

SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: *MacLean v. Francis*, 2023 NSSC 212

Date: 20230628

Docket: No. FNGMCA63386

Registry: Pictou

Between:

Julianna Rose MacLean

Applicant

v.

Alden Joseph Francis

Respondent

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Judge: The Honourable Justice Moira C. Legere Sers

Heard: May 31, 2023 in Pictou, Nova Scotia

Written Decision: June 28, 2023

Counsel: Daniel F. Roper for the Applicant
Roseanne Skoke for the Respondent

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DECISION

HEARD BEFORE The Honourable Justice Moira C. Legere Sers, a Justice of the
Supreme Court of Nova Scotia (Family Division)

HEARING DATE: May 31, 2023

COUNSEL: Daniel F. Roper for the Applicant

Roseanne Skoke for the Respondent

[1] This is a costs decision relating to the disclosure regarding the Applicant's May 13th, 2020, Application to Vary the child support order of August 20th, 2012.

[2] The Applicant alleges the Respondent's historical income was higher than he disclosed to the court.

History of Orders

[3] The first order on file was dated April 17, 2011, issued May 4th, 2011. In this proceeding the court imputed the Respondent's income at \$ 117,000 and ordered child support of \$1,544 per month, with the usual order for full annual disclosure.

[4] Mr. Francis said he had income from fishing and full-time employment income from the Band Council for which he received a \$30,000 annual honorarium. He later lost this honorarium before the next order in August 2012. He advised he made \$42,000 and his gross fishing income was \$79,000; netted out at \$40,000 - \$50,000.

[5] The court grossed up a portion of that income to arrive at imputed income of \$122,200.

[6] In August 2012 Mr. Francis made an application to Vary because he lost his employment with the Band Council. He advised the court he started a tuna

chartering business. He declared his income was roughly \$75,000 on lobster sales.

[7] A further order was **issued June 4th, 2013**, imputing income to the Respondent of \$91,000 (grossed up) resulting in an interim order until year end figures were available.

[8] On June 4th, 2013, the court found the annual income was \$89,000 for the purposes of child support. He was ordered to pay \$1,226 per month for the two children.

Current Application

[9] Ms. MacLean applied to Vary the previous order on **July 22, 2020**, seeking retroactive child support back to 2013.

[10] Ms. MacLean had information that Mr. Francis has income significantly higher than that which he declared and was fishing several additional tags including lobster, snow crab and tuna.

[11] The Respondent only filed an answer to the July 22, 2022, application on **April 11, 2021**, a delay of nearly nine months. He advises this delay was caused in part by COVID. He also applied to vary the parenting order ; seeking a shared custody arrangement.

[12] This is the starting point out of which this Motion for Costs arises.

[13] On September 20th, 2020, Mr. Francis filed an affidavit and statement of income.

[14] On October 6th, 2020, Ms. MacLean was able to obtain summary advice from Nova Scotia Legal Aid. She was advised to obtain legal counsel to assist her with her application.

[15] On January 7th, 2021, the court ordered the Respondent to file full financial disclosure including the Respondent's T4's for any snow crab or tuna.

[16] Both parties were self represented at this point. A written memorandum with these disclosure directions was sent to each party.

[17] Ms. Maclean filed her documentation February 4th. 2021.

[18] On March 4th, 2021, the Respondent's counsel appeared. She requested an adjournment because she was recently retained. The court advised counsel to complete the Respondent's disclosure including his full income tax returns and proof of income from all sources from 2020 year to date for 2021 and file a preconference summary.

[19] The court directed these be filed before the return date of April 15th, 2021.

[20] The court ordered the Respondent to fully disclose his business and personal income and set out six specific disclosure requirements that included the following:

1. The Respondent, Alden Joseph Francis, shall disclose full financial information concerning the Respondent's business and personal income to the Applicant as follows:
 - a. Complete copies of personal income tax returns for 2013 and 2021 including the Statement of Fishing Activities for all years.
 - b. CRA income tax returns information regulars for 2013 to 2021. This information can be obtained from CRA and shall be requested forthwith.
 - c. A summary of annual landings by species during 2013 to 2021. This information should contain both quantities and values to the extent that he is able through his employers/partners or buyers and DFO.
 - d. Details as to the relevant fishing area(s) applicable to each license during each year between 2013 and 2021 to the extent that he is able through DFO.
 - e. Copies of all T-slips (e.g. T4s, T4Fs, T4Es, etc.) for 2013 to 2021. This information can be obtained from the CRA, which shall be requested forthwith, and provided upon receipt.
 - f. Copies of all monthly bank statement containing any deposits relating to Mr. Francis' income during the period January 2013 to December 2021, and notations as to the source of all deposits.
2. In the event the Respondent is unable to provide proof of his deposits, the Respondent shall provide proof that he has made reasonable efforts to obtain this information. Such proof shall be from an independent source such as a bank or accountant and shall be filed within one week of the date of this Order.
3. The Respondent, Alden Joseph Francis, has provided his consent to a valuation report being prepared by TriNav Group Company with respect to his tuna license being #015291.
4. The parties agree that their respective accountants, Jarrett Reaume of Matson, Driscoll and Damico, and Dan Thompson of Thompson's Accounting, have the authority to communicate directly and provide each other with full disclosure in regard to the parties' financial disclosure.

