NOVA SCOTIA COURT OF APPEAL
Citation: *Hanak v. Hanak*, 2024 NSCA 44

Date: 20240412
Docket: CA 527181
Registry: Halifax

Between:

Ross Hanak

Appellant

v.

Jarmila Hanak

Respondent

Judge:	The Honourable Justice Elizabeth Van den Eynden
Appeal Heard:	March 20, 2024, in Halifax, Nova Scotia
Subject:	Fresh evidence, leave to appeal, imputation of income for support purposes
Summary:	The appellant seeks leave to appeal and, if granted, to overturn a provision in an interim order issued under the *Divorce Act* wherein annual income of $200,000 was imputed to him for the purpose of determining his interim support obligations. The appellant claims the imputation of $200,000 is flawed due to the judge misapprehending evidence/assessing his income based on inaccurate information. The appellant's application for leave and his stated ground of appeal are contingent on this Court admitting his proposed fresh evidence.
Issues:	(1) Should the fresh evidence be admitted? (2) Should leave to appeal be granted?

Result: Motion to adduce for fresh evidence dismissed. The proposed fresh evidence did not pass the due diligence assessment set out in *Palmer*. Leave to appeal denied as no arguable issue raised on appeal. Costs awarded to respondent in the amount of $5,000 plus disbursements of $623.46.

This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 28 paragraphs.

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Respondent

Judges:	Bourgeois, Scanlan, Van den Eynden, JJ.A.
Appeal Heard:	March 20, 2024, in Halifax, Nova Scotia
Held:	Motion for fresh evidence dismissed, leave to appeal denied, costs awarded to respondent, per reasons of Van den Eynden, J.A.; Scanlan and Bourgeois, JJ.A. concurring
Counsel:	Christopher I. Robinson, for the appellant Tanya Nicholson, for the respondent

Reasons for judgment:

Introduction

[1] Mr. Hanak seeks leave to appeal[1] and if granted, to overturn a provision in an interim order issued under the *Divorce Act*[2] wherein annual income of $200,000 was imputed to him for the purpose of determining his interim support obligations. Mr. Hanak had urged the judge to accept that his support obligations should be based on an annual income which he guesstimated to be $46,000.

[2] Justice Theresa M. Forgeron of the Nova Scotia Supreme Court (Family Division) presided over the interim hearing. Ms. Hanak was granted primary care of the parties' daughter. Mr. Hanak was ordered to pay child support ($1,611/month), section 7 expenses (82% of the child's uninsured medical expenses) and spousal support ($1000/month). The judge's reasons are reported (2023 NSSC 237).

[3] Mr. Hanak claims the imputation of $200,000 is flawed because the judge misapprehended evidence related to the gross income and expenses of his business. Further, he says the judge assessed his income based on inaccurate information and speculation. However, Mr. Hanak's application for leave and his stated ground of appeal are contingent on this Court admitting his proposed fresh evidence.

[4] For the reasons that follow, I would not admit the fresh evidence nor grant leave to appeal. I would order costs of $5000 plus disbursements of $623.46.

Background

[5] Mr. Hanak operates, as a sole proprietor, a seasonal motel business in Nova Scotia. The motel is typically open annually from May to November and is Mr. Hanak's main source of income.

[6] The interim hearing was held on July 7 and 18, 2023. As a sole proprietor, Mr. Hanak's T1 2022 personal tax return was to be filed with the Canada Revenue Agency (CRA) by June 15, 2023. He did not file as required, nor did he produce this return to the court before the interim hearing was completed.

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[1] As this is an appeal of an interlocutory order, leave to appeal is required. See *Leyte v. Leyte*, 2019 NSCA 41 and *Charapovich v. Charapovich*, 2023 NSCA 15.
[2] R.S.C., 1985, c. 3 (2nd Supp.)

[7] The judge found Mr. Hanak's financial disclosure to be lacking. She said:

> [54] Section 21 of the [Federal Child Support Guidellines] require parents to supply their three most recent income tax returns with all attachments and assessment notices. In addition, for parents who are self-employed, they must also file "the financial statements of the spouse's business or professional practice, other than a partnership, and ..". The failure [to] do so can result in an adverse inference being drawn against the payor as stated in s. 23 which provides:
>
> > 23 Where the court proceeds to a hearing on the basis of an application under paragraph 22(1)(a), the court may draw an adverse inference against the spouse who failed to comply and impute income to that spouse in such amount as it considers appropriate.
>
> [55] Similar obligations are set out in *Rules* 59. 21 and 59.22[.]
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> [56] In this case, the father did not produce his 2022 income tax return. In addition, the father did not produce the statement of business or professional activities for the 2021 tax year. Rather, for 2021, he simply stated what his gross and net incomes were, without any breakdown.

