Disclosure in Spousal Support Cases:

Advising the Family Law Client[1]

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The Nature and Extent of disclosure obligations in the SSAG era

Once upon a time the quantum of spousal support was largely decided based on the parties' lifestyle during the marriage. The lawyer's task was to prepare accurate budgets and, if anything, arguments turned on what the lifestyle had been historically and whether or not it was possible for it to continue given the post-divorce realities of two households. The actual income of a payor or recipient spouse was relevant to determining an affordable quantum of support and, of course, significant in cases in which a spouse claimed to have suffered a post-separation decline in income or in variation cases. With the introduction of *Child Support Guidelines* by the Federal and Provincial governments, the focus shifted in child support cases to a precise determination of the payor parent's income. Although that legislative reform did not affect spousal support, inevitably, courts began to use the income determined for child support purposes as the baseline for spousal support awards. Widespread use of support calculation software also pushed to the fore considerations of percentage income allocation over the budgeted needs of a particular couple. The introduction of the *Spousal Support Advisory Guidelines* ("SSAG") has now firmly established this change of focus from budget division to income allocation.

With the great importance of income has come an inevitable preoccupation with how it is calculated. Much of the argument in any spousal support case is now about the inputs to the SSAG software. Under the *Child Support Guidelines* framework the income accepted by the Canada Revenue

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Agency for tax purposes is not necessarily appropriate for support purposes. Consequently production of tax returns and notices of assessment is only the beginning in many cases. The scope of what is relevant disclosure in a spousal support case has expanded considerably, although there do remain limits on what must be provided.

The Scope of the Obligations

The general framework for disclosure is set by the *Family Law Rules*. The starting point for income issues is the financial statement. The *Rules* require that a financial statement make full and frank disclosure of the party's financial situation and attach any documents to prove income that the statement requires.[2] If the other side believes that the financial statement is lacking then he or she may ask for the necessary additional information, failing which, the court may order production[3]. A court may order questioning on a financial statement but only *after* a request has been made for information under the *Rules*.[4] The *Rules* encourage documentary disclosure in advance of, and one hopes removing the need for, examinations with their attendant costs and delay. The penalties for failing to deliver a financial statement or to provide information required under the *Rules* are severe including the dismissal of the party's case or a finding of contempt. [5]

Either party may require the other to provide an affidavit of documents under R.19 of the *Family Law Rules*. All relevant documents that are within the party's control or available to the party on request

[2] R.13(6) of the *Family Law Rules*
[3] R.13(11) of the *Family Law Rules*
[4] R.13(13) of the *Family Law Rules*
[5] R.13(17) Failure to Obey Order to File Statement or Give Information—If a party does not obey an order to serve and file a financial statement or net family property statement or to give information as this rule requires, the court may,
(a) dismiss the party's case;
(b) strike out any document filed by the party;
(c) make a contempt order against the party;
(d) order that any information that should have appeared on the statement may not be used by the party at the motion or trial;
(e) make any other appropriate order.
Family Law Rules

are to be listed and produced.[6] On motion, a court may order a party to provide an affidavit of documents listing relevant documents that are in the control of, or available on request to a corporation that is controlled directly or indirectly by the party or another corporation that the party controls directly or indirectly.[7] Furthermore, a party may seek an order for questioning of the other party or a third party. A court may order the questioning of a party outside this jurisdiction. [8]

The obligation to disclose documents extends to electronic documents. E-discovery is not just for commercial litigators. R.2 of the *Family Law Rules* defines "documents" to mean "information, sound or images recorded by any method." Income related disclosure may include internal business records and communications, banking and other financial records. As an example, email traffic between the spouse or other non-arm's length party and the Chief Financial Officer or accountant for the business might be relevant to determining whether the income paid out to the spouse from a closely held corporation is market-based or not. Similarly such email communications may shed light on whether there are personal expenses run through the business improperly. Many income planning discussions that used to be conducted over the telephone are today conducted in some electronic form and will thus leave a record that may be very helpful.