5. The issue of costs arising from the preparation of the valuation report and guideline income report shall be subject to a future decision by this Honourable Court.
6. It is further ordered that any disclosure, reproduction, dissemination or publishing of the files and records, or any part of them or the information contained in them, contrary to any term provided in this order may be treated as contempt and subject to sanctions provided by *Nova Scotia Civil Procedure Rule 59.26 (5)* and 59.26B.

On **April 14th, 2021**, the Respondent provided some disclosure. This included:

- 2013 Notice of Assessment
- 2014 General tax return (no Notice of Assessment)
- 2015 General Tax return and Notice of Assessment
- 2016 General tax return and Notice of Assessment
- 2017 Notice of Assessment
- 2018 General Tax Return (no Notice of Assessment)
- 2019 General Tax Return
- 2020 ROE and T4's

This disclosure, while a necessary first step, was not current nor complete.

[21] The Applicant was provided the Respondent's documents at 6:00 pm the evening before the court appearance of April 15, 2021.

[22] The court adjourned for a further two weeks to give her an opportunity to review the documentation.

[23] Assessing Mr. Francis's income has historically been problematic due to a lack of full and timely disclosure.

[24] He and his counsel advised early on that he did not have adequate record keeping regarding his income and expenses.

[25] On May 18th Ms. MacLean advised the court that she had retained counsel and her counsel asked for an adjournment May 18th and again on June 17th . Both counsel had not been able to speak to one another.

[26] At the September 9, 2021, court appearance Mr. Roper indicated he wished to review whether a forensic accountant was required to assist with the determination of the Respondent's actual income for child support purposes.

[27] **October 20th, 2022**, all parties were present by phone.

[28] Mr. Roper advised he had received no response to his detailed letter to the Respondent's counsel to obtain disclosure. He asked for Order to Disclose which imposed a deadline for disclosure.

[29] The only filing from Mr. Francis, **the morning of the appearance**, was the 2021 income tax return. Six items of disclosure remained unanswered. The only statement of fishing filed was for 2018.

[30] Mr. Roper asked for the Respondent's consent to engage the expert who could prepare the evaluation for the tuna licence. Mr. Francis did not, at this point agree to an expert.

[31] His counsel acknowledged the lack of compliance with the request for disclosure. To mitigate this failure, she advised the court that the Respondent gives the Applicant a lump sum, every fishing season (May-June), roughly in the amount of \$20,000 to \$25,000. She advised he also contributes towards section 7 costs.

[32] Counsel both agreed to speak directly to the Respondent's accountant to obtain the necessary disclosure.

[33] The court cautioned that failure to file full disclosure could result in an order of costs.

[34] The court advised that there must be a reasonable effort to file sufficient disclosure with the court, to assess the Respondent's income and to determine whether what Mr. Francis is paying is an appropriate child support payment in line with the Guidelines.

[35] The court directed the Respondent's counsel to immediately draft a request for his Canada Revenue Agency documents, banking statements and a request to Department of Fisheries' and Oceans to obtain information as to fishing the licences held by Mr. Francis. These requests were outstanding since May 2021.

[36] A live issue was whether the Respondent was utilizing the licences he possessed.

[37] Again, the court noted that if there was not cooperation with providing the necessary full disclosure for the report, costs could be assessed against the defaulting party.

[38] The court directed the Respondent's counsel advise the Applicant's counsel whether his client consented to the evaluation of the tuna licensee within one week, (by October 27th). Eventually the Respondent consented to the expert report.

[39] The Applicant advised they would pursue the report and the issue of costs would be dealt with later.

[40] The Applicant's counsel prepared the order on the date of the appearance. The order was provided to the Respondent's counsel. A further delay occurred. (See: 78(04) (1(b) - a lawyer is to sign within 5 days of receipt or provide commentary as to why the order is not acceptable).

[41] The court issued the order to disclose.

[42] Despite repeated requests the Respondent had not filed sufficient disclosure to provide the information necessary for the experts to complete their opinion.

