NOVA SCOTIA COURT OF APPEAL
Citation: MacLellan v. MacDonald, 2010 NSCA 34

Date: 20100428
Docket: CA 313755
Registry: Halifax

Between:

Lisa Danielle MacDonald (MacLellan)

Appellant

v.

Paul Douglas MacDonald

Respondent

Judges:	MacDonald, C.J.N.S., Oland and Hamilton, JJ.A.
Appeal Heard:	March 29, 2010, in Halifax, Nova Scotia
Held:	Appeal is dismissed, per reasons for judgment of Hamilton, J.A.; MacDonald, C.J.N.S. and Oland, J.A. concurring. Costs awarded to the respondent of $1,000, including disbursements.
Counsel:	Jill S. Perry, for the appellant Mark Gouthro, for the respondent, attending by video conference

Reasons for judgment:

[1] The issue in this appeal is whether Justice Theresa M. Forgeron erred when she ordered the respondent father to pay the **Federal Child Support Guidelines** ("**Guidelines**") table amount of monthly child support based on an annual income of $45,000, and then proceeded to order a recalculation of child support on January 15 of each year if the father's actual income for the preceding calendar year exceeded $45,000. Also at issue is whether the appellant mother filed her notice of appeal on time.

Facts and decision under appeal

[2] Child support for the three children of the marriage was the only issue before the judge. This required her to determine the father's income. In determining his income, the judge stated in her oral May 12, 2009 decision (2009 NSSC 214):

> [2] Mr. MacDonald is a 2007 graduate of a community college in Newfoundland. In January 2008, he found a job in St.[sic] John, New Brunswick in his field. Significant overtime was available to Mr. MacDonald in 2008. On average, he worked more than 60 hours a week because he needed the money. He continued to work overtime in 2009 because he had to pay for his legal fees and had no savings.
>
> ...
>
> [8] When determining income, only the most current income figure is to be used. This principle is found in s. 3 of the *Guidelines* which read as follows:
>
> > (3) Where, for the purpose of these Guidelines, any amount is determined on the basis of specified information, the most current information must be used.
>
> This principle has also been consistently followed by our courts. The steps to be processed when establishing an annual income are set out in ss. 16 to 20 of the *Guidelines* which I have reviewed.
>
> [9] The basic responsibility of the court is to set a current, annual income which is fair, reliable, and equitable. Child support is based upon certain objectives which are outlined in s.1 of the *Guidelines* and which I will read as follows:

> 1 The objectives of these Guidelines are
>
> (a) to establish a fair standard of support for children that ensures that they continue to benefit from the financial means of both spouses after separation;
>
> (b) to reduce conflict and tension between spouses by making the calculation of child support orders more objective;
>
> (c) to improve the efficiency of the legal process by giving courts and spouses guidance in setting the levels of child support orders and encouraging settlement; and
>
> (d) to ensure consistent treatment of spouses and children who are in similar circumstances.

None of these objectives supports the notion that child support should either confer a windfall or a corresponding loss.

[10] Reliable, current information is to be used in the establishment of income for child support purposes. Historical data can often be helpful, but it is not determinative. Where historical data is not consistent with the payor's future income earning potential, the historical data must be adjusted. One must always look to the factual circumstances existing at the time of trial. Speculation and crystal ball gazing are not appropriate functions of the court.

[11] There is little historical data before the court. Mr. MacDonald has only been employed in his current position since January 2008. His base salary is $38,438.40 per annum. He earned $72,897 in 2008, because he worked astonishing amounts of overtime which Mr. MacDonald cannot be expected to continue to earn in the future, based on a balance of probabilities. Further, even if he is physically and emotionally able to work such gruelling hours, the evidence suggests, on a balance of probabilities, that the quantity of overtime may not be available in the future because of the downturn in the economy.

[12] I cannot accept Ms. MacDonald's position that child support should be set at $68,000 per annum when Mr. MacDonald's base salary is only $38,438.40. She has failed to meet the burden upon her. Further, the idea that the parties would have to be continually before the court to readjust the child support figure based upon an actual income earned does little to advance the objectives of the *Guidelines*.

