NOVA SCOTIA COURT OF APPEAL
Citation: ***Saunders v. Saunders***, 2011 NSCA 81

Date: 20110914
Docket: CA 341628
Registry: Halifax

Between:

David Stephen Saunders

Appellant

v.

Jan Susan Saunders

Respondent

Judges:	Fichaud, Farrar and Bryson, JJ.A.
Appeal Heard:	June 15, 2011, in Halifax, Nova Scotia
Held:	Appeal allowed in part per reasons for judgment of Farrar, J.A.; Fichaud and Bryson, JJ.A. concurring.
Counsel:	Lloyd Berliner, for the appellant Gordon R. Kelly and Adrienne Bowers, for the respondent

Reasons for judgment:

[1] This is an appeal by Dr. David Stephen Saunders from certain provisions of a November 29, 2010 Corollary Relief Judgment which gave effect to the decision of the Honourable Justice Arthur W.D. Pickup dated July 29, 2010 (**Saunders v. Saunders**, 2010 NSSC 304). The appellant alleges that the trial judge erred:

1. by using an exchange rate of approximately 14% to convert the appellant's income from American dollars to Canadian;

2. in ordering spousal support in the amount of $9,100 per month for an indefinite period of time;

3. in dividing the funds held in a limited liability company known as CanAm LLC equally between the parties.

[2] For the reasons I will develop, I would allow the appeal, in part, and reduce the amount of spousal support to $7,500 per month. I would not interfere with the exchange rate used by the trial judge, however, I would add a provision to the Order requiring that the exchange rate be reviewed every second year starting September 1, 2012 to be effective August 1, 2012, the second anniversary of the effective date of the corollary relief judgment. The conversion rate shall be based on the average conversion rate for the 24 months preceding August 1, as explained later (¶ 34).

[3] Finally, I would not interfere with the trial judge's distribution of the funds in CanAm LLC.

[4] As success was divided on the appeal, I would not award costs to either party.

Facts

[5] The parties were married on May 4, 1974, in Oakville, Ontario. They separated on December 28, 2007. Ms. Saunders petitioned for divorce on November 6th, 2008.

[6] Following the separation, and prior to the petition for divorce being filed, the parties entered into an interim consent order providing that spousal support would be $8,000 per month. Six thousand dollars of that amount was to be paid by Dr. Saunders personally and $2,000 was to be withdrawn by Ms. Saunders from the CanAm LLC account.

[7] The matter came on for trial in Amherst on May 27 and 28, 2010. Prior to, and during the trial, the parties agreed on a number of issues, including the valuation and division of their assets and debts. What remained to be determined, in broad terms, was the amount of spousal support to be paid, and the distribution of the funds in CanAm LLC.

[8] At the time of trial Dr. Saunders was employed with the Blue Ridge Physician Group Inc. in Tennessee. Dr. Saunders' income for 2010 was US $265,000. The trial judge used a conversion rate to arrive at a Canadian dollar equivalent of approximately $302,500. Ms. Saunders was working in a half time contract position with an annualized income of $33,700 per year.

[9] Ms. Saunders is a registered nurse and in 2009 her employment income from working as an RN was approximately $48,600. Since obtaining her contract position, Ms. Saunders has elected not to work as a registered nurse.

[10] The trial judge determined that Ms. Saunders' imputed income, for the purposes of spousal support, was in the range of $50,000 per year. The trial judge also found that if she were to accept a full-time position her income would be in excess of $50,000 per year.

[11] In September, 2004, the parties, along with their two children, set up CanAm LLC and entered into a limited liability company operating agreement referred to as the CanAm Agreement.

[12] Dr. and Ms. Saunders are equal shareholders in CanAm owning 48% of the shares each, with each of the children owning 2% of the shares.

[13] The parties agreed on the value of the company being US $52,454.43.

[14] Between July, 2008 and the time of trial, Ms. Saunders had withdrawn US $71,000 from the CanAm account.

[15] The trial judge ordered that the balance in CanAm be divided equally between the parties with a $4,180.39 adjustment in Ms. Saunders' favour for amounts owed to her for past spousal support and outstanding costs/orders.

