

IN THE FAMILY COURT OF NOVA SCOTIA

Citation: C.A.L. v. P.M.L., 2009 NSFC 20

Date: 20090831

Docket: 08Y061548

Registry: Yarmouth

Between:

C.A.L.

Applicant

v.

P.M.L.

Respondent

Judge: The Honourable Chief Judge John D. Comeau

Heard: August 5, 2009, Yarmouth, Nova Scotia

Written Decision: August 31, 2009

Counsel: Greg Barro, Esq., for the Applicant

Louis d'Entremont, Esq., for the Respondent

The Application:

[1] This is an application for sole custody and child support of Brandon, born May 16, 1999. The Applicant is also seeking spousal support.

[2] There are two children of the marriage. Brandon resides with the Applicant, who is his mother, and Dilan, born June 16, 1995, resides with the Respondent, father.

[3] The parties agree to a split custody arrangement which confirms the living situation referred to above. Reasonable access has been working well.

[4] An Interim Order between the parties was entered into on the 17th of December 2008 and the Order was issued February 11th, 2009. This Order provided for child support in the amount of \$732.00 a month and spousal support of \$768.00 both totalling \$1500.00 with the first payment due December 19, 2008 and continuing due the 15th of each month thereafter.

Issues:

- [5] 1. Determination of annual income for the purposes of child and spousal support.
- [6] 2. Determination of arrears, if any, with respect to the Order of December 17th, 2008.
- [7] 3. Whether there is an ability to pay spousal support after giving priority to child support?
- [8] 4. Method of determining child support.

The Facts:

[9] The parties were married November 6th, 1993 and separated October 25th, 2008. The Applicant, mother, resides with a man and they share expenses. The Respondent and Dilan remain in the family home.

[10] During the course of the marriage, the Applicant was a homemaker, caring for the children. She worked very sporadically near the end of their cohabitation as a clerk in a store. She has no formal training but wants to be a nurse. This will require upgrading before she can attempt to train for the profession of nursing. Presently she works in a fish plant and has a monthly income of \$1000.00.

[11] The Respondent, father, is a fisherman, harvesting mainly lobsters but he does some summer fishing (this year slime eels). Judicial notice is taken that the lobster fishing season in the Respondent's area runs from the last Monday in November to May 31st of the following year.

Respondent's Business Financial setup

[12] 1 - Incorporated limited company with assets, including the boat, fishing licence (no evidence that it is in his personal name) and truck. The Respondent is the only shareholder.

[13] 2 - Family trust where money went in and then out to the Applicant (on paper). Actual funds were to the Respondent when they were together.

[14] 3 - Corporate line of credit \$10,000.00

[15] 4 - No evidence of personal account.

Financial Statements from the Respondent's Ltd. Company

[16] Unaudited October 31, 2008

[17] Income - 2007 - \$283,883; Net - \$48,625

[18] Income - 2008 - \$346,650; Net - \$73,256

| <u>Assets</u> | <u>2008</u> | <u>2009</u> |
|---------------------------------|----------------------------|----------------------------|
| Current | | |
| HST receivable | \$336.00 | \$519.00 |
| Property and equipment (Note 2) | \$103,471.00 | \$90,597.00 |
| Intangibles (Note 3) | <u>\$48,787.00</u> | <u>\$51,210.00</u> |
| | <u>\$179,235.00</u> | <u>\$170,538.00</u> |

[19] Note 2 is explained as follows:

1. Accounting policies

Property and equipment

Property and equipment is recorded at cost net of investment tax credits and is being amortized using the diminishing balance method at the following annual rates:

| | |
|----------------|-----|
| Fishing vessel | 15% |
| Equipment | 20% |
| Computer | 30% |

Motor vehicle 30%

The cost of these items, adding to the book value and accumulated amortization is \$283,105.00.

[20] Intangibles are goodwill and licences.

Accounting policy on the licence is as follows:

Fishing licence is stated at cost. Amortization is being provided for at the rate of 7% per annum on the same basis as the corporate tax return.

