NOVA SCOTIA COURT OF APPEAL
Citation: *Johnson v. Barker*, 2017 NSCA 53

Date: 20170614
Docket: CA 453214
Registry: Halifax

Between:

Glenn Evan Johnson

Appellant

v.

Marla Jean Barker

Respondent

Judges:	Beveridge, Hamilton, Farrar JJ.A.
Appeal Heard:	March 16, 2017, in Halifax, Nova Scotia
Held:	Appeal allowed without costs, per reasons for judgment of Hamilton, J.A.; Beveridge and Farrar, JJ.A. concurring
Counsel:	Kenzie MacKinnon, Q.C. and Keith Lehwald, for the appellant Deborah Bowes, for the respondent

Reasons for judgment:

[1] The main issue in this appeal is the amount of annual income imputed to the appellant, Glenn Evan Johnson, by Judge Corrine E. Sparks of the Family Court of Nova Scotia, for the purpose of paying spousal maintenance to his ex-common law spouse, the respondent, Marla Jean Barker. The judge imputed an annual income of $102,133 to him, in addition to his average reported total income of $47,867. She based the additional income on the large amount of cash the appellant kept in his office, his assets, his ownership of G.E. Johnson Trucking Ltd. and his benefits from using company assets and having capital gains income.

[2] For the reasons that follow, I would allow the appeal without costs to either party, set aside the judge's June 6, 2016 Order, order a new hearing of the respondent's application by a different judge and increase spousal maintenance payable by the appellant to the respondent to $1,500 per month, retroactive to January 2016, until the completion of the new hearing or otherwise agreed to by the parties.

Background

[3] The parties were in a common law relationship for almost 20 years, separating in September 2014 when the appellant was 58 years old and the respondent 50. They have no children. Before and during their relationship, the appellant's company consecutively operated many small businesses as opportunities changed including construction, excavation, aggregate sales, snowplowing, digging wells, sales of all-terrain vehicles and small-engine lawn products, rentals and a car and dog wash. In addition, the appellant personally bought real estate, fixed it up and sold it, sometimes living in it as a principal residence. The respondent was mostly employed doing clerical and manual work for the appellant's businesses while the parties lived together.

[4] Both have a grade 12 education. The respondent also has a diploma in offset printing and commercial graphics and attended part of an electronic trade course.

[5] In September 2014, the respondent received a letter from the appellant's lawyer indicating the appellant wanted to separate and for her to leave their home. The respondent testified that when she received this letter, she secretly took keys to the appellant's office and removed, without his authority, four boxes she thought contained the appellant's cash and documents. She gave evidence that she had

previously looked in the boxes and had seen the appellant's scribbled numbers which she interpreted to mean there was up to $480,000 in the boxes. The appellant discovered she had taken the boxes. The police were called. The parties agree that when the police arrived, two of the boxes were returned to the appellant. The appellant acknowledged finding a third box in the barn. He testified that two of the boxes he recovered contained documents only and that the third contained company revenue of approximately $10,000 in cash and cheques that had not yet been deposited into the company's bank account. He testified he never found the fourth box which contained $140,000 in cash of his after-tax savings which he always kept separate from his company's revenues. The respondent testified she did not have the fourth box.

[6] The respondent continued living in the home after she received the letter. The appellant moved out. On February 3, 2015, she filed an application for spousal maintenance. Prior to the hearing of the application, the parties reached an agreement in April 2015 whereby the appellant would pay the respondent $750 per month spousal maintenance, based on the appellant's reported annual income of $36,414.66. An Interim Consent Order to this effect was issued on June 5, 2015 and the hearing date for the respondent's application was adjourned.

[7] The respondent subsequently moved out of their home after the appellant turned up at the house, unannounced, with another woman. At that time, he insisted the respondent move out. Her application for spousal maintenance was heard commencing November 26, 2015.

Decision

[8] The judge gave her oral decision (FWMCA – 094302) on April 15, 2016. She began by stating that the appellant's actions in causing the respondent to leave their home "cast him in a rather negative light, as he has shown an inability to honour his legal commitments under the terms of a negotiated separation agreement." There is nothing in the record indicating there was a negotiated agreement providing that the respondent would continue to live in the house. The judge's misunderstanding concerning the existence of such an agreement permeates her assessment of the appellant's evidence throughout her decision. It led her to make comments irrelevant to the determination of the appellant's income, the only issue before her. Amongst other things, she said:

> It would be an understatement to say this action was unwise and ruthless on the part of the husband. . . . Rhetorically, the question must be asked: Why was it not possible for the husband to wait for resolution of his legal and financial matters before bullishly forcing himself into the couple's home, albeit with another woman?
>
> More broadly, however, this unfavourable and poor choice by the husband fails to demonstrate even a scintilla of compassion for the wife and her dire financial circumstances.

