**IN THE SUPREME COURT OF NOVA SCOTIA**
**Citation:** Tarlton v. Jackson, 2014 NSSC 231

**Date:** 20140502
**Docket:** 1201-55735
(SFHD 10881)
**Registry:** Halifax

**Between:**

Jonathan Derek Noel Tarlton

Applicant

and

Gail Jill Jackson

Respondent

**Judge:** Associate Chief Justice Lawrence I. O'Neil

**Heard:** May 2, 2014 in Halifax, Nova Scotia

**Written Release:** June 20, 2014

**Counsel:** Kim Johnson for the Applicant (*ex-parte*)

**By the Court**:

**Orally**

[1] In response to an *ex parte* motion on behalf of the Applicant, the Court has been asked to interpret Rules 59.21 and 59.22. The specific question before the Court is whether those Rules require an applicant who seeks to terminate child support to file any of the financial statements identified in Rule 59.22. Rules 59.21 and 59.22 provide:

59.21 - Disclosure by financial statements

(1) A party who makes a claim for support, and the party against whom the claim is made, must make disclosure as required by the applicable legislation, including the Guidelines, and this Rule 59 is not intended to alter those requirements.

(2) Required disclosure of information must be made in the following financial statements, which are further provided for in Rules 59.22 and 59.24:

(a) statement of income;

(b) statement of special or extraordinary expenses;

(c) statement of expenses;

(d) statement of undue hardship circumstances;

(e) statement of property.

(3) Parties who agree on the terms of an order for support, or a variation order for support, are not required to file financial statements if all of the following apply, unless a judge orders otherwise:

(a) the order does not affect support for a child;

(b) the agreement is in writing and signed by the parties or counsel on their behalf;

(c) the parties sign and file a waiver of financial statements.

59.22 - Disclosure of financial information for child support and other claims

(1) A party who makes the following claim for child support, and the party against whom the claim is made, must file the following statement or statements:

| *Claim* | *Statement* |
|---|---|
| child support in the table amount under the *Guidelines* and no other financial claim | by the party claiming, none<br>by the party claimed against, a statement of income |
| special or extraordinary expenses under the *Guidelines*<br><br>if the child is able to contribute to the special or extraordinary expenses | by the party claiming, a statement of special or extraordinary expenses<br>by both parties, a statement of income<br>by the party claiming, an additional statement of the child's income or ability to contribute |

| | |
|---|---|
| child support that is different from the table amount, or the table amount plus special or extraordinary expenses<br>if child support is also for a child who is nineteen years of age or older | by both parties, a statement of income and a statement of expenses<br><br>by the party claiming, an additional statement of the child's income and expenses |
| a claim that child support should be increased from, or decreased from, the table amount on the basis that child support in the table amount would cause undue hardship | by both parties, a statement of income and a statement of expenses,<br>and<br>both parties must also obtain from the other members of their households, as defined in Schedule II of the *Guidelines*, the members' income tax return and notice of assessment for the most recent tax year and any other information required to compare household standards of living in accordance with Schedule II, and file a copy,<br>and<br>the party making the claim must file a statement of undue hardship circumstances and the party's calculation and comparison of the household standards of living, as provided in Schedule II,<br>and<br>the party against whom the claim is made may file a separate calculation and comparison of the household standards of living, as provided in<br>Schedule II. |

(2) A party who makes any of the following claims, and the party against whom the claim is made, must file the following statements:

| *Claim* | *Statement* |
|---|---|
| division of assets | a statement of property |
| spousal support | a statement of income, a statement of expenses and a statement of property,<br>and<br>a statement of income, a statement of expenses and a statement of property of a person to whom the party is married, or with whom the party lives and has lived for two years or more as a common law partner, or with whom the party is a registered domestic partner |
| variation of an order for spousal support | a statement of income and a statement of expenses,<br>and<br>a statement of income and a statement of expenses by a person to whom the party is married, or with whom the party lives and has lived for two years or more as a common law partner, or with whom the party is a registered domestic partner. |

[2] The Court is advised and the file confirms that Mr. Tarlton has applied to terminate his child support obligation because the subject child is no longer dependent. The question is whether, with that application, he must file any of the financial statements identified under Rule 59.22 presumably on the assumption that his application may be opposed or there may be a counter-application.

[3] This application presents an opportunity to comment on the need for our system of resolving family disputes to be expeditious, to be efficient, to be cost effective and to be timely. We are in an era when people have increasing difficulty accessing justice, which often means cost effective and expeditious access to the Courts. This issue is raised in this situation. It is important to interpret the Rules governing the processes in this Court in a manner that lessens

the burden on individuals because of the resulting costs, delay and hardship for families of both Applicants and Respondents and in particular, the children of these families.