> [13] I have determined that the base child support will be set based upon a recalculation method. A base rate will be set to determine the monthly amount of child support. On January 15th of the following year, Mr. MacDonald will produce proof of the total gross income which he earned and child support for the prior calendar year will be recalculated. If there is any amount owing, Mr. MacDonald will pay this amount to Ms. MacDonald within 15 days.
>
> ...
>
> [15] I set the base rate at $45,000 per annum, which includes approximately $7,000 in overtime taking into consideration the overtime already earned and the likelihood of overtime earnings in the future, based upon likely overtime available and overtime hours Mr. MacDonald will likely work.
>
> [16] Monthly child support for 2009 is thus set at $849 per month with the requirement of recalculation on January 15, 2010 based upon actual income earned by Mr. MacDonald in 2009. Recalculation will be for the entire 2009 calender year, including January to April which forms part of the retroactive order discussed by counsel and confirmed later in this decision. This process of recalculation will continue every year thereafter unless otherwise ordered by a court of competent jurisdiction.
>
> [17] ...So just to be clear, counsel, for 2009 and forward there is a base rate set at $45,000 which produces a monthly amount, based upon the New Brunswick Table where Mr. MacDonald resides, of $849 per month. . . . However, there will be a recalculation on January 15th of 2010 for the 2009 figure so that . . . and that is from January to December, so that if Mr. MacDonald earns more than $45,000, child support will be recalculated and paid within 15 days. That is the total amount must be paid within 15 days. Therefore, Mr. MacDonald if you find you are earning more than $45,000, I would strongly urge you to pay more in on a regular basis, because the full amount is due within 15 days of the January 15th recalculation.

[3] Paragraphs 10 and 11 of the Corollary Relief Judgment ("CRJ") issued on June 11, 2009 giving effect to the decision provide:

> 10. The father shall pay child maintenance to the mother pursuant to the Federal Child Support Guidelines and in accordance with the New Brunswick tables, the amount of $849 per month, commencing May 1, 2009, and continuing on the first day of every month thereafter until otherwise ordered by a court of

> competent jurisdiction. The table amount is based on a base salary of $45,000 per year.
>
> 11. In addition to the table amount noted in paragraph 10 above, the father shall provide the mother with proof of his total annual income and calculations regarding the difference between the child support he paid and the child support he should have paid to the mother on or before January 15th of each year. Any money owing to the mother according to those calculations shall be paid within fifteen days.

[4] The mother's notice of appeal was filed on July 8, 2009, fifty-seven days after the judge's oral decision was given in court and twenty-seven days after the CRJ was issued.

[5] The registrar of this court accepted the mother's notice of appeal for filing on July 8, 2009 as it complied with the court's practice of accepting notices of appeal relating to CRJ's if they are presented for filing within 30 days of the date the CRJ was issued.

[6] No issue was raised with respect to the timeliness of this filing until the father's factum was filed on October 9, 2009.

[7] At the court's request, notice of this appeal was given to the Director of the Nova Scotia Maintenance Enforcement Program ("MEP") because the enforceability of the CRJ was raised as an issue. After correspondence with the parties and the court, the Director provided the two letters set out in ¶ 32 and did not seek intervener status in the appeal, on the understanding the mandate of the MEP and her jurisdiction were not in issue.

Timeliness of filing notice of appeal

[8] The first issue I want to deal with is the timeliness issue raised by the father. The father did not raise this issue until he filed his factum three months after the mother filed her notice of appeal. He made no mention of it during the telephone chambers with the chambers judge during which the appeal was set down for hearing. He made no application to have the issue determined at an early stage before the mother spent time and money perfecting her appeal. Without notice of this issue the mother had no reason to consider whether she should make a cautionary application to have the time extended for her to file her notice of appeal.

It is far too late in the appeal process for a preliminary issue such as this to be raised in a factum. If the father wanted to raise this issue it should have been done much earlier in the appeal process.

[9] That being said however, I must now deal with the father's argument. The father's argument is that the mother's appeal should be dismissed because her notice of appeal was filed out of time. He argues that the notice of appeal was filed late because the thirty day period within which this appeal could be taken pursuant to the **Divorce Act**, ("**Act**") R.S.C. 1985, c. 3 (2nd Supp), and the **Nova Scotia Civil Procedure Rules** ("**Rules**") began to run on May 12, 2009, the date the judge gave her oral decision in court, and not from the date the CRJ was issued on June 11, 2009.

[10] His argument requires consideration of s. 21 of the **Act** and **Rule** 90.13 in particular.