[9] The judge referred to s. 16 to 19 of the *Child Support Guidelines* in determining the appellant's income for spousal maintenance purposes, as the parties agreed she should. She correctly stated that the burden was on the respondent to prove that income should be imputed to the appellant.

[10] Referring to ss. 16 and 17 of the *Guidelines*, the judge found the average total income reported in the appellant's tax returns for the last three years was $47,867. The parties agreed.

[11] She found this amount was not appropriate as the appellant's income for support purposes:

> In the present circumstances, neither of these approaches [applying s. 16 and 17] are appropriate, as the payor husband has a lifestyle which demonstrates extravagant spending, and an ability to divert and hoard large sums of cash at home. Through his excessive accumulation of cash, the husband, I find, has amassed significant assets, along with many nonessential items, such as a boat, Harley Davidson motorcycle, and a myriad of adult luxury and sporting items.

[12] The judge then referred to ss. 18 and 19 of the *Guidelines*. She initially noted the authority in s. 18(1) to consider a company's pre-tax income, but in her analysis she only referred to the company's retained earnings. She noted the authority in s. 19(1) to take into account the lower tax rate that applies to dividends, capital gains and diverted income:

> **That said, I now turn to Section 18(1) of the *Child Support Guidelines*, which provides authority for the Court to consider all or part of the pre-tax income of the corporation for the most recent taxation year.** This is a recourse available if, by applying Section 16 and 17, the Court is unable to establish appropriate income for a self-employed individual.
>
> With this in mind, I turn to Section 19(10)(sic), which deems it appropriate for the Court to impute income in a host of circumstances which include, among other things, where it appears that income has been diverted

> which could affect the level of child maintenance to be determined under the *Guidelines*, and where the parent unreasonably deducts expenses from income.
>
> And finally, Section 19(1)(h), where a parent derives a significant portion of income from dividends, capital gains or other sources that are taxed at a lower rate than employment or business income, or that are exempt from tax.
>
> In addressing Section 19(1)(d), where funds have been diverted by the support payor, here I find the husband has stashed away at his home huge sums of cash, which could and should have been declared as income. As the wife was employed for many years in the husband's business, I accept her evidence that the husband would often be paid large sums in cash for drilling wells, and so on.
>
> The husband himself admitted he does not make regular deposits from the dog wash and car wash businesses, an usual practice to say the least, and again, this leads me to conclude significant funds were being diverted. Thus, I find part of the cash stored at home should be included as his income.
>
> **As well, the husband has funds retained in his corporation, and these retained earnings, as well, should form part of his income.** The objective here is to prevent a payor from shielding himself from payment of appropriate spousal support by, in effect, making minimal draws, and consequently leaving the bulk of his earnings in his corporate account.
>
> [Emphasis added]

[13] The judge found the appellant had $200,000 in cash at the time of separation. She found this was untaxed income, rather than his after-tax savings, and that it should be taken into account in determining his income for spousal maintenance purposes.

[14] She imputed an annual income of $150,000 to the appellant, calculated as follows:

1. $47,867, his average total income as reported in his tax returns for the last three years, plus
2. $66,666, one third of the $200,000 cash, plus
3. $16,666, one third of $50,000, determined by reference only to the retained earnings disclosed in the company's most recent balance sheet, plus

4. $18,801, a catch-all amount to round the appellant's income up to $150,000, determined without specifying amounts but by mentioning the non-cash nature of depreciation, the appellant's benefit from using the company's truck and cell phone and the favourable tax treatment of capital gains.

[15] Based on the appellant's imputed income of $150,000 and the respondent's annual income of $5,196, the judge ordered the appellant to pay monthly spousal maintenance of $3,600 to the respondent indefinitely.

[16] She found the spousal maintenance should be paid indefinitely based on the respondent's limited employment options – in light of her limited education and reliance on the appellant and her contributions to the appellant's business success.

[17] The respondent had not made an application for division of property at the time of the hearing before the judge.

Issues

[18] There are three issues:

1. Did the judge err in imputing an annual income of $150,000 to the appellant?
2. Did the judge err in ordering the appellant to pay monthly spousal maintenance of $3,600?
3. Did the judge err in awarding spousal maintenance for an indefinite period as opposed to having support cease at the time the appellant turns 65?