[4] Much has been discussed in legal circles in Canada over the last year or two about the responsibility of all justice stakeholders to ensure better access to justice and the role to be played by Judges, administrative staff and lawyers in achieving this objective.

[5] The Final Report of the Family Justice Working Group of the Action Committee on Access to Justice in Civil and Family Matters - April 2013 is a blue print for reform of family proceedings in many Canadian jurisdictions. Under Justice Cromwell's leadership, the 'Action Committee' has provided a road map for reform and a challenge to all stakeholders to improve our 'justice system'.

[6] The Family Justice Working Group urges a re-examination of procedures in family matters. For example, the following recommendations are made *inter alia*:

> . . . . .
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> **Recommendation 21:** That family courts adopt simplified procedures for smaller or more limited family law disputes. [emphasis added]
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> **Recommendation 22:** That the use of simplified, interactive court forms accompanied by easy to follow instructions be expanded.
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> . . . . .
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> **Recommendation 26:** That the following measures be considered:
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> - each case be assessed and placed on a different procedural track that is proportional and appropriate to the needs of the case; [emphasis added]
>
> - enhance judicial discretion to impose proportional processes on the parties; [emphasis added]
>
> - all court appearances be meaningful;

> - parties be required (where possible) to agree on a common expert witness;
>
> - both courts and parties be encouraged, where appropriate, to engage in a short, focused hearing under oath and without affidavits or written briefs to allow the court to hear oral evidence and, thus, reduce the cost and time of preparing legal materials; [emphasis added]
>
> - jurisdictions explore using non-judicial case managers to help the parties move their cases forward and, where appropriate, narrow and resolve many issues in a proceeding;
>
> - case managers should have and use the powers, in appropriate circumstances, to limit the number of issues to be tried and the number of witnesses to be examined; [emphasis added]
>
> - judges should use costs awards more freely and more assertively to contain process and encourage reasonable behaviour. [emphasis added]
>
> **Recommendation 27:** That jurisdictions explore the use of less adversarial hearing models, including inquisitorial or modified inquisitorial models and, if appropriate, to pilot and evaluate such alternative models in Canada. [emphasis added]
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> . . . . .

[7] These recommendations are standards for us to follow and they identify worthy goals.

[8] It is important that we be mindful of the role, the important role that is played by the intake process and front line staff, lawyers and Judges in determining the extent to which we can achieve these objectives in the area of family law. Just as the absence of disclosure is often described as a "cancer" in family law; the requirements for unnecessary and burdensome disclosure and processes are obstacles to accessing justice. Therefore, when we read the Rules and consider an application, we must, as a Court and legal community, be mindful of opportunities to lessen the paper and process burden on individuals, a burden which can result in delay and costs. Eliminating unnecessary filing requirements and processes by the exercise of discretion is an early opportunity to improve access to justice.

[9] Associate Chief Justice Smith recently commented on 'a culture shift' that must take place in relation to civil justice generally. In *Garner v. Bank of Nova Scotia*, 2014 NSSC 63 she observed:

> [34] During the hearing of this motion, I referred counsel to the recent Supreme Court of Canada decision in Hryniak v. Mauldin, 2014 SCC 7 (CanLII), 2014 SCC 7. In that case, the court, which was speaking in the context of a summary judgment motion, discussed a culture shift that must take place in relation to civil justice in Canada. It recognized that our civil justice system is premised upon an adjudication process that must be fair and just. The court went on to say, however, that undue process and protracted trials, with unnecessary expense and delay, can prevent the fair and just resolution of disputes (see ¶ 24). It further stated that a fair and just process is illusory unless it is also accessible, proportionate, timely and affordable. The proportionality principle means that the best forum for resolving a dispute is not always that with the most painstaking procedure (see ¶ 28). While these comments were made in the context of a summary judgement motion, in my view, they are applicable to all civil cases in Canada.

[10] The Supreme Court of Canada decision referenced by Associate Chief Justice Smith provided important guidance and commentary on the need for proportionality in how the Court assists persons to resolve disputes.

[11] Justice Karakatsanis, on behalf of the Court in *Hryniak v. Mauldin*, 2014 SCC 7, discussed the broad issue in clear terms:

> [1] Ensuring access to justice is the greatest challenge to the rule of law in Canada today. Trials have become increasingly expensive and protracted. Most Canadians cannot afford to sue when they are wronged or defend themselves when they are sued, and cannot afford to go to trial. Without an effective and accessible means of enforcing rights, the rule of law is threatened. Without public adjudication of civil cases, the development of the common law is stunted.
>
> [2] Increasingly, there is recognition that a culture shift is required in order to create an environment promoting timely and affordable access to the civil justice system. This shift entails simplifying pre-trial procedures and moving the emphasis away from the conventional trial in favour of proportional procedures tailored to the needs of the particular case. The balance between procedure and access struck by our justice system must come to reflect modern reality and recognize that new models of adjudication can be fair and just. [emphasis added]