This order was issued December 06, 2021. In his submissions the Applicant's counsel advised as follows:

A forensic accountant was hired, and a subsequent letter was sent to (the Respondent's counsel) seeking specified disclosure requested by the expert. Several follow-ups were made with (the Respondent's counsel) office, but the disclosure was not forthcoming.

On September 6, 2022, Ms. MacLean filed a Notice of Motion for interim relief and supporting affidavit. The matter came before the court on October 20, 2022, and an Order to Disclose was issued on December 6, 2022.

The matter returned for conferencing on January 18th. Mr. Francis was in breach of the Order to Disclose. A Disclosure Order and a Third-Party Production Order were granted. These Orders were issued on February 27, 2023.

Mr. Francis continued to be in breach of his disclosure obligations and so this matter was returned to the court docket before your Ladyship on May 31, 2023. ***On that morning, an exhibit book was electronically received from (the Respondent's counsel's) office that satisfied some, but not all, of the outstanding disclosure.***

It should be noted that the following items of disclosure are still outstanding.

- T-Slips for 2017 and 2021 remain outstanding.
- Scotiabank Statements from January 2013-December 2015 remain outstanding. (see attached letter from Ms. Skoke dated January 17, 2023 at Tab A)
- We have not received any of Mr. Francis' RBC statements as promised in his counsel's attached letter of January 17, 2023.
- On the issue of deposition notations, none have been provided contrary to the Order of the court.
- Mr. Francis, through (his counsel) have still not answered Mr. Whynot's question related to the tuna license, which as posed by me to (his counsel) on February 23, 2023.

[43] The Respondent's counsel offers some reasons for the disclosure delay. She advised he lacks a proper record keeping system. To reconstruct his historical expenses, he had to obtain this information from his suppliers.

[44] She also advised:

- The Respondent's income is not always reflective of the actual income due to the source of some of his income.
- Not all the information was within his control.
- The latest delay of one month after she received the Arisaig disclosure his counsel was attempting to organize the documents into an exhibit book and her office had staffing limitations.
- Counsel *assumed* the latest disclosure had been sent directly to the Respondent from the course of the disclosure.
- Her client had to bear the responsibility for obtaining disclosure form his accountant.
- She has staff limitations impeding timely preparation of the exhibit book.

[45] It is not unusual to find some businesses have record keeping gaps and some litigants have difficulty retroactively reconstructing their financial records.

[46] The court can, if asked, address disclosure issues with counsel to agree on cost effective alternatives. No request was made in this case to facilitate alternative disclosure.

Reasonable expectations on Disclosure

[47] Disclosure in child support applications is expected to be prompt and timely.

It is intended to put counsel, the participants, and the court in a position to assess with some certainty, precision and accuracy, the actual income of the payor.

[48] Disclosure allows the court to address the entitlement of the children to adequate support as determined by the guidelines.

[49] Disclosure is not intended to be a game of hide and seek. There is a positive duty to disclosure. It is expected that there will be a reasonable explanation for failure to disclose.

[50] The delay in this instance is beyond the scope of reasonable. It is inexcusable.

[51] Every application or request, every motion to obtain disclosure, costs the court and the litigants time and resources.

[52] It increases legal fees and presents obstacles to attaining a just and reasonable result.

[53] It prejudices the children and potentially the litigants.

[54] It places the court in a position where speculation is required to arrive at a just conclusion.

[55] It can compromise and delay arriving at a decision that gives children what they are legally entitled to receive.

[56] The Applicant's counsel provides a thorough review of the time and effort expended in his struggle to extract disclosure from the Respondent.

[57] The requirement to disclose in a timely fashion is the underpinning of the child support guidelines.

[58] The *Civil Procedure Rules*, the *Provincial and Federal Child Support Guidelines*, the requirements under *the Parenting Support Act* and the *Divorce Act* are well known to both counsel.

Conclusions

[59] I am certain whatever frailties these self represented litigants experienced between the application date in July 2020 and their retention of counsel have been addressed; each has had a full opportunity to be advised by experienced counsel as to their rights and responsibilities.

[60] On the first court appearance on January 7th, 2021, the court gave specific directions to disclose and a time deadline. The exhibit filed in April 2021 by the Respondent was not complete or compliant.

[61] In March 2021, another court appearance occurred at which time the court identified that certain documents were absent and identified the required documents for the Respondent.

[62] The night before the April 2021 appearance the exhibit book was filed, again incomplete and absent year to date income.

[63] The matter was adjourned to allow the parties to review the documentation.

[64] In June 2022 both parties had counsel and while there was no agreement on an expert, disclosure was still outstanding.

[65] On October 20th, 2022, having been unable to obtain adequate responses from the Respondent, an order for production was issued which remained unsigned by the Respondent's counsel but was ultimately issued by the court.