[11] Section 21 of the **Act** governs the time limits for appealing judgments granting divorces and other orders made under the **Act**:

> **21.** (1) Subject to subsections (2) and (3), an appeal lies to the appellate court from any **judgment or order**, whether final or interim, rendered or made by a court under this Act.
>
> (2) No appeal lies from **a judgment granting a divorce** on or after the day on which the divorce takes effect. [on the thirty-first day after the day on which the judgment granting the divorce is rendered, (s.12(1)), or later if the judgment granting the divorce is appealed, (s.12(3))]
>
> (3) No appeal lies from an **order** made under this Act more than thirty days after the day on which the **order was made**.
>
> (4) An appellate court or a judge thereof may, on special grounds, either before or after the expiration of the time fixed by subsection (3) for instituting an appeal, by order extend that time.
>
> ...
>
> (6) Except as otherwise provided by this Act or the rules or regulations, an appeal under this section shall be asserted, heard and decided according to the ordinary

> procedure governing appeals to the appellate court from the court rendering the judgment or making the order being appealed. (Emphasis added)

[12] **Rule** 90.13 sets out the time limits for starting appeals governed by the **Act**, among others:

> **90.13** (1) An appeal under legislation that provides a deadline for starting the appeal must be started no later than the time provided in the legislation and the calculation of the days shall be as intended by the legislation.
>
> (2) **An appeal**, or application for leave to appeal, **from one of the following kinds of orders,** or from the decision upon which it is based, **must be started no more than the number of days in the following table after the date of the order,** unless legislation provides, or a judge of the Court of Appeal permits, otherwise:
>
> ...
>
> | ***Kind of Order*** | ***Number of Days After*** |
> |---|---|
> | under *Divorce Act* | 30 days, within the meaning of *Divorce Act* |
>
> ...
>
> (3) An appeal from a decision of a court or tribunal that has not issued an order must be started no more than the number of days stated for the applicable proceeding listed in the above table, after the day the decision is made, unless legislation provides, or a judge of the Court of Appeal permits otherwise. (Emphasis added)

[13] It is **Rule** 90.13(2) that we are concerned with in this appeal because a written order, the CRJ, has been issued. We are not concerned with the time period within which an appeal may be brought where a judgment has been rendered but no written order had been issued, which is governed by **Rule** 90.13(3).

[14] The wording of **Rule** 90.13(2), to the effect that where an order has been issued an appeal must be started no more than thirty days “after the date of the order”, is similar to the wording of that part of the predecessor **1972 Rule** to **Rule** 90.13(2), 1972 Rule 62.02(1) that applied when an order had been issued:

> 62.02 (1) An appeal . . . shall be brought . . . within thirty days . . . from the date of the order for judgment appealed from or, if no order has been made from the date of the decision. (Emphasis added)

[15] That part of **1972 Rule** 62.02(1) that dealt with when an appeal could be brought in circumstances where an order had been issued, has been interpreted by this court to mean that the time limit for starting an appeal when an order has been issued begins to run from the date the order is issued, not from the date of the decision.

[16] In **McGuire v. Fermini**, [1984] N.S.J. No. 32; 64 N.S.R. (2d) 421; 42 C.P.C. 189; 143 A.P.R. 42, Macdonald J.A. stated:

> **[13]** The decision and the order for judgment are, of course, intricately involved one with the other – yet they are separate and distinct and **the practice of this Court has been, at least since the enactment of Rule 62 in 1975, to treat the actual date of the order as the starting date in calculating the time in which to commence an appeal.** If no order has been taken out the time starts to run from the date of the decision. See Rule 62.02 which provides for different periods of time in which to commence appeals from different tribunals which time is calculated ". . . from the date of the order for judgment appealed from or, if no order has been made from the date of the decision."
>
> **[14] It is therefore my opinion that the date the order is actually issued is the commencement date of the appeal period.** (Emphasis added)

[17] This approach was confirmed by MacDonald C.J.N.S. in **Whey v. Halifax (Regional Municipality)**, 2006 NSCA 40:

> [5] **With an order having been issued on March 6, 2006, it is abundantly clear from Rule *62.02(1)* that the 30 day clock begins from that date.** Thus the 30 day period to file an appeal is still running and will continue to run for at least another week. Therefore the extension application, obviously filed as an abundance of caution, is rendered, at this stage, unnecessary.
>
> [6] This is not one of those rare cases where an order may have been unnecessary. Arguably, in such a case, the 30 day clock would have been triggered from the date of the decision. While the respondents initially took that position, they later properly confirmed that an order was indeed necessary in this case. With that acknowledgment, I cannot see how they can now argue that the

> appeal period has expired. There is yet to pass "30 days from the date of the order for judgement appealed from". (Emphasis added)

[18] While neither of these cases deals with an appeal from a CRJ, both clearly state that under **1972 Rule** 62.02(1), where a written order has been issued, the time limit for filing an appeal begins to run from the date the order is issued. The situation would be different if no order was issued, but that is not the case here.

[19] The **Rules** and their interpretation however, are not determinative because if there is anything in the **Rules** which is inconsistent with the **Act**, the **Act** prevails.

[20] I am satisfied that there is nothing in the **Act** which would be incompatible with the court's interpretation of **1972 Rule** 62.02(1) as referred to above and as it relates to a situation where a written order has been issued, and that this court's interpretation of **1972 Rule** 62.02(1) applies to **Rule** 90.13.

[21] It is s. 21(3) of the **Act** that we are concerned with. Section 21(2) does not apply because it applies only to judgments for divorce and the appellant is not appealing her divorce judgment, only the order for corollary relief; **A.H. v. D.S.H.**, 2003 BCCA 361, ¶ 6 and 7. Section 21(3) effectively limits the time to appeal from an order for corollary relief to thirty days after the day on which such an order was "made". The question is whether the judge "made" the order for corollary relief under appeal on the date of her decision or on the date the CRJ was issued.

[22] The answer to this question is not clear from the wording of s. 21(3) as evidenced by the differing authority on this issue. The cases of **Cameron v. Hattie** (1916), 26 D.L.R. 496 (N.S.C.A.), **Levesque v. Levesque**, [1992] A.J. No 514 and **Berro v. Berro**, 2001 ABCA 157 held that an order is "made" on the date of the decision. The more recent cases of this Court in **Arsenault v Arsenault**, 2006 NSCA 38 and **Murray v. MacKay**, 2006 NSCA 43, both dealing with CRJ's, proceeded on the basis the CRJ is "made" when the written order is issued.

[23] Also in the recent case of **Duffy v. Duffy**, 2009 NLCA 11, the court, after referring to s. 21(6) and the Newfoundland civil procedure rules, concluded that a CRJ is "made" for the purpose of an appeal when the written order is issued:

> **13** Both section 21 of the **Divorce Act** and rule 57.03 of the Rules of Court set a limit of thirty days within which the appeal in this case had to be

> commenced. However, while both provisions refer to the order, only the rule specifically states when time would begin to run, that is, when the formal order has been settled and filed.
>
> **14** The reference in the **Divorce Act** to when "the order was made" is ambiguous because it may mean either the "order made" as part of the judgment or reasons for decision, or the formal "order made" and filed after being settled and approved by the judge. Section 21(6) of the Act assists in resolving the ambiguity. It provides that the procedural rules applicable to an appeal to this Court apply insofar as they are not inconsistent with the Act. In the result, the clarity of rule 57.03(2) may be read in conjunction with section 21 to resolve the ambiguity.
>
> ...
>
> **16** In the result, I conclude that, under section 21 of the **Divorce Act**, time begins to run upon the filing of the formal order.

[24] As in Newfoundland, the procedural rules that govern this court are helpful in clarifying that a CRJ is “made” when the written order is issued. The predecessor **1972 Rule** to **Rule** 90.13 has been interpreted to that effect as indicated previously, (¶ 13-17) and the **Rules** generally anticipate (1) that a written order will be issued after a decision is given:

> **78.03** (1) An order must be in writing, except directions and a ruling may be given orally and other kinds of orders may be given orally if the order is to be enforced before a written order can be made.

(2) that a written order takes effect when issued:

> **78.07** (1) A written order is in effect when it is issued and an order made orally is in effect from the time it is spoken, unless the order provides otherwise...

and (3) that a civil appeal will not be set down for hearing until after a written order is filed:

> **90.15** A person may appeal from a decision for which no order is issued, and **the person must file the order before the appeal is set down for hearing unless the decision is of a tribunal that does not issue an order**. (Emphasis added)

[25] These **Rules** support the conclusion reached in **Duffy, supra** and applied in **Arsenault, supra** and **Murray, supra** that a CRJ is "made" pursuant to s. 21(3) when it is issued, not on the date of the decision.