Goodwill has only a book value of \$1.00

The net book value and accumulated amortization puts the total cost of these intangibles at \$110,250.00

| <u>Liabilities</u> | <u>2008</u> | <u>2007</u> |
|-----------------------------------|--------------------|--------------------|
| Bank Debt | \$9,543.00 | \$9,068.00 |
| Payable to related party | \$3,459.00 | \$0.00 |
| Income taxes payable | \$15,517.00 | \$15,848.00 |
| Due to E.S. Fisheries Ltd | \$269,918.00 | \$259,187.00 |
| Payable to shareholders | \$0.00 | \$15.00 |
| Current portion of long-term debt | \$6,385.00 | \$10,100.00 |
| Long-term debt | \$42,800.00 | \$20,074.00 |

Long-term debt is detailed as follows:

0.9% GMAC loan (truck) repayable in bi-weekly installments of \$396.00, including interest.

8.4% Royal Bank loan, repayable in bi-weekly installments of \$392.00, including interest due in 2014.

Shareholder's equity is a minus balance:

2008

(168,387)

2007

(143,754)

Profit and Loss Statement of Respondent's Ltd. Company

| | 3 months | 12 months |
|------------------------|-----------------------|-----------------------|
| | Nov 1/08 to Jan 31/09 | Nov 1/07 to Oct 31/08 |
| | <u>2009</u> | <u>2008</u> |
| Revenue | | |
| Sales | \$103,246.00 | \$346,650.00 |
| Gain on sale of assets | | \$11,074.00 |
| Interest Income | \$2.00 | \$5.00 |
| HST recovered | _____ | <u>\$7,461.00</u> |
| | \$103,248.00 | \$365,190.00 |

Expenses include amortized assets as referred to earlier.

Net income is as follows:

| | <u>2009</u> | <u>2008</u> |
|--|--------------------|--------------------|
| | \$15,488.00 | \$62,736.00 |

[21] The Respondent has a family trust. Money from the business (corporation) went out to the trust and quickly out of that so as to gain a lower tax rate. Funds

were paid to the Applicant as an employee, although she did no work. These funds were not used by her but they were family monies and used for such.

[22] The Respondent's mother has been handling the finances of the company for seven years. In 2005 her and her husband mortgaged their house to help out the Respondent's company and himself personally for income taxes owed. The funds amounted to \$16,000 for the company and \$40,000 - \$45,000 for him personally.

[23] They (his parents) had to mortgage a second time in July 2008 between \$20,000 and \$25,000 to carry him and the company until he was back fishing full time (lobster fishery). His mother says "he was going to lose everything if we did not do it. Could not sell out that quick."

Present state of the company

[24] The company is \$60,000 in debt which includes corporate tax since the fall of 2008 to the end of May 2009. Many creditors have called and are willing to wait until the fall fishery (lobstering) starts again.

ES Fisheries Ltd

[25] This company is the major creditor of the Respondent's business. Not only is it owed money but it supports him in covering the bank debt. This company is owned by a relative and they buy all his lobsters (because he is tied up with them financially, he has to sell all his lobsters to them).

[26] In her testimony the Respondent's mother says he has no option but to sell. The Respondent indicates ES Fisheries Ltd. will play a role in this and he is presently in negotiations with them. ES Fisheries Ltd. would pay the Respondent's company debt and then pay his company \$100,000 over four to five years. He would then work as Captain on the boat for ES Fisheries. The sale would include all corporate assets, boat, licence, gear.

[27] This sale would keep the Respondent personally solvent. As Captain for ES Fisheries, he would get 20% of the gross. Ten percent comes off the top for the boat share.

Respondent's personal finances

[28] The Respondent's mother (bookkeeper of the company) and the Respondent indicate they (which includes the Applicant) incurred too much personal debt buying a large camper and paying campground fees after the lobster season when no money was coming in.

[29] He has also taken too many dividends from the company which has left him with only two options, sell or bankruptcy. His personal debts are as follows:

| | | <u>Monthly</u> |
|----------------|-------------|-----------------------|
| RBC (Camper) | \$48,000.00 | \$376.00 |
| Citi Financial | \$15,000.00 | \$510.00 |
| Credit Cards | \$7,000.00 | \$485.00 |

Monthly

| | | |
|---------------------------|-------------------|---------------|
| Credit Union | \$15,000.00 | \$200.00 |
| Mortgage on parent's home | \$126,000.00 (?) | \$712.00 |
| Revenue Canada | <u>\$8,000.00</u> | <u>\$0.00</u> |
| | \$93,000.00 | \$2283.00 |

No assets are shown on his personal financial statement.

