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REPORTS OF FAMILY LAW

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Recueil de jurisprudence en droit de la famille

[Indexed as: **Senek v. Senek**]

Ernest Elie Senek, (Petitioner) Appellant and Gwendolyn Enid Senek, (Respondent) Respondent

Manitoba Court of Appeal

Docket: AF 13-30-08074

2014 MBCA 67

Freda M. Steel, Diana M. Cameron, William J. Burnett JJ.A.

Heard: June 18, 2014

Judgment: June 18, 2014

Family law —— Support — Spousal support under Divorce Act and provincial statutes — Variation or termination — Change in financial circumstances — Change in means of spouse —— Parties divorced in 1997, after long-term marriage of 25 years — Husband was ordered to pay wife spousal support in amount of $800 per month — After husband retired, he brought motion to terminate spousal support — Motion judge refused to terminate spousal support, but varied order such that it would terminate when wife turned 65 years of age — Husband appealed — Appeal dismissed — Wife continued to have need for spousal support — Without support, wife's annual income would only be $11,721 — Certain items in husband's budget were questionable, and he had ability to pay.

Cases considered by *Freda M. Steel J.A.*:

Boston v. Boston (2001), 201 D.L.R. (4th) 1, 28 C.C.P.B. 17, 271 N.R. 248, 149 O.A.C. 50, 17 R.F.L. (5th) 4, 2001 C.E.B. & P.G.R. 8385 (headnote only), 2001 CarswellOnt 2432, 2001 CarswellOnt 2433, 2001 SCC 43, [2001] 2 S.C.R. 413, [2001] S.C.J. No. 45, REJB 2001-25002 (S.C.C.) — followed

Cymbalisty v. Cymbalisty (2003), 44 R.F.L. (5th) 27, 232 D.L.R. (4th) 718, 38 C.C.P.B. 265, [2004] 8 W.W.R. 220, 2003 MBCA 138, 2003 CarswellMan 458, 180 Man. R. (2d) 112, 310 W.A.C. 112, 2003 C.E.B. & P.G.R. 8079 (Man. C.A.) — referred to

Hickey v. Hickey (1999), [1999] 2 S.C.R. 518, 172 D.L.R. (4th) 577, 1999 CarswellMan 254, 1999 CarswellMan 255, 46 R.F.L. (4th) 1, 240 N.R. 312,

[1999] 8 W.W.R. 485, 138 Man. R. (2d) 40, 202 W.A.C. 40, [1999] S.C.J. No. 9 (S.C.C.) — referred to

MacQuarrie v. MacQuarrie (2012), 2012 CarswellPEI 5, 2012 PECA 3, 992 A.P.R. 246, 319 Nfld. & P.E.I.R. 246, 18 R.F.L. (7th) 1, [2012] P.E.I.J. No. 5 (P.E.I. C.A.) — considered

Statutes considered:

Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.)
s. 17(1)(a) — pursuant to

APPEAL by husband from judgment reported at *Senek v. Senek* (2013), 2013 CarswellMan 782 (Man. Q.B.), dismissing husband's motion to terminate spousal support.

S.D. Abel, for Appellant
J.C. Robinson, S.D. Berg, for Respondent

***Freda M. Steel J.A.*:**

1 This is an appeal of a motion to vary spousal support.

2 When the parties divorced in 1997, after a long-term marriage of 25 years, the husband was ordered to pay spousal support in the amount of $800 per month. After the husband retired, he moved, pursuant to s. 17(1)(a) of the *Divorce Act*, to terminate spousal support as of June 2013, the date of his retirement, because of that change of circumstance.

3 The motion judge refused to terminate spousal support, but varied the order such that it would terminate when the wife turned 65 years of age, in approximately four years on July 31, 2017, a variation to which the wife had consented.

4 The husband appeals, arguing two grounds of appeal. First, that the motion judge failed to properly apply the principle arising out of the Supreme Court of Canada decision in *Boston v. Boston*, 2001 SCC 43, [2001] 2 S.C.R. 413 (S.C.C.). In the marital property division at the time of separation, the husband's pension plan was not divided as a result of an agreement. Instead, the wife opted to make a smaller equalization payment to him than she would otherwise have had to make. The husband argues that, in effect, similar to the situation in *Boston*, to make him pay spousal support out of his pension at this point would constitute double recovery.

5 Second, the husband argues that to continue the spousal support obligation at present would create hardship on him and his current wife because of their reduced family income. He submits that the motion judge misapprehended the evidence in his analysis of the husband's expenses, especially when the wife did not challenge those expenses by way of cross-examination or affidavit.

6 Counsel are, of course, familiar with the high standard of deference this court owes when reviewing orders of support. Deference is owed to the motion judge's decision absent an error in principle, a significant misapprehension of the evidence or unless the award is clearly wrong. See *Hickey v. Hickey*, [1999] 2 S.C.R. 518 (S.C.C.).

7 We do not believe that the principle in *Boston* applies to this situation. In that case, the Supreme Court of Canada was asked to consider the validity of "double dipping" into pension income. That is, can a pension which has been divided as property under marital property legislation be looked to as a source of income for assessing support? As Major J. made clear in that case, the principle against double recovery arises when compensatory spousal support is awarded as opposed to spousal support based on need. It is not an automatic exclusion.

8 McQuaid J.A. in the case of *MacQuarrie v. MacQuarrie*, 2012 PECA 3, 319 Nfld. & P.E.I.R. 246 (P.E.I. C.A.), summarized the ratio from *Boston* in this way, "Simply put, the challenge is to avoid double recovery when it is fair to do so. This is not to say that in all cases double recovery will be eliminated because, in some cases double recovery may be the only fair way to continue support" (at para. 91). See also *Cymbalisty v. Cymbalisty*, 2003 MBCA 138 (Man. C.A.) at para. 37, (2003), 180 Man. R. (2d) 112 (Man. C.A.). In fact, some academics have noted that the exception based on need is an exception "which seems to have swallowed the rule" (Rollie Thompson, "To Vary, To Review, Perchance to Change; Changing Spousal Support" (2012) 31 CFLQ 355 at 380).

9 I agree with the motion judge that this is a case for the application of that exception. The wife continues to have a need for spousal support. The wife now lives very simply on an annual income of $21,321 including spousal support which represents 45 per cent of her income. Without that support, her annual income would only be $11,721 despite the fact that the motion judge held that she was doing whatever she could to support herself in the small community in which she lives.

10 On the other hand, the husband's income upon retirement is $38,472. The motion judge also held that certain items in the husband's budget were questionable leading to a finding that, not only did the wife continue to have a need, but the husband had an ability to pay.

11 Even if the wife did not challenge the husband's expenses, the motion judge is certainly entitled to do so. The husband filed his financial statement as part of the documentary evidence in the case. The motion judge was entitled to weigh and evaluate that evidence, whether or not the wife questioned it. That is a judge's job - to evaluate the evidence filed.

12 In any case, the husband's expenses were questioned in argument by counsel for the wife who drew the motion judge's attention to those expenses. The motion judge was entitled to accept those submissions and conclude, for example, that three cars for two people was excessive when compared to the wife's financial need. I see no grounds for intervention in the motion judge's evaluation of the financial evidence.

13 The appeal is dismissed with costs.

Appeal dismissed.

[Indexed as: **Marche v. Wagstaff**]

Barbara Allison Wagstaff, Appellant and Roy Marche, Respondent

Newfoundland and Labrador Court of Appeal

Docket: 13/11

2014 NLCA 28

B.G. Welsh, L.D. Barry, C.W. White JJ.A.

Heard: May 13, 2014

Judgment: July 7, 2014

Family law —— Support — Spousal support under Divorce Act and provincial statutes — Variation or termination — General principles —— Parties were involved in matrimonial litigation — In March 2009, trial judge ordered husband to pay wife spousal support of $416 per month, with provision for review after February 2013 — Husband brought application for variation — Applications judge found that wife's cohabitation with another man and her employment income constituted material changes, and relieved husband of his spousal support obligation — Wife appealed — Appeal allowed — Applications judge erred in effectively conducting review of trial judge's decision — Applications judge erred in failing to consider how husband's increased income should impact his spousal support obligation, and in over-emphasizing self-sufficiency — Applications judge should have considered wife's cohabitation and benefits thereby acquired in context of parties' cohabitation agreement — Applications judge erred by not giving wife sufficient credit for her child care responsibilities.

The parties were involved in matrimonial litigation. In March 2009, the trial judge ordered the husband to pay the wife spousal support of $416 per month, with a provision for review after February 2013.

The husband brought an application for variation. The applications judge found that the wife's cohabitation with another man and her employment income constituted material changes, and relieved the husband of his spousal support obligation. The wife appealed.

Held: The appeal was allowed.

Per Barry J.A. (White J.A. concurring): The applications judge erred in effectively conducting a review of the trial judge's decision. The applications judge erred in failing to consider how the husband's increased income should impact his spousal support obligation, and in over-emphasizing self-sufficiency. The applications judge should have considered the wife's cohabitation and the bene-

fits thereby acquired in the context of the parties' cohabitation agreement. The applications judge erred by not giving the wife sufficient credit for her child care responsibilities.

Per Welsh J.A. (dissenting): The applications judge did not err in terminating spousal support. The applications judge would have been aware at the hearing and at the time of his decision that the date for review was imminent. This was a factor the applications judge took into account, particularly insofar as the support order was compensatory in nature. Further, since this was a variation application, it was open to the applications judge to focus on the objective most engaged by the change in circumstances that grounded the application, which was economic self-sufficiency. While the applications judge was required to give reasons for his decision, his failure to advert specifically to the other objectives was not determinative.

Cases considered by *L.D. Barry J.A.*:

Bell v. Bell (2000), 2000 CarswellNfld 146, 192 Nfld. & P.E.I.R. 26, 580 A.P.R. 26 (Nfld. U.F.C.) — referred to

Kent v. Kent (2010), 324 D.L.R. (4th) 238, 2010 CarswellNfld 278, 2010 NLCA 53, 301 Nfld. & P.E.I.R. 152, 88 R.F.L. (6th) 241, 932 A.P.R. 152, [2010] N.J. No. 287 (N.L. C.A.) — referred to

Leskun v. Leskun (2006), 2006 SCC 25, 2006 CarswellBC 1492, 2006 CarswellBC 1493, 349 N.R. 158, [2006] 1 S.C.R. 920, 34 R.F.L. (6th) 1, 226 B.C.A.C. 1, 268 D.L.R. (4th) 577, 373 W.A.C. 1, 62 B.C.L.R. (4th) 197, [2006] S.C.J. No. 25 (S.C.C.) — referred to

Tobin v. Tobin (1974), 1974 CarswellOnt 199, 19 R.F.L. 18 (Ont. H.C.) — considered

Cases considered by *B.G. Welsh J.A.* (dissenting):

Beck v. Beck (2012), 1022 A.P.R. 287, 329 Nfld. & P.E.I.R. 287, 2012 CarswellNfld 419, 2012 NLTD(F) 34 (N.L. T.D.) — considered in a minority or dissenting opinion

Boston v. Boston (2001), 201 D.L.R. (4th) 1, 28 C.C.P.B. 17, 271 N.R. 248, 149 O.A.C. 50, 17 R.F.L. (5th) 4, 2001 C.E.B. & P.G.R. 8385 (headnote only), 2001 CarswellOnt 2432, 2001 CarswellOnt 2433, 2001 SCC 43, [2001] 2 S.C.R. 413, [2001] S.C.J. No. 45, REJB 2001-25002 (S.C.C.) — referred to in a minority or dissenting opinion

Bracklow v. Bracklow (1999), 1999 CarswellBC 532, 1999 CarswellBC 533, 169 D.L.R. (4th) 577, 236 N.R. 79, 44 R.F.L. (4th) 1, 120 B.C.A.C. 211, 196 W.A.C. 211, [1999] 1 S.C.R. 420, [1999] 8 W.W.R. 740, 63 B.C.L.R. (3d) 77, [1999] S.C.J. No. 14 (S.C.C.) — considered in a minority or dissenting opinion

Droit de la famille - 09668 (2011), 2011 CarswellQue 13700, 2011 CarswellQue 13701, 2011 SCC 65, *(*sub nom. *Droit de la famille 10565)* 339 D.L.R. (4th)

658, 6 R.F.L. (7th) 68, *(*sub nom. *P. (R.) v. C. (R.))* 425 N.R. 1, *(*sub nom. *R.P. v. R.C.)* [2011] 3 S.C.R. 819 (S.C.C.) — referred to in a minority or dissenting opinion

Droit de la famille - 091889 (2011), 2011 CarswellQue 13698, 2011 CarswellQue 13699, 2011 SCC 64, *(*sub nom. *P. (L.M.) v. S. (L.))* 424 N.R. 341, *(*sub nom. *Droit de la famille - 10897)* 339 D.L.R. (4th) 624, 6 R.F.L. (7th) 1, *(*sub nom. *L.M.P. v. L.S.)* [2011] 3 S.C.R. 775, [2011] S.C.J. No. 64, [2011] A.C.S. No. 64 (S.C.C.) — considered in a minority or dissenting opinion

Dunnigan v. Park (2007), 2007 CarswellBC 1441, 2007 BCCA 329, 38 R.F.L. (6th) 241 (B.C. C.A.) — referred to in a minority or dissenting opinion

Hickey v. Hickey (1999), [1999] 2 S.C.R. 518, 172 D.L.R. (4th) 577, 1999 CarswellMan 254, 1999 CarswellMan 255, 46 R.F.L. (4th) 1, 240 N.R. 312, [1999] 8 W.W.R. 485, 138 Man. R. (2d) 40, 202 W.A.C. 40, [1999] S.C.J. No. 9 (S.C.C.) — considered in a minority or dissenting opinion

Juvatopolos v. Juvatopolos (2005), 202 O.A.C. 1, 2005 CarswellOnt 4774, 19 R.F.L. (6th) 76, [2005] O.J. No. 4181 (Ont. C.A.) — referred to in a minority or dissenting opinion

Lu v. Sun (2005), 2005 NSCA 112, 2005 CarswellNS 338, 235 N.S.R. (2d) 353, 747 A.P.R. 353, 17 R.F.L. (6th) 57, [2005] N.S.J. No. 314 (N.S. C.A.) — referred to in a minority or dissenting opinion

Marche v. Marche (2009), 2009 NLTD 31, 2009 CarswellNfld 53 (N.L. T.D.) — referred to in a minority or dissenting opinion

Miglin v. Miglin (2003), 2003 SCC 24, 2003 CarswellOnt 1374, 2003 CarswellOnt 1375, 224 D.L.R. (4th) 193, 34 R.F.L. (5th) 255, 66 O.R. (3d) 736 (note), [2003] 1 S.C.R. 303, 171 O.A.C. 201, 302 N.R. 201, REJB 2003-40012, [2003] S.C.J. No. 21 (S.C.C.) — referred to in a minority or dissenting opinion

Moge v. Moge (1992), [1993] R.D.F. 168, [1993] 1 W.W.R. 481, 99 D.L.R. (4th) 456, [1992] 3 S.C.R. 813, 81 Man. R. (2d) 161, 30 W.A.C. 161, 43 R.F.L. (3d) 345, 145 N.R. 1, 1992 CarswellMan 143, 1992 CarswellMan 222, [1992] S.C.J. No. 107, EYB 1992-67141, [1990] S.C.C.A. No. 249 (S.C.C.) — considered in a minority or dissenting opinion

Swales v. Swales (2010), 90 R.F.L. (6th) 314, 2010 CarswellAlta 1946, 2010 ABCA 292 (Alta. C.A.) — referred to in a minority or dissenting opinion

Williams v. Williams (2010), 2010 CarswellSask 213, 2010 SKCA 52, 83 R.F.L. (6th) 11, [2010] S.J. No. 206, [2010] S.J. No. 2006 (Sask. C.A.) — referred to in a minority or dissenting opinion

Statutes considered by *B.G. Welsh J.A.* (dissenting):

Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.)

Generally — referred to

s. 15.2(6) [en. 1997, c. 1, s. 2] — referred to

s. 17 — considered

s. 17(1)(a) — considered
s. 17(4.1) [en. 1997, c. 1, s. 5(1)] — considered
s. 17(7) — considered
s. 17(7)(d) — considered

APPEAL by wife from decision terminating spousal support.

Adam J. Crocker, for Appellant
Fred Stagg, Q.C., for Respondent

***L.D. Barry J.A.*:**

1 Barbara Wagstaff appeals a decision of February 7, 2013, which ordered that effective February 2, 2013, Roy Marche be relieved of his obligation to pay her spousal support. The trial judge had ordered that Mr. Marche pay spousal support of $416.00 per month commencing on March 1, 2009, continuing for four years, with a provision for review after February 28, 2013 and permission to apply for a variation within the four-year period, based on a material change in circumstances.

2 The application for variation was filed by Mr. Marche on November 18, 2011. The hearing occurred on October 11, 2012 and a decision was rendered on February 7, 2013.

3 An applications judge held that Ms. Wagstaff's cohabitation with another man and her employment income from a company owned by her new partner constituted material changes. He rejected Ms. Wagstaff's argument of continuing need because he found she was "the author of her own difficulties" by her choice to remain underemployed instead of retraining or pursuing a career based upon her degree in psychology.

4 The applications judge did not expressly deal with Ms. Wagstaff's application to increase her spousal support based upon Mr. Marche's increased income. He held that Ms. Wagstaff would be fully compensated for the hardship she suffered as a result of the marriage breakdown when the last payment ordered by the trial judge had been made, and he relieved Mr. Marche of his spousal support obligation, effective February 2, 2013.

The Issues

5 Five main issues arise. Did the applications judge err:

(a) by effectively conducting a review of the spousal support order rather than considering whether a variation was warranted because of a change in material circumstances?

(b) by omitting to consider Ms. Wagstaff's application for a variation based upon Mr. Marche's increased income?

(c) by over-emphasizing self-sufficiency and ignoring or under-emphasizing Ms. Wagstaff's economic needs?

(d) by failing to properly consider the significance of Ms. Wagstaff's cohabitation with a third party, which saw her sharing certain expenses and living rent-free?

(e) by failing to properly recognize the impediments to Ms. Wagstaff's full-time employment arising from her child-care responsibilities relating to a diabetic son?

The Law and Analysis

(a) Review or variation

6 Mr. Marche applied on September 13, 2011 for a variation in support due to a material change in circumstances. The applications judge adjudicated upon the limits of Ms. Wagstaff's entitlement to support based on compensatory principles and also on the objective of self-sufficiency as it related to her current circumstances, essentially without reference to the effect of the material change in circumstances that he found were established. It was on the basis of his analysis of those two issues that he relieved Mr. Marche of his spousal support obligations. The applications judge thereby effectively conducted a review hearing.

7 The onus on an applicant for variation is quite distinct from that on an applicant at a review hearing. At a review hearing the parties may have support awards altered without demonstrating a material change in circumstances. On an application for variation, the applicant bears such an onus and the test for variation is a strict one. See *Leskun v. Leskun*, 2006 SCC 25, [2006] 1 S.C.R. 920 (S.C.C.).

8 In *Tobin v. Tobin* (1974), 19 R.F.L. 18 (Ont. H.C.), the Court held that the applications judge had erred when he essentially "unlocked the door to a reconsideration of the whole matter" by effectively conducting a review of spousal support based upon his view of the need for compensation to reflect the economic disadvantage from the marriage, rather than basing his decision upon the effect of a material change in circumstances. The same error occurred in the present case. The trial judge's

decision provided for a review after February 28, 2013. Mr. Marche was not entitled to a review in September, 2011, when he filed his application, nor in October, 2012, the date of the hearing.

(b) Mr. Marche's increased income

9 The applications judge noted the increase in Mr. Marche's income from $52,917.00 when the 2009 spousal support order was made to $68,503.00 in 2011. However, he made no reference to why this would not provide a basis for increasing the amount of spousal support. This was an error, unless the applications judge was correct in concluding Ms. Marche should have been self-sufficient by the time of the decision.

(c) Self-sufficiency

10 The applications judge concluded "Ms. Wagstaff's financial predicament is attributable to her failure to make her economic well-being a priority". He noted that "she was given a reasonable four year timetable to attain self-sufficiency" and that it was her personal choice to remain underemployed. In fact, the trial judge had noted in 2009 that in four years' time, by February, 2013, Ms. Wagstaff should be "in a position to take steps toward economic self-sufficiency", as her two sons grew older. So the original support order following trial anticipated Ms. Wagstaff not being fully self-sufficient by 2013. That was the reason a review was to be conducted. The applications judge erred in concluding the trial judge had given Ms. Wagstaff only four years to attain self-sufficiency.

(d) Cohabitation

11 The parties acknowledged before the applications judge that the original support order was mainly compensatory in nature. The trial judge noted that Ms. Wagstaff had been economically disadvantaged by the role she assumed during the marriage and has continued to assume since its breakdown (a reference to child care responsibilities). The judge concluded she was entitled "to some relief from the economic hardship that arises from the marriage breakdown".

12 The benefits flowing from subsequent cohabitation with a third party are a factor to be considered in determining need on an application for variation. See, *Bell v. Bell* (2000), 192 Nfld. & P.E.I.R. 26 (Nfld. U.F.C.), at paras. 43-47, and *Kent v. Kent*, 2010 NLCA 53, 301 Nfld. & P.E.I.R. 152 (N.L. C.A.), at paras. 86 ff. But any restrictions on those benefits arising from a cohabitation agreement are also relevant. Counsel

for Mr. Marche suggests the cohabitation agreement in the present case, dated August 2, 2010, is merely a device to insulate Ms. Wagstaff from any attempt to reduce her spousal support. This is pure speculation. No evidence has been provided to support this conjecture and I reject it.

13 In Ms. Wagstaff's circumstances, Mr. Marche is entitled to put forward the benefits from cohabitation, calculated in the context of the cohabitation agreement and its restrictions, as a factor to be considered in his favour on his application to reduce or rescind the spousal support order. But his increased income provides a factor weighing probably just as heavily in Ms. Wagstaff's favour.

(e) Child care responsibilities

14 Ms. Wagstaff put forward her child care responsibilities, especially those arising from the fact one son is a diabetic, as a reason why she could not achieve full-time employment up to 2013. I agree this is a factor which should have been considered by the applications judge in determining whether she was under-employed by choice. With respect, the applications judge erred by ignoring this.

Summary and Dispositon

15 In summary:

(i) The applications judge erred in effectively conducting a review of the trial judge's decision, rather than restricting himself to a decision on whether a material change in circumstances warranted a variation of the amount of child support.

(ii) The applications judge erred in failing to consider how Mr. Marche's increased income in 2011 should impact upon the amount of spousal support Ms. Wagstaff should be entitled to from the date of the increase.

(iii) The applications judge erred in over-emphasizing self-sufficiency and concluding the trial judge had set a deadline of four years within which Ms. Wagstaff was to achieve this.

(iv) The applications judge properly considered the fact of Ms. Wagstaff's cohabitation with a third party and benefits thereby acquired but should have calculated these in the context of the cohabitation agreement in determining the proper amount for spousal support.

(v) The applications judge erred by not giving Ms. Wagstaff sufficient credit for her child care responsibilities before concluding she was under-employed by her own choice.

16 On the basis of the above conclusions, two things remain outstanding to dispose of this matter: first, a determination should be made of what spousal support should have been as of September 13, 2011, the date of the application, considering all relevant factors, including Ms. Wagstaff's cohabitation benefits and income from her partner's company as well as Mr. Marche's increased income and, second, provision should be made for a proper review of the support order, effective 2013, if either of the parties so wishes.

17 It is ordered that either party has leave to apply to the Trial Division (Family) for a proper determination of what the amount of spousal support should have been, from September 2011 to February 28, 2013, based upon the above conclusions.

18 It is further ordered that either party has leave to apply to the Trial Division (Family) for a review of the parties' circumstances following February 2, 2013, to determine whether payments for spousal support should continue and the duration of such payments. To assist the parties in deciding whether to seek a review, it may be helpful to point out:

(i) the trial judge contemplated that Ms. Wagstaff would probably not be fully self-sufficient by 2013 but would have been in a position to become so once her children became adults;

(ii) some reduction in spousal support would probably follow from this consideration, with support payments probably ceasing in two to three years; and

(iii) a review judge will be entitled to attribute additional income to Ms. Marche, should she be underemployed, and benefits from cohabitation such as rent-free accommodation will also be a factor.

19 In the circumstances, the parties shall bear their own costs.

***C.W. White J.A.*:**

I concur

***B.G. Welsh J.A.* (dissenting):**

20 By decision dated March 5, 2009, Butler J. ordered Mr. Marche to pay spousal support for a period of four years in the following terms ([*Marche v. Marche*] 2009 NLTD 31 (N.L. T.D.)):

> [70] I Order that Mr. Marche shall pay spousal support to Mrs. Marche of $416.00 per month on the first of each month commencing March 1, 2009 and to continue for four years. After February 28, 2013 there shall be a review of the parties' circumstances (unless the parties have reached agreement on the terms of spousal support entitlement, duration and quantum (if any) to be paid thereafter). Nothing contained in this portion of the judgment shall preclude either party from making Application to vary spousal support within the four-year period referred to above on the basis of a material change in circumstances. Without limiting the foregoing, if Mr. Marche should lose his employment or Mrs. Marche be successful, earlier than anticipated, in earning substantial income, I would consider such facts as unforeseen.

21 In making the order for spousal support, Butler J. took the following factors into account: the marriage was of medium duration during which Ms. Wagstaff was a full-time homemaker who took primary responsibility for care of the two children who were ages eleven and eight at the time of separation in January 2006; the younger child has diabetes which requires medication and monitoring both day and night; Ms. Wagstaff was active doing unpaid volunteer work; prior to moving to Newfoundland in 1993, Ms. Wagstaff obtained a Bachelor of Arts degree in psychology; Mr. Marche is a welder who earned approximately $53,000 and $54,000 in 2007 and 2008; while the parties were divorced in 2007, the family continued to live in a small community where Mr. Marche was employed, but where Ms. Wagstaff had limited employment options. I note that, after Butler J.'s decision in March 2009, Ms. Wagstaff moved to the St. John's area sometime prior to July 2010 when she began cohabiting with Mr. Myles.

22 Regarding Ms. Wagstaff's situation, Butler J. explained:

> [55] [Ms. Wagstaff] is 38 years of age, well educated, intelligent, and energetic. She has a great deal to offer a potential employer but in the mainstream workplace she will be competing with more recent graduates who may be perceived as more attractive to some employers. ... She is entitled to some relief from the economic hardship that arises from the marriage breakdown.

> . . .
>
> [58] Based upon the evidence I received, it is anticipated that in four years' time, (by September 2012) [the elder child] will be pursuing some form of post-secondary education. ... At that time [the younger child] will be in grade 10, through the worst of adolescence and assuming greater responsibility for his diabetes. [Ms. Wagstaff] should therefore be in a position to take steps towards economic self-sufficiency.

23 Butler J. concluded that Ms. Wagstaff would have tax-free income of approximately $17,000 per year, and that Mr. Marche, after paying taxes, employment benefits and child support, "would have left to support himself and assist [Ms. Wagstaff] directly, only $27,000.00 per year" (paragraph 61).

24 On November 18, 2011, Mr. Marche applied to vary the spousal support order, by rescinding or reducing it, on the basis of changed circumstances. Mr. Marche relied on two factors: Ms. Wagstaff was earning some income from employment, and she was cohabiting with Mr. Myles. In response, Ms. Wagstaff raised the issue of Mr. Marche's increase in income from about $53,000 to $68,000 per year.

25 On the application to vary, by decision dated February 7, 2013, Peddle J. concluded that spousal support should continue at the prescribed rate, but that it would be terminated as of the date set by Butler J. for a review.

Analysis

26 I begin with the approach to be taken to the appeal of a support order, as stated in *Hickey v. Hickey*, [1999] 2 S.C.R. 518 (S.C.C.):

> [10] When family law legislation gives judges the power to decide on support obligations based on certain objectives, values, factors, and criteria, determining whether support will be awarded or varied, and if so, the amount of the order, involves the exercise of considerable discretion by trial judges. They must balance the objectives and factors set out in the *Divorce Act* or in provincial support statutes with an appreciation of the particular facts of the case. It is a difficult but important determination, which is critical to the lives of the parties and to their children. Because of its fact-based and discretionary nature, trial judges must be given considerable deference by appellate courts when such decisions are reviewed.
>
> . . .

> [12] ... Though an appeal court must intervene when there is a material error, a serious misapprehension of the evidence, or an error in law, it is not entitled to overturn a support order simply because it would have made a different decision or balanced the factors differently.

27 Section 17 of the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.), provides for variation of a support order:

> (1) A court of competent jurisdiction may make an order varying, rescinding or suspending, prospectively or retrospectively,
>
> (a) a support order or any provision thereof by either or both former spouses; ...
>
> . . .
>
> (4.1) Before a court makes a variation order in respect of a spousal support order, the court shall satisfy itself that a change in the condition, means, needs or other circumstances of either former spouse has occurred since the making of the spousal support order ... and, in making the variation order, the court shall take that change into consideration.
>
> . . .
>
> (7) A variation order varying a spousal support order should
>
> (a) recognize any economic advantages or disadvantages to the former spouses arising from the marriage or its breakdown;
>
> (b) apportion between the former spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;
>
> (c) relieve any economic hardship of the former spouses arising from the breakdown of the marriage; and
>
> (d) in so far as practicable, promote the economic self-sufficiency of each former spouse within a reasonable period of time.

28 The courts have required a material change in circumstances to ground the variation of a support order under section 17. In *Droit de la*

famille - 091889, 2011 SCC 64, [2011] 3 S.C.R. 775 (S.C.C.), Abella and Rothstein JJ., for the majority, reiterated:

> [44] In sum, it bears repeating that the threshold question under s. 17, whether or not there is an agreement, is the one Sopinka J. described in *Willick* [[1994] 3 S.C.R. 670], namely:
>
> > In deciding whether the conditions for variation exist, it is common ground that the change must be a material change of circumstances. This means a change, such that, if known at the time, would likely have resulted in different terms. The corollary to this is that if the matter which is relied on as constituting a change was known at the relevant time it cannot be relied on as the basis for variation. [p. 688]

29 Peddle J. accepted that there had been a material change in circumstances in this case when, in July 2010, Ms. Wagstaff began cohabiting with a new partner:

> [10] I am satisfied that repartnering by Ms. Wagstaff within the period set for review was not foreseen when the initial order was made; it is of real importance and it is continuing. The threshold test of "a material change in circumstances" has been met.
>
> [11] The repartnering of the support recipient does not mean automatic termination of spousal support. It does have an effect, how much, when and why depends on the circumstances of each case. The basis for the last order is an important factor.

In addition, Peddle J. considered Ms. Wagstaff's employment commencing in April 2011 to be a relevant factor. I note that Ms. Wagstaff's cohabitation with Mr. Myles resulted in her taking up residence in a locale that permitted significantly increased access to retraining and employment options.

30 The conclusion that there had been a material change in circumstances was not appealed, though Ms. Wagstaff raised the effect of a cohabitation agreement with Mr. Myles as a factor in the analysis of whether Peddle J. erred in varying the order. The requirement for a material change having been satisfied, Peddle J. proceeded to consider whether the spousal support order should be varied.

31 The beginning point in that analysis is the nature of the order. As discussed in *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420 (S.C.C.), under the *Divorce Act*, a spousal support order may be compensatory, contrac-

tual or non-compensatory in nature. McLachlin J., for the majority, summarized:

> [49] In summary, the statutes and the case law suggest three conceptual bases for entitlement to spousal support: (1) compensatory, (2) contractual, and (3) non-compensatory. Marriage, as this Court held in *Moge* [[1992] 3 S.C.R. 813] (at p. 870), is a "joint endeavour", a socio-economic partnership. That is the starting position. Support agreements are important (although not necessarily decisive), and so is the idea that spouses should be compensated on marriage breakdown for losses and hardships caused by the marriage. Indeed, a review of cases suggests that in most circumstances compensation now serves as the main reason for support. However, contract and compensation are not the only sources of a support obligation. The obligation may alternatively arise out of the marriage relationship itself. Where a spouse achieves economic self-sufficiency on the basis of his or her own efforts, or on an award of compensatory support, the obligation founded on the marriage relationship itself lies dormant. But where need is established that is not met on a compensatory or contractual basis, the fundamental marital obligation may play a vital role. Absent negating factors, it is available, in appropriate circumstances, to provide just support.
>
> (Underlining in original.)

As Cook J. stated in *Beck v. Beck*, 2012 NLTD(F) 34, 329 Nfld. & P.E.I.R. 287 (N.L. T.D.), compensatory support "is typically described as compensation for forgone careers and missed opportunities" (paragraph 42).

32 The original order in this case was compensatory in nature (decision of Butler J., at paragraph 48). One factor considered by Peddle J. in assessing Mr. Marche's application to vary the order is that, in so far as practicable, a spousal support order should promote the economic self-sufficiency of each former spouse within a reasonable period of time (section 17(7)(d) of the *Divorce Act*; *Boston v. Boston*, 2001 SCC 43, [2001] 2 S.C.R. 413 (S.C.C.)). In *Moge v. Moge*, [1992] 3 S.C.R. 813 (S.C.C.), L'Heureux-Dubé, for the majority, commented on the possible effect where a spouse assumed the role of homemaker in the traditional sense, at page 867:

> The financial consequences of the end of a marriage extend beyond the simple loss of future earning power or losses directly related to the care of children. They will often encompass loss of seniority, missed promotions and lack of access to fringe benefits such as pen-

> sion plans, life, disability, dental and health insurance .... As persons outside of the work force cannot take advantage of job-retraining and the upgrading of skills provided by employers, one serious economic consequence of remaining out of the work force is that the value of education and job training often decreases with each year in comparison to those who remain active in the work force and may even become redundant after several years of non-use. All of these factors contribute to the inability of a person not in the labour force to develop economic security for retirement in his or her later years.

33 The courts have recognized that there are some circumstances when economic self-sufficiency is not a viable goal, such as, for example, cases of debilitating illness or a long-term marriage where the spouse is of an age, education or experience that employment options are limited at best (*Droit de la famille - 091889*, *supra*; *Droit de la famille - 09668*, 2011 SCC 65, [2011] 3 S.C.R. 819 (S.C.C.)). That circumstance is not raised on the facts of this case.

34 The courts have also recognized that at the time of separation and divorce it is difficult to predict the factors that may impinge on the ability of a spouse to attain economic self-sufficiency (*Miglin v. Miglin*, 2003 SCC 24, [2003] 1 S.C.R. 303 (S.C.C.)). For this reason, a spousal support order may provide for a review after a period of time, four years in this case, at which point, spousal support may be terminated, continued or varied.

35 A review, being part of the order, does not require a change in circumstances. This is in contrast to an application to vary which engages the statutory requirement (*Beck v. Beck*, *supra*, at paragraph 34). However, once a change in circumstances is established, the statutory objectives relevant to a variation application are the same as those that would apply to a review (sections 15.2(6) and 17(7) of the *Divorce Act*). Accordingly, applying section 17 of the *Act*, a change in circumstances that would ground a variation will, of necessity, relate to the objectives that are engaged whether an initial order, a review or a variation is at issue. It is on this basis that Peddle J. conducted the analysis after determining that a material change in circumstances had been established.

36 On the particular facts here, in assessing the variation application, Peddle J. would have been aware at the hearing on October 11, 2012 and at the time of his decision on February 7, 2013 that the February 28, 2013 date for a review set out in Butler J.'s decision was imminent. This

was a factor which Peddle J. could take into account, particularly in so far as the support order was compensatory in nature.

37 Peddle J. inferred from Butler J.'s order that it was anticipated that Ms. Wagstaff may attain economic self-sufficiency by February 28, 2013. Ms. Wagstaff submits that this is an inaccurate reading of Butler J.'s decision in which she stated that, by February 28, 2013, Ms. Wagstaff "should therefore be in a position *to take steps towards* economic self-sufficiency" (paragraph 58, italics added). However, this comment could not have been intended to indicate that Ms. Wagstaff would not be moving toward, and perhaps have achieved, economic self-sufficiency before that date. If that had been the intention, presumably the word "then", rather than "therefore" would have been used. Further, a longer period of support would have been ordered with a review set for a later date. By ordering a review after four years, Butler J. must be taken to have meant that an assessment of Ms. Wagstaff's progress regarding economic self-sufficiency would be meaningful at that time.

38 Accordingly, in considering Mr. Marche's application for variation, Ms. Wagstaff's conduct in moving toward economic self-sufficiency during the four year period ending February 28, 2013 is a relevant consideration. Further, Butler J.'s order regarding a review of spousal support would not have constrained Peddle J.'s analysis of Ms. Wagstaff's progress to economic self-sufficiency. There was no reason to limit his assessment on the assumption that Ms. Wagstaff would be unable to take steps toward economic self-sufficiency until February 2013, or that the review could not be superseded by a variation order that terminated support.

39 Indeed, Peddle J. accepted that Ms. Wagstaff had not achieved economic self-sufficiency. However, he concluded that she had failed to act in a manner so as to achieve that objective:

> [22] Ms. Wagstaff's financial predicament is attributable to her failure to make her economic well-being a priority. She was given a reasonable four year timeline to attain self-sufficiency. Justice Butler was very complimentary in her assessment of Ms. Wagstaff's qualities: "intelligent, well educated, energetic and has a lot to offer a potential employer". The office job she accepted within Mr. Myles' business is unrelated to the field of psychology, is not secure and pays a modest $12.50 an hour. She must take responsibility for this choice and resulting consequences. It would be unfair to disadvantage Mr. Marche because of Ms. Wagstaff's personal choices.

40 In analyzing issues relating to the economic self-sufficiency objective, the courts have applied a test of "reasonable efforts" or "reasonable decisions" by the payee spouse. The assessment will depend on the circumstances and facts of each case (*Beck v. Beck*, *supra*, at paragraphs 38, 47, 59 and 71; *Williams v. Williams*, 2010 SKCA 52 (Sask. C.A.); *Swales v. Swales*, 2010 ABCA 292 (Alta. C.A.); *Dunnigan v. Park*, 2007 BCCA 329 (B.C. C.A.); *Juvatopolos v. Juvatopolos* (2005), 19 R.F.L. (6th) 76 (Ont. C.A.); *Lu v. Sun*, 2005 NSCA 112, 235 N.S.R. (2d) 353 (N.S. C.A.)).

41 In this case, Peddle J. was satisfied that Ms. Wagstaff had failed to make reasonable efforts toward becoming self-sufficient. While he did not use that language, he pointed to Ms. Wagstaff's choices which resulted in minimal income when, in the absence of evidence to the contrary, it would be inferred from her educational background, her personality, and her experience as a volunteer that she could have sought more advantageous employment. A significant impediment to her ability to obtain such employment, identified in 2009 by Butler J., was the dearth of opportunities in the town where she and Mr. Marche had resided. By moving to the St. John's area in 2010, Ms. Wagstaff substantially increased her employment prospects. While her younger child still required some supervision, particularly in respect of his diabetes, Ms. Wagstaff was not precluded from taking employment or upgrading her qualifications. Indeed, she began employment in April 2011.

42 Ms. Wagstaff also submits that Peddle J. erred by failing to give proper consideration to the cohabitation agreement she had with Mr. Myles. Peddle J. summarized:

> [20] ... The rights and obligations of the parties during cohabitation and on separation are outlined in a Cohabitation Agreement signed by the parties August 2, 2010. Under the terms of the Agreement, Ms. Wagstaff is responsible for supporting and maintaining herself. It provides for equal sharing of the cost of food and utilities. She is responsible for her own vehicle expenses, clothing costs and medical, dental and prescription costs. She is also responsible for her own debt. The Agreement precludes any claim against Mr. Myles' past, present or future real and personal property and any claims for support. Ms. Wagstaff contends that the uncertainty of her employment, the instability of her relationship and the terms of her Cohabitation Agreement is a basis for continuing Mr. Marche's spousal support obligation.

43 It is clear that Peddle J. was aware of the implications flowing from the cohabitation agreement. While Ms. Wagstaff would have benefitted from living rent free, the agreement had strict provisions regarding the financial responsibilities of each party. The focus of Peddle J.'s decision was on the compensatory nature of the support order and Ms. Wagstaff's failure to make reasonable choices and efforts toward economic self-sufficiency. He was satisfied that, in the circumstances, a period of four years should have been adequate for Ms. Wagstaff to at least make strides toward self-sufficiency. Her failure in this regard was fundamental.

44 In addition, Ms. Wagstaff submits that Mr. Marche's increase in salary to approximately $68,000 is a relevant factor. She is apparently relying on the non-compensatory basis for spousal support to ground her position that the order should be varied, not by a reduction or termination, but by an increase or continuation of support. Non-compensatory support is discussed in *Bracklow* at paragraphs 40 to 49. McLachlin J., for the Court, explained:

> [40] While the statutes contemplate an obligation of support based on the grounds of contract and compensation, they do not confine the obligation to these grounds. ... Even if a spouse has foregone no career opportunities or has not otherwise been handicapped by the marriage, the court is required to consider that spouse's actual ability to fend for himself or herself and the effort that has been made to do so, including efforts after the marriage breakdown. Similarly, "economic circumstances" (s. 89(1)(e)) invites broad consideration of all factors relating to the parties' financial positions, not just those related to compensation. The same may be said for the broad injunction of the *Divorce Act* that the court consider the "condition, means, needs and other circumstances of each spouse". To be sure, these factors may support arguments based on compensation for what happened during the marriage and its breakdown. But they invite an inquiry that goes beyond compensation to the actual situation of the parties at the time of the application. Thus, the basic social obligation model may equally be seen to occupy the statutory provisions.
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> [Underlining in original.]

45 McLachlin J. went on to discuss the objectives of spousal support orders (paragraph 27, above):

> [41] ... The first two objectives - to recognize the economic consequences of the marriage or its breakdown and to apportion between the spouses financial consequences of child care over and above

> child support payments - are primarily related to compensation. But the third and fourth objectives are difficult to confine to that goal. ... Looking only at compensation, one merely asks what loss the marriage or marriage breakup caused that would not have been suffered but for the marriage. But even where loss in this sense cannot be established, the breakup may cause economic hardship in a larger, non-compensatory sense. ...
>
> [42] Similarly, the fourth objective ... to promote economic self-sufficiency - may or may not be tied to compensation for disadvantages caused by the marriage or its breakup. A spouse's lack of self-sufficiency may be related to foregoing career and educational opportunities because of the marriage. But it may also arise from completely different sources, like the disappearance of the kind of work the spouse was trained to do (a career shift having nothing to do with the marriage or its breakdown) or, as in this case, ill-health.

I note here that, in contrast to child support where an increase in the payor's income ordinarily results in an automatic increase in the support payable, in the context of spousal support, an increase in the payor's income is simply a factor that may be considered in assessing the objectives set out in section 17 of the *Act*.

46 Peddle J. dismissed Ms. Wagstaff's continuing need argument "because she is largely the author of her own difficulties" (paragraph 24). Mr. Marche's increased income may have been relevant if, for example, Ms. Wagstaff had established economic hardship, with an assessment of her attempts to promote her economic self-sufficiency weighed in the balance. On appeal, Ms. Wagstaff is not submitting that Peddle J. erred by failing to find that her spousal support should be increased or continued based on economic hardship. The basis of her submission is that Peddle J. erred by focusing on the economic self-sufficiency objective.

47 This submission is not persuasive. Since this was a variation application, it was open to Peddle J. to focus on the objective most engaged by the change in circumstances that grounded the application. While Peddle J. was required to give reasons for his decision, his failure to advert specifically to the other objectives in section 17 is not determinative. Indeed, a review of the facts and Ms. Wagstaff's submissions provides no basis on which to conclude that Peddle J. erred in the exercise of his discretion to conclude that her circumstances were not such as to warrant support based on continuing need. This situation may be contrasted with that in *Beck* in which Cook J. ordered non-compensatory spousal support be-

cause, despite Ms. Beck's reasonable efforts, in light of her earning capacity and other factors, she was unable to become self-sufficient.

48 In the result, Peddle J. varied the spousal support order by terminating the order effective February 28, 2013. This, he concluded, would satisfy the compensatory aspect of Butler J.'s order. As to Mr. Marche's request to vary the order by reducing or terminating it earlier, Peddle J. was satisfied that the changes in Ms. Wagstaff's circumstances were not such as to warrant granting this request. This conclusion was not appealed.

49 As set out in *Hickey*, on an appeal, this Court should interfere with a decision on spousal support only when satisfied that the decision contains a material error, a serious misapprehension of the evidence, or an error in law. That threshold requirement is not satisfied in this case. The decision on the variation application supersedes the order regarding a review under Butler J.'s order.

Summary

50 In assessing Mr. Marche's application to vary the spousal support order, Peddle J. did not err in the exercise of his discretion by ordering that spousal support would continue at the rate ordered by Butler J., but that support would terminate "when the last payment ordered by Justice Butler is made".

51 Accordingly, I would dismiss Ms. Wagstaff's appeal. In the Trial Division, Peddle J. ordered that the parties would bear their own costs. I would make a similar order on the appeal. In the circumstances a sharing of the financial burden of the appeal is a just result.

Appeal allowed.

[Indexed as: **M. (P.) v. M. (S.)**]

P. M., Appellant (Petitioner) and S. M., Respondent (Respondent)

Saskatchewan Court of Appeal

Docket: CACV2096

2012 SKCA 55

Richards, Ottenbreit, Caldwell JJ.A.

Heard: March 16, 2012

Judgment: May 17, 2012

Family law —— Support — Spousal support under Divorce Act and provincial statutes — Retroactivity of order —— Parties married in 1978, had three children, and separated in August 2007 — Wife was teacher earning $72,549 per year and husband was commercial real estate broker with income imputed at $431,670 per year — Pursuant to interim spousal support order, husband paid $7,000 per month in spousal support commencing February 2009 — Husband brought petition for divorce and corollary relief including termination of, or short-term spousal support — Trial judge ordered husband to pay $94,925 in retroactive spousal support as lump sum for 17 months between September 2007 and January 2009 at $7,000 per month — Husband appealed on ground that retroactive spousal support should not have been awarded — Appeal allowed in part on this ground — Interim spousal support award did not operate to deny wife right to seek retroactive support for period before February 2009 — Trial judge did not make reviewable error by not adjusting size of lump sum payment for retroactive support to take into account income tax considerations — However, trial judge did not apply proper principles in determining retroactive spousal support award — Wife's needs were being met from September 2007 to January 2009 and ongoing — Husband did not conceal assets or fail to make appropriate disclosure — Wife waited 18 months after separation before applying for support — Award of retroactive support was not warranted.

Family law —— Division of family property — Order for division of property — Order for payment — Global equalization order —— Parties married in 1978, had three children, and separated in August 2007 — Parties' registered assets included wife's employment pension and each party's Registered Retirement Savings Plans, and non-registered assets included parties' matrimonial home, beach home, bank accounts and husband's ownership interests in three commercial real estate companies — Husband's ownership interest in third company was valued at $554,872 in December 2009 as consequence of restructuring of company without knowledge of husband's plan to sell interest to re-

maining partner for $825,000, which husband did in January 2010 — Parties agreed to equalize registered assets by way of spousal rollover, and value of non-registered assets in husband's possession was $799,891.96, and value of non-registered assets in wife's possession was $965,016.94 — Husband brought petition for divorce and corollary relief, including equalization of family property and occupation rent — Trial judge ordered wife to pay equalization payment of $5,176.34 — Trial judge calculated equalization payment on basis of equal division of total non-registered assets adjusted by wife's responsibility for one-half of 2007 tax debt and determination of husband's responsibility for retroactive spousal and child support — Trial judge set valuation date of all registered assets and two of husband's ownership interests at date of husband's petition — Trial judge held that valuation date of husband's ownership interest in third company was properly based on sale price of husband's shares in January 2010 and not on valuation of husband's ownership interest prepared at time of company restructuring — Trial judge found no evidence supported allegation that wife's gambling dissipated family assets and held that this was not exceptional case warranting award of occupation rent — Husband appealed on ground that trial judge erred in valuation of shares in business and wife's pension — Appeal allowed in part on other grounds — Trial judge did not err in not taking income tax considerations into account when she valued husband's interest in business — Trial judge did not make reviewable error in valuation of wife's pension.

Family law —— Division of family property — Valuation of specific assets — Business — Private corporation —— Parties married in 1978, had three children, and separated in August 2007 — Parties' non-registered assets included husband's ownership interests in three commercial real estate companies — Husband's ownership interest in third company was valued at $554,872 in December 2009 as consequence of restructuring of company without knowledge of husband's plan to sell interest to remaining partner for $825,000, which husband did in January 2010 — Husband brought petition for divorce and corollary relief, including equalization of family property — Trial judge ordered wife to pay equalization payment of $5,176.34 — Trial judge held that valuation date of all registered assets and two of husband's ownership interests was appropriately set at date of husband's petition — Trial judge held that valuation date of husband's ownership interest in third company was properly based on sale price of husband's shares in January 2010 and not on valuation of husband's ownership interest prepared at time of company restructuring — Husband appealed on ground that trial judge erred in valuing husband's interest in business — Appeal allowed in part on other grounds — Trial judge did not err in not taking income tax considerations into account when she valued husband's interest in business — Husband did not lead evidence relating to his income tax liability arising from sale of shares — There was no error in approach taken by trial judge.

Family law —— Division of family property — Valuation of specific assets — Pension —— Parties married in 1978, had three children, and separated in August 2007 — Parties' registered assets included wife's employment defined benefit pension plan — Parties agreed to equalize registered assets by way of spousal rollover — Husband brought petition for divorce and corollary relief, including equalization of family property — Trial judge ordered wife to pay equalization payment of $5,176.34 — Husband appealed on ground that trial judge erred in valuing wife's pension as of date of petition rather than as of date of trial — Appeal allowed in part on other grounds — Trial judge did not make reviewable error in valuation of wife's pension — Since wife participated in defined benefit pension plan, it did not matter if bulk of increase in value of pension between date of petition and date of trial was due to market forces rather than contributions.

Family law —— Support — Spousal support under Divorce Act and provincial statutes — Entitlement — General principles — Miscellaneous —— Parties married in 1978, had three children, and separated in August 2007 — Wife was teacher earning $72,549 per year and husband was commercial real estate broker with income imputed at $431,670 per year — Wife took maternity leave for each child and worked part time until 1997 — Husband brought petition for divorce and corollary relief, including termination of, or short-term spousal support — Trial judge ordered husband to pay $8,000 per month in spousal support through 2019, and thereafter to pay $3,000 per month — Trial judge considered means, needs and other circumstances of each spouse, and also determined wife's self-sufficiency by considering present and potential incomes, standard of living during marriage, and principle to have spousal support payable to achieve equitable sharing of resources upon separation — Trial judge awarded support that provided wife with 34.97 per cent of available resources as equitable sharing — Husband appealed on ground that trial judge erred in determining amount and duration of spousal support — Appeal allowed in part on this ground — Trial judge made reviewable error of principle by ordering husband to pay spousal support on basis of income earning potential rather than on his likely actual earnings — Support order should not effectively force husband to maximize his income to age 65, and obligate him to work past date on which he reasonably expected to retire, particularly since his reasonable plans for retirement existed pre-separation and wife had valuable home, secure employment and indexed pension — Quantum of spousal support, being $8,000 per month, was appropriate level of support, given length of marriage — However, spousal support was to be paid only until end of 2014, at which point husband would be 60 and situation could be reassessed.

Family law —— Support — Child support under federal and provincial guidelines — Determination of award amount — Expenses for post-secondary education —— Parties married in 1978, had three children, and separated

in August 2007 — Mother was teacher earning $72,549 per year and father was commercial real estate broker with income imputed at $431,670 per year — Of parties' three children, father paid $51,165 tuition for oldest child's chiropractic education, $3,687 for middle child's university tuition, and lost $43,836 on condominium purchased for youngest child who dropped out of university after first term — Parties agreed as couple to pay for children's first post-secondary degrees without question and second degree if degree was meaningful — Father brought petition for divorce and corollary relief, including reimbursement for one-half of post-secondary expenses — Trial judge ordered mother to contribute 17 per cent of two children's tuition, or $9,324, after considering her income without spousal support of $8,000 per month — Trial judge held that father's loss on condominium was not reasonable education expense but was investment decision father made on own — Father appealed on ground that trial judge erred in determining size of mother's contribution to children's tuition — Appeal allowed in part on this ground — Trial judge erred in calculating mother's contribution toward children's tuition as spousal support payments were to be deducted from payor spouse's income for purpose of determining extraordinary expenses award — It was appropriate to correct error and order wife to pay her proper share of tuition fees — Wife's obligation was increased from $9,324 to $17,004, being 31 per cent of two children's tuition.

Cases considered by *Richards J.A.*:

Bracklow v. Bracklow (1999), 1999 CarswellBC 532, 1999 CarswellBC 533, 169 D.L.R. (4th) 577, 236 N.R. 79, 44 R.F.L. (4th) 1, 120 B.C.A.C. 211, 196 W.A.C. 211, [1999] 1 S.C.R. 420, [1999] 8 W.W.R. 740, 63 B.C.L.R. (3d) 77, [1999] S.C.J. No. 14 (S.C.C.) — referred to

Hickey v. Hickey (1999), [1999] 2 S.C.R. 518, 172 D.L.R. (4th) 577, 1999 CarswellMan 254, 1999 CarswellMan 255, 46 R.F.L. (4th) 1, 240 N.R. 312, [1999] 8 W.W.R. 485, 138 Man. R. (2d) 40, 202 W.A.C. 40, [1999] S.C.J. No. 9 (S.C.C.) — considered

Kerr v. Baranow (2011), 14 B.C.L.R. (5th) 203, [2011] 3 W.W.R. 575, 64 E.T.R. (3d) 1, 93 R.F.L. (6th) 1, 300 B.C.A.C. 1, 509 W.A.C. 1, 274 O.A.C. 1, [2011] 1 S.C.R. 269, 2011 SCC 10, 2011 CarswellBC 240, 2011 CarswellBC 241, 328 D.L.R. (4th) 577, 411 N.R. 200, *(*sub nom. *Vanasse v. Seguin)* 108 O.R. (3d) 399, [2011] S.C.J. No. 10, [2011] A.C.S. No. 10 (S.C.C.) — followed

Leskun v. Leskun (2006), 2006 SCC 25, 2006 CarswellBC 1492, 2006 CarswellBC 1493, 349 N.R. 158, [2006] 1 S.C.R. 920, 34 R.F.L. (6th) 1, 226 B.C.A.C. 1, 268 D.L.R. (4th) 577, 373 W.A.C. 1, 62 B.C.L.R. (4th) 197, [2006] S.C.J. No. 25 (S.C.C.) — followed

MacKinnon v. MacKinnon (2005), 2005 CarswellOnt 1536, 199 O.A.C. 353, 75 O.R. (3d) 175, 13 R.F.L. (6th) 221, 256 D.L.R. (4th) 385, [2005] O.J. No. 1552 (Ont. C.A.) — considered

Moge v. Moge (1992), [1993] R.D.F. 168, [1993] 1 W.W.R. 481, 99 D.L.R. (4th) 456, [1992] 3 S.C.R. 813, 81 Man. R. (2d) 161, 30 W.A.C. 161, 43 R.F.L. (3d) 345, 145 N.R. 1, 1992 CarswellMan 143, 1992 CarswellMan 222, [1992] S.C.J. No. 107, EYB 1992-67141, [1990] S.C.C.A. No. 249 (S.C.C.) — considered

Willick v. Willick (1994), 6 R.F.L. (4th) 161, 119 D.L.R. (4th) 405, 173 N.R. 321, 125 Sask. R. 81, 81 W.A.C. 81, [1994] 3 S.C.R. 670, [1994] R.D.F. 617, 1994 CarswellSask 48, 1994 CarswellSask 450, [1994] S.C.J. No. 94, EYB 1994-67936 (S.C.C.) — considered

Statutes considered:

Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.)
Generally — referred to
s. 15.2(4) [en. 1997, c. 1, s. 2] — considered
s. 15.2(6) [en. 1997, c. 1, s. 2] — considered

Regulations considered:

Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.)
Federal Child Support Guidelines, SOR/97-175
s. 7 — considered
Sched. III — referred to

APPEAL by husband from judgment reported at *M. (P.) v. M. (S.)* (2011), 2011 SKQB 126, 2011 CarswellSask 280, 370 Sask. R. 196, [2011] S.J. No. 262 (Sask. Q.B.), awarding wife retroactive and ongoing spousal support, dividing family property, and awarding extraordinary expenses for children's education.

Fred C. Zinkhan, for Appellant
James J. Vogel, Joanne C. Moser, for Respondent

***Richards J.A.*:**

I. Introduction

1 P. and S.M. were married for 29 years prior to their separation. Both enjoy successful careers. They raised three children.

2 Mr. M. petitioned for divorce. A trial was conducted to resolve issues relating to the division of family property, spousal support and the funding of some of the children's post-secondary education. The trial judge's decision generally favoured Ms. M.'s positions on these issues.

3 Mr. M. now appeals from the trial decision. He submits the trial judge made errors in relation to (a) both retroactive and ongoing spousal sup-

port, (b) the valuation of certain business and pension assets, and (c) support for the children's post-secondary education.

4 I respectfully conclude, for the reasons set out below, that the trial judge should not have awarded Ms. M. retroactive spousal support and that changes must be made to the amount and duration of the ongoing support awarded to her. The trial judge also overlooked a point in calculating Ms. M.'s share of education costs. However, in all other respects, her decision should be sustained.

II. Some Basic Facts

5 The M.s (whom, for the sake of clarity, I will refer to as "P." and "S." in the balance of these reasons) met in university. They graduated in 1978. S. began working as a teacher, her chosen career, and P. took up retail sales. In 1982, P. became a commercial real estate broker. He has enjoyed success in that field and his income is now many multiples of S.'s income. At the time of the trial, P. was 56 and S. was 54. Both are in good health.

6 As noted, P. and S. have three children: L. (born in 1984), E. (born in 1987) and A. (born in 1989). S. took maternity leaves from teaching after each child was born. She started working part-time after L.'s birth and did not return to full-time employment until 1997. This caused her to lose some contributory service in relation to her pension.

7 P. was involved with the children as they grew up. He did not work nights or weekends. He attended the children's activities. Both he and S. helped with homework. S. indicates that she would never say P. was anything other than a good father.

8 P. and S. lived in Regina. In 2005, they began constructing a home in Regina Beach. Their plan was to use it as a retirement residence. The Regina Beach home was valued, on agreement, at $950,000.

9 During the course of their marriage, P. kept financial matters to himself and he and S. did not discuss P.'s earnings. They agreed that P. was responsible for the financial management of the household.