[8] Mr. Hanak attempted to persuade the judge that deficiencies in his financial disclosure was the fault of Ms. Hanak. The judge rejected his premise:

> [52] The father blamed the mother for the errors found in his tax returns. The father said that the mother completed and signed his annual tax returns without his consent. The father said he has since discovered that the mother stole from the business and filed inaccurate returns.
>
> [53] I reject the father's allegations. I do not accept that the father had a laissez-faire attitude about the business, blindly trusting the mother with that responsibility and being a victim of her theft. To the contrary, the father was very much in charge of the business and its finances. He was the person who managed and controlled the business, not the mother. Although the mother did many tasks for the business, she did not exercise control. Further, the father knew, as a Canadian resident and business owner, that he had to file annual income tax returns. To suggest that the father never examined his tax returns for accuracy before or after their filing defies logic, especially given the father's business acumen, and his need to control.
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> …
>
> [57] I find that the mother is not responsible for the father's failure to produce. I do not accept that the mother has the receipts and the information that the father requires to complete his 2022 tax return or to verify the business expenses stated in his 2019 to 2021 tax returns. Further, the father has his 2021 tax return, the original of which must have included the statement of business or professional activities which he should have produced. He did not.

[9] The judge summarized her reasons for imputing income of $200,000 to Mr. Hanak as follows:

> [61] The mother proved that income should be imputed to the father in the requested amount of $200,000 for the following reasons:
>
> - The father' income tax returns are not accurate, either with respect to the amount of gross income earned or the amount of business expenses.
> - I infer that the father's income was under-reported given the parties' lifestyle, their lack of debt, and their property acquisitions, including storing large quantities of cash in their home.
> - The father did not produce his 2022 income tax return, nor a statement of business or professional activities for 2021.
> - The father did not produce receipts or provide explanations for the claimed business expenses.
> - The motel business likely experienced challenges in 2020 because of the pandemic. 2020 cannot be used to determine income on a prospective basis.
> - In 2022, the father earned $337,353 from the motel. I have almost no evidence about the 2022 business expenses. I do know, however, that in 2020 and 2019, the father claimed $113,390 and $103,302 in business expenses.
> - Some of the business expenses have a glaring personal element, such as those related to meals and entertainment, travel, motor vehicle, and a portion of the utility expenses (including cell phones and internet).
> - It is likely that some personal repair and maintenance expenses, and some of the repair and maintenance expenses associated with the rental properties, but without the rental income being reported, are included in the claimed business expenses.
> - Even without making adjustments for the above factors, and without scrutinizing the other business expenses, the father should have netted more than $200,000 in income for the purpose of calculating reasonable, available income for child support purposes on a go forward basis.

[10] The foregoing amount of $337,353 was based on evidence put forward by Ms. Hanak. She was also involved in the business operations of the motel and tendered a sales report, which indicated gross sales for January 1, 2022 to December 31, 2022 of $337,352. 93. In her affidavit she explained:

> 93. Attached at Exhibit "11" is a copy of the receipt for sales for the 2022 season. This does not include rental income, cash from motel guests or his profit from selling items. This is lower than it could have been since Ross closed the motel a month early, in mid-October. We were fully booked until the last day.
>
> 94. I offered to run the motel for another month but Ross refused. I estimate that I could have earned another $30,000 or more in the final month.

[11] During the interim hearing, Ms. Hanak was not cross-examined on the sales report, nor did Mr. Hanak directly question its accuracy during his testimony.

The proposed fresh evidence

[12] Mr. Hanak seeks to introduce fresh evidence on appeal. As noted, his application for leave and the appeal hinges on the admission of his proffered fresh evidence. Without the fresh evidence being admitted, and most critically his T1 2022 tax return, there would be no arguable issue on appeal—thus no basis upon which to grant leave. As stated in Mr. Hanak's appeal factum:

> 2. The Appellant, despite his best efforts, was unable to disclose his 2022 ITR prior to the hearing, because it didn't exist. The Appellant and his accounting professional were able to complete the 2022 ITR post-hearing and have sought to have it admitted as fresh evidence. **These arguments are advanced with the presumption that the 2022 ITR is admitted as fresh evidence.**
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> [emphasis added]

[13] Should leave be granted, the sole ground of appeal set out in Mr. Hanak's factum is:

> (1) The Learned Trial Judge erred in law and in mixed law and fact in imputing the Appellant's income by misapprehending the evidence with respect to the gross income and expenses of his business. In particular, the Learned Trial Judge assessed the Appellant's income based on inaccurate information, and speculation.