[30] In the Respondent's financial statement he shows \$1037.00 as rent/mortgage per month. His mother indicates this is on the matrimonial home. In addition to this, he helps pay the mortgage on his parent's home when he is full time fishing.

[31] His total expenses which include \$1500 alimony/child support are \$6893.00.

The Applicant's Income and Expenses

[32] The Applicant has monthly income of \$1000.00 from working in a fish plant. As mentioned earlier, she has no formal training and intends to upgrade her education. Monthly expenses which include sharing rent with the man she is living with are \$1580.00.

The Law:

Duty of parent or guardian

8 Every one

- (a) who is a parent of a child that is under the age of majority; or
- (b) who is a guardian of a child that is under the age of majority where the child is a member of the guardian's household,

is under a legal duty to provide reasonable needs for the child except where there is lawful excuse for not providing the same. R.S., c. 160, s.8.

Maintenance order

- 9** Upon application, a court may make an order, including an interim order, requiring a parent or guardian to pay maintenance for a dependent child. 1997 (2nd Sess.), c. 3, s.4.

Powers of court

- 10**
- (1)** When determining the amount of maintenance to be paid for a dependent child, or a child of unmarried parents pursuant to Section 11, the court shall do so in accordance with the Guidelines.
 - (2)** The court may make an order pursuant to subsection (1), including an interim order, for a definite or indefinite period or until a specified event occurs, and may impose terms, conditions or restrictions in connection with the order or interim order as the court thinks fit and just.
 - (3)** A court may award an amount that is different from the amount that would be determined in accordance with the Guidelines if the court is satisfied that
 - (a)** special provisions in an order, a judgment or a written agreement respecting the financial obligations of the spouses or common-law partners, or the division or transfer of their property, directly or indirectly benefit a child, or special provisions have otherwise been made for the benefit of a child; and
 - (b)** the application of the Guidelines would result in an amount of child maintenance that is inequitable given those special provisions.

- (4) Where the court awards, pursuant to subsection (3), an amount that is different from the amount that would be determined in accordance with the Guidelines, the court shall record its reasons for doing so.
- (5) Notwithstanding subsection (1), a court may award an amount that is different from the amount that would be determined in accordance with the Guidelines on the consent of both spouses or common-law partners or parents if satisfied that reasonable arrangements have been made for the maintenance of the child to whom the order relates.
- (6) For the purpose of subsection (5), in determining whether reasonable arrangements have been made for the maintenance of a child, the court shall have regard to the Guidelines, but the court shall not consider the arrangements to be unreasonable solely because the amount of maintenance agreed to is not the same as the amount that would otherwise have been determined in accordance with the Guidelines.

Spousal Support

Court order

- 3 (1) The court may, on application by either or both spouses or common-law partners, make an order requiring a spouse or common-law partner to secure or pay, or to secure and pay, such lump sum or periodic sums, or such lump sum and periodic sums, as the court thinks reasonable for the maintenance of the other spouse or common-law partner.

- (2) Where an application is made pursuant to subsection (1), the court may, on application by either or both spouses or common-law partners, make an interim order requiring a spouse or common-law partner to secure or pay, or to secure and pay, such lump sum or periodic sums, or such lump sum and periodic sums, as the court thinks reasonable for the maintenance of the other spouse or common-law partner, pending the determination of the application under subsection (1).
- (3) The court may make an order pursuant to subsection (1) or an interim order pursuant to subsection (2) for a definite or indefinite period or until a specified event occurs, and may impose terms, conditions or restrictions in connection with the order as the court thinks fit and just.

Priority

- 3A (1) Where the court is considering an application for a child maintenance order and an application for a spousal or common-law partner maintenance order, the court shall give priority to child maintenance in determining the applications.
- (2) Where the amount of a spousal or common-law partner maintenance order is less than it otherwise would have been as a result of giving priority to child maintenance, any subsequent reduction or termination of that child maintenance constitutes a change of circumstances for the purposes of an application for a variation order in respect of the spousal or common-law partner maintenance order. 1997 (2nd Sess.), c.3, s.2 2000, c.29, s.4.