10 P. and S. separated in the fall of 2007. P. lived at Regina Beach and S. lived at their home in the city. In June of 2008, S. moved to Regina Beach and P. returned to their house in Regina. That latter property was ultimately sold for $350,000. P. has since purchased a cottage at Regina Beach and a home in Regina. S. continues to live in the Regina Beach house.

11 P. and S. agreed that neither of them had brought assets into the marriage. They also agreed that the family property should be divided equally. However, they disagreed about the valuation of S.'s pension and P.'s business assets, about the extent of S.'s entitlement to spousal support and about their respective obligations in relation to some of the costs of their children's post-secondary education.

III. The Trial Decision

12 The key features of the trial decision relevant to this appeal were as follows:

(a) S. was awarded retroactive spousal support of $7,000 per month from September of 2007 to January of 2009, payable in a lump sum of $94,925.

(b) S.'s pension was valued as of the date of the application for divorce ($458,010) rather than as of the date of the trial ($698,868).

(c) P.'s interest in Koyl Commercial Real Estate ("Koyl") was valued at $825,000.

(d) S. was awarded ongoing spousal support of $8,000 per month until December 31, 2019 and $3,000 per month thereafter.

(e) S. was held to be responsible for her proportionate share of $54,852 spent by P. on tuition for L. and E.

IV. Analysis

13 P. argues that the trial judge made a number of errors in her decision. I will address each of his submissions in turn.

A. Retroactive Spousal Support

14 P.'s first argument is that the trial judge erred in awarding S. retroactive spousal support. He makes three points in this regard: (a) the question of retroactive support had been considered and rejected in the context of S.'s application for interim support and was, therefore, *res judicata*, (b) the trial judge failed to make a tax adjustment to the amount of the lump sum retroactive award, and (c) the trial judge did not apply the proper principles when determining whether retroactive support should be ordered.

15 I will deal first with the submission that the issue of retroactive support had been resolved against S. and was *res judicata*. This argument is rooted in a fiat of Wilson J. dealing with an application by S. for interim support. It was issued on July 6, 2009. In the fiat, Wilson J. noted, at para. 33, that S. was seeking support both on an ongoing basis and retroactively. She resolved the issue of retroactive support by writing as follows:

> [33] The wife seeks support on an ongoing basis as well as retroactively. In light of the fact that the husband did not pay any monthly support since January, 2009, it is appropriate that the spousal support payments commence February 1, 2009. I order that the husband pay to the wife the sum of $7,000 per month commencing February 1, 2009, and continuing on the first day of each and every month thereafter until further order, or agreement of the parties.

16 In my view, this decision cannot be read as operating to deny S. the right to seek retroactive support for the time period before February of 2009. Wilson J.'s order was made with a view to providing S. With *interim* relief. Thus, by its very nature, it was not intended to stand as a final disposition of questions relating to P.'s spousal support obligations. It does not engage the doctrine of *res judicata*.

17 Similarly, I am not persuaded that the trial judge made a reviewable error by deciding not to adjust the size of P.'s lump sum payment for retroactive support so as to take account of income tax considerations. Those considerations are that, because P. was ordered to address retroactive support by way of a lump sum payment, as opposed to periodic payments over time, the payment will not be tax deductible in his hands or be taxable in S.'s.

18 The central problem with this aspect of P.'s argument is that, as he and S. both agree, the trial judge was under no obligation to make a tax adjustment. In light of the applicable standard of review, I am not persuaded that the trial judge's approach is open to being modified by this Court.

19 I turn, therefore, to the third of P.'s arguments about retroactive spousal support. His point here is that the trial judge did not approach the issue using the proper principles and, on a related note, simply failed to appreciate or give proper effect to the relevant facts.

20 In explaining her decision with respect to retroactive spousal support, the trial judge summarized some of the relevant evidence and the arguments and then ordered support at the rate of $7,000 per month for the 17

months between the date of separation and the date when Wilson J. had ordered that retroactive payments should begin, *i.e.* she ordered retroactive support for the period running from September of 2007 to January of 2009. The trial judge wrote as follows:

> [111] I accept that the $3,000.00 paid from December, 2008 to January, 2009 is relative to spousal support, as well as the $17,471.00 (less $210.00 paid for P.'s Yacht Club membership) paid towards the upkeep of the Regina Beach property and the $3,604.00 mistakenly taken by S. from P.'s line of credit, for a total of $24,075.00. The remainder of the monies were paid pursuant to an interim division of family property. Spousal support in the amount of $7,000.00 for the 17 months between September, 2007 and January, 2009 less $24,075.00 is $94,925.00. I agree with S. that she was entitled to spousal support from the date of separation for the reasons previously given. Retroactive spousal support is ordered in the amount of $94,925.00.

21 I agree with P. that, in proceeding as she did, the trial judge did not apply the proper principles. She explained her conclusion only by way of referring to "the reasons previously given." I take this to be a reference to her reasons for ordering spousal support on an ongoing basis. The problem with this line of thinking is that retroactive spousal support is not awarded on the same footing as ongoing support. Thus, as a result of this oversight, it is necessary to identify the applicable principles and then take a fresh look at S.'s entitlements.

22 The governing authority on this point is *Kerr v. Baranow*, 2011 SCC 10, [2011] 1 S.C.R. 269 (S.C.C.). In that case, Cromwell J. explained that, where (as here) the payor spouse complains that support could have been pursued earlier, two foundational interests are in play. The first concerns the need to give the payor spouse some certainty with respect to his or her obligations. The second concerns providing incentives for the payee spouse to advance his or her claims promptly. Referring to *MacKinnon v. MacKinnon* (2005), 75 O.R. (3d) 175 (Ont. C.A.) at para. 24, Cromwell J. also noted that the date of the initiation of proceedings for spousal support is the "usual commencement date" for such support to begin, absent a reason not to make the order effective as of that date.

23 Cromwell J. explained that the factors relevant to an award of retroactive spousal support are (a) the needs of the recipient, (b) the conduct of the payor, (c) the reason for the delay in seeking support, and (d) any

hardship found by the payor spouse if an order should be made. He said this:

> [207] While *D.B.S.* was concerned with child as opposed to spousal support, I agree with the Court of Appeal that similar considerations to those set out in the context of child support are also relevant to deciding the suitability of a "retroactive" award of spousal support. Specifically, these factors are the needs of the recipient the conduct of the payor, the reason for the delay in seeking support and any hardship the retroactive award may occasion on the payor spouse. However, in spousal support cases, these factors must be considered and weighed in light of the different legal principles and objectives that underpin spousal as compared with child support. I will mention some of those differences briefly, although certainly not exhaustively.
>
> [208] ...[T]here is no presumptive entitlement to spousal support and, unlike child support, the spouse is in general not under any legal obligation to look out for the separated spouse's legal interests. Thus, concerns about notice, delay and misconduct generally carry more weight in relation to claims for spousal support: see, e.g., M. L. Gordon, "Blame Over: Retroactive Child and Spousal Support in the Post-Guideline Era" (2004-2005), 23 *C.F.L.Q.* 243, at pp. 281 and 291-92.
>
> [emphasis added]

24 With that background, I turn to the circumstances of this case. The first factor to be taken into account is the "needs of the recipient." This consideration involves S.'s needs both at the time the support allegedly should have been paid and at present. This was explained by Cromwell J. in *Kerr v. Baranow* in these terms:

> [212] ..."A [spouse] who underwent hardship in the past may be compensated for this unfortunate circumstance through a retroactive award. On the other hand, the argument for retroactive [spousal] support will be less convincing where the [spouse] already enjoyed all the advantages (s)he would have received [from that support]". ...

25 Here, the evidence was that P. and S. had a pre-separation lifestyle which was modest but very comfortable. They lived in a 1,500 square foot bungalow, bought used cars, had a cottage, and took winter vacations which, given their combined incomes, were not extravagant. There is no evidence that S.'s lifestyle declined after the separation. She lived in their Regina home and then, in the summer of 2008, moved to the new Regina Beach home which P. had vacated in her favour. She continued to

earn her teacher's salary of some $70,000 per year and also received various other sums: $58,000 in July of 2008, being one-half of P.'s bank account; $165,000 in August of 2009, being one-half of the proceeds from the sale of the family home; $3,604 from P.'s line of credit in February of 2009; $1,500 from P. in December of 2008 and again in January of 2009. As well, P. paid for all of the utilities and taxes on the Regina Beach home through to September of 2009. As a result, it is difficult to see how S.'s needs were not met during the period from September of 2007 to January of 2009. Further, there is no suggestion that, at present, her needs are not being met.

26 Next, I turn to the "conduct of the payor" factor. The conduct in issue here must be connected to P.'s support obligations including, as explained in *Kerr v. Baranow* at para. 212, such things as the concealment of assets or the failure to make appropriate disclosure. No such considerations are at play here, at least in relation to the time period relevant to retroactive support. P. voluntarily divided his bank account with S., vacated the Regina Beach home, paid the utility costs, upkeep and taxes for the Regina Beach home and responded positively to the only two requests S made for money.

27 The third factor to be considered with respect to retroactive spousal support is "the reason for the delay in seeking support." In dealing with this point, it is necessary to remember the relevant timeline: (a) P. and S. separated in September of 2007, (b) P. served a petition for divorce and property statement on May 24, 2008, (c) S. did not file any materials until on or about March 3, 2009 at which time she brought an application for interim spousal support and filed her own property statement. Her notice of motion did not seek retroactive support but, as noted above, on July 6, 2009, Wilson J. granted such support retroactive to February 1 of that year. As a result, it is clear that the idea of retroactive spousal support was a live one as of that date. S.'s Answer and Counter-Petition, dated September 21, 2009, made no express reference to retroactive spousal support. Significantly, there was apparently no mention of retroactive spousal support until the last day of the trial when S.'s counsel raised it in his closing submissions.

28 It can be seen, therefore, that S. waited at least 18 months after she and P. had separated before applying for support. She explains this by saying that, notwithstanding the separation, she had hoped to reconcile with P. She also says that, for at least part of that period, she and P. were involved in the Collaborative Law process and that, as a consequence, it

would not have been appropriate to commence proceedings seeking support. However, the record concerning all of this is extremely thin and contains no reference to any relevant dates.

29 The fourth and final factor to be considered in relation to retroactive spousal support is the question of whether the award will occasion any "hardship" for P. the payor spouse. The root issue here is whether, by fashioning an award with respect to what the payor spouse should have paid in the past, as opposed to what he or she can presently afford, that spouse will suffer a disruption in his or her financial situation. Given the level of P.'s income and the size of his asset base relative to the amount of money ($94,925) involved in the order for retroactive support, this is not a meaningful consideration in this case.

30 Taking all of the four relevant factors into account, my view is that an award of retroactive spousal support is not warranted on the facts of this case. S. suffered no hardship during the period running from September of 2007 to February of 2009 and she advanced her claim for support for the time prior to February of 2009 only during argument in the closing minutes of the trial. In combination, these two considerations tip the balance against her on this issue. As Cromwell J. observed in *Kerr v. Baranow*, at para. 212, "the argument for retroactive [spousal] support will be less convincing where the [spouse] already enjoyed all the advantages (s)he would have received [from that support]."

B. The Tax Implications of Selling the Koyl Shares

31 P.'s next argument is that the trial judge erred by failing to take income tax considerations into account when she valued his interest in Koyl.

32 The facts giving rise to this issue are straightforward, P. initially purchased an interest in Koyl in 1986. He bought a further interest in 1996 and thereby brought his stake in the company up to 23 percent.

33 In his evidence in chief, P. explained that Gavin Koyl had retired in 2008 and that, as part of the work done on his withdrawal from the business, Koyl had been valued with the assistance of Meyers Norris Penny, P. testified that his interest had been determined to be worth $592,474.

34 However, on cross examination, P. revealed for the first time that, in January of 2010, he had entered into an agreement with Garth Frederickson, another Koyl shareholder, whereby he had borrowed $825,000 from Mr. Frederickson at an interest rate of six percent. The loan had been

secured by his Koyl shares and it was repayable in three years. By virtue of a voting trust arrangement in favour of Mr. Frederickson, P. testified that he will not be involved in the operations of Koyl during this time period. Significantly, Paul's shares are to transfer to Mr. Frederickson in January of 2013 and he will receive no dividends in the interim.

35 All of this apparently came as a surprise to P.'s own expert, Wayne Paproski of Meyers Norris Penny. Mr. Paproski had prepared a report valuing Koyl at $2,349,127 and P.'s pro-rata share of the company at $554,872. At trial, Mr. Paproski added another $75,000 to that total to compensate for an error in his original calculation. In cross examination, he acknowledged that, if he had known of the sale of P.'s shares to Mr. Frederickson, that fact would definitely have been considered in his valuation. He testified that a third party sale is the best evidence of value.

36 The trial judge saw the transaction between P. and Mr. Frederickson as a sale of P.'s interest in Koyl. (This characterization is not challenged.) As a result, she valued P.'s stake in the company at $825,000 less the interest he will have to pay over the life of the three-year loan. She did not make any adjustments for income tax and explained her reasoning on this point as follows:

> [43] Both experts agree that the $825,000.00 sale price is a strong indicator of value for Koyl and had they known of the $825,000.00 sale at the time they were preparing their valuation of Koyl Commercial, it would have greatly influenced their valuation of the company. A large reason for this matter proceeding to trial was the difference in opinion between the experts regarding the valuation of Koyl Commercial Real Estate.
>
> [44] ... P. has not provided any explanation why he essentially hid this transaction from S. and her counsel. As a consequence, certain matters could not be properly canvassed at this trial, the most important being the true disposition costs of Koyl in 2014. In my view, P. has to bear the consequences of his actions and I am not prepared to speculate as to what the disposition costs might be. It is not sufficient to say that he would be subject to a certain tax rate or that there would be a certain adjusted cost base. There are many other potential considerations, such as capital losses that he could apply the disposition against, that cannot now be properly examined.
>
> [45] I am prepared to accept $825,000.00 as the value of Koyl Commercial Real Estate less 6% interest over three years which I accept will be $150,000.00 putting the value of Koyl for the purposes of this litigation at $675,000.00. It is not appropriate to reduce the value of

> the company by the foregone management fees as these fees would be foregone in a sale in any event.

37 I am not persuaded by P.'s argument that the trial judge erred when she declined to adjust the value of his interest in Koyl for income tax. The judge correctly pointed out that, because the fact of the sale of the Koyl shares came out only during the course of P.'s cross examination, no expert evidence was available in relation to key aspects of his income tax liability arising from the sale. The most important consideration in all of this was the lack of an adequate evidentiary record concerning the adjusted cost base of his shares. Thus, for example, while Brian Turnquist, an accountant, did offer some evidence about P.'s possible tax liability, he specifically said that he was offering his comments on the assumption the shares had a zero cost base. Mr. Turnquist further qualified his evidence by saying this:

> And on that assumption, if there's no capital losses, if you're looking at, you know, a maximum amount that would be taxable would be half of $825,000, which without a calculator would be $412,500. Barring any other income tax planning or the like because again I'm not privy with Mr. M.'s taxation situation either. Evidence hasn't been put forth to me what that would be or the like, so I'm giving you a hypothetical based on that.

38 The bottom line in all of this is quite clear. If P. wanted to argue that the value of his Koyl shares should be reduced because of income tax considerations, he should have led the evidence necessary to make such an argument possible. He did not do this and, as a result, I see no error in the approach taken by the trial judge.

C. The Valuation of S.'s Pension

39 P. also argues that the trial judge erred in valuing S.'s pension as of the date proceedings were commenced rather than as of the date of the trial.

40 S.'s pension is a defined benefit plan. As explained at trial by Douglas Volk of the Saskatchewan Teachers' Superannuation Commission, her annual pension entitlement will be calculated on the basis of the following formula: 2 percent × contributory service (to a maximum of 35 years) × average salary of five highest earning years. The commuted value of her pension was $458,010, as of the date the divorce application was issued (March of 2008). The commuted value as of the date of the trial (October of 2010) was $698,868. Mr. Volk explained that these val-

ues represented the cost of purchasing annuities that would generate the future income stream represented by S.'s pension entitlements.

41 P. contends that the bulk of the increase in the value of S.'s pension between the date of the petition and the date of the trial should have been seen as having been caused by "market forces," rather than by any contribution made by S. As a result, he says the valuation should have been made as of the date of trial. He bases this argument on the fact that, in the 2008-2010 time period, S. contributed an estimated $14,520.18 to her pension, an amount said to have been matched by her employer. These two amounts ($29,040.36 in total) represent only about 12 percent of the increase in the value of the pension between the date of petition and the date of trial. The other 88 percent, according to P. was due to "market forces."

42 I am not persuaded by this argument. First and most fundamentally, S. participates in a *defined benefit* plan. The amount of her contributions bears no necessary relationship to her entitlements under the plan. As noted, she will receive, annually, a pension of 2 percent × contributory service × average salary of her five highest earning years. She is not in a situation where, as under a defined contribution plan, her benefits will be tied to the contributions made by her and her employer. In other words, the amount she paid into her plan between 2008 and 2010 is effectively irrelevant to the value of her pension.

43 Second, of course, between 2008 and 2010 there were changes in the variables which drove the value of S.'s pension. Her salary increased during this period with the result that the average of her five highest earning years increased. Further, her total years of contributory service increased. Both of these developments would self-evidently elevate the commuted value of her pension by increasing the level of her future income stream. However, there was no evidence of any sort before the trial judge about the amount of the increase in the value of her pension which could be attributed to these two factors.

44 It seems to me that, in significant part, P.'s argument with respect to pension valuation reduces to the idea that interest rates fell between 2008 and 2010 and, therefore, different discount rates must have been used to determine the commuted value of S.'s pension in the calculations made in those two years. The idea, I suppose, is that the change in the discount rate is entirely fortuitous and, in consequence, akin to a change in value occasioned by "market forces." Unfortunately for P. there is not much that can be said about this line of argument. Given the state of the record,

it was not possible for the trial judge to come to grips with it and it is not possible for this Court to do so either. As counsel acknowledged, there was simply no evidence on this point and, as a result, there is no factual foundation on which any such argument (even assuming it has merit) can be constructed.

45 I conclude that the trial judge made no reviewable error in the valuation of S.'s pension.

D. The Amount and Duration of Spousal Support

46 P.'s next set of arguments concerns the amount and duration of the spousal support he was ordered to provide S. As will be recalled, the trial judge concluded that he should pay $8,000 per month to December 31, 2019 and then, thereafter, $3,000 per month on an ongoing basis. P. raises a number of arguments about this aspect of the trial judge's decision. Broadly speaking, he says (a) the $8,000 per month amount is too high, (b) the trial judge's choice of December 31, 2019 as a date for reducing support obligations to $3,000 per month is arbitrary, and (c) the trial judge erred in requiring him to support Susan on a permanent or ongoing basis.

47 The factors which guide the making of support orders are set out in the *Divorce Act*. Section 15.2(4) says a court contemplating an order of this sort is to consider the conditions, means and needs and other circumstances of each spouse:

> (4) In making an order under subsection (1) or an interim order under subsection (2), the court shall take into consideration the condition, means, needs and other circumstances of each spouse, including
>
> (a) the length of time the spouses cohabited;
>
> (b) the functions performed by each spouse during cohabitation; and
>
> (c) any order, agreement or arrangement relating to support of either spouse.

48 The objectives of spousal support orders are explained in s. 15.2(6):

> (6) An order made under subsection (1) or an interim order under subsection (2) that provides for the support of a spouse should
>
> (a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;
>
> (b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and

above any obligation for the support of any child of the marriage;

(c) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and

(d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.

49 The proper interpretation and application of these provisions has been explored by the Supreme Court of Canada in a variety of cases. See, for example: *Moge v. Moge*, [1992] 3 S.C.R. 813 (S.C.C.) and *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420 (S.C.C.).

50 Before turning to the analysis necessary to deal with P.'s arguments, it is perhaps useful to briefly revisit the reasoning of the trial judge on this issue. She began the relevant part of her reasons by considering P. and S.'s conditions, means and circumstances, the length of time they cohabitated and the functions each performed during the marriage. The essence of her analysis is found at paras. 97-101 of her reasons, under the heading "Decision on Spousal Support." It is apparent that she was significantly concerned about the fact that, if P.'s income continues at its present level, he and Susan will be in different post-divorce financial situations. She wrote as follows at para. 98 of her decision:

> [98] The family retirement plan involved both P. and S. dabbling, in other words retaining some of their employment income, after retirement at approximately the age of 60. I accept that S. will retire as soon as she can, at full pension, and P. may start to slow down in his early 60's. Whatever he does. the evidence suggests that it will be his choice rather than circumstances beyond his control, that dictate his income. S. on the other hand, is limited in her earnings. Consequently, the standards of living in each household will be quite different. P.'s will continue as it was during the marriage whereas S* will enjoy far less affluence.
>
> [emphasis added]

51 The trial judge then went on to accept that S.'s career had not been significantly disrupted by child-rearing during the course of the marriage. However, she said this was only one of many considerations in determining spousal support payable after the dissolution of a long-term relationship. In this regard, she referred to L'Heureux-Dubé J.'s comment in *Moge v. Moge*, *supra*, at p. 870, to the effect that "...the longer the relationship endures, the closer the economic union, the greater will be the presumptive claim to equal standards of living upon its dissolution."

52 After canvassing these matters, the trial judge set out her bottom-line conclusion by explaining as follows:

> [100] Without spousal support, based on their incomes of $431,000.00 and $72,549.00, P. and S. would receive 83.12% and 16.88% respectively of the available cash resources. With the current order of $7,000.00 monthly in spousal support, the division of cash resources is 67.19% and 32.8% respectively. If spousal support were set at $8.000.00 monthly, the division of available resources would be 65.03% and 34.97%. In my view, this is an equitable sharing of resources, given the length of the marriage, and the roles P. and S. assumed during the marriage. It will also allow both S. and P. to maintain the lifestyle they enjoyed during their long-term marriage.
>
> [101] P. will pay $8,000.00 spousal support until December 31, 2019. Thereafter, spousal support will be set at $3,000.00 monthly.
>
> [emphasis added]

53 To put this result in context, I will begin by considering the evidence concerning the work and retirement plans of P. and S. P. testified that, before their separation, he and S# had talked about "retiring to Regina Beach and perhaps travelling a little bit." He said they had thought this might happen "when [S.'s] pension maxed out" and that S. might work as a substitute teacher after her retirement. P. also indicated he had discussed with S. the idea that he would work full-time until he was 60 and that he would then "dabble," *i.e.* work something less than full-time. Later in his evidence, P. said that he would like the option of retiring at age 60: "That's — that's been my goal." In reference to his work, he said, "[A]s long as I can do it, I'll do it" and explained this by saying that he thought being a real estate broker is akin to being an NFL quarterback. One day he would wake up and not be able to do his job anymore. P. also referred to some issues with depression in 2001 and implied these sorts of health concerns might stand between him and his work.

54 S. testified that, prior to separating, she and P. had talked about retirement at Regina Beach and had said they would live there and travel and enjoy their family. S. also indicated that she had thought she would be retiring at about age 55 but that, in light of the separation, she would be working at least "a couple more years for sure." Later in her evidence, she reiterated that she had believed that she would retire "by the time I was 55 for sure." She testified that P. had said he loved his work and "would continue working in some manner, in some way, like dabble...for a long time. He had no real set plans for retirement."

55 As indicated above, having considered this testimony, the trial judge concluded that P.'s concerns about health and declining energy levels were not "realistic." She then went on to accept that S. would retire as soon as she could at full pension and, importantly, found that P. would likely start to slow down in his early 60's.

56 However, as noted, the trial judge nonetheless ordered that P. pay S. $8,000 per month through to the end of 2019, a point in time when P. will be 65. She did this notwithstanding her findings about P.'s plans for future work and retirement. All of this is complicated to some extent because the trial judge did not explain why she selected the end of 2019 as the date when P.'s obligations were to step down from $8,000 per month to $3,000 per month. P. suggests she used a point corresponding with his 65th birthday, an "arbitrary" choice in his view. S. speculates that the 2019 date was chosen because, in June of that year, she will have reached her maximum 35 years of contributory pension service.

57 S.'s explanation is not entirely satisfactory. If the 2019 date was intended to coordinate with the time when she could maximize her pension entitlements, it overlooks the fact that, in her evidence, S. did not suggest she would work until her entitlements were maximized. Further, it overlooks the fact that she reaches that date in June of 2019, rather than in December. Taking all of this into account, the best explanation for the 2019 date is the one offered by P. It is consistent with the trial judge's root point that P.'s income is high and that, if he slows down or chooses to earn less, it will be by his own choice. Accordingly, it seems to me that the 2019 date must be seen as a proxy for a "normal" retirement date for P.

58 This feeds into the aspect of the trial judge's decision which requires P. beginning in January of 2020, to pay Susan $3,000 per month in spousal support on an ongoing basis. The trial judge offered no explanation as to how that level of support was selected. Presumably, she must have concluded that, by the end of 2019, P.'s income will have led him to accumulate a capital base which, in addition to meeting his own retirement needs, will also allow him to support S. at the rate of $3,000 per month. However, even assuming this to be the basis of the order, its logic very directly depends on P.'s situation with respect to retirement or "slowing down." In other words, by requiring P. to support S. on an ongoing basis, this aspect of the support order also pushes P. in the direction of having to maximize his income to age 65, or later.

59 In my respectful view, all of this highlights the central problem with the trial judge's decision as it pertains to spousal support going forward. It ties P.'s support obligations to what he *can* earn, not to what it is likely that he *will* earn. This is a case where a payor spouse has reasonable plans for retirement and where those plans existed pre-separation. This is also a case where, significantly, the payee spouse has a $950,000 home, secure employment, a $72,000 per annum salary and an indexed pension. In these circumstances, a support order should not effectively force P. the payor spouse, to maximize his income to age 65 and thereby oblige him to work past the date on which he had reasonably expected to retire. If S. was unable to work or to support herself, or if it could be shown that P.'s plans for retirement or "slowing down" reflected a bad faith attempt to avoid supporting S. the situation might be different. But there is no suggestion here of any such motivation.

60 P.'s concerns about the trial judge's spousal support decision are compounded by his worry that he will never be able to vary the order even if, in keeping with his plans, he decides to retire or work less and his income falls as a result. This, of course, is because the variation of a support order will be granted only if there is a "material change of circumstances." In *Willick v. Willick*, [1994] 3 S.C.R. 670 (S.C.C.), this concept was defined as follows, at p. 688:

> In deciding whether the conditions for variation exist, it is common ground that the change must be a material change of circumstances. This means a change, such that, if known at the time, would likely have resulted in different terms. The corollary to this is that if the matter which is relied on as constituting a change was known at the relevant time it cannot be relied on as the basis for variation. ...

61 Thus, given the wording of the trial judgment, particularly at para. 98, P. may be forgiven for being concerned that he is locked into the payment regime prescribed by the trial judge regardless of what happens to his actual income in light of a good-faith decision to retire or scale back at work. In other words, the trial judge expressly contemplated this prospect but made the support order notwithstanding it and, as a consequence, it is not easy to see how a decision by P. to retire or work less would fit within the *Willick* sense of "material change of circumstance."

62 I am, of course, aware of the governing standard of review in relation to spousal support orders. This Court is not entitled to simply re-make the decision of the trial judge concerning such support. Rather, as indicated by the Supreme Court of Canada in *Hickey v. Hickey*, [1999] 2

S.C.R. 518 (S.C.C.) at para. 11, it may intervene only if the reasons of the trial judge disclose an error in principle, a significant misapprehension of the evidence or unless the decision of the trial judge is clearly wrong. What, then, is to be made of the situation at hand?

63 In my view, and in the circumstances of this case, the trial judge did make a reviewable error, an error of principle, by ordering P. to pay spousal support on the basis of his income earning *potential* rather than on the basis of his likely *actual* earnings. Accordingly, this Court is obliged to intervene. P. should be freed from the situation where he is locked into prescribed support obligations even if he retires or "scales back" in good faith. This goal can be best accomplished by an order which puts a time limit on P's support obligations and allows for the issue to be re-visited when his retirement situation is clearer. In light of the evidence, the appropriate time to reassess the situation is December 31, 2014, the date roughly corresponding with Paul's 60th birthday.

64 In *Leskun v. Leskun*, 2006 SCC 25, [2006] 1 S.C.R. 920 (S.C.C.), the Supreme Court provided helpful guidance with respect to the use of orders of this kind. It cautioned against their liberal employment and indicated that, insofar as possible, courts should resolve the controversies between litigants by way of permanent orders. But, the Court also recognized that review orders play a useful role because they entitle parties to return to court for reconsideration of support obligations without having to show a material change of circumstance. As a result, time-limited awards of support can be properly employed when the future involves genuine and material uncertainty. This, it seems to me, is the situation here.

65 What then is the appropriate level of support payable to S. during the period leading up to the end of 2014? P. accepts that she is entitled to some support but says $8,000 per month is too much. He queries why S. would need $168,000 per year (her $72,000 salary plus $96,000 in spousal support) to maintain the lifestyle she enjoyed prior to their separation. P.'s position on this point is not without merit but, in the end, I am not persuaded that (given the applicable standard of review) the $8,000 per month figure amounts to a reviewable error in relation to the period running to the end of 2014. The trial judge, in the exercise of her discretion, elected to emphasize the length of P. and S.'s relationship and to stress the notion, expressed in *Moge v. Moge*, that in longer term marriages there will be a more convincing claim to equal standards of living upon dissolution of the relationship. Especially with respect to the years

immediately following the breakdown of P. and S.'s long-term relationship, this was an approach which was open to the trial judge. S. is in transition, not just in her relationship with P. but also in terms of completing landscape work on the Regina Beach house and so forth.

66 Accordingly, I conclude that P.'s obligation to pay $8,000 per month in spousal support should remain in place, but only until December 31, 2014. He will have then just turned 60 and his plans to retire or to scale back work in his "early 60's" should have come into focus. At that time, the Court of Queen's Bench, if requested to do so by S. will be in a position to take a fresh and more informed look at the amount (if any) of spousal support S. should be paid on a go-forward basis. The judge who makes any such assessment will obviously consider all of the relevant factors and will not be constrained by the assessment of the situation made by the trial judge in these proceedings.

E. Contributions to the Children's Tuition

67 P.'s final argument is that the trial judge erred in determining the size of S.'s obligations in relation to funding the children's university tuition.

68 At trial, P. contended that S. should reimburse one-half of certain costs he had paid for the children's education. This consisted of $51,165 of tuition for L. $3,687 of tuition for E. and $43,836 lost on the re-sale of a condominium he bought for A. when she attended the University of Victoria. The trial judge accepted that P. and S had agreed to support their children while they pursued their first degrees and that, as a result, S. was responsible for her *pro rata* share of the relevant tuition costs. She rejected P.'s argument that S. pay for losses on the condominium because S. was not a party to the decision to buy it. In calculating S.'s proportionate share of the $54,852 of tuition fees, the trial judge considered her annual income *less* spousal support. She did so in purported reliance on Schedule III of the *Federal Child Support Guidelines*. On this footing, she determined S.'s obligation to be $9,324.84.

69 P. argues that the trial judge made an error in her calculations. Specifically, he points out that Schedule III of the *Guidelines* does not state that, for purposes of determining an amount under s. 7, spousal support is to be deducted from the payee spouse's income. Rather, it says such payments are to be deducted from the payor spouse's income. As a result, on P.'s calculation, the trial judge should have found S.'s proportionate share of the tuition expenses to be $17,004.12 rather than $9,324.84.

70 S. does not dispute the suggestion that the trial judge made an error and she takes no issue with P.'s calculations concerning her proper share of the tuition costs. She says the trial judge lacked jurisdiction to make an order respecting tuition because P.'s pleadings did not put such expenditures in issue. She also says that her liability in relation to this point arises only from a good faith gesture on her part to support her children and that, given the overall size of the assets involved in these proceedings, the Court should not trouble itself with an error in the range of only $8,000.

71 I have some sympathy for S.'s position but conclude that ultimately P. must prevail on this point. Several considerations inform my assessment in this regard. First, S. did not cross-appeal on the question of whether the trial judge had jurisdiction to deal with tuition fees. Second, she has not pointed to any way in which she was prejudiced by P.'s failure to expressly flag this question in his pleadings. Third, questions of jurisdiction aside, S. does not suggest that the decision concerning tuition costs was somehow wrong in principle. Thus, given that the trial judge's mistake was in the nature of a calculation error, it seems appropriate to do the arithmetic correctly and require S. to pay her proper share of the tuition fees.

72 In short, I see no basis in principle for denying P's argument on this issue.

V. Conclusion

73 P.'s appeal is allowed to the extent of (a) setting aside the award of $94,925 to S. for retroactive spousal support, (b) varying the award for ongoing spousal support so that it provides he is to pay support in the amount of $8,000 per month to December 31, 2014 *with a proviso* that, at that time, the issue of his ongoing support obligations (if any) may be reviewed at S.'s initiative, and (c) increasing S.'s obligation in relation to the children's tuition fees from $9,324.84 to $17,004.12.

74 P. and S. have each had mixed success with respect to the outcome of this appeal. As a result, there will be no order as to costs.

***Ottenbreit J.A.*:**

I concur

***Caldwell J.A.*:**

I concur

Appeal allowed in part.

[Indexed as: **M. (C.M.) v. C. (D.G.)**]

C.M.M., Applicant and D.G.C., Respondent

Ontario Superior Court of Justice (Divisional Court)

Docket: 57/14

2014 ONSC 2356

Harvison Young J.

Heard: April 1, 2014

Judgment: April 15, 2014*

Civil practice and procedure —— Actions involving parties under disability — Infants — Guardian ad litem, next friend or litigation guardian — Appointment — General principles —— Litigation guardian — Child was born after mother unexpectedly became pregnant after short relationship with father — Mother and father executed agreement that provided for one-time lump sum of $37,500 by father to mother and father was to have no contact with child — Child, now aged 15, sought child support from father so she could attend private school — Motion judge concluded that R. 7 of Rules of Civil Procedure applied in circumstances and required child to be represented by litigation guardian — Motion judge dismissed child's request for interim child support, interim disbursements, restrained child from contacting father's family and declined to strike out portions of father's answer and affidavits — Child applied for leave to appeal — Leave to appeal granted in part — This was novel case because minor child who had not withdrawn from parental control was seeking support without any involvement of mother — There was serious debate about correctness of motion judge's decision that litigation guardian must be appointed — Litigation guardian had not been appointed in cases where minors had withdrawn from parental control so it was questionable whether litigation guardian must be appointed where minor was claiming support from parent without any involvement from custodial parent — Implications of issue went beyond this case — Question that proposed appeal raised involved matters of such importance that leave to appeal should be granted.

Civil practice and procedure —— Practice on appeal — Leave to appeal — Application — General principles —— Child was born after mother unexpectedly became pregnant after short relationship with father — Mother and father executed agreement that provided for one-time lump sum of $37,500 by father

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*A corrigendum issued by the court on April 16, 2014 has been incorporated herein.

to mother and father was to have no contact with child — Child, now aged 15, sought child support from father so she could attend private school — Motion judge concluded that R. 7 of Rules of Civil Procedure applied in circumstances and required child to be represented by litigation guardian — Motion judge dismissed child's request for interim child support, interim disbursements, restrained child from contacting father's family and declined to strike out portions of father's answer and affidavits — Child applied for leave to appeal — Leave to appeal granted in part — This was novel case because minor child who had not withdrawn from parental control was seeking support without any involvement of mother — There was serious debate about correctness of motion judge's decision that litigation guardian must be appointed — Litigation guardian had not been appointed in cases where minors had withdrawn from parental control so it was questionable whether litigation guardian must be appointed where minor was claiming support from parent without any involvement from custodial parent — Implications of issue went beyond this case — Question that proposed appeal raised involved matters of such importance that leave to appeal should be granted — Finding that child had not made out compelling case for eligibility to child support was open to motion judge on record and did not give rise to any reason to doubt correctness of decision — There were no conflicting decisions that could give rise to leave to appeal — Motion judge's decision not to award interim disbursements was discretionary and decision was well-grounded and justified on basis of record for reasons she gave — Motion judge did not misapprehend evidence such as to give rise to serious debate as to correctness of decision — Motion judge did not err in characterization of issues relating to motion to strike out — Child had not established that there were conflicting decisions or that there was serious debate as to correctness of decision — Record supported motion judge's order restraining child from contacting father's family — There was no reason to doubt correctness of decision and there were no conflicting decisions.

Family law — Support — Child support under federal and provincial guidelines — Interim award — Child was born after mother unexpectedly became pregnant after short relationship with father — Mother and father executed agreement that provided for one-time lump sum of $37,500 by father to mother and father was to have no contact with child — Child, now aged 15, sought child support from father so she could attend private school — Motion judge concluded that R. 7 of Rules of Civil Procedure applied in circumstances and required child to be represented by litigation guardian — Motion judge dismissed child's request for interim child support, interim disbursements, restrained child from contacting father's family and declined to strike out portions of father's answer and affidavits — Child applied for leave to appeal — Leave to appeal granted in part — Finding that child had not made out compelling case for eligibility to child support was open to motion judge on record and did not

give rise to any reason to doubt correctness of decision — There were no conflicting decisions that could give rise to leave to appeal.

Family law —— Costs — Support —— Child was born after mother unexpectedly became pregnant after short relationship with father — Mother and father executed agreement that provided for one-time lump sum of $37,500 by father to mother and father was to have no contact with child — Child, now aged 15, sought child support from father so she could attend private school — Motion judge concluded that R. 7 of Rules of Civil Procedure applied in circumstances and required child to be represented by litigation guardian — Motion judge dismissed child's request for interim child support, interim disbursements, restrained child from contacting father's family and declined to strike out portions of father's answer and affidavits — Child applied for leave to appeal — Leave to appeal granted in part — Motion judge's decision not to award interim disbursements was discretionary and decision was well-grounded and justified on basis of record for reasons she gave — Motion judge did not misapprehend evidence such as to give rise to serious debate as to correctness of decision.

Evidence —— Affidavits — General principles —— Striking out — Child was born after mother unexpectedly became pregnant after short relationship with father — Mother and father executed agreement that provided for one-time lump sum of $37,500 by father to mother and father was to have no contact with child — Child, now aged 15, sought child support from father so she could attend private school — Motion judge concluded that R. 7 of Rules of Civil Procedure applied in circumstances and required child to be represented by litigation guardian — Motion judge dismissed child's request for interim child support, interim disbursements, restrained child from contacting father's family and declined to strike out portions of father's answer and affidavits — Child applied for leave to appeal — Leave to appeal granted in part — Motion judge did not err in characterization of issues relating to motion to strike out — Child had not established that there were conflicting decisions or that there was serious debate as to correctness of decision.

Family law —— Restraining orders —— Child was born after mother unexpectedly became pregnant after short relationship with father — Mother and father executed agreement that provided for one-time lump sum of $37,500 by father to mother and father was to have no contact with child — Child, now aged 15, sought child support from father so she could attend private school — Motion judge concluded that R. 7 of Rules of Civil Procedure applied in circumstances and required child to be represented by litigation guardian — Motion judge dismissed child's request for interim child support, interim disbursements, restrained child from contacting father's family and declined to strike out portions of father's answer and affidavits — Child applied for leave to appeal — Leave to appeal granted in part — Record supported motion judge's order re-

straining child from contacting father's family — There was no reason to doubt correctness of decision and there were no conflicting decisions.

Cases considered by *Harvison Young J.*:

Comtrade Petroleum Inc. v. 490300 Ontario Ltd. (1992), 7 O.R. (3d) 542, 6 C.P.C. (3d) 271, 55 O.A.C. 316, 1992 CarswellOnt 429, [1992] O.J. No. 652 (Ont. Div. Ct.) — considered

G. (J.) v. G. (P.) (1988), 1988 CarswellOnt 1455, [1988] O.J. No. 3137 (Ont. Prov. Ct.) — referred to

Himel v. Greenberg (2010), 93 R.F.L. (6th) 384, 2010 CarswellOnt 8262, 2010 ONSC 4084 (Ont. S.C.J.) — considered

Kline v. Kline (2007), 2007 ONCJ 575, 2007 CarswellOnt 7843, [2007] O.J. No. 4728 (Ont. C.J.) — referred to

Major v. Major (2009), 71 R.F.L. (6th) 422, 2009 CarswellOnt 3201 (Ont. Div. Ct.) — referred to

Rizzo & Rizzo Shoes Ltd., Re (1998), 1998 CarswellOnt 1, 1998 CarswellOnt 2, 50 C.B.R. (3d) 163, [1998] 1 S.C.R. 27, 33 C.C.E.L. (2d) 173, 154 D.L.R. (4th) 193, 36 O.R. (3d) 418 (headnote only), *(*sub nom. *Rizzo & Rizzo Shoes Ltd. (Bankrupt), Re)* 221 N.R. 241, *(*sub nom. *Rizzo & Rizzo Shoes Ltd. (Bankrupt), Re)* 106 O.A.C. 1, *(*sub nom. *Adrien v. Ontario Ministry of Labour)* 98 C.L.L.C. 210-006, [1998] S.C.J. No. 2 (S.C.C.) — considered

S. (C.) v. S. (M.) (2007), 37 R.F.L. (6th) 373, 2007 CarswellOnt 1267, [2007] O.J. No. 787 (Ont. S.C.J.) — referred to

Sodoski v. Sodoski (2004), 2004 ONCJ 424, 2004 CarswellOnt 6499, [2004] O.J. No. 5913 (Ont. C.J.) — referred to

Zabawskyj v. Zabawskyj (2008), 55 R.F.L. (6th) 36, 2008 CarswellOnt 2412, [2008] O.J. No. 1650 (Ont. S.C.J.) — considered

Zagdanski v. Zagdanski (August 16, 2002), Doc. ND 166822/89, [2002] O.J. No. 3415 (Ont. Div. Ct.) — referred to

626381 Ontario Ltd. v. Kagan, Shastri, Barristers & Solicitors (2013), 2013 ONSC 4114, 2013 CarswellOnt 8104, 116 O.R. (3d) 202, 285 C.R.R. (2d) 53 (Ont. S.C.J.) — considered

Statutes considered:

Child and Family Services Act, R.S.O. 1990, c. C.11
Generally — referred to

Children's Law Reform Act, R.S.O. 1990, c. C.12
Generally — referred to

Family Law Act, R.S.O. 1990, c. F.3
s. 31(2) — considered
s. 33(1) — considered
s. 33(2) — considered

Rules considered:

Family Law Rules, O. Reg. 114/99
Generally — referred to
R. 1(7) — considered
R. 2 — considered
R. 2(1) — considered
R. 4 — considered
R. 24(12) — considered
Rules of Civil Procedure, R.R.O. 1990, Reg. 194
Generally — referred to
R. 7 — considered
R. 62.02 — considered
R. 62.02(4) — considered
R. 62.02(4)(a) — considered
R. 62.02(4)(b) — considered

Regulations considered:

Family Law Act, R.S.O. 1990, c. F.3
Child Support Guidelines, O. Reg. 391/97
Generally — referred to
s. 7 — considered

APPLICATION by child for leave to appeal from judgment reported at *M. (C.M.) v. C. (D.G.)* (2014), 2014 ONSC 567, 2014 CarswellOnt 1771, 41 R.F.L. (7th) 456 (Ont. S.C.J.), dismissing child's application to pursue child support from respondent father without litigation guardian and for various other forms of relief.

Jeffrey Wilson, for C.M.M.
Harold Niman, Vanessa Amyot, for D.G.C
Andrea Luey, for Justice for Children and Youth
Samantha Preshner, for Children's Lawyer
Courtney Harris, for Attorney General of Ontario

***Harvison Young J.*:**

1 This is a motion for leave to appeal that arises from a number of orders made by D. Wilson J. on January 24, 2014 [2014 CarswellOnt 1771, 41 R.F.L. (7th) 456 (Ont. S.C.J.)]

2 The unusual background of this motion may be briefly summarized. The applicant, C.M.M., is a 15 year-old girl who is seeking child support from her biological father, the respondent, D.G.C. C.M.M. lives with her

mother, J.M. Although she has been named as a party, J.M. has not played any role in her daughter's claim.

3 C.M.M. was born in 1998 after J.M. unexpectedly became pregnant after a relatively short relationship with the respondent. J.M. and D.G.C. negotiated and executed a written agreement (the "Agreement") that provided for the payment of a one-time lump sum of $37,500 by D.G.C. to J.M. It also provided that D.G.C. was to have no contact with the child whatsoever. Both J.M. and the respondent were represented by experienced counsel at that time.

4 The money was paid and the father played no role in the birth or life of C.M.M., as stipulated by the Agreement, until the applicant wrote to the respondent's mother in February 2013. In that letter, the applicant asked for "your family's financial support for fees at Havergal College for the commencement of my high school years". The application that gives rise to this motion was commenced shortly thereafter.

5 On December 12, 2013, a number of motions and cross-motions were heard. The motion judge subsequently made a number of determinations that are listed in "Appendix A" to these reasons.

Motions Before this Court

6 The applicant seeks leave to appeal from most, though not all, of the motion judge's orders listed in Appendix A.

7 The applicant child seeks leave to appeal from the following orders:

(1) That the applicant appoint a litigation guardian in these proceedings;

(2) Dismissing the applicant's request that the respondent father pay interim child support;

(3) Dismissing the applicant's request for interim disbursements;

(4) Dismissing the applicant's request that portions of the respondent's affidavit and Answer be struck;

(5) That the parties be identified by initials; and

(6) Restraining the applicant from contacting the respondent's family.

8 In the materials filed on the motion before this court, the applicant took the position that if she was unsuccessful in obtaining leave to appeal on the litigation guardian issue, she would seek an order permitting the matter to proceed without a litigation guardian pursuant to the court's *parens patriae* jurisdiction, or pursuant to a Notice of Constitutional

Question that she has filed. Justice for Children and Youth sought leave to intervene with respect to the constitutional issue, and the Attorney-General (Ontario) filed responding materials.

9 As a further alternative, the applicant would seek an order appointing the Office of the Children's Lawyer (the "OCL") as her litigation guardian.

Preliminary Issue

10 At the beginning of the motion hearing before this court, counsel agreed that if leave was granted on the litigation guardian issue, the alternative relief sought by the applicant, namely that she proceed without a litigation guardian or that the OCL be appointed, would not require submissions. Similarly, they agreed that in the event leave was granted on the litigation guardian issue, submissions on the constitutional argument would not be necessary.

11 After hearing submissions from the applicant and respondent on the leave to appeal grounds, I advised the parties that I would be granting leave to appeal on the litigation guardian issue with reasons to follow. Accordingly, it was unnecessary to hear from the OCL, the Attorney General or Justice for Children and Youth, and the applicant's claim for alternative relief was not argued. I advised the parties that I would be reserving my decision on the issues of interim support and interim costs, but dismissing the balance of the motion grounds.

12 After considering the parties' submissions and the relevant law, I have concluded that leave to appeal should be denied on all issues except for the litigation guardian issue. These are my reasons.

The Test for Leave to Appeal

13 Rule 62.02(4) of the *Rules of Civil of Procedure*, R.R.O. 1990, Reg. 194 provides that leave shall not be granted to appeal from an interlocutory order of a judge of the Superior Court of Justice unless one of the following conditions is satisfied:

> (a) there is a conflicting decision by another judge or court in Ontario or elsewhere on the matter involved in the proposed appeal and it is, in the opinion of the judge hearing the motion, desirable that leave to appeal be granted; or
>
> (b) there appears to the judge hearing the motion good reason to doubt the correctness of the order in question and the pro-

> posed appeal involves matters of such importance that, in his or her opinion, leave to appeal should be granted.

14 As has been held in a number of cases, this court need not actually doubt the correctness of the decision. It is sufficient that its correctness be "open to very serious debate": see *Zagdanski v. Zagdanski*, [2002] O.J. No. 3415 (Ont. Div. Ct.), at para. 16; and *Major v. Major* (2009), 71 R.F.L. (6th) 422 (Ont. Div. Ct.), at para. 6.

15 Throughout his submissions on behalf of the applicant, Mr. Wilson relied on rule 62.02(4)(a), arguing that with respect to every issue (with the exception of the interim disbursements issue), the applicant had met that limb of the test for leave in that there were conflicting decisions on the point. With the possible exception of the litigation guardian issue, which I will discuss in more detail below, I do not agree that the applicant was able to point to conflicting cases within the meaning of Rule 62.02(4)(a).

16 An exercise of discretion that has led to a different result because of different circumstances does not constitute a "conflicting decision" within the meaning of rule 62.02. In *Comtrade Petroleum Inc. v. 490300 Ontario Ltd.* (1992), 7 O.R. (3d) 542 (Ont. Div. Ct.), Montgomery J. made the following comments for the court, at p. 544:

> [W]e feel it is necessary to make some comment on the manner in which subrule (a) has been interpreted. An exercise of discretion which has led to a different result because of different circumstances does not meet the requirement for a "conflicting decision". It is necessary to demonstrate a difference in the principles chosen as a guide to the exercise of such a discretion.

1. The Litigation Guardian Issue

17 The motion judge rejected the applicant's argument, which Mr. Wilson also reiterated forcefully before this court, that the *Family Law Rules*, O. Reg. 114/99 provide an entire scheme for a child suing a parent for support, and that recourse to the *Rules of Civil Procedure* is therefore unnecessary. The motion judge concluded that Rule 7 of the *Rules of Civil Procedure* operates in the circumstances, and requires that the applicant be represented by a litigation guardian.

18 The motion judge based her conclusion on this issue on a number of grounds. First, she relied on Rule 1(7) of the *Family Law Rules*, which confers a broad discretion on courts to refer to the *Rules of Civil Procedure* to address matters not specifically dealt with by the *Family Law*

Rules. She noted that there are many examples of this, citing the case of *Himel v. Greenberg*, 2010 ONSC 4084, 93 R.F.L. (6th) 384 (Ont. S.C.J.). She found that the issue of the appointment of a litigation guardian was not clearly addressed, citing the decision of *Zabawskyj v. Zabawskyj* (2008), 55 R.F.L. (6th) 36 (Ont. S.C.J.), at paras. 41-42 of the endorsement:

> This case involved a family law application in which an 81 year old woman claimed a trust interest in property owned by her husband who was 85. Both of the parties were deemed incapable of instructing counsel. As a result, the wife moved for an order appointing the Public Guardian and Trustee as litigation guardian while the son of the father moved for an order appointing him as his father's representative.
>
> In ruling on the motions, the judge noted that a "special party" is a person who is mentally incapable of instructing counsel and mentally incapable of understanding information or issues in the litigation. He went on to state, at para. 12, "Rule 4(2) of the *Family Law Rules* provides that a court may authorize a person to represent a special party if the person is appropriate for the task and willing to act as representative. This rule is somewhat terse. As a result, courts have tended to rely on Rule 1(7) of the *Family Law Rules* to look to Rule 7 of the *Rules of Civil Procedure* where a more detailed framework exists for considering the issue of the representation of mentally incapable person in litigation. Applying the Rule 7 framework to issues of mental capacity in family law litigation makes sense. It ensures a consistency of practice and jurisprudence on the issue, thereby affording parties needed guidance" I agree.

19 The motion judge also considered the policy considerations at play, finding that there were sound policy reasons for interpreting the legislation in this manner. She noted that the applicant's mother had been made a party by the respondent, but had not responded to the litigation. Given that the outcome of the application was by no means certain, it would be unfair to the respondent if the applicant, who has no source of income or assets, was essentially insulated from any costs awards that might be ordered: see paras. 45-47.

The Parties' Submissions

20 On behalf of the applicant, Mr. Wilson argued strenuously that the motion judge erred in her application of the *Rules of Civil Procedure* to the *Family Law Rules*. He submitted that there are conflicting decisions

on whether a person under the age of 18 requires a litigation guardian when suing a parent for support.

21 In addition, the applicant submitted that there is good reason to doubt the correctness of the motion judge's recourse to the *Rules of Civil Procedure*. The heart of the applicant's argument, which she also made before the motion judge, was that it is unnecessary and wrong to resort to the *Rules of Civil Procedure* because the *Family Law Rules* operate as a complete code on the subject of representation of children. Because they do not impose a litigation guardian requirement, there is no basis for imposing such requirement.

22 Mr. Wilson pointed to subsection 33(2) of the *Family Law Act*, R.S.O. 1990, c. F.3 (the "*FLA*"), which allows a child to bring an application for child support. He also submitted that under the *Family Law Rules*, the applicant is not a "special party" within the meaning of the following definition from rule 2(1):

> "special party" means a party who is a child or who is or appears to be mentally incapable for the purposes of the *Substitute Decisions Act, 1992* in respect of an issue in the case and who, as a result, requires legal representation, but does not include a child in a custody, access, child protection, adoption or child support case.

23 On this view, the applicant falls within the exception contained in this rule. In other words, she is "a child in a child support case." The applicant further noted that a litigation guardian is not required where a child is involved in a child protection case under the *Child and Family Services Act*, R.S.O. 1990, c. C.11 or a custody and access case under the *Children's Law Reform Act*, R.S.O. 1990, c. C.12. She submitted that if the motion judge is correct, all of the circumstances in which children have counsel but no litigation guardian will need to be corrected.

24 On behalf of the respondent, Mr. Niman submitted that to begin with, rule 2(1) is a definitional section, but even if it is to be applied in this case, the applicant has misinterpreted the Rule. Rule 2, according to the respondent, is meant to apply to children who are *subjects* of a custody, access, child protection, adoption or child support case. It is not meant to apply to children who are parties to such cases.

25 According to the respondent, this is the only logical reading of the rule. A child cannot be a party to a custody, access, or child protection case of which he or she is the subject. He submitted this reading of the rule is consistent with the Supreme Court of Canada's approach to statutory interpretation, namely that "the words of an Act are to be read in

their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.": *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27 (S.C.C.), at para 21.

26 Mr. Wilson submitted that the applicant's position on this issue is supported by the existence of a number of child support cases where minors have been permitted to claim child support without litigation guardians, citing *G. (J.) v. G. (P.)*, [1988] O.J. No. 3137 (Ont. Prov. Ct.) and *Kline v. Kline*, 2007 ONCJ 575 (Ont. C.J.) as examples.

27 While Mr. Niman conceded that there are cases in which children have been permitted to sue their parents for child support without a litigation guardian, he says that all of the cases relied on by the applicant involve children who had withdrawn (or allegedly withdrawn) from parental control within the meaning of s. 31(2) of the *FLA*. In this case, however, the child is living with her mother.

28 Mr. Niman argued that, in any event, a proper reading of Rule 4 supports the motion judge's view that there is a "gap" in the *Family Law Rules* because it is clearly contemplating legal *representation*, and not litigation guardians. At no point does Rule 4 mention a litigation guardian. In short, it is the *Rules of Civil Procedure* and not the *Family Law Rules* that addresses the issue of litigation guardians (as opposed to legal representatives or lawyers) in any situation involving children. Both parties cited policy considerations in support of their positions. Mr. Wilson argued that if a litigation guardian is appointed in this case, the litigation will be stymied because she is unable to find someone willing to act as litigation guardian for her.

29 The respondent referred to the following articulation of the purpose underlying the litigation guardian requirement from *Holmested and Watson: Ontario Civil Procedure*:

> The purpose of a rule requiring a litigation guardian for parties under disability is drawn for protection to the party, the other parties and the Court itself. The rule offers protection to the party by ensuring that a competent person with a duty to act for the party's benefit is there to instruct counsel and take steps in the litigation on the party's behalf. To the other parties, the rule offers the protection of a competent person who instructs counsel on how the proceeding is to be conducted, is responsible for costs and is responsible for seeing that the court's eventual judgment is obeyed. A litigation guardian offers assurance to the court that its process is not abused by or against a

> party under disability and that its order will be obeyed [D. McKay and G. Watson, *Holmested and Watson: Ontario Civil Procedure*, looseleaf, vol. 2 (Toronto: Carswell, 1984-), p. 7-13].

30 This passage was cited with approval by Stinson J. in *626381 Ontario Ltd. v. Kagan, Shastri, Barristers & Solicitors*, 2013 ONSC 4114, 116 O.R. (3d) 202 (Ont. S.C.J.), at para 17.

Analysis

31 This is a novel case because it is normally the custodial parent who brings the application for child support. The applicant lives with her mother and has not withdrawn from parental control, as was the case in all of the support cases drawn to the court's attention in which a minor has claimed support from a parent. The question of whether those cases are applicable to the present case and/or whether they are correct to the extent that litigation guardians were not required is at the core of the question of whether the motion judge was correct. If those cases are applicable, then the applicant is correct in asserting that there are conflicting decisions. Given the novelty of this issue, it is desirable that leave to appeal be granted on this issue.

32 It is not necessary for the purposes of this leave application to decide whether the applicant has satisfied the "conflicting decision" test for leave set out in rule 62.02(4)(a) because I am of the view that there is, in any event, very serious debate as to the correctness of the motion judge's decision.

33 The motion judge's interpretation of the intersection of the *Family Law Rules* and the *Rules of Civil Procedure* led to the conclusion that a litigation guardian must be appointed in this case, despite the fact that there are cases involving minors who have withdrawn from parental control where such a requirement has not been imposed. She referred to these cases as "exceptional" in terms of the general rule that litigation guardians be appointed. Seen within the context of custody claims, these cases are indeed exceptional in the sense that child support claims are normally brought by the custodial parent. There is no case law involving situations like this where a child living with one parent takes the initiative to claim support from the other without any apparent encouragement or support to do so from the custodial parent. I note that these "exceptional" cases do not address the question of whether a litigation guardian was required. There is no indication that the question was raised at all, which undermines the applicant's argument that they stand for the pro-

position that a litigation guardian is not required when a minor seeks child support.

34 The question, then, is whether and/or why it is that a litigation guardian has not been appointed in cases where minors have withdrawn from parental control, but must be appointed in a case where the minor is claiming support from a parent without any involvement or apparent involvement of the custodial parent. The policy consideration that it is desirable and in the interests of the fairness and integrity of the legal system to have someone be responsible for costs would also appear to apply, at least in principle, to the case of a minor who has withdrawn from parental control.

35 For all these reasons, and given the absence of clear authority on the applicability of a litigation guardian requirement in such cases, I am satisfied that there is very serious debate as to the correctness of the motion judge's decision to order the appointment of a litigation guardian. I emphasize, however, that I am unable to say that I doubt the correctness of the motion judge's decision on this point.

36 I am also satisfied that the applicant has met the second limb of the test in Rule 62.04(b) with respect to the litigation guardian issue. The implications of this issue, as I have discussed, go far beyond the confines of this case. The fact that, as the respondent emphasized, the absence of a litigation guardian requirement could encourage child support litigation at the *de facto* initiative of custodial parents but without any accountability for costs on their part lies at the heart of the policy considerations to which the motion judge was very much alive. The respondent's position is that the mother has, in fact, been behind this litigation. On the other hand, the applicant submits that a requirement that a litigation guardian be appointed in a case such as this risks compromising the child's interests where a custodial parent is unwilling or unable to pursue a child support claim. There is no question that the proposed appeal on the litigation guardian issue involves matters of such importance that leave to appeal should be granted.

