NOVA SCOTIA COURT OF APPEAL
Citation: ***Koval v. Brinton***, 2010 NSCA 78

Date: 20101013
Docket: CA 323360
Registry: Halifax

Between:

Rebecca Suzanne Koval

Appellant

v.

Donald Jeffrey Brinton

Respondent

Judges:	Saunders, Oland and Bryson, JJ.A.
Appeal Heard:	September 27, 2010, in Halifax, Nova Scotia
Held:	Appeal dismissed per reasons for judgment of Saunders, J.A.; Oland and Bryson, JJ.A. concurring.
Counsel:	Judith A. Schoen, for the appellant Deborah I. Conrad, for the respondent

Reasons for judgment:

[1] This case invites our review of the law and the facts surrounding a Nova Scotia judge's refusal to confirm a provisional order issued by a judge in New Brunswick under the **Divorce Act**, R.S.C. 1985, c. 3 (2nd Supp.).

[2] The appellant asks us to admit fresh evidence and allow an appeal from the decision of Nova Scotia Supreme Court (Family Division) Justice Douglas C. Campbell.

[3] The respondent asks us to admit other fresh evidence in reply and dismiss the appeal.

[4] For the reasons that follow I would admit the fresh evidence but dismiss the appeal.

Background

[5] The parties were married in 2000 and divorced in May, 2008. A divorce judgment and corollary relief order were issued by the Court of Queen's Bench of the Province of Alberta on May 23, 2008.

[6] There are two children of the marriage, Jacob born on July 29, 2004 and Nora born July 10, 2006.

[7] In early 2007, the appellant told the respondent that she would be moving to Saint John, New Brunswick to be closer to her parents who planned to retire there. A few months later the respondent joined the Canadian Forces, hoping to be stationed in eastern Canada. He was posted to Halifax in December, 2007.

[8] The appellant sought a variation of the 2008 corollary relief judgment by applying for a provisional order in New Brunswick. After a hearing, Justice Bruce Noble of the Court of Queen's Bench granted a provisional order dated April 23, 2009 which provided:

> 1. The respondent's income is provisionally set at $43,788.00 resulting in a child support payment of $630.00 per month, commencing January 1, 2009.

> 2. The respondent shall be responsible for payment of one half of special expenses pursuant to s. 7 of the Child Support Guidelines. The existing expenses are child care in the net yearly expense of $6,087.00 and net health expenses of $1,763.00 per year.
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> 3. This order is provisional only and is of no force and effect until confirmed by the appropriate court in the Province of Nova Scotia.
>
> 4. This order is effective as of April 9, 2009.

[9] The provisional order was subject to confirmation by a court in Nova Scotia. The order and accompanying file were subsequently forwarded to Halifax for that purpose.

[10] On November 23, 2009, a confirmation hearing was held in the Family Division of the Nova Scotia Supreme Court. No notice was given to the appellant, as notice is not required for such matters. The respondent attended the hearing but was not represented by counsel. The respondent had filed various materials in advance of the hearing consisting of sworn financial information, and an unsworn statement addressing some of the evidence the appellant had presented at the earlier hearing in New Brunswick. The respondent took the stand and gave sworn testimony before Justice Campbell.

[11] The main issues addressed at the hearing were annual income, costs associated with the respondent's attempts at access, and Section 7 expenses.

[12] Following the hearing, Campbell, J. issued an order dated December 22, 2009 which reads in part:

> 1. UPON Donald Jeffrey Brinton having been found to have a current annual income of $46,639.00, he is ordered to pay child support for the two children of the marriage
>
> Jacob Derek Brinton, born July 29, 2004
>
> Nora Rebecca Frances Brinton, born July 10, 2006

> at the rate of $663.00 per month, payable in two installments of $331.50, commencing the 15th day of April, 2009 and continuing on the 15th and 30th day of each month thereafter until further order of the Court.
>
> 2. THAT the Respondent shall continue to name the children for coverage in his medical and dental insurance plan through his place of employment.
>
> 3. THAT commencing on the 15th and 30th day of November, 2009 and on the 15th and 30th day of each month thereafter, until further order of a court of competent jurisdiction, there shall be no contribution by the Respondent to special expenses incurred for the subject children.

[13] Justice Campbell's order was revised slightly by an Erratum dated April 27, 2010 wherein he corrected a mistake. The change in the operative provision now provides:

> ..., at the rate of $663.00 per month, payable in two installments of $331.50, commencing the 1st day of April, 2009 and continuing on the 1st and 15th day of each and every month thereafter until further order of the Court.