The family law bar has been slow to take on e-discovery. The obligations to preserve electronic information apply to our cases just as much as to civil cases. Counsel should be familiar with The Sedona Canada Principles and should consider sending a preservation notice to the other side at the outset of an appropriate case. If a court finds spoliation, that is that a party has intentionally destroyed evidence

[6] R.19(1) and (2) of the *Family Law Rules*
[7] R.19(6) of the *Family Law Rules*
[8] R.20(5) of the *Family Law Rules*

relevant to the proceeding, then the court may impose penalties ranging from taking an adverse inference on a factual matter to findings of contempt. [9]

The scope of disclosure is broad but not without restriction. There are many cases in which courts refuse to sanction disclosure requests that are no more than fishing expeditions whose goal is tactical rather than substantive. There is a requirement of proportionality to disclosure that is given expression in R.2(3) of the *Family Law Rules* which expressly directs courts to deal with cases justly by taking into account the need to save expense and time and to deal with cases in ways that are appropriate to their importance and complexity. Numerous courts have pointed out that while non-disclosure may impair the ability to fairly determine the issues, excessive disclosure may add unreasonably to the cost of the proceeding and may unreasonably delay the case. Courts are aware that breach of a disclosure order may result in onerous sanctions against one party. Given the severe implications of a disclosure order there need to be common sense limits on these orders. [10] Having said that, if a party does fail to comply with a disclosure order he or she must be able to demonstrate the exercise of due diligence in trying to comply with the order to avoid costs sanctions or, potentially, having his or her pleadings struck.[11]

Impact on Third Parties

The broad scope of disclosure obligations intrude onto third parties with some frequency. A spouse may receive income through companies owned or controlled by third parties or from a family trust. A third party may be compelled to make documentary production, to be questioned, or to attend as a witness at trial. Pre-trial third party discovery procedures are not as of right. The party seeking such an order must demonstrate not only that the information is necessary and relevant but that it would be

[9] *McDougall v. Black & Decker Canada Inc.,* (2008) CarswellAlta 1686(Alta.C.A.)
[10] See *Splett v. Pearo* (2011) CarswellOnt 10349 (Ont.S.C.), *Chernyakhovsky v. Chernyakhovsky* [2005] O.J.No. 944 (Ont.S.C.) and *Boyd v. Fields* [2006] O.J. No. 5762 (Ont.S.C.) and *Belanger v. Belanger* [2011] CarswellOnt 11365 (Ont.S.C.)
[11] *Spettigue v. Varcoe*[2011] CarswellOnt 12078 (Ont.S.C.)

unfair to the party seeking the information if it is not produced. The test for third party disclosure is the same as in civil cases. The court must consider: the importance of the documents in the litigation; whether production pre trial is necessary to avoid unfairness; whether there are other available sources for the information, and the relationship of the third party to the litigation. A third party who has an interest in the subject of the lawsuit or whose interests are allied with a party to the proceeding is more likely to be ordered to make production. [12] Often in family law cases the "third party" is closely aligned as a relative, business partner or corporate entity with a close relationship to one of the spouses. Typically a truly independent third party is not regarded with such suspicion by the other party and there is less incentive to look behind the income information contained in the spouse's tax documents such as T4s or T5s.

The desire for confidentiality

Many aspects of contemporary family law in Ontario come as a complete and unwelcome surprise to separating spouses, such as: the extent and duration of spousal support obligations, the quantum of child support, or the particular quirks of equalization. All these may cause consternation to a client when he or she first learns of them. The extent of the disclosure obligation and the potential for a public airing of the spouses' private financial circumstances, not to mention those of their family and business associates, is often the most unpleasant surprise of all. As a result parties look for ways to keep their circumstances private. The options available to try to preserve privacy are limited and none without drawbacks. Parties can ask the opposing party and his or her advisors to sign a confidentiality agreement, seek a sealing order from the court or submit a dispute to private mediation or arbitration.

The *Family Law Rules* incorporate the deemed undertaking rule that there is an obligation to keep confidential all information and documents acquired through financial statements, documentary

[12] *Ontario(Attorney General) v. Ballard Estate*(1995) 26 O.R. (3d) 39 (Ont.C.A.) and see in the family law context, *Himel v. Greenberg* (2010) CarswellOnt 8261 (Ont.S.C.)

disclosure or questioning. Furthermore, that information can only be used for the case in which it was collected and not for some collateral purpose. However, this deemed undertaking is waived if the evidence is filed with a court and in any case can be used to impeach testimony in another case.[13] The efficacy of the rule in protecting a client or third party's privacy interest is minimal.