2. Should the Respondent be required to Pay Interim Child Support?

37 The motion judge declined to order the respondent to pay interim child support, noting that the language in s. 33(1) of the *FLA* is discretionary. As she acknowledged, although a parent cannot contract out of a child's right to support, it is not the task of the motion judge to scrutinize

the merits of the application to determine whether it will ultimately be successful. The motion judge was not satisfied on the evidence that the applicant had established immediate need, noting that the applicant's affidavit evidence indicated that she sought funds to attend private school. Noting that the respondent had given evidence that he had limited financial means, and that the applicant would not suffer prejudice, the motion judge declined to order interim support.

Analysis

38 I would not grant leave to appeal the motion judge's refusal to order interim child support in this case. The applicant has not met the test for leave in either limb of rule 62.02(4).

39 Section 33(1) of the *FLA* states that a court *may* order a person to provide support for his or her dependent. This language is clearly discretionary. The motion judge exercised her discretion in refusing to grant interim child support. I do not agree with Mr. Wilson's submission that a court must, on all applications under s. 33(1), record reasons for departing from the *Child Support Guidelines*, O. Reg. 391/97 (the "*Guidelines*"). The case he relies on as support for this proposition states only that where a court actually awards an amount that is inconsistent with the *Guidelines*, it must articulate reasons for doing so: see *Sodoski v. Sodoski*, [2004] O.J. No. 5913 (Ont. C.J.). Here, the motion judge was not satisfied that eligibility for an award had been established.

40 As her reasons indicate, the motion judge was alive to the issues raised by the applicant. The combination of the fact that, in her view, the case's outcome was "by no means certain", and the fact that she did not find that need had been established, led her to decline to order interim support in these circumstances.

41 Despite the fact that the claim filed seeks child support as well as s. 7 expenses under the *Guidelines*, it is clear from the letter sent by the applicant to her paternal grandmother (in which she asked for financial help in attending Havergal) that the s. 7 aspect of the claim is an important element. The absence of any material filed by the mother to indicate her financial circumstances was thus a relevant factor to which the motion judge was clearly alive. In short, she found on the record before her that the applicant had not made out a compelling case for eligibility to child support. That finding was open to her on the record, and does not give rise to any reason to doubt the correctness of her decision not to grant interim child support. In addition, there are no conflicting decisions that

could give rise to leave pursuant to rule 62.02(4)(a): see *Comtrade*. Accordingly, leave to appeal on this issue is denied.

3. Should the Applicant be Awarded Interim Disbursements?

42 The motion judge declined to award interim disbursements. She noted that the applicant sought $50,000 because she had no funds with which to proceed with the litigation. The motion judge recognized that she had the discretion under rule 24(12) of the *Family Law Rules* to order the payment of expenses in order to ensure that the process is fair to all parties. She held, however, that the $50,000 requested by the applicant, presumably to pay for a valuation of the respondent's income, was an "exorbitant amount as an estimate for preparation of such a report without some further explanation as to why the fees would approach that amount." She found that that the applicant had not demonstrated that it would be fair in the circumstances for the respondent to pay that amount. In her view, such an order would not level the playing field, but would result in financial hardship to the respondent. Taking into account this consideration as well as the novelty of the case and the fact that unlike many family law cases, it was not one in which the respondent could recoup the amount by means of, for example, a set-off against an equalization payment, the motion judge held that it would be unfair to order the interim disbursements sought.

43 The motion judge's decision was discretionary. It was, in my view, well-grounded and justified on the basis of the record before her for the reasons that she gave, as emphasized by Mr. Niman in the course of this motion for leave. She reviewed and considered the proper considerations to be applied in exercising her discretion in relation to an award of interim costs. I do not agree with Mr. Wilson that the cases he cited as "conflicting" are in fact conflicting cases. They involve exercises of discretion under different circumstances, and do not demonstrate different principles chosen to guide the exercise of that discretion: see *Comtrade*. I find no basis for the applicant's submission that the motion judge misapprehended the evidence that gives rise to any serious debate as to the correctness of her decision on this issue.

44 In short, I find no basis for granting leave to appeal on this issue. The test has not been made out, and the application for leave to appeal the refusal to order the payment of interim disbursements is denied.

4. Should Portions of the Respondent's Answer and Affidavits be Struck?

45 The motion judge declined to strike most of the impugned paragraphs. She acknowledged that all or part of any document may be struck out where it might delay or make it difficult to have a fair trial, is inflammatory, a waste of time, a nuisance or an abuse of process. She characterized the impugned paragraphs as relating either to the circumstances surrounding the Agreement or the circumstances surrounding the respondent's lawsuit with his former firm.

46 I see no error of law in her characterization of the issues as they relate to this issue. The motion judge carefully considered the applicant's submissions and rejected them. I am unable to conclude that the applicant has satisfied the test for leave under either Rule 62.02(4)(a) or (b). The motion judge considered the facts of this case and concluded that the Agreement and its circumstances were not only relevant but critical to the issues in the application.

47 Accordingly, she declined to strike the impugned paragraphs (with one exception that is not in dispute in this motion for leave). In my view, the applicant has not cited any authorities that support the argument that there are conflicting decisions (see *Comtrade*) or that there is very serious debate as to the correctness of her decision. In any event, the issue does not go beyond the interests of the parties in this litigation. Leave to appeal on this issue is denied.

5. Should the Names of the Parties be Initialized?

48 The motion judge ordered that the parties' names be initialized on the basis that the respondent had demonstrated that if his children learned of the litigation, emotional harm could result. She declined to order that the court file be sealed.

49 In the course of oral submissions, counsel for the applicant withdrew this ground of appeal. Accordingly, I do not propose to address the issue any further.

6. Should an Order be Made Restraining the Applicant from Communicating with the Respondent's Family?

50 The motion judge ordered the applicant not to contact the respondent's family without his consent. She noted that the applicant had contacted the respondent's mother without any notice to the respondent.

Given the circumstances, and given the order initializing the file in order to prevent harm to the respondent's children, a restraining order of this nature was warranted. The applicant submitted that there is good reason to doubt the correctness of the decision because there are no cases where an order of this nature has been imposed on a 14 year-old child seeking support from a parent. She submitted that the order was made without a finding that anyone feared for his or her safety. The applicant further submitted that in the only case where such an order was made, the court found evidence that an older child was actively attempting to alienate the child from a younger child: see *S. (C.) v. S. (M.)* (2007), 37 R.F.L. (6th) 373 (Ont. S.C.J.).

51 In my view, the record before the motion judge provided ample grounds for her to make an order restraining the applicant from contacting the respondent's family. This included the undisputed evidence that the applicant had contacted the respondent's mother without notice to him. It also included evidence that the applicant had participated in online discussions about the respondent and his personal life. His affidavit evidence stated that he feared his children might be harmed if they were to discover this information. In summary, I find no reason to doubt the correctness of the motion judge's decision to grant this order, and her decision in this regard is not open to very serious debate. The decisions cited by the applicant are fact-driven and do not constitute conflicting decisions within the meaning of Rule 62.02(4)(a): see *Comtrade*.

Conclusion

52 For these reasons, I would grant leave to appeal on the litigation guardian issue, and dismiss the application for leave on all other issues.

Costs

53 The parties may make brief written submissions to me within 60 days as to the costs of this motion on a timetable to be agreed upon between themselves.

Application for leave to appeal allowed in part, on issue of litigation guardian.

Appendix A

Orders Made by Wilson J.

In response to the applicant's motions, the motion judge ordered the following:

- That the respondent produce certain financial disclosure; and
- That both the respondent and applicant (on consent) be permitted to file expert reports outside of the time requirement in the *Rules*.

In response to the applicant's motions, the motion judge declined to order the following:

- That the respondent pay temporary child support;
- That the respondent pay interim disbursements in the amount of $50,000;
- That certain paragraphs of the respondent's Answer and Affidavits sworn November 1, November 8 and November 29, 2013 be struck; and
- Dismissing the applicant's motion for summary judgment dismissing the claims in paragraphs 6 and 7 of the respondent's Answer.

In response to the respondent's motions, the motion judge ordered the following:

- That the applicant be represented by a litigation guardian in the proceedings;
- That the parties' names by initialized. Wilson J. declined to order that the court file be sealed;
- That the applicant and J.M attend for questioning;
- Production of the file of Linda Silver-Drainoff, the solicitor who acted for J.M. when he signed the Agreement; and
- That the applicant refrain from contacting the respondent's family without his consent.

[Indexed as: **Newton v. Newton**]

David Roy Newton, Applicant and Jennifer Louise Newton, Respondent

Ontario Superior Court of Justice

Docket: Thunder Bay FS-10-0344

2014 ONSC 2757

D.C. Shaw J.

Heard: April 29, 2014

Judgment: May 5, 2014

Family law —— Division of family property — Matrimonial home — Severance of joint tenancy —— Parties separated, and husband remained in matrimonial home — Wife breached court orders made to enforce her obligations of financial disclosure, and, as result, she incurred penalties and costs — At trial date of application at bar, wife owed husband $45,075.48 in penalties and cost — At trial date of application at bar, husband owed wife equalization payment of $4,776.72, and wife's equity in home was $30,323 — Husband sought orders offsetting equalization payment against wife's penalties and vesting wife's equity in home to him in final satisfaction of balance of wife's penalties and costs — Husband brought application for this relief — Application granted — In unusual circumstances of case at bar, it was equitable that husband have remedy that he requested — Under Partition Act (PA), husband had right to require order that jointly owned home be sold — Order under PA could be interpreted as providing "authority" to "convey" property as required by s. 100 of Courts of Justice Act — Court has broad discretion to grant vesting order to permit court to deal with property in accordance with judgment of court — Wife had obligation to pay husband for penalty and costs that had been awarded against her — Wife's past conduct and her anticipated future behaviour indicated that she would be unlikely to comply without more intrusive remedy of vesting order — There was reasonable relationship between value of wife's equity in home and amount of her liability to husband — There was no need to put husband through extra expense of obtaining order under PA when vesting order would achieve same result directly and expeditiously.

Real property —— Sale of land — Judicial sale — Vesting order —— Parties separated, and husband remained in matrimonial home — Wife breached court orders made to enforce her obligations of financial disclosure, and, as result, she incurred penalties and costs — At trial date of application at bar, wife owed husband $45,075.48 in penalties and cost — At trial date of application at bar, husband owed wife equalization payment of $4,776.72, and wife's equity in home

was $30,323 — Husband sought orders offsetting equalization payment against wife's penalties and vesting wife's equity in home to him in final satisfaction of balance of wife's penalties and costs — Husband brought application for this relief — Application granted — In unusual circumstances of case at bar, it was equitable that husband have remedy that he requested — Under Partition Act (PA), husband had right to require order that jointly owned home be sold — Order under PA could be interpreted as providing "authority" to "convey" property as required by s. 100 of Courts of Justice Act — Court has broad discretion to grant vesting order to permit court to deal with property in accordance with judgment of court — Wife had obligation to pay husband for penalty and costs that had been awarded against her — Wife's past conduct and her anticipated future behaviour indicated that she would be unlikely to comply without more intrusive remedy of vesting order — There was reasonable relationship between value of wife's equity in home and amount of her liability to husband — There was no need to put husband through extra expense of obtaining order under PA when vesting order would achieve same result directly and expeditiously.

Cases considered by *D.C. Shaw J.*:

Lynch v. Segal (2005), 2005 CarswellOnt 8735, [2006] O.J. No. 5014 (Ont. C.A.) — considered

Statutes considered:

Courts of Justice Act, R.S.O. 1990, c. C.43
s. 100 — considered
Family Law Act, R.S.O. 1990, c. F.3
s. 9(1)(d)(i) — considered
Partition Act, R.S.O. 1990, c. P.4
Generally — referred to

Rules considered:

Family Law Rules, O. Reg. 114/99
R. 22(4) — considered
R. 31(5)(c) — considered

APPLICATION by husband for orders offsetting both equalization payment he owed to wife and wife's equity in matrimonial home against penalties and costs wife owed to him.

Martha Petryshyn, for Applicant
No one for Respondent

***D.C. Shaw J.*:**

1 This case proceeded as an undefended trial. The respondent, Jennifer Louise Newton, filed no Answer in response to the Application of David Roy Newton. She did not attend at trial. She is in breach of several court orders which required her to make financial disclosure. She was served with a Request to Admit in February 2014, which requested her to admit to the material facts in this case. She did not serve a Response to Request to Admit and, as a consequence, under the provisions of rule 22(4), is considered to have admitted for the purposes of this case that the facts are true.

2 Those material facts, as contained in the Request to Admit and as attested to by Mr. Newton at trial including the following, which I accept as have been established.

3 The parties were married on February 15, 1992. They separated on February 5, 2008. At the date of separation, the parties resided in a home at 135 West Gore Street, Thunder Bay. The home has a present value of approximately $90,000. As of the date of separation, it was subject to a mortgage of $28,353.15. Mr. Newton remained in the home when the parties separated. He has paid out the mortgage in full since the date of separation. He has also paid all taxes, insurance and utilities on the home since the date of separation.

4 Mr. Newton owns a one-fifth interest in farm land located in Gilbert Plains, Manitoba. It had a value of $18,000 on the date of separation. He owned this land on the date of marriage, at which time it had a value of $10,000.

5 On the date of separation, Mr. Newton retained household items and vehicles of a value of $750. Ms. Newton retained household items of a value of $400.

6 Mr. Newton had bank accounts totalling $20,277.26 and Ms. Newton had bank accounts totalling, to the best of Mr. Newton's knowledge, $16,789.33 after the parties had transferred monies from certain accounts on separation.

7 Mr. Newton had a pension with a net after tax value on separation of $22,226.92. Ms. Newton had a pension with a net after tax value of $20,132.64.

8 Mr. Newton had a life insurance policy with a cash surrender value of $1,121.63 on the date of separation.

9 Mr. Newton owned tools and vehicles on the date of marriage of $5,500. He also owned the aforementioned land in Gilbert Plains, Manitoba, valued at $10,000.

10 The above values result in an equalization payment owing by Mr. Newton to Ms. Newton of $4,776.72. Mr. Newton wishes to keep the matrimonial home. Ms. Newton has given no indication since separation more than six years ago that she has any interest in retaining the home. Valuing the home at $90,000 and taking into account the mortgage of $28,353.15 on the date of separation, Ms. Newton would have equity in the home of $30,323. If Mr. Newton was to pay Ms. Newton for her equity in the home and pay her the equalization payment of $4,776, he would owe her $35,099.

11 As noted, Ms. Newton has failed to make financial disclosure. She has breached court orders which have been made to enforce her legal obligations of financial disclosure.

12 On March 25, 2011, Pierce J. ordered Ms. Newton to produce a sworn Financial Statement. She was also ordered to verify the entries in the Financial Statement, to produce her income tax returns for 2008, 2009 and 2010, and to produce an actuarial valuation of her pension. She failed to comply.

13 On a contempt motion on June 30, 2011, I ordered Ms. Newton to produce the documents required under the order of March 25, 2011 by August 2, 2011, failing which she was required to attend court on August 11, 2011 to show cause why she should not be found in contempt. She did not comply.

14 On August 11, 2011, Pierce J. gave Ms. Newton until September 2, 2011 to comply with the above orders. She ordered Ms. Newton to appear in court on September 8, 2011 to show cause why she should not be found in contempt. Ms. Newton failed to comply and failed to attend court.

15 On September 8, 2011, Fregeau J. found Ms. Newton in contempt for failure to abide by the terms of the orders of March 25, June 20 and August 11, 2011. She was fined $1,000, payable forthwith. She was ordered to produce all documents required under the above orders by September 15, 2011. For each day that she failed to produce the documents after September 15, 2011, she was ordered to pay a penalty of $50 to Mr. Newton, pursuant to rule 31(5)(c). She was ordered to appear before the court on September 29, 2011 so that her breach of compliance could be

reviewed. She was ordered to pay costs of $300. She failed to comply with this order.

16 On September 29, 2011, Stach J. ordered Ms. Newton to be arrested and brought before the court.

17 Ms. Newton was arrested on July 5, 2012. She was released on a recognizance with a deposit of $200 by order of Pierce J. It was a condition of her release that she attend court on July 27, 2012 and bring with her a sworn Financial Statement, income and asset verification and pension information.

18 Ms. Newton appeared in court on July 27, 2012. Fitzpatrick J. ordered her to produce by August 17, 2012 a completed Financial Statement, with documentation verifying the entries on the Financial Statement, and her income tax returns for 2008 to 2011.

19 On August 27, 2012, Ms. Newton did not appear in court. She had not complied with the order of Fitzpatrick J. Fitzpatrick J. ordered the administrator of Ms. Newton's pension plan to provide a valuation of her pension. He directed the matter proceed to trial or to a motion for summary judgment. He ordered costs against Ms. Newton of $1,000. She has failed to pay those costs.

20 The penalty of $50 per day imposed by Fregeau J. on September 5, 2011 in favour of Mr. Newton has been in effect for 956 days up to the date of trial. The penalty totals $47,800. There are costs owing by Ms. Newton of $1,300. The total of the penalty and costs payable by Ms. Newton to Mr. Newton is $49,100. He has received $4,024.52 by way of garnishee proceedings, leaving a total owing to him of $45,075.48.

21 Mr. Newton proposes that an order be granted, vesting in him title to the home at 135 West Gore Street. In consideration of the vesting of title, he proposes that the equalization payment of $4,775 and Ms. Newton's equity in the home of $30,323, totalling $35,099, be offset against the penalty and costs owing to him of $45,075.58, with the difference of approximately $10,000 in his favour to be extinguished. Mr. Newton also requests costs of this hearing, on a full indemnity basis, in the amount of $4,9348.

22 The jurisdiction of the court to make a vesting order was reviewed by Blair J.A. in *Lynch v. Segal* (2005), [2006] O.J. No. 5014 (Ont. C.A.):

> [29] Section 100 of the *Courts of Justice Act* states:
>
> > A court may by order vest in any person an interest in real or personal property that the court has authority to order be disposed of, encumbered or conveyed.
>
> [30] As this court noted in *HSBC Bank of Canada v. Regal Constellation Hotel Ltd. (Receiver of) 2004 CanLII 206 (ON CA)* (2004), 71 O.R. (3d) 355, [2004] O.J. No. 2744, 242 D.L.R. (4th) 689 (C.A.), at paras. 32-33:
>
> > The vesting order itself is a creature of statute, although it has its origins in equitable concepts regarding the enforcement of remedies granted by the Court of Chancery. Vesting orders were discussed by this court in *Chippewas of Sarnia Band v. Canada (Attorney General) 2000 CanLII* 16991 (ON CA), (2000), 51 O.R. (3d) 641, 195 D.L.R. (4th) 135 (C.A.) at pp. 726-27 O.R., p. 227 D.L.R., where it was observed that:
> >
> > > Vesting orders are equitable in origin and discretionary in nature. The Court of Chancery made in personam orders, directing parties to deal with property in accordance with the judgment of the court. Judgments of the Court of Chancery were enforced on proceedings for contempt, followed by imprisonment or sequestration. The statutory power to make a vesting order supplemented the contempt power by allowing the Court to effect the change of title directly: see McGhee, Snell's Equity 30th ed., (London: Sweet and Maxwell, 2000) at pp. 41-42.
> >
> > (Emphasis added)
> >
> > A vesting order, then, has a dual character. It is on the one hand a court order ("allowing the court to effect the change of title directly"), and on the other hand a conveyance of title (vesting "an interest in real or personal property" in the party entitled thereto under the order)... [page651]
>
> [31] The rationale for the vesting power, therefore, is to permit the court to direct the parties to deal with property in accordance with the judgment of the court. The jurisdiction is quite elastic. Nothing in the

> language of either s. 100 of the *Courts of Justice Act* or s. 34(1)(c) of the *Family Law Act* operates to constrain the flexible discretionary nature of the power.
>
> [32] I do not think any useful purpose is served by attempting to categorize the types of circumstances in which a vesting order may issue in family law proceedings. The court has a broad discretion, and whether such an order will or will not be granted will depend upon the circumstances of the particular case. I agree with the appellants that the onus is on the person seeking such an order to establish that it is appropriate. As a vesting order — in the family law context, at least — is in the nature of an enforcement order, the court will need to be satisfied (as the trial judge was here) that the previous conduct of the person obliged to pay, and his or her reasonably anticipated future behaviour, indicate that the payment order will not likely be complied with in the absence of more intrusive provisions: see *Kennedy v. Sinclair*, 2001 CanLII 28208 (ON SC), [2001] O.J. No. 1837, 18 R.F.L. (5th) 91 (S.C.J.), affd 2003 CanLII 57393 (ON CA), [2003] O.J. No. 2678, 42 R.F.L. (5th) 46 (C.A.). Thus, the spouse seeking the vesting order will have already established a payment liability on the part of the other spouse and the amount of that liability, and will need to persuade the court that the vesting order is necessary to ensure compliance with the obligation.
>
> [33] In addition, the court should be satisfied that there is some reasonable relationship between the value of the asset to be transferred and the amount of the targeted spouse's liability and, of course, that the interests of any competing execution creditors or encumbrancers with exigible claims against the specific property in question are not an impediment to the granting of a vesting order. However, I would not go so far as to say — as argued by the appellants — that the onus to satisfy the court on these matters is at all times on the person seeking the order. I shall return to these issues later in these reasons.

23 Mr. Newton submits that the foundational authority for a vesting order under s. 100 of the *Courts of Justice Act* is, in this case, s. 9(1)(d)(i) of the *Family Law Act*. However, in my view s. 9(1)(d)(i), which provides for a vesting order, is for the purpose of satisfying an equalization payment. The vesting order which Mr. Newton seeks is not for the purpose of satisfying an equalization payment. He is the spouse who owes the equalization payment. However, under the *Partition Act*, Mr. Newton has the right to require an order that the jointly owned home be sold. An order under the *Partition Act* could be interpreted as providing the "au-

thority" to "convey" property as required by s. 100 of the *Courts of Justice Act*.

24 As observed in *Lynch v. Segal*, the court has a broad discretion to grant a vesting order in the particular circumstances of a case to permit the court to deal with property in accordance with the judgment of the court. In the family law context, it is in the nature of an enforcement order.

25 Ms. Newton has an obligation to pay Mr. Newton for the penalty and costs that have been awarded against her by the court. Ms. Newton's past conduct and her anticipated future behaviour indicates that she would be unlikely to comply without the more intrusive remedy of a vesting order. Ms. Newton has failed or refused to comply with six orders of this court. Even after she was found in contempt she continued to fail to comply.

26 I am satisfied that there is a reasonable relationship between the value of Ms. Newton's equity in the home and the amount of her liability to Mr. Newton. Her liability, in fact, exceeds the value of her equity. Mr. Newton is prepared to waive the excess liability.

27 Mr. Newton would have the right to compel the sale of the home and to execute against Ms. Newton's share of the equity to partially satisfy her financial obligations to him. I see no need to put Mr. Newton through that extra expense when a vesting order will achieve the same result directly and expeditiously. A vesting order is an equitable, discretionary remedy. In the unusual circumstances of this case, it is equitable that Mr. Newton have the remedy that he requests.

28 There shall be a finding that there is an equalization payment payable by Mr. Newton to Ms. Newton in the sum of $4,775. That equalization payment shall be deemed to be satisfied by offsetting it against the penalty imposed against Ms. Newton in favour of Mr. Newton by Fregeau J. on September 5, 2011. The interest of Ms. Newton in 135 West Gore Street, Thunder Bay shall be transferred to Mr. Newton and vested in him in full and final satisfaction of the remaining balance of the penalty and in full and final satisfaction of the outstanding costs awards of the interlocutory proceedings payable by Ms. Newton. The penalty awarded by Fregeau J. is hereby terminated.

29 Mr. Newton shall have his costs of preparation for trial and of the trial on a full recovery basis, fixed in the sum of $4,938.94, inclusive of

HST. In view of the past conduct of Ms. Newton, full recovery costs are warranted. Costs shall be payable forthwith.

Application granted.

[Indexed as: **Afolabi v. Fala**]

Olanipekun Rasak Afolabi v. Esther Adebola Fala

Ontario Superior Court of Justice

Docket: FS-13-77485-00

2014 ONSC 1713

Emery J.

Heard: February 21, 2014

Judgment: May 16, 2014

Family law —— Division of family property — Matrimonial home — Severance of joint tenancy —— Parties separated after three years of marriage, and husband moved out of matrimonial home, which was jointly owned by parties — Husband commenced family law proceeding — Husband brought motion for partial summary judgment ordering sale of home and distribution of net proceeds before trial — Motion granted — Under Partition Act, husband had fundamental right as joint tenant to compel sale of home absent sufficient reason for court to exercise its discretion to refuse that claim — Now that husband had asserted that right, evidentiary burden shifted to wife to show that there was genuine issue that required trial — Prospect of equalization claims or order for spousal support were not genuine issues that required trial — It appeared that wife would be spouse ordered to pay equalization payment and spousal support — Alleged failure of husband to pay his share of mortgage and expenses relating to home was not genuine issue that required trial — Wife provided no evidence of agreement by parties to be liable for his or her share of expenses as matter of contract — Wife's claim for unequal division of net family property was not genuine issue that required trial — There was little or no evidence that husband failed to disclose his debts at date parties were married, or that he intentionally or recklessly incurred debts to reduce or deplete his net family property.

Cases considered by *Emery J.*:

B. (F.) v. G. (S.) (2001), 2001 CarswellOnt 1413, 199 D.L.R. (4th) 554, 16 R.F.L. (5th) 237, [2001] O.T.C. 293, [2001] O.J. No. 1586 (Ont. S.C.J.) — referred to

Bailey v. Rhoden (2008), 2008 CarswellOnt 4988, [2008] O.J. No. 3301 (Ont. S.C.J.) — considered

Combined Air Mechanical Services Inc. v. Flesch (2014), 2014 CarswellOnt 640, 2014 CarswellOnt 641, 2014 SCC 7, 95 E.T.R. (3d) 1, 27 C.L.R. (4th) 1, 37 R.P.R. (5th) 1, 46 C.P.C. (7th) 217, 2014 CSC 7, (sub nom. *Hryniak v. Mauldin)* 314 O.A.C. 1, (sub nom. *Hryniak v. Mauldin)* 453 N.R. 51, 12

C.C.E.L. (4th) 1, (sub nom. *Hryniak v. Mauldin)* 366 D.L.R. (4th) 641, [2014] S.C.J. No. 7 (S.C.C.) — followed

Davis v. Davis (1953), [1954] 1 D.L.R. 827, 1953 CarswellOnt 106, [1954] O.W.N. 11, [1954] O.R. 23, [1953] O.J. No. 733 (Ont. C.A.) — referred to

Latcham v. Latcham (2002), 2002 CarswellOnt 1757, 27 R.F.L. (5th) 358, [2002] O.J. No. 2126 (Ont. C.A.) — followed

Maskewycz v. Maskewycz (1973), 2 O.R. (2d) 713, 1973 CarswellOnt 181, 13 R.F.L. 210, 44 D.L.R. (3d) 180 (Ont. C.A.) — referred to

Serra v. Serra (2009), 61 R.F.L. (6th) 1, 93 O.R. (3d) 161, 307 D.L.R. (4th) 1, 2009 CarswellOnt 513, 2009 ONCA 105, 246 O.A.C. 37, [2009] O.J. No. 432 (Ont. C.A.) — referred to

Silva v. Silva (1990), 1990 CarswellOnt 319, 30 R.F.L. (3d) 117, 1 O.R. (3d) 436, 42 O.A.C. 5, 75 D.L.R. (4th) 415, [1990] O.J. No. 2183 (Ont. C.A.) — considered

Starr v. Gordon (2010), 88 R.F.L. (6th) 54, 2010 CarswellOnt 5508, 2010 ONSC 4167, [2010] O.J. No. 3223 (Ont. S.C.J.) — referred to

Ward v. Ward (2012), 111 O.R. (3d) 81, 2012 CarswellOnt 8658, 2012 ONCA 462, 99 C.C.P.B. 1, 293 O.A.C. 63, 352 D.L.R. (4th) 201, 26 R.F.L. (7th) 358, [2012] O.J. No. 3033 (Ont. C.A.) — referred to

1061590 Ontario Ltd. v. Ontario Jockey Club (1995), 43 R.P.R. (2d) 161, 16 C.E.L.R. (N.S.) 1, 77 O.A.C. 196, 1995 CarswellOnt 63, 21 O.R. (3d) 547, [1995] O.J. No. 132 (Ont. C.A.) — followed

Statutes considered:

Family Law Act, 1986, S.O. 1986, c. 4
Generally — referred to
s. 5(1) — considered
s. 5(6) — considered
s. 5(7) — considered

Partition Act, R.S.O. 1990, c. P.4
Generally — referred to
s. 2 — considered
s. 3 — considered
s. 3(1) — considered

Rules considered:

Family Law Rules, O. Reg. 114/99
Generally — referred to
R. 2 — considered
R. 2(2) — considered
R. 2(3) — considered
R. 2(4) — considered
R. 16 — considered

R. 16(4) — considered
R. 16(4.1) — considered
R. 16(6) — considered
R. 20.1 — considered
Rules of Civil Procedure, R.R.O. 1990, Reg. 194
Generally — referred to
R. 20 — considered
R. 20.01(1) — considered
R. 20.02(2) — considered
R. 20.04(2)(a) — considered
R. 20.04(2.1) [en. O. Reg. 438/08] — considered
R. 20.04(2.2) [en. O. Reg. 438/08] — considered

MOTION by husband for partial summary judgment of his family law proceeding to order sale of home and distribution of net proceeds before trial.

Rachel Jansen, Marvin Kurz, for Applicant
Barbara J. Byers, for Respondent

***Emery J.*:**

1 Mr. Afolabi seeks to unlock the equity in the matrimonial home he owns with his estranged wife, Esther Adebola Fala. He hopes to take out his share of that equity despite the other family issues between them. Mr. Afolabi now moves for summary judgment on that part of his claim relating to the sale of the home and distribution of the net proceeds of sale before trial. He relies upon the *Partition Act*, R.S.O. 1990, c. P.4 ("Act"), and rule 16(6) of the *Family Law Rules* as the key to this relief.

Position of the Applicant

2 Mr. Afolabi and Ms. Fala purchased the property at 109 Woodhaven Drive in Brampton, Ontario ("Woodhaven") from Ms. Fala's daughter, Beverly Fala, on February 28, 2008. The transaction documents show that Beverly Fala transferred title to Woodhaven to Mr. Afolabi and Ms. Fala as joint tenants for the purchase price of $252,503. On the same day, Mr. Afolabi and Ms. Fala granted a charge to ING Bank of Canada for $252,000. According to the affidavit filed by Mr. Afolabi on this motion, the total equity in Woodhaven at the time was approximately $40,000 despite the stated purchase price.

3 Mr. Afolabi's affidavit describes how Ms. Fala could not qualify for the mortgage herself because she was a "twice discharged bankrupt". He

states that because of his credit, they were able to borrow the necessary funds to acquire Woodhaven. He agreed to sell the townhouse he owned in order to pay Ms. Fala $20,000 towards his interest in Woodhaven. He paid this amount to Ms. Fala when the sale of the townhouse closed on June 27, 2008.

4 Mr. Afolabi began co-habiting with Ms. Fala in July 2008. They married on November 20, 2008.

5 Mr. Afolabi and Ms. Fala separated on March 1, 2012. Mr. Afolabi slept in a separate bedroom in the matrimonial home until he moved out on October 7, 2012. He rented a room in Mississauga until he relocated to a small one bedroom apartment in Brampton. Mr. Afolabi's interest in Woodhaven is his sole asset. He seeks to realize his equity in Woodhaven so that he can afford a better place to live.

6 Ms. Fala continues to reside in Woodhaven, which is a four bedroom house with a garage. Mr. Afolabi believes that Ms. Fala is renting a room to another individual and collecting rent. He is of the view that she has enjoyed exclusive occupation of the house since he moved out, and that she is in a superior financial position to himself because of it.

7 In a subsequent affidavit, Mr. Afolabi states that he and Ms. Fala each contributed to the monthly expenses for Woodhaven while they both lived there. They alternated making the mortgage payment (which included taxes). The mortgage payment was taken out of Ms. Fala's bank account but Mr. Afolabi paid his half to her directly, initially by money order and later in cash at her request. According to Mr. Afolabi, they also alternated paying all of the household bills, including utilities, taxes, water and insurance.

8 Mr. Afolabi declined to make payments on the mortgage or toward the household expenses after October 2012 because he no longer resided at Woodhaven.

9 Mr. Afolabi argues there is no genuine issue that requires a trial for an order that Woodhaven be sold and that he receive one-half of the net proceeds of sale. He argues that the equalization claimed by Ms. Fala is not a genuine issue requiring a trial because it will be Ms. Fala who must pay him an equalization payment in any event.

10 In addition to an order that Woodhaven be sold and the proceeds divided, Mr. Afolabi seeks a division of the household contents located in the home and an order allowing him access to the property to recover items of a personal nature.

11 Mr. Afolabi also seeks further disclosure in the form of all bankruptcy documents relating to Ms. Fala's "bankruptcy status" as of the date of the marriage.

Position of the Respondent

12 Ms. Fala takes the position that there are numerous issues that must be determined at trial at the same time as the claims relating to Woodhaven. Her argument is essentially that no one part of the matters between the parties can be determined in isolation from the others. In particular, Ms. Fala claims an unequal division of net family property in her favour in her Answer and in response to this motion.

13 Counsel for Ms. Fala argued that the history concerning the acquisition of Woodhaven is important as context to decide Mr. Afolabi's motion. According to her affidavit, Ms. Fala purchased Woodhaven in January of 2002 but put the property in the name of her daughter, Beverly Fala, for credit reasons. Beverly was in university at the time. Ms. Fala deposes that she made all mortgage, taxes, fire insurance and utility payments on the home before 2008.

14 Ms. Fala met Mr. Afolabi in January 2005. They purchased the property from Beverly Fala on February 28, 2008.

15 Ms. Fala states in her affidavit that when the house was transferred on February 28, 2008, she and Mr. Afolabi were required take out a mortgage on Woodhaven in the amount of $252,000. I note that the letter from Mr. F. David Woolfson dated March 3, 2008 reporting on the transfer of title and on the new first charge shows substantially all of the proceeds secured by that charge to ING Bank of Canada were used to pay out the existing first mortgage to Xceed Mortgage Corporation. It would therefore appear that this first mortgage simply replaced the previous mortgage.

16 Ms. Fala's daughter, Beverly Fala, also filed an affidavit to corroborate her mother's affidavit. She confirms that Woodhaven was purchased in her name on January 11, 2002. She further confirms that she was a 20 year old university student at the time. She deposes that Ms. Fala paid all of the mortgage payments, taxes, fire insurance and utilities on the home. Beverly states that she transferred title to Woodhaven on February 28, 2008 to her mother and Mr. Afolabi because they planned to marry. Beverly explains that she moved out of the house because, as a 25 year old woman, she did not feel comfortable living in the same house with a stepfather.

17 Ms. Fala states in her affidavit that Mr. Afolabi told her when they first met that he had no mortgage on his townhouse. In fact, he had a large mortgage on his townhouse. She states that he told her that he had a good job as the union president at a steel rolling plant, making $60,000 a year. Subsequently, he was let go from his job in 2007. It was for these reasons that Ms. Fala reluctantly agreed to allow him to move in with her.

18 After they were married, Ms. Fala says that she discovered that Mr. Afolabi was only receiving $810 per month in income from a disability pension. He paid very little toward the monthly expenses for the house. She states that he racked up large credit card debts, using his credit cards to visit Nigeria each year between 2007 and 2012. Except for taking the trip with him in 2007, Ms. Fala states that she was left at home each time and was constantly hounded by his creditors.

19 In summary, Ms. Fala states that Mr. Afolabi has recklessly spent his money, lied to her about his assets and debts and has contributed little to the mortgage, taxes and other household expenses at Woodhaven. She says that their marriage was a short and unhappy one. She is prepared to give him back his $20,000 provided that he conveys his interest in Woodhaven to her. She says that Mr. Afolabi is not entitled to one-half the equity in the house and that it would be unconscionable for him to receive it.

20 Ms. Fala also states that she has paid $1,250 per month for the mortgage, and $58.24 per month for fire insurance since the date of separation. She claims that he owes her $9,811.80 for his one-half share of those expenses as of February 1, 2014.

21 Ms. Fala also alleges that Mr. Afolabi has failed to disclose his income for 2012. This disclosure relates to the spousal support claim each of the parties is making against the other.

22 Ms. Fala denies that Mr. Afolabi contributed to the contents at Woodhaven as most of that furniture had been acquired before he moved into the house in July 2008. She states that Mr. Afolabi can pick up his personal items at the matrimonial home, provided he is accompanied by a police escort. She states that she is afraid that Mr. Afolabi will become violent with her if the police are not present. There is no evidence before the court of violence on the part of either party occurring before this motion, or any prospect of violence occurring now.

Analysis

23 I propose to examine the law of partition and sale to identify the rights and obligations of each party regarding Mr. Afolabi's claim. I will then deal with the law relating to summary judgements under rule 16(6) of the *Family Law Rules* and how it applies to Mr. Afolabi's motion for a final order to sell Woodhaven.

The Claim for Partition and Sale

24 Mr. Afolabi bases his claim for the partition and sale of Woodhaven on sections 2 and 3(1) of the *Act*, which read as follows:

> **Who may be compelled to make partition or sale**
>
> 2. All joint tenants, tenants in common, and coparceners, all doweresses, and parties entitled to dower, tenants by the curtesy, mortgagees or other creditors having liens on, and all parties interested in, to or out of, any land in Ontario, may be compelled to make or suffer partition or sale of the land, or any part thereof, whether the estate is legal and equitable or equitable only.
>
> **Who may bring action or make application for partition**
>
> 3. (1) Any person interested in land in Ontario, or the guardian of a minor entitled to the immediate possession of an estate therein, may bring an action or make an application for the partition of such land or for the sale thereof under the directions of the court if such sale is considered by the court to be more advantageous to the parties interested.

25 The parties hold title to Woodhaven as joint tenants. As a joint tenant, Mr. Afolabi is a person interested in land and has the right to make an application for the sale of that land under section 3 of the *Act*. He relies upon section 2 of the *Act* to compel Ms. Fala as the other joint tenant to sell or suffer partition of the property. Mr. Afolabi seeks a final order to sell Woodhaven to realize his interest to enforce his rights as a joint tenant. He takes the position those rights and the corresponding obligations of Ms. Fala do not involve genuine issues that would take the time and expense of a trial to decide.

26 Ms. Fala did not raise any issue with my jurisdiction to hear the motion for summary judgment on this part of Mr. Afolabi's claim. Therefore, I find that I have jurisdiction to hear the motion and to the exercise of any power given by Rule 16 should I grant judgment in whole or in part.

27 Under the *Act*, a joint tenant has a *prima facie* right to an order for the partition or sale of lands held with another joint tenant. The other joint tenant has a corresponding obligation to permit that partition or sale. These have been described in the case law as fundamental rights flowing from the joint tenancy. The court is required to compel such partition or sale if no sufficient reason can be shown why such an order should not be made.

28 Each case must be considered on its own facts and circumstances. The court must exercise its discretion having regard to those particular facts and circumstances: see *Davis v. Davis* (1953), [1954] O.R. 23 (Ont. C.A.).

29 The onus to show what circumstances are present in a proceeding that might require the court to exercise its discretion to refuse an application for a partition or sale order rests with the party opposing the application. That party must show the court there is a sufficient reason recognized in law why an order for partition or sale should not be made.

30 There has been conflict over the years between those cases where the court has made a final order for the sale of property held jointly by spouses before the trial of other family law claims, and those cases holding that an order for partition and sale should not be made until any dispute related to the property has first been determined: see *Maskewycz v. Maskewycz* (1973), 2 O.R. (2d) 713 (Ont. C.A.).

31 The case before me is very much like the facts in *Silva v. Silva* (1990), 1 O.R. (3d) 436 (Ont. C.A.). The matrimonial home in *Silva* was the only family asset. The husband's appeal was brought on the basis that he did not wish the matrimonial home to be sold at all until the issues relating to the division of net family property had been resolved. The husband expected to receive an award of property or an amount that was more than one-half of the net family property under the prevailing family law legislation at the time. He expected this equalization to be a credit to him and paid out of the proceeds of the sale when the home was sold.

32 The court in *Silva* was confronted with conflicting principles in Ontario cases that gave a limited discretion for the motion judge to refuse an order for partition or sale under the *Partition Act.* On the appeal, Justice Finlayson concluded that partition and sale did not prejudice either spouses claim with respect to the home under the *Family Law Act*, 1986, S.O. 1986, c. 4, as amended. The wife in that case needed the funds that would flow from the sale of her interest as soon as possible. The court held that the husband's concern about collecting a subsequent award for

equalization, in the circumstances of that case, amounted to prejudice to the wife within the meaning of the case law. The court therefore found there to be no reason why the home should not be sold and the net proceeds divided equally.

33 The judicial trend in recent times has been to confine the discretion of the court to refuse an order for the partition or sale of jointly held property to a narrow standard. The Court of Appeal in *Latcham v. Latcham* (2002), 27 R.F.L. (5th) 358 (Ont. C.A.) confirmed that the proper standard for the exercise of judicial discretion to refuse partition under section 2 of the *Partition Act* required evidence of malicious, vexatious or oppressive conduct. The court held that this narrow standard for the exercise of discretion flowed from a joint owners' *prima facie* right to partition.

34 In *Bailey v. Rhoden* [2008 CarswellOnt 4988 (Ont. S.C.J.)], 2008 CanLII 42427, it was held that the court could refuse partition and sale if it were shown that the sale would cause such hardship to the joint tenant resisting the application that the hardship amounted to oppression.

35 If there is no evidence before the court from Ms. Fala of malicious, vexatious or oppressive conduct behind this application, or that the sale will cause hardship to Ms. Fala amounting to oppression, the court should not exercise discretion to refuse an order for partition or sale of the jointly held property.

Application of Summary Judgment Principles

36 Counsel for Mr. Afolabi raised the question of whether, or to what extent Rule 20 of the (Ontario) *Rules of Civil Procedure* applies to the interpretation of Rule 16(6) of the *Family Law Rules* by analogy. It was further submitted by counsel for Mr. Afolabi that certain principles set out in the recent decision of the Supreme Court of Canada in *Combined Air Mechanical Services Inc. v. Flesch*, *(*sub nom. *Hryniak v. Mauldin)* 2014 SCC 7, 366 D.L.R. (4th) 641 (S.C.C.), concerning the interpretation of Rule 20, as amended, should be extended to the treatment of summary judgment motions under Rule 16.

37 The *Hryniak* decision recognizes the practical realities of the time and expense incurred by parties engaging or that become engaged by the civil justice system. The Supreme Court has called for a cultural shift in the justice delivery system to ensure access to justice for all. The modern requirement for a court procedure that is fair to the parties because it is more proportionate to their needs and takes less time or expense than the

conventional trial process is answered in appropriate cases by the summary judgment procedure.

38 The Supreme Court explained in *Hryniak* that while Rule 20 in the Ontario *Rules of Civil Procedure* goes further than other summary judgement rules in Canada; the values and principles relevant to its interpretation are of general application. In essence, the appropriate use of a motion for summary judgment under the (Ontario) *Rules of Civil Procedure* is an access to justice issue for parties to a civil action. I see no reason why parties to a family law case should not be accorded the same access to justice under the same principles. If anything, family law in Ontario cries out for the summary disposition of issues in appropriate circumstances as much as in any other area of law. This accessibility to timely, affordable justice is as important to the parties in conflict as it is to the confidence of citizens in our court system that cases will be adjudicated efficiently and effectively according to law.

39 The two Rules contain similar language to allow for summary judgment before trial. Rule 20.04(2)(a) reads as follows:

> The court shall grant summary judgment if,
>
> (a) the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence; or...

40 Rule 16(6) of the *Family Law Rules* in turn reads as follows:

> 16(6) If there is no genuine issue requiring a trial of a claim or defence, the court shall make a final order accordingly.

41 The *Family Law Rules* recognize that a final order regarding an issue between the parties can be made at any time during a family law case on consent or by an order of the court. The approach to applying the summary judgment rule in *Hryniak* is adaptable to the requirements and practice under the *Family Law Rules* for the court to make a final order on a motion for summary judgment where to do so would represent the fairest process to the parties and provide the basis for the court to make a just adjudication on the merits. This is part of the cultural shift the Supreme Court spoke about when discussing the mandate of the motions judge.

42 Although the use, scope and evidentiary basis for a motion for summary judgment under Rule 16 is more restricted than under the (Ontario) *Rules of Civil Procedure*, the principles expressed by Justice Karakatsanis for stage one of the roadmap to follow under Rule 20 align with Rule 2 of the *Family Law Rules*. Rule 2(2) states the primary objective is to enable the court to deal with cases justly. Rules 2(3) and (4) expand

upon the meaning of the primary objective for the *Family Law Rules* as follows:

> Rule 2(3)
>
> **DEALING WITH CASES JUSTLY -**
>
> Dealing with a case justly includes,
>
> (a) ensuring that the procedure is fair to all parties;
>
> (b) saving expense and time;
>
> (c) dealing with the case in ways that are appropriate to its importance and complexity; and
>
> (d) giving appropriate court resources to the case while taking account of the need to give resources to other cases.
>
> . . .
>
> (4)
>
> **DUTY TO PROMOTE PRIMARY OBJECTIVE —**
>
> The Court is required to apply these rules to promote the primary objective, and parties and their lawyers are required to help the court to promote the primary objective.

43 Considerations of proportionality, timeliness and affordability are therefore relevant for the adjudication of a motion for summary judgment under Rule 16. Those principles assist the court in measuring whether the summary judgment procedure provides the fairest process to the parties for the adjudication of one or more issues, or if there could be advantages provided by the trial process that would make a difference for the court to reach a just conclusion.

44 The evidentiary requirements for a motion for summary judgment or a final order under each rule, and the evidentiary basis for opposing motions appear to be similar, if not the same. Rule 20.01(1) provides that either a plaintiff or a defendant may move with supporting affidavit material or other evidence for summary judgment. Rule 20.02(2) requires the party responding to affidavit material or other evidence supporting any motion for summary judgment to set out, in affidavit material or other evidence, specific facts showing that there is a genuine issue requiring a trial. Rule 16(4) requires the party making the motion to serve an affidavit or other evidence that sets out specific facts showing there is no genuine issue requiring a trial. Rule 16(4.1) requires the party responding to the motion to set out in an affidavit or other evidence, specific facts showing there is a genuine issue for trial.

45 Rule 16 of the *Family Law Rules* has not yet been amended to include a counterpart to the new powers given to a motions court under Rule 20.04(2.1) or (2.2) of the (Ontario) *Rules of Civil Procedure*. A motion for summary judgment under Rule 16 is therefore limited to the evidentiary vehicles permitted under rule 16(4) to set out specific facts in a factual record showing there is no genuine issue requiring a trial. The onus of satisfying the court there is no genuine issue rests on the moving party. However, once the moving party has established a *prima facie* case on the affidavits or other evidence filed, the evidentiary burden shifts to the responding party to set out specific facts that there is a genuine issue that requires a trial: see rule 16(4.1). Until the powers of the court are expanded by amendments to Rule 16, the court can only consider the merits of the motion for summary judgment on the factual record without importing powers by analogy to rules 20.04(2.1) or (2.2): *Starr v. Gordon*, 2010 ONSC 4167 (Ont. S.C.J.), 88 R.F.L. (6th) 54. It follows that while the principles in *Hryniak* apply to summary judgment under rule 16(6), they only extend to motions decided on the basis of the factual record without regard to the additional powers given to the court under Rule 20.

46 The court in the family arena has in the past imported principles from motions decided under Rule 20 prior to 2010 for the interpretation of language and concepts common to the summary disposition of cases and the proper application of evidentiary requirements: *B. (F.) v. G. (S.)* (2001), 199 D.L.R. (4th) 554 (Ont. S.C.J.). In my view, those cases remain of assistance for the determination of motions for summary judgement on the factual record under Rule 16.

47 In the case of *1061590 Ontario Ltd. v. Ontario Jockey Club* (1995), 21 O.R. (3d) 547 (Ont. C.A.), at p. 557, Justice Osborne wrote that a responding party on a motion for summary judgment "must lead trump or risk losing". The purpose behind this obligation is clear: to ensure that the motions judge has a full record that contains the best evidence available to the responding party. It is this obligation imposed on each party that enables the motions judge to assess from the motion materials whether he or she is confident that the factual record provides the evidence required by the court to take a good hard look at whether the claim or defence can be adjudicated justly without requiring a trial.

48 If the motions judge can conclude there is no genuine issue requiring a trial, a final order must be granted under rule 16(6).

Applying the Law of Partition and Sale on the Motion

49 Mr. Afolabi's motion for a final order to have Woodhaven listed for sale is based on his rights flowing from his ownership of the property as a joint tenant. He deposes that he paid Ms. Fala for his interest consistent with their intent when they purchased Woodhaven together, and when he paid his share of the expenses while they lived in Woodhaven together. As I understand his position, Mr. Afolabi states there is no reason why Woodhaven should not be sold immediately and the net proceeds divided equally. Any issue about an equalization between the net family properties of the parties should not stand in the way of the order he seeks. He says it will be Ms. Fala who will owe him an equalization payment in any event. Accordingly, there is no genuine issue about the claim he has brought under the *Partition Act* that would require a trial to order that Woodhaven be sold.

50 Mr. Afolabi has a fundamental right as a joint tenant to compel the sale of the property absent a sufficient reason for the court to exercise its discretion to refuse that claim. Now that Mr. Afolabi has asserted that right, the evidentiary burden has shifted to Ms. Fala to show by affidavit or other evidence there is a genuine issue that requires a trial. Whether this court can determine if Ms. Fala has met that evidentiary burden depends on whether Ms. Fala has provided the evidence necessary to satisfy the court there is a genuine issue that requires a trial to refuse the order for sale, or that another issue in the family case must be tried before that determination is made.

51 Ms. Fala raises three grounds to support her position that a trial is required:

1. There are other family law issues with Mr. Afolabi that are intertwined with his claim that Woodhaven be sold immediately and the net proceeds divided;
2. Mr. Afolabi owes her a significant sum for his share of the mortgage and household expenses since he stopped making any contribution in October 2012; and
3. It would be unconscionable for Mr. Afolabi to receive one-half the net proceeds should Woodhaven be sold.

52 On the first ground, I do not find evidence in Ms. Fala's affidavit material to establish that Woodhaven should not be sold before other issues of a financial nature are determined at trial. It appears from the evidence filed by the parties that Ms. Fala will be the spouse ordered to pay

Mr. Afolabi an equalization payment at trial. In her Financial Statement sworn October 17, 2013, she claims a net family property value of $71,710, compared to Mr. Afolabi's net family property value of $46,118 disclosed in his Financial Statement sworn on August 20, 2013. Although each party claims spousal support from the other, it would appear that Ms. Fala's income now exceeds that of Mr. Afolabi. She may end up facing an order at trial that she pay support to him.

53 The prospect of equalization claims or an order for spousal support are therefore not genuine issues that require a trial. To delay the adjudication of Mr. Afolabi's claim to have Woodhaven sold because of these issues would be disproportionate in terms of time and expense to the disposition of the other issues. Requiring the largest issue to go to trial with the others would certainly cost both parties more time and money. This would not be consistent with Rule 2 of the *Family Law Rules* or the principles expressed in *Hryniak*.

54 On the second ground, Ms. Fala claims that Mr. Afolabi has not paid his share of the mortgage and expenses relating to Woodhaven. I see no evidence where either party has described an agreement that each of them will pay, or be liable for his or her share of the household expenses as a matter of contract. Mr. Afolabi deposes in his affidavit that both he and Ms. Fala contributed to their personal and living expenses and to all carrying costs of Woodhaven during their marriage, and that he continued contributing to the carrying costs of the home up to November 2012. He does not use the word "jointly" to describe this arrangement. Ms. Fala does not provide any evidence with respect to the arrangement in her affidavit. Ms. Fala states only that she has made all the mortgage and fire insurance payments since separation and that Mr. Afolabi now owes her $9,811.

55 I do not see this as a genuine issue that requires a trial. It would not be a fair process to permit Ms. Fala to defer the sale of the house and a disbursement of proceeds to Mr. Afolabi and herself because of a smaller issue that is not secured by the property or determinative of an interest in it. Requiring a trial of this issue at the expense of ordering Woodhaven listed for sale would make the process unaffordable to each of them, and therefore unfair. This is not in keeping with the *Hryniak* principles.

56 Third, Ms. Fala provides no evidence of how or why dividing the net proceeds from the sale of Woodhaven would be unconscionable. The details of Mr. Afolabi's personal and financial shortcomings are equal to those facts he alleges against her. What is telling is that the evidentiary

record shows Mr. Afolabi paid Ms. Fala the $20,000 for his interest in Woodhaven that she admits receiving in 2008, at a time when the equity in Woodhaven was estimated to be $40,000. They both purchased a ticket to ride the upswing of the real estate market and they have enjoyed the increase in Woodhaven's perceived value together.

57 Section 5(1) of the *Family Law Act* establishes the general rule providing for the equalization of net family properties between spouses upon the breakdown of a marriage: *Ward v. Ward*, 2012 ONCA 462, 111 O.R. (3d) 81 (Ont. C.A.). The purpose behind the equalization regime prescribed by section 5(1) and any exercise of discretion by the court under section 5(6) to order an unequal division between net family properties is explained in section 5(7) which enshrines the concept of joint responsibilities inherent in a marital relationship. However, the cases have clearly established that for the court to exercise the discretion to make an order for an unequal division under the equitable considerations set out in section 5(6), the spouse seeking the unequal division has the onus of establishing the basis for that order. The threshold is high for the court to find that the equalization of net family properties would be "unconscionable". The cases have consistently held that to cross that threshold, the circumstances between the parties must "shock the conscience of the court": *Serra v. Serra*, 2009 ONCA 105, 93 O.R. (3d) 161 (Ont. C.A.), at para. 47 and *Ward v. Ward*, at para. 26.

58 Ms. Fala has not provided the evidence necessary to show her claim for an unequal division of their net family properties is a genuine issue requiring a trial. Ms. Fala's affidavit contains little if any evidence of Mr. Afolabi's failure to disclose his debts and liabilities as of the date they married. He may have misrepresented his assets and his income, but he says the same of her. Most of the facts concerning his true situation became known to Ms. Fala before they were married in any event. Mr. Afolabi sold his townhouse and paid off his mortgage against it before he married her. He lost his job before they married. Further, I do not find evidence beyond the bald assertions in Ms. Fala's affidavit that Mr. Afolabi intentionally or recklessly incurred debts or liabilities to reduce or deplete his net family property.

59 There is no evidence given by Ms. Fala to show that allowing Mr. Afolabi one-half the net proceeds of sale for his interest in Woodhaven would shock the conscience of the court. I therefore conclude that Ms. Fala's claim for an unequal division of net family property is not a genuine issue that requires a trial.

60 Mr. Afolabi attached a document bearing the title "Comparative Market Analysis" as an exhibit to his affidavit. This document was prepared by a real estate sales person and suggests a list for Woodhaven of between $375,000 to $385,000. I would not normally accept an attachment of this nature as opinion evidence regarding a matter at issue without compliance with Rule 20.1 of the *Family Law Rules* regarding the content and service of an expert's report. However, counsel for Ms. Fala agreed in her submissions that $380,000 could be a reasonable estimate of Woodhaven's current fair market value. I therefore conclude that there is a sufficient basis to find the fair market value of Woodhaven to be $380,000.

61 I find that Ms. Fala has not established that Mr. Afolabi has acted maliciously, vexatiously or in an oppressive manner towards her as those terms have been considered in the authorities. I further find that Ms. Fala has not shown any hardship she would suffer if Woodhaven were to be sold that might be considered as oppressive to her interests. I make these findings on the three grounds discussed above that I have considered individually and collectively.

62 I find on the factual record before me that Mr. Afolabi's motion for that part of his claim relating to the sale of Woodhaven and the distribution of sale proceeds does not require a trial. Ms. Fala has not established a sufficient basis for me to exercise the discretion I have under section 2 of the *Partition Act* to refuse Mr. Afolabi the relief he requests. Based on Ms. Fala's obligation to put her best evidence forward to show there to be a genuine issue that requires a trial, I am not satisfied on the record before me that a trial would provide the parties with a process that is any more fair to reach a just adjudication on this part of the claim.

63 Accordingly, I make the following orders:

1. A final order for Ms. Fala to cooperate with Mr. Afolabi to list the property described as 109 Woodhaven Drive in Brampton, Ontario, L7A 1Y4 for sale at the listing price of $380,000. The property is to be listed for sale by June 16, 2014, with an experienced sales person at a recognized real estate broker's office in the City of Mississauga or the City of Brampton that counsel for the parties can mutually agree upon. If counsel cannot obtain instructions to agree on the listing agent, Ms. Fala is ordered to propose the names of three experienced real estate agents from which Mr. Afolabi shall select the listing agent.

2. That a third law firm that counsel for the parties are to mutually agree upon be retained to act for both parties as vendors on the sale.

3. That if an unconditional offer from a purchaser at or above the listing price or within 5 per cent below the listing price is not accepted by both parties, the parties may arrange to attend before me for further directions.

4. An order that both parties shall cooperate to do all things and execute all documents necessary to complete the sale of the matrimonial home. If either party requires further direction from the court under subparagraphs 1, 2 or 3 or this paragraph to compel the cooperation of the other, either party may bring a motion on notice to the other party, returnable before me.

5. On consent, an order authorizing Mr. Afolabi to attend at Woodhaven on or before May 30, 2014 with an officer of the Peel Regional Police Service, if requested, to retrieve his personal possessions and belongings at a time and date mutually agreed upon by the respondent, such personal possessions and belongings to include:

   (a) record albums, over 50 in number;

   (b) three suitcases;

   (c) tool box; and

   (d) weights.

6. Upon the sale of Woodhaven and payment of all encumbrances, expenses, real estate commission and legal fees to the third party real estate lawyer, each party shall receive $60,000 from those net proceeds of sale and the balance shall be held in trust by the third party real estate lawyer until further order, provided that either party may bring a motion on notice to pay that money into court pending the trial or resolution of the remaining issues.

7. The entitlement and amount at issue to satisfy the balance of the claims made by either party is adjourned along with all other outstanding issues to the trial management conference.

