

IN THE FAMILY COURT OF NOVA SCOTIA

**Citation:** M.L.A.R. v. G.T.R., 2011 NSFC 7

**Date:** 20110322

**Docket:** FYMCA - 038252

**Registry:** Yarmouth

**Between:**

MLAR and WER

- Applicants

v.

GTR(F) and JPJ

- Respondents

Before the Honourable Judge John D. Comeau Judge of the Family Court for the Province of Nova Scotia

**Heard at:** Yarmouth, Nova Scotia, February 2, 2011

MLAR and WER - unrepresented

GTR(F) and JPJ - unrepresented

**Decision Date:** March 22, 2011

**Revised Decision:** The decision date has been changed from March 2, 2011 to March 22, 2011 and this replaces the previously distributed decision. And the text of the original decision has been corrected according to the erratum dated February 24, 2012. The text of the erratum is appended to this decision.

**Editorial Notice**

Identifying information has been removed from this electronic version of the judgment.

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**DECISION**

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**The Application:**

[1] The Court is dealing with an application dated April 4, 2005 to vary an order which was dated June 18, 1998. An interim order on this application acknowledged arrangements for the care of the child J. born February 16, 1996 as follows:

“THAT the primary residence and care arrangements for the child J. born February \*, 1996, that were in place when this matter came before the Court on June 1, 2005, shall continue until this matter returns to Court on Wednesday, September 28, 2005 at 9:00 a.m. (The primary residence and care arrangements just referred to are that the child’s primary residence is with the Applicant, MLAR and she is providing primary care for the child).”

This interim order is dated June 1, 2005.

[2] The Applicant, MLAR is referred to in Court logs as “the maternal step-grandmother” of the child. Her husband is the maternal grandfather WER. They are requesting custody of J.. This matter was adjourned numerous times. A Homestudy was ordered on November 29, 2006 with emphasis on custody. It was submitted February 26, 2007 and recommended that custody be to the Applicants, MLAR and her husband WER.

[3] On May 23, 2007 the parties agreed to adjourn the matter without date. The Court has determined it is in the best interests of the child that this application be heard in addition to a more current application below:

The present application requests the following relief in the form of an application to vary. No specific order is referred to.

“An application under the **Maintenance and Custody Act** by Applicants WER and MLAR, for child support for J. born February 16, 1996, as per the Child Support Guidelines, retroactive since custody. I therefore request this application is made pursuant to Section 37 of the **Maintenance and Custody Act** of Nova Scotia.”

[4] The document (application) requesting this is dated November 15, 2010. The Respondents were given notice that the Applicants were also requesting special expenses for orthodontic treatment.

**Irregularity of the Application:**

[5] In April of 2005 the Applicant MLAR applied to vary an order of June 18, 1998 which was a registered agreement for child support between the parents

(Respondents) only. This was for custody of the child. There is no evidence that she was joined as a party to this proceeding between the parents.

[6] Further, there is no evidence or court order that grants custody of the child J. to the Applicants.

[7] The evidence is that the Applicants are and have been guardians of the child as defined under Section 2(e) of the **Maintenance and Custody Act**.

[8] The Court will deal with both applications as original applications by a guardian under the **Act** (see the law *infra.*). It is not necessary to prove a change in circumstances (see Section 37 of the **Maintenance and Custody Act**).

**Issues:**

1. Duty of parents to support a child;
2. Duty of guardians to support a child;

3. Determination of child support;
4. Section seven special expenses apportionment between parents and guardians.

**The facts:**

[9] The child J. born February \* , 1996 has been in the primary care of the Applicants prior to June 1, 2005. Reference is made to that placement and parenting plan in a court order of that date. There is evidence from the Applicant MLAR the child was placed with them when he was 18 months old. Court proceedings were started when he was 10 years old. There is no evidence that the parents (Respondents) have contributed to the costs of caring for this child except for \$50 for a two month period. In 1997 the Respondent mother GTR received the Child Tax Credit for J. and \$50 a month from the Respondent father JPJ as child support.