Factors considered

- 4 In determining whether to order a person to pay maintenance to that person's spouse or common-law partner and the amount of any maintenance to be paid, the court shall consider

- (a) the division of function in their relationship;
- (b) the express or tacit agreement of the spouses or common-law partners that one will maintain the other;
- (c) the terms of a marriage contract or separation agreement between the spouses or common-law partners;
- (d) custodial arrangements made with respect to the children of the relationship.
- (e) the obligations of each spouse or common-law partner towards any children;
- (f) the physical or mental disability of either spouse or common-law partner.
- (g) the inability of a spouse or common-law partner to the education or career potential of the other;
- (h) the contribution of a spouse or common-law partner to the education or career potential of the other;
- (i) the reasonable needs of the spouse or common-law partner with a right to maintenance;
- (j) the reasonable needs of the spouse or common-law partner obliged to pay maintenance;
- (k) the separate property of each spouse or common-law partner;

- (l) the ability to pay of the spouse or common-law partner who is obliged to pay maintenance having regard to that spouse's or common-law partner's obligation to pay child maintenance in accordance with the Guidelines;
- (m) the ability of the spouse or common-law partner with the right to maintenance to contribute to his own maintenance. R.S., c. 160, s. 4; 1997 (2nd Sess.), c. 3, s. 3; 2000, c. 29, ss. 5,8.

Obligation of maintained spouse or partner

- 5** A maintained spouse or common-law partner has an obligation to assume responsibility for his own maintenance unless, considering the ages of the spouses or common-law partners, the duration of the relationship, the nature of the needs of the maintained spouse or common-law partner and the origin of those needs, it would be unreasonable to require the maintained spouse or common-law partner to assume responsibility for his maintenance, and it would be reasonable to require the other spouse or common-law partner to continue to bear this responsibility. R.S., c. 160, s. 5; 2000, c. 29, s. 8.

Reduction or forfeiture of maintenance

- 6**
- (1) Maintenance to which a spouse or common-law partner would otherwise be entitled may be reduced where the spouse or common-law partner entitled to maintenance engages in conduct that arbitrarily or unreasonably prolongs the needs upon which maintenance is based or that arbitrarily or unreasonably prolongs the period of time required by the person maintained to prepare himself to assume responsibility for his own maintenance.
 - (2) Maintenance to which a spouse or common-law partner would otherwise be entitled may be reduced or eliminated where the spouse or common-law partner entitled to maintenance

- (a) persistently engages in a course of conduct that constitutes a repudiation of that spouse's marriage relationship;
- (b) persistently engages in a course of conduct which, if the common-law partners were married and living together, would constitute a repudiation of their marriage relationship;
- (c) marries;
- (d) remarries;
- (e) cohabits with another person in a conjugal relationship

[33] Counsel for the Respondent argues the applicability of this section. The Applicant resides with a man in a conjugal relationship. They share expenses for rent. She is not engaging in a conduct that arbitrarily or unreasonably prolongs the needs upon which maintenance (would be) based. Subsection 2 of this section is discretionary and the facts of this case do not warrant the application of that section.

[34] Corporate income is dealt with in accordance with Section 18 of the **Child Support Guidelines**.

Shareholder, director or officer

- 18 (1) Where a spouse is a shareholder, director or officer of a corporation and the court is of the opinion that the amount of the spouse's annual income as determined under section 16 does not fairly reflect all the money available to the spouse for the payment of child support, the court may consider the situations described in section 17 and determine the spouse's annual income to include
- (a) all or part of the pre-tax income of the corporation, and of any corporation that is related to that corporation, for the most recent taxation year; or
 - (b) an amount commensurate with the services that the spouse provides to the corporation, provided that the amount does not exceed the corporation's pre-tax income.

Adjustment to corporation's pre-tax income

- (2) In determining the pre-tax income of a corporation for the purposes of subsection (1), all amounts paid by the corporation as salaries, wages or management fees, or other payments or benefits, to or on behalf of persons with whom the corporation does not deal at arm's length must be added to the pre-tax income, unless the spouse establishes that the payments were reasonable in the circumstances.