64 If the parties cannot resolve the costs of this motion between themselves, Mr. Afolabi shall serve his costs submissions consisting of no more than three double-spaced typed written pages upon counsel for Ms. Fala by May 30, 2014, who shall serve her costs submissions consisting of no more than three double-spaced typed written pages on counsel for the applicant by June 9, 2014. Counsel for Mr. Afolabi shall then have three further days after that to serve counsel for the respondent with reply submissions, if any, consisting of no more than two double-spaced typed written pages, and shall file all submissions exchanged between the parties with the trial co-ordinator in Brampton to my attention by June 16, 2014.

Motion granted.

[Indexed as: **Chatham-Kent Children's Services v. H. (A.)**]

Chatham-Kent Children's Services[1], Respondent on the appeal/Responding party on this motion and A.H. and E.H., Appellants; J.S. and S.T., Appellants; E.K., Appellant; R.(H.) K., Appellant/Responding party on this motion

Ontario Superior Court of Justice

Docket: 5838/14, 5839/14, 5840/14

2014 ONSC 1697

Lynda Templeton J.

Heard: March 11, 2014

Judgment: March 16, 2014

Family law —— Children in need of protection — Practice and procedure in custody hearings — Conduct of hearing — Exclusion from court —— Fourteen children from Lev Tahor religious group who were subject to child protection proceedings disappeared with their parents from jurisdiction — Prior to hearing emergency motion by Children's Aid Society, judge made order excluding access to emergency motion proceedings — Media appealed order — Judge indicated that he was not willing to hear appeal of order and that he would only be considering whether order sought with respect to access by media to transcript and materials filed during in camera emergency motion ought to be granted — Redacted copy of transcript of evidence heard on emergency motion ordered to be made available to media — Temporary shield was no longer warranted with respect to those children who were now safely in care of society, as order was no longer necessary to prevent serious risk to proper administration of justice with respect to children in care — However, with respect to children who were yet to be located, court could not and would not abdicate in its duty to protect them to best of its ability.

Cases considered by *Lynda Templeton J.*:

A.B. (Litigation Guardian of) v. Bragg Communications Inc. (2012), 2012 SCC 46, (sub nom. *A.B. v. Bragg Communications Inc.)* [2012] 2 S.C.R. 567, (sub nom. *B. (A.) v. Bragg Communications Inc.)* 266 C.R.R. (2d) 185, 2012 CarswellNS 675, 2012 CarswellNS 676, 25 C.P.C. (7th) 1, 350 D.L.R. (4th) 519, 95 C.C.L.T. (3d) 171, 1021 A.P.R. 1, 322 N.S.R. (2d) 1 (S.C.C.) — considered

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[1]the 'CKCS'

Canadian Newspapers Co. v. Canada (Attorney General) (1985), 49 O.R. (2d) 557, 16 D.L.R. (4th) 642, 7 O.A.C. 161, 17 C.C.C. (3d) 385, 44 C.R. (3d) 97, 14 C.R.R. 276, 1985 CarswellOnt 77 (Ont. C.A.) — referred to

Dagenais v. Canadian Broadcasting Corp. (1994), 1994 CarswellOnt 1168, 1994 SCC 102, 34 C.R. (4th) 269, 20 O.R. (3d) 816 (note), [1994] 3 S.C.R. 835, 120 D.L.R. (4th) 12, 175 N.R. 1, 94 C.C.C. (3d) 289, 76 O.A.C. 81, 25 C.R.R. (2d) 1, 1994 CarswellOnt 112, EYB 1994-67668, [1994] S.C.J. No. 104 (S.C.C.) — considered

H. (M.E.) v. Williams (2012), 2012 ONCA 35, 108 O.R. (3d) 321, 2012 CarswellOnt 1100, 287 O.A.C. 133, 346 D.L.R. (4th) 668, 15 R.F.L. (7th) 37, [2012] O.J. No. 525 (Ont. C.A.) — referred to

M. (Y.) v. Children's Aid Society (1989), 65 D.L.R. (4th) 427, 94 N.S.R. (2d) 143, 247 A.P.R. 143, 1989 CarswellNS 447 (N.S. Co. Ct.) — followed

MacIntyre v. Nova Scotia (Attorney General) (1982), [1982] 1 S.C.R. 175, 49 N.S.R. (2d) 609, 40 N.R. 181, 1982 CarswellNS 21, 26 C.R. (3d) 193, 96 A.P.R. 609, 132 D.L.R. (3d) 385, (sub nom. *Nova Scotia (Attorney General) v. MacIntyre)* 65 C.C.C. (2d) 129, 1982 CarswellNS 110, [1982] A.C.S. No. 1, [1982] S.C.J. No. 1 (S.C.C.) — referred to

R. v. Mentuck (2001), 158 C.C.C. (3d) 449, 205 D.L.R. (4th) 512, 163 Man. R. (2d) 1, 269 W.A.C. 1, 2001 CarswellMan 535, 2001 CarswellMan 536, 2001 SCC 76, 47 C.R. (5th) 63, [2002] 2 W.W.R. 409, 277 N.R. 160, [2001] 3 S.C.R. 442, [2001] S.C.J. No. 73 (S.C.C.) — considered

Toronto Star Newspapers Ltd. v. Ontario (2005), 253 D.L.R. (4th) 577, 29 C.R. (6th) 251, 197 C.C.C. (3d) 1, [2005] 2 S.C.R. 188, 2005 SCC 41, 2005 CarswellOnt 2613, 2005 CarswellOnt 2614, 76 O.R. (3d) 320 (note), (sub nom. *R. v. Toronto Star Newspapers Ltd.)* 335 N.R. 201, (sub nom. *R. v. Toronto Star Newspapers Ltd.)* 200 O.A.C. 348, 132 C.R.R. (2d) 178, EYB 2005-92055, [2005] S.C.J. No. 41 (S.C.C.) — considered

Winnipeg Child & Family Services (Central Area) v. W. (K.L.) (2000), 2000 SCC 48, 2000 CarswellMan 469, 2000 CarswellMan 470, 260 N.R. 203, 191 D.L.R. (4th) 1, 10 R.F.L. (5th) 122, [2001] 1 W.W.R. 1, 78 C.R.R. (2d) 1, 150 Man. R. (2d) 161, 230 W.A.C. 161, [2000] 2 S.C.R. 519, REJB 2000-20378, [2000] S.C.J. No. 48 (S.C.C.) — referred to

Statutes considered:

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11

Generally — referred to

s. 15(1) — considered

Child and Family Services Act, R.S.O. 1990, c. C.11

Generally — referred to

s. 45(7)(b) — considered

s. 45(8) — referred to

s. 51(2)(d) — referred to

APPEAL by media from order excluding access to proceedings.

L. Hodgson-Harris, for CKCS
G. Wong, for minor Respondent, R.(H.) K.
J. Long, for Children
I. Fischer, A. Lazier, for Media

***Lynda Templeton J.*:**

1 The media has brought a motion to this Court for a variation of my order dated March 5 2014 excluding access to the proceedings.

2 This motion is heard within the context of an appeal by the parents of the subject children (and one minor parent) with respect to an order made on February 13 2014 in the Ontario Court of Justice that requires the children to be returned to Quebec. The appeal of that order was scheduled to be heard on March 5 2014 but for emergency reasons directly concerning the safety, protection and best interests of the children and which required the court's immediate attention and intervention, the appeal was adjourned to April 4 2014.

Background

3 For the sake of continued substantive and administrative clarity in this case, the following motions have been filed in the *Ontario* Superior Court of Justice since the decision of Mr. Justice Fuerth on February 13 2014:

(a) Motions returnable on February 25th 2014:

(i) A motion by the appellants J.S. and S.T. for an order varying *inter alia* the provisions of the stay granted in the Ontario Court of Justice on February 3 2014;

(ii) A motion by the appellants A.H. and E.H. for an order varying *inter alia* the provisions of the stay granted in the Ontario Court of Justice on February 3 2014;

(iii) A motion by the appellants E.K. and R.(H.)K. for an order varying *inter alia* the provisions of the stay granted in the Ontario Court of Justice on February 3 2014; and

(iv) A motion by the respondent C.K.C.S. for an order *inter alia* dismissing the above-noted motions and expediting the hearing of the appeal.

(b) Motions returnable on March 5 2014:

(i) A motion by the appellants J.S. and S.T. for an order *inter alia* permitting the admission of further and other evidence at the hearing of the appeal;

(ii) A motion by the appellants A.H. and E.H. for an order *inter alia* permitting the admission of further and other evidence at the hearing of the appeal; and

(iv) A motion by the appellants E.K. and R.(H.)K. for an order, *inter alia*, permitting the admission of further and other evidence at the hearing of the appeal.

4 On February 25th 2014 all motions returnable on that date were dismissed as abandoned by counsel given the early availability of both counsel and the court to hear the appeal, namely, seven days hence. The court continued the conditions imposed by Mr. Justice Fuerth in his order of February 13 2014 with respect to, and in particular, non-removal of the children from the Municipality of Chatham-Kent.

5 On March 5th 2014, the date set for the hearing of the appeal, I considered five oral motions that were brought without notice on the basis of urgency:

(i) An oral motion for an immediate *in camera* hearing under the *Child and Family Services Act* R.S.O. 1990, c. C.11, as am.[2];

(ii) An oral motion by the media for time to consult with counsel in response to the request for an *in camera* hearing prior to the commencement of the hearing;

(iii) An oral motion by the CKCS for an order pursuant to s. 51(2) (d) of the *Act* that the children be placed in the care of the society during the adjournment;

(iv) An oral motion for the removal of Julie Lee as counsel for the appellants J.S., S.T., A.H., E.H. and E.K; and

(v) An oral motion for the immediate appointment of counsel for all of the children who are the subject of the appeal.

6 Prior to the hearing on March 5th 2014, I learned that the appellants and their children had apparently disappeared during the prior two days; that contrary to the order of Justice Fuerth on February 13th 2014 and my order on February 25th 2014 the appellants had either left voluntarily or

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[2]the 'Act'

had been removed from the jurisdiction; and that the location of all of the children was unknown or uncertain.

7 I met with all counsel for all of the parties to this litigation who agreed that given the apparent disappearance of the children, the hearing of an emergency motion by the CKCA in accordance with the provisions of the *Child and Family Services Act* would be required and should be heard *in camera.*

8 Unlike the prior conduct of the appellants in Quebec (when two of the appellants appeared before the court and provided an indication with respect to where the children were located after having been removed from the jurisdiction of that court), in this instance, the appellants and the children had disappeared without notice or explanation even to their own counsel. No one from the religious community or otherwise was present to provide any information to the court. In sum, the children had vanished and were missing.

9 The pending motion for interim relief was therefore clearly urgent and required the court's immediate consideration and intervention. The evidence to be called on the motion concerned the steps taken by all of the authorities involved to that point in time to locate the children; the orders and steps further needed to ensure the protection and safety of the missing children including their return to the Municipality of Chatham-Kent if and when found. To that point in time, no order existed that would allow the authorities to act appropriately in this situation.

10 Because of the immediate and urgent circumstances bearing directly upon the physical and emotional safety of the children, the oral motion by the media for a delay of the hearing so that they could consult with counsel regarding the exclusion order was denied and the motion by the CKCS was ordered to be conducted *in camera*. I confirmed in open court that the order excluding the media was made in the exercise of my discretion pursuant to s. 45 (7) (b). I also confirmed that the exclusion order did not apply to the hearing of the appeal and was limited in scope to the motion before the court. I made those orders with reasons to follow.

11 On hearing the testimony elicited by the CKCS, the request that the children be immediately placed in the care of the society was granted. A less intrusive order was not available. In addition, I ordered police assistance in the execution of that order. The formal orders were then prepared at the conclusion of the hearing and signed by me to allow law enforcement agencies to begin the process of searching for the missing

children both nationally and internationally and to take the children into the care of the society when found.

12 In addition, I granted an order removing Ms. Lee as counsel of record for the adult appellants given the breakdown of their solicitor/client relationship and signed an order requesting the appointment of a lawyer by the Office of the Children's Lawyer for each of the children who are the subject of the appeal.

13 As I have indicated, the hearing of the appeal was adjourned to April 4 2014. In addition, the motions by the appellants returnable on March 5 2014 were adjourned to the same date.

14 On March 6 2014 I issued an Endorsement containing the reasons for the exclusion order. This Endorsement supplements those reasons if and as necessary.

Subsequent Events

15 On March 6 2014, the Registrar in Chatham received correspondence dated the same day from Mr. Paul Schabas. The writer indicated that his law firm represented a number of media outlets. Enclosed with the letter was a motion for an order changing, varying or setting aside the exclusion order and granting public access to the transcript of the apprehension hearing and all motion materials filed in relation to the apprehension hearing.[3] No affidavit materials were enclosed, served or filed at that time in support of the motion.

16 On March 7 2014 Regional Senior Justice Heeney responded to the letter. In that letter, Mr. Justice Heeney confirmed *inter alia* that if the clients of Mr. Schabas were dissatisfied with the exclusion order, Mr. Schabas was at liberty to launch an appeal to the appropriate court.[4] He also indicated that I, Justice Templeton, would "entertain submissions

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[3]A copy of the letter dated March 6 2014 and enclosure is attached hereto and marked Schedule 'A'.

[4]Contrary to a report published on March 11 2014, at no time did Mr. Justice Heeney decide not to hear an appeal of the exclusion order. Indeed, he does not have the jurisdiction to hear such an appeal and at no time did the court agree to 'revisit' the order.

that access to the transcript of the proceedings be granted if and when the children are apprehended and safely in the care of the society"[5].

17 On or about Saturday March 8 2014 six of the fourteen minor children who had disappeared were located in Trinidad were taken into the care of the society upon their arrival back in Canada from Trinidad.

18 On or about Sunday March 9 2014 two more of the fourteen minor children who had disappeared were found in Calgary and were taken into the care of the society upon their arrival in Toronto from Calgary.

19 On March 10 2014 I received a letter dated the same day from Mr. Schabas requesting that I "reconsider" releasing the transcript and any materials filed on the apprehension motion to the media in light of the fact that all of the children are now either in the care of child welfare authorities or outside the country[6].

20 With respect, it was difficult to understand the position of counsel that a hearing be held for the purpose of *reconsidering* a decision given that no decision had ever been made concerning the transcript of the proceedings.

21 In fact I had indicated and continued to be willing to entertain a motion that turns on the sole question of whether the media ought to be allowed access to a transcript of the *in camera* proceeding once the children are apprehended and safely in the care of the society.

22 On March 10 2014, I sent a letter to all counsel confirming that I would hear the media's motion the following day, March 11 2014 by teleconference on the record[7].

The Motion

23 At the outset of the motion, I indicated to counsel that I was not prepared to hear an appeal of my exclusion order.

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[5]A copy of the letter dated March 7 2014 and enclosure is attached hereto and marked Schedule 'B'.

[6]A copy of the letter dated March 10 2014 is attached hereto and marked Schedule 'C'.

[7]A copy of the letter dated March 7 2014 from the court is attached hereto and marked Schedule 'D'.

24 The only issue to be determined on this motion is whether the order sought with respect to access by the media to the transcript and materials filed on March 5 2014 ought to be granted.

25 On March 11 2014 I heard submissions from counsel for the media and counsel for the society, counsel for the minor parent who is an appellant and counsel from the Office of the Children's Lawyer[8].

26 The motion requesting access to the transcript of the *in camera* hearing and all motion materials in relation to the apprehension motion was forcefully argued by counsel for the media.

27 In summary, it is the position of the media that the exclusion order has created a gap of knowledge for the public; that the doctrine of court openness as set out in *Dagenais*[9] requires and supports the request for the order sought; that circumstances have changed since the exclusion order in that most of the children who disappeared have now been found and are safely under the protection of the CKCS; that the children who have not yet been found have been located and are out of the country; and that an appropriate exercise of the discretion pursuant to the test defined in *Dagenais/Mentuck*[10] would result in the orders sought.

28 The motion is equally strenuously opposed however by the parties to the proceeding, namely, the minor parent who is an appellant and represented by counsel, the Office of the Children's Lawyer, which represents the children and the CKCS who is the respondent on the appeal.

29 It is the position of all of the parties in this proceeding that the paramount purpose of the *Act* must be respected and applied; that there has been an insufficient change in the factual circumstances since the order in that six children are still missing and are not yet in the care and protection of the society; that this decision must be made in the context of the rights of the children to privacy; that when children are missing and in need of protection, the principle of openness is protected by the creation

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[8]It should be noted that the moving parties (the media) took exception to the lack of notice with respect to the exclusion order, the lack of opportunity to make representations with respect to the exclusion order and the order itself. It was the position of counsel for the media that I erred in the exercise of my discretion in respect of these issues on March 5 2014. However, I found that those issues were beyond the scope of the motion before me.

[9]*Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 (S.C.C.)

[10]*R. v. Mentuck*, [2001] S.C.J. No. 73 (S.C.C.)

and existence of a court record but the dissemination of the evidence into the public domain places the children at further risk in these particular circumstances; that since the order for non-publication of the identity has been breached by way of a tweeted message that included the name of one of the children, there are concerns regarding the media's compliance with the court order.

Analysis

30 I agree with counsel for the media that the *Dagenais/Mentuck* test applies in this case.

31 It is clear law that restrictions on the open court principle and freedom of the press in relation to judicial proceedings can only be ordered where the party seeking such a restriction establishes through convincing evidence that

> (a) such an order is necessary in order to prevent a serious risk to the proper administration of justice because reasonably alternative measures will not prevent the risk; and
>
> (b) the salutary effects of the publication ban outweigh the deleterious effects on the rights and interest of the parties and the public, including the effects on the right to free expression, the right of the accused to a fair and public trial, and the efficacy of the administration of justice.

32 In 2005, the Supreme Court of Canada considered the case of *Toronto Star Newspapers Ltd. v. Ontario*[11] in which the Crown appealed an order of the Ontario Court of Appeal that had quashed an order sealing search warrants, the information used to obtain the warrants and the related documents. The appeal to the Supreme Court was dismissed.

33 On behalf of the majority, the Honourable Mr. Justice Fish wrote as follows:

> In any constitutional climate, the administration of justice thrives on exposure to light — and withers under a cloud of secrecy.
>
> That lesson of history is enshrined in the *Canadian Charter of Rights and Freedoms*. Section 2(b) of the *Charter* guarantees, in more comprehensive terms, freedom of communication and freedom of expression. These fundamental and closely related freedoms both depend for their vitality on public access to information of public interest.

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[11] 2005 SCC 41 (S.C.C.)

What goes on in the courts ought therefore to be, and manifestly is, of central concern to Canadians.

The freedoms I have mentioned, though fundamental, are by no means absolute. Under certain conditions, public access to confidential or sensitive information related to court proceedings will endanger and not protect the integrity of our system of justice. A temporary shield will in some cases suffice; in others, permanent protection is warranted.

Competing claims related to court proceedings necessarily involve an exercise in judicial discretion. It is now well established that court proceedings are presumptively "open" in Canada. Public access will be barred only when the appropriate court, in the exercise of its discretion, concludes that disclosure would *subvert the ends of justice* or *unduly impair its proper administration.*

This criterion has come to be known as the *Dagenais/Mentuck* test, after the decisions of this Court in which the governing principles were established and refined. The issue in this case is whether that test, developed in the context of publication bans at the time of trial, applies as well at the pre-charge or "investigative stage" of criminal proceedings...

In my view, the *Dagenais/Mentuck* test applies to *all* discretionary court orders that limit freedom of expression and freedom of the press in relation to legal proceedings. Any other conclusion appears to me inconsistent with an unbroken line of authority in this Court over the past two decades. And it would tend to undermine the open court principle inextricably incorporated into the core values of s. 2(*b*) of the *Charter.*

The *Dagenais/Mentuck* test, though applicable at every stage of the judicial process, was from the outset meant to be applied in a flexible and contextual manner. A serious risk to the administration of justice at the investigative stage, for example, will often involve considerations that have become irrelevant by the time of trial. On the other hand, the perceived risk may be more difficult to demonstrate in a concrete manner at that early stage. Where a sealing order is at that stage solicited for a brief period only, this factor alone may well invite caution in opting for full and immediate disclosure.

Even then, however, a party seeking to limit public access to legal proceedings must rely on more than a generalized assertion that publicity could compromise investigative efficacy. If such a generalized assertion were sufficient to support a sealing order, the presumption

would favour secrecy rather than openness, a plainly unacceptable result.

In this case, the evidence brought by the Crown in support of its application to delay access amounted to a generalized assertion of possible disadvantage to an ongoing investigation. The Court of Appeal accordingly held that the Crown had not discharged its burden. As mentioned earlier, I would not interfere with that finding and I propose, accordingly, that we dismiss the present appeal...

Since the advent of the Charter, the Court has had occasion to consider discretionary actions which limit the openness of judicial proceedings in other contexts.

The *Dagenais/Mentuck* test, as it has since come to be known, has been applied to the exercise of discretion to limit freedom of expression and of the press in a variety of legal settings. And this Court has recently held that the test applies to *all* discretionary actions which have that limiting effect:

While the test was developed in the context of publication bans, it is equally applicable to all discretionary actions by a trial judge to limit freedom of expression by the press during judicial proceedings. Discretion must be exercised in accordance with the *Charter*, whether it arises under the common law, as is the case with a publication ban...; is authorized by statute, for example under s. 486(1) of the *Criminal Code* which allows the exclusion of the public from judicial proceedings in certain circumstances (*Canadian Broadcasting Corp. v. New Brunswick (Attorney General)*, [1996 CanLII 184 (SCC), [1996] 3 S.C.R. 480], at para. 69); or under rules of court, for example, a confidentiality order (*Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41 (CanLII), [2002] 2 S.C.R. 522, 2002 SCC 41)...

It hardly follows, however, that the *Dagenais/Mentuck* test should be applied mechanistically. Regard must always be had to the circumstances in which a sealing order is sought by the Crown, or by others with a real and demonstrated interest in delaying public disclosure. The test, though applicable at *all* stages, is a flexible and contextual one. Courts have thus tailored it to fit a variety of discretionary actions, such as confidentiality orders, judicial investigative hearings, and Crown-initiated applications for publication bans.

In *Vancouver Sun*, the Court recognized that the evidentiary burden on an application to hold an investigative hearing *in camera* cannot be subject to the same stringent standard as applications for a publication ban at trial:

> Even though the evidence may reveal little more than reasonable expectations, this is often all that can be expected at that stage of the process and the presiding judge, applying the *Dagenais/Mentuck* test in a contextual manner, would be entitled to proceed on the basis of evidence that satisfies him or her that publicity would unduly impair the proper administration of justice.
>
> Similar considerations apply to other applications to limit openness at the investigative stage of the judicial process...
>
> Quite properly, Doherty J.A. emphasized the importance of freedom of expression and of the press, and noted that applications to intrude on that freedom must be "subject to close scrutiny and meet rigorous standards" (para. 19). Ultimately, however, he rejected the Crown's claim in this instance because it rested entirely on a general assertion that publicity can compromise investigative integrity.

34 In my opinion, freedom of communication and freedom of expression are fundamental to the safeguarding of both democracy and accountability for and on behalf of all Canadians including all participants in the administration of justice. These freedoms "reassure the public that all persons regardless of race, colour or creed are equal before the law and that there is no arbitrary action or abuse of power"[12].

35 I also entirely agree with the opinion of the court in *M. (Y.) v. Children's Aid Society*[13] that "justice must not only be done but must also appear to be done. The courts, the administration of justice, public bodies and agencies, all have been the subject of scrutiny by the media. Agencies such as the ones involved here have great power and can exercise certain controls over the lives of citizens. The public ought to feel comfortable that such authority is being handled properly. Surely, personnel of these agencies ought not to fear reasonable public scrutiny of their operations."

36 The courts have repeatedly found that the open court principle, permitting public access to information about the courts, is deeply rooted in the Canadian system of justice. At every stage the rule should be one of public accessibility and concomitant judicial accountability. Indeed, the court has held that curtailment of public accessibility can only be justified where there is present the need to protect social values of superordi-

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[12]*Canadian Newspapers Co. v. Canada (Attorney General)* (1985), 49 O.R. (2d) 557 (Ont. C.A.)

[13](1989), 65 D.L.R. (4th) 427 (N.S. Co. Ct.)

nate importance[14]. This principle and the *Charter* support the media's right to publish or broadcast information about court proceedings and the media's right to gather that information, and the rights of listeners to receive the information.

37 But these freedoms are not absolute. The Supreme Court of Canada has clearly confirmed that under certain conditions, public access to confidential or sensitive information related to court proceedings will endanger and not protect the integrity of our system of justice. A temporary shield will in some cases suffice; in others, permanent protection is warranted.

38 In the case before me, the question is therefore whether public access to sensitive information involving children who are vulnerable and missing and have been found to require the protection of a government agency under the *CFSA* will endanger and fail to protect the integrity of our justice system.

39 In other words, have the parties to the litigation shown that without the protective or limiting orders they seek, there is a serious risk to the proper administration of justice? It is trite law that the interest that is jeopardized must have a public component. Purely personal concerns would not justify the restriction sought[15].

40 The significance of the *vulnerability* of children in the analysis was considered by the Supreme Court of Canada just two years ago in *A.B. (Litigation Guardian of) v. Bragg Communications Inc.*[16] which is a case that involved application of the open court principle, publications bans and a 15 year old child who was the victim of sexualized cyber bullying. In this case, the child sought to proceed anonymously in her pursuit of legal proceedings. The court granted her request. In doing so, the Honourable Madame Justice Abella wrote the following on behalf of the court,

> The open court principle requires that court proceedings presumptively be open and accessible to the public and to the media. This principle has been described as a "hallmark of a democratic society" (*Vancouver Sun (Re)*, 2004 SCC 43 (CanLII), [2004] 2 S.C.R. 332, at para. 23) and is inextricably tied to freedom of expression... If alter-

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[14]*MacIntyre v. Nova Scotia (Attorney General)*, [1982] 1 S.C.R. 175 (S.C.C.)

[15]*H. (M.E.) v. Williams* (2012), 108 O.R. (3d) 321 (Ont. C.A.)

[16][2012] 2 S.C.R. 567 (S.C.C.)

native measures can just as effectively protect the interests engaged, the restriction is unjustified. If no such alternatives exist, the inquiry turns to whether the proper balance was struck between the open court principle and the privacy rights of the girl: *Dagenais v. Canadian Broadcasting Corp.*, 1994 CanLII 39 (SCC), [1994] 3 S.C.R. 835; *R. v. Mentuck*, 2001 SCC 76 (CanLII), [2001] 3 S.C.R. 442.

Since *Edmonton Journal v. Alberta (Attorney General)*, 1989 CanLII 20 (SCC), [1989] 2 S.C.R. 1326, the critical importance of the open court principle and a free press has been tenaciously embedded in the jurisprudence and need not be further revisited here. What does need some exploration, however, are the interests said to justify restricting such access in this case: privacy and the protection of children from cyberbullying. These interests must be shown to be sufficiently compelling to warrant restrictions on freedom of the press and open courts. As Dickson J. noted in *Attorney General of Nova Scotia v. MacIntyre*, 1982 CanLII 14 (SCC), [1982] 1 S.C.R. 175, there are cases in which the protection of social values must prevail over openness (pp. 186-87).

The *amicus curiae* pointed to the absence of evidence of harm from the girl about her own emotional vulnerability. But, while evidence of a direct, harmful consequence to an individual applicant is relevant, courts may also conclude that there is objectively discernable harm....

This Court found objective harm, for example, in upholding the constitutionality of Quebec's *Rules of Practice* that limited the media's ability to film, take photographs, and conduct interviews in relation to legal proceedings (in *Canadian Broadcasting Corp. v. Canada (Attorney General)*, 2011 SCC 2 (CanLII), [2011] 1 S.C.R. 19), and in prohibiting the media from broadcasting a video exhibit (in *Canadian Broadcasting Corp. v. The Queen*, 2011 SCC 3 (CanLII), [2011] 1 S.C.R. 65). In the former, Deschamps J. held (at para. 56) that the *Dagenais/Mentuck* test requires neither more nor less than the one from *R. v. Oakes*, 1986 CanLII 46 (SCC), [1986] 1 S.C.R. 103. In other words, absent scientific or empirical evidence of the necessity of restricting access, the court can find harm by applying reason and logic: *RJR-MacDonald Inc. v. Canada (Attorney General)*,

Recognition of the *inherent* vulnerability of children has consistent and deep roots in Canadian law. This results in protection for young people's privacy under (my emphasis) the *Criminal Code*, R.S.C. 1985, c. C-46 (s. 486), the *Youth Criminal Justice Act*, S.C. 2002, c. 1 (s. 110), and **child welfare legislation** (my emphasis) not to mention international protections such as the *Convention on*

> *the Rights of the Child*, Can. T.S. 1992 No. 3, **all based on age, not the sensitivity of the particular child** (my emphasis)... The law attributes the heightened vulnerability based on chronology, not temperament: See *R. v. D.B.*, 2008 SCC 25 (CanLII), [2008] 2 S.C.R. 3, at paras. 41, 61 and 84-87; *R. v. Sharpe*, 2001 SCC 2 (CanLII), [2001] 1 S.C.R. 45, at paras. 170-74.
>
> This led Cohen J. in *Toronto Star Newspaper Ltd. v. Ontario*, 2012 ONCJ 27 (CanLII), 2012 ONCJ 27 (CanLII), to explain the importance of privacy in the specific context of young persons who are participants in the justice system:
>
> *The concern to avoid labeling and stigmatization is essential to an understanding of why the protection of privacy is such an important value in the Act. However it is not the only explanation. The value of the privacy of young persons under the Act has deeper roots than exclusively pragmatic considerations would suggest. We must also look to the Charter, because the protection of privacy of young persons has undoubted constitutional significance.*
>
> *Privacy is recognized in Canadian constitutional jurisprudence as implicating liberty and security interests. In Dyment, the court stated that privacy is worthy of constitutional protection because it is "grounded in man's physical and moral autonomy," is "essential for the well-being of the individual," and is "at the heart of liberty in a modern state" (para. 17). These considerations apply equally if not more strongly in the case of young persons. Furthermore, the constitutional protection of privacy embraces the privacy of young persons, not only as an aspect of their rights under section 7 and 8 of the Charter, but by virtue of the presumption of their diminished moral culpability, which has been found to be a principle of fundamental justice under the Charter.*
>
> *... the protection of the privacy of young persons fosters respect for dignity, personal integrity and autonomy of the young person.*

41 The case before me is not a criminal matter; it is not a civil matter; it is not a family law matter. And this is not a case about a religious community. This is a matter that concerns only the children of the appellants.

42 In my opinion, in certain circumstances, the protection of a vulnerable child and that child's privacy may well go beyond merely the name of the child in protection proceedings. Children who are the subject of an application by the state for intervention are also allegedly vulnerable in their environment at home, at school and/or in their neighbourhood. They are subject to the conduct and attitudes of the adults who interact with them. Disclosure to others of the intimacy of their lives is beyond their

control. Without the ability or opportunity for critical thought, they are swept into a process of the balancing of rights of others and in that process, it can be difficult to hear their voice.

43 Because of the best interests test, allegations about the conduct or attitude of adults toward a child cannot be separated and considered insolation from the child; the allegations cannot be measured without exposure of the impact of that conduct or attitude on the child and/or the child's response thereto. In other words, the child's world and privacy are inextricably linked to an investigation of the parent's.

44 In child protection matters, therefore, the need to shield a vulnerable child rests not only on the child's chronological age but also and perhaps more significantly, the factual circumstances in which the child lives or has been placed.

45 The paramount purpose of the *CFSA* is to promote the best interests, protection and well being of children. The health, welfare and education of children in the context of their best interests are, and must be, the primary focus of the judiciary in the application of the provisions of this legislation. The foundation of this approach lies in s. 15(1) of the *Charter* which guarantees equal protection and equal benefit of the law to all persons including children.

46 The Supreme Court of Canada has also recognized that children are "highly vulnerable members of our society, and given society's interest in protecting them from harm, fair process in the child protection context must reflect that children's lives and health may need to be given priority where the protection of these interests diverges from the protection of parents' rights to freedom from state intervention."[17] In my view, in exigent circumstances, this may also apply to other freedoms available to other individuals including the media.

47 But I am also of the view, that the infringement, if any, must be limited as soon and as far as possible in order to ensure the accountability of the state and the integrity of the administration of justice. Indeed, the *CFSA* emphasizes the need for consideration of the least restrictive alternatives in virtually every aspect of its provisions.

48 Having considered the evidence elicited from the witnesses on the motion, reviewed the transcript, considered the submissions of counsel

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[17] *Winnipeg Child & Family Services (Central Area) v. W. (K.L.)*, [2000] 2 S.C.R. 519 (S.C.C.)

and reviewed the law, I find that the temporary shield referred to by the Supreme Court of Canada is no longer warranted with respect to those children who are now safely in the care of the society. The order is no longer necessary in order to prevent a serious risk to the proper administration of justice with respect to the children who are in care.

49 I am not so satisfied, however, with respect to the children who have yet to be located. These children are apparently beyond the reach of this court but the court cannot and must not abdicate its duty to protect them to the best of its ability.

50 In all of the circumstances therefore an order shall issue as set out below.

51 However, I would like to also caution the media as follows. Rights and freedoms are inextricably linked with responsibility. That responsibility in the context of vulnerable children requires accuracy in reporting and compliance with court orders. Another cornerstone of the openness of court principle is the work of the court reporter who records the proceedings verbatim and without filter. Where there is uncertainty with respect to accuracy, therefore, resort should be had to the record.

52 The children before me have already been identified not by name in the public domain but by who they are. They have been identified by the membership and other choices of their parents. For the court, however, these children are not "Lev Tahor children" as has been described by the press. These fourteen young people are simply young human beings who are in the court's care until the court can be assured that it is in their best interests to be under the sole care and control of their parents which is the hope of all members of the judiciary who preside over these types of cases.

Conclusion

53 A redacted copy of the transcript of the evidence heard on March 5 2014 will be provided to counsel for the media on or before Wednesday March 19 2014. The transcript will be redacted with respect to any evidence concerning the identity of all of the children and all evidence with respect to those children who have not yet been found. The delay is solely to allow the reporter time to redact the transcript as directed.

54 To assist the media, a copy of the redacted transcript will also be made available at the Courthouse in London and at the Courthouse in Chatham.

55 No copies of the transcript are to be made. Members of the media are to be provided with as much time and opportunity as they need to read the transcript and make such notes as they require. No exhibits were filed on the motion.

56 The publication ban pursuant to s. 48(8) of the CFSA remains in full force and effect.

57 No costs are payable by any of the parties.

58 An order will issue in accordance with these reasons.

Order accordingly.

[Indexed as: **Chatham-Kent Children's Services v. H. (A.)**]

Chatham-Kent Children's Services, Respondent and A.H. and E.H.; E.K. and R.(H.)K.; J.S. and S.T., Appellants

Ontario Superior Court of Justice

Docket: 5838/14, 5839/14, 5340/14

2014 ONSC 2352

L. Templeton J.

Heard: March 5, April 4, 2014

Judgment: April 14, 2014

Family law —— Children in need of protection — Miscellaneous —— Jurisdiction — Respondent parents had lived in Quebec with their children for years as part of community known as Lev Tahor — Child protection authorities in Quebec had been investigating families based upon concerns about welfare of children, including, forced marriage of children under 16 years of age, failure to provide adequate education for children, inappropriate discipline of children and neglect — Quebec agency commenced proceedings but parents took children and moved to Ontario — Order was made in absence of parents that children be placed in foster care for 30 days and receive medical examination — Agency sought to enforce order of Quebec court and applied for order under s. 40 of Children's Law Reform Act (CLRA), authorizing it to deliver children to Quebec agency — Judge found that agency had standing and application was granted — Parents appealed — Appeal allowed — Ontario court had jurisdiction per se under common law to enforce order of Quebec court — Agency did not have standing to apply for remedy under CLRA — Use of word "person" in CLRA contemplated natural person and not corporation — Including corporation as person in CLRA would import meaning that was inconsistent with context of legislation — There was clearly distinction in legislation between concept of person and corporation such as agency and judge erred in finding that agency was person within context of CLRA and that agency had standing to commence application — Enforcement provisions under CLRA were not available to agency — Lack of enforcement provisions in Child and Family Services Act (CFSA) with respect to extra-provincial orders in child protection matters was intentional — This was not case where children were removed from parent without consent — Children were found to be at risk with respect to all adults who were responsible for them and were in need of protection — State's agency where family was now located was in position to continue to seek appropriate order or take further action as it saw fit — CLRA was not designed to and did not concern children who were at risk — CFSA governed conduct and interven-

tion of state with respect to children — If parents met all expectations since relocation to Ontario such that children were no longer in need of protection it would not make sense to return them to Quebec just because prior order had placed them in care — Absence of enforcement provisions was intentional and recognized immediate and evolving needs of children who were in need of protection.

Conflict of laws — Family law — Children — Custody — Children in need of protection — Jurisdiction — Respondent parents had lived in Quebec with their children for years as part of community known as Lev Tahor — Child protection authorities in Quebec had been investigating families based upon concerns about welfare of children, including, forced marriage of children under 16 years of age, failure to provide adequate education for children, inappropriate discipline of children and neglect — Quebec agency commenced proceedings but parents took children and moved to Ontario — Order was made in absence of parents that children be placed in foster care for 30 days and receive medical examination — Agency sought to enforce order of Quebec court and applied for order under s. 40 of Children's Law Reform Act (CLRA), authorizing it to deliver children to Quebec agency — Judge found that agency had standing and application was granted — Parents appealed — Appeal allowed — Ontario court had jurisdiction per se under common law to enforce order of Quebec court — Agency did not have standing to apply for remedy under CLRA — Use of word "person" in CLRA contemplated natural person and not corporation — Including corporation as person in CLRA would import meaning that was inconsistent with context of legislation — There was clearly distinction in legislation between concept of person and corporation such as agency and judge erred in finding that agency was person within context of CLRA and that agency had standing to commence application — Enforcement provisions under CLRA were not available to agency — Lack of enforcement provisions in Child and Family Services Act (CFSA) with respect to extra-provincial orders in child protection matters was intentional — This was not case where children were removed from parent without consent — Children were found to be at risk with respect to all adults who were responsible for them and were in need of protection — State's agency where family was now located was in position to continue to seek appropriate order or take further action as it saw fit — CLRA was not designed to and did not concern children who were at risk — CFSA governed conduct and intervention of state with respect to children — If parents met all expectations since relocation to Ontario such that children were no longer in need of protection it would not make sense to return them to Quebec just because prior order had placed them in care — Absence of enforcement provisions was intentional and recognized immediate and evolving needs of children who were in need of protection.

Cases considered by *L. Templeton J.*:

Bonczuk v. Bourassa (1986), 55 O.R. (2d) 696, 30 D.L.R. (4th) 146, 1986 CarswellOnt 2178, [1986] O.J. No. 618 (Ont. H.C.) — considered

Brown v. Topeka Board of Education (1954), 347 U.S. 483, 74 S.Ct. 686, 38 A.L.R.2d 1180, 98 L.Ed. 873 (U.S. Kan. S.C.) — considered

Children's Aid Society of Durham (County) v. P. (B.) (2007), 2007 CarswellOnt 7069, 287 D.L.R. (4th) 262, 46 R.F.L. (6th) 153 (Ont. S.C.J.) — followed

Children's Aid Society of Ottawa v. C. (H.) (2003), 2003 CarswellOnt 5286, [2003] O.J. No. 5309 (Ont. S.C.J.) — considered

Frame v. Smith (1987), 1987 CarswellOnt 969, 78 N.R. 40, [1987] 2 S.C.R. 99, 42 D.L.R. (4th) 81, 23 O.A.C. 84, 42 C.C.L.T. 1, [1988] 1 C.N.L.R. 152, 9 R.F.L. (3d) 225, 1987 CarswellOnt 347, [1987] S.C.J. No. 49, EYB 1987-67479 (S.C.C.) — referred to

Jabbaz v. Mouammar (2003), 2003 CarswellOnt 1619, 38 R.F.L. (5th) 103, 226 D.L.R. (4th) 494, 171 O.A.C. 102, [2003] O.J. No. 1616 (Ont. C.A.) — referred to

New Brunswick (Minister of Health & Community Services) v. G. (J.) (1999), 66 C.R.R. (2d) 267, 50 R.F.L. (4th) 63, 216 N.B.R. (2d) 25, 552 A.P.R. 25, [1999] 3 S.C.R. 46, 7 B.H.R.C. 615, 1999 CarswellNB 305, 1999 CarswellNB 306, 244 N.R. 276, 177 D.L.R. (4th) 124, 26 C.R. (5th) 203, REJB 1999-14250, [1999] S.C.J. No. 47 (S.C.C.) — considered

Pro Swing Inc. v. ELTA Golf Inc. (2006), 52 C.P.R. (4th) 321, [2006] 2 S.C.R. 612, 2006 SCC 52, 2006 CarswellOnt 7203, 2006 CarswellOnt 7204, 354 N.R. 201, 218 O.A.C. 339, 273 D.L.R. (4th) 663, 41 C.P.C. (6th) 1, [2006] S.C.J. No. 52 (S.C.C.) — considered

R. v. Jones (1986), 1986 CarswellAlta 181, 1986 CarswellAlta 716, 69 N.R. 241, [1986] 2 S.C.R. 284, (sub nom. *Jones v. R.)* 31 D.L.R. (4th) 569, [1986] 6 W.W.R. 577, 47 Alta. L.R. (2d) 97, 73 A.R. 133, 28 C.C.C. (3d) 513, (sub nom. *Jones v. R.)* 25 C.R.R. 63, EYB 1986-66948, [1986] S.C.J. No. 56 (S.C.C.) — considered

Société de l'aide à l'enfance d'Ottawa c. L. (I.) (2012), 2012 ONSC 2808, 2012 CarswellOnt 9930, 2012 CarswellOnt 5951, 2012 ONCS 2808, [2012] O.J. No. 2120, [2012] O.J. No. 3832 (Ont. Div. Ct.) — considered

Wisconsin (State) v. Yoder (1972), 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (U.S. Sup. Ct.) — considered

Statutes considered:

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11

Generally — referred to

s. 24(1) — referred to

Child and Family Services Act, R.S.O. 1990, c. C.11

Generally — referred to

Pt. III — referred to
s. 1(1) — considered
s. 45(7) — referred to
s. 60 — referred to
Children's Law Reform Act, R.S.O. 1990, c. C.12
Generally — referred to
s. 1 — considered
s. 2(1) — considered
s. 4 — considered
s. 10 — considered
s. 10(1) — considered
s. 19 — considered
s. 21 — considered
s. 21(2) — considered
s. 21.1 [en. 2009, c. 11, s. 7] — considered
s. 21.2 [en. 2009, c. 11, s. 8] — considered
s. 21.2(1) "society" [en. 2009, c. 11, s. 8] — considered
s. 21.2(2) [en. 2009, c. 11, s. 8] — considered
s. 21.2(3) [en. 2009, c. 11, s. 8] — considered
s. 21.2(4) [en. 2009, c. 11, s. 8] — considered
s. 22 — considered
s. 36 — considered
s. 36(1) — considered
s. 36(2) — considered
s. 37 — considered
s. 40 — considered
s. 40(3) — considered
s. 41 — considered
s. 41(1) — considered
s. 41(2) — considered
s. 41(4) — considered
s. 46 — considered
Code de procédure civile, L.R.Q., c. C-25
en général — referred to
Courts of Justice Act, 1984, S.O. 1984, c. 11
s. 212 — considered
Courts of Justice Act, R.S.O. 1990, c. C.43
s. 146 — considered
Instruction publique, Loi sur l', RLRQ, c. I-13.3
en général — referred to
art. 1 — considered
art. 14 — considered
art. 15(1) — considered

art. 15(2) — considered
art. 15(4) — considered
Legislation Act, 2006, S.O. 2006, c. 21, Sched. F
Generally — referred to
Pt. VI — referred to
s. 47 — considered
s. 50 — considered
s. 85 — considered
s. 86 — considered
s. 87 — considered
Protection de la jeunesse, Loi sur la, RLRQ, c. P-34.1
en général — referred to
art. 76 — considered
art. 91 — referred to
Services de santé et les services sociaux, Loi sur les, RLRQ, c. S-4.2
général — referred to

Rules considered:

Family Law Rules, O. Reg. 114/99
R. 14(19) — considered

Treaties considered:

Hague Convention on the Civil Aspects of International Child Abduction, 1980, C.T.S. 1983/35; 19 I.L.M. 1501
Generally — referred to
Article 3 — considered

APPEAL by parents from judgment reported at *Chatham-Kent Children's Services v. H. (A.)* (2014), 2014 ONCJ 50, 2014 CarswellOnt 1365 (Ont. C.J.), granting Ontario agency's application to enforce Quebec order.

Loree Hodgson-Harris, for Chatham-Kent Children's Services
Marnelle Dragile, for A.H. and E.H.
No one for E.K.
Gerry Wong, for R. (H.) K.
No one for J.S. and S.T.
Stephen Codas, Rayleen Cantin, William Sullivan, for Children's Lawyer

***L. Templeton J.*:**

1 The pivotal issue in this appeal is 'context'.

2 Given the nature of the circumstances of this case, the significance of the issues and the attention this case has drawn in the public domain, a

review of the evidence that was before the *Chambre de la Jeunesse* of the Quebec Court and the *Ontario Court of Justice* is warranted.

The Proceedings in Quebec

3 The appellants are all members of a religious community known as 'Lev Tahor'.

4 The appellants J.S. and S.T. are the parents of eight children, namely, M.S. (a son, born April 14, 2013); C.S. (a son, born February 2, 2007); R.S. (a daughter, born June 16, 2005); Y.S. (a daughter, born January 1, 2004); M.S. (a son, born July 29, 2001); Y.S. (a son, born June 21, 2000); M.S. (a daughter, born January 4, 1999); and Y.S. (a daughter, born December 14, 1997).

5 A.H. and his wife E.H. are the parents of a number of children including the appellant R.H.K. (a daughter, born November 27, 1996); Y.H. (a daughter, born January 22, 1999); T.H. (a daughter, born August 1, 2000); S.H. (a daughter, born August 10, 2002); and M.H. (a son, born May 17, 2004).

6 R.(H.)K. (the eldest daughter of A.H. and E.H.) and E.K. are the parents of B.K. (a daughter, born September 14, 2013).

7 The original Lev Tahor community founded by Shlomo Helbrans moved to the Ste-Agathe area in Quebec in or about 2000 and now consists of more than 250 people comprised of approximately 42 families[1]. According to the group's leaders, the religious beliefs of Lev Tahor are guided primarily by the Tora and their practices are analogous to the original practice of Judaism[2].

8 The record in this case supports the claim of the appellants that the traditional way of life of members of the Lev Tahor community is not "merely a matter of personal preference, but one of deep religious conviction, shared by an organized group, and intimately related to daily living". For the appellants, like many communities brought together by their faith-based beliefs, "religion is not simply a matter of theocratic

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[1]Ex. 'C' to the Affidavit of Henri Primeau, sworn January 6, 2014

[2]Affidavit of Uriel Goldman, Nachman Helbrans and Mayor Rosner (hereinafter 'the Goldman Affidavit') sworn December 16, 2013

belief but pervades and determines their entire way of life regulating it with detail through strictly enforced rules of the church community"[3].

9 The acceptance by individuals of conformity to and daily practice of their deep religious conviction is not unique to Lev Tahor. Indeed, the observations regarding the Lev Tahor community above are quoted from the decision of the Supreme Court of the United States in *Wisconsin (State) v. Yoder* No. 70-110, in reference to members of the Old Order Amish who were the litigants in that case. Such is the commonality of the commitment of numerous and varied religious communities to the tenets of the founding and guiding principles of their faith.

10 The adoption and practice of the Tora to the extent perceived by members of Lev Tahor as desirable or necessary in their daily lives include the type of clothing to be worn at all times; their food preparation and consumption; their language; their moral and social conduct; and, their education. All members of Lev Tahor, regardless of age or gender, adhere to the practices and tenets of their faith-based beliefs.

11 The children in the Lev Tahor community, including the appellants' children, are educated at home by other members of the community.

12 The *Education Act*[4] in Quebec commences with the following provisions regarding children living in that Province,

> **STUDENTS' RIGHTS**
>
> 1. Every person is entitled to the preschool education services and elementary and secondary school instructional services provided for by this Act and by the basic school regulation made by the Government under section 447, from the first day of the school calendar in the school year in which he attains the age of admission to the last day of the school calendar in the school year in which he attains 18 years of age, or 21 years of age in the case of a handicapped person within the meaning of the Act to secure handicapped persons in the exercise of their rights with a view to achieving social, school and workplace integration (chapter E-20.1)[5].

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[3] *Wisconsin (State) v. Yoder* [406 U.S. 205 (U.S. Sup. Ct. 1972)] No. 70-110

[4] Chapter I - 13.3

[5] Given that the first section of this statute addresses the right of a child regardless of gender to an education, be it in school or at home, it is reasonable to infer that the legislature in Quebec considers the right of the child to an education to be of paramount importance.

> Every person is also entitled to other educational services, student services and special educational services provided for by this Act and the basic school regulation referred to in the first paragraph and to the educational services prescribed by the basic vocational training regulation established by the Government under section 448, within the scope of the programs offered by the school board.
>
> The age of admission to preschool education is 5 years on or before the date prescribed by the basic school regulation; the age of admission to elementary school education is 6 years on or before the same date.
>
> **COMPULSORY SCHOOL ATTENDANCE**
>
> 14. Every child resident in Québec shall attend school from the first day of the school calendar in the school year following that in which he attains 6 years of age until the last day of the school calendar in the school year in which he attains 16 years of age or at the end of which he obtains a diploma awarded by the Minister, whichever occurs first.
>
> 15. The following students are exempt from compulsory school attendance:
>
> (1) a student excused by the school board by reason of illness or for the purpose of receiving medical treatment or care required by his state of health;
>
> (2) a student excused by the school board, at the request of his parents and after consultation with the advisory committee on services for handicapped students and students with social maladjustments or learning disabilities established under section 185, by reason of a physical or mental handicap which prevents him from attending school; ....
>
> (4) a student who receives home schooling and benefits from an educational experience which, according to an evaluation made by or for the school board, are equivalent to what is provided at school (my emphasis).
>
> In addition, the school board may exempt one of its students, at the request of his parents, from compulsory school attendance for one or more periods totalling not more than six weeks in any school year, to allow him to carry out urgent work

13 In or about 2011, the Lev Tahor community came into conflict with the local school board responsible for the geographic area in which the appellants lived with respect to the education of their children. According to Mr. Goldman, a Lev Tahor community organizer, the school board

took issue with the fact that (a) the children of their community had not been registered in the local schools, and (b) the children were not educated in accordance with the curriculum required by Quebec law.[6] In other words, the children in the Lev Tahor community were not receiving benefits from an educational experience, which were equivalent to what was provided at school.

14 The religious beliefs of the Lev Tahor include but are not limited to (a) a rejection of the concept of Zionism; (b) a belief that God is present in everything and controls everything; (c) a rejection of Darwinism because it is based on a concept of randomness and mutation that suggests a lack of direction by a higher power; and (d) an acceptance of science generally but an interpretation of scientific principles that accords with their religious beliefs.

15 Mr. Goldman deposes that the community attempted to work co-operatively with the school board to resolve their concerns but the board refused to accommodate their religious beliefs.

16 As early as April 2 2013, the leaders of the Lev Tahor community developed a contingency plan in the event that the authorities would initiate action and seek to apprehend the children. Over the course of the following months, they met with municipal officials in Smiths Falls, and Belleville, Ontario and retained a licenced real estate agent to explore the possibilities of relocation and settlement in Picton, Vanklik Hills, Brighton, Bracebridge, Peterborough, Chatham and other communities[7].

17 In August 2013 the Director of Youth Protection ("DYP") became involved with the appellants. The evidence indicates, however, that the DYP had been concerned about and investigating the circumstances involving the children of the Lev Tahor community for some months prior to this time[8].

18 The *Youth Protection Act*[9] applies to children who are in situations that could potentially threaten their lives or compromise their security or development. These children are often in serious difficulty and need protection. The DYP is responsible for enforcing the *Act*. The DYP inter-

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[6]The Goldman Affidavit dated December 16, 2013

[7]Affidavit of Henri Primeau dated January 6, 2011

[8]Affidavit of Aline Beaumier dated December 10, 2013

[9]Chapter P-34.1

venes to put an end to and prevent the recurrence of a situation in which the security or development of the child is in danger.

19 The Youth Protection Act specifies six situations in which the DYP is required to intervene, namely when a child is abandoned; neglected; subject to psychological abuse; sexually abused; physically abused; or has severe behavioural problems (when the parents fail to take the necessary steps or the child is 14 or older and refuses to comply with the parents' wishes).

20 The DYP may also be required to act in three other situations in which, according to the Youth Protection Act, the security or the development of a child is in danger, namely, when the child has run away; the child is not attending school; or parents have abandoned a child following placement, such as in a foster home, under the terms of the Health and Social Services Act.

21 A letter dated September 3 2013[10] from Mayer Rosner and Nachman Helbrans to Denis Baraby (who is the director of the Centre jeunesse des Laurentides[11]) with respect to the steps the community had taken in response to the concerns raised under the *Youth Protection Act* was filed with the court. The residents of Ste-Agathe reside within the jurisdiction of this agency.

22 It is clear from this letter that the concerns of the DYP had gone far beyond those regarding the education of the children. The authors of this letter wrote as follows,

> With the DYP as a guide, the bar has been set to higher standards. It is truly a delight to see such a positive change by the community members and their offspring. Kitchens have been repaired, dinettes restored to perfection, floors redone, lawns and trees are tended to in a timely manner, truly a new era has arrived to our community...
>
> Much credit is due to the DYP for their advice and patience with us on the matter and encouragement provided, hence allowing us to take

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[10]It appears from the contents of this letter that the date of the letter should have been September 3, 2012 or the dates referred to in the letter should have referred to the year 2014 rather than 2013.

[11]The "Centre jeunesse" in Quebec is similar in function and mandate as the child protective agencies (such as the Respondent agency) that act under the auspices of the *Child and Family Services Act* R.S.O. 1990 c. C. 11 in Ontario.

the required corrective measures to ensure a healthy, safe and happy environment for all, young and old alike...

Assessments for general home safety and specifically child safety were done by licensed and professional individuals. Licensed contractors are actively repairing porches, stairways and basements etc. Other home renovations such as roofing, leak repair are just a few of the corrective measures taken as parts (sic) of our ongoing effort to improve the quality of our daily lifestyle...

Health concerns were also identified and resolved...

In a community gathering, we have put a great emphasis on cleanliness in the home. The community has started a non-profit venture to ease the burden of mothers and allow more time for them to tend to the needs of their children and household chores. A bakery is now in operation for the purpose of baking bread and other baked goods to ease the workloads of mothers at home...

In addition to confronting general environmental issues, dental health was considered and accounted for. Fungal care has been dealt with medically and naturally. Where medical advice or doctor's orders were applicable, natural methods were overridden.

Educational material on personal and home hygiene has been prepared for lectures and distribution...Education by a certified hygienist will be lecturing to the men, woman (sic) and children of the community in the near future. A date has yet to be announced...

We aim to be in full compliance and reach our goals by March 20, 2013. We thank you in advance for your patience on the matter...

The action plan is divided in 5 sections: Health; Safety; Clothing; Education; Home Repairs...

Safe personal hygiene has been at the top of the list. In areas such as home cleaning, dental treatment and prevention, and fungal care a lecture has been delivered in a community gathering to raise further awareness on the subject...Once again, we thank you for the recommendations offered by your organization... [Dental/oral hygiene] will be given special attention specifically to children and young adults, ensuring routine cleaning and good brushing habits...

Those with fungus and other foot maladies have booked appointments and/or seen doctors...

In the home, child and general safety was given detailed attention...repairs done and/or preventative measure taken...electrical outlet inserts; porch repairs; railings installed; gate installations; deck repairs; ceiling leak repairs; floors replaced; exhaust fans installed;

> steps repaired; suffocation hazards removed (ie draper cords, blind cords etc.)...safety gates repaired or installed where applicable; high chairs verified to be certified CSA or equivalent; smoke detectors installed, batteries replaced...
>
> We are proud to inform you that as of March 20, 2013 we will be integrating French, English and Mathematical studies into the school curriculum. A complete and comprehensive guide on the new curriculum will be available on the universal deadline of March 20, 2013...

23 According to Mr. Primeau, on October 30 2013, he met with the directors of the Lev Tahor community and another real estate agent at the Chatham address where the community now lives. They also met with officials from the municipality of Chatham-Kent to discuss expansion and other zoning-related issues.

24 Aline Beaumier, a worker with the "Centre jeunesse des Laurentides" ("the Centre"),has deposed that on Monday, November 11 2013 she and Mr. Baraby met with the Lev Tahor community leaders, Mayer Rosner, Nachman Helbrans and Uriel Goldman. The leaders requested that the social workers from the Centre schedule appointments with the Lev Tahor families rather than making unannounced visits to their homes. She has denied the allegation by members of the Lev Tahor community that they met on November 4, 2013 and that they were ever informed that the community intended to move to Ontario.

25 On Thursday, November 14 2013 two other workers from the Centre met with the appellant S.S. in her home. Her husband was not present. The workers explained to S.S. that a motion for "provisional measures"[12] would be presented to the court on Tuesday, November 19 2013 and that their presence would be required. She was also advised that her regular workers from the Centre would talk to her in greater detail about the hearing on Monday, November 18 2013. S.S. was advised of her right (and the right of her husband) to be represented by a lawyer at the hearing.

26 According to Mr. Primeau, he received a call from Mayer Rosner on Thursday, November 14 2013 and was told that the issue concerning the education of the children had forced the community to move ahead with their plans to move to Ontario. He was asked by Mayer Rosner to secure all of the vacant homes in Chatham at the location they had visited on

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[12]Known in Ontario as interim or temporary orders.

October 30 2013. Mr. Primeau did as he was asked and has deposed that on November 15 2013 he confirmed that many of the homes would be available for occupancy on Monday, November 18 2013, with more to become available in the weeks following.

27 On Sunday, November 17 2013 he received a notice from Mayer Rosner that buses had been booked and everything was arranged for their move to Chatham.

28 The documentary evidence before the court confirms that a contract was entered into with a bus company in Saint-Jerome, Quebec on or about November 15 2013 for three buses with a capacity of "Autocar 56" to leave from 571 rue des Bouleaux, Ste-Agathe on November 17, 2013 at 23:59 and take the passengers to Chatham-Kent.