Issues

[16] The issues on appeal can be summarized as follows:

1. The trial judge erred in awarding Ms. Saunders $9,100 per month:

   (i) by using an exchange rate of approximately 14%;

   (ii) by determining Ms. Saunders' income to be only $50,000;

   (iii) by failing to take into account the overstatement of Ms. Saunders' monthly expenses as submitted;

2. The trial judge erred in ordering that CanAm LLC be distributed equally between the parties.

Standard of Review

[17] In **MacLennan v. MacLennan**, 2003 NSCA 9, this Court commented on the standard of review applicable in cases dealing with property division and spousal support. Cromwell, J.A. (as he then was) summarized the authorities:

> [9] In both support and division of property cases, a deferential standard of appellate review has been adopted: **Corkum v. Corkum** (1989), 20 R.F.L. (3d) 197 (N.S.C.A.); **MacIsaac v. MacIsaac** (1996), 150 N.S.R. (2d) 321 (C.A.); **Roberts v. Shotton** (1997), 156 N.S.R. (2d) 47 (C.A.). The determination of support and division of property requires the exercise of judicial discretion. Provided that the judge of first instance applies correct principles and does not make a palpable and overriding error of fact, the exercise of such discretion will not be interfered with on appeal unless its result is so clearly wrong as to amount to an injustice: **Heinemann v. Heinemann** (1989), 91 N.S.R. (2d) 136 (S.C.A.D.) at 162; **LeBlanc v. LeBlanc**, [1988] 1 S.C.R. 217 at 223 - 24; **Elsom v. Elsom**,

> [1989] 1 S.C.R. 1367 at 1374 - 77; **Hickey v. Hickey**, [1999] 2 S.C.R. 518 at paras. 10 - 13.

[18] As this appeal is concerned with spousal support and the division of property, the trial judge's decision is entitled to deference. Unless he has erred in principle, significantly misapprehended the evidence or made an award that is clearly wrong, we will not interfere.

Analysis

1(i) The trial judge erred by using an exchange rate of approximately 14% in converting Dr. Saunders' income from American currency to Canadian.

[19] Dr. Saunders argues that the trial judge erred by using an exchange rate of approximately 14% when there was no proof of the exchange rates and it was contrary to the agreed upon exchange rate of 1.0184%.

[20] Dealing with the latter argument first, it can be dismissed summarily. There was no agreed upon exchange rate for the purposes of converting Dr. Saunders' income into Canadian dollars. The agreed upon exchange rate referred to by Dr. Saunders is set forth in the Statement of Matters Agreed and Outstanding Issues which was read into the record and confirmed in an agreement dated June 3, 2010. The document reads as follows:

> The parties have agreed to the valuation and division of the following property and to use a conversion rate of 1.0184 for converting the value of US property into Canadian dollar value.

[21] The agreement between the parties only relates to the valuation and division of property. As was apparent from the pre-trial and post-trial briefs filed on behalf of the parties, the exchange rate, for the purposes of determining Dr. Saunders' income, was a live issue at trial.

[22] I will now turn to the argument that the trial judge erred in using an exchange rate of 14% without any proof of that exchange rate.

[23] In the pre-trial brief filed on behalf of Ms. Saunders on May 14, 2010, her counsel attached a printout showing the historical exchange rates between US and Canadian dollars for the period from January 1, 2009, to December 31, 2009. In her brief, Ms. Saunders submitted:

> Based on the average rate of conversion from US to Canadian dollars in 2009 (1.14172, printout at Tab 41), Dr. Saunders' income in 2009 in Canadian dollars would have been $280,314.98.

[24] Dr. Saunders, in his pre-trial brief, does not object to Ms. Saunders' counsel having provided the exchange figures to the trial judge nor was any issue taken with respect to the accuracy of the information provided. Rather, Dr. Saunders submitted:

> It is respectfully submitted that it would be reasonable and just in the circumstances for Dr. Saunders to pay Ms. Saunders spousal support in an amount less than suggested by the Advisory Guidelines, based on his income of $265,000 USD per year ($269,876.00 CAD at a rate of 1.01840), and based on an income of $80,000 per year for Ms. Saunders.

[25] He argued the exchange rate should be the same as that agreed upon for the valuation of property.

[26] The issue was also canvassed in the post-trial briefs (there was no oral argument at the conclusion of trial). Dr. Saunders was the first to file his post-trial brief (on January 18, 2010). No mention is made of the exchange rate in that brief.

