weights against production of additional information at this time.

[55] The matter will be scheduled for a hearing to determine whether the parties' separation agreement should be set aside. The outcome of that hearing will determine the extent of Mr. McDonald's disclosure obligations.

ACJ