[26] Interpreting s. 21(3) in this way is also consistent with the law that applies in most civil cases, that until a written order is issued, the judge has discretion to withdraw, modify, or even reverse his or her decision; **Burke v Sitser**, 2002 NSCA 115, [2002] N.S.J. No. 416,; **Crédit foncier franco-canadien v. Fort Massey Realities Ltd.**, [1981] 49 N.S.R. (2d) 646.

[27] Accordingly, I am satisfied the mother's notice of appeal was filed on time, having been filed within thirty days of the date the order for corollary relief was issued.

[28] Even if this was not the case, I would not have dismissed the mother's appeal on the basis that she had not filed her notice of appeal on time, without first giving her the opportunity to apply for an extension of time to file an appeal as permitted by s. 21(4) of the **Act** and **Rule** 90.13.

Fresh evidence

[29] In connection with her appeal, and with the consent of the father, the mother seeks to introduce as fresh evidence:

> 1. A letter dated December 15, 2009 from Judy Crump, Director of the MEP, to the mother's counsel,
>
> 2. A letter dated January 4, 2010 from the father's counsel to counsel for the MEP, and
>
> 3. A letter dated March 8, 2010 from Judy Crump to counsel for both parties.

[30] These letters were sought and obtained in relation to the position of the MEP on the enforceability of paragraph 11 of the CRJ after the CRJ was issued.

[31] The test for the admission of fresh evidence is set out in **Palmer v. The Queen**, [1980] 1 S.C.R. 759. **Thies v. Thies**, [1992] N.S.J. No. 82, 1992

CarswellNS 495, indicates this test also applies in civil appeals. Fresh evidence is admissible if (a) it could not have been produced at the trial by due diligence, (b) the evidence bears upon a potentially decisive issue, (c) the evidence is reasonably capable of belief, and (d) if believed, the evidence could be reasonably expected to have affected the result at trial. The evidence must also be in admissible form unless the parties agree otherwise.

[32] I am satisfied the fresh evidence should be admitted. The parties agreed the letters could be admitted in their present form and that there was no need for cross-examination of the authors. It was reasonable that the mother did not check the MEP's position on a recalculation order such as this prior to trial as it was not a position taken by either party before the judge. The judge raised this possibility during the hearing. Thus, it is not reasonable to expect that these letters could have been produced at trial with due diligence. The letters are potentially decisive of one of the issues raised by the mother on appeal. The letters are reasonably capable of belief. If believed, the information contained in them could affect the result.

[33] I will set out in full the two letters from Ms. Crump admitted as fresh evidence as they may be instructive to others:

December letter:

> I am writing in response to your letter dated December 1, 2009, on the above noted matter. You have requested a response from the Director, Maintenance Enforcement Program (MEP), on the Program's position with respect to the enforceability of paragraph 11 of the Corollary Relief Judgment which reads:
>
> > ... 11. In addition to the table amount noted in paragraph 10 above, the father shall provide the mother with proof of his total annual income and calculations regarding the difference between the child support he paid and the child support he should have paid to the mother on or before January 15th of each year. Any money owing to the mother according to those calculations shall be paid within fifteen days...
>
> In the event that Mr. MacDonald (the "payor") provides to Ms. MacLellan (the "recipient") proof of his annual income and calculations in accordance with paragraph 11 of the Corollary Relief Judgment, and both parties are in agreement with the amount owing and communicate this agreement in writing to NS MEP, the amount owing, as calculated by the payor in his calculations, may be enforceable by the Program. Should the payor not provide payment of this amount

within 15 days of January 15, NS MEP may then take appropriate enforcement action as available to the Program to collect the amount calculated by the payor in his calculations.

If the recipient disputes the amount owing as calculated by the payor, NS MEP will enforce only the undisputed amount. NS MEP will exercise its discretion under section 11(1)(da) of the *Maintenance Enforcement Act* and decline to enforce any amount above what is agreed to by both parties unless and until the NS MEP receives a superceding Court Order fixing the quantum of support payable under paragraph 11.