[27] In the post-trial brief filed on behalf of Ms. Saunders, counsel again referred to the exchange rate at ¶36:

> In 2009 the parties' incomes from employment were
>
> Ms. Saunders - $48,601.91 [Exhibit 10]
>
> Dr. Saunders - $245,519.90 (US) [Exhibit 20]
>
> Based on the average rate of conversion from US to Canadian dollars in 2009 (1.14172, print out attached to Ms. Saunders' pre-trial brief at Tab 41), Dr.

> Saunders' income in 2009 in Canadian dollars, for the 9½ months that he worked would have been $280,314.98. (AB, vol. 5, p. 1489)

[28] Dr. Saunders filed his response on July 2nd, 2010, stating:

> The conversion rate used by the Petitioner of 1.1472% is grossly inflated and inconsistent with the agreed upon exchange rate of 1.01840%. (See statement of matters agreed and outstanding issues).

[29] Although Dr. Saunders suggested that the conversion rate was grossly inflated, no issue was taken with the accuracy of the information that was provided by Ms. Saunders in her pre-hearing brief. Nor was there any suggestion to the trial judge that he should not have regard to the exchange rates.

[30] To suggest, after the fact, that the trial judge should not have had regard to the historical exchange rates in determining Dr. Saunders' income is somewhat disingenuous. Both parties had an opportunity to put their positions forward and did so. At no time did either party suggest to the trial judge that it was not open to him to accept one or the other of their positions. To the contrary, they invited him to do so.

[31] What the trial judge did was consistent with how courts have determined the payors' Canadian dollar equivalent income for the purposes of support. In **A.D.B. v. S.A.M.**, 2006 NSSC 201 Justice MacDonald of the Family Division, albeit in different circumstances, commented on the issue as follows:

> 24 It appears to be generally accepted that the means by which a non-resident's annual income is to be determined, "as if the person were a resident of Canada", is to be accomplished by applying the relevant exchange rate to the total income earned by the non-resident. There is disagreement in the case law concerning the timing for application of the exchange rate. Because there can be rapid fluctuations in currency exchange rates the most common response is to apply the average yearly exchange rate for the year preceding the determination of total annual income. ...

[32] The trial judge used the exchange rates for the preceding year for the determination of Dr. Saunders' total income. In doing so he did not err.

[33] However, as Justice MacDonald noted in **A.B.D.**. **supra**, there can be rapid fluctuations in the currency exchange rates. An appropriate exchange rate today may soon become unfairly inaccurate for macroeconomic reasons unrelated to the parties' personal circumstances. An adjustment for this factor is best determined by a prescribed and simple arithmetic mechanism that the parties or their counsel may undertake consensually, one hopes, with a minimum of litigation expense. By failing to consider this factor, and by incorporating for the indefinite future an exchange rate that was already markedly obsolete at the hearing date, the judge erred.

[34] I would add a provision to the order requiring that the exchange rate be reviewed every second year, starting September 1, 2012 to be effective August 1, 2012, the second anniversary of the effective date of the corollary relief judgment. The exchange rate shall be based on the average exchange rate for the 24 months preceding August 1. I have allowed a period of time between the effective date (August 1) and the review date (September 1) to allow the parties time to compile the information necessary. The review would adjust the spousal support by the ratio between the exchange rate used for the existing spousal support and the average exchange rate over the 24 months up to and including August 1 before the prescribed review date. This formula review for exchange rates would not, of course, prevent the parties from seeking other variations based on material changes of circumstances under the jurisprudence.

(ii) The trial judge erred by imputing Ms. Saunders' income to be only $50,000.

[35] The trial judge made the following findings of fact:

> Ms. Saunders' income, in 2010, in a non-nursing half-time contract position as an access manager would be $33,700 per year (¶ 36);
>
> Her employment income in 2009 from her work as an RN was $48,601.91 (¶ 37);
>
> Ms. Saunders chose to only work day shifts and work on a part-time casual basis so that she can control when she works (¶ 40);

> More work was available to Ms. Saunders and she was asked to work on a full time basis but declined (¶ 40);
>
> Ms. Saunders did not want to work more than two or three shifts per week when employed as an RN (¶ 40);
>
> Ms. Saunders has no physical or mental issues that would prevent her from working on a full time basis (¶ 39);
>
> If Ms. Saunders were to work in a full-time position, her income would be in excess of $50,000 per year (¶ 42);
>
> Ms. Saunders has chosen to work part-time (¶ 60);
>
> There is no reason why Ms. Saunders could not work full-time (¶ 60);

