Nielsen v. *Nielsen*, 2013 NWTSC 82

Date: 2013 10 29
Docket: S-1-DV-2012-104217

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

LAURIE NIELSEN

Petitioner (Respondent)

- and -

DAVID ALAN NIELSEN

Respondent (Applicant)

MEMORANDUM OF JUDGMENT

[1] The Petitioner (Respondent) is seeking enhanced costs as a result of the adjournment of the Examination for Discovery of the Respondent (Applicant) which had been ordered by Charbonneau J. to be held on September 21 and 22, 2013. On September 19, 2013, I granted the Respondent's application to adjourn the Examination for Discovery and granted the Petitioner the costs of the adjournment. The issue of what costs should be granted and whether costs should exceed what is permitted in Schedule A of the *Rules of the Supreme Court of the Northwest Territories* (the *"Rules"*) was adjourned to September 26, 2013 for further submissions.

[2] The Petitioner's Notice of Motion seeking to address issues of interim spousal support, child support and child support arrears was also adjourned to September 26, 2013. At that time, counsel for the Petitioner pursued the application for interim spousal support and agreed that the issues regarding child support could be adjourned.

[3] The Petitioner commenced this proceeding by filing a Petition for Divorce on September 12, 2012. At the same time, a Notice of Motion was filed seeking several items of relief including financial disclosure, child support, and spousal support. The Notice of Motion was returnable on October 4, 2012 but was withdrawn and relisted twice before being adjourned *sine die*.

[4] On August 13, 2013, the Petitioner filed a second Notice of Motion seeking several items of relief including: a number of financial documents, that the Respondent attend an Examination for Discovery on September 21, 2013, spousal support, child support and costs for the Respondent's failure to attend an Examination for Discovery on July 12, 2013. In support of this application, the Petitioner filed an Affidavit sworn on August 13, 2013.

[5] On August 29, 2013, the Respondent appeared without counsel and an Interim Order was granted which denied the Respondent's request for an adjournment of the application, required the Respondent to provide a number of items of financial disclosure to the Petitioner by September 19, 2013 and required the Respondent to attend an Examination for Discovery on September 21 and 22, 2013, subject to an application by counsel for the Respondent to change the date. All other relief was adjourned to September 19, 2013.

[6] On September 19, 2013, the Respondent's counsel, Mr. Duchene, appeared and applied for an adjournment of the September 21 and 22, 2013 Examination for Discovery dates on the basis that he was not available and he was not prepared. The Petitioner opposed the request. I granted the application for an adjournment but because of my concerns about how the Respondent and/or his counsel had conducted matters to date, I granted the Petitioner the costs of the adjournment.

[7] Since the Petitioner filed for divorce in this jurisdiction in September 2012, her counsel, Mr. Stout, has been dealing with Lawrence Pinsky, a lawyer who practices in Manitoba but is not a member of the Law Society of the Northwest Territories and does not have a restricted appearance certificate to act on this matter. The apparent reason for Mr. Pinsky's involvement stems from the parties' ownership of shares in a corporation that owns two McDonald's franchises in Yellowknife. According to the franchise agreement and option agreement, the agreement is governed by the laws in force in Manitoba.

[8] Following the filing of the Petitioner's Notice of Motion in September 2012, counsel for both parties negotiated an agreement which was intended to move the divorce forward, deal with the exchange of financial information, and establish deadlines for this to occur. The valuation of the McDonald's franchises and assets was one of the issues which had to be determined.

[9] In addition, in the agreement, the Respondent committed to continue paying the Petitioner approximately $7,000 per month pending either the settlement of this matter, a court order to the contrary or on 30 days' notice of an intention to

terminate. The agreement also dealt with the issue of child support for the children of the marriage. The agreement was concluded on October 1, 2012 and counsel exchanged letters on October 1 and 2, 2012 confirming the details of the agreement.

[10] Following this agreement, counsel for the parties continued to exchange correspondence and apparently some financial information later in October 2012.

[11] On December 4, 2012 and February 19, 2013, Mr. Stout e-mailed Mr. Pinsky and inquired about the business valuation. There is no evidence of a written response by Mr. Pinsky but it is apparent that counsel had been in communication as Mr. Stout's second e-mail refers to "our recent telephone conversation."