29 On Monday, November 18 2013, four workers from the Centre attended at the homes of the appellants in the Lev Tahor community in Ste-Agathe and found that the entire community had left. It is their evidence that the home of the appellants J.S. and S.T. was in complete disarray with everything the family owned seeming to be left on the floor. They were apparently barely able to walk through the bedrooms[13].

30 With the assistance of the Quebec Provincial Police, the Centre was able to locate the appellants in Chatham. The Chatham-Kent Children's Services were notified of the location of the families.

31 It has since been confirmed that approximately 31 families, including 129 children, who are all members of the Lev Tahor community have relocated to the Municipality of Chatham-Kent.

32 On Tuesday, November 19 2013 the Centre presented a Request for Protection and a Request for Provisional Measures to the *Chambre de la Jeunesse* of the Quebec Court with respect to each of the children of the appellants and the appellant R.(H.)K. herself. The Centre sought orders that would (a) keep the children in the care of the appellants subject to supervision by the Centre; (b) require that they report periodically to the Centre; and (c) require the appellants to comply with the law with respect to the education of each child.

33 It was the submission of the Centre that the security or development of each of the children was compromised in that:

(i) the children are isolated from the outside world;

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[13]Affidavit of Aline Beaumier dated December 10 2013

(ii) the children neither attend school nor receive educational instruction according to the law in Quebec;

(iii) the children do not know how to read or write in English or in French;

(iv) the children do not have the same level of general knowledge as other children of the same age outside the community;

(v) the children do not have access to any books or educational materials;

(vi) the female children spend their days learning to maintain a home, to cook and to pray;

(vii) for several hours a day, the male children receive religious education;

(viii) the children do not have access to games or toys;

(ix) the children react negatively in fear, distrust or disgust when in contact with people from outside of the community and their way of life;

(x) from the age of three, the female children are required to adhere to a strict dress code and are dressed in a chador which reveals only the oval of their faces;

(xi) most of the female children in the community are obliged to wear stockings both day and night, a practice that has resulted in fungal infection in their feet;

(xii) the children are threatened that they will go to hell if they disobey the rules of the community;

(xiii) several times a day, melatonin in the form of tablets is administered to the children; and

(xiv) the removal of children from their families is a form of punishment used in the community should the parents of the children breach the rules of the community.

34 In addition, the Centre submitted that a wedding may be arranged for a female child who has reached the age of 14 years and lives in the community. The marriage is arranged by the Rabbi and the parents of the bride and groom. A ceremony is conducted and the marriage is then formalized by the bride and groom by way of sexual relations, which must occur following the wedding ceremony and prior to Sunrise. The sexual relationship between the bride and groom is then to be confirmed by a Rabbi.

35 On November 19 2013 Mr. Justice M. Jasmin was the presiding judge. In addition to workers from the Centre and counsel for the Centre, the appellants J.S. and A.H. also appeared in person and with counsel. They indicated to Justice Jasmin that the families had left Quebec and intended to live in the Windsor area; that they had found accommodation that was available to them; that they had met with the landlord who was in the process of confirming their financial status; that they were currently living on a temporary basis in a motel in Chatham pending confirmation of their rental agreement; and, that they had been planning this move to Ontario for some period of time because they had been informed by the DYP that they had to conform to the requirements of the Minister of Education with respect to school attendance by the children or at least instruction in conformity to the Ministry's curriculum.

36 It appears from the decision of Justice Hamel dated November 22 2013 that the appellants had also indicated to Mr. Justice Jasmin that the decision to leave Ste-Agathe had been made some eight or nine days before the visit of the workers from the Centre (the DYP) on November 14 2013; that E.H. had not learned of the imminent departure of most members of the community until the evening of Thursday, November 14; and, that everything had been finalized by Friday, November 15 2013.

37 The appellants told the court that (a) they will not obey the order of the court because of their fear that their children will be apprehended; and (b) that they will not return the children to Quebec or before the court unless the court assures them that the children will not be apprehended.

38 Mr. Justice Jasmin appointed counsel for the children, adjourned the proceedings to November 21 2013 and ordered the children of all three appellant families to appear before the court on that date.

39 On November 21 2013 the same two fathers (two of the appellants) again appeared with a lawyer representing all three appellant families. Contrary to the order of the court, they did not bring the children with them. Mr. Justice P. Hamel was the presiding judge. Justice Hamel ordered the children of all three appellant families to be produced and presented to the court on November 22 2013. A.H. indicated that he was willing to present the children but on certain conditions. J.S. told the court that he had no intention of producing his children and bringing them before the court. The matter was adjourned to November 22 2013.

40 On November 22 2013 none of the appellants or their children appeared in court. Counsel for the appellants told Mr. Justice Hamel that they had returned to Ontario.

41 In his decision, Justice Hamel reviewed the history of this matter and the evidence that had been placed before or heard by the court to that date.

42 He also described the position and submissions of the appellants with respect to jurisdiction. It was apparently their position that the court lacked jurisdiction over the children because (a) the children are no longer residents of Quebec; and (b) the requirements under s. 76 of the legislation for interim relief by the DYP had not been satisfied[14] .

43 On the basis of the evidence before him, including but not limited to

- the removal of the children by the appellants from the jurisdiction of the court in the middle of the night;
- the evidence that the departure of the appellant families appeared hurried and intended to evade the jurisdiction of the court given that their homes were in a state of disarray, with personal effects, jewellery, credit cards and clothing left behind;
- the intentional refusal of the appellants to produce the children to the court in contravention of the order of Mr. Justice Jasmin;
- the consequent breach by the appellants of the rights of the children to participate in the proceedings in Quebec according to law; and,
- the consequent denial by the appellants of the rights of the children to be represented by counsel, to consult with counsel in confidence and to provide instructions,

and for detailed reasons set out in his Ruling, Justice Hamel found that the court retained jurisdiction over the children and that the rights of the children had been breached by the acts and conduct of the appellants.

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[14]Section 76 of the *Youth Protection Act* commences with the requirement that if made by a person other than the child or his parents, the motion, together with notice of the filing date, must be served on the parents, on the child if 14 years of age or over, on the director and on the advocates of the parties in one of the modes provided for in the *Code of Civil Procedure* (chapter C-25), not less than 10 days or more than 60 days before proof and hearing.

44 Pursuant to s. 91 of the *Youth Protection Act*[15], he authorized the DYP to transmit to child protection agencies and police forces throughout Canada, any information likely to ensure the protection of the children and their return before the court in Quebec. He ordered the children to be present at a hearing scheduled for November 27, 2013.

45 On November 27 2013 Mr. Justice Hamel conducted an interim hearing to determine if the children of the appellants were in need of protection and, if so, the appropriate disposition in the circumstances. In addition to the evidence of three workers from the Centre who testified, the court also heard the testimony of a former member of the Lev Tahor community. None of the appellants were present at the hearing to instruct their lawyer who remained in the courtroom to at least observe the proceedings on their behalf.

46 The testimony of the workers was the same as previously set out above. The former member of the Lev Tahor (A.B.) testified as follows. In or about the end of 2009 he started staying with and in the Lev Tahor community. Initially, he stayed for one week and a few weeks later returned and stayed for a period of three weeks. Eventually he remained in the community for almost two years. He left in or about November 2011.

47 A.B. told the court that while he was living in the Lev Tahor community, he started to question the legitimacy of what he saw. His wife was also concerned. They eventually decided to leave[16].

48 On his arrival in the community, A.B. had been placed in charge of the young men over 13 at prayer times. He found the behaviour of the boys challenging and asked the community for advice. A member of the

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[15]This section provides that where the tribunal concludes that the rights of a child in difficulty have been wronged by persons, bodies or institutions, it may order the situation to be corrected.

[16]A.B. testified that when the community learned of their plans, his wife was separated from him and required to live in another home. During their separation, they were allowed to spend only 1 1/2 hours together in the day time. His wife was subjected to negative opinions from the other members about her husband including the opinion that he suffered from a borderline personality disorder and she was pressured to divorce him. The forced separation ended when A.B. agreed to make a formal oath of allegiance to the Lev Tahor community and his wife agreed to a number of conditions.

community C.A.A. suggested that he hit the troublemaker with a wire coat hanger.

49 A.B. testified that although he had not seen this method of discipline used by anyone himself, he later learned that corporal punishment was a usual practice of discipline in the community. Every classroom of the young (small) boys' school, for example, was equipped with a wooden stick or rod to hit those boys who did not behave. When A.B. worked as a substitute teacher in this school (ages 8 to 13 years), he was instructed to first warn a child who spoke without permission or misbehaved and then slap the child on the face with an open hand when necessary.

50 A.B. testified that he did not act as a 'substitute teacher' on many occasions but recalls using this method of discipline three times on his students. He did not teach anything but was required to supervise their prayers.

51 The community school had one class for each level of study but would combine classes at certain times. There were four classes in all, comprised of boys from approximately 3 to 5 years of age; approximately 5 to 7 years of age; approximately 7 to 10 years of age; and, approximately 10 to 13 years of age.

52 According to A.B., the boys learned the Hebrew alphabet, reading skills and prayers in the lower levels of study and the Bible (and Jewish commentaries thereon) in the higher levels. The goal of their education was to enable them to understand the teachings of the Rabbi.

53 The boys were not taught any secular subject at all. The boys were to be occupied with holy studies. The books they studied were written in Hebrew with some available in Aramaic. Prayer books would also include Yiddish translation.

54 The girls on the other hand were taught rudimentary English and math. The educational goal for the girls was to enable them to manage a household and pay bills.

55 A.B. testified that the hours of study depended on the level. The youngest children would be in school for only a couple of hours per day. The older children would be in school from approximately 8:00 in the morning until late afternoon. On a number of occasions, the members of the community who were teachers would not appear for their classes and boys would approach A.B. and ask him to be their teacher.

56 Most of the children spoke exclusively Yiddish because it is the traditional language of the Jews. A small minority also knew some Hebrew,

although modern spoken Hebrew was considered to be an implement of the Zionist movement and the ideology of the Lev Tahor community was to combat and resist anything connected to Zionism. The children were taught to report to the Rabbi anyone who used English or Hebrew words.

57 A.B. also testified that he heard the Rabbi warn the appellant S.S. to comply with the rules "lest bad things happen" and that he would "not want more of that" in reference to the death of the appellant's baby.

58 According to A.B., another form of punishment in the community was the removal of the offender's wife, husband or child(ren). On numerous occasions, arrangements were made for the children of other community members to live with A.B. because their parents were not able to raise their children the correct way. One child who was taken from his parents to live with A.B. was only four years of age. A.B. would learn that the child had been returned to his family when they did not come to his home after school.

59 A.B. testified that he married his wife in the Lev Tahor community in or about 2010. His wife was 15 years of age at the time of their wedding. The Rabbi had called A.B. into his office and told A.B. that a match that had been made between a girl, who was not enthusiastic enough about life in the Lev Tahor community, and a boy he described as a "piece of cattle/sheep", meaning that he was simple-minded and unable to take care of himself. According to A.B., the Rabbi told him that the girl would need a strong husband to guide her the right way and that the boy needed a girl who would be a substitute mother. The girl next in line to become engaged was the kind of girl this boy needed. He asked A.B. if he would be interested in a match with the girl who needed a "strong husband", a girl he referred to as A-minus. A.B. agreed. The following evening, the Rabbi called A.B. into his office and confirmed the engagement. The Rabbi also confirmed that in accordance with their practice, A.B. would not meet his wife until the wedding. A date was set for two months hence.

60 In the meantime, A.B.'s future wife was removed from her home and placed in the home of another member of the community for the purpose of re-education given her parents' failure to educate her properly in their own home. The first time A.B. saw his bride was at their wedding.

61 When asked if he had attended or participated in other weddings in the Lev Tahor community in which children who were less than 16 years old were married, A.B. confirmed that he had attended the weddings of

girls under the age of 16 and named approximately ten such brides and their grooms.

62 According to A.B., the appellant R.(H.)K. was just 14 when she married her husband, the appellant E.K. It was his evidence that the Rabbi insisted that the children in the community be married prior to the age of 16 in order to comply with Jewish law. It was a positive commandment that a man get married on reaching the age of 13.

63 In explaining to the court why he had left Lev Tahor and reported what he had seen and heard to the authorities, A.B. testified that he believed that he was obligated to help Jewish children who are in trouble and he believed that the conditions in which the children were living were damaging to them. It was his opinion that due to their isolation and lack of education, the children in the Lev Tahor community would not be able to live an independent life, free to make choices and decisions as to how she/he lives.

64 In his oral decision, Mr. Justice Hamel stated at the outset that at that stage of the proceedings, in the absence of evidence to the contrary, the allegations had to be taken as proven. He then took into account the significance of the allegations including sexual abuse (forced underage marriage and sexual relations); lack of attention to the educational needs of the children; physical abuse; and neglect of health care. He noted that despite the gravity of the situation, despite the seriousness of the concerns of the DYP, the supervision of and intervention by the Centre with the appellant families permitted at least minimum protection for the children. He accepted the evidence from the DYP that the objective of the DYP was, through long-term intervention, to assist the community in modifying bit by bit, some of the practices with respect to the children[17].

65 He was gravely concerned that the appellants did not appear to respect many rights of the children including their right to an investigation; their right to a hearing before an impartial judge; and their right to be represented by a lawyer and to privileged communications with that lawyer. In his view, the escape of the appellants had placed the children in a situation that was unstable, precarious and harmful to their security and

[17]Minutes of the decision dated November 27 2013 of Mr. Justice Hamel

development in the short term. The flight to Ontario had created a serious risk to the children[18].

66 In light of all of these circumstances, Mr. Justice Hamel ordered the apprehension of the children of the appellants and their placement into foster care for a period of 30 days during which time they would be medically examined to ensure their wellbeing. The appellants were granted supervised access to the children, the frequency and timing of which would be determined by the Centre.

67 On February 21 2014 the Superior Court of Quebec dismissed the appeal of this decision on the basis that the time limits for the appeal had expired.

The Proceedings in Ontario

68 On November 19 2013 a supervisor with the Chatham-Kent Children's Services ("the agency") received information from Mr. Baraby that Uriel Goldman, a member of the Lev Tahor community, had sent an email to the DYP indicating that the appellants J.S. and S.T. were currently staying at the Ramada Inn in Windsor, Ontario. The supervisor contacted, in turn, the Director of Services — Intake for the Windsor-Essex Children's Aid Society ("the C.A.S.") and conveyed the information she had received from Mr. Baraby. A worker from the C.A.S. learned that a member of the community, Nachman Helbrans, had been assisting these appellants who would be moving to Chatham on November 27 2013.

69 On November 27 2013 two workers from the agency went to the address in Chatham that had been provided as the new home address for the appellants J.S. and S.T. and their children. At this address, the workers spoke to another member of the community, Mayer Rosner, who indicated that the appellants J.S. and S.T. had yet to arrive. On behalf of the workers, Mr. Rosner made a phone call and determined that the appellants would be arriving at the address 1½ hours later. He told the workers that the family had been delayed because they had gone to the immigration office and were arranging for health cards. He also indicated that

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[18]In Justice Hamel's opinion, based on all of the evidence before him, the actions of the appellants constituted a flight to Ontario to escape the reach of the Quebec court in its determination to protect their children rather than simply a re-location in the ordinary sense of that word.

some of the children of J.S. and S.T. had already arrived in Chatham but he was not sure with whom they were staying.

70 The workers returned to the home 1½ hours later and spoke to J.S. who had arrived with his family. They were allowed to enter the home where they found S.T. and some children, including a baby. They saw food, mattresses, a stove, garbage bags filled with clothes, diapers and wipes, a playpen and a crib that had yet to be assembled. On request, J.S. produced passports and immigration papers as well as a receipt for health cards. All the children were seen by the workers to be smiling and helping to put things away. J.S. permitted photographs to be taken of all nine passports, which included each of the appellants and seven of their eight children.

71 On December 4 2013 the agency requested a warrant for the apprehension of the children for the purpose of assisting the DYP in the execution of the order of Mr. Justice Hamel dated November 27 2013 requiring the children to be apprehended and returned to Quebec. On December 7 2013 the agency was notified that the Justice of the Peace had declined the request. It is the position of the agency that the Justice of the Peace erred in doing so.

72 On December 10 2013 the agency served and filed three Applications, each of which was identified as an Application (General) (*Child and Family Service Act* Cases other than Child Protection and Status Review). In the Application, the agency was named as the applicant and the appellants were, in turn, named as the respondents.

73 In the Applications[19], which are identical but for the names of the parents and the children, the agency sought the following relief:

(a) an order allowing the agency to assist the child welfare authorities in Quebec in the execution of the court order dated November 27 2013 so that the children may be returned to the child welfare authorities in accordance with the court order made in the jurisdiction where the children habitually reside;

(b) in the alternative, an order requiring the agency or the appellants to return the children to the child welfare authorities in Quebec in accordance with the court order made in the jurisdiction where the children habitually reside;

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[19]For the sake of simplicity, I shall refer to all three Applications before the court as "the Application" given their identical nature.

(c) in the alternative, an order recognizing and enforcing the terms of the court order made in the jurisdiction where the children habitually reside and thereby secure the prompt return of the children to the child welfare authorities in Quebec in accordance with the order;

(d) in the alternative, an order authorizing the agency to apprehend the children as agent for the child welfare authorities in Quebec for the purpose of giving effect to the rights of the child welfare authorities in Quebec pursuant to the court order made on November 27, 2013;

(e) an order for the assistance of the police; and

(f) various other orders regarding publication of information.

74 As the applicant, the agency referred to its reliance on s. 146 of the *Court of Justice Act*[20]; ss. 36, 40(3) and 46 of the *Children's Law Reform Act*[21]; s. 45(7) of the *Child and Family Services Act*[22] (with respect to non-publication); the *Convention on Civil Aspects of International Child Abduction*; and, the common law.

75 In support of the Application, Ms. Aline Beaumier from the Centre filed an Affidavit dated December 10 2013, which along with the exhibits attached thereto described for the Ontario court the proceedings and evidence that had resulted in the order of Mr. Justice Hamel on November 27 2013. She filed a further Affidavit dated January 7 2014 wherein she indicated that the DYP had found foster families who are all from the Hassidic Community of Montreal and respect Jewish rituals and way of life. Ms. Jennifer Doran, a worker with the agency, also filed an Affidavit describing the events since November 19 2013.

76 Interestingly, in response to the Application, the court did not receive any direct or indirect evidence at all from the appellants who are the named respondents in the proceeding. The court did receive, however, a joint affidavit[23] dated December 16 2013 from three other members of

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[20]R.S.O. 1990, c. C.43

[21]R.S.O. 1990, c. C.12

[22]R.S.O. 1990, c. C.11

[23]The admissibility of which is subject to question given that the Rules do not envisage Affidavits in such form.

the Lev Tahor community, namely, Uriel Goldman, Nachman Helbrans, and M.R hereinafter referred to as the "Goldman Affidavit".

77 In this affidavit, Uriel Goldman, Nachman Helbrans, and Mayer Rosner identified themselves as "community organizers for the Lev Tahor community". Nachman Helbrans is apparently a son of the founder Shlomo Helbrans The three men deposed that in their capacity as leaders of the community, they had knowledge of the matters contained in their affidavit. They then went on to describe their religious beliefs, practice and obligations as well as a history of their contact with the DYP in Quebec. I have included most if not all of their evidence in my review above.

78 It also bears noting that at one point in their affidavit, Mr. Goldman, Mr. Helbrans and Mr. Rosner depose that "The (sic) Respondents were never advised by the Quebec agency on November 14 2013 what the nature of the allegations were against them other than being informed that there was an issue with the Quebec education curriculum". Given that none of the affiants are the respondents in this proceeding and were not in attendance at the meeting in Quebec on that date, it is difficult to understand how they knew what the respondents were told or not told. If they relied on information provided to them by the respondents, then they ought to have complied with r. 14(19) of the *Family Law Rules*.

79 Ms. Beaumier replied to this joint affidavit and denied some of the allegations regarding contact between the Centre and the community on November 4 2013.

80 Further affidavits were then filed by members of the Lev Tahor community in response to the Application but none were from the respondents/appellants themselves.

81 One of the response affidavits described the bus trip from Quebec to Ontario; another was the affidavit from the real estate agent referred to above; and a third was a second affidavit from Mayer Rosner dated January 7 2014 and was in response to Ms. Beaumier's reply affidavit dated December 30 2013.

82 Based on the allegations contained in these documents, it became clear that the recollections of the affiants with respect to if and when meetings had occurred and what transpired during meetings in Quebec had diverged.

83 On December 19 2013 the appellants filed a Notice of Constitutional Question and indicated an intention to claim a remedy pursuant to s. 24(1) of the *Canadian Charter of Rights and Freedoms* in relation to the

agency's request for an order to apprehend the children for the purpose of assisting in the enforcement of the order of the court in Quebec dated November 27 2013.

84 The application was heard in the Ontario Court of Justice on January 10 2014 by Mr. Justice S. Fuerth. It is his order rendered at the conclusion of the hearing that is the subject of this appeal.

The Order of Justice Fuerth dated February 3 2014

85 In his decision, Mr. Justice Fuerth framed the issues before him as follows:

(a) Does the Ontario Court of Justice have jurisdiction to grant the relief sought under s. 40 of the *CLRA*?

(b) Does the CAS have standing to bring an application under the *CLRA*?

(c) Should the Ontario Court of Justice recognize the court order from Quebec and make an order accordingly?

(d) Was there an infringement of the *Charter of Rights* and, if so, what is the appropriate remedy?

86 Justice Fuerth answered in the affirmative to the first three questions and in the negative to the fourth. In his review of s. 19, s. 22, s. 40 and s. 41, he determined

(a) that the touchstone for jurisdiction of the Ontario Court was the habitual residence of the child or children at the time of the application;

(b) that it would be impractical at best and potentially harmful at worst if the CAS were required to conduct a separate and new investigation into all of the issues currently before the court in Quebec simply because the parents had decided as a tactical manoeuver to absent themselves from Quebec in order to frustrate the process of justice that had commenced;

(c) the respondents were given oral notice or the proceeding in Quebec on November 14 2013;

(d) the relocation to Ontario was a flight in haste in the face of a proceeding perceived by the community to place the children at risk of apprehension; (e) the respondents were given an opportunity to be heard in Quebec before any order was made by the court;

(f) there was no evidence before him that the law in Quebec that was applied by the court did not require consideration of the best interests of the children;

(g) the order in Quebec was not made contrary to public policy;

(h) the children were habitually resident in Quebec at the time the order was made by the court in that jurisdiction.

87 Mr. Justice Fuerth then went on to determine whether the provisions of the *CLRA* were available to natural persons only. He found that the legislation was not limited to natural persons on the basis that is the legislature had intended to limit the definition, it would have "said so in the clearest of language". He wrote as follows, "In this case, "person" had the meaning intended by the Legislature as reflected in the *Legislation Act*, to include corporations. The term was not otherwise defined in the Children's Law Reform Act. An examination of section 46 of the CLRA, i.e. the Hague Convention section, clearly contemplated the return of children into the care of "institutions". Reading Part III as a whole, the purpose of the Act was clearly intended to provide a legislative framework for the recognition of an extra-provincial order and to recognize the jurisdiction of that extra-provincial court based upon the consideration of the habitual residence of the children who had been removed. If, after judicial review, it was determined that the extra-provincial order ought to be recognized (and s. 41 of the CLRA was mandatory in that regard), effect should be given to the order...The recognition of the Society's standing in this case flowed from their statutory responsibilities for the protection and welfare of children within its territorial jurisdiction."

Issues

88 Did the judge hearing the application err on a question of pure law?

89 Did the judge hearing the application make a palpable and overriding error in finding that

(a) the respondent was entitled to rely on the enforcement provisions of the *CLRA* and thereafter order the Respondent to deliver the children to Quebec in keeping with the order of Justice Hamel dated November 27 2013?

(b) the appellants E.K. and R.(H.) K. had received proper notice of the proceedings in Quebec?

90 The parties agree that the standard of review in this case in one of correctness.

Analysis

(a) Enforcement per se of the order dated November 27 2013 from the Chambre de la Jeunesse of the Quebec Court pursuant to the common law

91 The jurisdiction of any court in Canada with respect to child protection or child welfare matters ends at the borders of the province of that court. There is currently no mechanism in place that provides for the enforcement of non-monetary judgments outside of the province where the court sits save and except where specifically legislated.

92 The lack of judicial resource with respect to enforcement of non-monetary orders was addressed in 2006 by the Supreme Court of Canada in *Pro Swing Inc. v. ELTA Golf Inc.*.[24]. In that case, Pro Swing sought to enforce a non-monetary judgment in the form of a consent decree and a contempt order that had been granted by a court in the United States. In her decision, Madam Justice Deschamps on behalf of the majority, wrote as follows, "The traditional common law rule is clear and simple. In order to be recognizable and enforceable, a foreign judgment must be (a) for a debt, or definite sum of money ...; and (b) final and conclusive, but not otherwise."[25]

93 The Court went on to observe however that, "The traditional common law rule that limits the recognition and enforcement of foreign orders[26] to final money orders should be changed. Such a change requires a cautious approach and must be accompanied by a judicial discretion enabling the domestic court to consider relevant factors so as to ensure that the orders do not disturb the structure and integrity of the Canadian legal system ... the conditions for recognition and enforcement can generally be expressed as follows: the judgment must have been rendered by a court of competent jurisdiction and must be final, and it must be of a

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[24][2006] 2 S.C.R. 612 (S.C.C.)

[25]*Pro Swing*, ibid

[26]For the sake of clarity, in civil and family law matters, an extra-provincial order or an order that is rendered beyond the provincial borders of the court called upon to enforce it, may also be referred to as a 'foreign order' in the sense that it is foreign to the court that is asked to enforce it.

nature that the principle of comity requires the domestic court to enforce."[27]

94 In writing for the dissent, the Chief Justice agreed with the majority opinion that the common law should be extended to permit the enforcement of non-monetary judgments in appropriate circumstances; "The common law must evolve in a way that takes into account the important social and economic forces that shape commercial and other kinds of relationships. That evolution must take place both incrementally and in a principled way, taking into account, in the context of the foreign non-money judgments, the underlying principles of comity, order and fairness ... [however] courts should decline to enforce foreign non-money orders that are nor final and clear."

95 The purpose of my reference to this case is to demonstrate that the issue of the enforcement of non-monetary orders from outside Ontario is not new. The Supreme Court of Canada addressed the issue of enforcement seven years ago. But even if the common law had developed in the manner suggested by the Supreme Court of Canada since 2006, the requirement that the order be a final order is not met in this case. The order of Mr. Justice Hamel is clearly a *temporary* order. Enforcement of his order is therefore not available to the agency even within the common law context envisaged by the Supreme Court of Canada.

96 I therefore find that the court in Ontario does not have the jurisdiction *per se* under the common law to enforce the order of Justice Hamel dated November 27 2013. It is neither a monetary order nor is it final.

(b) Enforcement of the order pursuant to the provisions of the Child and Family Services Act[28]

97 The *Child and Family Services Act* ("the *CFSA*") does not include provisions for the enforcement by an agency or society of an order rendered outside of Ontario.

98 The movement of families who are under the supervision of child welfare agencies in Ontario, however, is not uncommon. Family courts in Ontario frequently deal with children who have been moved by their parents from place to place within the borders of a province for a variety of reasons with and without notice to the supervising agency.

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[27] *Pro Swing*, headnote

[28] R.S.O. 1990, c. C.11

99 From time to time, families who are under the supervision of an agency also move to or from another province with or without notice to the supervising agency involved. Indeed, affidavits with the court by agencies or societies are often replete with the transient history of the families and children they are concerned with.

100 In cases where the family who is under the auspices of an agency has moved to another locale within a province, the practice for the supervising agency, once the family has been located, has been to (a) obtain a warrant from the court for the apprehension and return of the children to the control of the supervising agency; or (b) to transfer the file to the agency that has jurisdiction over the place where the children reside for continuation of the proceeding; or, (c) to convey the information and evidence in support of their concerns to the agency that has jurisdiction of the location where the children reside to allow that agency to assess the situation under its own mandate and to apply the provisions of the *CFSA* as its sees fit in with respect to the family in its new setting. Should the family move to another province, option (c) is the only option available.

101 For reasons known only to the agency in the case at bar, the Centre and the agency have not adopted option (c). Instead, the agency has chosen a unique way of proceeding and that is pursuant to the *CLRA* legislation which does include enforcement provisions in certain circumstances.

(c) Enforcement of the order pursuant to the provisions of the Children's Law Reform Act[29]

102 Section 1 of the *CFSA* provides as follows:

> (1) The paramount purpose of this Act is to promote the best interests, protection and well being of children.
>
> (2) The additional purposes of this Act, so long as they are consistent with the best interests, protection and well being of children, are:
>
> 1. To recognize that while parents may need help in caring for their children, that help should give support to the autonomy and integrity of the family unit and, wherever possible, be provided on the basis of mutual consent.

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[29]R.S.O. 1990, c. C.12

2. To recognize that the least disruptive course of action that is available and is appropriate in a particular case to help a child should be considered.

3. To recognize that children's services should be provided in a manner that,

   i. respects a child's need for continuity of care and for stable relationships within a family and cultural environment,

   ii. takes into account physical, cultural, emotional, spiritual, mental and developmental needs and differences among children,

   iii. provides early assessment, planning and decision-making to achieve permanent plans for children in accordance with their best interests, and

   iv. includes the participation of a child, his or her parents and relatives and the members of the child's extended family and community, where appropriate.

4. To recognize that, wherever possible, services to children and their families should be provided in a manner that respects cultural, religious and regional differences.

103 The *CLRA*, on the other hand, is intended to be a comprehensive scheme for dealing with custody and access problems, including enforcement.[30] It concerns the status of the children rather than the parents and is intended to remove disabilities suffered by children born outside of marriage. The purpose of the legislation is to declare that all children should have equal status including those children born inside and outside of the institution of marriage.

104 Unlike *CFSA*, certain sections of the *CLRA* specifically provide for the enforcement of extra-provincial orders.....

> s. 41 (1) Upon application by any person in whose favour an order for the custody of or access to a child has been made by an extra-

[30] *Frame v. Smith* (1987), 9 R.F.L. (3d) 225 (S.C.C.)

provincial tribunal, a court shall recognize the order unless the court is satisfied,

(a) that the respondent was not given reasonable notice of the commencement of the proceeding in which the order was made;

(b) that the respondent was not given an opportunity to be heard by the extra-provincial tribunal before the order was made;

(c) that the law of the place in which the order was made did not require the extra-provincial tribunal to have regard for the best interests of the child;

(d) that the order of the extra-provincial tribunal is contrary to public policy in Ontario; or

(e) that, in accordance with section 22, the extra-provincial tribunal would not have jurisdiction if it were a court in Ontario.

(2) An order made by an extra-provincial tribunal that is recognized by a court shall be deemed to be an order of the court and enforceable as such.

. . .

(4) A court that has recognized an extra-provincial order may make such further orders under this Part as the court considers necessary to give effect to the order.

105 In addition, s. 46 of the *CLRA* confirms that the *Convention on Civil Aspects of International Child Abduction* is in force in Ontario and that the provisions thereof are law in Ontario in the event of the international movement of a child.

106 It is understandable therefore why the agency applied to the court for a remedy under the *CLRA*. The provisions in s. 46 are clear and do not include the requirement that the order be a *final* order.

107 As I have indicated above, the agency has relied on the provisions of ss. 36, 40(3) and 46 of the *CLRA*.

108 Section 36 provides as follows,

s. 36(1) Where a court is satisfied upon application by a person (my emphasis) in whose favour an order has been made for custody of or access to a child that there are reasonable and probable grounds for believing that any person is unlawfully withholding the child from the applicant, the court by order may authorize the applicant or someone on his or her behalf to apprehend the child for the purpose of

> giving effect to the rights of the applicant to custody or access, as the case may be.
>
> (2) Where a court is satisfied upon application that there are reasonable and probable grounds for believing,
>
> (a) that any person is unlawfully withholding a child from a person entitled to custody of or access to the child;
>
> (b) that a person who is prohibited by court order or separation agreement from removing a child from Ontario proposes to remove the child or have the child removed from Ontario; or
>
> (c) that a person who is entitled to access to a child proposes to remove the child or to have the child removed from Ontario and that the child is not likely to return,
>
> the court by order may direct a police force, having jurisdiction in any area where it appears to the court that the child may be, to locate, apprehend and deliver the child to the person named in the order.

109 The fundamental issue and first issue to be decided therefore, with respect to the application of this legislation to the facts in this case, turns on whether the agency has standing[31] to apply for a remedy under the *CLRA*.

110 In his decision, Justice Fuerth decided that the agency had such standing. He wrote as follows,

> It was submitted that the *Children's Law Reform Act* was limited in application to applications by natural persons. With the greatest respect I disagree. Had the legislature sought to limit applications to natural persons, it would have said so in the clearest of language. For example, "parent" is often used in legislation to denote a certain class of natural persons, by way of relationship to the child, such as "mother" or "father". Persons who are described in this way that is by way of relationship through blood or marriage are intended to mean natural persons.
>
> In this case, "person" had the meaning intended by the Legislature as reflected in the *Legislation Act, 2006*, being Schedule F to the *Access to Justice Act, 2006*, S.O. 2006, c. 21, to include corporations. The term was not otherwise defined in the *Children's Law Reform Act*. An examination of section 46 of the *Children's Law Reform Act*, i.e.

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[31] legally protectable stake or interest

> the Hague Convention section, clearly contemplated the return of children into the care of "institutions". Reading Part III as a whole, the purpose of the Act was clearly intended to provide a legislative framework for the recognition of an extra-provincial order and to recognize the jurisdiction of that extra-provincial court based upon the consideration of the habitual residence of the children who had been removed. If, after judicial review, it was determined that the extra-provincial order ought to be recognized (and section 41 of the *Children's Law Reform Act* was mandatory in that regard), effect should be given to the order.

111 The *CLRA* does not define the word 'person' and therefore Justice Fuerth properly turned to the *Legislation Act*[32] ("the *Act*") for assistance with respect to whether the agency which is an incorporated body was a 'person' to which the provisions and benefits of the legislation could apply in this case.

112 The relevant sections of the *Act* fall within Part VI entitled 'Interpretation'. Section 46 indicates that every provision of this Part applies to every Act and regulation. Section 87 specifies that 'person' includes a corporation.

113 Were the provisions of the *Act* to be limited to these two sections, Justice Fuerth would clearly have been correct in his finding as set out above. But, with due respect, the relevant provisions of the *Act* are not limited to only these two sections in this regard.

114 Section 47 of the *Act* is also applicable and states as follows,

> Section 46 applies unless,
>
> (a) a contrary intention appears; or
>
> (b) its application would give to a term or provision a meaning that is inconsistent with the context.

115 Section 50 of the *Act* provides further direction;

> The interpretation and definition provisions in every Act and regulation are subject to the exceptions contained in section 47.

116 And finally, sections 85 and 86 of the *Act* assist in the analysis as follows,

> If a term is defined, other forms of the term have corresponding meanings.

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[32]R.S.O. 2006 c. 21

> Terms used in regulations have the same meaning as in the Act under whose authority they are made.

117 I turn then to my opening statement in this decision, namely, the crucial question to be answered: In light of these qualifying provisions of the *Legislation Act*, what is the context of the *CLRA*?

118 I have already referred to the intention of the *CLRA* when it was passed into law.

119 In the *CLRA*, the first use of the word 'person' is found in s. 1 where the legislation provides that for all purposes of the law of Ontario, a "person is the child of his or her natural parents and his or her status as their child is independent of whether the child is born within or outside marriage." Clearly, the use of the word 'person' in this section contemplated a 'natural person' and not a corporation.

120 The second time the term 'person' is used in the *CLRA* is in s. 2(1) which is entitled "Rule of Construction". This section states as follows,

> For the purposes of construing any instrument, Act or regulation, unless the contrary intention appears, a reference to a person...or class of persons described in terms of relationship by blood or marriage to another person, shall be construed to refer to or include a person who comes within the description by reasons of the relationship of parent and child as determined under section 1.

121 Clearly, a corporation would not qualify as a person or a member of class of persons who may be described in terms of relationship by blood or marriage to another person.

122 Section 4 of the *CLRA* refers to male person in reference to an application for a declaration of paternity and a female person in reference to an application for a declaration of maternity. Section 10 provides that if a person named in an order under subsection (1) refuses to submit to the blood test or DNA test, the court may draw such inferences as it thinks appropriate.

123 Under s. 21 of the *CLRA*, a parent of a child or any other 'person' may apply to a court for an order respecting custody of or access to the child or determining any aspect of the incidents of custody of the child. Given that the definition of 'person' is not modified by the nature of the claim that is sought, it is difficult to conceive of a corporation having the desire or standing to seek an order for access to a child in the context of this section.

124 My view that the inclusion of a corporation as a 'person' in the *CLRA* would import a meaning that is inconsistent with the context of the legislation is bolstered by the requirement in section 21(2) of the *CLRA* that an application for custody of or access to a child must be accompanied by an affidavit of the person applying for custody or access containing "information respecting the person's current or previous involvement in any family proceedings, including proceedings under Part III of the *Child and Family Services Act* (child protection), or in any criminal proceedings." Compliance with this section is to alert the court to any concerns a proposed caregiver may present with respect to the health, safety, welfare and best interests of the child. Again, it is difficult if not impossible in these circumstances to conceive of a corporation being involved in child protection proceedings in the context intended here.

125 Finally, s. 21.2 of the *CLRA* which is entitled 'CAS Records Search, Non-parents' provides, in my view, a clear understanding of the legislative intent in reference to the concept or definition of 'person' in the *CLRA*. S.21.1 reads as follows:

> **Definition**
>
> (1) In this section,
>
> "society" means an approved agency designated as a children's aid society under the Child and Family Services Act,
>
> **Request for Report**
>
> (2) Every person who applies under section 21 for custody of a child and who is not a parent of the child shall submit a request, in the form provided by the Ministry of the Attorney General, to every society or other body or person prescribed by the regulations, for a report as to,
>
> (a) whether a society has records relating to the person applying for custody; and
>
> (b) if there are records and the records indicate that one or more files relating to the person have been opened, the date on which each file was opened and, if the file was closed, the date on which the file was closed.
>
> **Request to be filed**
>
> (3) A copy of each request made under subsection (2) shall be filed with the court.

Report required

(4) Within 30 days of receiving a request under subsection (2), a society or other body or person shall provide the court in which the application was filed with a report, in the form provided by the Ministry of the Attorney General, containing the information required under that subsection, and shall provide a copy of the report to the requesting party.

126 It is clear from this section of the *CLRA* that there is a distinction in the legislation between the concept of 'person' and a corporation such as a society which in this case is Chatham-Kent Children's Services. "Person" and 'society' are two distinct and separate entities requiring an interface with respect to applications for custody of a child by a person who is not a parent of the child.

127 The application of the definition of person to a corporation would clearly give to this section a meaning that is inconsistent in and of itself and within the context of the *CLRA*. This section would make no sense were a society to also be a 'person' under this legislation.

128 For these reasons, I find that Justice Fuerth erred in his finding that (a) the agency was a person within the context of the *CLRA*; and (b) that the agency had standing to commence this Application.

129 The *Hague Convention* referred to by His Honour is a very efficient tool conceived by the international community to dissuade parents from illegally removing their children from one country to another[33] . It is of international application to its Contracting States. The reference in Article 3 of the *Convention* to the attribution of rights of custody to a person, an institution or any other body under the law of the State in which the child was habitually resident does not import, in my view, a 'corporation' or 'institution' into the meaning of 'person' in the provincial legislation, the *CLRA*.

130 In my view, extension of the definition of "person" to include a corporation has the potential to lead to an absurd result such as claims by corporations who are in business or offer services other than the protection of children.

131 I am also satisfied that the cases referred to by Justice Fuerth in his decision neither support his conclusion that the meaning of 'person' in

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[33] *Jabbaz v. Mouammar*, [2003] O.J. No. 1616 (Ont. C.A.)

the *CLRA* includes a 'corporation' nor support the enforcement of the order of Mr. Justice Hamel in the manner he has sanctioned.

132 In *Bonczuk v. Bourassa*[34], the respondent father had obtained an order from a Quebec judge finding the applicant mother in contempt and transferring custody of the couple's two children to the respondent. Previously, another Quebec judge had granted custody to the applicant. The respondent obtained the assistance of a municipal police force to enforce the order in Mississauga, Ontario where the applicant lived with the children. The applicant applied for an *ex parte* order returning the children to her and restraining the Ontario police from acting on the Quebec judgment. The order was granted. The court found that the Ontario police did not have the authority to act in aid of a civil judgment. That authority was conferred on the sheriffs by virtue of s. 212 of the *Courts of Justice Act*, 1984 (Ont.), c. 11. The court also held that in certain circumstances, s. 37 of the *Children's Law Reform Act* authorizes a court to direct a police force to assist in the execution of a custody order but that the provision is not available to an individual who has obtained a custody order from an extra-provincial tribunal but has not yet commenced enforcement proceedings in Ontario.

133 In my view, this case is clearly and significantly distinguished from the case at bar on the basis that it concerned two *natural* persons, namely, the parents of the children and did not involved an incorporated party.

134 In *Société de l'aide à l'enfance d'Ottawa c. L. (I.)*[35], a decision of the Ontario Divisional Court, the appellant was the maternal grandmother of two children in a child protection proceeding. The children had been temporarily placed by their mother with their maternal grandmother in Gatineau, Quebec while their mother, who had been receiving assistance from the Ottawa C.A.S., resided in Ottawa. The plan was for the children to ultimately return to live with their mother in Ottawa.

135 The Ottawa C.A.S. advised the Centre in Quebec of their concerns about the two children and began communicating with the Centre as soon as the children started living with their grandmother again in Quebec. Matters escalated when the grandmother advised a worker from the Centre that she could no longer handle the children, that she was over-

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[34](1986), 55 O.R. (2d) 696 (Ont. H.C.)

[35]2012 ONSC 2808 (Ont. Div. Ct.)

whelmed, and that she wanted the children to be placed in a foster home. Meanwhile, the Ottawa C.A.S. had concerns about the quality of care the children were receiving from their grandmother, and the viability of the mother's plan to have the children reside with her in Ottawa.

136 The Ottawa C.A.S. recognized its jurisdictional limitations and obtained the consent and assistance of the Centre to apprehend the children from their grandmother in Gatineau, Quebec. On July 9 and 10 2009, in the presence of a representative from the Centre, the Ottawa C.A.S. attended the residence of the grandmother in Gatineau to apprehend the children. One child was apprehended on the first day and the second child was apprehended on the next. Both children were brought to a place of safety in Ontario.

137 The court found that,

> Without doubt, there does not exist any statutory authority permitting the C.A.S. to apprehend children outside their territory in another province. However, this is a common problem in communities sharing a border with two different provinces...
>
> Notwithstanding that there is no statutory authority authorizing such a scenario, we agree with the conclusion of the motions judge that the apprehension of the children in these circumstances was legal. The collaborative approach between the C.A.S. and the CJO (the Centre) is a practical solution that best serves the interests of children when the C.A.S. works in a region that borders another province, and when the children are habitually resident in the jurisdiction of the C.A.S....
>
> (W)e confirm the conclusion of the motions judge that the C.A.S. has the power to apprehend children in another province with the consent and cooperation and working in tandem with the child protection agency in Quebec when the children are habitually resident in the jurisdiction of the C.A.S. ...The motions judge concluded that the children's habitual residence had been in Ottawa since November 2007. This conclusion is amply confirmed by the facts...the mother chose to have the children placed with their grandmother rather than in a foster home; the representative from the C.A.S. continued to have contact with the children, the mother and with the appellant by going to the appellant's home ...
>
> As the children were habitually resident in Ontario, the Superior Court of Justice of Ontario has jurisdiction to deal with this child protection proceeding...

> The caselaw is clear that even if the apprehension was illegal (which was not the finding of the motions judge or of this court), the Ontario Superior Court of Justice has jurisdiction to hear the motion for child protection, as the children were habitually resident in the Province of Ontario at the date of their apprehension.

138 In this latter case, unlike the case at bar, the entire proceedings from apprehension to appearance before the court and thereafter occurred under the auspices of the *CFSA* as a child protection proceeding, *not* as a custody proceeding. Secondly, unlike the case at bar, it was significant to the court that the communities of Gatineau and Ottawa shared a provincial border unlike Chatham and St. Agathe. Gatineau is located on the northern banks of the Ottawa River and together with the City of Ottawa forms Canada's 'National Capital Region'. Finally, the agency in the case at bar attempted to obtain a warrant to apprehend the children in co-operation with the Centre in Ste-Agathe but were unsuccessful in doing so.

139 In my view, for all of these reasons, the enforcement provisions under the *CLRA* are not available to the Chatham-Kent Children's Services.

(d) The Absence of Enforcement Provisions in the CFSA

140 I agree with the submissions of counsel for the agency that the *CLRA* and the *CFSA* are not necessarily mutually exclusive nor are they necessarily in conflict.

141 But for the following reasons, I am also of the view that the lack of enforcement provisions with respect to extra-provincial orders in child protection matters was intentional on behalf of the legislature for the following reasons.

142 It must never be forgotten that the authority for child protection agencies is derived from the state no matter where the agency is located. Like all federal and provincial law enforcement agencies including the police, immigration, tax and other state funded and empowered investigative bodies, the function of the state agency is to ensure that private citizens comply with the law. The accountability of a state agency in the exercise of its intervention in the private affairs and lives of citizens is properly subject to scrutiny.

143 In child protection matters, an order of the court that sanctions intervention by an agency, sanctions intervention of the state. It is neither personal to the workers involved nor the Executive Director of the agency

144 In my view, the lack of an enforcement provision in the *CFSA* recognizes a number of factors in this context:

(a) There is a fundamental premise that if children are at risk, the *local* agency that acts on behalf of the state where the children are located has and must have the power to act on the basis of its own information. As stated by Blishen J. in *Children's Aid Society of Ottawa v. C. (H.)* "Children's Aid Societies have the mandate to investigate allegations that children within their territorial jurisdictions may be in need of protection and to take action to protect those children, including apprehending the children or bringing cases before the court where necessary, regardless of the 'ordinary residence' of the children. Whether the children are in the jurisdiction as visitors, tourists, refugees or to attend school should not and does not make a difference when there are protection concerns."[36];

(b) The fact of flight *in and of itself* is not a determining factor with respect to whether or not a child is in need of protection;

(c) Where there has been a breach of a court order, it must be the offending party who is subject to the court's sanctions not extended family members;

(d) The facts founding the basis of any finding that a child is in need of protection are not static but are consistently subject to change at will. The significance of issues and circumstances such as accommodation, education, medical and dental attention and discipline may change over time. The need for the intervention of the state into a family's life must be therefore be constantly evaluated no matter where the family is located. In some circumstances, the prior court order whether extra-provincial or not may no longer be necessary;

(e) Consistency in the foundation and application of the principles of law throughout the country with respect to child protection ensure that the consequence of flight by parents with respect to the children is not visited upon the children. In other words, it does not matter where you go in Canada, no parent will be allowed to place

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[36](2003), 127 A.C.W.S. (3d) 1159 (Ont. S.C.J.) [2003 CarswellOnt 5286 (Ont. S.C.J.)]

a child at risk and/or infringe upon that child's rights with impunity;

(f) Enforcement provisions with respect to extra-provincial orders in the *CFSA* would not necessarily enure to the benefit of the child. Enforcement of an order by requiring a minor child to be returned to a prior locale would result in a change of schools, homes and environment. The enforcement of an extra-provincial order may therefore visit upon the children already found to be at risk and solely as a consequence of the conduct of their parents further harm and further risk;

145 The application of the rule of law with respect to child protection although within the purview of each province is maintained throughout the country by taking into account the prior and current conduct of the parents as and when they appear before the court where they are currently residing.

146 Unlike circumstances involving child abduction, the children in this case have not removed from a parent without the consent of that parent. They have been found to be at risk with respect to all adults who were responsible for them and in need of protection. Armed with this information, the state's agency where the family is newly located is in a position to continue the quest for an appropriate order or take such further and other steps as the state deems fit.

147 The fundamental and significant difference between the *CLRA* and the *CFSA* is that the *CFSA* governs the conduct of and intervention of the state with respect to children; the *CLRA* governs the conduct of private citizens with respect to children; the *CLRA* is not designed to and does not concern children who are at risk but concerns children who are cared for appropriately by one of their parents if not both, hence the existence of enforcement provisions.

148 My opinion is bolstered by the fact that if the parents of these children met all of the expectations since their relocation to Ontario such that the children were no longer in need of protection, it would not make sense to return them to a former environment where they had been in need of protection simply because a prior order had placed them in care.

149 The significance of child protection legislation is not particular to the involvement of an agency but is derived from the significance of the intervention of the state in the personal lives of its private citizens.

150 In my view, therefore, the absence of enforcement provisions is intentional and recognizes the immediate and ever-evolving needs of children who are in need of protection from the adults who were or are responsible for the child's care.

(e) Notice of the proceedings to R.(H.)K. and E.K.

151 The minor parent R.(H.)K. and her adult husband E.K. both submit that they did not receive proper notice of the Quebec court proceedings. I agree.

152 As I have indicated, the intervention of the state into the private lives of its citizens or families requires scrutiny. In this case, there is evidence that neither R.K. nor her husband E.K. received proper notice of the proceedings prior to the commencement of those proceedings in Quebec. Service of pleadings and other court material was not waived by either party. It cannot be presumed that notice was given to either party by another family member or community member even if such notice were appropriate, which it is not.

153 It is undisputed that at the time of the investigation in Quebec in August 2013, R.(H.)K. and her husband along with their infant daughter were residing together. R.(H.)K. was not living with her parents.

154 On November 14 2013, two members of the Centre spoke to two of the three adult men, namely A.H. and J.S. about their intention to commence proceedings returnable on November 19 2013. Although she may have been elsewhere in the home, neither R.(H.)K. nor her husband were physically present during this meeting. On November 18 2013, R.(H.)K. and her husband left Quebec with their baby B.K.

155 No lawyer was authorized to accept service for either R.(H.)K. or her husband.

156 The evidence before the judge hearing the application here in Ontario was that on November 14 2013 E.K. was not given oral notice of the hearing on November 19 and he was not present for the proceedings on November 19 or 20 2013. In his decision, Mr. Justice Hamel stated that only A.H. and J.S. had been provided with appropriate notice.

157 For these reasons, I accept the submissions of the appellants that an overriding and palpable error was made with respect to the issue of notice to these two litigants. In my view, oral if not written notice of state intervention is fundamental to natural justice.

158 Given their departure from Quebec, it is reasonable to assume or infer that both R.(H.)K. and her husband were aware of the proceedings. However, the onus is on the state to satisfy the court that notice was provided. In this case, other than the conduct of the parents, there is no evidence of notice. For these reasons, I agree with the submissions of the appellants in this regard.

(e) Further discussion

(i) the best interests of the children:

159 Even if I were wrong with respect to any or all of the above, I am entirely satisfied that it would be contrary to the best interests of these children to be returned to Quebec. I decline to visit upon the children, the consequences of the conduct of their parents.

160 These children have already been found to be in need of protection. To create further upheaval and instability in their lives would most surely have disastrous emotional and psychological ramifications for them.

161 In my view, enforcement of an extra-provincial order that results in movement of children from their parents by hundreds of miles undermines the overarching goals of provincial legislation including but not limited to recognition of the least disruptive course of action that is available and is appropriate to help a child and the recognition that children's services should be provided in a manner that includes the participation of the child, his or her parents and relatives and the members of the child's extended family *and community* (my emphasis), where appropriate.

162 Further, I am satisfied that the rehabilitation that may be necessary for the parents in order to achieve reunification of their families and withdrawal or termination of the intervention of the state can be commenced and continued in the current locale.

163 The lesson to be learned by the appellants who are the parents of the children in question and all members of the Lev Tahor community who left Quebec is that 'flight' from one community in Canada to another in either custody or child protection proceedings is to no avail. Not because these parents face the return of their children to a prior home where they no longer have a connection but because the state will continue to exert its pressure and influence over the family through its local agencies no matter where they are in order to ensure that the children in that family are not at risk. It is the state that assumes care for the children by way of

apprehension. The state's agent exercises the state's responsibilities and is accountable for meeting the state's obligations to the child.

164 The constitutional rights of children Canada are guaranteed no matter where or with whom they live.

165 In my view therefore, repatriation of children who are in care must be based on the best interests of those children and not based on the conduct of the parents.

(ii) the integrity of the administration of justice:

166 On the other hand, the recognition and integrity of a court order is essential to the administration of justice. In child protection proceedings, the recognition of and integrity of a court order and the administration of justice is safeguarded by the ongoing intervention of the state and the weight attributed to the extra-provincial order by the court currently seized with the protection issues. The integrity of the court order is not undermined by a child who is subject to the order but by the adult who has the responsibility for that child and flouts the order. It is the adult alone who must bear the consequences. Where there has been a breach of a court order, it is the offending party who is returned to the jurisdiction of the court that made the order.

167 In this case, the appellants removed the children from the supervision of the state, namely, the Province of Quebec. The state, now in the form of the Province of Ontario, continued to intervene and supervise the families on behalf of the children. On my order, when the parents attempted to avoid any intervention of the state whatsoever, the children were taken into the fulltime care and control of the state not by virtue of the flight in and of itself but on the basis of the whole of the evidence before the court including current and historical circumstances.

(iii) the privacy of the child:

168 During the course of the appeal process, I was obliged to hear an emergency motion with respect to the disappearance of the children who are the subject of this appeal. In order to deal with this situation it was necessary to exercise my *parens patriae* jurisdiction for the protection of the children. The protection of a child from harm, where it becomes necessary to do so, is a basic tenet of our legal system.

169 The actions of the parents and the reaction of the court in this situation however created a maelstrom of consideration and discussion in the

media. I have been dismayed that both the religious leaders of the Lev Tahor community and the director of the child protection agency in Quebec have disclosed allegations and have discussed the issues in this case in the public domain. A child protection agency does not have a personal vested interest in these children. In my view, it is highly improper for any child welfare agency which acts on behalf of the state to disclose or discuss in the public domain, any allegations with respect to any of its clients especially when those allegations concern already highly vulnerable children of the families involved.

170 In discussing any matters touching upon this case with any member of the public, the privacy of these innocent children, the very lives who are at the heart of this case, has been permanently compromised.

(iv) factual findings or inferences:

171 It is the role of the court to make findings of fact and to draw reasonable inferences from the facts based on evidence the court finds to be both credible and reliable. The evidence before the court with respect to the treatment of their children by these parents who are the appellants are allegations only. No findings of fact have yet been made by a court pursuant to a trial. It is crucial that observers of and participants in the justice system remember this fundamental principle of law given the high profile this case has been afforded by the media.

(v) whether education is a child protection issue:

172 During the course of discussions and submissions, a question was raised with respect to whether education is a child protection issue. In this regard, I endorse the decision of Mr. Justice Shaughnessy in Durham *Children's Aid Society of Durham (County) v. P. (B.)*[37] in which he wrote, "The *CFSA* then is engaged where neglect of education becomes a child protection issue. To decide otherwise is to relegate children who are at risk of emotional harm due to a parent's failure to provide educational instruction without the remedies and protection afforded to any other child who is at risk of emotional harm. In my view this would be an absurd, illogical and inequitable result which would be incompatible with the object of the CFSA found in S. 1(1) of its preamble".

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[37](2007), 46 R.F.L. (6th) 153 (Ont. S.C.J.)

173 In *R. v. Jones*[38], which is also quoted by Justice Shaughnessy, Mr. Justice LaForest of the Supreme Court of Canada commented on the state's interest in the education of its citizens:

> Whether one views it from an economic, social, cultural or civic point of view, the education of the young is critically important in our society. From an early period, the provinces have responded to this interest by developing schemes for compulsory education. Education is today a matter of prime concern to governments everywhere. Activities in this area account for a very significant part of every provincial budget. Indeed in modern society, education has far reaching implications beyond the province, not only at the national, but at the international level.

174 Justice La Forest also cited the decision of the Supreme Court of the United States *Brown v. Topeka Board of Education*[39]

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principle instrument in the awakening of the child to cultural values, in preparing him for later professional training, and helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.

(vi) the right of the family:

175 In the balancing of various rights guaranteed under the Charter and in assessing the impact of various issues relating to the three families before the court, it is necessary to recognize that parents must be accorded a relatively large measure of freedom from state interference to raise their children as they see fit. Indeed former Chief Justice Lamer reminded us in *New Brunswick (Minister of Health & Community Services) v. G. (J.)*[40], that parents are presumed to act in their children's best interest: "Since best interests of the child are presumed to lie with the parent, the

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[38][1986] 2 S.C.R. 284 (S.C.C.)

[39]347 U.S. 483 (U.S. Kan. S.C. 1954)

[40][1999] 3 S.C.R. 46 (S.C.C.)

child's psychological integrity and well-being may be seriously affected by the interference with the parent-child relationship."

(vi) the right of the child:

176 The interests and rights of the children in this case must not be ignored or minimized in their importance. There is cogent and probative evidence before the court that the circumstances in this case fundamentally beg the question whether the community to which the appellants belong is entitled to foster self-perpetuation by the suppression or limitation of critical thought in its children.

177 There is also cogent and probative evidence before the court that the one or more girls younger than 16 years of age have been married in a ceremony sanctioned or performed by a person perceived to be a religious leader of the community.

178 These two factors alone are sufficient to cause the court grave concern about the health and welfare of these children and their protection.

Summary

179 I find that Fuerth J. erred on a question of pure law in having determined that without a recognition and enforcement provision being available in the *CFSA*, jurisdiction for such an order arose in the *CLRA*.

180 I find that neither R.(H.) K. nor E.K. received proper notice of the proceedings.

Conclusion

181 The appeals are granted to the extent that the order of Justice Fuerth dated February 3 2014 is hereby set aside with respect to the enforcement of the order of Mr. Justice Hamel dated November 22 2013 and with respect to the requirement that the children be returned to Quebec.

182 The Chatham-Kent Children's Services shall exercise its mandate with respect to the commencement and/or continuation of its own protection proceedings under the *CFSA* based on its own investigations and the information and evidence from Quebec in support of the remedy it sees fit in all of the circumstances.

183 This matter is remanded back to the Ontario Court of Justice for adjudication with respect to whether the children of the appellants are in need of protection.

Costs

184 I will be prepared to entertain the issue of costs with respect to this appeal when the issue of whether the parents ought to be paying support for the children who were ordered by me into the temporary care and control of the Chatham-Kent Children's Services has been decided pursuant to s. 60 of the *CFSA*.

Appeal allowed.