[36] After making these findings, the trial judge inexplicably determined that Ms. Saunders' imputed income, for spousal support purposes, to be in the $50,000 per year range, approximately the amount she earned in 2009 while working part-time as an RN. The trial judge failed to explain why he was not imputing a greater amount of income to Ms. Saunders in light of his findings that she was capable of earning more income and there was no reason for her not to be working full time. By failing to impute income to Ms. Saunders, in keeping with her capacities and abilities or at least failing to explain why he did not do so, the trial judge was in error.

[37] A similar conclusion was reached by the Ontario Court of Appeal in **Ladisa v. Ladisa**, [2005] O.J. No. 276 (Q.L.) where the Court held:

> **26** In refusing to impute any income to the father over and above his pension, the trial judge ignored the evidence that the father could - and did - work up to 90 days at a time without losing his disability pension and assumed that the father would be unable to obtain any other employment to supplement his pension. This constituted an error in law. ...

[38] The trial judge reviewed the evidence and made findings of fact that Ms. Saunders had chosen to be under-employed but he did not take the extra step and

impute a greater income than that which she was able to earn by working part-time. He held:

> 42 In respect of Ms. Saunders income, I determine it to be in the $50,000 per year range. This is close to what she made in 2009. It does not reflect full-time work, but two to three shifts in a two week period with, presumably, some overtime. If she were to accept a full-time position it would be in excess of $50,000 per year.

By failing to impute more income to her he fell into error.

[39] I will take the trial judge's error in considering the overall amount of spousal support. I will come back to this after discussing Ms. Saunders' expenses.

(iii) The trial judge erred in failing to take into account the overstatement of Ms. Saunders' monthly expenses as submitted.

[40] Section 15.2(4) of the **Divorce Act** requires that certain factors are to be taken into consideration when making an award of spousal support pursuant to the **Divorce Act**. Section 15.2(4) directs that the Court:

> … shall take into consideration the condition, means, needs and other circumstances of each spouse, including
>
> (a) the length of time the spouses cohabited;
>
> (b) the functions performed by each spouse during cohabitation; and
>
> (c) any order, agreement or arrangement relating to support of either spouse.

[41] The Court is mandated to take into consideration the means, needs and other circumstances of each spouse. **Bracklow v. Bracklow**, [1999] 1 S.C.R. 420 analyzed the respective obligations of husbands and wives. The trial judge, here, accurately summarized this decision as follows::

> [58] In *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420, 44 R.F.L. (4th) 1, The Supreme Court of Canada analysed the respective obligations of husbands and wives and stated at pps. 439 - 440 (S.C.R.):

> ... a matter of applying the relevant factors and striking the balance that best achieves justice in the particular case before the court.
>
> ...
>
> There is no hard and fast rule. The judge must look at all the factors in light of the stipulated objectives of support, and exercise his or her discretion in a manner that equitably alleviates the adverse consequences of the marriage breakdown.

[42] Section 15.2(6) of the **Divorce Act** outlines the objectives of an order for spousal support and directs that an order:

> …for the support of a spouse should
>
> (a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;
>
> (b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;
>
> (c) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and
>
> (d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.

[43] The Supreme Court of Canada in **Moge v. Moge**, [1992] 3 S.C.R. 813 stated that all four objectives enumerated in s. 15.2(6) of the **Divorce Act** are to be equally considered in making an award for spousal support, and none is paramount.

[44] In support of her claim for spousal support, Ms. Saunders provided the Court with an updated Statement of Income and Expenses indicating monthly expenses of over $11,000 per month.

[45] In reviewing the evidence in relation to the budget and monthly expenses provided by Ms. Saunders, the trial judge concluded the expenses as submitted by

Ms. Saunders were overstated and did not reflect a realistic monthly expense amount (¶ 57).