**Financial information - Respondents:**

**JPJ**

[10] The Respondent father has not provided the Court with his last three years Income Tax Returns, although requested throughout the long history of this proceeding. A financial statement shows \$240 a week, \$960 a month working for \*. The above is net income. He is on modified duties having injured his shoulder. He receives \$212 per week, \$848 a month. Included in his statement is a Child Tax Credit for other children. (This is required to be deducted under Schedule III of the Guidelines in the process of determining annual income).

[11] The Respondent has provided copies of pay stubs as follows:

04 - 15 - 2010	Gross \$239.93	Net	\$189.69
04-22-2010	Gross \$319.91	Net	\$240.45
04-29-2010	Gross \$319.91	Net	\$240.45

Total gross income from employment is \$16635.32 per year.

[12] Other income from Workers Compensation appears to be a non-recurring amount as per a letter from them to the Respondents dated April 20, 2010.

“Attention: JPJ

Re: Claim No. 2000516

This letter is to inform you that your October 08, 2008 claim has been approved for temporary earnings replacement benefits from April 16, 2010 to April 30, 2010 at the rate of \$214.03 per week.”

**GTR(F)**

[13] The Respondent mother has been a student and has been working part time at

\*.

[14] Income Tax Returns are as follows at line 150:



2007 \$12,151

2008 \$9,555

2009 \$1,804

2008 and 2009 show tuition and education amounts for tax credits indicating she was a student during these years.

[15] All these tax returns show Child Tax Credit benefits as income. Her statement of "gross monthly income from all sources" indicates she is a casual worker and student with income of \$1468 a month. She indicates to date she has received \$4000 for casual work at \*. She has a Child Tax Credit which is deducted (excluded) under the Schedule III of the Child Support Guidelines. Day care expenses of the Respondent shows she has resident child care costs which is also relevant to the Child Tax Credit she receives.

[16] Total gross annual income \$17616. The Court has not received any evidence concerning the personal circumstances and resident families of the Respondents. It

is clear they live separate and apart and have their own families. There has not been a claim for undue hardship by either Respondent. The Court's deliberation is a determination of annual income.

**Section 7 special expenses:**

[17] The Applicant MLAR has submitted an orthodontic bill for the child. To date this indicates she has paid the dentist \$560. A letter was addressed to the Applicants from an orthodontist advising that "J. would require two phases of orthodontic care in order to correct his malocclusion". He attached quotes which are as follows:

"The total for phase I is \$3580.00 and the child full (as described in the bill) is \$5880.00 - Grand total \$9460

**Phase I Simple**

Option A: **Payment in Full at the Beginning of Treatment**

A 5% bookkeeping courtesy is given for payment in full (\$179)

Option B: **In Office Financing (no interest charge)**

An initial payment of \$880 with balance of \$2700 paid in 12 months payments of \$225 per month

Option C: **In Office Financing (no interest charge)**

An initial payment of \$1240 with balance of \$2340 paid in 12 equal monthly payments of \$195 per month

**\*\* we ask that you manage your account in our office either by post-dated cheques, or Automatic credit card withdrawal. Visa, Mastercard and Amex are accepted.\*\***

**Child Full:**

“Option A: **Payment in Full at the Beginning of Treatment**  
A 5% bookkeeping courtesy is given for payment in full (\$294)

Option B: **In Office Financing (no interest charge)**  
An initial payment of \$800 with balance of \$5080 paid in  
20 monthly payments of \$254 per month

Option C: **In Office Financing (no interest charge)**  
An initial payment of \$1880 with balance of \$4000 paid in 20  
equal monthly payments of \$200 per month

**\*\* we ask that you manage your account in our office either by post-dated cheques, or Automatic credit card withdrawal. Visa, Mastercard and Amex are accepted\*\***

[18] There is no evidence of the time limit between the two procedures but it would be reasonable to anticipate one would be paid off before the other started.

The Court will make its decision by taking that into account.

**The Law:**

[19] The **Maintenance and Custody Act** provides the Court with jurisdiction to deal with child support.

**“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.

**Powers of court**

**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."

[20] The position the Applicants are in with respect to the child is covered in the **MCAct**.

### **“Interpretation**

**2** In this Act,

(e) “guardian” includes a head of a family and any other person who has in law or in fact the custody or care of a child;

### **Person to whom maintenance is paid**

**32** The court may order maintenance to be paid to the person for whose benefit the payment is ordered, to that person’s parent or child, to some other responsible person or to the court.”