[12] On March 28, 2013, Mr. Stout wrote to Mr. Pinsky regarding this matter and commented "I think it fair to say that this file has not proceeded expeditiously. Consequently, I believe it is necessary that we arrange for a fulsome examination for discovery of the parties." He went on to request that Mr. Pinsky provide available dates.

[13] On April 4, 2013, Mr. Stout again e-mailed Mr. Pinsky requesting available dates for examination for discovery of the Respondent. He indicated that if he did not hear from Mr. Pinsky within the next week, that he would simply arrange for an appointment and serve the Notice of Appointment on Mr. Pinsky's office.

[14] On April 15, 2013, Mr. Stout again e-mailed Mr. Pinsky and requested dates for the examination for discovery. That same day, Ms. Neufeld, assistant to Mr. Pinsky, replied by e-mail and advised that Mr. Pinsky was out of the office all day and the e-mail would be brought to his attention when he returned to the office the following day.

[15] Mr. Pinsky replied by e-mail the following day and indicated that he and Mr. Stout should talk and that a time should be set up so that they could do so. Mr. Stout replied on April 18, 2013 and requested that Mr. Pinsky's assistant contact Mr. Stout's assistant in order to arrange a telephone call. Mr. Stout e-mailed Mr. Pinsky on April 25, 2013 and noted that he had not heard from Mr. Pinsky's office with respect to scheduling a call between them.

[16] There is no evidence of a reply to this e-mail and no indication that Mr. Pinsky ever provided dates for examination for discovery of the Respondent.

[17] On June 17, 2013, Mr. Stout wrote to Mr. Pinsky and noted that he had not received the materials that they had requested and had not heard from him for quite some time. Mr. Stout advised that he had arranged for an examination for discovery of the Respondent on July 12, 2013. Included with the letter was the Notice of Appointment.

[18] Following this letter, Mr. Stout wrote to Mr. Pinsky two more times: in the first letter, he advised of the location of the examination for discovery; and in the second letter, he re-confirmed the date, location and time of the examination for discovery and requested financial information be provided.

[19] On July 4, 2013, the Respondent was personally served with the Notice of Appointment.

[20] On July 5, 2013, Mr. Pinsky wrote to Mr. Stout regarding this matter and complained that the Notice of Appointment was not properly completed and not in compliance with the *Rules*. He advised that the Respondent would not be attending. There is no evidence that Mr. Pinsky had responded to Mr. Stout's previous requests regarding scheduling the examination for discovery and Mr. Pinsky provided no explanation for his failure to respond.

[21] Neither the Respondent nor his counsel attended at the Examination for Discovery on July 12, 2013. The day prior, on July 11, 2013, the Respondent filed an Answer and Counter Petition which was done as a self-represented litigant, as there is no counsel listed on the documents.

[22] Mr. Duchene filed a Notice of Change of Representation on July 26, 2013 which indicated that the Respondent had retained Mr. Duchene to act on his behalf in this matter. The Notice of Change of Representation was not served on the Petitioner or her counsel until September 12, 2013, well after the August 29, 2013 returnable date of the Petitioner's Notice of Motion referred to in the next paragraph.

[23] On August 13, 2013, the Petitioner filed a Notice of Motion requesting that the Court set a date for Examination for Discovery of the Respondent on September 21 and 22, 2013. The Respondent, apparently self-represented at this point, was personally served the Notice of Motion and supporting Affidavit on August 15, 2013.

[24] Mr. Duchene went on vacation around August 19, 2013 and did not return to the office until September 9, 2013. While he was aware of the August 29, 2013 court date prior to going on vacation, he did not arrange for an agent to appear on that date.

[25] The Respondent appeared personally on August 29, 2013 and requested an adjournment on the basis that Mr. Duchene was now his lawyer and was not available. The adjournment request was denied and an Order was made setting the Examination for Discovery on September 21 and 22, 2013.