[35] The most helpful (and leading) case in Nova Scotia dealing with self-employed income is *Wilcox v. Snow*, 1999 NSCA 163 at p. 6.

In the case of a self-employed businessman, like the respondent, there is very good reason why the Court must look beyond the bare tax return to determine the self-employed businessman's income for the purposes of the **Guidelines**. The net business income, for income tax purposes, of a self-employed businessman, is not necessarily a true reflection of this income, for the purpose of determining his ability to pay child support. The tax department may permit the self-employed businessman to make certain deductions from the gross income of the business in the calculation of his net business income for income tax purposes. However, in the determination of the income of that same self-employed businessman, for the purpose of assessing his ability to pay child support, those same deductions may not be reasonable.

In the recent case of *Vermeulen v. Vermeulen*, [1999] N.S.J. No. 193 (Q.L.), this court upheld the decision of a trial judge who went beyond the self-employed spouse's income, as declared in his tax return. Chief Justice Glube, writing for the Court, said the following:

In my opinion, the decision of Justice Hall to impute the sum of \$30,000.00 as income is quite reasonable. It is one thing to deal with your income tax to provide the most favourable conclusion, but it is another matter if that affects the person's ability to make support payments.

A similar conclusion was reached by Associate Chief Judge Comeau of the Family court in the case of *C.A.L. v. R.V.W.*, [1998] N.S.J. No. 542 (Q.L.).

Schedule III to the **Guidelines** is entitled "Adjustments to Income." Section 9 of Schedule III is particularly relevant to this case, where the respondent is a self-employed businessman.

9. Where the spouse's net self-employment income is determined by deducting an amount for salaries, benefits, wages or management fees, or other payments, paid to or on behalf of persons with whom the spouse does not deal at arm's length, include that amount, unless the spouse establishes that the payments were necessary to earn the self-employment income and were reasonable in the circumstances.

Failing agreement between the parties, income is determined under the provisions of s. 16 to 20 of the **Guidelines**.

[14] While s. 16 of the **Guidelines** provides that a spouse's annual income is determined using the sources of income set out under the heading "Total Income" in the T1 General Form issued by Revenue Canada, that reference is clearly subject to ss. 17 to 20 of the **Guidelines**, and is also subject to being adjusted "in accordance with Schedule III."

16. Subject to sections 17 to 20, a spouse's annual income is determined using the sources of income set out under the heading "Total Income" in the T1 General form issued by Revenue Canada and is adjusted in accordance with Schedule III.

Further, ss. 17 to 20 of the **Guidelines** provide for cases where the Court may determine the spouse's income other than by reference, solely, to the spouse's income tax return. Section 19(1), for example, permits the Court to impute income to a spouse in circumstances where the spouse is intentionally under employed or unemployed (s.19(1)(a));

where it appears that income has been diverted which would affect the level of child support to be determined under these **Guidelines** (s. 19(1)(d));

where the spouse has failed to provide income information when under a legal obligation to do so (s. 19(1)(f));

where the spouse unreasonably deducts expenses from income (s.19(1)(g)).

Section 19(2) provides that the reasonableness of an expense deduction, for the purposes of s. 19(1)(g), is not solely governed by whether the deduction is permitted under the **Income Tax Act**.

Conclusion/Decision:

[36] The Respondent says he has very little income and provided statements from his business company to prove this. There was agreement in December 2008 which was incorporated in a Court Order of \$732 child support (Guideline income would be \$54,200.00 using the tables) and \$768 spousal support for a total of \$1500.00.

[37] He agrees that the Applicant was a homemaker caring for the children during the course of the marriage.

Determination of Annual Income

[38] Counsel for the Respondent indicates that the profit and loss statement of the Company is the most valuable form of disclosure to determine the Respondent's annual income. He urges the Court to use the net income of \$62,736.00 showing year 2008. Counsel for the Applicant argues that this is not an accurate reflection of annual income because it contains two amortization (depreciation) figures. If these were taken out of the expense column, it would amount to \$84,228.00.