[66] At the September appearance the Applicant's counsel needed time to review the documentation.

[67] On October 20th, the Respondents' filings were filed the morning of the appearance and once again counsel needed time to review to determine what, if anything, remained outstanding.

[68] On the May 31 virtual pretrial conference, the Applicant's counsel advised they had, just that morning at 9:00 am, received a 10-tab exhibit book of

disclosure with lengthy documentation which he had not had time to review. He could not address the sufficiency of this for the appearance.

[69] The Respondent's counsel received this documentation on March 27th, 2023, from the Arisaig employee. The Applicant's counsel was provided the link on May 26th, 2023, but he lacked the necessary authorization to access the link, requiring such from the sender.

[70] The first he had this documentation purporting to complete disclosure was the morning of May 31st the last appearance.

[71] The Respondents counsel assumed he had access when she did and suggested the provider should have disclosed to both as ordered by the court.

[72] This information is within the control of the Respondent and there is a positive duty on the Respondent and his counsel to ensure at this late date that the Applicant has in fact received the data.

[73] It has been a long and winding road towards disclosure to achieve what is necessary to put the counsel and the court in a position to determine the Respondent's annual income and child support.

[74] There are questions raised by the Applicant that require accurate evidence to determine why Mr. Francis does fish some licences and not others, or whether the court might be required again to impute income.

[75] This information was within the Respondent's control or available to him without court order.

[76] There have been multiple virtual court appearances before counsel came on record and multiple virtual court appearances since, including three significant virtual court appearances before the Applicant had counsel and June 17th, September 9th, and October 20th as well as the latest in May 2023 where both counsel were present.

[77] Six of those relate directly and almost solely to the failure to disclose. Each virtual appearance may be cost efficient in terms of travel costs, yet each require the file to be sent to the presiding judge or await a judge's presence in court for a virtual appearance.

[78] Each appearance required staff to extract the file, ensure it was complete, ensure recent filings were updated on the civil index.

[79] Each time a judge must review the file to determine its status, read counsel's submissions and render directions.

[80] The file is then returned to the court, it is updated by staff and returned to filing.

[81] Each appearance requires counsel, and the litigants prepare for the presentation to the court.

[82] Cost efficient action requires the parties comply with the courts directions when given.

[83] There is an unidentified but significant administrative cost to these multiple appearances.

[84] The range of costs under Tariff “C” for an appearance on a motion such as this one; generally, under one hour; would be between \$250 and \$500 per appearance.

[85] The judge has the discretion, according to the *Rules* to impose and alter these costs.

[86] This is not a decision on costs in the cause issue, it is a costs motion before the proceeding is heard. The “amount involved” therefor is not an appropriate yardstick.

[87] The extent of the delay and the lack of reasonable excuse requires the court send a clear message.

Relief

[88] Mr. Roper asks for an order for costs associated with his documented efforts to obtain this disclosure. He itemizes his account at \$4,206.13 and \$66 for costs and disbursements for the unnecessary delay and appearances to obtain disclosure.

[89] The Respondent's counsel advises her client is prepared to pay \$1,800 in recognition of the delay.

[90] The Respondent's counsel suggests a larger than offered costs award may prejudice child support. There is no evidence of that before me.

[91] Before retaining counsel, the court gave the parties explicit instructions on disclosure.

[92] The Respondent's counsel has been on the file since March 4th, 2021, and the Applicant's counsel by May 2021.

[93] The failure to adequately disclose continued after counsel were retained.

[94] There have been seven virtual appearances since the Respondent's counsel was retained and five since the Applicant's counsel was retained.

[95] For the first appearance since the Applicant's counsel appeared to push for full disclosure, I order costs payable of \$250; \$300 for the second appearance in June 2022 and \$500 for each of the remaining three appearances.

[96] I order an additional \$500.00 due to the egregious failure to disclose.

[97] The total award of costs is \$2,550.00 payable by July 15th, 2023, to the Applicant's counsel in trust for the Applicant.

[98] It should not be inferred by this award that self-represented litigants are forgiven disclosure requirements; the law is clear.

[99] In this case there were multiple adjournments when neither party were represented, where each sought to obtain legal advice and COVID *may* have been one of the factors, making access to counsel difficult and adjournments necessary.

[100] This costs award is focused on the chronic failure to disclose.

[101] Should there be future failures not reasonably explained, Mr. Francis is on notice that full compensation for reasonable legal fees to obtain this disclosure will be considered.

[102] Mr. Francis should also be aware that if these appearances were not virtual, a higher award would have been considered. The Respondent's counsel shall prepare the order and file it with the court immediately.

Legere-Sers, J.