[Indexed as: **Jivraj v. Jivraj**]

Nubiah Jivraj, Applicant and Amin Mohamad Ali Jivraj, Respondent

Alberta Court of Queen's Bench

Docket: Edmonton 4803-165973

2014 ABQB 307

J.B. Veit J.

Heard: May 16, 2014

Judgment: May 22, 2014

Family law —— Division of family property — Matrimonial home — Order for possession — Variation of order —— Parties separated — Parties agreed that wife and child would go to live with wife's parents, and that husband and his parents would live in matrimonial home (home) — Court order was issued formalizing this arrangement (existing order) — After existing order was filed, husband changed locks on home — Wife brought application to either change locks again so that she could have unrestricted access to home or for exclusive possession of home — Application dismissed — Because there had been no material change of circumstances, wife could not apply to change existing order — Only thing which had changed since date existing order was issued was that husband had changed locks to home — Change of locks was not material change of circumstance — Parties had agreed, and court had ordered, that wife would live with her parents — Husband's change of locks on home merely followed as reasonable corollary upon existing order — In particular, changing of locks did not change either wife's matrimonial property claim or her spousal support claim — Husband's actions in allowing wife to pick up personal belongings after existing order was issued confirmed that his only objective in changing locks was to ensure that wife did not continue to have unrestricted access to home.

Family law —— Costs — In family law proceedings generally — Factors considered — Conduct of litigation —— Parties separated — Parties agreed that wife and child would go to live with wife's parents, and that husband and his parents would live in matrimonial home (home) — Court order was issued formalizing this arrangement (existing order) — After existing order was filed, husband changed locks on home — Three days after existing order was filed, wife brought application to either change locks again so that she could have unrestricted access to home or for exclusive possession of home (first application) — First application was not heard because wife did not give husband notice required by Rules of Court — Wife brought second application seeking

same relief as on first application — Application dismissed — Wife was ordered to pay costs of $700 rather than $500 for second application and to pay costs of $500 for first application — In order to recognize that futility of second application should have been apparent to wife, costs were awarded on somewhat accelerated basis, but neither double costs nor solicitor and client costs — There was no emergency requiring wife to take up court time, thereby giving rise to adjournment which gave wife opportunity to rethink advisability of bringing on her process — Wife had also had four opportunities to remove belongings from matrimonial home to her new residence — Wife therefore had double opportunity to reflect on whether, in light of this family's financial circumstances, it was appropriate to bring second application before court.

Cases considered by *J.B. Veit J.*:

Combined Air Mechanical Services Inc. v. Flesch (2014), 2014 CarswellOnt 640, 2014 CarswellOnt 641, 2014 SCC 7, 95 E.T.R. (3d) 1, 27 C.L.R. (4th) 1, 37 R.P.R. (5th) 1, 46 C.P.C. (7th) 217, 2014 CSC 7, *(*sub nom. *Hryniak v. Mauldin)* 314 O.A.C. 1, *(*sub nom. *Hryniak v. Mauldin)* 453 N.R. 51, 12 C.C.E.L. (4th) 1, *(*sub nom. *Hryniak v. Mauldin)* 366 D.L.R. (4th) 641, [2014] S.C.J. No. 7 (S.C.C.) — considered

Rules considered:

Alberta Rules of Court, Alta. Reg. 124/2010
Generally — referred to

APPLICATION by wife to vary order granting husband possession of matrimonial home.

Megan Tupper (Student-at-Law), for Applicant, Ms Jivraj
Michelle L. Mackay, for Respondent, Mr. Jivraj

***J.B. Veit J.*:**

Summary

1 Should accelerated costs be granted to the respondent who successfully defends an application for ongoing access to the matrimonial home by the wife who earlier agreed to live elsewhere?

2 Slightly accelerated costs, not amounting to solicitor and client costs are appropriate here. After being told by the then presiding judge that her application for ongoing access to the matrimonial home was not a matter which should be heard without notice to the husband, the wife had access to the matrimonial home on four occasions to remove personal belongings and personal belongings of the child of the marriage. The wife nevertheless brought the current application. A culture shift, within not only

the bench and bar but also within the community, is required to ensure that all legal proceedings, but especially family law proceedings, remain proportionate, timely and affordable.

3 In the circumstances here, the respondent is entitled to costs of $700.00 rather than $500.00 for the current hearing and for costs of $500.00 for the earlier occasion on which he was required to attend court.

Cases and authority cited

4 **By the court:** *Combined Air Mechanical Services Inc. v. Flesch*, 2014 SCC 7 (S.C.C.).

1. Background

5 The parties are the married parents of one child. The wife is employed in an administrative position; the husband is currently on sick leave and is receiving workers' compensation. Prior to separation, the parties lived in a residence which was also occupied by the husband's parents.

6 When unhappy differences between the parties led to their separation, the mother, together with the parties' child, agreed to go to live with her own parents. This arrangement was formalized by court order on April 22, 2014. After the court order was filed, the respondent husband changed the locks on the matrimonial home.

7 On April 25, 2014, the mother brought an application to either change the locks again so that she could have unrestricted access to the matrimonial home, or for exclusive possession of the matrimonial home. Because she only gave the respondent 12 hours' notice of her application instead of the notice required by the Rules of Court, her application was not heard on April 25, the chambers judge before whom the matter was scheduled to be heard being of the view that wife had not proved an emergency, or similar circumstance, justifying a without notice application.

8 Between April 25 and May 16, the date on which the wife's application was heard on notice and on the merits, the wife had access to the matrimonial home on 4 separate occasions during which she removed her own personal belongings and belongings of the parties' child.

2. Has there been a material change of circumstance since April 22, 2014?

9 There has been no material change of circumstance since April 22, 2014. On that date, the court ordered shared parenting of the child of the marriage and formally recognized arrangements whereby the mother and the child would live in the maternal grandparents' home, leaving the unemployed father living in the matrimonial home with his parents. It is clear from the tenor of the April 22, 2014 order that there was not excessive space available in the maternal grandparents' home: the order indicated that, although the child of the marriage must have a bed of her own in her mother's bedroom in her grandparents' home, within one month, the child should have a bedroom of her own. This term of the April 22, 2014 order makes it clear that the maternal grandparents' home cannot accommodate any division of general matrimonial property, such as household furniture and furnishings, at this time.

10 The only thing which has changed since April 22, 2014 is that the husband has changed the locks to the matrimonial home.

11 The change of locks is not a material change of circumstance: the parties had agreed, and the court had ordered, that the wife would live with her parents. The father's change of locks on the matrimonial home merely followed as a reasonable corollary upon the April 22, 2014 order; in particular, the changing of the locks did not change either the wife's matrimonial property claim or her spousal support claim. Indeed, the father's actions in allowing the mother to come on 4 separate occasions to pick up personal belongings confirms that his only objective in changing the locks is to ensure that his wife does not continue to have unrestricted access to the home in which he now lives with his parents when there is no reason for her to have such access.

12 Because there has been no material change of circumstance, the wife/applicant cannot apply to change the arrangements formalized on April 22, 2014.

13 In any event, however, given the father's employment status and the fact that the paternal grandparents have always lived in the matrimonial home, if the wife had been able to establish a material change of circumstance allowing her to bring this application, she would not have been successful in obtaining exclusive possession of that residence.

14 Nor is it appropriate at this juncture to order the sale of the matrimonial home; the husband has indicated an intention to buy out the wife's

interest in the home, but the parties have yet to analyze all of the matrimonial property, including pensions for example, which must be assessed before a price is set for the buy-out of the residence.

3. Should the successful husband/respondent get solicitor and client costs for the two hearings?

15 The husband/respondent was successful on both hearings before this court; therefore, he is entitled to a minimum of $500.00 for each appearance. The issue before the court is whether he is also entitled to accelerated costs, in particular, solicitor and client costs.

16 In their recent decision in *Combined Air Mechanical Services Inc.*, albeit in the totally different context of alternative adjudication of disputes, the Supreme Court of Canada reminded us that a shift in culture is required to ensure that the justice system be able to provide a fair and just process which is "proportionate, timely and affordable". As important as is this principle in the commercial context in which it was articulated, this principle is all the more pertinent in family disputes, where the cost of legal proceedings cannot be written off or passed along as a cost of doing business; in family law matters, legal costs come out of the budget of the parents and out of the availability of funding for the well-being of children.

17 The courts and the bar must therefore discourage time and money consuming process which does not aid in achieving fair and just process and which may, in fact, be counter-productive to those ideals. This shift in culture must also affect the community at large; members of the community must come to realize that, not only for their own financial wellbeing, but also for the best use by the community of access to the justice system, courts are a last resort, not a first one, in solving minor disputes. Here, not only was there no emergency requiring the applicant to take up court time alongside those other litigants who respected the Rules, thereby giving rise to an adjournment which gave the applicant the opportunity to rethink the advisability of bringing on her process, but the wife has had four opportunities to remove belongings from the matrimonial home to her new residence, the wife therefore had a double opportunity to reflect on whether, in light of this family's financial circumstances, it was appropriate to bring this application before the court. Normal costs are appropriate for those circumstances where there is a real issue that must be decided. Where, as here, one side is certain of success because in its view there is no real issue to be decided, that party

can make a formal offer under the Rules which will have the effect of doubling the costs awarded if that side proves to be correct in its assessment. However, where, as here, we are dealing with chambers applications with relatively short timelines, the only effective way in which a party can try to ensure the award of accelerated costs is by a Calderbank-type, or informal, offer. However, even the preparation and delivery of such an informal offer requires the expenditure of time and money by the lawyer who formulates and delivers such an offer. The additional cost of preparing even a Caldberbank offer is not warranted where, as here because there is no questioning on affidavit, for example, the total tariff costs are only $500.00. In order to recognize that the futility of this application should have been apparent to the applicant, I will therefore award somewhat accelerated costs, but neither double costs nor solicitor and client costs. In the result, the applicant will pay to the respondent $500.00 for the unsuccessful application on April 25 and $700.00 for the unsuccessful application of May 16.

Application dismissed.

[Indexed as: **MacNeil v. Hedmann**]

Cynthia Lynn MacNeil, Plaintiff and David George Clinton Hedmann, Defendant

Yukon Territory Supreme Court

Docket: Whitehorse S.C. 09-D4165

2014 YKSC 29

E.W. Stach J.

Judgment: June 12, 2014

Family law —— Costs — In family law proceedings generally — Factors considered — Multiple factors considered —— Trial focused on making and validity of prenuptial contract entered into prior to marriage and its surviving validity in face of subsequent agreement signed by parties near date of separation — It was determined that final agreement had no legal effect and prenuptial agreement was valid and binding and governed division of matrimonial property — Wife sought costs — Wife was successful party and was entitled to costs — Husband was difficult, uncompromising and persistent adversary but that did not support claim for special costs — Husband's resistance to wife's claims was not outrageous or extraordinary — Award of costs on scale C was appropriate — Issues were complex and matter was hard fought — Matter was of more than ordinary difficulty — Wife's costs were assessed at $56,203.51 — However, wife was entitled to increased costs — Husband's conduct constituted unusual circumstance and its effect was to increase wife's litigation costs — Unusually complex factual matrix and points of law were also unusual circumstances and were inadequately compensated under scale C — Increased costs were awarded and one-third of 306 units were to be assessed at 1.5 times scale C level.

Cases considered by *E.W. Stach J.*:

MacNeil v. Hedmann (2012), 2012 YKCA 11, 2012 CarswellYukon 176 (Y.T. C.A.) — referred to

Ross v. Ross Mining Ltd. (2012), 2012 YKSC 18, 2012 CarswellYukon 14 (Y.T. S.C.) — followed

380876 British Columbia Ltd. v. Ron Perrick Law Corp. (2009), 2009 CarswellBC 2337, 2009 BCSC 1209 (B.C. S.C.) — referred to

Statutes considered:

Family Property and Support Act, R.S.Y. 2002, c. 83

Generally — referred to

s. 2(1) — considered

ADDITIONAL REASONS to judgment reported at *MacNeil v. Hedmann* (2014), 2014 YKSC 16, 2014 CarswellYukon 30 (Y.T. S.C.), respecting costs.

Debbie P. Hoffman, for Plaintiff
Mr. Hedmann, for himself

***E.W. Stach J.*:**

1 I have had the opportunity to consider the written submissions of the parties on the costs issue. Their respective submissions differ markedly from one another, just as their positions on the major issues of fact and law at trial stood in such stark contrast. Together, they provide an accurate reflection of this lengthy trial between the parties, hard-fought from beginning to end.

2 The plaintiff, Cynthia MacNeil, emerged from trial as the decidedly successful party. As I see it, there is no reason here to depart from the usual rule that costs should follow the event. It remains for me, then, to determine the appropriate measure of those costs. Once done, it is my intention to fix and certify the costs, inclusive of disbursements, in a lump sum in order to eliminate the time and expense of further assessment.

offers to settle

3 Each of the parties made one or more offers to settle this dispute. The offers to settle made by David Hedmann, however, are distantly off the mark when compared to the result of the trial before me. The single offer of Cynthia MacNeil on the other hand fails to make any reference to costs, and was made at a time when the appeal following the first trial was still pending. By its own terms that offer had long since expired, well before the second trial began.

4 In my judgment none of the offers to settle should factor into my decision-making respecting costs.

special costs

5 In her written submissions Cynthia MacNeil advances a claim for special costs premised on alleged misconduct on the part of David Hedmann, both prior to and during trial. Her allegations of pre-trial mis-

conduct are, in fact, the subject of comment in my trial reasons.[1] Although I am probably entitled to consider such conduct again in my disposition of costs, I am reluctant now to fasten on it as a punitive factor in a costs award in circumstances where I found it did not merit an award of damages in the first instance.

6 As to the allegations of misconduct premised upon David Hedmann's repeated applications for adjournment both before and during the trial, costs, for the most part, have already been awarded against him on that ground. As frustrating as these repeated applications may have been for the plaintiff, I am disinclined to double up on those costs or to parlay the cumulative requests for adjournment into a punitive award of special costs.

7 David Hedmann proved himself to be a difficult, uncompromising and persistent adversary but, without more, those traits alone cannot support a claim for special costs. An award of special costs goes beyond indemnity and enters the realm of punishment. Such costs are usually reserved for cases where the court seeks to disassociate itself from misconduct.[2] Like Veale J. in *Ross v. Ross Mining Ltd.*,[3] I find that, taken together, David Hedmann's conduct in the present case arguably approaches the category of "deserving of rebuke" but I remain unsatisfied that it clearly crosses the line. And, although I concluded that there was ultimately no merit to David Hedmann's defence or counterclaim, his resistance to the claims of the plaintiff in the main action is neither outrageous nor extraordinary having regard for the uncertain state of the law in the Yukon at the time, and the widely disparate view of the 'facts' held by the parties.

8 I decline on these grounds to make an award of special costs.

scale B or scale C

9 I have no difficulty in concluding that an award of costs at Scale C is appropriate here. The major issues in this proceeding focused on the making and validity of a prenuptial contract entered into prior to the marriage, and its surviving validity in the face of a subsequent document

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[1]See paragraph 130 of my Reasons at Trial.

[2]*380876 British Columbia Ltd. v. Ron Perrick Law Corp.*, 2009 BCSC 1209 (B.C. S.C.) per M. J. Allan J. at para. 14.

[3]2012 YKSC 18 (Y.T. S.C.) at para 33

signed by the parties near the date of their separation. Those issues have elsewhere been described as "complex" and as involving questions of fact, and questions about the formalities and conditions of a binding variation agreement.[4] Still another layer of complexity was added to this matrix by an additional issue, whether the subsequent (allegedly amending) document was secured through undue influence.

10 Nor is the complexity of this trial limited only to complex issues of fact. Section 2(1) of the Yukon's *Family Property and Support Act*, broadly speaking, accords primacy to validly made marriage contracts. Previously undetermined in the case law of the Yukon, however, was the interplay between such contractual primacy and other provisions in the Act dealing with family homes in the Yukon, family and non-family assets, contributions by spouses etc. These legal issues required painstaking examination of the Act as a whole and a search for any helpful precedent in other jurisdictions within Canada. Moreover, the issues of law which surfaced in this trial are likely to be of wider interest to many other family law litigants in the Yukon where a marriage contract is part of the mix, and most certainly in all such cases where child support and spousal support are not a factor.

11 The length of trial is also a factor in this calculus. Here, the evidence-taking portion of the trial, including applications made at trial, took up three weeks of trial time. Written submissions from each of the parties then followed and, eventually, there were also written submissions on the costs issue. Taken together with my previous comments about the complexity of trial issues, the number of pre-trial applications made, and the fact that the matter was hard-fought from the beginning of trial through to the submissions of the parties on costs, I have absolutely no doubt that this is a matter of 'more than ordinary difficulty' or that costs must be awarded at the level of Scale C. I so order.

12 I have examined the number of units claimed on behalf of Cynthia MacNeil for each of various steps taken by counsel during the course of this litigation. (306 units) I find that they were necessary and reasonable.

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[4]See the Oral Reasons for Judgment of the Court of Appeal for Yukon recorded in *MacNeil v. Hedmann*, 2012 YKCA 11 (Y.T. C.A.) per Harris J. A. at para 7.

Based on a level C award for costs and including tax and disbursements, I calculate the total award for costs on this basis would be $56,203.51;

306 × 170 =	$52,202.00	(fees)
	2,601.00	(tax)
	1,582.51	(disbursements)
Total	$56,203.51	

13 I shall now consider Cynthia MacNeil's claim for increased costs under s.2(e) of Appendix B.

Increased costs

14 In *Ross v. Ross Mining Ltd.*[5] Veale J. sets out the factors that must be met to support an award for increased costs. Also of note are his views that, unlike *special costs*, the focus of *increased costs* is not on punishment, but on indemnification, and that sections 2(e) and (f) of Appendix B provide an alternative to *special costs* on a lower threshold, short of requiring conduct deserving of rebuke.

15 It is difficult, even in ordinary circumstances, to get cases to trial and through a trial process without encountering some delay. Matters are expedited, of course, where the litigants and counsel, notwithstanding their differences, take reasonable positions and cooperate with one another with a view to getting their issues decided. The converse is true and the litigation expense mounts considerably where one or more of the parties is unduly combative or resorts to every conceivable ploy to cause delay, or determines by various means to render the litigation burdensomely expensive for his or her adversary.

16 As the trial unfolded and as I look back at the court record in this case, I recognize a number of signs of undue combativeness on the part of David Hedmann. Counsel for Cynthia MacNeil referred to a number of such examples in her written cost submissions. More to the point I am persuaded that although some or all of that conduct springs from the inherently combative nature of David Hedmann, some of its manifestations in this case have effectively increased the litigation expense for Cynthia MacNeil, probably deliberately so.

17 In reaching that conclusion I have attempted to take due account of the fact that David Hedmann is a self-represented lay litigant; but he is

[5]Supra note 3 at paras. 42 and 45

also a man of considerable intellect who has availed himself of the assistance of counsel from time to time in respect of this case.

18 On balance, I find that much of the conduct complained of constitutes an 'unusual circumstance', and because its net effect is to increase the litigation costs of Cynthia MacNeil, it would be unjust in my opinion if that were not reflected in the costs order ultimately made in this case.

19 Similarly, I find that the unusually complex factual matrix underlying this case — combined with the somewhat abstruse points of law respecting the application of Yukon's *Family Property and Support Act* heretofore undetermined - are unusual circumstances, and inadequately compensated even under Scale C. The trial decision moreover, is likely to be of consequence to other family law litigants in the Yukon. Taken together with my comments about the litigation conduct of David Hedmann and their effect, the usual costs awarded under Scale C are grossly inadequate. If left wholly uncompensated, it would create an injustice.

20 On these grounds, I direct that increased costs be awarded in this case. It remains for me to fix the quantum of increased costs.

21 It is quite impossible to state with any degree of precision the extent to which this amalgam of unusual circumstances has increased the litigation costs of the plaintiff beyond the norm. While I am tempted to apply increased costs of 1.5 times for each of the 306 units claimed here, I have concluded that doing so may inadequately take into account another guiding principle, namely that costs ultimately awarded should bear a reasonable relationship to the amount in issue. In the result I direct that 1/3 of the 306 units (102 units) be assessed at 1.5 times the Scale C level. The amount I set out in paragraph 12 must be adjusted upwards accordingly. Once done a certificate in the adjusted amount shall issue.

Order accordingly.

[Indexed as: **Thompson v. St. Croix**]

Karen Thompson, Petitioner v. Ronald St. Croix, Respondent

Nova Scotia Supreme Court

Docket: 1204-005732, SKD-082305

2014 NSSC 275

James L. Chipman J.

Heard: June 9-13, 2014

Judgment: July 15, 2014*

Family law —— Divorce — Grounds — Living separate and apart — Calculation of time period —— Parties married in 2002, and divorced in June 2014 — Parties had one child, born in January 2006 — Parties' claims regarding date of separation, custody, division of net family property, child support, and spousal support proceeded to trial — Parties' date of separation was determined to be August 31, 2011 — It was uncontroverted that parties had not lived together since their separation at end of August 2011 — While there were visits by husband in September, November and December of 2011, their visits were not harmonious.

Family law —— Custody and access — Factors to be considered in custody award — Best interests of child generally — Multiple factors considered —— Parties married in 2002, separated in August 2011, and divorced in June 2014 — Parties had one child, born in January 2006 — In December 2013, interim order was made which provided that child would reside primarily with mother — Parties' claims regarding date of separation, custody, division of net family property, child support, and spousal support proceeded to trial — Mother was granted sole custody and primary residence of child — Mother had done most to shield child from parties' conflict — Mother could be relied on to make decisions for child — Child would continue to have stability of living in his primary home, which would afford him proximity to his school, friends and extracurriculars.

Family law —— Support — Spousal support under Divorce Act and provincial statutes — Entitlement — Miscellaneous —— Parties married in 2002, separated in August 2011, and divorced in June 2014 — Parties had one child, born in January 2006 — Parties' claims regarding date of separation, custody,

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*A corrigendum issued by the court on August 1, 2014 has been incorporated herein.

division of net family property, child support, and spousal support proceeded to trial — Evidence warranted spousal support to be paid by wife to husband — When wife had significant health difficulties and when her mother was diagnosed with terminal cancer, husband increased his household contribution along with providing support to wife.

Family law — Support — Spousal support under Divorce Act and provincial statutes — Determination of spouse's annual income — Imputed income — Parties married in 2002, separated in August 2011, and divorced in June 2014 — Parties had one child, born in January 2006 — In 2013, husband embarked upon educational leave from work to enroll in university program — Parties' claims regarding date of separation, custody, division of net family property, child support, and spousal support proceeded to trial — Wife was ordered to pay husband spousal support in amount of $2,169 per month until June 30, 2017 — Husband was imputed with annual income in amount of $50,000 — Husband could have taken on another course of studies of shorter duration or found different employment — Wife was imputed with annual income in amount of $225,000 — There was considerable latitude respecting wife's potential hours of work — Child's ongoing medical needs did not warrant wife reducing her hours by approximately 20 per cent.

Family law — Division of family property — Order for division of property — Order for partition and sale.

Family law — Division of family property — Order for division of property — Order for payment — Global equalization order.

Family law — Support — Child support under federal and provincial guidelines — Determination of award amount — General principles.

Cases considered by *James L. Chipman J.*:

Abbott v. Abbott (2002), 208 N.S.R. (2d) 79, 652 A.P.R. 79, 2002 NSSF 39, 2002 CarswellNS 395, [2002] N.S.J. No. 420 (N.S. S.C.) — considered

C. (J.R.) v. C. (S.J.) (2010), 82 R.F.L. (6th) 234, 2010 NSSC 85, 2010 CarswellNS 126, [2010] N.S.J. No. 101 (N.S. S.C.) — considered

Clarke v. Clarke (2004), 2004 NSSF 43, 2004 CarswellNS 155 (N.S. S.C.) — considered

Cogswell v. Wright (2014), 2014 CarswellNS 412, 2014 NSSC 173 (N.S. S.C.) — considered

D. (C.H.F.) v. H. (C.R.) (2006), 2006 CarswellNS 307, 2006 NSSC 230, [2006] N.S.J. No. 296 (N.S. S.C.) — considered

Dixon v. Hinsley (2001), 2001 CarswellOnt 3243, 22 R.F.L. (5th) 55, [2001] O.J. No. 3707 (Ont. C.J.) — considered

Drygala v. Pauli (2002), 29 R.F.L. (5th) 293, 2002 CarswellOnt 3228, 61 O.R. (3d) 711, 219 D.L.R. (4th) 319, 164 O.A.C. 241, (sub nom. *A.M.D. v. A.J.P.)* [2002] O.J. No. 3731 (Ont. C.A.) — followed

Gibney v. Conohan (2011), 2011 NSSC 268, 2011 CarswellNS 551, 966 A.P.R. 260, 305 N.S.R. (2d) 260, 10 R.F.L. (7th) 461 (N.S. S.C.) — considered

Hammond v. Nelson (2012), 2012 NSSC 27, 2012 CarswellNS 90 (N.S. S.C.) — considered

Lockerby v. Lockerby (2010), 2010 CarswellNS 459, 2010 NSSC 282 (N.S. S.C.) — considered

Montgomery v. Montgomery (2000), 2000 NSCA 2, 2000 CarswellNS 1, 3 R.F.L. (5th) 126, 181 D.L.R. (4th) 415, 182 N.S.R. (2d) 184, 563 A.P.R. 184, [2000] N.S.J. No. 1 (N.S. C.A.) — distinguished

Moore v. Moore (2003), 47 R.F.L. (5th) 127, 2003 NSCA 116, 2003 CarswellNS 389, 218 N.S.R. (2d) 294, 687 A.P.R. 294 (N.S. C.A.) — referred to

Morash v. Morash (2004), 2004 NSCA 20, 2004 CarswellNS 42, 221 N.S.R. (2d) 115, 697 A.P.R. 115, 2004 C.E.B. & P.G.R. 8095, 48 R.F.L. (5th) 312, 40 C.C.P.B. 99, [2004] N.S.J. No. 40 (N.S. C.A.) — referred to

Murphy v. Hancock (2011), 2011 NSSC 197, 2011 CarswellNS 343 (N.S. S.C.) — considered

R. (F.F.) v. F. (K.) (2013), 2013 CarswellNfld 24, 2013 NLCA 8, 29 R.F.L. (7th) 115, 1030 A.P.R. 262, 332 Nfld. & P.E.I.R. 262, [2013] N.J. No. 26 (N.L. C.A.) — considered

Saunders v. Saunders (2011), 2011 CarswellNS 620, 2011 NSCA 81, 975 A.P.R. 297, 307 N.S.R. (2d) 297, 7 R.F.L. (7th) 265 (N.S. C.A.) — followed

Shurson v. Shurson (2007), 2007 NSSC 101, 2007 CarswellNS 142 (N.S. S.C.) — considered

Simmons v. Simmons (2001), 2001 CarswellNS 252, 196 N.S.R. (2d) 140, 613 A.P.R. 140, 20 R.F.L. (5th) 153, 2001 NSSF 35, [2001] N.S.J. No. 276 (N.S. S.C.) — followed

Strecko v. Strecko (2014), 2014 NSCA 66, 2014 CarswellNS 448 (N.S. C.A.) — referred to

Volcko v. Volcko (2013), 2013 CarswellNS 1027, 2013 NSSC 342, 1073 A.P.R. 131, 339 N.S.R. (2d) 131 (N.S. S.C.) — considered

Young v. Young (1993), [1993] 8 W.W.R. 513, 108 D.L.R. (4th) 193, 18 C.R.R. (2d) 41, [1993] 4 S.C.R. 3, 84 B.C.L.R. (2d) 1, 160 N.R. 1, 49 R.F.L. (3d) 117, 34 B.C.A.C. 161, 56 W.A.C. 161, [1993] R.D.F. 703, 1993 CarswellBC 264, 1993 CarswellBC 1269, [1993] S.C.J. No. 112, EYB 1993-67111 (S.C.C.) — followed

Statutes considered:

Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.)
s. 8 — considered

s. 8(3)(a) — considered
s. 15.3(1) [en. 1997, c. 1, s. 2] — considered
s. 16(1) — considered
s. 16(8) — considered
Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.)
Generally — referred to
Matrimonial Property Act, R.S.N.S. 1989, c. 275
Generally — referred to
s. 4(1) — considered
s. 13(h) — considered
s. 22(2) — considered
s. 22(3) — considered

Regulations considered:

Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.)
Federal Child Support Guidelines, SOR/97-175
Generally — referred to
s. 3 — considered
s. 7 — considered
s. 9(b) — considered
s. 9(c) — considered
s. 19(1)(a) — considered
Sched. I, s. 4(c) — referred to

TRIAL of parties' claims regarding date of separation, custody, division of net family property, child support and spousal support.

Julia E. Cornish, Q.C., Jennifer M. Kooren, Katharine A. Lovett (law student), for Petitioner
Ronald St. Croix, for himself

***James L. Chipman J.*:**

Introduction

1 This is a divorce proceeding involving a couple originally from Newfoundland and Labrador. Ronald St. Croix and Karen Thompson began living together in August, 2000. Two years later they married and remained together for approximately nine years. There is one child of the marriage, David Carl St. Croix, ("David") born January 10, 2006.

2 At the time of separation in late summer of 2011, the couple owned a matrimonial home located at 48 Lanark Drive, Paradise (a community on the outskirts of St. John's).

3 Mr. St. Croix is an environmental technologist and Ms. Thompson is a medical doctor who became a fully qualified psychiatrist in the spring of 2011. In July, 2011 she accepted a position as an adult general psychiatrist with Annapolis Valley District Health Authority ("A.V.D.H.A.") where she continues to practice. Mr. St. Croix worked for Nalcor Energy for several years until taking an education leave in the late summer of 2013.

4 Shortly after accepting her position with A.V.D.H.A., Dr. Thompson and David moved to a rental home in Port Williams, Kings County, Nova Scotia. Mr. St. Croix remained in the matrimonial home in Paradise until commencing his education leave. In August, 2013, he moved to the Annapolis Valley as he enrolled as a full time Bachelor of Business Administration student at Acadia University for the 2013-14 academic year.

5 At the time of trial Mr. St. Croix took time off from work with Nalcor as shortly after finishing exams at Acadia in April he returned to his former position. When he returned to Newfoundland, he resumed living in the matrimonial home, which was unoccupied while he was away at university.

History of the Proceedings

6 Mr. St. Croix started divorce proceedings in Newfoundland in June, 2012, which Dr. Thompson became aware of on November 1, 2012, when she was served. Dr. Thompson started her divorce proceeding in Nova Scotia in August, 2012. In the days preceding the trial Mr. St. Croix filed an Answer in Nova Scotia.

7 In November, 2012, Dr. Thompson brought an Application within the Newfoundland proceeding, requesting, among other things, transfer of the proceeding to Nova Scotia.

8 Pursuant to an Order of the Supreme Court of Newfoundland and Labrador Trial Division (Family), issued November 28, 2012, the divorce proceeding was transferred to Nova Scotia. One of the requirements of the Order was that Dr. Thompson file a Motion regarding interim parenting issues. Dr. Thompson brought an Interim Motion on December 6, 2012, which was resolved by an Interim Consent Order issued December 20, 2012.

9 On April 25, 2013, Mr. St. Croix filed a Notice of Motion seeking interim spousal support (retroactive and prospective), summer parenting time, and interim shared parenting. As Mr. St. Croix's Motion did not

address child support, Dr. Thompson brought a separate Motion seeking interim child support (prospective and retroactive to the extent that Mr. St. Croix was seeking interim spousal support), as well as an Order that Mr. St. Croix continue to be responsible for line of credit payments relating to the matrimonial home where he was residing.

10 The Motion was converted to a settlement conference, which was held on June 19, 2013. The settlement conference only resolved 2013 summer parenting.

11 On October 28, 2013, Dr. Thompson filed an Emergency Motion concerning interim parenting issues. This Motion was heard by the Honourable Justice Gerald R.P. Moir on November 7, 2013, and resulted in an Interim Order issued December 20, 2013.

12 On September 16, 2013, Dr. Thompson filed a Request for Date Assignment Conference. Mr. St. Croix objected to this Request and a conference was held on November 21, 2013. Following this, a Date Assignment Conference was heard by the Honourable Justice Pierre L. Muise on December 19, 2013.

13 In advance of the trial I conducted a Trial Readiness conference on April 11, and pretrial conferences on April 23 and June 3, 2014.

14 At the commencement of trial I heard a Motion from Mr. St. Croix who objected to the granting of a divorce on the basis that there was a prospect for reconciliation. Having heard Dr. Thompson's counsel's reply, I made the determination that the Motion should be denied.

15 The Petitioner then led evidence — which was ultimately uncontroverted — confirming the Divorce Judgment should be granted. That is to say, given the totality of the evidence I was satisfied that all procedural and jurisdictional requirements were met. The grounds for divorce were established based on a breakdown of the marriage as evidenced by the fact that the parties lived separate and apart for at least one year immediately proceeding the determination of the divorce and were living separate and apart at the commencement of the proceeding. Accordingly, by Order issued June 18, 2014 (Appendix I), I granted Divorce Judgment.

16 On the same date, June 18, 2014, I granted a Partial Corollary Relief Order (Appendix II) referable to 2014 summer parenting and the matrimonial home. In all of the circumstances I felt it was critical to make a timely decision on these issues.

Issues

17 There are a number of remaining issues to be resolved: date of separation, custody (and David's living arrangements and the decision-making arrangement for him), property division, retroactive and prospective child and spousal support. Costs have been pleaded but the parties have deferred costs arguments until this decision.

Approach to Issues

18 Where there are multiple issues, they must be approached in a sequence which places them in the appropriate and logical order. Once the date of separation is sorted out, this involves beginning with David's parenting. In addition to the obvious importance of this issue, the parenting arrangement provides the context for determining other issues. A parenting arrangement may be relevant to the division of assets, pursuant to s. 13(h) of the *Matrimonial Property Act*, R.S.N.S. 1989, c.275 ("*M.P.A.*").

19 Mr. St. Croix seeks a shared custody arrangement and the expenses of each parent are relevant under s. 9(b) and (c) of the *Federal Child Support Guidelines*, SOR 97-175. ("*Child Support Guidelines*"). Possession of the home and responsibility for debts have an impact on expenses that are relevant to child support. In dealing with support applications under the *Divorce Act*, R.S.C. 1985 (2nd Supp.), c.3, ("*Divorce Act")* s. 15.3(1) child support must be addressed before spousal support.

Date of Separation

20 Dr. Thompson maintains the parties separated in mid-August, 2011, when she and David moved to Nova Scotia. Mr. St. Croix says the separation occurred in early February, 2012. The breakdown of a marriage is addressed in s. 8 of the *Divorce Act*.

> 8. (1) A court of competent jurisdiction may, on application by either or both spouses, grant a divorce to the spouse or spouses on the ground that there has been a breakdown of their marriage.
>
> (2) Breakdown of a marriage is established only if
>
> (a) the spouses have lived separate and apart for at least one year immediately preceding the determination of the divorce proceeding and were living separate and apart at the commencement of the proceeding; or

(b) the spouse against whom the divorce proceeding is brought has, since celebration of the marriage,

(i) committed adultery, or

(ii) treated the other spouse with physical or mental cruelty of such a kind as to render intolerable the continued cohabitation of the spouses.

(3) For the purposes of paragraph (2)(a),

(a) spouses shall be deemed to have lived separate and apart for any period during which they lived apart and either of them had the intention to live separate and apart from the other;

21 Concerning the determination of a separation date, Justice Beaton noted as follows in *Volcko v. Volcko*, 2013 NSSC 342 (N.S. S.C.) at para. 8:

> In determining the date of separation, each case must be examined on its own facts; while a certain factor or combination of factors might lead to a particular determination in one case, it does not necessarily follow that the presence of the same factor(s) would always lead to a similar determination in another case: *Dupere v. Dupere* (1974) 9 N.B.R. (2d) 554 (QB); *French v. French*, 1997 CanLII 4543 (NSSC), (1997) 162 N.S.R. (2d) 104 (SC); *Gardner v. Gardner*, 2005 NSSF 17 (CanLII), (2005) 232 N.S.R. (2d) 68 (SC).

22 In this case the background to Dr. Thompson's move provides context for a number of issues including the date of separation. The Petitioner cited four main reasons for wanting to move from the St. John's area to Nova Scotia:

1. To be closer to her brothers (resident in the HRM), particularly since the death of their mother (albeit this was about two years earlier);
2. Due to the "stressful" work situation in St. John's which involved locums and no permanent job guarantee as well as a strenuous on-call schedule;
3. Her view that the Nova Scotia public education system was somewhat superior to the Newfoundland education system, particularly in respect of the enrichment program for David, who by all accounts is a very intelligent child; and
4. Mr. St. Croix's car hobby, as Nova Scotia would offer a closer (therefore cheaper) transit point for car parts shipped

from other areas of North America and that the Shubenacadie race track would be nearby.

23 Dr. Thompson went on to explain that by the summer of 2011 she and Mr. St. Croix were having "a lot of trouble in our marriage largely leading to the separation issue". She elaborated that the two were in conflict as to what Mr. St. Croix would do in their new environment. Dr. Thompson testified Mr. St. Croix wanted to pursue a hobby racing business whereas she wanted him to obtain a job in Nova Scotia. To this end, when she was speaking with recruiters, she was receptive to their offers to attempt to place Mr. St. Croix. She testified that Mr. St. Croix was resistant to these efforts (to the point where he would not furnish his resume) adding that he was not "on board" with selling their house as he wanted to keep it as a rental property. Dr. Thompson regarded this as a "nightmare situation" given that the family would be residing in another province.

24 Dr. Thompson said that after a June, 2011 recruiting trip to Nova Scotia she narrowed her choice to the Annapolis Valley over other rural Nova Scotia communities. She testified that Mr. St. Croix was "not interested" in the final decision and left the matter up to her. During a second recruiting trip in July, 2011, Dr. Thompson signed a contract with A.V.D.H.A. She did not qualify for a $20,000.00 signing bonus as it was contingent on being on call, something she did not want to agree to, "given it was just me and David". She also opened up her own bank account in Nova Scotia during this time as she stated she was growing concerned about Mr. St. Croix's expenditures toward his car hobby and potential car business.

25 Dr. Thompson then went about securing housing in Port Williams, as through her research, she determined the Port Williams Elementary School would be optimum for David. Dr. Thompson said that Mr. St. Croix did not play a role in looking for a home. Her evidence was that because their marriage was in significant trouble and they were leading separate lives, "Ron was aware I was relocating with David and he was perfectly content with it". She went on to say, "he felt good as he would have more time to work on his vehicles".

26 The above is to be contrasted with the evidence of Mr. St. Croix.

27 For his part, Mr. St. Croix said there was a specific plan discussed with his wife. This would involve him staying in the matrimonial home in Paradise and continuing to work at Nalcor for a six month period. He testified this plan was agreed upon so that the family would continue to

have health benefits (through Mr. St. Croix's employer) until Dr. Thompson's new position would provide for such benefits (six month waiting period with A.V.D.H.A.). During this half year away from his family, Mr. St. Croix would also oversee required uncompleted renovations to their 48 Lanark Dr. home in Paradise.

28 Mr. St. Croix added that the agreed upon plan did not involve a search for employment. According to him, the couple discussed how he would upgrade his education once he joined his family in Nova Scotia.

29 Irrespective of the background leading up to Dr. Thompson's departure, it is uncontroverted that the two have not lived together since their separation in mid-August, 2011. While there were visits by Mr. St. Croix to Nova Scotia in September, November and December of 2011, I find from the evidence of both parties that their visits were not harmonious. Returning to *Volcko*, *supra*, Justice Beaton, beginning at para. 7 and continuing to para. 28, provides a thorough review of the authorities regarding determination of a separation date. In finding Mr. and Mrs. Volcko separated on the earlier date in that case, the judge noted points which are applicable here:

> [17] The Wife relied on Miller v. Miller, 2000 NSCA 64 in support of her position that while the parties may have lived in separate residences after 2006, the nature and frequency of their interaction and their continued counselling meant they were not separated. In Miller (supra), Bateman, J.A. described the parties' circumstances as follows:
>
> > [4] The trial judge aptly described the circumstances of the parties' separation as unique. The Wife testified that on October 24, 1995 she moved into a friend's home, she and Mr. Miller having agreed to live in different residences while they worked on their marital problems. From that time forward they spent the majority of weekends together, had regular sexual relations, shopped, dined and attended social functions together as they had always done. She testified that although the parties were living in separate accommodations it was with a view to working out their differences, not ending their marriage. During the months preceding Christmas of 1997 they began to spend less time together and were arguing frequently. In March of 1998 the Wife initiated divorce proceedings. The Wife's evidence in this regard was uncontradicted. Justice Haliburton found that January 1,

> 1998 was the date of separation. Counsel for Mr. Miller submits that the trial judge should have choose October 24, 1995 or, alternatively, some date between then and January 1, 1998. We are not persuaded that Justice Haliburton erred in law in fixing the separation date as he did on these unusual facts...
>
> [18] There is a sharp distinction to be drawn between the factual circumstances in Miller (supra) and this case. Here, the parties did not spend the majority of their free time together, they did not engage in regular sexual relations, they did not shop together, and they did not attend social functions together as they had previously done. Rather, their contact centred around their children, with the exception of their attendance at marriage counselling. Each had a different motivation for participating in counselling, with the Wife seeking to repair the marriage and the Husband looking to finalize its end. In Miller, both parties, while living in separate residences, were mutually intending to resolve their marital problems.

30 Finally, Justice Beaton's comments at para. 24 are particularly of assistance on the facts of the within case:

> [24] Section 8 of the Divorce Act does not require a mutual intention to end the marriage, as discussed in *O'Brien v. O'Brien*, 2013 ONSC 5750, per McDermot, J. at paragraph 50:
>
> > Unlike the decision marry, the decision to separate is not a mutual one. It is a decision which is often made by one party over the objections of the other. Those protestations matter not: once one party has decided to permanently separate and has acted on it, the other party has no ability to stop the process or object to it. This is confirmed by section 8(3)(a) of the Divorce Act, which states that "spouses shall be deemed to have lived separate and apart for any period during which they lived separate and apart and either of them had the intention to live separate and apart from the other" (emphasis). As stated by D.L. Corbett J. in *Strobele v. Strobele*, [2005] OJ 6312 (S.C.J.), the separation occurs when "the parties knew or acting reasonably, ought to have known that their relationship was over and would not resume"[paragraph 29].

31 In the result I find that the date of separation is at the end of August, 2011. Before leaving this section, however, I feel compelled to make a finding which will have important consequences for my subsequent determinations on child and spousal support. At the same time, I will ex-

plain my rationale for determining August 31, 2011 as the date of separation.

32 I have carefully reviewed the *viva voce* and documentary evidence in an effort to sort through the conflicting testimony concerning the parties' decision to move to Nova Scotia. I have also reflected on the demeanor of both witnesses as they gave their evidence in this area. On balance, I find as a fact that neither version is correct but rather something in between.

33 I find that Dr. Thompson and Mr. St. Croix came to the collective decision to move from Newfoundland to Nova Scotia. By June, 2011 Mr. St. Croix agreed with Dr. Thompson's selection of a position with the A.V.D.H.A. By July, he agreed with her decision to sign the contract. He consented with her leaving with David because he was of the honest belief that he would rejoin his wife and son in six months' time. In this area I completely accept Mr. St. Croix's evidence as I do not believe he would have agreed to permit his son to leave without a battle. After all, this is the same man who has (albeit recently with the backdrop of all the litigation) contacted the RCMP with regard to charging Dr. Thompson with kidnapping David.

34 Where I depart with Mr. St. Croix's version of events and accept Dr. Thompson's, is regarding the employment plan. I do not believe their agreement (developed when they were a couple in the summer of 2011) involved Mr. St. Croix not doing a job search. Rather, given the testimony, I find that the plan was for Mr. St. Croix to follow his wife and son to Nova Scotia six months hence. He would then pursue job opportunities while at the same time explore turning his auto racing hobby into a for profit business.

35 As things unfolded, Mr. St. Croix and Dr. Thompson did not see the plan through as by the end of August Dr. Thompson made the determination (which she articulated to Mr. St. Croix) that their relationship was over. This decision was further communicated when the two saw one another during Mr. St. Croix's summer, fall and early winter 2011 visit to Nova Scotia. They were anything but harmonious visits and involved bickering and Mr. St. Croix staying in a separate room in Dr. Thompson's residence.

What parenting arrangement would be in David's best interest?

36 As a Petition for Divorce has been issued, the appropriate starting point in determining the parenting arrangement is s. 16(1) of the *Divorce Act*:

> 16(1) A court of competent jurisdiction may, on application by either or both spouses or by any other person, make an order respecting the custody of or the access to, or the custody of an access to, any or all children of the marriage.

37 In determining the appropriate parenting arrangement, the *Divorce Act* mandates that the best interests of the children is paramount:

> 16(8) In making an order under this section the court shall take into consideration only the best interests of the child of the marriage as determined by reference to the condition, means, needs and other circumstances of the child.

38 In *D. (C.H.F.) v. H. (C.R.)*, 2006 NSSC 230 (N.S. S.C.), Justice B. MacDonald, quoting from *Dixon v. Hinsley* (2001), 22 R.F.L. (5th) 55 (Ont. C.J.), noted that a broad view must be taken to determine what is truly in the best interests of a child in any given circumstances:

> "the best interests" of the child is regarded as an all embracing concept. It encompasses the physical, emotional, intellectual and moral well being of the child. The court must look not only at the child's day-to-day needs but also to his or her longer term growth and development...What is in the child's best interest must be examined by the perspective of the child's need with an examination of the ability and willingness of each parent to meet those needs. Each parent's plan for the child must be examined carefully in light of the children's needs. Custody is not always awarded to the parent who has "cooked the most meals, driven the most miles, attended the most concerts or cheered the loudest of their achievement."

39 Further, in *Young v. Young*, [1993] 4 S.C.R. 3 (S.C.C.) the Supreme Court noted that the test of the best interest of the child is the only consideration in determining parenting arrangements:

> First, the "best interests of the child" test is the only test. The express wording of s. 16(8) of the *Divorce Act* requires the court to look only at the best interests of the child in making orders of custody and access. This means that parental preferences and "rights" play no role.
>
> Second, the test is broad. Parliament has recognized that the variety of circumstances which may arise in disputes over custody and access is so diverse that predetermined rules, designed to resolve certain types of disputes in advance, may not be useful. Rather, it has

> been left to the judge to decide what is in the "best interests of the child", by reference to the "condition, means, needs and other circumstances" of the child. Nevertheless, the judicial task is not one of pure discretion. By embodying the "best interests" test in legislation and by setting out general factors to be considered, Parliament has established a legal test, albeit a flexible one. Like all legal tests, it is to be applied according to the evidence in the case, viewed objectively. There is no room for the judge's personal predilections and prejudices. The judge's duty is to apply the law. He or she must not do what he or she wants to do but what he or she ought to do.

40 Commencing in late August, 2013, Mr. St. Croix began living in Nova Scotia for the balance of 2013 and his plan involves living here for in the order of three quarters of each successive year. In the result, he seeks a shared parenting arrangement. On the other hand, Dr. Thompson asks the Court to continue the parenting arrangement set out in the Interim Order of December 20, 2013. Pursuant to the Order, David primarily resides with his mother, while Mr. St. Croix has parenting time every other weekend from Friday after school until Monday morning, and every week from Wednesday after school until Thursday morning.

41 Dr. Thompson and Mr. St. Croix have a similar proposal for David for the summer holidays. This is contained within the Partial Corollary Relief Order (Appendix II).

42 The evidence discloses that Dr. Thompson has been David's primary caregiver throughout much of his life. Since birth she has taken him to the vast majority of his medical appointments. David has lived with Dr. Thompson in Port Williams since August, 2011. Mr. St. Croix has had regular, in person, access with David since the parties' separation. Since Mr. St. Croix relocated to Nova Scotia in August, 2013, he has continued to have regular access with David (since November 7, 2013, that access has been as set out in the Interim Order).

43 Although Dr. Thompson agrees Mr. St. Croix should have regular parenting time with David, she does not agree that a shared parenting arrangement would be in David's best interests. It is the Petitioner's position that a constant and predictable routine and environment is what is best for David.

44 As I remarked more than once over the trial, it is my view that both parents equally love their son. His best interests are to be considered above all other considerations. This requires that, where possible, each parent have a strong presence in his life.

45 Through the course of the trial there was consistent evidence from both parties that David is a very intelligent eight year old. He has been provided an individualized education plan as a gifted student in his grade two class at Port Williams Elementary. He is involved in extracurricular activities ranging from karate to music lessons. He has friends but is somewhat solitary in his approach and was investigated as possibly being on the autism spectrum, but this was ruled out.

46 Unfortunately, David's parents, especially since their separation, have had a significantly strained relationship. This has resulted in poor communication (acknowledged by both sides) and overall conflict. In addition to the R.C.M.P. complaint there have been episodes between the parents causing heightened anxiety centering around David's schooling, after school program and karate lessons. With the December 20, 2013 Interim Order in place the situation has somewhat improved, but there still exists considerable tension and difficult communication.

47 For the past two and one half years, there have been numerous plane trips with David flying from Halifax to St. John's and return to facilitate liberal access with his father. This has manifested itself as another issue between the parents as Mr. St. Croix is of the view his son can travel unaccompanied, whereas Dr. Thompson feels otherwise.

48 Considerable trial time was spent on this issue, inclusive of Mr. St. Croix introducing an exhibit of the various airlines' policies regarding unaccompanied minors. Having considered all of the evidence, I am of the emphatic view that Dr. Thompson's position on this issue is reasonable and must prevail. It is clearly in the best interest of this particular eight year old that he has a travel companion for the foreseeable future, perhaps until he reaches the higher elementary grades.

49 The cost of airline travel for the 2014 summer was specifically addressed in the Interim Order (Appendix II). After the summer the cost of having David travel accompanied shall be borne by the parent travelling with him. If a parent is not travelling with David, then the cost (of flying a mutually acceptable relative or close friend) shall be shared equally.

50 Before leaving this area I wish to add that there were a number of email exchanges introduced as exhibits which touched on this topic and other parenting decisions. Unfortunately, Mr. St. Croix's emails were often far from diplomatic, deploying derogatory adjectives to characterize Dr. Thompson and her actions. I do not wish to dwell on this other than to make the point that the emails are part of the evidence which convinces me that the appropriate decision making arrangement for

David must rest with one or the other parent and that — for the reasons indicated and further developed below — the parent should be Karen Thompson. Some of the other evidence relates to disagreements between the parties regarding a flu shot (Karen, yes/Ron, no), dirt bike (Ron, yes/Karen, no) and production of a travel letter pursuant to the December 20, 2013 Order (Mr. St. Croix belatedly producing the letter with his initial refusal due to a typographical error in the Order).

51 The culminating effect of these disagreements has been to cause tension and stress between the parties. Furthermore, and of even greater concern, is the "spillover" effect the upset has undoubtedly had on David. There was evidence from both parents of several times when David has been told by one parent about the other's faults. This, of course, is harmful to David and the best decision making arrangement for him must seek to minimize/eliminate this.

52 In *Lockerby v. Lockerby*, 2010 NSSC 282 (N.S. S.C.), Justice Jollimore had cause to review a volatile relationship and ultimately decided it was best for the children to reside primarily with their father and for him to have the final decision making authority over the children. At paras. 70-72 Justice Jollimore set the background, which offers assistance with my determination:

> 70 As long ago as 1998, the court distinguished between an "inability" to cooperate and an "unwillingness" to cooperate in determining parenting arrangements in Godfrey-Smith, 1998 CanLII 1857 (N.S.S.C.) at paragraph 20. In that case, then-Justice Michael MacDonald relied on the parties' past cooperative relationship to determine that a joint custody relationship was appropriate. I distinguish the circumstances before me from those which existed in Godfrey-Smith, 1998 CanLII 1857 (N.S.S.C.). The Lockerbys have experienced a prolonged period of high conflict. This is not a situation where once cooperative parents now restrict their communications to curt emails. This is a situation where children have experienced more than one and one-half years of allegations that their father has consciously made decisions designed to hurt them, whether by failing to return items they take to his home or by sabotaging the hot water system in their home. After the experiences of the past years, the children cannot expect that their parents will cooperate in decision-making. It is in the children's best interests that decisions about them do not become an opportunity for conflict between their parents and that the children do not have to worry that their decisions will be buried under their parents' conflict. For the children to have the security of knowing that important decisions will not fall victim to their

> parents' conflict means there must be a sole decision-maker. A sole decision-maker will also ensure that decisions do not become a battlefield.
>
> 71 Between the parents, Mr. Lockerby has done more to shield the children from the conflict. He says this has meant not responding to comments the children relay from their mother and not explaining his side of the story. He says that the consequence of this is that he is either left to let it go (leaving the children with the impression he has done something wrong) or explaining the adult situation to the children and thereby speaking negatively of their mother. He appreciates that silence has unfortunate consequences for him, but knows this is necessary, if the children are to be kept out of their parents' conflict. Between the parents, I rely on Mr. Lockerby to make decisions for the children without using the situation to perpetuate the parents' conflict. Mr. Lockerby shall have sole custody of the children. When important decisions are to be made, he shall advise Ms. Lockerby of the decision he intends to make and make the final decision.
>
> 72 To ensure the children's relationships with their parents are not challenged by involving them in the separation and to ensure that their contact with each parent is maximized, the children should have their primary residence with their father beginning immediately. Any access arrangements the parents have already made for this summer will be followed.

53 In this case I find Dr. Thompson has done the most to shield David from the conflict. Between the parents, I rely on Dr. Thompson to make decisions for David. When she makes an important decision about David, she shall advise Mr. St. Croix on a timely basis.

54 In *Hammond v. Nelson*, 2012 NSSC 27 (N.S. S.C.), Dellapinna J. did a thorough review of recent cases regarding shared parenting (including Associate Chief Justice O'Neil's decisions in *Murphy v. Hancock*, 2011 NSSC 197 (N.S. S.C.); and *Gibney v. Conohan*, 2011 NSSC 268 (N.S. S.C.)). In doing so, Justice Dellapinna developed a non-exhaustive list of eight considerations (para. 68) for the Court to review when one parent is seeking shared parenting. I have bourne these considerations in mind in making my determination that David should primarily reside with Dr. Thompson and that she should have the final decision making authority.

55 In *Hammond* the parties dated for approximately three months. They had one child together, who was about two and a half years old at the time of the hearing. Both parents were involved with their child from the time of birth, although they have had difficulties communicating with

each other. Justice Dellapinna found that both parents were able to be their child's primary parent. However the Court ultimately found that imposing a shared parenting arrangement over the mother's objections would have an adverse effect on the parents' relationship, and an adverse effect on the child. As well, Justice Dellapinna found that the child required stability, and that was found in leaving the child in the primary care of her mother with the father having generous parenting time (at para. 90-91).

56 Nova Scotia Courts have determined shared custody arrangements require an even greater level of cooperation and communication between the parents than joint custody arrangements. Parents must not only foster and encourage meaningful, regular and frequent contact between the children and the other parent they must also cooperate in providing similar routines and value systems in each household for the children.

57 In *R. (F.F.) v. F. (K.)*, 2013 NLCA 8 (N.L. C.A.), White J.A. found that the trial judge did not err in ordering "qualified joint custody" that granted the mother final decision-making authority (at para. 49).

58 The trial judge found that:

> I have, as indicated, concluded that there is ongoing animosity between Mr. R. and Ms. F. I have also concluded that there is an abundance of evidence which proves a lingering lack of cooperation and effective communication. I have therefore, following the principles set out in the foregoing jurisprudence, also concluded that K.'s best interests will be better served with one parent having final decision-making authority concerning major issues that affect her; this is because I am firmly convinced, based on the evidence, that both of K.'s parents will not be able to consistently agree on issues which affect K.; this includes extra-curricular and recreational pursuits. As stated in *Lamont-Daneault v. Daneault*, [2003] M.J. No. 318, supra, and *Sawatzky v. Sherris*, [2002] M.J. No. 429, 2002 CarswellMan 465 (Man. C.A.), supra, ordinarily this is the parent with primary care and control. Because I cannot find a valid reason for departing from that which is ordinarily ordered, the ensuing order will provide for joint custody but with Ms. F. having final decision making authority if she and Mr. R. cannot agree on major decisions which affect K.

59 White J.A. held that:

> Assigning one parent final decision making authority may be appropriate where there is evidence of an inability to resolve matters because of a high degree of conflict existing between the parents: see *Carnell v. Follett*, 2010 NLTD(F) 25, 300 Nfld. & P.E.I.R. 133;

> *Snook v. Lane* (2006), 255 Nfld. & P.E.I.R. 339 (NLUFC). While parents should strive to come to an agreement and rationally and fairly deal with issues as they arise, it must be recognized that this is not always possible and that, as a result, the child of the relationship may be caught in the conflict.

60 Justice B. MacDonald considered this issue in *C. (J.R.) v. C. (S.J.)*, 2010 NSSC 85 (N.S. S.C.). MacDonald J. goes into detail considering the distinction between sole custody, and joint custody when one parent has the final decision-making authority (at para 26-30). Ultimately she notes that "...joint custody must not be granted as a form of wishful thinking. The nature and extent of the conflict between the parties must be analyzed to determine if joint custody is in a child's best interest" (at para. 30).

61 Having regard to the evidence, I am of the view that the optimal parenting arrangement for David involves the parenting plan proposed by Dr. Thompson and (but for changes in respect of phone calls, which I will address below) attached to my decision as Appendix III. With this plan in place, David will continue to have the stability of living in his primary home in Port Williams. This will afford him proximity to his school, friends and extracurriculars. When his father is resident in the Port Williams vicinity (which by his evidence will likely be for the regular Acadia University school year or an extended one involving spring and/or summer courses), David will live with Mr. St. Croix over every Wednesday and every other weekend (as more particularly set out at Appendix III).

62 As for the aforementioned phone calls, I have modified the parenting plan so that they occur less often and for a shorter duration. In this regard, I am mindful of David's school and extracurricular schedule along with his bedtime routine, as addressed by both parents in testimony.

63 In my view, the parenting plan I have set out allows for both parents to continue to have a strong presence in David's life but with less likelihood of conflict, and therefore in their child's best interest.

Property Division Application

(a) Principles

64 Under the *M.P.A.*, I must first identify the assets and then classify them as matrimonial or non-matrimonial. Identifying assets simply involves listing them. Classifying assets requires determining whether they are excluded under s. 4(1) of the *M.P.A*. Once items are identified and

classified, they must be valued. The *M.P.A.* provides that matrimonial assets are to be divided equally. In limited circumstances the *M.P.A.* allows for an unequal division of matrimonial assets and a division of non-matrimonial assets.