The Law on Costs

[26] Costs are always in the discretion of the court although it is generally acknowledged that costs are intended: to indemnify successful parties for the costs of litigation; to encourage settlement; and to discourage and punish inappropriate behavior by litigants: *Clark* v. *Taylor,* [2003] N.W.T.J. No. 67 at para. 5.

[27] Rule 648(1) provides that costs are determined pursuant to Schedule A of the *Rules*, referred to as the Tariff, unless otherwise ordered by the court.

[28] Costs can also be awarded on a solicitor-client basis, which provides full indemnification for the costs incurred in a proceeding, or on an enhanced basis, which is generally somewhere between the Tariff amount and full indemnification.

[29] With respect to solicitor-client costs, the approach that has generally been followed by this Court was stated in *Personal Insurance* v. *Richinger*, 2012 NWTSC 19 at p. 12:

> In *Katlodeechee First Nation* v. *H.M.T.Q.*, 2004 NWTSC 12, Vertes J., citing *Young* v. *Young*, [1993] 4 S.C.R. 3, said that the jurisprudence is clear that solicitor-client costs should only be awarded in rare and exceptional circumstances, generally only where there has been reprehensible, scandalous or outrageous conduct on the part of one of the parties.

[30] As mentioned, costs can also be awarded on an enhanced basis. There are a number of factors to consider in determining whether to grant enhanced costs: the reasonableness of the fees, the adequacy of the tariffs, the complexity of the matter, and whether the issues have important implications for the parties or broader implications for the community: *5142 NWT Ltd et al* v. *Town of Hay River et al*, 2008 NWTSC 31; *WCB* v. *Mercer; Mercer* v. *WCB*, 2012 NWTSC 78,

at para. 11; *Union of Northern Workers* v. *Kathryn Carriere (No. 2)*, 2013 NWTSC 27 at para. 17.

Position of the Parties

[31] The Petitioner seeks costs on a substantial or full indemnification basis because of her concern about the behavior of the Respondent and his counsel. The Petitioner argues that there is a need for a message to be sent to the Respondent and to recognize the conduct and lack of cooperation demonstrated by the Respondent. The Petitioner claims reimbursement for her counsel's travel expenses, expenses associated with arranging the examination for discovery and her counsel's fees.

[32] The Respondent disputes the Petitioner's request for enhanced costs for several reasons. He denies that he has delayed disclosure and states that there is disagreement regarding the disclosure that has been made by both parties. Further, he argues that the Petitioner had an obligation to mitigate costs and, being aware that the Respondent's counsel was not available on September 21, the Petitioner's counsel should not have appeared in person (as the Petitioner's counsel is located in Ottawa) and should have instead appeared by telephone on September 19. The Respondent also points to Rule 648(4) which allows proper travelling and living expenses for solicitors who reside outside the Northwest Territories only where there are no qualified resident solicitors or conflicts of interest prevent resident solicitors from acting in the matter.

Decision on Costs

[33] In making my ruling on September 19, 2013, I granted the Petitioner her costs because of my concern about how the Respondent had conducted himself with respect to the examinations for discovery. The issue now is whether those costs should exceed the Tariff and if so, whether they should be solicitor-client costs or enhanced costs.

[34] Solicitor-client costs have been ordered in situations where a party has refused to attend for examination for discovery or where the examination was cancelled at the last minute for an invalid reason: *Rockwell Graphic Systems, Inc.* v. *Houle* (1998), 78 A.C.W.S. (3d) 460 (Ont. Ct. (Gen. Div.)); *Deutsche Financial Services* v. *Welsh* (1998), 162 Nfld. & P.E.I.R. 247 (Nfld. S.C.).

[35] In this case, I have concerns with what has occurred. This matter has been brought before this Court on two occasions to schedule an Examination for Discovery, something which should have been a simple matter arranged between counsel without the necessity of the Court becoming involved. That this application had to be made does not promote the orderly administration of justice and the legitimate expectation that counsel will display professional courtesy to one another.

[36] The legal system in Canada is an adversarial one and proceedings in family law can be fraught with tension and acrimony. There are situations where it may be necessary for a party to resort to the courts to set an examination for discovery or to have another party comply with their obligations under the *Rules* in order to keep matters moving expeditiously. However, in my view, this situation should not arise because of a failure of counsel to respond to repeated requests from another counsel.