[14] Justice Campbell found that the respondent's current annual income was $46,639.00. He ordered that the respondent be relieved of any contribution to Section 7 expenses, after satisfying himself that there had been a decrease in day care costs following Jacob's (the elder child's) recent enrollment in school and that the respondent's payment of Section 7 expenses would be more than offset by accounting for his increased costs when exercising access in New Brunswick and by requiring him to provide medical and dental insurance coverage to his children under his medical plan.

[15] In her Notice of Appeal, the appellant lists three grounds, with the third ground broken down in to four sub-issues. It reads:

> (1) The Trial Justice erred in failing to confirm the Provisional Order of the Court of Queen's Bench of New Brunswick.
>
> (2) Alternatively, the Trial Justice erred in failing to remit the matter back to New Brunswick for further evidence as provided for in **Section 18(5)** of the **Divorce Act**.

(3) The Trial Justice erred in the application of the Federal Child Support Guidelines, and in particular:

a) disallowing the Appellant's **Section 7** claim;

b) considering the Respondent's travel to and from New Brunswick to constitute "unusually high costs associated with access to a child";

c) effectively utilizing **Section 18** of the **Guidelines** to eliminate a **Section 7** claim; and

d) considering **Section 10** of the **Guidelines** although not plead by the Defendant.

Issues

[16] In my view, the variety of issues canvassed by the appellant and the respondent in their respective facta can all more appropriately be dealt with as a single question: did the trial judge err in declining to confirm the provisional order of the Court of Queen's Bench of New Brunswick?

Standard of Review

[17] While acknowledging that unless the judge's reasons reveal an error in principle or a patent and overriding error of fact this Court will not intervene, the appellant argues that little if any deference is owed to the decision of the trial judge in this case because he was not privy to "both sides" of the dispute Her factum puts it this way:

31. Nevertheless, although a Trial Judge's exercise of discretion is ordinarily a matter owed significant deference, particularly in the family support context, it is respectfully submitted that the inherent one-sidedness of the provisional hearing process means that the advantage of the trial judge to hear and see witnesses disappears; so, too, does the foundation for significant deference.

[18] No authority is given for such a proposition. Neither am I aware of any. It is not clear whether the appellant is suggesting that no deference is owed at all; or whether I ought to invoke some kind of sliding scale such that the "degree" of

deference paid is proportionate to the “amount” of testimony actually heard by the judge.

[19] With respect, I am not attracted to either proposition and would reject the submission out of hand. Our responsibilities as an appellate court are well known. Our role is limited. It is not our function to retry the case. We do not “find” facts. Rather, our review is directed towards correcting serious errors of law or obvious and dispositive errors of fact. A high degree of deference is paid to a trial judge’s factual findings, especially in family law matters. As was stated by this Court in **Edwards v. Edwards (Pereira)**, [1994] N.S.J. (361)(Q.L.) and subsequently affirmed in **LeParque v. LeParque**, 2005 NSCA 127:

> [53] This court is not a fact finding tribunal. That is the role of the trial judge. Ours, as has been said many times, is a more limited role. We are charged with the duty of reviewing the reasons of the trier of fact with a view of correcting errors of law and manifest errors of fact. The degree of deference accorded to the trial judge with respect to factual findings is probably no higher anywhere than it is in matters relating to family law. Hart, J.A. put it well when he said on behalf of this court in **Corkhum v. Corkhum** (1989), 20 R.F.L. (3d) 197 at 198:
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> > "In domestic matters the trial judge always has a great advantage over an appellate court. He sees and hears the witnesses and can assess the emotional aspects of their testimony in a way that is denied to us. Unless there has been a glaring misconception of the facts before him or some manifest error in the application of the law, we would be unwise to interfere."

[20] Quite apart from this Court’s own jurisprudence, the basic premise upon which the appellant’s submission is based, is flawed. She complains that the provisional hearing setting is inherently one-sided, and as a result, is owed less deference due to the fact that witnesses are not heard. In fact, the process allows for both sides to be heard. In this case the appellant was heard in New Brunswick, and the respondent in Nova Scotia. Provisional orders in this context fall under ss. 18(3) and (4) of the **Divorce Act**, R.S.C. 1985, c. 3 (2nd Supp.):

> (3) Where a court in a province makes a provisional order, it shall send to the Attorney General for the province
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> (a) three copies of the provisional order certified by a judge or officer of the court;

> (b) a certified or sworn document setting out or summarizing the evidence given to the court; and
>
> (c) a statement giving any available information respecting the identification, location, income and assets of the respondent.
>
> (4) On receipt of the documents referred to in subsection (3), the Attorney General shall send the documents to the Attorney General for the province in which the respondent is ordinarily resident.