65 As Justice Smith (as she then was) noted in *Abbott v. Abbott*, 2002 CarswellNS 395 (N.S. S.C.), at para. 14:

> An interest in matrimonial property is generally not determined based on a party's contribution to the asset (financial or otherwise) during the marriage. The starting point under the Nova Scotia Matrimonial Property Act is the presumption that all property acquired by either or both spouses before or during the marriage is matrimonial property with certain exceptions as set out in s. 4(1) of the Act. The Act allows the Court to grant an unequal division of matrimonial assets taking into account the date and manner of acquisition of the assets (see s. 13(e)), however, it is not necessary, nor is it desirable, for the parties to focus on who spent what on the property during the marriage. In many marriages one spouse is significantly or completely responsible for the expenses relating to the matrimonial assets such as the matrimonial home. Nevertheless, the law provides for a presumption of an equal division of these assets.

66 Further, at para. 19, Justice Smith stated the following concerning valuation dates for matrimonial assets:

> The Matrimonial Property Act does not specify a date that should be used for the valuation of matrimonial assets. The case law that has developed in Nova Scotia establishes that there is no requirement on the Court to assign a single valuation date for all matrimonial assets (see: *Reardon v. Smith* (1999), 1 R.F.L. (5th) 83 (N.S.C.A.)). The Court has the discretion to decide what is fair and equitable in the circumstances of each case (see: *Simmons v. Simmons* (2001), 196 N.S.R. (2d) 140 (N.S.S.C.)).

(b) Division of Matrimonial Home

67 In *Simmons* [*Simmons v. Simmons*, 2001 CarswellNS 252 (N.S. S.C.)] (referenced by Justice Smith in the above quote) Justice D. Campbell provided principles for the valuation of assets, which continue to be accepted by the Courts in Nova Scotia. With respect to the matrimonial home, Campbell, J. held that it should be valued as of the date of division.

68 The parties' home at 48 Lanark Dr. in Paradise was appraised by William G. Balsom of Kirkland, Balsom & Associates on May 2, 2014. Mr.

Balsom's report was introduced in evidence and he gave *viva voce* evidence from St. John's via a video/audio link. On the basis of his report and testimony I find the matrimonial home has an appraised value of $364,900.00 "as is". In this regard, the original report valued the house at $359,900.00 but through cross-examination it was developed that Mr. Balsom erroneously considered the lot of the smaller next door properly (46 Lanark Drive) when he prepared his opinion. The "as is" designation refers to the fact that there are fairly significant uncompleted renovations which need to be done to the property.

69 Since the property is in Newfoundland, the Court does not have jurisdiction to make an Order with respect to the property itself. However, I am able to make an Order that the parties do something with respect to the property, or that the value of the property be taken into account for a division of assets. In this respect, I refer to *M.P.A.* s. 22(2) and (3):

> **Immovable property**
>
> (2) The ownership of immoveable [immovable] property as between spouses is governed by the law of the place where that property is situated.
>
> **Consideration of value of immovable property**
>
> (3) Notwithstanding subsection (2), where the law of the Province governs the division of assets, the value of the immoveable [immovable] property wherever situated may be taken into consideration for the purposes of a division of assets. R.S., c. 275, s. 22.

70 At the conclusion of the trial I ordered that the parties sell the home and the Order (also addressing 2014 summer access) is found at Appendix II.

71 I recognize that it may take considerable time for the house to be sold. With this in mind, I am cognizant of the history involving Mr. St. Croix not realistically attempting to rent the house out when he lived in Nova Scotia from late August, 2013 until late April, 2014. I am also mindful of how Dr. Thompson was forced to step in to pay the couple's line of credit mortgage when Mr. St. Croix defaulted on the monthly obligation. In the result, I order that in the event the home does not sell on or before October 31, 2014, that a rental agency be commissioned to rent the house. I further order that if Mr. St. Croix should somehow change plans and remain in the house, that he be responsible for all line of credit, mortgage, utility, tax and associated expenses referable to 48 Lanark Drive for as long as he lives there.

(c) Remaining Matrimonial Assets and Debts

72 With respect to the remainder of the matrimonial property and debts, there was considerable evidence regarding various bank accounts and lines of credit. Dr. Thompson argued that the bulk of the assets be equally divided but that some of the debts should not be divided equally. As for Mr. St. Croix, his position was set out in his pretrial brief as follows:

> Matrimonial assets and debt should be unequally divided. The couple had intertwined finances throughout the marriage. Significant investment decisions, capital expenditure and debt accruals were assumed by the couple based on the future earning potential of Ms. Thompson.
>
> Based on long term effects an equal division of assets and debts will have on the financial health of Ron, it is proposed that Karen absorb the outstanding debt associated with the CIBC line of credit and the National Bank line of credit. Karen should also be responsible for payment of her student loan. These amounts, while not insignificant, are much more manageable for Karen on a cash flow basis within a long term personal debt consolidation plan. The opposite effect unto Ron would challenge his ability to be a parent to David and potentially lead to personal bankruptcy proceedings.
>
> Karen should also provide an equalization payment to Ron in the form of lost capital as her actions have resulted in the renovation in the home remaining unfurnished. Any appreciation in value associated with the sale of the matrimonial home as it should have been completed is now lost. Potentially, there will also have to be restorative work on the exterior to repair weather damaged materials. These costs should also be directed unto Karen.
>
> An additional effect is in the long term security of Ron's financial health and his path toward self-sufficiency upon the breakdown of the marriage. Significant decisions in the couple's marital arrangement were made respecting the fact that Karen would be earning a significant income upon completion of her medical program. Of paramount importance in the relationship was the decision to move to Nova Scotia as a family to support Karen in her career endeavour.
>
> As a result of the breakdown of the marriage, Ron's future financial security is completely unknown. The couple agreed to move as a family to Nova Scotia. Karen's unilateral decision to end the marriage does not belie her responsibilities and obligations of the matrimonial arrangement. The current situation has in effect usurped

> Ron's ability to be an equal parent in David's life and also jeopardized Ron's financial future.
>
> An unequal division in Ron's favour would accelerate Ron's path toward self-sufficiency at the same time preserving the standard of living that each spouse experienced and planned for in their future together.

73 Once again, the *M.P.A* allows for an unequal division of property only in limited circumstances. As for debts, as Jollimore J. noted in *Lockerby*, supra, at para 146:

> Section 12(1) of the Matrimonial Property Act provides that matrimonial assets are divided equally notwithstanding the ownership of the assets. There is no similar treatment of debts. In Cameron, 1995 CanLII 4433 (N.S.S.C.), affirmed by Cameron, 1996 CanLII 5598 (N.S.C.A.), Justice Goodfellow noted, at paragraph 26, that a debt is not automatically shared simply because the debt may be labeled as matrimonial indebtedness. Whether the debt will be shared depends on whether the division of matrimonial assets in equal shares would be unfair or unconscionable. His Lordship did comment, again at paragraph 26, that "In most conceivable situations fairness and conscience dictate a sharing of matrimonial indebtedness."

74 In *Cogswell v. Wright*, 2014 NSSC 173 (N.S. S.C.), Justice Legere Sers noted as follows at paras. 209-215 concerning debts:

> 209 Our Court of Appeal has directed courts to ask certain questions when addressing the issue whether debts are matrimonial (*Ellis v. Ellis* (1999), 175 NSR (2d) 268; see also *Bailey v. Bailey* (1990), 98 NSR (2d) 9 (paragraph 23)).
>
> 210 These questions include:
>
> 1. Were the debts incurred for the benefit of the family unit?
> 2. Were they ordinary household debts and if incurred after separation (as the orthodontic debts were) were they necessary to meet basic living expenses or preserve matrimonial assets? and
> 3. Were they reasonably incurred?
>
> 211 While knowledge of a debt is not essential to its classification as matrimonial, in *Selbstaedt v. Selbstaedt*, 2004 NSSF 110, Dellapinna, J. at paragraph 45 noted "the non-disclosure of a significant debt by one of the parties may make the task of meeting the burden of proof more difficult to achieve."
>
> 212 The Matrimonial Property Act does not specifically deal with a division of debts. There is not a legislated presumption, as with as-

> sets, that debts are divided equally; therefore, each debt must be considered individually.
>
> 213 A Court may consider, among other factors, the amount of the debt, the liability of the spouse, and the current balance.
>
> 214 In order to consider whether there may need to be an unequal division of these debts, the Court also has to consider in this case section 13 of the Matrimonial Property Act, whether there was unreasonable impoverishment of the matrimonial assets by a spouse.
>
> 215 The Court must also reflect on whether this debt was incurred solely for the benefit of one spouse.

75 In *Simmons*, *supra*, Justice Campbell outlined the general principles for the valuation date of an asset, noting at para. 33:

> 33 In conclusion, fairness in the valuation process is achieved by applying separation date values to those assets which tend to be consumed by actual usage or whose value has been earned or accrued by reference to the passage of time and corresponding years of employment service or other earned basis. Other assets should be valued as of the date of division which is the date when an accounting occurs between the spouses.

76 These principles have been cited in numerous subsequent decisions and approved of by the Nova Scotia Court of Appeal (see *Moore v. Moore*, 2003 NSCA 116 (N.S. C.A.) at para. 24; *Morash v. Morash*, 2004 NSCA 20 (N.S. C.A.) at para. 20).

77 In *Simmons*, *supra*, the Court also discussed the division of bank accounts (see para. 21) stating that an operating bank account should be valued at the point when the spouses separate their finances.

78 According to *Clarke v. Clarke*, 2004 NSSF 43 (N.S. S.C.) and *Shurson v. Shurson*, 2007 NSSC 101 (N.S. S.C.), both spouses are entitled to the benefit of a mortgage payout.

79 With respect to pensions, *Morash*, *supra* establishes that the date for division of a regulated pension such as Mr. St. Croix's will be at the date of the couples' separation. At para. 32 the Court of Appeal held that, "pension credits earned before and during the marriage (subject to valuation dates) are a matrimonial asset and subject to equal division". Accordingly, Mr. St. Croix's pension with Nalcor (effective approximately August, 2005 and up until August 31, 2011 with an estimated present value of $80,000.00) shall be divided equally between the parties.

80 I am mindful of the positions of both parties in coming to my determination of the division of their assets and liabilities. I must say I have

some sympathy with the approach suggested by Mr. St. Croix but on balance, I believe this may be better addressed (and properly in law) thorough my ultimate disposition with respect to spousal support.

81 In the result I have reviewed the oral and documentary evidence in this area and determined that the table handed up in closing submissions by the Petitioner offers, for the most part, an equitable division of matrimonial property and debts. Accordingly, I have appended the table as Appendix IV and order that it be followed. It is identical to what the Petitioner proposed with five exceptions where I have:

1. increased the value of the appraised value of the matrimonial home from $359,900 to $364,900 for the aforementioned reason.
2. reduced the value of the Respondent's "3 Datsuns" from $20,000.00 to $9,000.00 to reflect the evidence that two of the three vehicles are not operating and used for extra parts;
3. factored in the aforementioned pension estimate;
4. not provided any credit to the Petitioner for allegedly crediting ($1,630.00 estimate) the parties' joint VISA as I found the evidence here to be imprecise; and
5. factored in the Petitioner's student loan current balance ($33,096.00) to be divided on account of my decision to award spousal support.

82 In coming to my determination of a division of the parties' assets and debts I have gone over the entirety of the evidence along with the aforementioned authorities. At the end of the day, I am satisfied the Appendix IV chart represents a fair and equitable distribution of the matrimonial assets and debts.

Retrospective and Prospective Child Support

83 Since the date of separation, David has lived primarily with his mother. This will go on as I have continued the existing parenting plan into the future. In determining child support I must consider the parents' income and where appropriate, impute income to one or both parents. Once this is done, I must apply the *Child Support Guidelines* to establish David's support. I have accordingly, followed this approach in making this determination.

Retrospective and Prospective Spousal Support

84 As mentioned at para. 81, *supra*, for reasons that will be fully developed, it is my decision to award spousal support. Unlike the mandatory requirement to follow the *Child Support Guidelines*, the law does not oblige me to apply the *Spousal Support Advisory Guidelines ("S.S.A.G.")* (see *Strecko v. Strecko*, 2014 NSCA 66 (N.S. C.A.), at para. 50, per Oland J.A., Beveridge and Farrar J.J.A., concurring). Nevertheless, as fully developed herein, I have consulted the *S.S.A.G.* and found them to be of guidance in determining the award for spousal support.

(a) Background

85 The parties had what I would describe as a contemporary marriage. After living together for nearly two years, they married on August 3, 2002. They lived together as a married couple for slightly in excess of nine years. During this time, there were periods of separation on account of Mr. St. Croix's work and due to marital discord. These times apart — when one examines the parties' timelines and considers their evidence (albeit somewhat conflicting on the number of times apart and duration) — are not of a magnitude that causes me to qualify the finding that it was a nine year marriage. In the midst of the marriage, their only child, David was born January 10, 2006.

86 During their time together, the parties' incomes were as follows:

Year	Dr. Thompson*	Mr. St. Croix
2000**	$4,339.00	$16,214.00
2001	$281.00	$26,631.00
2002	$2,557.00	$41,757.00
2003	$2,038.00	$27,981.00
2004	$22,889.00	$28,619.00
2005	$44,103.00	$45,579.00
2006	$19,752.00	$60,847.00
2007	$61,200.00	$75,803.00
2008	$58,521.00	$77,885.00
2009	$17,559.00 plus $36,000.00 (tax free disability)	$77,310.00
2010	$56,805.00	$85,619.00

Year	Dr. Thompson*	Mr. St. Croix
2011 (January-August)	$67,690.00	$55,318.00
Total	$393,734.00	$619,563.00

Notes:

* Not including a combination of student loans, scholarships, grants and savings.

** The parties were only together for 5 months of 2000.

87 Given the totals, Mr. St. Croix's earnings over these eleven years were $619,563.00 and Dr. Thompson's $393,734.00. This amounts to a ratio of roughly 60/40 (Mr. St. Croix over Dr. Thompson). Apart from the income differential, as might be expected, the parties did not carry out identical household functions. I will refrain from comparing their respective contributions in this area other than to say that on the totality of the evidence I believe Mr. St. Croix did the majority of the household tasks.

88 I say this with reference to the fact that Dr. Thompson understandably devoted much of her time to studying. By contrast, Mr. St. Croix had jobs which he testified he could "leave at the gate" when he left in the afternoon.

89 Additionally, there were times over their nine years together when Dr. Thompson's personal circumstances required Mr. St. Croix to do more to support his wife. In this regard, the evidence discloses Dr. Thompson had significant health difficulties beginning in June, 2003, which required six months away from her studies. Approximately six years later, Dr. Thompson's mother was diagnosed with terminal cancer and she died on September 14, 2009. During both of these time periods I find Mr. St. Croix increased his household contribution along with providing support to his spouse.

90 I therefore find that the evidence warrants spousal support to be paid by Dr. Thompson to Mr. St. Croix. The questions now arise as to in what amount and for what length of time?

(b) Income and Expenses

91 To answer the above questions I will first examine income and expenses. I will also consider as paramount David's child support as I consider his parents' spousal support obligations/entitlement.

92 In advance of trial both parties completed Statements of Income as well as Statements of Expenses. In the case of Mr. St. Croix they were filed late and unsworn. Of perhaps greater concern to the Court was the fact that Mr. St. Croix showed monthly budgeted expenses that were excessive involving among other items, housecleaning of $175.00 and "professional service arrears" of $400.00. Through cross-examination it was developed that Mr. St. Croix felt he owed in the order of $45,000.00 in legal fees related to the litigation in the matter, yet he did not follow up with the Court's invitation to produce documentation backing up this figure.

93 On account of the above and other examples of inflated items, Mr. St. Croix showed total monthly expenses of $14,000.00. Accordingly, when his income was factored in there was a net deficit of in excess of $8,800.00 per month.

94 As for Dr. Thompson, her total monthly expenses (shown in her Statement of Expenses filed May 5, 2014) were shown to be $15,386.09.

95 While not as overstated as Mr. St. Croix's, I found some of the items to be on the high side. For example, given Dr. Thompson's $30,000.00 annual RRSP/TFSA contribution, she showed a $2,500.00 monthly amount. She also listed monthly professional conference fees of nearly $500.00. In the result, after factoring in her income, Dr. Thompson showed an overall monthly deficit of just over $4,500.00.

96 In addition to my view that both parties' expenses are overstated, I am of the view that their incomes are less than what they can and should be for their sakes and for David. Accordingly, I will now address imputation of income.

(c) Imputation of Income

97 In *Saunders v. Saunders*, 2011 NSCA 81 (N.S. C.A.), Farrar J.A. (Fichaud and Bryson JJA concurring) considered the issue of spousal support and imputing income. At paras 40-42, the court of Appeal provided the statutory and jurisprudential backdrop:

> 40 Section 15.2(4) of the Divorce Act requires that certain factors are to be taken into consideration when making an award of spousal support pursuant to the Divorce Act. Section 15.2(4) directs that the Court:
>
> a. ... shall take into consideration the condition, means, needs and other circumstances of each spouse, including

b. (a) the length of time the spouses cohabited;

c. (b) the functions performed by each spouse during cohabitation; and

d. (c) any order, agreement or arrangement relating to support of either spouse.

41 The Court is mandated to take into consideration the means, needs and other circumstances of each spouse. *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420 analyzed the respective obligations of husbands and wives. The trial judge, here, accurately summarized this decision as follows:

a. [58] In *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420, 44 R.F.L. (4th) 1, The Supreme Court of Canada analysed the respective obligations of husbands and wives and stated at pps. 439-440 (S.C.R.):

b. ... a matter of applying the relevant factors and striking the balance that best achieves justice in the particular case before the court.

c. ...

d. There is no hard and fast rule. The judge must look at all the factors in light of the stipulated objectives of support, and exercise his or her discretion in a manner that equitably alleviates the adverse consequences of the marriage breakdown.

42 Section 15.2(6) of the Divorce Act outlines the objectives of an order for spousal support and directs that an order:

a. ... for the support of a spouse should

b. (a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;

c. (b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;

d. (c) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and

e. (d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.

98 Later at paras 53-59, Justice Farrar discussed how to determine the appropriate amount of support:

53 In Read v. Read, 2000 NSCA 33, Freeman, J.A. quoting Justice Goodfellow in Mosher v. Mosher (1999), 177 N.S.R. (2d) 236 (S.C.)

at 238 to the effect that the duty of support is on the payor to provide reasonable support. The key question in this case is what is reasonable support having regard to all the circumstances. As I have previously set out, I found that the trial judge erred in two ways: (i) by failing to impute more income to Ms. Saunders; and (ii) by misapprehending or failing to take into account her actual needs. What then is the appropriate amount of support?

54 In Shurson v. Shurson, 2008 NSSC 264, Justice MacDonald of the Family Division was considering an application to vary the spousal support provisions of the parties' corollary relief judgment. She held:

a. [13] Examples of circumstances that may lead to a decision that a spouse is entitled to compensatory support are:

b. a) a spouse's education, career development or earning potential have been impeded as a result of the marriage because, for example:

c. — a spouse has withdrawn from the workforce, delays entry into the workforce, or otherwise defers pursuing a career or economic independence to provide care for children and/or a spouse;

d. — a spouse's education or career development has been negatively affected by frequent moves to permit the other spouse to pursue these opportunities;

e. — a spouse has an actual loss of seniority, promotion, training, or pension benefits resulting from an absence from the workforce for family reasons.

f. b) a spouse has contributed financially either directly or indirectly to assist the other spouse in his or her education or career development.

g. [14] Non-compensatory support incorporates an analysis based upon need and ability to pay. If spouses have lived fully integrated lives, so that the marriage creates a pattern of dependence, the higher-income spouse is to be considered to have assumed financial responsibility for the lower-income spouse. In such cases a court may award support to reflect the pattern of dependence created by the marriage and to prevent hardship arising from marriage breakdown. L'Heureux-Dubé, J. wrote in Moge v. Moge, supra, at p. 390:

h. Although the doctrine of spousal support which focuses on equitable sharing does not guarantee to either party the standard of living enjoyed during the marriage, this standard is far from irrelevant to support entitlement (see Mullin v. Mullin,

[1991] P.E.I.J. No. 128, supra, and Linton v. Linton, [1990] O.J. No. 2267, supra). Furthermore, great disparities in the standard of living that would be experienced by spouses in the absence of support are often a revealing indication of the economic disadvantages inherent in the role assumed by one party. As marriage should be regarded as a joint endeavour, the longer the relationship endures, the closer the economic union, the greater will be the presumptive claim to equal standards of living upon its dissolution (see Rogerson, "Judicial Interpretation of the Spousal and Child Support Provisions of the Divorce Act, 1985 (Part I)", supra, at pp. 174-75). (emphasis added)

i. [15] It is not clear from Justice L'Heureux-Dubé's, decision whether entitlement arising from a "pattern of dependence" is compensatory or non-compensatory. A pattern of dependence may create a compensatory claim because it can justify an entitlement even though a spouse has sufficient income to cover reasonable expenses and might be considered to be self-supporting. This often is described as the "lifestyle argument" — that the spouse should have a lifestyle upon separation somewhat similar to that enjoyed during marriage. (Linton v. Linton, 1990 CarswellOnt 316 (Ont. C.A.) A lengthy marriage generally leads to a pooling of resources and an interdependency even when both parties are working. Usually the recipient spouse will never be able to earn sufficient income to independently provide the previous lifestyle. This would form the basis of a compensatory claim but does not necessarily entitle a spouse to lifetime spousal support. The essence of a compensatory claim is that eventually it may be paid out. This leads to a discussion about the quantum and duration of the claim.

j. [16] Once it is decided that a spouse is entitled to spousal support, the quantum (amount and duration) is to be determined by considering the length of the relationship, the goal of the support (is it compensatory, non-compensatory or both), the goal of self-sufficiency, and the condition, means, needs and other circumstances of each spouse. In considering the condition, means, needs and other circumstances of each spouse one may examine the division of matrimonial property and consider the extent to which that division has adequately compensated for the economic dislocation caused to a spouse flowing from the marriage and its breakdown and any contin-

> uing need the spouse may have for support arising from other factors and other objectives set forth in s. 15(2). (Tatham v. Tatham, [2005] B.C.J. No. 2186, 2005 CarswellBC 2346 (B.C.C.A.)
>
> 55 The spousal support to be awarded in this case contains both compensatory and non-compensatory elements. It is compensatory in the sense that the parties were married in excess of 30 years and worked as a team in Dr. Saunders' medical practice. Ms. Saunders acted as the office manager as well as his registered nurse. Undoubtedly she contributed directly and indirectly in his career development. The non-compensatory aspect of it is based on Ms. Saunders' needs and Dr. Saunders' ability to pay.
>
> 56 However, I also have to take into consideration that Ms. Saunders has the ability to earn a greater income than she is presently earning. Even though she has the ability to earn a higher amount, I am satisfied that she still requires spousal support to assist her in her lifestyle and Dr. Saunders has an ability to pay spousal support.
>
> 57 Taking into account that the amount of income Ms. Saunders is able to earn is greater than what she is presently earning, the fact that the expenses are overstated by a considerable amount, leaving her with a deficit of much less than set forth in her statement of expenses, the compensatory aspect of the spousal support, and Dr. Saunders' income, I would award $7,500 per month for spousal support. This is approximately $4,100 more than her actual needs (see para. 49) and addresses both the compensatory and non-compensatory elements of spousal support. This is still a significant award which is in excess of her actual needs which would allow her to maintain her "comfortable lifestyle" referred to by the trial judge.
>
> 58 The amount of spousal support overpaid by Dr. Saunders, by my calculation, is $22,400 (14 months × $1,600, August 2010 to September 2011). Dr. Saunders may recover this amount by reducing his spousal support payments for the next 23 months by $1,000 per month for the first 22 months and $400 for the final month.

99 In imputing income I am mindful of the authorities cited by Justice Farrar and also derive guidance from *Drygala v. Pauli*, [2002] W.D.F.L. 406 (Ont. C.A.) [2002 CarswellOnt 3228 (Ont. C.A.)] a decision of the Ontario Court of Appeal. After reviewing the Child Support Guidelines and in particular s. 19(1)(a), Justice Gillese stated as follows at paras. 24-26:

> [24] The meaning of the word "intentionally" in s. 19(1)(a) has received inconsistent application in the courts. On the one hand, there

> are the so-called bad faith cases in which the word "intentionally" has been interpreted as meaning a deliberate course of conduct for the purpose of undermining or avoiding the parent's support obligation. These cases act on the explicit assumption that a court should not impute income in the absence of such a motive, as to do so results in an onerous financial obligation on a parent who chooses to make a career change. Williams v. Williams (1997), 32 R.F.L. (4th) 23, [1997] N.W.T.R. 303 (S.C.); Hall v. Hall, [1997] O.J. No. 453 (Quicklaw) (Gen. Div.); Hunt v. Smolis-Hunt, [2001] A.J. No. 1170 (Quicklaw) (C.A.); Yaremchuk v. Yaremchuk (1998), 38 R.F.L. (4th) 312, 158 D.L.R. (4th) 180 (Alta. Q.B.); Goudie v. Buchanan, [2001] N.J. No. 187 (Quicklaw) (Nfld. S.C.); Ronan v. Douglas-Walsh (1994), 5 R.F.L. (4th) 235 (Ont. Prov. Div.); Woloshyn v. Woloshyn (1996), 22 R.F.L. (4th) 129, 109 Man. R. (2d) 35 (Man. Q.B.), affd (1997), 28 R.F.L. (4th) 70, 115 Man. R. (2d) 225 (C.A.).
>
> [25] On the other hand, there are a number of conflicting cases in which the courts have held that there is no need to find a specific intent to evade child support obligations before income can be imputed. See, for example, Montgomery v. Montgomery (2000), 181 D.L.R. (4th) 415, 3 R.F.L. (5th) 126 (N.S.C.A.); Donovan v. Donovan (2000), 190 D.L.R. (4th) 696 (Man. C.A.); Hanson v. Hanson, 1999 CarswellBC 2545 (eC) (S.C.)
>
> [26] In my view, the latter approach is correct.

100 The Ontario Court of Appeal went on to discuss "reasonable educational need" at paras. 38-41:

> [38] There is a duty to seek employment in a case where a parent is healthy. As a general rule, a parent cannot avoid child support obligations by a self-induced reduction of income. Thus, once it has been established that a spouse is intentionally unemployed or under-employed, the burden shifts to that spouse to establish what is required by virtue of his or her reasonable educational needs.
>
> [39] There are two aspects to this stage of inquiry. The trial judge must first determine whether the educational needs are reasonable. This involves a consideration of the course of study. A spouse is not to be excused from his or her child support obligations in furtherance of unrealistic or unproductive career aspirations.
>
> [40] But, s. 19(1)(a) speaks not only to the reasonableness of the spouse's educational needs. It also dictates that the trial judge determine what is required by virtue of those educational needs. The spouse has the burden of demonstrating that unemployment or under-employment is required by virtue of his or her reasonable educational

needs. How many courses must be taken and when? How much time must be devoted in and out of the classroom to ensure continuation in the program? Are the academic demands such that the spouse is excused from pursuing part-time work? Could the program be completed over a longer period with the spouse taking fewer courses so that the spouse could obtain part-time employment? If the rigours of the program preclude part-time employment during the regular academic school year, is summer employment reasonably expected? Can the spouse take co-operative courses as part of the program and earn some income in that way? These are the types of considerations that go into determining what level of under-employment is required by the reasonable educational needs of a spouse.

[41] The burden of proof is upon the spouse pursuing education as he or she is the person with access to the requisite information. The spouse is in the best position to know the particular requirements and demands of his or her educational program. He [page721] or she will have information about the hours of study necessary to fulfill such requirements, including the appropriate preparation time. He or she is in the best position to show whether part-time employment can be reasonably obtained in light of these educational requirements.

101 As for quantum of income, Gillese J.A. said at paras. 45 and 46:

[45] When imputing income based on intentional under-employment or unemployment, a court must consider what is reasonable in the circumstances. The factors to be considered have been stated in a number of cases as age, education, experience, skills and health of the parent. See, for example, Hanson, supra, and Cholodniuk v. Sears (2001), 14 R.F.L. (5th) 9, 204 Sask. R. 268 (Q.B.). I accept those factors as appropriate and relevant considerations and would add such matters as the availability of job opportunities, the number of hours that could be worked in light of the parent's overall obligations including educational demands and the hourly rate that the parent could reasonably be expected to obtain.

[46] When imputing income, the court must consider the amount that can be earned if a person is working to capacity while pursuing a reasonable educational objective. How is a court to decide that when, typically, there is little information provided on what the parent could earn by way of part-time or summer employment? If the parent does not provide the court with adequate information on the types of jobs available, the hourly rates for such jobs and the number of hours that could be worked, the court can consider the parent's previous earning history and impute an appropriate percentage thereof. [page722]

102 *Saunders*, *supra* and *Drygala*, *supra* offer important principles which require consideration in the case at hand. Accordingly, I have assessed the evidence and made my findings bearing these authorities in mind.

(d) Imputation of Income to Mr. St. Croix

103 Within the *Drygala*, *supra* decision (from the above quote at para. 25) the Nova Scotia Court of Appeal decision of *Montgomery* [*Montgomery v. Montgomery*, 2000 CarswellNS 1 (N.S. C.A.)] is referenced. This case was extensively addressed by Dr. Thompson's counsel in her pretrial brief:

> As well, in his affidavit of November 5, 2013, Ron testifies that attending Acadia University allowed him to pursue a path towards self-sufficiency". It is respectfully submitted that Ron was self-sufficient when he was working full-time in Newfoundland.
>
> In ***Montgomery v. Montgomery*, 2000 NSCA 2,** the Nova Scotia Court of Appeal considered a situation where a divorced father of four worked for the Department of Environment earning $60,000 per year. The father returned to law school part-time and then left his job to article, earning $20,000 per year. The father sought a variation of child and spousal support. He argued that no income should be imputed to him because he was not attempting to avoid support, but rather secure a more satisfying job, and increase his income in the long-term.
>
> Pugsley, J.A. held that:
>
> > 35 Section 19 does not establish any restriction on the Court to imputing income only in those situations where the applicant intended to evade child support obligations, or alternatively, recklessly disregarded the needs of his children in furtherance of his own career aspirations (at para. 35)
>
> The Court considered the word "reasonable" is the most critical to consider, and that it is necessary to consider not just the circumstances of the payor, but all of the circumstances including the financial circumstances of the children (at para. 36-37).
>
> In ***Montgomery***, *supra*, Pugsley J.A. noted that the chambers judge determined the father's choice was not a "reasonable educational need" (at para. 39). The father acknowledged that it might take at least ten years to earn a similar income to what he was earning with the government (at para. 40).

> Based on that, the Court of Appeal agreed with the Chambers judge and there was no variation of support.
>
> It is submitted that, similarly in this case Ron's choice to take a leave of absence from work and return to school was not for a reasonable educational need. Ron just finished his first year of a four year program. It is unclear if Ron intends to continue at Acadia for the balance of the four years, and whether his employer will allow him to do so. Ron previously testified that he is required to apply for a leave from his work each year.
>
> It is also unclear how this program will affect Ron's job prospects in Nova Scotia or Newfoundland if he completes the program.

104 In my view this argument does not stand up when one considers the evidence at trial. Unlike Mr. Montgomery, Mr. St. Croix's decision to leave his job at Nalcor is (partially) motivated by the fact that his position will in all likelihood, be eliminated with the next few years. Whereas Mr. Montgomery left a senior position in government with a guaranteed income stream into the future, the same cannot be said for Mr. St. Croix.

105 Another distinguishing feature between Mr. Montgomery and Mr. St. Croix relates to geography. The *Montgomery* case did not involve his spouse relocating to another province with the child (children with Mr. Montgomery) of the marriage. Considering this factor, I must say that I have considerable sympathy with Mr. St. Croix's stated wish to live closer to David so he can be a bigger part of his life. In the result, I find the facts of the within case to be clearly distinguishable from what our Court of Appeal considered.

106 Mr. St. Croix gave evidence that the couple's initial decision to relocate to Nova Scotia was both motivated by his wife's situation in Newfoundland along with his employment. Concerning the former, he testified that Dr. Thompson was not happy in their Lanark Dr. neighborhood. He added that while she decided the hospital psychiatric service in St. John's was not satisfactory, she did not really explore private practice options in the area because she had essentially decided to move on. In speaking of his wife's employment potential, Mr. St. Croix offered, "she's great at what she does...she could write her own ticket".

107 With respect to his employment circumstance, Mr. St. Croix, with the aid of exhibits concerning Nalcor, explained that the plant in Holyrood is to be retired and decommissioned. He noted his environmental technologist job function will be eliminated by 2017 or 2018. In the result, referring to himself and Dr. Thompson, "We made a significant consideration

to my job and future when we moved". While emphasizing his uncertain future with Nalcor, Mr. St. Croix said, "I wasn't going to tell her where to work — whatever she decided, I would make the opportunity".

108 As things unfolded, Mr. St. Croix remained in the matrimonial home for approximately two years after his wife and child left. During this time he continued working for Nalcor and earned approximately $85,000.00 per annum.

109 In the late summer of 2013 the situation markedly changed when Mr. St. Croix embarked upon an educational leave from Nalcor to enroll in the Bachelor of Business Administration program at Acadia University. He became a full-time student in September, 2013 and remained so until the completion of his exams on April 21, 2014.

110 Upon completion of year one of his studies (in which he earned a 3.0 grade point average), Mr. St. Croix resumed work at Nalcor at his old job at his former rate of pay. His plan is to remain with Nalcor until late August when he will return to Acadia for the 2014-15 academic year. In this regard, Nalcor has granted him another educational leave.

111 During his direct testimony the Respondent explained his plan may involve extending the academic year into the spring and/or summer of 2015 and perhaps 2016 so as to possibly graduate with a B.B.A. prior to his scheduled graduation date of April 2017.

112 Mr. St. Croix offered an explanation as to why he was in the B.B.A. program to the effect that he may want to open a business and/or have a position combining his environmental technology education/background with his Business degree.

113 Given the evidence, I queried the witness about other potential education programs of shorter duration and also about his job search. The latter was especially followed up on cross-examination. It emerged that Mr. St. Croix had only made in the order of five actual job applications and that he restricted his search to the Annapolis Valley. He confirmed he was not prepared to commute to the HRM (Halifax Shipyard, example) or the South Shore (Michelin, example). It was further developed on cross-examination that Mr. St. Croix has not taken on any part time employment while at Acadia.

114 The above is highly relevant evidence as I embark upon income assessment for Mr. St. Croix from the date of separation to the present and into the future. This exercise has ramifications for child support obligations (and spousal support entitlement).

115 For the first couple of years it is a straightforward exercise as we have Mr. St. Croix's Nalcor income of approximately $85,000.00 per annum. From the time Mr. St. Croix commences at Acadia in September, 2013, this is a far less certain calculation. Below, I will explain with examples.

116 If Mr. St. Croix stays at Acadia (as he did in 2013-14) for the traditional university academic year, he has in the order of four months to go back at work at Nalcor (as he began doing this past late April and plans on continuing into late August). In this scenario, he will earn approximately one third of his former income; i.e., $27,500.00. The figure is halved (to $13,750.00) if he stays at Acadia through the spring session and only returns to Nalcor for a couple of months. Of course, there would be zero Nalcor employment income if Mr. St. Croix were to (say as early as the 2014-15 academic year) decide to stay on for spring and summer course sessions.

117 Just as this exercise can take Mr. St. Croix's income down to zero, the scenarios may be altered to heighten his yearly income. For example, he could continue to take courses during the traditional academic year and maintain the four months at Nalcor along with taking on part time employment while at Acadia.

118 More fundamentally, there is the overriding question as to whether Mr. St. Croix's current plan (with its potential to expand or contract yearly income) is reasonable. Without belabouring the point there remains the option for the Respondent to take on another course of studies (of shorter duration and more aligned to his current environmental technologist education, training and experience) and/or find suitable employment in his chosen field within the Annapolis Valley or within a reasonable commute of the Valley.

119 With all of the above in mind I find that it would be unreasonable to hold Mr. St. Croix's income within the realm of $85,000.00 per annum. At the same time, I make the finding that it would be unreasonable to take his income down to an annual amount contemplated by the above scenarios involving working at Nalcor for abbreviated or non-existent durations, with no other income sources. In the result, I have imputed Mr. St. Croix's income at $50,000.00 per annum commencing in 2014 and continuing at this level for 2015, 2016 and 2017.

(e) Imputation of Income to Dr. Thompson

120 The other part of this analysis requires me to examine Dr. Thompson's actual earnings along with what projected earnings may reasonably

be attributed to her over the same time period. The evidence is clear Dr. Thompson's earnings with A.V.D.H.A. are approximately $200,000.00 per annum.

121 The question arises as to whether these earnings were reasonable and what is a fair projection of her income. Accordingly, the Court must scrutinize the evidence here just as has been done in the case of Mr. St. Croix.

122 At the outset of this discussion it bears mention that Mr. St Croix brought into evidence exhibits inclusive of a survey "National Physician Survey, 2013. Results for Nova Scotia", to attempt to demonstrate Dr. Thompson has vast earning potential — upwards of $500,000.00 per annum. Just as I did not rely on generalized statistics for environmental technologists and/or Business program graduates when imputing Mr. St. Croix's income, I chose not to follow generalized surveys concerning psychiatry. Instead, I will focus on the tangible evidence realistically applied to the Petitioner.

123 Having regard to Dr. Thompson's employment contract (exhibit 18) with A.V.D.H.A. and the testimony of Dr. Thompson, I find that there is considerable latitude respecting her potential hours of work. As she acknowledged, when she began employment with A.V.D.H.A. she was working full time, 37.5 hours per week. She later — in consultation with her employer — reduced her hours to the current 30 hours per week. As for the hourly rate, this is currently in the realm of $147.00 per hour with a possible increase, albeit this is by no means a certainty as government may hold the line in these challenging economic times.

124 There is also overtime income to be factored into the equation. Dr. Thompson explained there is a premium for overtime between 5:00 p.m. and 8:00 a.m. on weekdays and on Saturdays at time plus 35%. On Sundays the premium is time plus 50%. Overtime pay is generated once the call comes to a psychiatrist who has agreed to be on call.

125 Dr. Thompson said that she made the decision to reduce her working hours from 37.5 to 30 on account of her son's medical appointments and snow days. She explained the day off, Friday, became a "buffer" which she could use to reschedule patients at minimal disruption. As for overtime, Dr. Thompson acknowledged on cross-examination that after Mr. St. Croix moved to Nova Scotia, she placed herself on call with more frequency than before.

126 In closing submissions, I queried Ms. Cornish on her client's reduction of work hours. In addition to making the point that Dr. Thompson's decrease in work hours was on account of David's needs, she emphasized that as a professional, Dr. Thompson utilized many of her non-paid work hours to prepare and generally for professional endeavors. With respect to the former, I do not find that David's ongoing medical needs are such that they warrant Dr. Thompson reducing her hours by approximately twenty percent. As for the latter, with respect to Ms. Cornish, I do not find the argument very compelling. Even if Dr. Thompson requires several non-paid hours to generate 30 paid hours per week, with the arrival of Mr. St. Croix as a full-time resident of Nova Scotia (and thus utilizing his access on a regular basis), Dr. Thompson has had (and will continue to have) more time to prepare.

127 Applying the jurisprudence to the facts of this case, I find a reasonable imputation of income to Dr. Thompson to be $225,000.00. This figure is derived from her hourly rate approaching $150.00 and based on a full-time week of 37.5 hours. It also allows for reasonable overtime on occasion.

128 With respect to the application of this figure, I have decided not to impute this level of income retroactively until the beginning of this year (2014). I have decided to proceed in this fashion for a number of reasons, including:

1. Dr. Thompson was a single parent to David for much of the time since separation until the end of August, 2013;
2. David experienced more medical appointments in these years on account of his eye issues and possible autism spectrum diagnosis; and
3. There was a period of adjustment during this time for Dr. Thompson in respect of her new job and surroundings.

129 In the result, I make the finding that there is to be an imputation of $225,000.00 per annum income for Dr. Thompson for 2014, 2015, 2016 and 2017; i.e., the same four years I have imputed $50,000.00 income to Mr. St. Croix.

(f) Calculations For Retrospective and Prospective Child and Spousal Support

130 I have considered the financial implications of imputing $225,000.00 as annual earnings for Dr. Thompson and $50,000.00 for Mr. St. Croix. I

have done this with reference to the *S.S.A.G.* which, when these figures are plugged in (having regard to one child with annual child care expenses of $5,000.00 and medical/dental premium in the order of $700.00, rounded up to take into account potential future medical expenses) yield monthly spousal support with a range from approximately $1,850.00 to $2,480.00. Recognizing the *S.S.A.G.* are advisory only, I have chosen to take an approximate low to mid-range figure of $2,169.00 as the monthly amount Dr. Thompson shall pay to Mr. St. Croix, retroactive to January 1, 2014 and continuing for each of the years 2014, 2015, 2016 and six months of 2017; i.e., until June 30, 2017. In my view this amount, $2,169.00 per month, for 3.5 years is reasonable. It provides Mr. St. Croix with an appropriate amount for a reasonable length of time, providing what some of the cases have characterized as a "cushion" for him as he transitions away from his employment in Newfoundland to appropriate schooling/remuneration in Nova Scotia.

131 Taking into account that the amount of income Mr. St. Croix is able to earn is greater than what he is presently earning, the fact that his expenses are overstated by a considerable amount (leaving him with a deficit of much less than set out in his Statement of Expenses), the compensatory aspect of the spousal support, and Dr. Thompson's income, I am of the view $2,169.00 per month for spousal support is appropriate. This will address Mr. St. Croix's need and both the compensatory and non-compensatory elements of spousal support.

132 I have also considered the financial implications of my imputation of income in the context of child support flowing from Mr. St. Croix to Dr. Thompson. Given these figures (and factoring in the aforementioned s. 3 and s. 7 amounts) the mandatory *Child Support Guideline* amount is $476.00 and it shall be paid on a monthly basis by Mr. St. Croix to Dr. Thompson beginning January 1, 2014 and into the future (dependent upon David's choices at age 19 and beyond). For the first seven months of 2014, this amounts to $3,332 owing from Mr. St. Croix to Dr. Thompson. I hasten to add that given Mr. St. Croix's stated intention to relocate to Nova Scotia, I have utilized the Nova Scotia Child Support Table in this calculation.

133 I have also considered retroactive child and spousal support prior to 2014. Dr. Thompson requested child support from Mr. St. Croix on March 2, 2012. It did not come out in Mr. St. Croix's testimony when he requested spousal support from Dr. Thompson and it is not entirely clear from the documentation when this may have been. In any case, I have

reviewed the evidence and make the observation that the parties' incomes were much closer to one another in 2011 and 2012, given that Mr. St. Croix was then full-time at Nalcor.

134 Furthermore, I am mindful of the consequences of the *Income Tax Act*. For spousal support, those tax consequences can only reach back to January 1 of the tax year before the year in which it is ordered. Accordingly, an order made for 2014 (such as here) will attract tax treatment for payments ordered to January 1, 2013. Of course, I could go back further but any amounts ordered would be tax free to Mr. St. Croix and Dr. Thompson would not receive any deductions for making any such payments.

135 In the final analysis, I believe it is fair and reasonable to award support dating back to January 1, 2013. In so doing, I have not imputed any income to the parties as the reasons for my 2014 and prospective imputation of income do not apply to 2013.

136 In 2013 Dr. Thompson's income (net of professional fees) was $199,106 and Mr. St. Croix's (net of union dues) was $63,551. I have consulted the *S.S.A.G.* to calculate the amounts owing, having regard to the factors set out, *supra*. For 2013, the tables show net monthly spousal support payable from Dr. Thompson to Mr. St. Croix in the amounts of $1,181. (low), $1,382 (medium) and $1,584 (high).

137 Consistent with my approach for the beginning of 2014 and prospectively, I have in my discretion chosen the low to medium of these figures; i.e., $1,300 per month. For 2013 this amounts to $15,600. As for the first seven months of 2014, given the earlier referenced $2,169.00 monthly, the retroactive amount owing is $15,183. Accordingly, by this decision Dr. Thompson shall pay Mr. St. Croix $30,783.00 as a retroactive lump sum amount for spousal support.

138 With respect to retroactive 2013 child support, I have again drawn upon the mandatory *Child Support Guidelines*. Since Mr. St. Croix was a resident of Newfoundland and Labrador (and paid taxes as a resident of this Province during 2013), I have consulted the Newfoundland and Labrador Child Support Table. Given the aforementioned 2013 salary figures, the monthly child support (inclusive of consideration of appropriate Section 3 and 7 expenses) is $632. In the result, Mr. St. Croix's 2013 child support owing to Dr. Thompson is $7,584.

Conclusion

139 As part of this decision I require the parties to annually exchange income tax returns by May 15 and copies of their Notices of Assessment or Re-Assessment within fourteen days of receipt.

140 Having projected the child and spousal amounts payable into mid-2017, I wish to add a significant caveat. It is appropriate that the parties actual incomes be determined commencing May 15, 2015, and that the support payments be adjusted upward effective July 1 if their incomes turn out to be higher than what I have imputed. Accordingly, child support shall be payable by Mr. St. Croix pursuant to the *Child Support Guidelines*, based upon an annual income of $50,000 effective January 1, 2014 and continuing on the first day of each month thereafter, with the appropriate exchange of financial information each May 15 of each year and upward adjustment to the Table amount accordingly. Section 7 *Guideline* expenses, unless otherwise agreed by the parties, shall be shared proportionate to their income.

141 The same disclosure/obligation shall flow to Dr. Thompson with respect to spousal support.

142 Within fifteen days of this decision, I would ask Mr. Cornish to draft an Order reflective of the disposition.

143 With respect to costs, in the event the parties cannot come to terms, I will receive written submissions within thirty days of this decision.

Order accordingly.

Appendix I

Form 62.23

2012 **No. 1204-005732 (082305)**

Supreme Court of Nova Scotia

Between:

Karen Thompson

Petitioner

- and -

Ronald St. Croix

Respondent

Divorce Order

Before the Honourable Justice James L. Chipman:

On motion of Julia E. Cornish, Q.C., counsel for the Petitioner, the following is ordered:

Divorce

1. Karen Thompson and Ronald St. Croix, who were married at Corner Brook, in the Province of Newfoundland, on August 3, 2002, are divorced.

Effective date

2. As no order is made under subsection 12(2) of the *Divorce Act*, it is declared that the effective date of the divorce is as provided in the *Divorce Act*, namely thirty-one days within the meaning of the *Act* after the date of this order unless an appeal is started.

Copies to parties

3. The prothonotary must mail a certified copy of this order, and any corollary relief order issued with it, to each party.

Certificate of divorce

4. The prothonotary must issue a certificate of divorce when the prothonotary is satisfied that a copy of this order is mailed to both parties, the order becomes effective, and no appeal is started.

Canada Pension Plan

5. Neither this divorce order, nor a corollary relief order issued with it, is intended to affect a statutory entitlement to seek a division of credits or benefits under the *Canada Pension Act.*

Issued June 18th, 2014

Prothonotary

Carol Morton
Prothonotary

Appendix II

Form 62.23

2012 **No. 1204-005732 (082305)**
SKD 082305

Supreme Court of Nova Scotia

Between:

Karen Thompson

Petitioner

- and -

Ronald St. Croix

Respondent

Partial Corollary Relief Order

Before the Honourable Justice James L. Chipman:

WHEREAS the parties appeared before the Court for a divorce trial on June 9, 2014 to June 13, 2014;

AND WHEREAS the evidence presented has been considered;

AND WHEREAS the parties were divorced by a Divorce Order dated June 18, 2014;

AND WHEREAS the Court determined that it was necessary to make a decision regarding issues about the summer parenting schedule and the treatment of the matrimonial home pending a written decision of all corollary matters;

AND UPON IT APPEARING the parties have the following child:

Name of Child	Date of Birth
David Carl St. Croix ("David")	January 10, 2006

NOW UPON MOTION of Julia E. Cornish, Q.C., counsel for the Petitioner, Karen Thompson;

IT IS HEREBY ORDERED THAT, pursuant to the *Divorce Act* (Canada) and the Nova Scotia *Matrimonial Property Act:*

1. The terms of the Interim Order from the Supreme Court of Nova Scotia dated December 20, 2013 shall continue except as varied herein.

Summer Parenting

2. The summer parenting schedule shall be as follows:
   a. David shall travel to St. John's, Newfoundland on June 29, 2014, and he shall be in Ronald St. Croix's care from June 29 until July 13, 2014, on which date David shall be returned to Halifax;
   b. David shall travel to St. John's with Karen Thompson on or about July 30, 2014. David shall be in Ronald St. Croix's care from August 3rd at 6 pm until August 17, on which date David shall return to Halifax;
   c. At all other times, David shall be in the care of Karen Thompson.
3. Ronald St. Croix shall purchase David's ticket and tickets for a companion to travel with David for June 29 and July 13. Karen Thompson shall reimburse Ronald St. Croix for the cost of the companion tickets for this period within two weeks of receiving the receipt.
4. Karen Thompson shall purchase David's ticket to Newfoundland for travel on July 30. Ronald St. Croix shall purchase David's ticket and tickets for a companion to travel with David to Halifax on August 17. Karen Thompson shall reimburse Ronald St. Croix for the cost of the companion tickets within two weeks of receiving the receipt.

Matrimonial Home

5. If Ronald St. Croix wishes to retain the matrimonial home located at 48 Lanark Drive, Paradise, Newfoundland, within thirty days of the date of this Order, he shall provide confirmation through Karen Thompson's counsel that he is approved to re-finance of the National Bank mortgage, National Bank line of credit, and CIBC line of credit, so as to remove Karen Thompson's name from those debts. The value assigned to the home for this purpose is $364,900 less disposition costs of $21,616.85 for a net value of $343,283.15 before the above-noted debts are taken into account.
6. If Ronald St. Croix provides confirmation within thirty days that he is approved to refinance the above-noted debts, the debts shall be refinanced within thirty days of Ronald St. Croix providing

confirmation of his approval, so as to remove Karen Thompson's name from those debts.

7. Pending refinancing of the aforesaid debts, Ronald St. Croix shall immediately resume responsibility for all expenses associated with the home, including but not limited to, the mortgage, utilities, property taxes, property insurance, CIBC line of credit, and National Bank line of credit.

8. If Ronald St. Croix does not provide confirmation within thirty days that he is approved to refinance the debts, or if the refinancing does not take place thirty days after Ronald St. Croix confirms his approval, or if Ronald St. Croix does not wish to retain the matrimonial home, then the home shall be listed for sale as is as soon as practicable.

9. If the home is listed for sale, pending its sale, Ronald St. Croix may remain living in the home for as long as he resides in Newfoundland. For as long as Ronald St. Croix is living in the home, he shall be responsible for the mortgage, utilities, property taxes, property insurance, CIBC line of credit, and National Bank line of credit. If Ronald St. Croix moves out of the home, the parties shall each pay one-half of those expenses. Upon the sale of the home, the aforesaid debts shall be paid out (mortgage, CIBC line of credit, National Bank line of credit) and the remaining proceeds of sale, after disposition costs, shall be paid into Court pending the decision on the remaining corollary matters by this Honourable Court.

10. Any routine repairs or maintenance required on the home pending sale shall be mutually agreed upon and jointly shared.

11. The house shall be listed for sale at $364,900, based on the appraisal report from William Balsom. The real estate agent will be Reagan Dilny or such other agent mutually acceptable to the parties.

12. All other corollary matters are reserved pending a written decision. The court reserves the right to add further clarification to the matters set out herein.

Enforcement

13. A requirement to pay money under this Order, that is not enforced under the *Maintenance Enforcement Act*, may be enforced by execution order, or periodic execution order.

14. The Sheriff must do such things as may be necessary to enforce this Order and, to do so, may exercise any power of a sheriff permitted in a recovery order or an execution order.

15. All Constables and Peace Officers are to do all such acts as may be necessary to enforce the terms of this Order and they have full power and authority to enter upon any lands and premises whatsoever to enforce the terms of this Order.

Issued June 18th, 2014.

Prothonotary
Carol Morton
Prothonotary

Appendix III

Thompson - St. Croix

Parenting Plan

Regular Parenting Time

When Mr. St. Croix is living in Nova Scotia, there will be a continuation* of the parenting arrangements in the December 20, 2013 Interim Order, which is that David will live primarily with Dr. Thompson. Mr. St. Croix will have parenting time every other weekend from after school Friday until Monday morning, and every Wednesday from after school until Thursday morning.

When Mr. St. Croix is living outside of Nova Scotia:

- Mr. St. Croix will have parenting time with David one weekend each month during the school year (except for March - which is addressed below)

- To maximize his parenting time, Mr. St. Croix may choose to visit during long weekends (except Easter - addressed below; or Labour Day because of the start of school)
- Dr. Thompson requires confirmation of where David will be staying while he is with Mr. St. Croix.
- Mr. St. Croix must give notice of his proposed weekends no later than six months in advance
- Mr. St. Croix must provide confirmation of the flights no later than one month before the visit
- Mr. St. Croix will be responsible for the cost of his visits; if David is travelling, Mr. St. Croix will pay for David's flight and the cost of a travelling companion (unless it is Dr. Thompson) until David is old enough (likely by age 12) to travel on his own
- Dr. Thompson proposes that Mr. St. Croix come to Nova Scotia for most of his visits so that David can continue to participate in his usual activities (except for holidays)
- Transfers will occur at neutral locations to be chosen by Dr. Thompson - Dr. Thompson will confirm the location once Mr. St. Croix provides confirmation of the flights
- All of this is premised on David travelling at reasonable times
- Email addresses shall be used for communicating about parenting - if Mr. St. Croix does not confirm his travel arrangements one month before the visit, then the visit will be cancelled

Summer vacation/holidays

a. Summer - Mr. St. Croix will have parenting time with David for two weeks in late June/early July (this can start as early as the first Saturday after school ends) and the first two weeks in August (can start the first Saturday in August).

The notice provisions above regarding confirmation of Mr. St. Croix's chosen parenting time, and dates of travel will apply.

b. Victoria Day weekend - if Mr. St. Croix chooses to have his May parenting time with David over the May long weekend, he may take up to two days off school to extend this trip if Mr. St. Croix chooses.

c. Christmas - in even numbered years, Mr. St. Croix will have parenting time with David for the first week of his school Christmas break. Mr. St. Croix's time may start as early as the first Saturday after the last day of school, with David returning no later than the following Sunday. Dr. Thompson will have parenting time with David for the second week.

In odd-numbered years, the schedule will reverse. Mr. St. Croix can pick David up in Nova Scotia (or Newfoundland if Dr. Thompson and Mr. St. Croix are already there) and have parenting time with David for the second week of his Christmas school break. If Mr. St. Croix is travelling outside of Nova Scotia with David, David shall return to Nova Scotia no later than 48 hours before school resumes in January.

David shall not travel on Christmas Eve or Day, and the parenting schedule shall be adjusted accordingly if this would otherwise be the mid-point of the break.

If they choose, either parent will have the right to spend time with David on Christmas Eve and Christmas Day (Christmas Eve from 1-4 pm; Christmas Day from 1-6 pm) if David is with the other parent during these times. The Christmas Eve/Day parenting time must occur in the Municipality in which David is spending time with the other parent.

The parent who does not have David on Christmas Even or Day must confirm whether they are going to avail of their access time by no later than December 1st of that calendar year.

d. March Break - in odd-numbered years, Mr. St. Croix will have parenting time with David during March Break (March Break is defined as the Saturday after school ends for the Break until the Sunday before school resumes). In even-numbered years, Dr. Thompson shall have parenting time with David.

e. Easter - in odd-numbered years, Mr. St. Croix will have parenting time with David from Good Friday to Easter Monday. In even-numbered years, Dr. Thompson will have parenting time with David during these times.

*With the exception of paragraph 5 of the Interim Order which shall be amended to read:

> Except in circumstances where a phone call would not be feasible, when David is in the care of Dr. Thompson, Mr. St. Croix shall be

permitted to have a phone call (not to exceed ten minutes) with David every second evening and when David is in the care of Mr. St. Croix, Dr. Thompson shall be permitted to have a phone call (not to exceed ten minutes) with David every second evening.

Appendix IV

		VALUE	MR. ST. CROIX	DR. THOMPSON	TOTAL
(A) MATRIMONIAL ASSETS					
REAL ESTATE					
1	48 Lanark Drive, Paradise, NL - to be sold and proceeds divided				$0.00
HOUSEHOLD ITEMS					
2	Divided				$.0.00
VEHICLES (to be retained by party with current possession)					
3	1999 Toyota Camry Solara	$5,000.00		$5,000.00	$5,000.00
4	2004 Ford F250 Super Duty	$8,000.00	$8,000.00		$8,000.00
5	3 Datsuns	$9,000.00	$9,000.00		$9,000.00
6	1987 Jaguar V 12 - Mr. St. Croix				
	($2,550.00 est.)	$2,500.00	$2,500.00		$2,500.00
7	1992 Nissan NX 2000	$250.00	$250.00		$250.00
8	1987 Yamaha Enticer 340	$250.00	$250.00		$250.00
9	Canoe	$300.00	$300.00		$300.00
PENSIONS/NALCOR ($80,000.00 estimate)					
10	Mr. St. Croix - Nalcor employment pension contributions during marriage ($80,000 estimate) to be divided equally at source				$0.00
RRSP's - rollover to equalize					
11	RRSP - Dr. Thompson ($8,712.60 in Sept/11				$0.00

		VALUE	MR. ST. CROIX	DR. THOMPSON	TOTAL
12	RRSP - Mr. St. Croix ($22,086.28 in Sept/11				$0.00
13	TFSA - Dr. Thompson (opened after separation)				$0.00
SAVINGS AND OTHER ACCOUNTS					
14	Dr. Thompson - CIBC Chequing	$998.00		$998.50	$998.50
15	Mr. St. Croix - US Dollar Account	$159.69	$159.69		$159.69
SUBTOTAL MATRIMONIAL ASSETS		$26,458.19	$20,459.69	$5,998.50	$26,458.19
(B) MATRIMONIAL DEBTS					
16	National Bank Line of Credit - $45,095.00				
	to be paid from proceeds jointly; balance				
	to be paid from Mr. St. Croix's proceeds				$0.00
17	CIBC Perosnal Line of Credit - $10,346.00 to be paid from proceeds jointly; balance to be paid from Mr. St. Croix's proceeds				$0.00
18	Mortage on matrimonial home - to be paid from proceeds				$0.00
19	Dr. Thompson - student loan ($33,096.00) to be divided equally				$0.00
SUBTOTAL MATRIMONIAL ASSETS		$0.00	$0.00	$0.00	$0.00
NET MATRIMONIAL ASSETS		$26,458.19	$20,459.69	$5,998.50	$26,458.19
PERCENTAGE DIVISION			50	50	
BALANCING ASSET (CASH)			-$12,730.60	$12,730.60	

		VALUE	MR. ST. CROIX	DR. THOMPSON	TOTAL
Credit to Dr. Thompson for mortgage payments			-$7,692.70	$7,692.70	
Credit to Dr. Thompson for CIBC LOC payments			-$3,107.44	$3,107.44	
Credit for $ from David's RESP Account			-$7,700.00	$7,700.00	
Credit to Dr. Thompson for National Bank					
LOC payments			-$4,275.00	$4,275.00	
TOTAL BALANCING PAYMENT			-$35,505.74	$35,505.74	

[Indexed as: **Violante v. Beun**]

Odorico Violante, Applicant(s) v. Virginie Michele Beun, Respondent(s)

Ontario Superior Court of Justice

Docket: Toronto FS-11-17775

Mesbur J.