Standard of Review

[19] The standard of review applying to an order for spousal maintenance was most recently set out in *White v. White*, 2016 NSCA 82 at para. 13:

> [13] . . . In the process, I will be mindful of the deference owed to Justice Stewart. This Court in *MacLennan v. MacLennan*, 2003 NSCA 9 explained:
>
> > [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 (N.S. C.A.) at 162; *LeBlanc v. LeBlanc*, [1988] 1 S.C.R. 217 (S.C.C.) at 223 - 24; *Elsom v. Elsom*, [1989] 1 S.C.R. 1367 (S.C.C.) at 1374 - 77; *Hickey v. Hickey*, [1999] 2 S.C.R. 518 (S.C.C.) at paras. 10 - 13.

[20] A shorter version of the same principle is set out in *Hurley v. Hurley*, 2012 NSCA 32 at para. 49:

> [49] The standard of review applicable in cases concerned with spousal support is well-known. 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 (*Saunders v. Saunders*, 2011 NSCA 81, para. 18).

Analysis

1. Did the judge err in imputing an annual income of $150,000 to the appellant?

[21] Spousal maintenance for common law couples is determined first and foremost by the statutory provisions in ss. 3-6 of the *Maintenance and Custody Act*, R.S.N.S. 1989, c.160. It is also guided by the Supreme Court of Canada's positions on compensatory and non-compensatory spousal support entitlement, quantum and duration in *Moge v. Moge*, [1992] 3 S.C.R. 813, and *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420.

[22] A judge may also consider the federal *Spousal Support Advisory Guidelines* (*SSAG*); *Kuszelewski v. Michaud*, 2009 NSCA 118, para. 34. Section 6.1 of the *SSAG* says the starting point for determining income is the factors set out in ss. 15-20 of the federal *Child Support Guidelines* and notes the importance of imputing income in some cases. The parties agree the judge was correct in referring to ss. 16-19 of the *Child Support Guidelines* in determining the amount of spousal maintenance.

[23] Section 16 of the *Child Support Guidelines* provides the starting point for determining the appellant's income:

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

Schedule III provides for adjustments, including those to neutralize the favourable tax rates for dividends and capital gains, as compared to other income, and to take into account non-cash expenses such as capital cost allowance.

[24] Section 17 provides that if the court is of the opinion that s. 16 does not provide the fairest determination of the appellant's income, the court can determine an amount based on the spouse's pattern of income over the last three years.

[25] Sections 18 and 19 deal with corporate income and other possible adjustments to income respectively:

> **Shareholder, director or officer**
>
> 18 (1) Where a spouse is a shareholder, director or officer of a corporation and the court is of the opinion that the amount of the spouse's annual income as determined under section 16 does not fairly reflect all the money available to the spouse for the payment of child support, the court may consider the situations described in section 17 and determine the spouse's annual income to include
>
> > (a) all or part of the pre-tax income of the corporation, and of any corporation that is related to that corporation, for the most recent taxation year; or
> >
> > (b) an amount commensurate with the services that the spouse provides to the corporation, provided that the amount does not exceed the corporation's pre-tax income.
>
> **Adjustment to corporation's pre-tax income**
>
> (2) In determining the pre-tax income of a corporation for the purposes of subsection (1), all amounts paid by the corporation as salaries, wages or management fees, or other payments or benefits, to or on behalf of persons with whom the corporation does not deal at arm's length must be added to the pre-tax income, unless the spouse establishes that the payments were reasonable in the circumstances.
>
> **Imputing income**
>
> 19 (1) The court may impute such amount of income to a spouse as it considers appropriate in the circumstances, which circumstances include the following:
>
> > (a) the spouse is intentionally under-employed or unemployed, other than where the under-employment or unemployment is required by the needs of

> a child of the marriage or any child under the age of majority or by the reasonable educational or health needs of the spouse;
>
> (b) the spouse is exempt from paying federal or provincial income tax;
>
> (c) the spouse lives in a country that has effective rates of income tax that are significantly lower than those in Canada;
>
> (d) it appears that income has been diverted which would affect the level of child support to be determined under these Guidelines;
>
> (e) the spouse's property is not reasonably utilized to generate income;
>
> (f) the spouse has failed to provide income information when under a legal obligation to do so;
>
> (g) the spouse unreasonably deducts expenses from income;
>
> (h) the spouse derives a significant portion of income from dividends, capital gains or other sources that are taxed at a lower rate than employment or business income or that are exempt from tax; and
>
> (i) the spouse is a beneficiary under a trust and is or will be in receipt of income or other benefits from the trust.