[21] Section 18(3)(b) of the **Divorce Act** requires a sworn document "setting out or summarizing the evidence given to the court" from the hearing in which the provisional order was issued. This is then sent under s. 18(4) to the province where the respondent resides. Should the Court desire more evidence, it has the discretion under s. 18(5) to remit the matter back to the Court that made the provisional order. Thus, there is an opportunity for the issue to be fully investigated by the Court, and an opportunity for both sides to be heard.

[22] To conclude on this point, the proper standard of review in this case may be simply stated. Absent an error of law or a manifest error of fact, this Court will not intervene.

Analysis

Fresh Evidence

[23] Before considering the merits of the appeal, I will first deal with the fresh evidence sought to be introduced by both parties. Further context will be helpful.

[24] As noted earlier, the appellant and the respondent were married in 2000 and divorced in Alberta in 2008. There are two children of the marriage – Jacob now 6 and Nora now 4, both of whom live with the appellant in New Brunswick. In the corollary relief judgment granted by the Alberta court in 2008, the respondent was ordered to pay Table support for the children in the amount of $430.00 per month, plus his proportionate share of any “section 7 expenses”. Section 7 expenses refer to special or extraordinary expenses relating to the child as set out in Section 7 of the **Federal Child Support Guidelines**, SOR/97-175.

[25] At the hearing before Noble, J. in April 2009, the appellant was granted a provisional order under ss. 18 and 19 of the **Divorce Act**, fixing the respondent's **Guideline** income at $43,788.00 and ordering him to pay the Table amount of $630.00 per month retroactive to January 1, 2009. The respondent was also ordered to pay one-half of the special expenses, determined to then be $7,850.00 for child care and health premiums.

[26] The provisional order and accompanying file were subsequently transmitted to Nova Scotia for confirmation. However, the transcript of proceedings before the New Brunswick court was not included among the materials transmitted. It would also appear that Noble, J.'s reasons for decision (if any were issued), were never transmitted.

[27] A confirmation hearing was held in Halifax on November 23, 2009. The appellant was not aware of the hearing and did not attend. The respondent appeared and gave evidence. After considering the evidence before him Campbell, J. declined to confirm the provisional order. Instead, he issued a varied confirmation order dated December 22, 2009, which took into account the significant expenses incurred by the respondent in exercising access such that effective November 1, 2009, he would be relieved of his previous obligation to contribute to the special expenses incurred for the children.

[28] After becoming aware of Justice Campbell's varied confirmation order, the appellant instructed counsel in Halifax to appeal on her behalf. She was out of time under the **Rules** and applied to this Court for an extension to file her notice of appeal. Her motion was contested by the respondent. In a decision now reported as **Koval v. Brinton**, 2010 NSCA 18 the appellant's motion to extend time to appeal was granted, upon terms.

[29] In the course of preparing her appeal, the appellant discovered that a transcript of the proceedings in New Brunswick had not been filed as part of the record considered by Justice Campbell in Halifax. She also sought to challenge the truthfulness of the respondent's testimony when he gave evidence at the confirmation hearing in Halifax.

[30] This prompted the appellant to seek to introduce fresh evidence on appeal which she describes in her written submission as follows:

> The evidence sought to be adduced by the Appellant at the hearing of the Appeal consists of (i) her Affidavit refuting the representations of fact made by the Respondent about his exercise of access, and upon which the learned Trial Judge relied to draw his conclusions about the Respondent's access costs; and (ii) the transcript of the provisional hearing before the New Brunswick court. The Appellant has no knowledge of why the latter was omitted from the court's record transmitted by New Brunswick to Justice Campbell, and only recently became aware that a transcript even existed. ...
>
> ***(i) Access Costs***
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> The learned Trial Judge took into account the Respondent's representations as to the cost of his exercising access to his children in Saint John, New Brunswick. In answer to the Judge's questioning, the Respondent testified that he regularly - at least monthly - incurred travel expenses, including gas, hotel bills, and meal expenses. The Appellant's evidence, if admitted, will be that these representations were false, and that in fact the Respondent exercised access a mere <u>three</u> times in the two and one-half years since she and the children moved to Saint John, NB. Moreover, of those three occasions, at no time did the Respondent stay overnight, thereby incurring a hotel expense. He drove up and back on Saturday.
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> It is respectfully submitted that this evidence is relevant, capable of belief, and, if believed, when taken with the other evidence, could reasonably expected to have affected the learned Judge's conclusion on the Respondent's obligation and ability to contribute to the children's Section 7 expenses. Given the manner in which provisional proceedings unfold, the Appellant's evidence could not have been adduced before the learned Nova Scotia Judge, nor could she reasonably have anticipated that such evidence would be required. The matters at issue before the New Brunswick Court did not include access arrangements or access costs; hence she offered no testimony nor was she questioned about these things.
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> ***(ii) New Brunswick transcript***
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> The proposed admission by this Honourable Court of the New Brunswick transcript presents a slightly different proposition than the more conventional fresh evidence contained in the Appellant's affidavit. It is respectfully submitted that the transcript *ought* to have formed part of the record before the learned Nova Scotia judge, and did not, for reasons unknown to the Appellant. As part of that