[46] The trial judge said the following with respect to the expenses of Ms. Saunders:

> [55] Ms. Saunders pays her adult son's rent of $1,350 per month and has included it in her expenses. Dr. Saunders suggests that this is not a reasonable cost that should be considered. I agree. He says the banking fees claimed and exchange fees will be reduced, if not, eliminated once the Florida home has been sold. I agree.
>
> [56] The expenses associated with fees in Canada, including legal fees, according to Dr. Saunders should not be expenses that a court should consider in relation to a determination of expenses and support, and provides authority in *Durocher v. Durocher*, [1991] N.S.J. 391. Dr. Saunders questions the expenses associated with household repairs and maintenance, given that the home has undergone extensive renovations in excess of $100,000.
>
> [57] On cross-examination it would appear that the actual budget for heating would be more in the range of $128 per month, resulting in a reduction of $215 per month. Postage at $56.14 appears high. Ms. Saunders claims $1,031.16 per month for household repairs, maintenance, appliance and furniture repairs and replacement. This is over $12,000 per year and is unrealistic as the house has just undergone a major renovation. Ms. Saunders claims clothing at $500 per month which is $6,000 per year. This amount is high. Ms. Saunders appears to have a relatively new vehicle and $260.90 per month for car maintenance and repair is high. She claims $553.50 per month for Christmas, birthdays, events and gifts, which works out to $6,640 per year. This, in my view, is likely overstated. Ms. Saunders claims $1,718.14 per month for fees in Canada and the US, including legal fees. There is no breakdown of what portion of these fees are legal fees. If they are legal fees I am satisfied they should not be included in the budget. Ms. Saunders claims $425.28 per month for "exchange fees". Presumably once this matter is completed, this amount should be eliminated. In summary, I am satisfied that expenses, as submitted by Ms. Saunders, are overstated and do not reflect a realistic monthly expense amount.

[47] By my calculation, the trial judge found that approximately $3,700 of Ms. Saunders' monthly expenses were not appropriate and another approximately $2,400 were overstated.

[48] Although the trial judge says that he has considered Ms. Saunders' income and her reasonable needs, he does not delineate what he considered to be her reasonable needs or how it factored into the final award (¶ 60).

[49] The trial judge also comments that Ms. Saunders was entitled to continue to enjoy a comfortable lifestyle as she experienced in her marriage with Dr. Saunders. However, there is no analysis in the trial judge's decision which gives any indication of the evidence being relied upon to tell us what amount was required for this "comfortable lifestyle". The expenses submitted by Ms. Saunders reveal a deficit of approximately $8,000 between income ($4,166.67 per month) and expenses ($11,245.81 per month). The trial judge found the expenses were overstated by somewhere between $3,700 and $6,100. Using the lower number of $3,700, would reduce the expenses to approximately $7,500, leaving her with a deficit of approximately $3,400 ($7,500-$4,100) after taking into consideration her income, which, as previously found, the trial judge should have imputed to be greater. No explanation is given by the trial judge as to why he felt the amount of $9,100, based on the conclusions which he had previously made, would be required to maintain a comfortable lifestyle and satisfy her needs.

[50] There is no explanation in his reasons as to how he arrived at the final number for spousal support or upon which the soundness of it may be tested. It is simply that, a conclusion. (**Clarke v. Ismaily**, 2002 NSCA 64, ¶ 18) .

[51] Ms. Saunders submitted that her needs are but one factor for the trial judge to consider in dealing with the issue of spousal support. That statement is accurate. However, it must be remembered that the needs of Ms. Saunders were an important consideration for the trial judge. The trial judge either misapprehended Ms. Saunders' actual needs or failed to properly take them into account when determining spousal support. This led him to award an amount which was clearly wrong in the circumstances of this case.

[52] I will now turn to what I consider to be the appropriate amount of spousal support in these circumstances.

What is the Appropriate Amount of Support?

[53] In **Read v. Read**, 2000 NSCA 33, Freeman, J.A. quoting Justice Goodfellow in **Mosher v. Mosher** (1999), 177 N.S.R. (2d) 236 (S.C.) at 238 to the effect that the duty of support is on the payor to provide reasonable support. The key question in this case is what is reasonable support having regard to all the circumstances. As I have previously set out, I found that the trial judge erred in two ways: (i) by failing to impute more income to Ms. Saunders; and (ii) by misapprehending or failing to take into account her actual needs. What then is the appropriate amount of support?