If the payor does not comply with his obligation under paragraph 11to provide proof of his income and/or the calculations, NS MEP will exercise its discretion under section 11(l)(da) of the *Maintenance Enforcement Act* and decline to enforce paragraph 11 of the Corollary Relief Judgment unless and until the NS MEP receives a superceding Court Order fixing the quantum of support payable under paragraph 11. Section 11(1)(da) of the *Act* provides as follows:

> 11 (1) The Director may decide not to enforce a maintenance order or part of a maintenance order where...
>
> ...(da) the amount of the support or maintenance cannot be determined from the face of the maintenance order or it is dependent on another variable that does not appear on the maintenance order

If the Director declines to enforce paragraph 11 of the Corollary Relief Judgment, section 11(2) of the *Act* provides that the recipient is then free to take any actions she wishes to enforce paragraph 11 of the Judgment.

The NS MEP is not a provincial child support service as contemplated by section 25.1 of the *Divorce Act*. It is our understanding that Nova Scotia does not have a provincial child support service for recalculation of support orders under the Child Support Guidelines. NS MEP is not authorized to recalculate orders under the Child Support Guidelines.

Although the payor is currently residing in New Brunswick, enforcement is currently being taken by Nova Scotia MEP. Where a payor under a Maintenance Order filed for enforcement with the NS MEP resides in another jurisdiction, the NS MEP's decision to request enforcement by the jurisdiction in which the payor resides is made on a case by case basis. Under the federal *Family Orders and Agreements Enforcement Assistant Act*, NS MEP can issue federal enforcement actions against a payor who resides in another Province or territory. These federal enforcement actions may include the interception of funds owing to the payor by

> the Federal Government as well as the denial of federal licences including passport revocation. NS MEP also has authority under the *Maintenance Enforcement Act* to issue garnishments against out of province employers. The law of the jurisdiction in which the employer is situated governs whether the employer is required to comply with an extra-provincial garnishment issued by NS MEP. Provided funds are obtained from these actions, NS MEP may continue enforcement. If these options do not result in payments or it is felt that more efficacious actions may be taken by the enforcement agency in the payor's jurisdiction, NS MEP may then consider requesting enforcement by that agency.
>
> If NS MEP were to request enforcement of this order by the New Brunswick enforcement program, the decision on enforcement of paragraph 11 of the Corollary Relief Judgment would be made by that agency, in accordance with the laws of New Brunswick governing the enforcement of support orders in that Province.
>
> I understand that this information will be included in your submission to the Court of Appeal. I trust that the above information is satisfactory in outlining the position of the Maintenance Enforcement Program with regard to paragraph 11 of the Corollary Relief Judgment. Please feel free to contact me if you require further clarification.

March letter:

> This letter is further to my letter to Jill Perry [appellant’s counsel], dated December 15, 2009, regarding the Director of Maintenance Enforcement's position respecting the enforceability of paragraph 11 of the Corollary Relief Judgment issued on June 11, 2009 in the divorce proceedings between your respective clients. This letter is provided at the request of both of you, on behalf of your respective clients, to provide further clarification regarding the matters referred to in my letter.
>
> Paragraph 11 of the Corollary Relief Judgment requires the father ("payor") to provide proof of his total income to the mother ("recipient") for the preceding year. There is nothing on the face of the order to indicate how the "total income" is to be determined or calculated or what proof is required. There is nothing to indicate how the total income is to be determined or calculated for the purpose of the Child Support Guidelines and a determination under the Guidelines of the amount of support payable for the "preceding year". The Order does not indicate on its face how the amount of child support the payor "should have paid to the mother" is to be calculated under the Guidelines.

> Sections 15 to 20, inclusive, of the Child Support Guidelines, govern how a Court may determine a spouse's income for the purpose of determining child support payable pursuant to the Child Support Guidelines. The Director of Maintenance Enforcement does not have authority to determine or calculate the income of a spouse for the purpose of the Child Support Guidelines, nor does the Director have authority to determine the quantum of child support payable pursuant to the Child Support Guidelines, even if income were determined or agreed upon by the parties.
>
> As stated in my letter of December 15, 2009, the Director may decline to enforce paragraph 11 of the Corollary Relief Judgment on the basis of section 11(1)(da) of the *Maintenance Enforcement Act*. The Director may also decline to enforce paragraph 11 of the Corollary Relief Judgment on another basis, namely on the basis of section 11(1)(f) of the *Maintenance Enforcement Act*. Section 11(1)(f) provides that the Director may decline to enforce a provision of an order if there is doubt or ambiguity on the part of the Director as to the force, effect or meaning of the provision of the order.