> record, it would have informed the learned Nova Scotia judge of the extent and nature of the evidence before the New Brunswick Court, including an explanation of the supporting documentation, particularly as regards the child care expense.
>
> For the purpose of the appeal, the Appellant submits that the interests of justice require the transcript be admitted so as to complete the record before this Honourable Court, thereby enabling it to have a full understanding of the proceeding and the evidence before the New Brunswick Court when the Provisional Order was made.

[31] The affidavit sworn by the appellant on July 22 which she seeks to include as part of her fresh evidence motion accuses the respondent of falsely stating the facts when he appeared before Campbell, J. The appellant makes reference to what she describes as accurate details of the number of times the respondent actually exercised access with their children.

[32] The appellant's motion to introduce fresh evidence prompted a similar motion by the respondent. Through his counsel he served a notice of motion and affidavit sworn September 2 where he includes details and attaches records said to affirm the truthfulness of what he told Justice Campbell and the significant expenses incurred while exercising access.

[33] This background forms the basis of the competing applications.

[34] At the appeal hearing we provisionally received the fresh evidence, ultimately reserving on the question of its admissibility until we completed our final deliberations on the merits of the appeal. We also permitted a brief, focused cross-examination of both the appellant and the respondent on their respective affidavits.

[35] The law with respect to seeking leave to introduce fresh evidence on appeal is well known and need not be canvassed in any detail. See for example, **Palmer and Palmer v. The Queen**, [1980] 1 S.C.R. 759; **Murphy v. Wulkowicz** , 2005 NSCA 147, and **Quigley v. Willmore**, 2008 NSCA 33, and **R. v. West**, 2010 NSCA 16.

[36] In my view, the proposed evidence satisfies all of the criteria in **Palmer, supra**, somewhat modified to address the unique features of the case. The due diligence factor is not applicable as the appellant had no knowledge of the

confirmation hearing and was unaware of the extent of the file materials forwarded to the court in Halifax or that a transcript had not been included. The transcript, the appellant's affidavit and the respondent's reply affidavit all bear upon a potentially decisive issue. Each is reasonably capable of belief and, as such, might reasonably be expected to have affected the result.

[37] In response to an objection raised at the appeal hearing by counsel for the appellant, I do not consider the individual pages or spreadsheets attached to the respondent's affidavit which were challenged by counsel, to be inadmissible. Much of the information on those few pages confirms geographical distances and mileage, or is otherwise included to verify the assertions sworn to by the respondent in his affidavit. Any challenge to this material really goes to weight rather than admissibility.

[38] In responding to questions during his cross-examination at the appeal hearing, the respondent testified that having declared bankruptcy he no longer had access to credit cards. As a result, he had always used cash to pay the costs associated with his access visits. He said he did not realize that the appellant would attempt to challenge the truthfulness of his evidence until after she filed her appeal of Justice Campbell's order. From that point on he said that he has tried to document his expenses, and his access visits. In that context, while it may appear that some of the information appended to the respondent's affidavit is an attempt to reconstruct past events, I am prepared to treat it as a matter of weight. And while, arguably, some of the information is "new" I am still satisfied that it qualifies as fresh evidence in that it is filed in response to the appellant having raised access costs as the principal issue on appeal.

[39] In the result and in the unique circumstances of this case I am prepared to receive the fresh evidence and include it as part of my overall consideration of the merits of this appeal. I am satisfied that the fresh evidence tendered by both parties will complete the record and provide a full understanding of the proceedings before the courts in New Brunswick and Nova Scotia, which have led to the issues now on appeal.

[40] Before I leave the subject of fresh evidence, I wish to express a cautionary note. As has been stated countless times, it is not our role to re-try cases. Matters do not come before this Court as trials *de novo*. No part of these reasons should be

interpreted as signalling an invitation to stage an appeal on competing affidavits, or mount some kind of follow-up trial under the guise of appellate review. The reception of the fresh evidence in this case was prompted by the unusual circumstances which brought it to this Court.