[37] The involvement of Mr. Pinsky, who I am advised, is still co-counsel on this matter, is troubling for a number of reasons. He is not a member of the Law Society of the Northwest Territories and does not have a restricted appearance certificate on this matter. Mr. Pinsky has not appeared in this Court on this matter so the issue of his involvement in a divorce filed in the Northwest Territories is perhaps best left to be considered another day. Regardless of Mr. Pinsky's status with the Law Society of the Northwest Territories, what is of greater concern to the Court is Mr. Pinsky's behaviour with respect to the Petitioner's counsel and his failure to respond to requests related to scheduling the examination for discovery. Mr. Stout wrote or e-mailed Mr. Pinsky on March 28, 2013, April 4, 2013, April 15, 2013, April 18, 2013, April 25, 2013 and June 17, 2013. There is no evidence of a response from Mr. Pinsky beyond an e-mail saying, "we should talk."

[38] The Respondent filed an Affidavit on September 18, 2013 in which he disputes a number of claims made by the Petitioner: the delays surrounding the valuation of the business, the Petitioner's claim for spousal support and child support, and that he has not been forthcoming with disclosure. However, he does not dispute that Mr. Pinsky did not respond to Mr. Stout's requests for examination for discovery dates. The only reference to examinations for discovery in the Respondent's Affidavit relates to Mr. Duchene's availability for the September 21 and 22, 2013 dates. There was, and continues to be, no explanation for why Mr. Pinsky did not respond to Mr. Stout's repeated requests for available dates for examination for discovery.

[39] The *CBA Code of Professional Conduct* governs the expected behaviour of lawyers practicing in the Northwest Territories. Chapter XVI details the responsibility of a lawyer to other lawyers. The Rule states "The lawyer's conduct toward all persons with whom the lawyer comes into contact in practice should be characterized by courtesy and good faith." The Commentary associated with this Rule states:

> 6. The lawyer should answer with reasonable promptness all professional letters and communications from other lawyers that require an answer and should be punctual in fulfilling all commitments.

[40] In the circumstances, it is clear that Mr. Pinsky did not meet the standard of reasonable promptness. I am not aware of what the acceptable standard is in Manitoba but I doubt that it is considered acceptable to ignore another lawyer's e-mails or letters and repeated requests to provide availability.

[41] It was only after the Petitioner served the Respondent personally with the Notice of Appointment that Mr. Pinsky responded to the Petitioner's counsel. The following day, on July 5, 2013, he wrote to Mr. Stout complaining about the scheduled Examination for Discovery and that it was not in compliance with the *Rules*. He further advised that the Respondent would not be attending.

[42] Aside from the incongruity of Mr. Pinsky complaining about Mr. Stout having unilaterally scheduled an Examination for Discovery, the *Rules* are clear that where a notice of appointment has been served in accordance with Rule 248, that the party "shall" attend and submit to examination.

[43] Mr. Pinsky's complaint was that Rule 247(2), which permits examination for discovery only after the examining party has delivered a statement as to documents, had not been complied with as the Petitioner had not provided a statement as to documents. If Mr. Pinsky was concerned that the Notice of Appointment was not in compliance with the *Rules*, there were a few options available to him. He could have requested a statement as to documents from the Petitioner. It should be noted that Mr. Stout, in response to Mr. Pinsky's complaint, did provide a statement as to documents on July 8, 2013, before the scheduled examination date.

[44] Mr. Pinsky could have also brought an application to this Court to set aside the Notice of Appointment rather than unilaterally decide that his client did not have to attend. As the Petitioner had provided the Notice of Appointment to Mr.

Pinsky on June 17, 2013, over 3 weeks in advance of the scheduled discovery date, Mr. Pinsky had ample opportunity to do so.

[45] Following the aborted examination for discovery, Mr. Duchene was retained as the Respondent's lawyer. He filed a Notice of Change of Representation with the Court on July 26, 2013. This was not served upon the Petitioner or her counsel until September 12, 2013.