[26] As set out in paragraph 14 above, the judge first determined that the appellant's income for purposes of s. 16 and 17 was $47,867. The parties agree with this amount, even though it does not reflect any Schedule III adjustments, presumably because no evidence was presented as to the amount by which the appellant's total reported income should be adjusted.

[27] As set out in *Coadic v. Coadic,* 2005 NSSC 291:

> [11] The court cannot impute income on an arbitrary basis, rather there must be a rational and a solid evidentiary foundation in order to do so. Imputation of income must be governed by principles of reasonableness and fairness in keeping with the case law which has developed.

Cash

[28] As indicated in paragraph 13 above, the judge found the appellant had $200,000 in cash at the time of separation and that this was untaxed income rather than the appellant's after-tax savings. She divided this amount by three and imputed $66,666 per year to the appellant:

> **The next question is when [were] these funds stashed away at home, and there's no convincing evidence on this.** However, the parties have cohabited for nearly 20 years. But I do find the husband's excessive expenditures

> on motorcycles, ATV, cars, boats, et cetera have persuaded me that his cash reserves at home far exceeded the sum which was being claimed by him and the amount that he claims was lost.
>
> So I will use the sum of two hundred thousand for the past three years, and I find six hundred and six – six thousand, six hundred and sixty-six dollars ($6,666) (sic) should be added to the annual draws and investment income of the support payor, for a total of one hundred and twenty-three thousand, eight hundred and ninety thousand (sic), one hundred and three thousand and eighty-one dollars ($103,081), and one hundred and sixteen, six hundred and twenty-eight dollars ($116,629), for the years 2012, 2013 and 2014, respectively.
>
> [Emphasis added]

[29] I have two concerns with this.

[30] First, there is no sound evidentiary basis for the judge's finding that the $200,000 "was likely stored at home to avoid tax liability". The appellant directly addressed the source and history of the $140,000 he said was in the missing box and no contradictory evidence was presented.

[31] The appellant's evidence was that, as far back as 1985, his practice was to keep some of his after-tax savings in a box, first at home and later at his office. He testified to having approximately $40,000 in cash saved by 2000 and $50,000 in cash by 2005. He explained his practice of keeping a portion of the profits from the sale of his personal real property in cash in the box after paying bills and investing some. He specified these sales: his St. Croix home, his first gravel pit in 2001, mobile homes, Crossley Court in 2012, Gerrish St., and Mantua in 2014. His taxable capital gains from some of these sales are included in his filed tax returns.

[32] The respondent testified that the appellant received cash in payment for work done by the company and for rent and that he put it in the boxes. She also gave evidence that she did not know if the appellant or his company declared the cash he received for income tax purposes:

> Q. What you would see is you would see money being received? But I'm suggesting to you that you would have no way of knowing that Mr. Johnson wouldn't later [after receiving cash payments] tell his bookkeeper or accountant about those receipts?
>
> A. No.
>
> Q. No what?

> A. I wouldn't know what he told the accountant later.
>
> . . .
>
> Q. Or what – and that could include him telling the accountant about every penny he received in payments? It's possible that Mr. Johnson told his accountant about every penny, isn't that true?
>
> A. I strongly doubt that, just from what I witnessed over the years, that's all.
>
> Q. And what – but all you witnessed is the receipt of money, isn't that right?
>
> A. Correct. I don't know what he does with his money, no.

[33] In concluding the $200,000 was undeclared income, the judge relied on the appellant's lifestyle, represented by the $200,000 cash and his accumulated assets. She noted the then 60-year-old appellant had assets with a value exceeding $636,072, while his annual draw from the company was only $30,000. She declared that his lifestyle was "extravagant" and that he made "lavish and extreme expenditures". These statements were based on the appellant's ownership of a boat and motor ($9,200), an ATV ($6,000), a car ($18,000), a Harley Davidson motorcycle ($4,500), and an old car, truck and scooter of little value according to the appellant's Statement of Property.

[34] I am satisfied the judge erred in finding the $200,000 in cash was undeclared income because there was no adequate evidentiary basis before her on which she could reach this conclusion. The appellant had accrued significant assets after working for forty years and he provided explanations of how his real estate ventures helped him do this. The respondent and the judge agreed he worked hard. The parties had no children. With respect to the judge, the appellant's ownership of a boat, car, ATV, and motorcycle with a total value of $30,500, does not indicate an extravagant lifestyle.