Merits

[41] The numerous issues and sub-issues raised by the appellant on appeal can be distilled rather simply. It comes down to this. The appellant says the evidence given by the respondent at the confirmation hearing before Campbell, J. on November 23, 2009, concerning expenses incurred while exercising access to the children, was demonstrably false. She pairs this submission with a complaint that the "transcript" of the original hearing before Noble, J. in New Brunswick on April 9, 2009, was not "included in the package" of materials subsequently sent by officials in New Brunswick to the court in Nova Scotia. I will say more about that "omission" in a moment. The appellant alleges that Campbell, J. was misled by the respondent's testimony and mistakenly relied upon it in deciding that the respondent should be relieved of any responsibility to contribute to his children's Section 7 expenses.

[42] These allegations form the basis of her attempt to introduce the New Brunswick "transcript" as fresh evidence, together with her affidavit sworn July 22, in which she both challenges the respondent's assertions regarding access costs, and offers particulars about her own rigorous schedule which she says obliges her to "... travel considerable distances in order to function on a daily basis with the children."

[43] In assessing the merits of the appeal the first point to make is that the so-called New Brunswick "transcript" does not assist the appellant in advancing her submissions. The typed transcript is a scant seven pages and simply records the exchanges between Justice Noble and the appellant's New Brunswick counsel, Corry Toole. Ms. Toole advised the court on the record that the appellant was present. However, Ms. Koval chose not to testify. Rather, Ms. Toole spoke to the documents which her client had introduced at the hearing. Counsel advised Justice Noble that the appellant (as petitioner) sought to vary the corollary relief judgment in two respects. First, she asked the court to issue a provisional order based on what they presumed to be the respondent's annual income of $43,788.00 (a figure

they gleaned from searching the Internet). This purported annual income would yield a Table child support obligation for the two children of $630.00 per month. The appellant's second request was based on her disclosure that she earned an annual income of $46,236.00. Given the close proximity in incomes, she asked that Section 7 special expenses as well as the medical/dental plan expenses be shared in "a 50/50 split". Finally, the appellant (petitioner) asked that the New Brunswick order be made retroactive to the date of filing, that being January, 2009.

[44] It is obvious from his exchanges with counsel that Justice Noble was troubled by the request that he impute an annual income to the respondent at the high end of the range without knowing the man's rank in the Canadian Forces and based only on the scant information introduced by the appellant from the Internet. However, the transcript of the hearing is replete with comments from both the appellant's counsel and Justice Noble confirming that any directions would be provisional only and that all ".... information to make a provisional order ... would be reviewed by the court down in Nova Scotia to confirm whether that is, in fact, correct or incorrect."

[45] The appellant says it was only when her counsel reviewed the Nova Scotia court file while preparing the appeal book that she discovered the New Brunswick transcript had not been included in the file sent to Nova Scotia. Thus, Campbell, J. would not have been aware of its contents when he presided over the Confirmation Hearing on November 23, 2009.

[46] In my respectful view, nothing turns on this "omission". The transmission of documents from the court from which the provisional order is issued to the court in which the confirmation hearing will take place is governed by subsections 18(2),(3)(4) and 19(1) of the **Divorce Act**. Subsection 18(3) provides for transmission of certain documents from the court making the provisional order to the Attorney General for the province. Subsection 18(4) requires the Attorney General for the province to transmit these documents to the Attorney General for the province in which the respondent is ordinarily resident, who is in turn required — under subsection 19(1) — to send the documents to that province's superior court.

[47] Subsection 18(3) sets out what documents must be transmitted by the court making the provisional order:

> (3) Where a court in a province makes a provisional order, it shall send to the Attorney General for the province
>
> (a) three copies of the provisional order certified by a judge or officer of the court;
>
> (b) a certified or sworn document setting out or summarizing the evidence given to the court; and
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> (c) a statement giving any available information respecting the identification, location, income and assets of the respondent.

[48] It is clear that under s. 18(3)(b) of the **Divorce Act**, a certified or sworn document setting out or summarizing the evidence given to the court at the initial hearing is required to be transmitted to the court conducting the confirmation hearing. The legislation does not specify that a "transcript" need always be prepared and sent. Rather, the statute speaks of a "certified or sworn document setting out or summarizing the evidence given to the court" (underlining mine).

[49] In this case no one "testified" before Noble, J. at the initial hearing in New Brunswick. Rather, the transcript (as noted earlier) records the submissions made by Ms. Koval's lawyer, and the exchanges between Noble, J. and counsel.