[54] In **Shurson v. Shurson**, 2008 NSSC 264, Justice MacDonald of the Family Division was considering an application to vary the spousal support provisions of the parties' corollary relief judgment. She held:

> [13] Examples of circumstances that may lead to a decision that a spouse is entitled to compensatory support are:
>
> a) a spouse's education, career development or earning potential have been impeded as a result of the marriage because, for example:
>
> - a spouse has withdrawn from the workforce, delays entry into the workforce, or otherwise defers pursuing a career or economic independence to provide care for children and/or a spouse;
>
> - a spouse's education or career development has been negatively affected by frequent moves to permit the other spouse to pursue these opportunities;
>
> - a spouse has an actual loss of seniority, promotion, training, or pension benefits resulting from an absence from the workforce for family reasons.
>
> b) a spouse has contributed financially either directly or indirectly to assist the other spouse in his or her education or career development.
>
> [14] Non-compensatory support incorporates an analysis based upon need and ability to pay. If spouses have lived fully integrated lives, so that the marriage creates a pattern of dependence, the higher-income spouse is to be considered to have assumed financial responsibility for the lower-income spouse. In such cases

a court may award support to reflect the pattern of dependence created by the marriage and to prevent hardship arising from marriage breakdown. L'Heureux-Dubé, J. wrote in *Moge v. Moge, supra*, at p. 390:

> Although the doctrine of spousal support which focuses on equitable sharing does not guarantee to either party the standard of living enjoyed during the marriage, this standard is far from irrelevant to support entitlement (see *Mullin v. Mullin, supra*, and *Linton v. Linton, supra*). Furthermore, great disparities in the standard of living that would be experienced by spouses in the absence of support are often a revealing indication of the economic disadvantages inherent in the role assumed by one party. As marriage should be regarded as a joint endeavour, the longer the relationship endures, the closer the economic union, the greater will be the presumptive claim to equal standards of living upon its dissolution (see Rogerson, "*Judicial Interpretation of the Spousal and Child Support Provisions of the Divorce Act*, 1985 (Part I)", supra, at pp. 174-75). (emphasis added)

[15] It is not clear from Justice L'Heureux-Dubé's, decision whether entitlement arising from a "pattern of dependence" is compensatory or non-compensatory. A pattern of dependence may create a compensatory claim because it can justify an entitlement even though a spouse has sufficient income to cover reasonable expenses and might be considered to be self-supporting. This often is described as the "lifestyle argument" - that the spouse should have a lifestyle upon separation somewhat similar to that enjoyed during marriage. (*Linton v. Linton*, 1990 CarswellOnt 316 (Ont. CA) A lengthy marriage generally leads to a pooling of resources and an interdependency even when both parties are working. Usually the recipient spouse will never be able to earn sufficient income to independently provide the previous lifestyle. This would form the basis of a compensatory claim but does not necessarily entitle a spouse to lifetime spousal support. The essence of a compensatory claim is that eventually it may be paid out. This leads to a discussion about the quantum and duration of the claim.

[16] Once it is decided that a spouse is entitled to spousal support, the quantum (amount and duration) is to be determined by considering the length of the relationship, the goal of the support (is it compensatory, non-compensatory or both), the goal of self-sufficiency, and the condition, means, needs and other circumstances of each spouse. In considering the condition, means, needs and other circumstances of each spouse one may examine the division of matrimonial property and consider the extent to which that division has adequately compensated for the economic dislocation caused to a spouse flowing from the marriage and its breakdown and any continuing need the spouse may have for

> support arising from other factors and other objectives set forth in s. 15(2). (*Tatham v. Tatham*, 2005 CarswellBC 2346 (B.C.C.A.)

[55] The spousal support to be awarded in this case contains both compensatory and non-compensatory elements. It is compensatory in the sense that the parties were married in excess of 30 years and worked as a team in Dr. Saunders' medical practice. Ms. Saunders acted as the office manager as well as his registered nurse. Undoubtedly she contributed directly and indirectly in his career development. The non-compensatory aspect of it is based on Ms. Saunders' needs and Dr. Saunders' ability to pay.

[56] However, I also have to take into consideration that Ms. Saunders has the ability to earn a greater income than she is presently earning. Even though she has the ability to earn a higher amount, I am satisfied that she still requires spousal support to assist her in her lifestyle and Dr. Saunders has an ability to pay spousal support.