It is possible to seek a sealing order from the court pursuant to s. 137(2) of the *Courts of Justice Act*. A sealing order is an exception to the general principle of open courts and the test to obtain a sealing order is very high. An order restricting public access to the courts should only be granted where it is necessary to prevent serious risk to an important interest, including a commercial interest, in the context of litigation because reasonable alternatives will not prevent the risk; and, where the salutary effects of the confidentiality order are not outweighed by its deleterious effects, in particular the infringement on the constitutional right to free expression. An important commercial interest is one that is not specific to the party but which has a public component. [14] If the request for a sealing order relates to information concerning a child then the best interests of a child is a super-ordinate value which may over-ride the open court principle.[15] Typically at its highest a party or third party seeking a sealing order in a spousal support case will be able to show economic harm to the public disclosure of financial information. That is insufficient to meet the test for a sealing order.[16] Nor is it possible to obtain a sealing order simply on consent. The test invokes the public interest in freedom of expression from which the parties to a lawsuit cannot opt out.[17]

Parties may enter into a confidentiality agreement. In *Ludmer v. Ludmer*, Mr. Justice Perkins ordered one of the parties to honour an undertaking to enter into a confidentiality agreement. Regrettably, the terms of the confidentiality agreement are not set out in the decision so it does not

[13] R.20(24)-(26) of the *Family Law Rules*
[14] *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522
[15] *K.(M.S.) v. T.(T.L.)* [2003] O.J. No. 352 (Ont.C.A.)
[16] *Himel v. Greenberg*(2010) CarswellOnt 8261 (Ont.S.C.) at 15-16
[17] *Himel v. Greenberg, supra*at 15

provide guidance about what type of confidentiality agreement was found to be acceptable by the court.[18] In *Josephson v. Hanna*, Mr. Justice Czutrin denied a motion by one of the parties to compel the other party and her solicitor to sign a confidentiality agreement. Czutrin J. noted that the deemed undertaking rule found in R.20(24)-(26) of the *Family Law Rules* sufficiently addresses the issue. Further, his honour expressed reservations stating: "I am not prepared to order the signing of a confidentiality agreement for a variety or reasons including what appears to be an acrimonious litigation extending to counsel and my concern that such agreements might lead to additional litigation and other issues."[19]

There are many potential difficulties with confidentiality agreements. As they have no legislative basis they rely on the law of contract which raises a preliminary question: What is the consideration for a confidentiality agreement? All these agreements do is permit a party who has a right to financial disclosure under the *Family Law Rules* in any event to receive the information. That is no consideration at all. Confidentiality agreements raise many troubling questions. Common terms that I have seen circulated include:

a. a provision permitting counsel to review documents but not the client, which puts the lawyer in conflict with his or her own duty to the client;

b. A provision that any new counsel or expert retained by the party must sign the agreement. This removes the right to consult an expert and, possibly, chose not to produce a report from that expert or disclose the retainer. It also precludes a party from obtaining a second opinion from another lawyer on a confidential basis;

[18] *Ludmer v. Ludmer*(2010) CarswellOnt 10836 (Ont.S.C.)
[19] *Josephson v. Hanna, supra,* at 4

c. A provision that documents be returned after the case is resolved, with no copies kept on file. That could cause difficulties if there is a future spousal support variation and might also prevent counsel from defending him or herself in a negligence claim;

d. A provision imposing liability for damages on the lawyer or expert if the agreement is breached. One would hope that no lawyer or professional expert would breach an agreement but it is possibly that inadvertently such a breach could happen thereby leading to the further litigation which Mr. Justice Czutrin referred to in *Josephson v. Hanna*, *supra*.

For all these reasons, I suggest that confidentiality agreements be approached with real caution by parties and their advisors.

Parties may choose alternate dispute resolution as a means to keep their dispute private. Now that the legislation requires at least limited rights of appeal from every arbitration award, this approach also has its limitations. Arbitration agreements usually provide for confidentiality. If one of the parties commences an appeal or seeks directions concerning the arbitration in the court for some reason, the court may grant a sealing order to enforce the confidentiality clause. The argument would be that there is a public interest in protecting the confidentiality provisions of arbitration agreements. There is some substance to that view but I am not sure it will ensure a sealing order in every case.

Given the limitations on all approaches to protecting privacy, perhaps the best advice to give to clients is to settle their cases privately and consensually if at all possible. Such advice can be easier to give than it is for parties to receive and implement! Whether parties litigate or not, financial disclosure is the building block of all spousal support cases. The obligations are extensive but still rationally connected to the matter in issue. There is a common sense thread running through the case law on what should be disclosed. If the party in control of the information makes prompt and sensible disclosure much of the suspicion which can fuel litigation in this area will be mitigated.