[14] If the fresh evidence is admitted, Mr. Hanak asks that we set aside the judge's income imputation of $200,000 and remit the matter back to the court below, before a different judge, for a re-determination of his income and support obligations. I will have more to say about Mr. Hanak's "best efforts" to disclose but will next summarize the fresh evidence.

[15] The proposed fresh evidence is comprised of:

> (1) an affidavit of Mr. Hanak wherein he repeats allegations the judge rejected respecting Ms. Hanak's responsibility for deficits in his financial disclosure, and he appends his T1 2022 tax return which indicates "Line 150" income of $116,208.20, and
>
> (2) an affidavit of an accountant Mr. Hanak retained to assist him in completion of his T1 2022 tax return which was apparently completed after the interim hearing.

[16] The fresh evidence did not include confirmation of the date the 2022 return was electronically filed with CRA nor did it include any resulting Notice of Assessment from CRA. Mr. Hanak says the fresh evidence establishes that his annual income, for the purpose of determining support obligations, should now be reduced to $82,248. He explained how he arrived at this amount and his view of its impact on the judge's interim determinations as follows:

> 5. The fresh evidence indicates that the Appellant's total income in accordance with s. 16 of the Guidelines is not $200,000, but rather $116,208, from which CERB loan and CPP payments are deducted, leaving income for support purposes of $82,248. The income difference has the following impacts: a) a monthly table child support payment of $706, instead of the $1,611 that was ordered; b) the Appellant's proportional share of s. 7 expenses would be 65% rather than 82% as ordered; and 3) the spousal support calculation will be altered by a 60% decrease in the Appellant's income.

[17] Both Mr. Hanak and his accountant (Reginald MacIntyre) were cross-examined on their proffered affidavits. The following testimony is noteworthy and, as a general statement, does not bode well for the admission of fresh evidence:

<u>Mr. MacIntyre's evidence:</u>

- Mr. Hanak contacted him in November 2022 respecting preparation of his 2022 return (due to be filed June 15, 2023). Mr. Hanak followed up his request in May of 2023 and provided Mr. MacIntyre with preparatory information in early June 2023. Additional information was requested and subsequently provided.

- The gross income figure he used for the 2022 motel business ($288,089.69) was provided by Mr. Hanak. There should be no deductions from this gross income number.[3]

- He was unaware of the gross business income of $337,353 provided to the hearing judge by Ms. Hanak.

- Due to personal issues, he was not able to complete Mr. Hanak's 2022 return by June 15, 2023 and advised him of this in advance of that date in case he wanted to retain someone else to complete and file his return on time.

- He did not recall being aware of any pending court dates in which Mr. Hanak's 2022 tax return would be of interest.

Mr. Hanak's evidence:

- Although he knew Mr. MacIntyre could not complete his 2022 tax return by June 15, 2023, he wanted him to carry on and complete the task.

- When asked about the gross sales number of $288,089.69 supplied to his accountant, Mr. Hanak said 15% is deducted for HST, and 15% (commission) for various third-party booking agencies such as Expedia from the gross sales figure.[4]

- Mr. Hanak confirmed he did not disclose his efforts to prepare, nor the status of his pending 2022 tax return before or during the interim hearing. Further, he never asked for an adjournment of the interim support determinations until his 2022 tax return could be finalized.

Should the fresh evidence be admitted?

[3] In line 3A of the Statement of Business or Professional Activities Income included in Mr. Hanak's T1 2022 tax return, the gross sales number of $288,089.69 is reported. That number is to be inclusive of GST/HST. Any adjustments to gross sales for various allowances including GST/HST is to be reported in line 3B and the adjusted gross sales reported in line 3G. No adjustments are reflected in line 3B of Mr. Hanak's tax return. The number inputted to line 3A and 3G are the same - $288,089.69.

[4] If these deductions are accurate, the gross sales number would well exceed $288,089.69—the number Mr. Hanak provided to his accountant in preparation of his 2022 tax return.

[18] *Civil Procedure Rule* 90.47(1) permits this Court to admit fresh evidence where there are "special grounds". As explained in *Armoyan v. Armoyan*, 2013 NSCA 99, leave to appeal to the S.C.C. denied, 35611 (6 February 2014):

> [131] Rule 90.47(1) permits the Court of Appeal to admit fresh evidence on "special grounds". The test for "special grounds" stems from *Palmer v. The Queen*, [1980] 1 S.C.R. 759, at p. 775. Under *Palmer*, the admission is governed by: (1) whether there was due diligence in the effort to adduce the evidence at trial, (2) relevance of the fresh evidence, (3) credibility of the fresh evidence, and (4) whether the fresh evidence could reasonably have affected the result. Further, the fresh evidence must be in admissible form. *Nova Scotia (Community Services) v. T.G.*, 2012 NSCA 43, paras 77-79, leave to appeal denied [2012] S.C.C.A. 237, and authorities there cited. *McIntyre v. Nova Scotia (Community Services*), 2012 NSCA 106, para 30.