[35] Second, the judge provides no explanation of why she divided the $200,000 cash by three and imputed $66,666 per year to the appellant, in effect finding he received $66,666 undeclared income each year. In fact, she states there was no convincing evidence as to the period of time over which the cash was accumulated. The burden of proof was on the respondent to prove the amount of income that should be imputed, if any, to the appellant (*Homsi v. Zaya*, 2009 ONCA 322). If the judge was saying the appellant's ownership of the motorcycles, ATV, car and boat valued by the appellant at a total of $30,500 supports adding $66,666 to the appellant's income every year, this is clearly wrong.

[36] Also, the judge gave no indication where the $66,666 per year will come from after the first three years when the $200,000 cash is exhausted.

[37] The judge's conclusion that the $200,000 cash was accumulated over just three years is based on her misapprehension of the evidence, as there is nothing in the record to support it.

Income imputed by reference to the appellant's company

[38] The judge also imputed an additional $16,666 to the appellant's annual income by reference to his company:

> **Additionally, in examining the 2015 Statement of Earnings [of the company] . . . I will deduct at least fifty thousand from his corporate retained earnings of a hundred and seventy-six thousand, eight hundred and twenty-three dollars ($176,823), which includes eighty-five thousand, nine hundred fifty-seven dollars ($85,957) in cash.** This, in my view, is a modest amount, and will leave the payor with at least a hundred and twenty-six thousand, seven hundred and seventy-three dollars ($126,773) in retained earnings, and with sufficient funds to promote his business interests, as well as allow discretionary funds for unexpected and unforeseeable events.
>
> Again, I would spread this over three years, and this increases the husband's income by at least sixteen thousand, six hundred and sixty-six ($16,666). . . .
>
> [Emphasis added]

[39] This too causes concern.

[40] While earlier in her decision the judge correctly referred to s. 18(1) as authorizing her to consider the company's pre-tax income for its most recent taxation year when determining the appellant's income for support purposes, she did not take the company's pre-tax income into account in her s. 18(1) analysis. In fact, the financial statements of the company indicate it had no pre-tax income for its 2015 taxation year, just a pre-tax loss of $26,401.

[41] Rather, in imputing $16,666 per year to the appellant, the only factor the judge considered was the company's retained earnings, which she stated included the company's cash on hand of $85,957, disclosed in its June 30, 2015 balance sheet.

[42] The judge's statement that cash is included in retained earnings was contrary to the evidence of the company's accountant:

> The Court: On the statement of earnings and retained earnings it says for the year-end June 30th, 2015, the retained earnings were one seventy-nine eight hundred and twenty-three dollars ($179,823), but what does that mean in terms of cash flow? Does that mean there's that amount of money in the bank at the end of the fiscal year?
>
> . . .
>
> A. So, that's a cumulative . . . balance . . . that's what the business has accrued in value.
>
> The Court: Equity?
>
> A. Yeah, that would be the equity.
>
> The Court: Not necessarily cash but it could be cash?
>
> A. No, that wouldn't be cash.
>
> The Court: Cash wouldn't be a component?
>
> A. No. No.
>
> The Court: Okay.
>
> A. That's strictly equity.

[43] The thrust of recent case law on s. 18(1)(a) suggests that merely looking at the retained earnings of a company is of limited assistance in applying s. 18 of the *Guidelines*.

[44] In *Child Support Guidelines in Canada, 2015*, Payne and Payne observe at p. 160:

> **It is pre-tax net corporate earnings and not retained earnings that should be used in applying section 18 of the Guidelines. [***Miller v. Joynt,* 2007 ABCA 214; *Mayer v. Mayer,* 2013 ONSC 7099] In *Nykiforuk v. Richmond* [2007 SKQB 433], Ryan-Froslie J. (as she then was) of the Saskatchewan Court of Queen's Bench (Family Division) observed that, in determining whether to exercise its discretion pursuant to section 18 of the Guidelines, the court must be satisfied that additional money is actually available and that it can be paid to the shareholder without endangering the financial viability of the company. **Merely looking at the retained earnings of the corporation is of limited assistance. Retained earnings are a shareholder's equity in the corporation (its assets less its liabilities). They do not represent cash available for distribution, nor do they reflect the pre-tax income of the corporation.** In making a determination