[46] Mr. Duchene's explanation for not doing so was that he had been retained on a limited basis to prepare a financial statement and a property statement, he was not sure of his further involvement in the matter and that the Notice of Change of Representation only takes effect 10 days following service.

[47] Mr. Duchene is mistaken as to when a change of representation takes effect in this situation. Rule 698 states that a party may change or retain a solicitor by filing and serving a notice to that effect. There is no waiting period; once service has been completed, the change or retention of a solicitor is complete. It is when a solicitor desires to cease to act for a party that 10 days following the filing of proof of service that the change will take effect (Rule 699).

[48] A party can retain a lawyer to act on a matter in all respects or for a limited purpose. Where the lawyer is retained for a limited purpose and the matter is before the Court, it is incumbent upon the lawyer to advise the Court. Rule 7.2 provides that a solicitor do so orally or by filing the terms of the retainer prior to the appearance. In this case, Mr. Duchene's Notice of Change of Representation makes no reference to a limited retainer.

[49] My concerns are ultimately not with the extent of Mr. Duchene's retainer or when his role changed but with two aspects of his involvement in this matter. The first is that Mr. Duchene was aware of the August 29, 2013 date prior to going on vacation earlier in August and he took no steps to arrange for an agent to appear for him on that date. While he may have been confused as to what his future role would be in this matter, anyone who reviewed the Court file and saw the Notice of Change of Representation would be under the impression that Mr. Duchene was retained to fully represent the Respondent in this matter.

[50] Mr. Duchene submitted that he did not have time to arrange for an agent as he found out about the August 29, 2013 date just prior to leaving on vacation. Further, that while on vacation, he was travelling in locations where telephone access was limited. In the circumstances, I do not believe that this is a satisfactory

explanation. Arranging for an agent in this jurisdiction often involves nothing more than making a telephone call to another lawyer and other members of the Bar are frequently accommodating in acceding to these requests. There is no evidence that Mr. Duchene could not have arranged for an agent for the August 29, 2013 date.

[51] The second concern that I have with Mr. Duchene's handling of this matter prior to the August 29, 2013 date is that Mr. Stout and Mr. Duchene were in regular contact on another file in the days leading up to Mr. Duchene's vacation. Mr. Duchene was aware that Mr. Stout was the Petitioner's counsel. Mr. Duchene did not inform Mr. Stout about his retainer on this matter. Regardless of Mr. Duchene's uncertainty over his role in this matter, advising Mr. Stout of his role, limited though it may have been at that time, would have been prudent. That basic professional courtesy could have avoided the August 29, 2013 and September 19, 2013 court dates as Mr. Stout was aware from the other file that Mr. Duchene was going on vacation.

[52] Based on the above, I am satisfied that this is an appropriate circumstance to order solicitor-client costs. The Petitioner will have her solicitor-client costs for the September 19, 2013 appearance and solicitor-client costs associated with the examinations for discovery which were scheduled for July 12, 2013, September 21 and 22, 2013.

[53] With respect to the travel costs of Petitioner's counsel, Rule 648(4) permits the travelling and living expenses of counsel from outside the Northwest Territories to be recovered where the Court is satisfied that there was a level of expertise required which was not available from resident solicitors or there were conflicts of interest which prevented resident solicitors from acting in the matter.

[54] As I stated in *WCB* v. *Mercer et al; Mercer* v. *WCB,* 2012 NWTSC 78 at para. 28:

> Parties are free to retain any lawyer to represent them but they must also recognize that claims for the costs of non-resident counsel are not automatically granted. It is well established that "some special circumstance must be demonstrated to justify the retention of non-resident counsel if recovery for the additional costs of doing so (such as travel expenses) is sought from the other side." *Peterkin* v. *U.N.W. et al*, 2006 NWTSC 58 at para. 18.

[55] This Rule is applicable to all appearances including examinations for discovery: *Seeton* v. *Commercial Union Assurance Company* (1999), 12 C.C.L.I. (3d) 295 (NWTSC) at para. 5.

[56] In this situation, no evidence has been presented that a resident solicitor could not represent the Petitioner in this matter. Therefore, the award of costs to the Petitioner will not include the travel or living expenses of her solicitor.