[21] The Nova Scotia Child Maintenance Guidelines provide for the determination of annual income.

### **“Calculation of annual income**

**16** Subject to Sections 17 to 20, a parent’s annual income is determined using the sources of income set out under the heading “(Total Income)” in the TI General form issued by the Canada Revenue Agency and is adjusted in accordance with Schedule III.

## Pattern of income

**17(1)** If the court is of the opinion that the determination of a parent's annual income under Section 16 would not be the fairest determination of that income, the court may have regard to the parent's income over the last 3 years and to 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."

[22] Special expenses in addition to guideline table amounts are provided for certain items:

### **"Special or extraordinary expenses**

**7(1)** In a child maintenance order the court may, on a parent's request, provide for an amount to cover all or any portion of the following expenses, which expenses may be estimated, taking into account the necessity of the expense in relation to the child's best interest and the reasonableness of the expense in relation to the means of the parents and those of the child and, where the parents cohabited after the birth of the child, to the family's pattern of spending prior to the separation:

(a) child care expenses incurred as a result of the custodial parent's employment, illness, disability or education or training for employment;

(b) that portion of the medical and dental insurance premiums attributable to the child;

(c) health related expenses that exceed insurance reimbursement by at least \$100 annually, including orthodontic treatment, professional counseling provided by a psychologist, social worker, psychiatrist or any other person, physiotherapy, occupational therapy, speech therapy and prescription drugs, hearing aids, glasses and contact lenses;

### **Sharing of expense**

(2) The guiding principle in determining the amount of an expense referred to in subsection (1) is that the expense is shared by the parents in proportion to their respective incomes after deducting from the expense, the contribution, if any, from the child.

[23] The Nova Scotia Child Maintenance Guidelines in Section 2 deals with the definition of parent that includes a guardian.

**2(e)** “parent” includes a parent, guardian, possible father and single woman as defined in Section 2 of the **MCAct**.

### **Person in place of a parent**

**5** Where a person against whom a child maintenance order is sought stands in the place of a parent for a child, the amount of a child maintenance order is, in respect of that person, such amount as the court considers appropriate, having regard to these Guidelines and any other parent’s legal duty to maintain the child.”

[24] Although this section in the Nova Scotia Child Maintenance uses the words “in the place of a parent” this reflects the Provincial Government’s attempt to mirror

the Federal Child Support Guidelines. It is necessary to interpret the word “parent” in s. 5 as defined in section 2(e) *supra*. because of the decision in **Reed v Smith** (1988), 86 N.S.R. (2d) 72 (S.C. App. Div) which found there is no obligation in Nova Scotia on a person in the place of a parent (step parent) to pay support for a child found in that circumstance. Judge Levy addressed this issue in **JDF.** and **HMF & H.T.** 2001 NSFC 17 (CanLII) (see page 4).

[25] In a document entitled Fast Food for Thought on the Federal Child Support Guidelines for judges on the road Julien D. Payne of the Law Foundation of Saskatchewan discusses circumstances where there may be multiple parents who are obliged to pay child support.

“The child support obligation is not confined to biological parents. It extends to persons who stand in the place of parents. Consequently, there may be multiple parents who are obligated to support a child.

Section 5 of the *Federal Child Support Guidelines* confers a broad discretion on the court to apportion the child support obligation between the biological and non-biological parents. There is no consistency in the judicial approach to section 5 of the guidelines. In *Adler v. Jonas*, [1998] B.C.J. No. 2062, Hardinge J., of the Supreme Court of British Columbia, identified the following six different methods of apportioning child support between multiple obligors but did not suggest that the list was exhaustive:



(a) Apportion mathematically, taking as the amount due the total expenses of the child and distributing this among payors according to the ability of each to pay (*Garad v. Garad*, [1996] B.C.J. No. 1165, May 21, 1996, Van Reg. D037200 S.C. - a pre-Guidelines case under the *Divorce Act*);