[19] In *Barendregt v. Grebiunas*, 2022 SCC 22, the Supreme Court of Canada re-affirmed the application of the *Palmer* test in the family law context.

[20] In *Barendregt*, the Supreme Court emphasised the need for a party to exercise diligence in bringing forward evidence prior to a hearing rather than seeking to introduce fresh evidence on appeal:

> [39] ... A party who has not acted with due diligence should not be afforded a "second kick at the can": *S.F.D. v. M.T.*, 2019 NBCA 62, 49 C.C.P.B. (2nd) 177, at para. 24. And the opposing party is entitled to certainty and generally should not have to relitigate an issue decided at first instance, absent a reviewable error. Otherwise, the opposing party must endure additional delay and expense to answer a new case on appeal. Permitting a party in an appeal to fill the gaps in their trial evidence based on the failings identified by the trial judge is fundamentally unfair to the other litigant in an adversarial proceeding.
>
> [40] On a systemic level, this principle preserves the distinction between the roles of trial and appellate courts. Evaluating evidence and making factual findings are the responsibilities of trial judges. Appellate courts, by contrast, are designed to review trial decisions for errors. The admission of additional evidence on appeal blurs this critical distinction by permitting litigants to effectively extend trial proceedings into the appellate arena.
>
> [41] By requiring litigants to call all evidence necessary to present their best case at first instance, the due diligence criterion protects this distinction. This, in turn, sustains the proper functioning of our judicial architecture (*R. v. Sipos*, 2014 SCC 47, [2014] 2 S.C.R. 423, at para. 30), and ensures the efficient and effective use of judicial resources (see *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 16).

> [42] The importance of the due diligence criterion may vary, however, depending on the proposed use of the evidence. Evidence sought to be adduced as a basis for intervention — to demonstrate the first instance decision was wrong — raises greater concerns for finality and order than evidence that may help determine an appropriate order *after* the court has found a material error. Since appellate intervention is justified on the basis of a reviewable error in the decision below, there is less concern for finality and order. Accordingly, in such cases, the due diligence criterion has less bearing on the interests of justice.
>
> [43] In sum, the due diligence criterion safeguards the importance of finality and order for the parties and the integrity of the judicial system. The focus at this stage of *Palmer* is on the *conduct* of the party. This is why evidence that could, by the exercise of due diligence, have been available for trial should generally not be admitted on appeal.
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> …
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> [54] … this Court has consistently applied *Palmer* to evidence pertaining to events that occurred between the trial and appeal: see, for example, *Catholic Children's Aid Society*, at p. 188; *R. v. Owen*, 2003 SCC 33, [2003] 1 S.C.R. 779, at paras. 50-51; *Sipos*, at paras. 29-30. The evidence in *Palmer* concerned facts that occurred both before and after trial and thus included both "fresh" and "new" evidence. …
>
> [55] The *Palmer* test is sufficiently flexible to deal with both types of evidence. …the core inquiries under all four criteria remain the same regardless of when the evidence, or the specific fact, came into existence. Because the same test applies, it is unnecessary to distinguish between "fresh" and "new" evidence. *Palmer* applies to the admission of all additional evidence tendered on appeal for the purpose of reviewing the decision below.

[21] Ms. Hanak objects to the admission of the fresh evidence. She submits:

> *i) Due diligence*
>
> …
>
> [21] With due diligence, the Appellant's 2022 ITR could have been produced before the hearing. A reasonably diligent party would have taken the requisite steps to ensure this financial disclosure was available - including seeking and maintaining any required documents, retaining an accountant who had the capacity to provide timely service, and addressing the QuickBooks issues at the time they became known. The Appellant did not meet the requirement of due diligence, and should not be allowed to tender evidence on appeal that ought to have been presented to the Court at the time of the hearing.
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> [22] The Supreme Court of Canada recognized there may be rare cases in family law where the lack of due diligence will not be fatal to a motion to adduce Fresh

Evidence. These cases require exceptional circumstances, which are not present in the facts at bar. …

ii) Relevance

[23] The Respondent acknowledges that the 2022 ITR is materially relevant to the proceeding. In the context of all credibility findings and argument, the Learned Trial Judge may have given relatively little weight to this piece of evidence, had it been produced in a timely manner.

iii) Credibility

…

[26] We submit that if the 2022 ITR were available at the time of the Interim Hearing, the Learned Trial Judge would have concluded it was equally unreliable on the issue of determining the Appellant's income. It should therefore fail the third part of the test for admissibility of fresh evidence.

iv) Would have Materially Affected the Result

[27] Although the 2022 ITR may have provided a better anchor point with which to impute the Appellant's income, it is not evident that this material would have changed the overall outcome at the hearing.