Heard: May 22, 2014

Judgment: May 23, 2014

Family law —— Custody and access — Factors to be considered in custody award — Conduct of parent — Parental alienation —— Parents married, had child and separated — Father brought motion to change temporary custody of child — Motion granted — Father granted temporary custody and mother granted supervised access for two hours, twice per week, and telephone access — Father and child were ordered to commence counselling to assist with transition — Rare and exceptional circumstances were established warranting change in temporary custody — Parenting capacity assessor, Office of Children's Lawyer (OCL) and children's aid society all took same strong and consistent position seeking immediate change based on parental alienation — Evidence described mother openly disparaging father in front of child, leading child to believe knife attack on father was his fault or he was aggressor, forcing child to choose sides, not allowing child to have her own thoughts and feelings, and sabotaging father's access — Child's behaviour had changed and her current negative attitude towards father flew in face of warm and loving relationship OCL had first observed — Mother's response to motion did not address serious allegations and, given their gravity, it would be inappropriate to risk further harm to child — Sole and primary concern was child's best interests.

Family law —— Custody and access — Variation of custody order — Factors to be considered — Interim custody —— Parental alienation — Parents married, had child and separated — Father brought motion to change temporary custody of child — Motion granted — Father granted temporary custody and mother granted supervised access for two hours, twice per week, and telephone access — Father and child were ordered to commence counselling to assist with transition — Rare and exceptional circumstances were established warranting change in temporary custody — Parenting capacity assessor, Office of Children's Lawyer (OCL) and children's aid society all took same strong and consistent position seeking immediate change based on parental alienation — Evidence described mother openly disparaging father in front of child, leading child to believe knife attack on father was his fault or he was aggressor, forcing child

to choose sides, not allowing child to have her own thoughts and feelings, and sabotaging father's access — Child's behaviour had changed and her current negative attitude towards father flew in face of warm and loving relationship OCL had first observed — Mother's response to motion did not address serious allegations and, given their gravity, it would be inappropriate to risk further harm to child — Sole and primary concern was child's best interests.

MOTION by father to change temporary custody of child.

T. Roll, for Applicant
O. Brustentova, for Respondent
A. Mohideen, L. Stringer, for OCL & CCAS

***Mesbur J.*:**

1 Applicant father moves to change temporary custody for Ruthie pending trial, even though the trial is now fixed on an expedited basis for September 8, a period only about 3 months away. Ruthie's lawyer supports the father's motion, as does counsel for the Catholic Children's Aid Society. The parenting capacity assessor, Linda Perlis has delivered an extensive report in which she identifies what she describes as significant alienating behavior by the mother against the father. She recommends an immediate change in custody. In addition to her report, Ms. Perlis has delivered an affidavit in which she sets out in detail her concerns and the reasons she concludes mother Is engaging in alienating behaviour.

2 This motion came on urgently after Ms. Perlis delivered her report last Friday. This past weekend was father's weekend with Ruthie, and he immediately launched this motion to change temporary custody in light of both Ms. Perlis' recommendations and the supportive positions taken by both the OCL and CCAS. Although Ruthie should have been returned to her mother's care at the end of the weekend, she was not. Father now seeks to regularize the current situation with an order for temporary custody in his favour. He also wishes to limit Ruthie's contact with her mother to supervised access. He seeks therapy and counselling for Ruthie to assist her in adjusting to such a significant change in living arrangements.

3 The OCL takes the position that although its role is to represent Ruthie and present the court with her views and preferences, the views and preferences Ruthie expresses, while strong and consistent, are not

independent. The OCL says they mirror mother's views and preferences to such a degree that they should not be accepted.

4 The CCAS has had involvement with this family for some time. They too have expressed significant concerns about parental alienation on the part of the mother, and whether mother's actions and behaviors create protection concerns. While Ms. Stringer, counsel for CCAS, does not put it as a "threat", she was very clear that if the court makes no change in custody now, the Society would be sufficiently concerned to actively consider pursuing protection proceedings to effect an immediate change in custody.

5 Mother takes the position that the Perlis report and affidavit, as well as the OCL social worker's affidavit have not been tested by cross examination. She suggests the issue of whether custody should be changed should be left to trial, where the question can be determined on a full evidentiary record. The trial is only 3 months away. The issue is whether custody should be changed now, given this early, expedited trial date.

6 The parties all agree that a change to temporary custody should only be made in rare and exceptional circumstances. The question is whether this is one of those cases. In my view it is.

7 In forty years of doing this kind of work, I have never before seen a professional parenting capacity assessor, the Children's Lawyer and a Children's Aid Society all take such a strong and consistent position seeking an immediate change in temporary custody.

8 Ms. Perlis, the parenting capacity assessor, sets out in her affidavit very clear concerns about mother's allenating behavior.

9 The OCL, who represents Ruthie, also points to cogent and compelling evidence of alienation.

10 Father, of course, does so as well, but principally relies on the findings of the professionals to support his position.

11 Linda Perlis, a lawyer and registered social worker was retained on consent of the parties and the OCL to conduct a parenting capacity assessment. She has filed both her comprehensive report and an affidavit in support of father's motion to change temporary custody.

12 In her affidavit, Ms. Perlis outlines numerous concerns she has about Ruthie. She opines mother is "actively alienating Ruthie". She outlines some of the factors she believes support this opinion as:

- Disparaging father to Ruthie openly;

- Advising Ruthie that father attempted to murder a family friend, when the opposite is the case;
- Violating child boundaries thereby putting Ruthie in a loyalty bind and forcing Ruthie to choose sides;
- Refusing to allow Ruthie to have her own thoughts and feelings;
- Failing to teach Ruthie to be compassionate, empathetic or concerned regarding the physical attack that occurred against her father;
- Sabotaging access by constantly undermining and interfering with access through calls placed to Ruthie's cellular phone during Ruthie's time with her father;
- Disparaging the professionals involved in the case in front of Ruthie;
- Preventing Ruthle from normal social and emotional development.

13 Ms. Perlis particularizes her concerns in her report. As a result of her assessment, Ms. Perlis describes mother as angry and controlling, with an explosive temper, overtly enmeshed with Ruthie. She opines that mother hates father, and shares that hatred with Ruthie, Ms. Perlis concludes that mother is engaged in a systematic and maliclous parental allenation campaign against father. She recommends that father become the custodial parent and mother have supervised access.

14 The OCL represents Ruthie. Ruthie's lawyer, Mr. Mohideen has been assisted in his task by a social worker. The social worker, Ms. Barlas, has delivered an affidavit in support of father's motion as well. She also recommends temporary custody to father, supervised therapeutic access to mother once a week, counselling for Ruthie, counselling for mother and counselling for father.

15 Ms. Barlas confirms that both parents and Ruthie's teachers describe Ruthie as a bright, friendly, articulate child, easily engaged, with a good sense of humour. Mother has provided the court with Ruthie's recent report cards, which certainly confirm this.

16 OCL counsel and Ms. Barlas have Interviewed Ruthie five times since the OCL took on this case. They have also conducted observational visits with Ruthie in each of her parents' homes.

17 The first meeting was with Ruthie and the mother at the OCL's offices. Ms. Barlas deposes Ruthie spoke very positively of her mother and the "bond" they share. She blamed her father for "ruining her family".

She shared stories showing father in a negative light. For example, she said her mother told her that father "started cheating on mother when Ruthie was 3 years old." She also confirmed mother took her to follow father who was meeting his girlfriend. Although she reported her father "lies about everything", she could provide the OCL with no examples.

18 The second meeting also occurred at the OCL's office. This time it was Ruthie and the father who attended. Ruthie reported many of father's faults. Ruthie said her mother had told her the father did not want to stay at the hospital when she was born, and this made her sad. She acknowledged that her mother questions her when she comes back from access, but does not express anger with her but with her father.

19 The OCL's third meeting was at Ruthie's school. At this meeting, Ruthie reported to the OCL that the reason she was not permitted to go to France was that mother told her it was her dad's lawyer and the OCL's fault. When Ruthie was told overnight access was in place because her parents had agreed to it, she was adamant that her mother would never have agreed to such a thing, and instead had told her she was "forced" into it.

20 In the fourth interview, which was also at Ruthie's school, Ruthie was even more negative. She expressed strong feelings about not wanting to see her father and hatred for her father. Ms. Barlas deposes that Ruthie's only justification for these feelings was because "he destroyed our beautiful family." She blamed her father for the breakdown of her parents' marriage, and told the OCL she could never forgive him; stating "I'm scarred for life".

21 Ruthie appeared to have a great deal of information about this court case, and particularly motions regarding the sale of the family home. She was unable to articulate anything positive about spending time with her father in the summer. She said she and her mother "feel the same" about the father, saying "we are depressed and sad". Ruthie told the OCL that she takes care of her mother when her mother's mood changes by "trying to caim her down."

22 By the time of their last meeting, the OCL describes Ruthie as "short and non-engaging", telling the OCL to ask her mother for answers to any questions they have.

23 Ms. Barlas further deposes that when she told Ruthie the judge might order increased time between her and her father, Ruthie went to the washroom and remained there for a long time. On her return, she appar-

ently threatened to harm herself and stated that if she did not get her way "something big was going to happen." Ms. Barlas states she learned later that while Ruthie was in the washroom, she was texting with her mother, Mother's affidavit filed in response to the motion does not deny this.

24 In sum, Ms. Barlas also opines that mother has been engaging Ruthie in alienating behaviour against her father. She describes Ruthie's relationship with her mother as "enmeshed", resulting in Ruthie's inability to establish a sense of self. She says Ruthie's views of her father are distorted and her complaints about him simply mirror her mother's. Ms. Barlas concludes that Ruthie feels a sense of responsibility for her mother's well-being, and is unable to express her true feelings about her father for fear of hurting her mother's feelings.

25 What is particularly disturbing in Ms. Barlas affidavit is that mother apparently has no regret she took Ruthie to see "the *putana* (prostitute) your father is leaving us for" and confronting the woman in Ruthie's presence. Mother also apparently acknowledged to the OCL that she told Ruthie if Ruthie goes to live with her father, she will never see her mother again. Mother does not deny taking Ruthie to confront father's girlfriend. More importantly, she does not appear to see anything inappropriate with her having done so.

26 The OCL also conducted observational visits with Ruthie and each of her parents. These occurred in late 2012, before the meetings described above. What is most telling is the description of the visit with Ruthie and her father in his home at that time.

27 Ruthie was not told in advance the OCL would be coming for an observational visit. When counsel and Ms. Barlas arrived at father's home to observe Ruthie with her father, Ruthie was doing homework, and she and her father were talking about a school play. Ruthie wanted her father and his family to attend. At dinner, Ruthie told her father how much she enjoyed his cooking. Ms. Barlas describes Ruthie as relaxed and loving. Ruthie smiled and joked with her father, rubbing his head. They shared stories of a game she and her father played.

28 When I contrast this description with the description of the OCL's later contacts with Ruthie I am concerned about the apparent incremental changes in Ruthie's behavior since this observational visit. I say this particularly because Ruthie's teacher from her former school reported to the OCL that Ruthie's face always lit up when her father came to pick her up, before the parties separated.

29 Mother's affidavit, filed in response to this motion, is focused in large part on financial issues, and what she describes as father's failure to pay proper support, and failure to make timely disclosure. While these complaints are important and may be valid, I fail to see how they bear on the serious issues of alienation raised in this motion.

30 Also, as the OCL points out, mother's affidavit is quite telling in terms of what is missing from it. Mother does not squarely address the very serious concerns raised by Ms. Barlas and Ms. Perlis. She simply accuses them of bias.

31 What strikes me more than anything is what Ruthie herself says in her own school work. Mother filed a supplementary affidavit that appends an autobiography recently Ruthie wrote in school. It is a lovely piece of work, richly coloured and illustrated. Ruthie received an "A+" on the assignment, and glowing comments from her teacher.

32 In chapter four, "My Family", Ruthie says: "In my family, we used to be three, Mom, Dad and I but now that my parents are divorced, I live with Mummy and visit my father." She goes on to say: "My mom is wonderful in so many ways, like she is close to me, loves me very much helps me with my homework. All of that added to her work at the airport and the house work. She always puts me first and I feel so special."

33 To the contrary, she says: "On the other hand, my father broke up the family, and I don't want to elaborate about it." Ruthie has illustrated this chapter with a torn photograph: one half contains her and her mother, while the other contains her father, alone.

34 Mother takes the position the marriage ended because of father's having an affair. She has clearly shared this information with Ruthie, going so far as to taking her to confront father's girlfriend, and describing the girlfriend as a prostitute. Mother does not deny doing so. As I see it, this is completely inappropriate information to share with a child.

35 Ruthie's autoblography also addresses her "pet peeves" in chapter nine. There, after describing an annoying cousin, she goes on to say:

> Another "activity" that I have to attend is the visit with my father. It became more a chore or pain that [sic] a pleasure. He does not understand me, nor does he try to. He does not spend time with me, even so he is next to me, because he always on the phone or watches television. He does not make any effort! This is not very pleasant.

36 Ruthie's description here flies in the face of the warm and loving relationship the OCL observed when they visited with Ruthie and her father.

37 The autobiography does not stop with negative comments about the father. It goes to say Ruthie dislikes her father's family "because 1) they give me the wrong gifts, clothes that never fit me" 2) they leave me in a corner when my father and I go to visit them."

38 Mother has also dealt quite inappropriately with the attack on the father, He was attacked and nearly killed by a knife-wielding acquaintance of the mother's. The attacker was charged with attempted murder, and has been convicted (although not yet sentenced) for aggravated assault. The father now suffers from depression and PTSD as a result of the attack.

39 The mother has apparently led Ruthie to believe that it was her father who was the aggressor, or somehow the attack was his fault. She suggests the father somehow deserved this because he broke up the family, or because he was uncooperative about consenting to mother and Ruthie travelling to France. Mother does not deny this. She simply says she herself had nothing to do with the attack. Leaving that aside, it is nevertheless shocking to think that a parent would lead a child to believe this about the other parent.

40 Not only do Ms. Perlis and the OCL urgently support an immediate change in custody, characterizing mother's behaviour as alienating, the Catholic Children's Aid Society also takes the position that if a change in custody is not made now, they will consider taking immediate protection proceedings in which they will seek to place Ruthie in her father's care at once.

41 I recognize the affidavits of the OCL and Ms. Perlis have not been tested by cross-examination. Neither have those of the mother or the father. That being said, I am sufficiently concerned about the gravity and nature of the allegations that I am not prepared to risk any further potential harm to Ruthie. The court's sole and primary concern must be Ruthie's best interests. I therefore conclude this is one of the rare and exceptional cases where an immediate change to temporary custody is necessary.

42 Accordingly, an immediate temporary order will issue in the following terms:

a) Father will have temporary custody of Ruthie, who will reside with him;

b) Mother may have telephone access with Ruthie twice a day for no more than five minutes for each call. Once call will be in the morning, before school, and the other will be at 8 p.m. Calls will be initiated by mother, to father's land line, or if he has no land line, on his cell phone;

c) Pending further order, father will have control of Ruthie's cell phone. He may decline to provide it to Ruthie at all, or may give it to her to use at his sole discretion;

d) Mother and Ruthie are prohibited from exchanging text messages with one another;

e) Mother will have temporary access to Ruthie twice a week after school for a period of 2 hours each time. Supervision will be arranged through a private supervision agency. It will commence as soon as possible, at the joint expense of the parties;

f) Ruthie and father will commence counselling immediately with Ruthie's counsellor to assist both Ruthie and the father with this transition;

g) Mother will not attempt to contact or visit with Ruthie, directly or indirectly, other than as set out above;

h) Ruthie's counsel, assisted by the OCL social worker, will advise Ruthie immediately of the terms of this order, and will tell her the court has made this determination independently, in her best interests, without the undue influence of either of her parents.

43 As I see it, the trial judge will be in a far better position than I am to determine what is ultimately in Ruthie's best interests in the longer term. For that reason, I will reserve the issue of costs of this motion to the trial judge.

Motion granted.

[Indexed as: **Hutchen v. Hutchen**]

Manuellla Hutchen, Claimant and Phillippe Edward Hutchen, Respondent

British Columbia Supreme Court

Docket: Victoria 14-0173

2014 BCSC 729

R.T.C. Johnston J.

Heard: March 4, 2014

Judgment: April 28, 2014

Family law —— Support — Spousal support under Divorce Act and provincial statutes — Determination of spouse's annual income — Imputed income —— Husband and wife began to live together in 1992, were married in 1993, separated in 2009, and divorced in 2011 — In March 2011 husband was ordered to pay wife spousal support of $1,500 per month, subject to review — Wife was child and youth care worker and worked throughout marriage, largely on part-time basis, with annual income in range of $9,701 to $18,000 — Wife's annual income in 2010 was $24,484 — Husband's annual income was approximately $150,000 in 2013 — In June 2013 wife moved to Washington State and began living with new partner — Wife had visitor status in United States and was unable to work there — Wife brought application for final order for spousal support retroactive to August 2013 — Wife took position that annual income of $26,000 be imputed to her — Husband took position that annual income of $41,000 be imputed to her — Husband ordered to pay spousal support of $3,100 per month beginning May 1, 2014 with review after two years — Support calculated under guidelines on income of $150,000 for husband and imputed income of $26,000 for wife — Imputing income to wife of more than $26,000 would ignore reality facing her which was that full-time employment in her field was hard to find and that length of employment in field was often subject to vagaries of public funding.

Family law —— Support — Spousal support under Divorce Act and provincial statutes — Factors to be considered — New relationship —— Husband and wife began to live together in 1992, were married in 1993, separated in 2009, and divorced in 2011 — In March 2011 husband was ordered to pay wife spousal support of $1,500 per month, subject to review — Wife's annual income in 2010 was $24,484 — Husband's annual income was approximately $150,000 in 2013 — In June 2013 wife moved to Washington State and began living with new partner who earned approximately $90,000 per year — Wife had visitor status in United States and was unable to work there — Wife brought application

for final order for spousal support retroactive to August 2013 — Husband ordered to pay spousal support of $3,100 per month beginning May 1, 2014 — Support calculated under guidelines on income of $150,000 for husband and imputed income of $26,000 for wife — Wife was primary caregiver for children while they were growing up and there was some basis for compensatory spousal support — Wife also had non-compensatory basis for support — Relative standards of living of former husband and wife were unacceptably unequal, given difference in earning capacity between them — While new relationship may not have much impact on compensatory support, it may have considerable impact on non-compensatory or needs-based support — Remarriage or long-term emotional and financial commitment of recipient spouse can begin process of transfer of obligation to support recipient spouse — Wife's new relationship was in early stages and she did not know whether it would develop into long-term marriage-like relationship which might shift weight of burden from payor spouse to new partner — Support to be reviewed after two years to determine whether wife's entitlement to compensatory support was exhausted and extent to which wife continued to need non-compensatory support, including state of her relationship with new partner.

Family law —— Support — Spousal support under Divorce Act and provincial statutes — Review of order —— Husband and wife began to live together in 1992, were married in 1993, separated in 2009, and divorced in 2011 — In March 2011 husband was ordered to pay wife spousal support of $1,500 per month, subject to review — Wife's annual income in 2010 was $24,484 — Husband's annual income was approximately $150,000 in 2013 — In June 2013 wife moved to Washington State and began living with new partner who earned approximately $90,000 per year — Wife had visitor status in United States and was unable to work there — Wife brought application for final order for spousal support retroactive to August 2013 — Husband ordered to pay spousal support of $3,100 per month beginning May 1, 2014 — Support calculated under guidelines on income of $150,000 for husband and imputed income of $26,000 for wife — Wife was primary caregiver for children while they were growing up and there was some basis for compensatory spousal support — Wife also had non-compensatory basis for support — Relative standards of living of former husband and wife were unacceptably unequal, given difference in earning capacity between them — While new relationship may not have much impact on compensatory support, it may have considerable impact on non-compensatory or needs-based support — Remarriage or long-term emotional and financial commitment of recipient spouse can begin process of transfer of obligation to support recipient spouse — Wife's new relationship was in early stages and she did not know whether it would develop into long-term marriage-like relationship which might shift weight of burden from payor spouse to new partner — It was too early to conclude, after three years of support, that wife had exhausted com-

pensatory support to which she was entitled after 17-year relationship — Support to be reviewed after two years to determine whether wife's entitlement to compensatory support was exhausted and extent to which wife continued to need non-compensatory support, including state of her relationship with new partner.

Family law —— Support — Spousal support under Divorce Act and provincial statutes — Entitlement — Miscellaneous —— Husband and wife began to live together in 1992, were married in 1993, separated in 2009, and divorced in 2011 — In March 2011 husband was ordered to pay wife spousal support of $1,500 per month, subject to review — Wife's annual income in 2010 was $24,484 — Husband's annual income was approximately $150,000 in 2013 — In June 2013 wife moved to Washington State and began living with new partner who earned approximately $90,000 per year — Wife had visitor status in United States and was unable to work there — Wife brought application for final order for spousal support retroactive to August 2013 — Husband ordered to pay spousal support of $3,100 per month beginning May 1, 2014 — Support calculated under guidelines on income of $150,000 for husband and imputed income of $26,000 for wife — Wife was primary caregiver for children while they were growing up and there was some basis for compensatory spousal support — Wife also had non-compensatory basis for support — Relative standards of living of former husband and wife were unacceptably unequal, given difference in earning capacity between them — While new relationship may not have much impact on compensatory support, it may have considerable impact on non-compensatory or needs-based support — Remarriage or long-term emotional and financial commitment of recipient spouse can begin process of transfer of obligation to support recipient spouse — Wife's new relationship was in early stages and she did not know whether it would develop into long-term marriage-like relationship which might shift weight of burden from payor spouse to new partner — It was too early to conclude, after three years of support, that wife had exhausted compensatory support to which she was entitled after 17-year relationship — Support to be reviewed after two years to determine whether wife's entitlement to compensatory support was exhausted and extent to which wife continued to need non-compensatory support, including state of her relationship with new partner.

Cases considered by *R.T.C. Johnston J.*:

Bracklow v. Bracklow (1999), 1999 CarswellBC 532, 1999 CarswellBC 533, 169 D.L.R. (4th) 577, 236 N.R. 79, 44 R.F.L. (4th) 1, 120 B.C.A.C. 211, 196 W.A.C. 211, [1999] 1 S.C.R. 420, [1999] 8 W.W.R. 740, 63 B.C.L.R. (3d) 77, [1999] S.C.J. No. 14 (S.C.C.) — followed

Chutter v. Chutter (2008), 301 D.L.R. (4th) 297, 60 R.F.L. (6th) 263, [2009] 3 W.W.R. 246, 2008 CarswellBC 2661, 2008 BCCA 507, 443 W.A.C. 109,

263 B.C.A.C. 109, 86 B.C.L.R. (4th) 233, [2008] B.C.J. No. 2398 (B.C. C.A.) — considered

Kelly v. Kelly (2007), 2007 BCSC 227, 2007 CarswellBC 342, [2007] B.C.J. No. 324 (B.C. S.C.) — considered

Moge v. Moge (1992), [1993] R.D.F. 168, [1993] 1 W.W.R. 481, 99 D.L.R. (4th) 456, [1992] 3 S.C.R. 813, 81 Man. R. (2d) 161, 30 W.A.C. 161, 43 R.F.L. (3d) 345, 145 N.R. 1, 1992 CarswellMan 143, 1992 CarswellMan 222, [1992] S.C.J. No. 107, EYB 1992-67141, [1990] S.C.C.A. No. 249 (S.C.C.) — considered

W. v. W. (2005), 2005 CarswellBC 1614, 2005 BCSC 1010, 19 R.F.L. (6th) 453, 47 B.C.L.R. (4th) 348, [2005] B.C.J. No. 1481 (B.C. S.C.) — considered

Yemchuk v. Yemchuk (2005), 2005 CarswellBC 1881, 2005 BCCA 406, [2005] 10 W.W.R. 634, 257 D.L.R. (4th) 476, 44 B.C.L.R. (4th) 77, 16 R.F.L. (6th) 430, 215 B.C.A.C. 193, 355 W.A.C. 193, [2005] B.C.J. No. 1748 (B.C. C.A.) — considered

Statutes considered:

Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.)

s. 15.2(4) [en. 1997, c. 1, s. 2] — considered

s. 15.2(6) [en. 1997, c. 1, s. 2] — considered

Family Law Act, S.B.C. 2011, c. 25

s. 161 — considered

s. 162 — considered

APPLICATION by wife for final order for spousal support.

J.M.W. Cudmore, for Claimant
B.A. MacLeod, for Respondent

***R.T.C. Johnston J.*:**

1 Ms. Hutchen, who now goes by the name Locche, seeks a final order for spousal support retroactive to August 2013.

2 Ms. Locche now lives in Washington State, U.S.A. Her current British Columbia connection is that her two children live in the province, and she has personal items in a storage locker in Victoria.

3 Mr. Hutchen is a heavy duty mechanic living in Alberta.

4 Mr. and Ms. Locche began to live together in July 1992, were married February 13, 1993, separated in July 2009, and were divorced on March 7, 2011.

5 They have two children, Jared and Christopher, neither of whom is a child of the marriage at this time.

6 All matters, other than a final spousal support order, have been previously dealt with, some by agreement between the parties, others by order of this court.

7 On March 7, 2011, the court ordered, with the consent of the parties, that Mr. Hutchen pay spousal support of $1,500 per month "subject to review". There was also a child support order at the same time, and both were based on Mr. Hutchen's agreed Guidelines income of $170,000.

8 There have been subsequent attempts to have the matter of spousal support finalized, with some uncertainty over whether the March 7, 2011, spousal support order was an interim or a final order. The parties agree that Gropper J. heard submissions on February 3, 2012, and directed that the March 7, 2011, spousal support order was interim in nature. No order has been filed to that effect.

9 At the beginning of the marriage, Mr. Hutchen worked in the concrete finishing industry, then moved to construction, then spent about seven years working as a diamond driller. This job required him to be away from home for weeks at a time, but allowed him to be home for weeks at a time. The parties disagree over how much time or effort Mr. Hutchens put into the home and family when he was not away in camp. Later in the marriage, Mr. Hutchen changed jobs again, to become a heavy duty mechanic, which did not require as much time away from home.

10 Ms. Locche had a Child and Youth Care Worker diploma when the parties married.

11 In 1992, the year of the marriage, Ms. Locche worked 40 hours a week for the Prince George Receiving Home Society, and earned $9,701 according to her tax information. It is not clear whether that was for a full year's employment.

12 Ms. Locche went from that job to a job as a youth care worker for School District 57 in Prince George, where she worked 22.5 hours a week, for between $15 and $20 per hour. Her 1993 tax information shows $9,425 in T4 earnings and $6,233 in maternity benefits, indicating that her year's work was interrupted by the arrival of their first child.

13 Ms. Locche worked throughout the marriage, mostly in areas related to her training, often 20 to 25 hours per week. She also had a variety of shorter duration jobs not related to her training, such as weekend security work, work at Rona, or a stint at her own cleaning business.

14 Ms. Locche's income during the marriage ranged between the 1992 figure of $9,701, up to a high in the $18,000 range. Her longest job lasted almost six years, and was with the Fort St. John School District. She left that job in 2005 because an asthma condition made the physical demands too difficult.

15 Ms. Locche stopped working in January 2008, about 18 months before the parties separated.

16 Ms. Locche has sworn that during the marriage, once she was settled in a job, Mr. Hutchen would "beg me to quit," which she says explains many of her frequent job changes.

17 Mr. Hutchen denies this and says that family finances were usually precarious enough that Ms. Locche's contributions to the family income were necessary.

18 The evidence of both parties leads me to infer that during the marriage the incomes and other resources of both were shared in order to support the family.

19 Neither party came out of the marriage with significant family assets, which provides some support for Mr. Hutchen's denial that, from time to time, he suggested Ms. Locche stop working.

20 When the parties divided family assets, Ms. Locche received just over $11,000 from the sale of a truck, and $17,297 by spousal RRSP rollover. The family home sold for a price that did not cover all mortgage and adjustment costs.

21 There is some inconsistency in Ms. Locche's evidence, because in her affidavit filed February 25, 2014, she swore:

> I worked for the majority of my marriage to the Respondent, I had to in order to support the family. The only time I ever quit a job was after 6 years of working for the school district. The school district implemented a physical education program for the children and I have severe asthma and because of this, I was unable to keep up with the requirements of the program.

This statement by Ms. Locche tends to support Mr. Hutchen's denial that he requested Ms. Locche to quit one or more jobs.

22 Since the parties separated, Ms. Locche's income has been variable. Her 2009 tax information shows total income of $4,947, of which $2,027 was social assistance benefits.

23 In June 2010 Ms. Locche started working for Pacific Coast Resources on an on-call basis as a Community Resource Worker. By the end of

2010, she was working full-time for this employer, according to her answer to an interrogatory, although in her third affidavit sworn January 24, 2011, she swore that she was working casual hours, picking up extra shifts "such that I work for approximately 30 hours each week." Her 2010 tax information shows total income of $24,484. Her pay was based on a $15.54 hourly rate as a casual employee. Full time, full year, that would amount to a bit over $32,000 per year in earnings.

24 Until August 2011 Ms. Locche continued working as a Community Support Worker for Pacific Coast Resources Society. After August 2011 she started working for the Sooke School District on a one year contract on a pilot program set to end in June 2012. Her pay there was based on annualized salary of $26,961.

25 Ms. Locche's 2011 income tax information is not in the record.

26 Ms. Locche swears that she left the Sooke School District job on stress leave in April 2012, and started another job in August of that year. Her 2012 tax information shows $13,494 in T4 earnings, $5,193 in Employment Income benefits.

27 From September to November of 2012, Ms. Locche was enrolled in the Aldebaran Hypnotherapy School in Tacoma, Washington. She says that for two months while she attended this school she lived with her "friend" Matt Smith.

28 In November 2012 Ms. Locche returned to Victoria and worked for Centaine Support Services.

29 In June 2013 Ms. Locche moved to Washington State and began to live with Mr. Smith. At present, she has visitor status in the United States.

30 Ms. Locche describes her relationship with Mr. Smith in an affidavit, filed February 25, 2014, in this way:

> 6. In response to paragraph 4 of the Respondent's affidavit, I was in a long distance relationship until only recently and we are still exploring our relationship to see how it will develop. I am very happy at the moment but I do not know for certain what the future holds as we are still in the early stages of our relationship.
>
> 7. Matt and I have consulted with an immigration attorney in Washington, as to the steps required for me to reside permanently here. An option available for us is to marry and consequently for me to obtain a spousal visa and become a permanent resident. Matt and I are certainly open to this possibility and it may be what the future holds for

> us. To be clear, however, Matt and I have not yet made the decision to marry.
>
> 8. Matt operates a company, he is a shellfish farmer, he drives a 1993 Honda Civic, has a 2002 truck for his work, and of course a fishing boat for his work. He lives a modest lifestyle; in 1980s style refurbished mobile home. He is currently in the process of building a home around $130,000 and as of yet there is no completion date.

31 In an affidavit in response to interrogatories, Ms. Locche swears that Mr. Smith has told her he earns around $90,000 per year.

32 Ms. Locche and Mr. Smith maintain separate finances.

33 While living in the United States with visitor status, Ms. Locche is not permitted to work. She recognizes that is a self-imposed impairment on her earning capacity, and proposes that her income be imputed at $26,000 per year for spousal support calculations. Mr. Hutchen argues that a more appropriate amount to impute to Ms. Locche would be $41,000 per year, a figure derived from $20 per hour for full-time, full year work.

34 Mr. Hutchen's tax information shows 2010 earnings of $145,596; 2011 income of $155,326; and 2012 income of $129,611.

35 Mr. Hutchen's pay stubs for 2013 support an income of $150,000 for that year.

Law

36 Section 15.2(4) of the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.), provides:

> In making an order under subsection (1) or an interim order under subsection (2), the court shall take into consideration the condition, means, needs and other circumstances of each spouse, including
>
> (a) the length of time the spouses cohabited;
>
> (b) the functions performed by each spouse during cohabitation; and
>
> (c) any order, agreement or arrangement relating to support of either spouse.

37 The objectives of spousal support orders are set out in s. 15.2(6):

> An order made under subsection (1) or an interim order under subsection (2) that provides for the support of a spouse should
>
> (a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;
>
> (b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;
>
> (c) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and
>
> (d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.

38 The application also invokes the *Family Law Act*, S.B.C. 2011, c. 25, where the provisions of ss. 161 and 162 are so close to the above sections of the *Divorce Act* that any difference is immaterial.

39 Ms. Locche submits that she has strong compensatory and non-compensatory basis for spousal support. *Moge v. Moge*, [1992] 3 S.C.R. 813 (S.C.C.), explained the compensatory approach to spousal support; *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420 (S.C.C.), dealt with the non-compensatory basis for spousal support.

40 In support of her claim for compensatory support, Ms. Locche says that she bore most of the burden of raising the two children of her marriage to Mr. Hutchen, and, for a time, cared for a child from Mr. Hutchen's previous relationship. The child-rearing responsibilities lasted through most of the 17 year relationship, which is moderate to long by present standards. Ms. Locche points to the fact that, while Mr. Hutchen's job as a diamond driller took him away for extended periods, she was on her own as a *de facto* single parent.

41 In *Moge*, L'Heureux-Dubé J. said at para. 42 (Quicklaw):

> The second observation I wish to make is that, in determining spousal support it is important not to lose sight of the fact that the support provisions of the Act are intended to deal with the *economic* consequences, for both parties, of the marriage or its breakdown." [Emphasis in original.]

And, at para. 45 (Quicklaw):

> But in many if not most cases, the absence of accumulated assets may require that one spouse pay support to the other in order to effect an equitable distribution of resources. This is precisely the case here, as the parties are not wealthy; for the most part, all they appear to possess are their respective incomes.

42 With respect to the consequences to a spouse who bears a disproportionate share of child-rearing or homemaking responsibilities, L'Heureux-Dubé J. said at para. 70 (Quicklaw):

> Hence, while the union survives, such division of labour, at least from an economic perspective, may be unobjectionable if such an arrangement reflects the wishes of the parties. However, once the marriage dissolves, the kinds of non-monetary contributions made by the wife may result in significant market disabilities. The sacrifices she has made at home catch up with her and the balance shifts in favour of the husband who has remained in the work force and focused his attention outside the home. In effect, she is left with a diminished earning capacity and may have conferred upon her husband an embellished one.

The curtailment of outside employment obviously has a significant impact on future earning capacity.

43 The relationship between roles taken on during the marriage and their economic consequences were discussed in para. 82 (Quicklaw):

> Conversely, the parties may decide or circumstances may require that both spouses work full-time. This in and of itself may not necessarily preclude compensation if, in the interest of the family or due to child-care responsibilities, one spouse declines a promotion, refuses a transfer, leaves a position to allow the other spouse to take advantage of an opportunity for advancement or otherwise curtails employment opportunities and thereby incurs economic loss.

44 Ms. Locche worked outside the home fairly steadily throughout the marriage until approximately 18 months before separation, although it appears that much of her work was less than full time. This may reflect either a need or a desire to be available to the children when they were not in school. It could also reflect a reality that her job, at least for the six years she worked for the Fort St. John School District, had its hours tied to the school day. Much of Ms. Locche's work was in her chosen field of Child and Youth Care work, or in closely related areas.

45 I am prepared to accept that Ms. Locche was the primary care giver for her children while they were growing up, as well as for Mr.

Hutchen's son from an earlier relationship, for some part of the marriage. That leads me to conclude that there was at least some element of necessity that contributed to Ms. Locche working less than full time through much of her marriage to Mr. Hutchen. That in turn leads me to find that Ms. Locche has shown an evidentiary basis for a claim for spousal support rooted in the compensatory model developed in *Moge*.

46 On the other hand, Ms. Locche's career path was established before she entered her relationship with Mr. Hutchen, and she continued to pursue that career throughout the marriage, with some detours when the pressures of a child care career required her to step aside into work involving less stress.

47 The evidence does not show that Ms. Locche's career was foregone in favour of the marriage, and her argument that she should be considered for spousal support on a compensatory basis because she bore the brunt of the child care responsibilities while Mr. Hutchen was working away from home, while true, goes only so far in establishing that Ms. Locche's career prospects, or her chance to acquire seniority or benefits in her career, were sacrificed to her role in the marriage. Logic and common sense dictate that Ms. Locche's career opportunities were subordinated to child rearing and homemaking throughout much of the marriage, and I so find.

48 While there is evidence that she has changed jobs frequently, and that some of those changes were so she could accompany Mr. Hutchen when he moved to better his employment prospects, I do not consider the evidence that Ms. Locche left one or more jobs because Mr. Hutchen asked her to, or told her he did not like her working, is persuasive.

49 I conclude that Ms. Locche's claim to spousal support on a compensatory basis, while established, is not as strong as her counsel advocates, primarily because she continued to work throughout the marriage, and there was no marriage-related reason why she had to work outside her career.

50 Ms. Locche also frames her claim to spousal support on non-compensatory grounds. She points to her income-earning capacity, as demonstrated during and after the marriage, and argues that she has sustained economic disadvantage as a result of the breakdown of the marriage, and the loss of access to Mr. Hutchen's much higher earnings.

51 *Bracklow* confirmed the non-compensatory basis for a spousal support award. At para. 41, the court said:

> "[E]conomic hardship ... arising from the breakdown of the marriage" is capable of encompassing not only health or career disadvantages arising from the marriage breakdown properly the subject of compensation (perhaps more directly covered in s. 15.2(6)(a): see *Payne on Divorce*, *supra*, at pp. 251-53), but the mere fact that a person who formerly enjoyed intra-spousal entitlement to support now finds herself or himself without it. Looking only at compensation, one merely asks what loss the marriage or marriage breakup caused that would not have been suffered but for the marriage. But even where loss in this sense cannot be established, the breakup may cause economic hardship in a larger, non-compensatory sense.

And at para. 49:

> In summary, the statutes and the case law suggest three conceptual bases for entitlement to spousal support: (1) compensatory, (2) contractual, and (3) non-compensatory. Marriage, as this Court held in *Moge* (at p. 870), is a "joint endeavour", a socio-economic partnership. That is the starting position. Support agreements are important (although not necessarily decisive), and so is the idea that spouses should be compensated on marriage breakdown for losses and hardships caused by the marriage. Indeed, a review of cases suggests that in most circumstances compensation now serves as the main reason for support. However, contract and compensation are not the only sources of a support obligation. The obligation may alternatively arise out of the marriage relationship itself. Where a spouse achieves economic self-sufficiency on the basis of his or her own efforts, or on an award of compensatory support, the obligation founded on the marriage relationship itself lies dormant. But where need is established that is not met on a compensatory or contractual basis, the fundamental marital obligation *may* play a vital role. Absent negating factors, it is available, in appropriate circumstances, to provide just support.

52 *Chutter v. Chutter*, 2008 BCCA 507 (B.C. C.A.), dealt with both compensatory and non-compensatory basis for spousal support. After noting that in *Moge* the Supreme Court of Canada had noted the relevance of the parties' standards of living to compensatory support, the court approved passages from *W. v. W.*, 2005 BCSC 1010 (B.C. S.C.), interpreting *Moge* to mean that in long marriages, spousal support should strive to achieve a rough equivalency of standards of living of the former spouses (para. 53). The court in *Chutter* went on to deal with non-com-

pensatory spousal support and in doing so, at para. 57, noted its earlier decision in *Yemchuk v. Yemchuk*, 2005 BCCA 406 (B.C. C.A.), where the court stated:

> [I]n the context of a long-term marriage involving a sharing of resources, I am satisfied that it should take into account the relative standards of living of the spouses following the marriage breakdown.

53 In this case, the relative standards of living must be considered unacceptably unequal, given the differential in earning capacity between the former spouses.

54 Ms. Locche has therefore made out a claim for non-compensatory spousal support.

55 For the purposes of determining quantum, I accept Mr. Hutchen's income as $150,000. Ms. Locche's is not so easily fixed. She suggests $26,000, apparently based loosely on her more recent income in British Columbia. Mr. Hutchen suggests I should impute to her an income of $41,000, based on her ability to earn between $18 and $23 per hour, and assuming full-time, full year employment. I note that $20 per hour full-time, full year employment would yield an income of $41,500.

56 Ms. Locche proposes an imputed income, which is much closer to her historical earnings as demonstrated by the tax and other information available. While it might understate her earning capacity, it does not do so by much. Mr. Hutchen proposes an imputed income ignores what I take to be the reality facing Ms. Locche — and that is that full-time employment is hard to find, and the nature of her field of endeavour is such that the length of her employment is often subject to the vagaries of public funding.

57 Sample without-child calculations, using the *Spousal Support Advisory Guidelines*, using imputed income of $26,000 for Ms. Locche, and $150,000 for Mr. Hutchen, show a range for spousal support between a low of $2,635 and a high of $3,513, with a mid-point of $3,074.

58 Ms. Locche argues for the upper end of the range, largely though not entirely, based on her assertion there is a strong compensatory basis for support.

59 Mr. Hutchen denies any compensatory basis for support and says if there is such a basis, it has been satisfied by the spousal support he has paid since 2011.

60 The parties do not agree on the impact Ms. Locche's new relationship should have on either entitlement or quantum of spousal support.

61 While remarriage may not have much impact on compensatory support, it may have considerable impact on non-compensatory or needs-based support. Remarriage of a recipient spouse may not immediately shift a burden of support to the recipient's new partner, but it can begin a process of transfer of the obligation to support the recipient spouse: *Kelly v. Kelly*, 2007 BCSC 227 (B.C. S.C.).

62 I use the term "remarriage" to include any arrangement having the indicia of a long-term emotional and financial commitment between two people.

63 Ms. Locche's new relationship is in its early stages, and she does not know whether it will develop into a long-term marriage-like relationship or marriage. If it develops into a long-term relationship, then the burden of providing needs-based support may be preparing to shift the weight from Mr. Hutchen to Mr. Smith but it would not significantly affect the compensatory based support, which is still a factor. It is too soon to conclude that Ms. Locche has exhausted the compensatory support to which she is entitled. In saying that, I disagree with Mr. Hutchen's submission to the contrary, which he based on the reasoning in *Kelly*, at paras. 29 and 30. In *Kelly*, the court found that over nine years of spousal support was sufficient to compensate the recipient for "the limited degree that compensatory concerns played in the making of the initial order," whereas here the spousal support has been paid for three years. *Kelly* involved a 12 year marriage, in the context of a 17 year relationship, a similar total length as in this case, with a shorter period of marriage.

64 Using the *Spousal Support Advisory Guidelines* as a reference, and recognizing that they are advisory only, I order Mr. Hutchen to pay spousal support of $3,100 per month commencing May 1, 2014.

65 Ms. Locche's application for retroactive spousal support is dismissed on the basis that, although there may have been effective notice to Mr. Hutchen that his spousal support obligation might increase in the early fall of 2013, when this application was first brought, I can see no satisfactory way in which he could have accurately or confidently ascertained the level at which his support obligation would be set. The extent to which compensatory considerations influenced the range of support would be pegged, along with uncertainty over the level at which Ms. Locche's income would be imputed makes it reasonable for Mr. Hutchen to have awaited the decision of the court before increasing his spousal support payment.

66 The uncertainty over Ms. Locche's domestic arrangements call for a review. Given the length of her present relationship, it is reasonable to set a review for two years from May 1, 2014.

67 That review should be confined to two aspects: first, whether Ms. Locche's entitlement to compensatory support has been exhausted; second, the extent to which Ms. Locche continues to need non-compensatory support, including but not restricted to, the state of her emotional and economic relationship to Mr. Smith or any other partner.

68 Ms. Locche shall have her costs of this application.

Order accordingly.

[Indexed as: **Matthews v. Mutiso**]

Amanda Mary Matthews, Applicant and Joseph Masaku Mutiso, Respondent

Ontario Superior Court of Justice

Docket: F1379/13

2014 ONSC 4010

Victor Mitrow J.

Heard: May 26, 2014

Judgment: July 7, 2014

Family law —— Annulment — Formal validity —— Cohabitation — Parties met when husband was living in Dubai, and married in Ontario — Husband returned to Dubai following week and parties visited each other on visitor's visas for two additional short periods of time, before husband told wife he no longer wanted to be married to her — Wife testified parties genuinely wanted to marry and had tried to get pregnant immediately after marriage but that she did not start sponsorship process and there was no financial interdependence — Wife testified that she was advised shortly after separation that person who performed marriage was not authorized — Application by wife for annulment of marriage — Application dismissed — Section 31 of Marriage Act applied to deem marriage valid if four conditions were met — As marriage was solemnized in good faith, was intended to comply with Act and neither party was legally disqualified to marry, case turned on whether parties lived together and cohabited as married couple — Parties elected to pursue long-distance relationship that led to marriage and three periods where they were physically together — Practical limitations prevented parties from living together and they cohabited as married couple within their unique circumstances — Husband's affidavit corroborated that parties wanted to have child together and were actively discussing which one would move so they could be together permanently — Marriage was declared valid under s. 31.

Cases considered by *Victor Mitrow J.*:

Isse v. Said (2012), 2012 ONSC 1829, 2012 CarswellOnt 3623, 19 R.F.L. (7th) 413, [2012] O.J. No. 1341 (Ont. S.C.J.) — followed

Upadyhaha v. Sehgal (2000), 2000 CarswellOnt 3306, 11 R.F.L. (5th) 210, [2000] O.J. No. 3508 (Ont. S.C.J.) — distinguished

Statutes considered:

Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.)

Generally — referred to

Marriage Act, R.S.O. 1990, c. M.3
Generally — referred to
s. 31 — considered

APPLICATION by wife for annulment of marriage.

Amanda Mary Matthews, for herself
No one for Joseph Masaku Mutiso

***Victor Mitrow J.*:**

Introduction

1 The sole issue in this application is the applicant's request for an annulment of the marriage. For reasons that follow, the application is dismissed.

History of This Proceeding

2 On December 10, 2013, the applicant and the respondent's then counsel, Mr. Mark Simpson appeared before me at which time an order was made as follows: the respondent was to advise within two weeks as to his position whether the parties cohabited at any time subsequent to marriage; the applicant was to serve and file her affidavit material in support of her claim by January 15, 2014; the respondent if he intended to defend the application was to serve and file his responding pleadings by January 27, 2014 and the application was adjourned to January 28, 2014 to set a summary hearing date.

3 This appeared to be a matter that could be dealt with by affidavit evidence and it was for that reason that the applicant was ordered to file affidavit material in support of her claim.

4 The applicant and respondent's counsel Mr. Simpson next appeared before me on February 21, 2014. The matter had been set for a summary hearing; however the material filed by the applicant was neither complete nor sufficient.

5 Mr. Simpson advised that his client was not opposing the relief sought. The respondent did not comply with the order dated December 10, 2013 requiring him to serve and file responding pleadings, however, the respondent did file an affidavit sworn January 8, 2014 setting out his position as to the parties' marital relationship.

6 The order that was made February 21, 2014, included an order requiring the applicant to file to file a fresh, comprehensive affidavit detailing

clearly all facts relied on in support of the claim, but the order provided that this would not prevent the applicant from adducing *viva voce* evidence at the hearing of the application with leave of the court.

7 At that time, Mr. Simpson advised that he would not be participating any further in this matter, having advised the court of his client's position and having filed his client's affidavit.

8 This matter eventually came on for hearing before me on May 26, 2014 as an undefended trial. The applicant had filed an affidavit sworn April 24, 2014, setting out the relevant background facts.

9 At the hearing the applicant advised the court that she was not opposed to the court considering the respondent's affidavit dated January 8, 2014.

10 Also the applicant gave *viva voce* evidence to supplement the evidence contained in her affidavit.

The Facts

11 At the date of the hearing of the application, the applicant was age 34 and the respondent was age 37. The applicant was previously divorced.

12 The applicant and the respondent met online sometime in 2012. At that time the respondent was living in Dubai, in the United Arab Emirates.

13 The parties were married to each other in London, Ontario on October 19, 2012.

14 The parties met face to face for the first time on October 15, 2012. On that occasion, the applicant picked up the respondent at the airport in Toronto and the respondent came to stay with the applicant at her London, Ontario residence.

15 Based on the applicant's evidence, it appeared that the parties initial relationship was very positive. The applicant testified that the parties had discussions about having children right away.

16 It was the applicant's evidence that she located a person to solemnize their marriage by searching the internet. This search yielded a person named Dale Brewster. This person had a website and was available to perform marriage ceremonies. It was Dale Brewster who married the parties on October 19, 2012. The parties did obtain a marriage licence. Prior to the date of marriage, the parties went to Niagara Falls on October 17,

2012 at which time they met the applicant's parents who were visiting Niagara Falls.

17 On the day of marriage, a couple, who were friends of the applicant, attended at the wedding ceremony as witnesses.

18 The applicant testified that she entered into the marriage voluntarily and that she was happy to get married.

19 By October 24, 2012, the respondent had returned to the United Arab Emirates.

20 During the period approximately December 14, 2012 to December 26, 2012, the applicant flew to the United Arab Emirates where she stayed with the respondent at his residence.

21 The parties next saw each other physically in March 2013. At that time, the applicant picked up the respondent at the airport in Montreal and the parties then drove to London, Ontario where they stayed at the applicant's residence for the period of approximately March 18 to March 26, 2013.

22 Each party had a visitor's visa when he or she was visiting the other party.

23 The applicant testified that the parties were not together physically for continuous periods of time because of their respective visa restrictions.

24 The applicant was clear that prior to June of 2013, she did not consider herself to be in a state of marital separation from the respondent.

25 It was the applicant's evidence that in early June 2013 that the relationship ended; the applicant thereafter regarded herself as being separated from the respondent.

26 The applicant testified that the respondent ended their relationship by telling the applicant that he no longer wanted to be married to her.

27 It was the applicant's evidence that the date of separation was June 6, 2013. This is consistent with the date of separation disclosed in the application.

28 It was also the applicant's testimony that she had tried to get pregnant right away; and that if they had a child it would be easier for the respondent to come to Canada and stay in Canada. The applicant stated that she had never started the process of sponsoring the respondent to come to Canada.

29 There was no financial interdependence between the parties, according to the applicant, during their brief relationship.

30 It was soon after the separation, according to the applicant, that she was contacted by phone (apparently by someone from the Ontario government) and was told that Dale Brewster, the person who performed the marriage ceremony, was not authorized to do so under the *Marriage Act*, R.S.O. 1990, c M.3.

31 By letter dated July 19, 2013, received from Service Ontario, the applicant received written confirmation that Dale Brewster was not authorized to perform marriages. That letter referred to s. 31 of the *Marriage Act*, stating that this section "is intended to deal with these types of irregularities". This letter is appended as an exhibit to the applicant's affidavit.

The Law

32 Section 31 of the *Marriage Act* states as follows:

> If the parties to a marriage solemnized in good faith and intended to be in compliance with this Act are not under a legal disqualification to contract such marriage and after such solemnization have lived together and cohabited as a married couple, such marriage shall be deemed a valid marriage, although the person who solemnized the marriage was not authorized to solemnize marriage, and despite the absence of or any irregularity or insufficiency in the publication of banns or the issue of the licence.

33 In *Isse v. Said*, 2012 ONSC 1829 (Ont. S.C.J.), D. A. Broad J. canvassed s. 31 of the *Marriage Act* on the facts before him. The four necessary elements for s. 31 to apply are summarized as follows by Broad J. at para. 16:

> There are four necessary elements for the deeming provision in paragraph 31 to apply, namely:
>
> 1. The marriage must have been solemnized in good faith;
> 2. The marriage must have been intended to be in compliance with the *Marriage* Act;
> 3. Neither party was under a legal disqualification to contract marriage; and
> 4. The parties must have lived together and cohabited as a married couple after solemnization.

34 The present case turns on the fourth element: the issue of whether the parties have lived together and cohabited as a married couple after solemnization. The evidence in the present case establishes compliance with the first three elements: that the marriage was solemnized in good faith, that the marriage was intended to be in compliance with the *Marriage Act*, and that neither party was under a legal disqualification to contract marriage.

35 Most of the jurisprudence in relation to s. 31 of the *Marriage Act*, centres on the one or more of the first three elements.

36 However, the decision of MacKenzie J., in the *Upadyhaha v. Sehgal*, [2000] O.J. No. 3508 (Ont. S.C.J.), involved a consideration of the fourth element, as to whether the parties in that case law lived together and cohabited as a married couple after the date of solemnization.

37 In *Upadyhaha*, the parties had met in 1995, and by the summer of 1996 the relationship had developed to the point that the parties discussed a future as a couple; in December of 1996, the wife informed the husband that if there was no marriage between them then the relationship would end; the husband shortly thereafter, stated he wished to continue the relationship and in January 1997, the wife indicated there would no continuation of the relationship unless a marriage was arranged; in February 1997, the parties went through a traditional form of marriage according to the Hindu religion but no marriage licence was obtained; the parties stayed in a hotel overnight after the ceremony and thereafter the husband spent a few days at the defendant's residence on a number of occasions from mid-February 1997 to the end of June 1997; however the husband never made the wife's residence as his ordinary or usual residence.

38 There was another unrelated issue in *Upadyhaha*, supra that was discussed in the reasons for judgment but which is not relevant to the case at bar.

39 MacKenzie J. found in all the circumstances that the saving provision in s. 31 of the *Marriage Act* did not apply. The court was unable to find as a fact that there was a living together and cohabitation as contemplated by s. 31. On the issue of cohabitation within the meaning of s. 31 of the *Marriage Act*, MacKenzie J. stated as follows at para. 30:

> On the evidence and the submissions, I am satisfied that the saving provision in section 31 of the Act does not operate here to create a valid marriage between the plaintiff and the defendant. I am not persuaded that the parties following the February 14th ceremony "lived

> together and cohabited as man and wife" within the meaning of those words set out in section 31. *I acknowledge that there may be in law a "living together" and "cohabitation as man and wife" between the parties where they are prevented from living together in the sense of following the ordinary routines of domestic life under the same roof and household due to reasons beyond their respective controls. There comes to mind examples such as military hostilities and prolonged illness.* Whatever the reason or motive of these two parties (apart from the stated reason that the defendant's premises at the time were too small), I am unable to find as a fact that there was a living together and cohabitation as contemplated by section 31 of the Act.
>
> [my emphasis]

Discussion

40 The operative words in s. 31, in relation to cohabitation is that after solemnization of the marriage, the parties must have "lived together and cohabited as a married couple". In order to find whether this element is satisfied, it is necessary to examine the conduct of parties in context of any unique facts relevant to each case.

41 In *Upadyhaha*, although MacKenzie J. found that the amount of cohabitation was insufficient within the meaning of s. 31 of the *Marriage Act*, there was no evidence that the parties had residences geographically far apart from each other, as in the present case. Importantly, MacKenzie J. acknowledged that there may be cases where parties could be living together and cohabiting as man and wife in circumstances where they are actually prevented from living together for reasons that include, as examples, military hostilities and prolonged illness.

42 In the present case there is no doubt, on the applicant's evidence, that she considered herself married to the respondent and that she did not regard the parties as being maritally separated prior to June 2013.

43 The parties met on the internet. The applicant resided in London, Ontario and the respondent resided in Dubai. Both parties voluntarily elected to pursue a long-distance relationship. This led to marriage and included three periods of time when the parties were physically together and living as a married couple. They planned to have a child. This would make it easier for the applicant to sponsor the respondent to come to Canada.

44 In contrast to the facts in *Upadyhaha*, in the present case, it was not surprising that the parties had not yet reached the stage in their relation-

ship where either party could move into the other party's residence. There were practical limitations including visitor visa requirements, and the time required for the applicant to sponsor the respondent to come to Canada.

45 There may be situations where people get married and for reasons other than marital separation, they are living physically separate and apart for periods of time because of their unique circumstances. This possibility was recognized in *Upadyhaha*, supra. There is no specific length of cohabitation included in s. 31. Each case must be decided on its own facts.

46 Based on the applicant's evidence, I find as a fact that the parties did live together and cohabit as a married couple subsequent to their marriage within the meaning of s. 31 of the *Marriage Act.* The reality of this case is that the applicant found herself in a situation where the respondent changed his mind about their ongoing relationship and this caused the applicant to take the position that as of June 6, 2013 the parties were separated. This separation does not detract from the fact that before that date, the parties had lived together and cohabited as a married couple within the context of their unique circumstances.

47 It is the applicant's submission that the amount of cohabitation is insufficient to satisfy the cohabitation requirement in s. 31 of the *Marriage Act*, and accordingly the applicant submits that the curative provision in s. 31 of the *Marriage Act* is not applicable. I do not accept that submission.

48 In his affidavit, the respondent states that despite the distance between the parties that he considered their union as a marriage and he corroborates the applicant's evidence that he and the applicant had discussed starting a family immediately. The respondent further deposes that the parties were having active discussions about which one would move in order for the parties to be together. It was his evidence that he and the applicant had a fight and that he threatened to leave the applicant.

49 The respondent's evidence corroborates the existence of an ongoing marital relationship between the parties despite the fact that they lived some distance apart and were not continuously together.

50 Even though the applicant had consented to the respondent's affidavit being considered on the hearing of the application, I find that the conclusion dismissing the application can be supported solely on the evidence of the applicant.

51 I find as a fact that the curative provisions contained in s. 31 of the *Marriage Act* apply and that the marriage between the applicant and the respondent is a valid marriage.

Order

52 For reasons set out above, a final order shall issue as follows:

(1) Pursuant to s. 31 of the *Marriage Act*, the marriage between the applicant and the respondent solemnized in London, Ontario, on October 19, 2012 is declared to be a valid marriage;

(2) The application for a declaration of annulment is dismissed without costs; and

(3) This order is without prejudice to the applicant's right to seek a divorce pursuant to the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.) c.3 [as am. by S.C. 1997, c.1].

Application dismissed.