Issues

[34] The mother's first argument is that the judge erred by not giving adequate consideration to the enforcement difficulties she may face with the recalculation provisions in the order for corollary relief. Her second argument is that the judge erred by misapplying the **Guidelines** by failing to determine the father's income for child support purposes or, alternatively, by setting the father's base income for monthly child support payments at $45,000.

Standard of review

[35] This court is to give considerable deference to the trial judge's decision on child support. We must only intervene if there is a material error, a serious misapprehension of the evidence, or an error in law, not simply because we would have made a different decision or balanced the factors differently; **Hickey v Hickey**, [1999] 2 S.C.R. 518, ¶ 11 and 12.

First issue

[36] The first issue is whether the judge erred by not giving adequate consideration to the enforcement difficulties the mother may face with the recalculation provisions in the order for corollary relief.

[37] On the basis of the fresh evidence, the mother points out that the MEP will not enforce any recalculated amount of child support unless the parties agree on the amount and inform the MEP of it. She agrees that there are other tools at her disposal to enforce the recalculation provisions, such as contempt proceedings, applications for execution and attachment orders. She argues however, that the recalculation provisions in the order have deprived her of the most effective enforcement option, the MEP, with its ability to garnish wages, attach pensions, seize and sell money and property, place liens against real property and suspend driving privileges. She argues that the MEP's refusal to enforce the recalculated amount unless it is agreed to by the parties and brought to the MEP's attention, may result in her having to return to court more frequently than would be the case without a recalculation provision with the attendant time, inconvenience and cost involved, if she no longer qualifies for legal aid. She argues that the judge's decision to order a recalculation indicates that she failed to give these enforcement difficulties adequate consideration and hence erred.

[38] The issue of the enforceability of any recalculated amount was not raised by counsel before the judge. The judge's reasons give no indication of how she balanced the means of enforcing the child support she ordered with the need to order a fair amount of child support, if at all. However, as a judge of the Nova Scotia Supreme Court Family Division, the judge would be acutely aware of the constraints within which the MEP operates in Nova Scotia as well as of the enforcement advantages offered by the MEP.

[39] The mere fact that the judge ordered a recalculation which the MEP has indicated it will not enforce, does not satisfy me that the judge failed to give adequate consideration to the enforceability issues surrounding any recalculated amounts. The judge was mandated to set a fair amount of child support for the children based on the father's current income. In the circumstances of this case where (1) the father had little relevant employment history, (2) the amount of overtime that he would be able to perform in the then current year was uncertain and (3) the father's sole source of income is from employment, which amount is easily verifiable from pay slips, the judge decided that the fair amount of child

support would best be met by determining the father's income as best she could on the evidence before her, setting the monthly payments based on that income and then providing for the uncertainty in his overtime income by adding a recalculation provision, in case her determination of his base income was wrong and the father earned more overtime than he expected.

[40] The MEP indicates it will enforce the monthly amounts and that if the parties agree on any year end recalculation, it will enforce them also. Thus a significant amount of the order will be enforced by the MEP. It is only if there is no agreement on the recalculated amount that enforceability by the MEP is an issue. Given the enforceability of the monthly payments, the availability of other means of enforcing the recalculations, albeit by means of resorting to court, and the need to set a fair amount of child support, I am satisfied that whatever consideration the judge gave to the enforcement issue was sufficient and does not amount to reversible error. Instead, I am satisfied the judge's foresight in proceeding in this manner on the particular circumstances of this case, may result in a better chance that there will be automatic adjustments to the amount of child support without the need to resort to the court.

Second issue

[41] The second issue is whether the judge erred by misapplying the **Guidelines** by failing to determine the father's income for child support purposes or, alternatively, by setting the father's base income for monthly child support at $45,000.

[42] With respect to the mother's first argument on this second issue, that the judge erred by failing to determine the father's income for child support purposes, she argues that the **Guidelines** require the judge to determine the father's income regardless of how difficult that may be and, instead of making this determination, the judge defaulted to having his income determined after the fact.