[39] It should be noted that because the Respondent is the sole shareholder of his company, reference to the corporate funds is reference to the Respondent's personal access to money from this source.

[40] His mother, who has been dealing with the company books, indicates this is part of his problem. That is; taking too many corporate dividends when the funds are not there to support this.

[41] At the present time, there is a problem with corporate and personal cash flow but this will change with the start-up of the lobster season. Last year's season saw lobster prices low, according to the Respondent. The profit and loss statement refers to three months of the season from November 1, 2008 to January 31, 2009 and the evidence is income was down.

[42] The **Child Support (maintenance) Guidelines** provides a method of determining a payor's annual income:

- 15 (1) Subject to subsection (2) (agreement of the parties) a spouse's annual income is determined by the Court in accordance with section 16 to 20.

- 16 Subject to Section 17 to 20, a spouse's annual is determined using the sources of income set out under the heading "Total Income" in the T1 General form issued by Canada Customs and Revenue Agency and is adjusted in accordance with Schedule III.

[43] In *Lavergne v. Lavergne (2007) 40 R.F.L. (6th) 239* the Alberta Court of Appeal clarified what total income means in the plain wording of s. 16 of the **Guidelines**.

Legislative Provisions

“The **Guidelines** have provisions regarding income and income information. The relevant provisions are set out in the appendix to these reasons. Section 16 directs that annual income, the basis upon which child support is payable, is determined “using the sources of income set out under the heading ‘Total Income’ in the T1 General form issued by Canada Customs and Revenue Agency.” There is no reference in s. 16 to any years to be considered.

[15] The appellant’s suggestion, that “total income” means the amount identified in line 150 of the payor’s individual tax return, does not track the plain wording of s. 16. The sources stipulated under the heading of “total income” in the prescribed T1 Form for the purpose of the *Income Tax Act* include commissions, pension and disability benefits, employment insurance, dividends, interest, partnership income, rental income, taxable capital gains, support payments, registered retirement savings plan receipts and self-employment income. Line 150, in contrast, permits credits to reduce the amounts when arriving at a total.”

17 (1) If the Court is of the opinion that the determination of a spouse’s annual income under section 16 would not be the fairest determination of that income, the Court may have regard to the spouse’s income over the last three years and determine an amount that is fair and reasonable in light of any pattern of income, fluctuation in income or receipt of a non-recurring amount during those years.

[44] Income information used must be the most current.

- 2 (3) Where, for the purposes of these Guidelines, any amount is determined on the basis of specified information, the most current information must be used.

Section 16 of the **Guidelines** is silent on the period for which the determination of annual income is to be made and whether annual income is the income of the past taxation year, estimated annual income for the current year, or an estimate of likely future annual income. (See *Lavergne, supra*)

[45] The Court in *Lavergne supra* concluded:

While using the amount identified at line 150 of the payor's individual tax return is a certain and simple means to determine annual income, it will not always be fair (as referred to in s. 17). Thus, the **Guidelines** provide alternative methods to determine income where the provisions of s. 16 would not result in a fair determination. These methods are to fulfill the objectives stated in s. 1(a), that the **Guidelines** are intended to ensure that children "continue to benefit from the financial means of both spouses after separation." The use of the past year's income tax return, without subsequent adjustment to reflect the actual income, is inconsistent with the **Guidelines**' multi-step approach to determining income and with the general discretion granted to the Court to specify annual income for the purposes of calculating child support obligations. While the **Guidelines** method is more complicated than relying only on historical income information, it better fulfills the objective that children should continue to benefit from the financial means of both parents after separation by providing them with those benefits on a more timely basis.

Prospective determination of income

[46] In *Lee v. Lee (1998) 165 D.L.R. (4th) 610* the Newfoundland Court of Appeal held:

That annual income is determined by looking at projected future income of the payor and not historical income except to make a fair prediction of future income where there is a trend of increasing or decreasing income. (words used in *Lavergne* in referring to this case)

[47] The Newfoundland Court of Appeal observed at page 4 of *Lee supra*:

Support must be paid out of the future income of the payor-spouse. The underlying rationale is still ability to pay. In the sense, the process of setting child support is a prospective one. In engaging in that predictive exercise, however, historical data is obviously important and usually provides the best forecast of current ability to pay.