[50] It is clear from reading the transcript of the proceedings in Halifax that Campbell, J. did have before him the order granted by Noble, J. and the exhibits that had been sworn and tendered by the appellant when she presented her case in New Brunswick on April 9, 2009. These materials, together with the recitals contained in Justice Noble's provisional order dated April 23, 2009, are in my opinion sufficient to satisfy the requirements of s. 18(3). In the result, the "failure" to provide a transcript of the hearing in New Brunswick, is immaterial.

[51] The narrow issue on appeal relates to Campbell, J.'s treatment of the respondent's purported expenses in exercising access. Because the appellant did not testify at the New Brunswick hearing, there is nothing in the transcript which would explain her views on that discrete subject. And because the respondent was not present at the New Brunswick hearing there is nothing in the transcript bearing

upon his later assertion made in Nova Scotia that his former wife's costs of daycare were inflated because their elder son had enrolled in school, or that he had incurred significant expenses in exercising access. These "omissions" are hardly surprising considering the fact that (as is typical) the respondent was not present at the first hearing in New Brunswick to challenge the appellant's evidence, or offer his own.

[52] When asked to explain why the "missing" transcript from the New Brunswick hearing was so important to her case, counsel for the appellant suggested that had the transcript been before Campbell, J., he would have been alerted to the fact that access had not been mentioned at all. What difference would that make? Counsel for the appellant then opined that this might have heightened the chance that Campbell, J. would have remitted the case to the New Brunswick court for further evidence. With respect, I see this as sheer speculation and an exercise we ought not to entertain.

[53] When pressed at the hearing to particularize the errors made by Justice Campbell, counsel for the appellant identified two. While she was not able to describe any palpable and overriding error of fact which would warrant our intervention, she said there was "an absence of evidence" which constituted an error of law. As well, she said Campbell, J. failed to exercise his discretion, judicially.

[54] With respect, I see no merit to the appellant's submissions. I am not persuaded that Campbell, J. erred in law, or in the exercise of his discretion, when issuing the varied confirmation order under appeal.

[55] Section 19(7) of the **Divorce Act** gave Justice Campbell jurisdiction to do a variety of things. It provides:

> (7) Subject to subsection (7.1), at the conclusion of a proceeding under this section, the court shall make an order
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> (a) confirming the provisional order without variation;
>
> (b) confirming the provisional order with variation; or
>
> (c) refusing confirmation of the provisional order.

[56] As was made clear in Justice Noble's order:

> IT IS HEREBY ORDERED AND DIRECTED THAT:
>
> ... (3) this order is provisional order and is of no force and effect until confirmed by the appropriate court in the Province of Nova Scotia.

[57] Pursuant to s. 19(7)(b), Campbell, J. confirmed the provisional order of Justice Noble with variation:

> IT IS HEREBY ORDERED that the Provisional Order of Judge Bruce A. Nobel ... be varied and confirmed as follows ...

[58] Thus, it was entirely within the discretion of the Nova Scotia court to confirm, vary or refuse confirmation of the provisional order of the New Brunswick court. In my view, Campbell, J. did not err in his consideration of the evidence or in the approach he took to craft an order which would provide a fair and practical resolution to these parents' litigation on a go forward basis.

[59] Neither did Campbell, J. err in declining to remit the matter back to New Brunswick to receive further evidence, as permitted in s. 18(5) of the **Divorce Act**. Any such direction to remit is entirely within the discretion of the confirming court pursuant to s. 19(8). In this case, Campbell, J. had the affidavit filed by the appellant in New Brunswick and referred to it during the hearing. The respondent was present and gave evidence. While acknowledging that there were certain evidentiary gaps, Campbell, J. was confident that he had sufficient evidence before him to craft a fair and sensible solution. I am not prepared to second guess him on that finding.

[60] The appellant was well aware that Noble, J.'s order was provisional only. She and her lawyer knew that it would have no force and effect unless or until it was confirmed in Nova Scotia. One might reasonably infer that it would not have surprised the appellant to find that her former husband would want to appear in Nova Scotia and contest the provisional order which had increased his support obligations.