(b) Add the incomes to get the total incomes of all the parents, find the Guideline amount for that figure and then divide that amount pro rata among the payors based on the percentage of the total income earned by each. (This approach was rejected in *Beatty v. Beatty*, [1997] B.C.J. No. 2269, April 4, 1997 [Filed: October 16, 1997], Vic. Reg. CA02831 [Registry: V02831] and *Gordon v. Paquette*, [1998] B.C.J. No. 225, January 9, 1998, Chilliwack Reg. E0398 C.A.);

(c) Apportion the amount of support due according to the role each contributor plays in the life of the child (*Dusseault v. Dolfo*, March 28, 1998, Kamloops Reg. 6157, 6158 and 6159 - Provincial Court);

(d) Treat each payor individually and apply the Guidelines, with the possibility of an excess of support (*Gordon v. Paquette, supra*);

(e) Determine the amount due from the last payor under the Guidelines, then subtract from it any being paid by a previous payor (*Ruth v. Young*, [1997] B.C.J. No. 1848, August 1, 1997, New West. E3910, S.C. and *Nay v. Nay*, 1998, New West., per Bennett J.); and

(f) Consider Guidelines amount for each payor, but also consider the means, needs and circumstances of the parties, the relationship between each potential payor and the child, its length, whether it continues and the extent to which the child relies on the support of the payor (*Singh v. Singh*, [1997] B.C.J. No. 2195, September 25, 1997, Kamloops Reg. D11364, [Registry: 011364] S.C. and *White . Rushton*, [1998] B.C.J. No. 422, February 19, 1998, Campbell River Reg. D3640, S.C.).

Where a biological parent is not paying child support, the best interests of the child may require a court to order a spouse who stands in the place of a parent

to pay the applicable table amount of child support, until such time as the court is satisfied as to the biological parent's obligation to support the child: *Janes v. Janes*, [1999] A.J. No. 242 (Q.B.); *Clarke v. Clarke*, [1998] B.C.J. No. 2370 (S.C.)”

[26] The guardians in the case before the Court have discharged their duty to support the child over many years and now they look to the biological parents to share in their obligation.

**Conclusion/Decision:**

[27] The child was placed informally with the Applicants a number of years ago, some time prior to June 1, 2005. A note from the Applicants contained in the evidence indicates he came to them when he was 18 months old (born February 16, 1996). Since that time the parents have not contributed any support except \$50 for two months on behalf of the Respondent father to the Applicants. The Respondent father paid child support to the mother for a number of years, which appears to include a time when the Applicants had care of the child. A consent order brokered by a social services maintenance support worker between the parents is dated May 10, 1996 and was registered under section 52 of the **Maintenance and Custody Act** June 18, 1998. The effect of registration is set out in s. 52 of the **Act**

**“Registration and effect of agreement**

**52(1)** A judge may, with the consent of either party, register in the court an agreement entered into between the parties respecting maintenance or respecting care and custody or access and visiting privileges or any amendment made to that agreement.

**(3)** An agreement, including amendments registered pursuant to this Section, shall for all purpose have the effect of an order for maintenance or respecting care and custody or access and visiting privileges made under this Act.”

[28] This (agreement) order provided for the Respondent father to pay to the Respondent mother \$50 a month in child support for the child J. starting May 1, 1996 and thereafter on the first of each and every month. It is necessary and fundamental that the persons providing the child’s primary care have the benefit of child support contributions by the parents.

**Remedial Decision:**

[29] It is in J.’s best interests that the Court recognize the status and care of the child. In order to give legal effect to a status quo that was established more than thirteen years ago, the Court will grant custody to the Applicants MLAR and WER.

There was no suggestion by the parents that they contest custody. The effective date of this order is June 1, 2005 as a recognition of when the care of the child by and in the guardians was acknowledged in a court order. Access is an issue that will be left to the parties.

**Child Support Required:**

[30] The parents have a combined income of \$34,251.32 (father \$16,635.32 and mother \$17,616). The table amount in the guidelines is \$303 rounded off to \$300, with each parent contributing \$150. Although some Courts have used other methods in this section, requiring the parents in this particular case to pay the guideline amount does not, because of their minimal income, provide the guardians with excessive support. As is the case when one parent is ordered to pay child support to the other the payee contributes by providing day to day care of the child which in most cases is far greater a cost than the table amount provides. This is the role of the Applicants (payees) before the Court.