[48] The Court of Appeal of Alberta in *Lavergne supra* referred to the decision of the Supreme Court of Canada in *D.B.S. [2006] 2. S.C.R. 231, 31 R.F.C. (6th)*:

The Supreme Court of Canada's most recent decision on child support, *D.B.S.*, does not address this issue directly. However, the decision is clear that other than retroactive awards, child support is prospective and that where the payor's income levels increase or decrease, so will contributions to the child's needs, just as if the family had remained together. This objective, to provide for the children as if the family had remained together, implies that the children should benefit from, or be deprived of, income at current, not past, levels.

[49] The Court cannot anticipate what the market value of lobster will be which is the main part of the Respondent's business. Determining his annual income requires looking at a combination of the last month of 2008 (lobster season runs from the last Monday in November to May 31st of the next year) and 2009 which

includes the end of the 2008/2009 lobster season and the beginning of the 2009/2010 lobster season.

[50] The Court is apprised of the knowledge from previous cases that a large percentage of the lobster stock (up to 70%) is caught at the beginning of the season. This is a combination of weather (better weather conditions in November and December) and the mobility of lobsters.

[51] The Respondent may not have the option of waiting until the lobster season to see what the stock and price of lobster will be. He is in negotiation to sell his operation and this would move him from the position of being self-employed to that of an employee but still working on a percentage of the sale of the lobster stock. The state of the lobster fishing will continue to affect the Respondent's income.

[52] The evidence is that the Respondent, with the participation of the Applicant, spent more than they earned. It is clear, however, that the Applicant was unaware of the Respondent's finances.

[53] Determination of annual income, in this particular case, taking into consideration the actual financial information given to the Court and because determination of income is prospective, other extrinsic factors such as the state of the lobster fishery should be considered.

[54] The Court has reviewed all the financial documents and information provided. Income and expenses for 2008 and a portion of 2009 have been considered. The amortization values have been deducted from expenses and because of the unavailability of specific information on prospective income, the Court will impute the Respondent's income at \$75,000.00.

The Interim Order of December 17, 2008

[55] A statement has been received from Maintenance Enforcement showing arrears of \$5400.00 as of July 17th. Monthly total payment ordered is \$1500.00 and \$2100.00 was shown paid. The Order does not specify payment through the Director of Maintenance Enforcement, however, the Director automatically receives all court orders and payees are enrolled in the program unless they opt out. One aspect of the Order being silent as to whether payments are direct or not is that

the Court can consider direct payments that have been made. Where it is ordered that all payments are to be made through the Director, there is a requirement to comply with the terms of payment and any direct payments are gratuitous and are not credited to the payor.

[56] Evidence from the Applicant is she received \$200.00 cash from the Respondent (through his mother). The Respondent says he paid her \$1500.00 from the family trust but she says it was to get her out of the house when they separated. Evidence is they separated in October 2008 and the Order was made in December 2008 with first payment on December 19, 2008. Any payments before that are irrelevant.

[57] The Respondent provided other mitigating factors with respect to the arrears, including \$650.00 rent he paid directly to the Applicant's current landlord. He also says both children lived with him for a period of three months (to June '09).

[58] The Court finds the arrears to be \$2346.00 and these shall be continued to be collected through the Maintenance Enforcement Program (Director).

Child Support

[59] The parties have two children and each has primary care of one of them. The Court considers this to be a shared parenting situation. (s. 9 **Guidelines**)

[60] How this is dealt with was outlined by the Supreme Court of Canada in *Contino v. Leonelli-Contino*, 2005 S.C.C. 63, [2005] 3 S.C.R. 217. A simple set off was used in this case.

[61] In the case before the Court, the Respondent's annual income is determined to be \$75,000.00 per annum and the table amount for one child is \$648.00. The Applicant's income is \$12,000.00 per annum {spousal support is excluded under Schedule III Section 3(a)} and the table amount is \$65.00 for the child with the Respondent. The set off would be \$583.00 which is payable by the Respondent who has the higher income. This will be retroactive to December 19, 2008, the month following the date of application. (See *D.B.S. v. S.R.G.*, 2006 S.C.C. 37 [2006] 2 S.C.R. 231; Payor to pay an amount of child support based on annual income minus adjustments may be retroactive).