[61] Justice Campbell's decision delivered orally at the hearing on November 23, 2009, was later released as a written decision, now reported as 2010 NSSC 174. In his reasons Campbell, J. stated, in part:

> [1] Section 7 of the Child Support Guidelines provides the court with a degree of discretion at a number of levels which discretion is not similarly attributed to the court when it comes to the table amount.
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> [2] Section 7 says and I quote:
>
> > In a child support order the court may -- (and I'm paraphrasing to some extent) -- provide for an amount to cover the following expenses or any portion of those expenses taking into account the necessity of the expense and the reasonableness of the expense, having regard to the "means of the spouses and those of the child and to the family spending pattern prior to the separation."
>
> [3] -- and at that point certain expenses are listed, that include health related expenses, medical and dental insurance premiums and daycare, among others.
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> [4] Sub-section (2) of that section says,
>
> > " That the guiding principle in determining the amount of any expense referred to in sub-section (1) is that the expenses shared by the spouses in proportion to their respective incomes after deducting from the expense the contribution, if any, from the child."
>
> [5] So the guiding principle is just that. It's a guide that we often do follow and in many cases I follow it. In this case I have a situation where the father lives in Nova Scotia and the mother lives in St. John, New Brunswick, some four-and-a-half to five hours away by car.
>
> [6] As I consider the reasonableness of -- there's no question that the various Section 7 expenses being claimed are necessities and that they are reasonably incurred, but when I decide how to have that -- those reasonable expenses covered I can take into account the means of the spouses and I have evidence that -- that -- that Mr. Brinton earns $46,236, which is more than the amount specified in the provisional order. I don't have detailed evidence as to the mother's income, although she says in her affidavit that she earns $46,236 working at Scotiabank. There was some suggestion that she may have had an increase in the paperwork submitted by the respondent. I don't have detailed information to support that but

I can conclude from that -- those above facts -- the parties are at least in relatively equal income situations and that it may well be that she's in a higher income situation and it may also be that the income as quoted in her affidavit, while true at the time, has changed. Whether or not she earns more -- the fact that she earns at least the same is significant to me and the fact that Mr. Brinton has access costs is also a factor that I can look at when I consider his means. That is to say, his ability to pay. I accept his evidence that his gas is about $90 per month, that is hotel is $120 as a minimum and that his meals' expense is about $75, which gets me to $285. I do not need to specify an amount for the indirect costs of running his car, but certainly they are not be ignored -- that the wear and tear on his car for ten hours of driving would be a significant monthly cost. I recognize that he does not always go every month, as he tells me, but on the other hand there are occasions when he has two hotel nights instead of the one. In addition to those facts, are the facts that the daycare costs were $6,087 after-tax at the time the order was made. Half of that represents a monthly contribution from Mr. Brinton of $253. I'm told by him that the oldest child is now in school and there is speculation that the daycare costs for that child would have decreased and that accordingly the quoted amount may well be lower. Even if it isn't lower, Mr. Brinton's access costs, which are the direct costs of $280 [sic] -- eight-five dollars and some other amount of wear and tear costs on his car, will -- would vastly exceed his expected share of the daycare and would even more greatly exceed that figure if the daycare bill is down. Now the Section 7 expenses are always going to be -- oh, scratch that. The stated health care expenses are $1,763 and I'm now told by Mr. Brinton that he has included the children on his medical plan and I'm prepared to assume that that will mean that for most medical costs between the plans 100% of the cost will be covered and therefore that Section 7 expense will either be minimal as it relates to certain coverages that maybe one plan does not cover while the other plan does, or they will be non-existent. So there's no need for me to further order him to pay with respect to that cost. I'm told that he also contributes to the mother's health insurance premiums. I do not see that in a court order anywhere and even though I'm told that those costs have increased substantially I'm satisfied that if I even had his -- his contri -- his normal contribution to that plan to the daycare costs, I would still be dealing with a contribution that is greatly exceeded by the true cost of his access to see his children. So for all of those reasons, I'm prepared to say that whatever would otherwise be his ability to pay Section 7's is more than offset by access costs that exceed that which would face a father whose children live in the same or nearby community and for that reason I feel it's justified that he be relieved of any contribution to Section 7.

[7] While the following is not a reason for deviating from the principle of pro-rating these costs, I do note that this will provide a more convenient way of dealing with what will otherwise always be a moving target. By eliminating the contribution to daycare there will not be a need to constantly become updated as

> to when the children's daycare costs change, when their medical costs are different, when the cost of the premium for the medical plan changes and instead -- and as a result there will be no real need for Mr. Brinton to be aware of Ms. Koval's income because we will be left with a simple straightforward order for the table amount which is purely a function of Mr. Brinton's income alone and the number of children who remain dependent in their mother's care. So all future changes to this order will be rather automatic and I'm told that there's a system in New Brunswick whereby that is done administratively and so it will be a simple matter of that agency being made aware of changes to Mr. Brinton's income and therefore changes to the order. ...