[31] The Court recognizes that the parents have their own homes and relationship situations. It is also acknowledged that the Applicant guardian made their

application November 15, 2010. The parents (Respondents) do not have access to their combined income because they are not together. Their incomes are minimal and should be used to pay future child support, not arrears, which is what a retroactive order would require. At the end of the proceeding, the Applicants appeared to recognize this.

[32] Consequently the child support order will not be retroactive.

**Special Expenses:**

[33] Section 7 of the Guidelines provides the Court with authority on the “request of a parent” to provide for an amount to cover certain things, including orthodontic treatment. The definition of parent in the Nova Scotia Maintenance Guidelines includes a guardian (see s. 2(e), *supra*).

[34] The expenses ordered under section 7 are apportioned and shared by the parents in proportion to their respective incomes (see s. 7(2) *supra*). Therefore, the guardians, by law, are required to share in this expense. A child’s contribution can also be considered.

**Cost of Orthodontic Treatment:**

[35] The invoices presented to the Court indicated that the first procedure is \$3580 and the second is \$5850. Repayment options were provided by the orthodontist as referred to earlier.

[36] It is necessary that the Court direct the payment payable to a specific person to insure enforcement. Judicial notice is taken of an information letter circulated by the Director of Maintenance Enforcement declining to enforce a provision which provides that a parent will share a percentage of special expenses.

“The Maintenance Enforcement Program is declining to enforce this provision. The program cannot enforce provisions such as “the parties are equally responsible for” or “the parties share equally”. As the director is declining to enforce this provision you may enforce it. If you choose to enforce this provision you will need to advise the program.”

**Determination of sharing of expense:**

[37] Section 7(2) provides that parents will share in the expense in proportion to their respective incomes. This is determined after deducting from the expense the contribution of the child.

[38] In this case the child is with guardians and there should be a contribution made by them on behalf of J. because they are before the Court representing his interests. That contribution will be one third of the total cost of the orthodontic expense which would be \$3153.33.

[39] The parent's income, father's \$16,635.22 and the mother's income of \$17,616 are close enough that fairness requires a 50/50 contribution on the total of \$6306.66.

[40] The following order shall be prepared by the Court Reporter and forwarded to the parties.

1. The Applicants shall have custody of the child J. born February \*, 1996. Access shall be by agreement of the parties. The effective date of this order with respect to custody shall be June 1, 2005.

2. The Respondent J.P.J. shall pay child support for the child J. in the amount of \$150.00 a month commencing April 1, 2011 payable through the Director of Maintenance Enforcement who will pay these funds to the guardians MLAR and WEP pursuant to section 32 of the **Maintenance and Custody Act.**

3. The Respondent CTR(F) shall pay child support for the child J. in the amount of \$150.00 a month commencing April 1, 2011 payable through the Director of Maintenance Enforcement who will pay these funds to the guardians MLAR and WER pursuant to section 32 of the **Maintenance and Custody Act.**

4. The Respondent father J.P.J. shall pay special expenses to the Applicants through the Director of Maintenance Enforcement in the following manner so that the Applicants may take up Option B offered by the orthodontist with respect to phase I and the final full treatment.



(a) Initial payment of \$293.33 payable on or before July 1, 2011;

(b) 12 equal monthly installments of \$75 a month commencing August 1, 2011 and to be completed by July 1, 2012. Payments are due the first of each and every month.

(c) Once the payments for phase I are completed as per above, the Respondent shall pay a lump sum of \$267 on August 1, 2012 and thereafter 20 monthly installments of \$84.70 commencing September 1, 2012 and to be completed by April 1, 2014

[41] The Respondent mother CTR(F) shall pay special expenses to the Applicants through the Director of Maintenance Enforcement in the following manner so that the Applicants may take Option B offered by the orthodontist with respect to phase I and the final full treatment.

- (a) Initial payment of \$293.33 payable on or before July 1, 2011;
- (b) 12 equal monthly installments of \$75 a month commencing August 1, 2011 and to be completed by July 1, 2012;
- (c) Once the payments for phase I are completed as per above, the Respondent shall pay a lump sum of \$267 on August 1, 2012 and thereafter 20 monthly installments of \$84.70 commencing September 1, 2012 and to be completed by April 1, 2014.