> [3] Summary judgment motions provide one such opportunity. Following the Civil Justice Reform Project: Summary of Findings and Recommendations (2007) (the Osborne Report), Ontario amended the Rules of Civil Procedure, R.R.O. 1990, Reg. 194 (Ontario Rules or Rules) to increase access to justice. This appeal, and its companion, Bruno Appliance and Furniture, Inc. v. Hryniak, 2014 SCC 8 (CanLII), 2014 SCC 8, address the proper interpretation of the amended Rule 20 (summary judgment motion).
>
> [4] In interpreting these provisions, the Ontario Court of Appeal placed too high a premium on the "full appreciation" of evidence that can be gained at a conventional trial, given that such a trial is not a realistic alternative for most litigants. In my view, a trial is not required if a summary judgment motion can achieve a fair and just adjudication, if it provides a process that allows the judge to make the necessary findings of fact, apply the law to those facts, and is a proportionate, more expeditious and less expensive means to achieve a just result than going to trial. [emphasis added]
>
> [5] To that end, I conclude that summary judgment rules must be interpreted broadly, favouring proportionality and fair access to the affordable, timely and just adjudication of claims.
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> [6] As the Court of Appeal observed, the inappropriate use of summary judgment motions creates its own costs and delays. However, judges can mitigate such risks by making use of their powers to manage and focus the process and, where possible, remain seized of the proceedings.

and further at paragraph 23-25, 30-32, 34 and 48-50:

> [23] This appeal concerns the values and choices underlying our civil justice system, and the ability of ordinary Canadians to access that justice. Our civil justice system is premised upon the value that the process of adjudication must be fair and just. This cannot be compromised.
>
> [24] However, undue process and protracted trials, with unnecessary expense and delay, can prevent the fair and just resolution of disputes. The full trial has become largely illusory because, except where government funding is available,[1] ordinary Canadians cannot afford to access the adjudication of civil disputes.[2] The cost and delay associated with the traditional process means that, as counsel for the intervener the Advocates' Society (in Bruno Appliance) stated at the hearing of this appeal, the trial process denies ordinary people the opportunity to have adjudication. And while going to trial has long been seen as a last resort, other dispute resolution mechanisms such as mediation and settlement are more likely to produce fair and just results when adjudication remains a realistic alternative.

[25] Prompt judicial resolution of legal disputes allows individuals to get on with their lives. But, when court costs and delays become too great, people look for alternatives or simply give up on justice. Sometimes, they choose to represent themselves, often creating further problems due to their lack of familiarity with the law.

. . . . .

[30] The proportionality principle is now reflected in many of the provinces' rules and can act as a touchstone for access to civil justice.[3] For example, Ontario Rules 1.04(1) and 1.04(1.1) provide:

> 1.04 (1) These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.
>
> 1.04 (1.1) In applying these rules, the court shall make orders and give directions that are proportionate to the importance and complexity of the issues, and to the amount involved, in the proceeding.

[31] Even where proportionality is not specifically codified, applying rules of court that involve discretion "includes . . . an underlying principle of proportionality which means taking account of the appropriateness of the procedure, its cost and impact on the litigation, and its timeliness, given the nature and complexity of the litigation" (Szeto v. Dwyer, 2010 NLCA 36 (CanLII), 2010 NLCA 36, 297 Nfld. & P.E.I.R. 311, at para. 53).

[32] This culture shift requires judges to actively manage the legal process in line with the principle of proportionality. While summary judgment motions can save time and resources, like most pre-trial procedures, they can also slow down the proceedings if used inappropriately. While judges can and should play a role in controlling such risks, counsel must, in accordance with the traditions of their profession, act in a way that facilitates rather than frustrates access to justice. Lawyers should consider their client's limited means and the nature of their case and fashion proportionate means to achieve a fair and just result.

. . . . .

[34] The summary judgment motion is an important tool for enhancing access to justice because it can provide a cheaper, faster alternative to a full trial. With the exception of Quebec, all provinces feature a summary judgment mechanism in

> their respective rules of civil procedure.[4] Generally, summary judgment is available where there is no genuine issue for trial.
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> . . . . .
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> [48] The Court of Appeal did not explicitly focus upon when there is a genuine issue requiring a trial. However, in considering whether it is against the interest of justice to use the new fact-finding powers, the court suggested that summary judgment would most often be appropriate when cases were document driven, with few witnesses and limited contentious factual issues, or when the record could be supplemented by oral evidence on discrete points. These are helpful observations but, as the court itself recognized, should not be taken as delineating firm categories of cases where summary judgment is and is not appropriate. For example, while this case is complex, with a voluminous record, the Court of Appeal ultimately agreed that there was no genuine issue requiring a trial.
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> [49] There will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits on a motion for summary judgment. This will be the case when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result.
>
> [50] These principles are interconnected and all speak to whether summary judgment will provide a fair and just adjudication. When a summary judgment motion allows the judge to find the necessary facts and resolve the dispute, proceeding to trial would generally not be proportionate, timely or cost effective. Similarly, a process that does not give a judge confidence in her conclusions can never be the proportionate way to resolve a dispute. It bears reiterating that the standard for fairness is not whether the procedure is as exhaustive as a trial, but whether it gives the judge confidence that she can find the necessary facts and apply the relevant legal principles so as to resolve the dispute.