[28] The Learned Trial Judge expressed concerns about the reasonableness of business expenses reported against revenue. …

[29] She had before her a receipt displaying a gross income of $337,353 for the Appellant's motel business in the year 2022. Her imputation of $200,000.00 was made in light of evidence that the business had significant unreported income which might have justified a higher estimate of gross revenue. She also considered, with some caution, the historic business expenses the Motel claimed in 2020 and 2019. She concluded that "the father should have netted more than $200,000.00 in income for the purposes of calculating reasonable, available income for child support purposes on a go forward basis." We should conclude that her finding on the Appellant's income was conservative in nature relative to her suspicions about the legitimacy of his business expenses. The production of the 2022 ITR, if made in time for the hearing, would not have satisfied the court's ability to fully scrutinize Guideline income in light of sections 17 - 21 of the *Federal Child Support Guidelines*. For this reason, the proposed fresh evidence fails the fourth test and should be excluded.

[30] Because this is an interim ruling that is under appeal, the 2022 ITR will be considered by the court at a divorce hearing. The trier of fact will be aided by extensive cross-examination and argument about the weight that ought to apply to the evidence from the Appellant about his tax return and the calculation of income and expenses that support his line 150 income. We respectfully submit that the Court of Appeal is not in the best position to weigh the credibility of the Appellant's evidence regarding Guideline Income. For this reason and the

> arguments advanced under the *Palmer* test, the Appellant's motion ought to be denied with costs to the Respondent.

[22] While Ms. Hanak makes compelling submissions on all of the *Palmer* criterion, it is sufficient to focus on the due diligence requirement.

[23] In my view, the proposed fresh evidence does not pass the due diligence assessment and the motion must be dismissed. Ironically, the proposed fresh evidence confirms Mr. Hanak's lack of diligence. More specifically, Mr. Hanak did not take reasonable steps to ensure his 2022 tax return was available for the interim hearing, nor did he inform Ms. Hanak or the hearing judge of the information he made available to his accountant and that preparation of his 2022 tax return was underway. Further, he could have, but did not ask for any adjournment of interim support issues until his accountant could complete his return. Instead, during the interim hearing, Mr. Hanak suggested his support obligations should be based on his income guesstimate of approximately $46,000 for 2022. This does not equate to "best efforts" or "due diligence" on Mr. Hanak's behalf. I would dismiss the motion for fresh evidence.

[24] I return to Mr. Hanak's application for leave to appeal. For leave to be granted, Mr. Hanak must raise an "arguable issue". As explained by this Court in *Lavy v. Hong*, 2018 NSCA 28:

> [24] The test for leave to appeal requires the appellants to raise an "arguable issue". The arguable issue must not be of merely academic interest, but one that actually arises on the facts and legitimately requires the Court's attention. It must be "an issue that would result in the appeal being allowed" …

[25] Ms. Hanak says leave to appeal should be denied. She submits:

> [15] Should the Appellant's motion to admit fresh evidence fail, there exists no arguable issue for this appeal. The Appellant relies on his 2022 ITR to demonstrate that the income imputed by the Learned Trial Judge was incorrect. The Appellant has not demonstrated any clear error of law or substantial injustice present in the Learned Trial Judge's interim decision and there is no arguable issue simply because his latest tax return presents a lower income than what the court imputed.

[26] Counsel for Mr. Hanak concedes that without the admission of the fresh evidence, there is no arguable issue to advance on appeal. I agree—no arguable issue has been advanced. Accordingly, I would deny leave to appeal.

Disposition

[27] For these reasons, I would dismiss the motion to adduce fresh evidence and deny leave to appeal.

[28] I would award costs payable forthwith by Mr. Hanak to Ms. Hanak in the amount of $5,000, a number both parties agreed would be reasonable. However, I would add to that disbursements of $623.46. Mr. Hanak's appeal book was deficient. Ms. Hanak's counsel corrected the deficiencies by filing a supplemental appeal book. The disbursements relate to the costs of preparing the required copies of the supplemental appeal book.

Van den Eynden, J.A.

Concurred in:

Bourgeois, J.A.

Scanlan, J.A.