[42] The Court did not have the dates for the start of both orthodontic treatment phases, but it appears that it could be started whenever funding was in place.

[43] All monies for child support and special expenses are payable to the guardians through the Director of Maintenance Enforcement. It is the guardians who have contact with the orthodontist (having taken the child there) and the Court has directed them to arrange for payment of these services by advising the orthodontist they wish to use Option B offered in the letter received from his office.

[44] The guardians are free to pay the orthodontist treatment fee any way they want, but because of the parent's minimal income, they will receive funds from them taking into account the orthodontist's Option B.

**Summary of payment for clarification to the self-represented parties (see also schedule "A"):**

**Child support:**

1. Each of the Respondent parents will pay to the guardians \$150 a month child support through the Director of Maintenance Enforcement starting April 1, 2011. They will receive a letter from the Director advising them how to make the payments. The Director will pay all monies for child support and special expenses to the guardians.

2. **Special Expenses - orthodontic treatment**

On July 1, 2011 each Respondent parent will pay an initial down payment of \$293.33 to the guardians through the Director of Maintenance Enforcement.

[45] Starting on August 1, 2011 each Respondent parent will pay \$75 on the first of each month thereafter with final payment on July 1, 2012. Payments shall be made to the guardians through the Director of Maintenance Enforcement.

[46] Starting on August 1, 2012 each Respondent parent will pay \$267 as initial down payment and thereafter 20 monthly installments of \$84.70 commencing September 1, 2012 to be completed by April 1, 2014. Payment shall be made to the guardians through the Director of Maintenance Enforcement (see Schedule "A").  
Order accordingly.

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JOHN D. COMEAU

Judge of the Family Court of Nova Scotia

SCHEDULE "A"

CHILD SUPPORT

J.P.J.

Payment due dates:

April 1, 2011: \$150 a month and thereafter \$150 on the first of the month until further order fo the Court.

Special Expenses: (this is in addition to child support)

July 1, 2011: \$293.33 lump sum (down payment)

August 1, 2011: \$75.00 for 12 months with final payment on July 1, 2012. Payments are due the first of each and every month.

August 1, 2012: \$267.00 lump sum (down payment).

September 1, 2012: \$84.70 for 20 months with final payment on April 1, 2014. Payments are due the first of each and every month.

SCHEDULE "A"

CHILD SUPPORT

C.T.R. (F)

Payment due dates:

April 1, 2011: \$150 a month and thereafter \$150  
on the first of the month until further order of the Court.

Special Expenses: (this is in addition to child support)

July 1, 2011: \$293.33 lump sum (down payment).

August 1, 2011: \$75.00 for 12 months with final payment on July 1,  
2012. Payments are due the first of each and every  
month.

August 1, 2012: \$267.00 lump sum (down payment).

September 1, 2012: \$84.70 for 20 months with final payment on April 1, 2014. Payments are due the first of each and every month.



IN THE FAMILY COURT OF NOVA SCOTIA

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**Between:**

MLAR and WER

- Applicants

v.

GTR(F) and JPJ

- Respondents

Before the Honourable Judge John D. Comeau Judge of the Family Court for the Province of Nova Scotia

**Heard at:** Yarmouth, Nova Scotia, February 2, 2011

MLAR and WER - unrepresented

GTR(F) and JPJ - unrepresented

**Decision Date:** March 2, 2011

**ERRATUM:** Paragraph [40(4)(c)] ... commencing September 1, 2012 to be completed by April 1, 2013...

should read ... commencing September 1, 2012 to be completed by April 1, 2014

**Paragraph [41(c)] ... commencing September 1, 2012 to be completed by April 1, 2013...  
should read ... commencing September 1, 2012 to be completed by April 1 , 2014**

**Paragraph [46] ... commencing September 1, 2012 to be completed by April 1, 2013...  
should read ... commencing September 1, 2012 to be completed by April 1 , 2014**

**Schedule "A" for J.P.J.  
September 1, 2012 ...with final payment on April 1, 2013  
should read ... with final payment on April 1, 2014**

**Schedule "A" for C.T.R. (F) ..  
September 1, 2012 ... with final payment on April 1, 2013  
should read ... with final payment on April 1, 2014**