[12] I caution that Nova Scotia does not have a Summary Judgment Rule similar to Ontario and we are governed by the procedures described in *Coady v. Burton* Canada Inc., 2013 NSCA 95.

[13] However, Rule 59 does permit Court officers and Judges to make many decisions that can achieve the objectives of the summary proceedings process.

[14] The issue raised herein identifies such an opportunity.

[15] After applying these general principles when interpreting Rules 59.21 and 59.22, I am satisfied that in a circumstance when a party is asking to terminate child support, that party is not making "a claim for support", as that language is used both in 59.21 and 59.22; therefore the filing requirement of 59.22 is not triggered. Rule 59.22 addresses several situations when a claim for child support is made and the Rule prescribes the specific filing requirements. Clearly Rule 59.21(2) must be read with the limiting language of Rule 59.22. (I note an application to terminate child support is not one of the situations addressed in Rule 59.22.)

[16] In the language of Rule 59.22, a party wishing to terminate child support is not making a claim for child support under the Guidelines. That party is not claiming special or extraordinary expenses, nor is that person seeking a support order that prescribes an amount different than the table amount. Finally, an application to terminate child support is not an application to deviate from the table amount based on undue hardship.

[17] Nonetheless, a counter-claim might very well involve a claim for child support. This may eventually impact the parties' filing requirements. That situation can be addressed if and when it arises. The Rules must be read broadly. It is important that judgment be exercised when determining whether information historically filed is relevant or necessary to a disposition. This is a determination that should be based on an assessment of the merits of the filing requirement. The Rules confer on Judges and Court Officers discretion and important decision-making authority. The application of the Rules must reflect both the spirit and purpose of the filing requirements and our role in improving access to Justice. What one is required to file must be necessary for the disposition of the matter currently before the Court.

[18] I observe that both the Federal *Child Support Guidelines*, SOR/2007-381 as amended and the Provincial *Child Maintenance Guidelines*, N.S. Reg. 53/98 at section 21, have a filing requirement that is similar to Rules 59.21 and 59.22. However, both Guidelines require that the income information required be necessary to determine the amount of the child support order. If the information is not necessary to achieve a resolution of the issues(s) raised, it need not be filed.

[19] The Federal *Child Support Guidelines*, at section 21.1 read:

> A spouse who is applying for a child support order and whose income information is necessary to determine the amount of the order must include the following with the application. [emphasis added]

[20] The Provincial *Child Maintenance Guidelines* at section 21 use the same language:

> A parent who is applying for a child maintenance order and whose income information is necessary must file the following…. [emphasis added]

[21] Clearly there is a double requirement under the *Child Support Guidelines* before a parent must file income information. The application must be for a child support order and the income information must be necessary to dispose of it. I read both of these requirements into Rules 59.21 and 59.22. Clearly if information is not necessary, discretion should be exercised in favour of not requiring it from parties.

[22] I observe that Rule 59.04(1) and (2) provide wide discretion to Court Officers to waive filing requirements when proceedings are started and to defer filing requirements. This discretion reinforces the obligation on Court Officers and Judges to ensure that irrelevant filings are not requested or that the timing of relevant filings be delayed so that matters may move to the next stage of processing; that we take advantage of opportunities to expedite the resolution of disputes, thereby lessening costs and hardship, and uncertainty for the public, and for families in particular. Rule 59.04(1) and (2) provide:

> Starting a proceeding
>
> 9.04 (1) A person who wishes to start a proceeding, must file all of the following:
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> (a) a notice or petition referred to in Rule 59.06;
>
> (b) documents, statements, and supporting disclosure required under Rules 59.20 to 59.23 or directed by a court officer to be filed. [emphasis added]

> (2) The documents, statements, and disclosure must be filed at the same time as the notice or petition is filed, unless a court officer permits otherwise. [emphasis added]

[23] In response to the specific question before me, the answer is that financial statements need not be filed; they are not necessary nor required by Rule 59.21 or the *Guidelines*. Mr. Tarlton is not making a claim for child support. There is a full opportunity to require the filing of this income information later should the information become necessary.

**ACJ**