[62] Evidently the respondent had reported to Justice Campbell his understanding of the ease with which the amount payable by a payor in accordance with the financial information provided by the parties bound by a support order could be altered, administratively, by the New Brunswick Family Support Order Services (FSOS). I have no evidence before me as to whether the respondent's assertion is correct or mistaken. However, for the purposes of this appeal, it does not matter. What Justice Campbell was attempting to do was save the parties the expense and inconvenience that would surely follow where, in Nova Scotia at least, a variation in their child support would always require a formal court order and the tracking of fluctuating daycare costs.

[63] Campbell, J. opined that the issue concerning the changing nature of daycare costs was a "moving target". The financial statement sworn and filed by the appellant listed special expenses totalling $8,067.00 annually, comprised of $5,862.00 for child care and $2,205.00 for medical and dental insurance premiums. After accepting the respondent's testimony, and considering the appellant's affidavit evidence, Campbell, J. exercised his discretion as regards Section 7 expenses under the *Federal Child Support Guidelines*. After taking into account the factors listed there he determined that the respondent's ability to contribute to Section 7 expenses was more than offset by the access costs for the respondent to travel to Saint John, New Brunswick. Counsel concede that access costs are a legitimate factor to be taken into account when considering the reasonableness of the expense in relation to the means of the spouses. See for example **Raftus v. Raftus** (1998), 166 N.S.R. (2d) 179, *per* Bateman, J.A. at para. 30.

[64] The trial judge accepted the respondent's evidence and found that his access costs were real, necessary, reasonable and significant. The appellant has not persuaded me that this finding was the result of palpable and overriding error.

Campbell, J. calculated that based on a minimum once a month visit, the respondent would incur monthly costs exceeding $500.00 (or just over $6,000.00 annually) which would be relatively equal to the appellant's net child care costs for two children in full time care (when, in fact, the elder child is now enrolled in school).

[65] Cross-examination of the respondent at the appeal hearing together with counsels' submissions indicate that through a recently negotiated settlement agreement Mr. Brinton will now exercise access to his children in New Brunswick by travelling there once every month beginning in October. This will involve two round trips in that Mr. Brinton will now be required to travel from Nova Scotia to New Brunswick, "collect" his two children, return with them to Halifax, and then at the end of the weekend drive back to New Brunswick with the children, and return alone to Nova Scotia. The respondent testified that this will increase the costs he described to Justice Campbell at the confirmation hearing in November, 2009.

[66] Further, Campbell, J. also obliged the respondent to continue to protect his children with coverage under his medical and dental insurance plan through the Canadian Forces. The evidence at the hearing revealed that the children are covered for 80% medical and dental through the respondent's plan, even though they are currently on the appellant's plan. Thus, even if the appellant did not have the children on her plan, they would be covered for 80% through the respondent, leaving only 20% of medical costs falling under the setoff. As of the confirmation hearing date the children were on both plans. I think it was reasonable for the trial judge to have concluded that through the combination of both plans the children are fully covered, thereby saving the appellant any costs for medical and dental care.

[67] After carefully considering the record, I see no error on the part of the trial judge that would warrant our intervention. Justice Campbell's approach was a practical one. It did not operate retroactively. It looked to the future and was designed to offer some certainty to the parties as they got on with their lives. It was tailored to the meet the needs of these children and the means of their parents. Rather than confirm a decision which would require a court order for variation every time there happened to be a change in daycare costs, the court exercised its discretion to relieve the respondent from contributing to Section 7 expenses, by

effectively offsetting the future costs of access against the future costs of daycare on a go forward basis. All of the necessary evidence was before the court. The respondent testified. Campbell, J. accepted his evidence. Both sides were heard, the appellant through her affidavit and her sworn documentation sent from the Court of Queen's Bench, and the respondent through his own sworn testimony. The appellant has failed to demonstrate that Campbell, J. erred in law or in the manner in which he exercised his discretion.

[68] In conclusion, Justice Campbell's decision finesses the requirement for costly applications to the court every time the child care situation changes. It also ensures that the children's medical and dental needs are addressed by covering them under the respondent's insurance plan. His order provides a fair and just result which addresses the financial realities surrounding access by a parent who is posted in another province and who can only access his children through his own efforts, at significant expense to himself, and it allocates those expenses appropriately.

[69] For all of these reasons I would dismiss the appeal with costs to the respondent of $2,500.00 inclusive of disbursements and inclusive of the $750.00 previously fixed as costs in the cause for two earlier appearances in Chambers.

Saunders, J.A.

Concurred in:

Oland, J.A.

Bryson, J.A.