[43] The mother has not satisfied me that the judge failed to determine the father's income for child support purposes. Her reasons indicate she was aware of the need to determine the father's current income at an amount that was "fair, reliable, and equitable" (¶ 9). Her reasons also indicate she was aware of the difficulty of making a fair determination of the father's income in this particular

case given his short relevant work history, one year, and the significant role overtime played in his income in that year, almost doubling his base salary. She accepted the father's testimony as to why he worked so much overtime the prior year, he was in a desperate financial situation arriving in Saint John to take up his job with only two duffel bags of possessions, had borrowed the money to buy a ticket to get there, and had barely enough money to pay for his first week's rent at a boarding house. She also accepted his testimony about the uncertainty of overtime being available to him in the then current year and heard his evidence that the dispatcher who regularly phoned him to offer overtime was telling him to take some time off, suggesting he was working too hard.

[44] Faced with these particular facts, the judge set the father's basic income at $45,000, his base salary of $38,438.40 plus $6,561.60 for overtime, and then ordered a recalculation at the end of each year in case his income was greater than this. In doing so, I am not satisfied that she failed to determine the father's income.

[45] The alternative argument made by the mother is that the judge erred in setting $45,000 as the father's 2009 base salary for the purpose of establishing the monthly child support payable by the father throughout the year.

[46] She argues that the judge gave too much weight to the father's testimony that his overtime in 2009 would be significantly less than it was in 2008. She argues that the judge gave too little weight to the evidence that the father's 2008 income of $72,897 was for only 49 weeks work, not 52. She also argues that the judge erred by placing a burden of proof on her to prove that the father would earn the same income in 2009 that he earned in 2008.

[47] I agree with the mother that the judge erred when she suggested that the mother had a burden to prove that the father's 2009 income would be the same as his 2008 income. The burden was on the father to prove on a balance of probabilities that his 2009 income would be less, **MacDonald v. Rasmussen**, [1997] S.J. No 667 (S.K.Q.B.), ¶ 18-19. Having said this however, I am not satisfied this was a reversible error because it did not affect her decision.

[48] A review of the transcript of the trial and the judge's reasons make it clear her decision did not turn on who had the burden of proof. There was no question the father's overtime work in 2008 made up almost 48 percent of his total 2008

income. It was also clear 2008 was his first year of employment following his retraining. The judge accepted the father's testimony as to his need and ability to work as much overtime as possible in 2008 because of his extreme financial difficulties. She also accepted his testimony that he would likely not be able to earn as much overtime in 2009 because the job he had been working on was ending within a few weeks and because 2008 had been a "banner year" for his employer. It was this unchallenged evidence, which the judge clearly accepted, that led her to her decision. The burden of proof played little part in the judge's decision because of the nature of the evidence before her.

[49] As to the weight the judge gave to the evidence, that is squarely within her jurisdiction, not ours. It is not for us to retry the case and re-weigh the evidence. The judge clearly considered all of the evidence that was before her including the evidence that the father's 2008 income was based on 49 week's work. The evidence previously referred to allowed the judge to infer, as she did, that the father's overtime income in 2009 was uncertain and would be less than it was in 2008.

[50] The mother also argues that the judge erred by granting this CRJ with its recalculation provision because it is inconsistent with most other child support orders which do not contain a recalculation provision. She points out correctly that one of the objectives of the **Guidelines** is to ensure consistency, but fails to note that consistency is sought for "spouses and children who are in similar circumstances". These last words are important. While it is may be true that most child support orders do not contain recalculation provisions, it is also true that in most cases there is a sufficient employment history of the payor parent to allow the judge to confidently determine the payor's income without the need for a recalculation provision. That was not the case here. When considering consistency it is not appropriate to compare this CRJ with its recalculation provision with an order granted in a situation where the payor parent had a stable employment history.

[51] Based on the evidence before her I am satisfied the judge did not make a material error, seriously misapprehend the evidence or make an error of law in setting the child support as she did.

[52] For the foregoing reasons I would dismiss the appeal. I would order costs in the amount of $1,000, including disbursements, to be paid by the mother to the father. The amount of costs is less than it otherwise would be to take into account the father's unsuccessful argument that the appeal should be dismissed because the mother's notice of appeal was filed late.

Hamilton, J.A.

Concurred in:

MacDonald, C.J.N.S.

Oland, J.A.