[57] Taking into account that the amount of income Ms. Saunders is able to earn is greater than what she is presently earning, the fact that the expenses are overstated by a considerable amount, leaving her with a deficit of much less than set forth in her statement of expenses, the compensatory aspect of the spousal support, and Dr. Saunders' income, I would award $7,500 per month for spousal support. This is approximately $4,100 more than her actual needs (see ¶ 49) and addresses both the compensatory and non-compensatory elements of spousal support. This is still a significant award which is in excess of her actual needs which would allow her to maintain her "comfortable lifestyle" referred to by the trial judge.

[58] The amount of spousal support overpaid by Dr. Saunders, by my calculation, is $22,400 (14 months X $1,600, August 2010 to September 2011). Dr. Saunders may recover this amount by reducing his spousal support payments for the next 23 months by $1,000 per month for the first 22 months and $400 for the final month.

[59] Dr. Saunders also appealed on the basis that the award of spousal support for an indefinite period of time was in error. However, argument on this aspect of the notice of appeal was neither addressed in the facta nor in the oral arguments. The appellant has not provided any basis upon which we would interfere with the trial

judge's discretion in ordering support for an indefinite period of time. As a result, I would not interfere with that provision in the corollary relief judgment.

2. The learned trial judge erred in ordering that CanAm LLC be distributed equally between the parties

[60] In September, 2004, CanAm LLC was incorporated. The parties and their two children are its shareholders. CanAM LLC is governed by an operating agreement commonly referred to as the CanAm Agreement.

[61] Dr. Saunders relies upon para. 6.1 of the CanAm Agreement which provides as follows:

> Net cash from operations (net cash from operations) means the gross cash proceeds from the LLC operations less the portion thereof used to pay or establish reserves for all the LLC expenses, debt payments, capital improvements, replacements and contingencies. Subject to the approval of the members, net cash from operations, if any, shall be distributed to the members pro rata in accordance with their respective ownership interest.

[62] Between July, 2008 until the time of trial, Ms. Saunders withdrew $71,000 US from the CanAm account, which the appellant says was contrary to the agreement.

[63] With respect, Dr. Saunders' argument on this point assumes that the support obligations paid out of CanAm were CanAm's obligation and that for every $2,000 that Ms. Saunders took out, he was entitled to take out $2,000. This is not a correct characterization of the arrangement made between the parties in the interim consent order (see ¶ 6). The $2,000 paid out of CanAm was a means by which Dr. Saunders financed his support payments. The trial judge, in his decision, addressed the issue head on and held:

> [25] I agree with counsel for Ms. Saunders that the $2,000 per month withdrawn from CanAm LLC as part of the spousal support order, was a way for Dr. Saunders to finance a portion of his spousal support obligation. In other words, it was a cash flow issue for Dr. Saunders and CanAm LLC was designated to pay this amount. Similarly throughout the parties' lifetime together CanAm LLC was used for cash flow for various family purposes. Despite the terms of the agreement now being relied upon by Dr. Saunders to suggest that any withdrawal

> by Ms. Saunders required an equal amount be paid to him, I am satisfied that this is the appropriate way to deal with the balance of these CanAm LLC funds. To do otherwise would be unfair. The payment of $2,000 from CanAm LLC to pay a part of Dr. Saunders' support obligation was consented to by way of consent order issued out of this court, and to now take the position that he is entitled to an equal amount of funds out of CanAm LLC, based on technical requirements of the CanAm LLC Agreement, is unfair. The balance remaining in trust after payment of $4,180.39 to Ms. Saunders is to be divided between the parties.

[64] Although the trial judge makes reference to the "technical requirements of the CanAm LLC Agreement", there is nothing done by the parties which ran afoul of that Agreement. If Dr. Saunders wished to have the funds shared equally out of the CanAm account, it would be necessary for him to pay back the monies withdrawn from the CanAm account to finance his support payments. In other words, if Ms. Saunders was to pay Dr. Saunders $35,500, being half the amount which she withdrew from the CanAm account, he would have to pay to her $38,000 that he owed to her in relation to the $2,000 per month spousal support payment.

[65] By treating the funds in the CanAm account as he did, the trial judge committed no error. I would dismiss this ground of appeal.

Costs

[66] As success on the appeal was divided, I would not award costs to either party.

Farrar, J.A.

Concurred in:

Fichaud, J.A.

Bryson, J.A