Spousal Support

[62] The Applicant is entitled to spousal support. The Court is not inclined to apply any of the provisions of Section 6 of the **Maintenance and Custody Act** for the reasons discussed earlier.

[63] Both counsel have used Childview to indicate what the outcome might be using the **Spousal Support Advisory Guidelines**.

[64] There existed a state of economic dependency during the course of the marriage. The Applicant was a homemaker, caring for the children, while the Respondent worked out of the home to provide for the family financially.

[65] The Supreme Court of Canada in *Moge v. Moge*, [1992] 3 S.C.R. 813 discussed spousal support within the concept of the traditional marriage.

The doctrine of equitable sharing of the economic consequences of marriage or marriage breakdown upon its dissolution, in my view, the Act promotes, seeks to recognize and account for both the economic disadvantages incurred by the spouse who makes such sacrifices and the economic advantages conferred upon the other spouse. Significantly, it recognizes that work within the home has undeniable value and transforms the notion of equality from the rhetorical status to which it was relegated under a deemed self-sufficiency model, to a substantive

imperative. In so far as economic circumstances permit, the Act seeks to put the remainder of the family in as close a position as possible to the household before the marriage breakdown. As Judge Abella wrote in “Economic Adjustment On Marriage Breakdown: Support”, *supra*, at p.3:

To recognize that each spouse is an equal economic and social partner in marriage, regardless of function, is a monumental revision of assumptions. It means, among other things, that caring for children is just as valuable as paying for their food and clothing. It means that organizing a household is just as important as the career that subsidizes this domestic enterprise. It means that the economics of marriage must be viewed qualitatively rather than quantitatively.

[66] Counsel for the parties have provided the Court with a work-up from the computer program Childview with results from the **Spousal Support Advisory Guidelines**. Both results calculate the duration of spousal support (because the length of the marriage November 6, 1993) to be 15 years. Section 5 of the **MCA** does require the payee (Applicant) to take appropriate measures to assume responsibility for her own maintenance and the Applicant intends to upgrade her education to attain that goal. Whether there has been progress on her part to assume the required obligation would be determined in a future application to vary before the Court.

[67] Child support has priority to spousal support and the Court has considered that in determining a reasonable amount for spousal support.

[68] The **Spousal Support Advisory Guidelines** are helpful but not determinative. The Childview work-up which is helpful uses annual incomes as follows: Payor \$74,000.00 / Recipient \$12,768.00. This results in monthly spousal support of \$737.00 (annually \$8844.00).

Conclusions for Final Court Order

[69] 1. The Court determines the Respondent's annual income to be \$75,000.00 while the Applicant's income is \$12,000.00

[70] 2. The table amount for child support is \$648.00 for the Respondent's obligation to the child with the Applicant. The Applicant's obligation to the child with the Respondent is \$65.00. The set-off is \$583.00 payable to the Applicant through the Director of Maintenance Enforcement commencing December 19, 2008 and thereafter payable on the 15th of each month. The Director may make an adjustment to arrears referred to below accordingly.

- [71] 3. Arrears from the Interim Order dated December 17, 2008 are \$2346.00 which shall be collected by the Director of Maintenance Enforcement in the usual manner. These will have to be adjusted by the Director to accommodate the Court's award of child and spousal support.
- [72] 4. Spousal support is \$737.00 for a period of 15 years or until such time as a Court determines the Applicant has assumed responsibility for her own maintenance or has failed to diligently undertake that initiative. Arrears in the Order of December 19, 2008 to be adjusted by the Director of Maintenance Enforcement.
- [73] 5. The Respondent shall pay a monthly total of \$1320.00 through the Director of Maintenance Enforcement commencing December 19, 2008 and thereafter the 15th of each month.
- [74] 6. Custody has not been contested and the Court grants the remedy sought by the Applicant of sole custody of Brandon to her. Reasonable access to the Respondent. Custody concerning Dilan

remains as set out in Section 18 of the **Maintenance and Custody Act** with reasonable access.

Order accordingly,

John D. Comeau
Chief Judge of the Family Court of Nova Scotia