Interim Spousal Support

[57] The Petitioner is also seeking interim spousal support. Section 15.2(2) of the *Divorce Act,* R.S.C. 1985, c. 3 (2nd Supp.), permits a court to make an interim order for the support of a spouse in an amount that the court considers reasonable. A court is required to consider a number of factors, which are set out in section 15.2(4), in deciding whether to make an interim order and they include taking into consideration the condition, means, needs and other circumstances of each spouse including the length of cohabitation, the functions performed by each spouse during cohabitation and any order, agreement or arrangement relating to support of either spouse.

[58] Prior to their separation, both the Petitioner and Respondent worked at the family business, the McDonald's franchises. The franchises are owned by Marcom Resources Ltd. ("Marcom") and the shares of Marcom are owned by 3927661 Canada Ltd. ("Holdco"). The Petitioner and Respondent are the sole shareholders of Holdco with the Petitioner holding 49% of the shares and the Respondent holding 51% of the shares.

[59] During the marriage, both parties worked at the McDonald's franchises and each received a salary of approximately $7,000 per month. In addition, each party received dividends that were equal throughout the year. In 2010, the Petitioner's T1 General form indicated that her net income was $129,099.86. Similarly, the Respondent's 2010 T1 indicated that his net income was $129,000.00

[60] Following the parties' separation in 2011, the Petitioner continued to work at McDonald's. However, she stopped working there in June 2012. Following this, the Petitioner continued to receive a salary and dividends. The Petitioner and Respondent negotiated an agreement in October 2012 where the Respondent would continue to pay the Petitioner $7,000 per month pending either the settlement of this matter, a court order to the contrary or on 30 days' notice of an intention to

terminate. In 2012, the Petitioner's income was $230,500 and the Respondent's income was $223,000.

[61] In their Affidavits, both parties disagree on the valuation of the McDonald's franchises and each allege that the other has taken money or dividends from the business without the consent of the other.

[62] Since the Petitioner has stopped working at the McDonalds in June 2012, she claims that she has not been employed elsewhere. The Respondent alleges that she is working for DJ Towing and is living in the unencumbered matrimonial home with her new partner, the owner of DJ Towing. He also states that he is prepared to continue to pay the Petitioner $7,000 per month, in accordance with the October 2012 agreement, until the Petitioner receives her payout for her shares of Holdco. It is not certain when this will happen as the parties do not agree on the valuation of the business.

[63] In this case, the Petitioner holds 49% of the shares of the business and it is reasonable that she continue to receive an income from the business pending resolution of the financial issues between the parties. While the Petitioner is no longer working at the business whereas the Respondent continues to do so, in my view, the agreement negotiated between the parties in October 2012 was reasonable and should be continued.

[64] The allegation that each party has taken money or dividends from the business without the other's consent raises some concerns about how both parties have acted in regards to the business to date. The Respondent has the controlling interest in the business and has the ability to control when dividends are issued and in what amounts. The Petitioner's ability to remove funds from the bank accounts of the business has since been removed as she no longer has signing authority. In order to ensure that equality is maintained between the parties pending the resolution of the financial issues, any dividends that are issued should be done so equally between the parties.

[65] In conclusion, for these reasons, I order that the Respondent continue to pay the Petitioner $7,000 per month, effective September 1, 2013. In addition, any dividends that are issued are to be issued in equal amounts to the Petitioner and Respondent. The Petitioner will have her solicitor-client costs for the September 19, 2013 appearance and solicitor-client costs associated with the examinations for discovery which were scheduled for July 12, 2013, September 21 and 22, 2013.

The Petitioner should submit, within 7 days, a Bill of Costs to the Respondent for the above. The costs will be payable forthwith.

[66] If there are any disagreements regarding the Bill of Costs, the parties should contact the Registry within 14 days of these Reasons being filed and make arrangements to have this matter heard before me.

S.H. Smallwood
J.S.C.

Dated at Yellowknife, NT, this
29th day of October 2013

Counsel for the Petitioner: David Stout
Counsel for Respondent: Andre Duchene

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THE HONOURABLE JUSTICE S.H. SMALLWOOD