> pursuant to section 18 of the Guidelines, a wide range of factors must be considered, including:
>
> 1) The pre-tax income of the corporation;
> 2) The nature of the business involved (Is it capital intensive or service-oriented? Is it subject to seasonal fluctuations or economic cycles?);
> 3) The corporate share structure, including any obligation imposed by shareholders' agreements;
> 4) The financial position and general operations of the company (What are the company's operating requirements, its inventory, accounts receivable and accounts payable? Are there bank covenants which may affect payment out of funds? Is there a necessity to upgrade equipment, etc.?); and
> 5) Is the company a well-established one or merely in its start-up phase?
>
> [Emphasis added]

Later, the pair write on p. 173:

> . . . **Pre-tax income and retained earnings are not the same and must not be confused in an application under section 18 of the Guidelines**. As the British Columbia Court of Appeal stated in *Hausmann v. Klukas,* retained earnings in a company's financial statement represent equity, not cash. Only the pre-tax income of a corporation for the most recent taxation year may be included in a spouse's annual income under section 18(1)(a) of the Guidelines. Section 18 is not directed at retained corporate earnings over several years but such retained earnings may result in the imputation of income to a spouse under section 19 of the Guidelines.
>
> [Emphasis added]

See also: Dinyar Marzban and Jamie R. Wood, "*Lifting the Corporate Veil: Income Determinations for Shareholders, Directors and Officers Under Section 18 of the Federal Child Support Guidelines*" (2012) 31 C.F.L.Q. 1; *Bembridge v. Bembridge*, 2009 NSSC 158, paras. 33 to 36.

[45] The judge was faced with a common difficult situation where there was no forensic accounting evidence to help her determine what, if any, amount to impute to the appellant in light of the financial circumstances of his company. While I am sympathetic to this, her brief reasons with respect to this issue suggest she erred in principle by resting her decision only on retained earnings and failing to consider the whole of the company's financial situation when she imputed $16,666 to the appellant.

Final component

[46] The final amount the judge imputed to the appellant was $18,801. Her only explanation for this was:

> I have also taken into account a modest adjustment for a depreciation of rental properties. The purchase dates vary, and the evidence is certainly imprecise, but globally, I have taken this into account, along with, of course, the use of the vehicle, the cell phone, and so on. Finally, I am aware that the husband receives considerable tax benefit from his capital gains allowance.

[47] She provided no breakdown of this amount and no value for any of the factors she referred to. It is impossible to discern the basis of this part of the judge's decision. For instance, I do not know if she took into consideration that the amount of capital cost allowance claimed by the appellant in each of his filed tax returns was less than $100 and that his tax benefit from receiving capital gains income is moderated by the fact he is generally taxed at the lowest marginal tax rate. There was no evidence of the amount of his benefit from using the company's cell phone and truck.

[48] Taking all of this into account, I am satisfied the judge erred in imputing an income of $150,000 to the appellant. She misunderstood the evidence, and found facts based on no sound evidentiary basis. She erred in principle and failed to consider all relevant factors in reaching certain conclusions. Her reasons are sometimes insufficient to allow me to determine the basis of her decision.

[49] I would allow this ground of appeal.

2. Did the judge err in ordering the appellant to pay monthly spousal maintenance of $3,600?

3. Did the judge err in awarding spousal maintenance for an indefinite period as opposed to having support cease at the time that Mr. Johnson turns 65 years of age?

[50] It is not necessary for me to deal with these two issues in light of my conclusion that the judge erred by imputing an annual income of $150,000 to the appellant and that the matter should be reheard by a different judge.

[51] The respondent's Notice of Contention does not provide a basis for upholding the judge's decision for different reasons.

[52] On finding an error in a spousal maintenance case such as this, my preference is to set the appropriate amount of spousal maintenance rather than return the matter for rehearing because of the time and money involved in a rehearing. In this case, however, it is necessary to order a rehearing because I am concerned the judge's misunderstanding of the evidence on what was included in the negotiated agreement between the parties with respect to the respondent's ability to stay in the home significantly affected her assessment of the appellant and her findings. In addition, her reasons indicate she was uncomfortable with the credibility of both parties on certain issues:

> I have considered the assertions of the wife may be inflated due to the unfortunate circumstances of the couple, and possible motives behind her testimony.
>
> . . .
>
> I do not accept the evidence placed before the Court by either party, for the reasons stated above. Here, the Court has reason to be suspicious of the veracity of both parties.

[53] Credibility is something better left to a judge of first instance.

[54] While I would order a rehearing of the respondent's application, I am satisfied in the meantime that the amount of spousal maintenance payable to the respondent should be increased to $1,500 per month, retroactive to January 2016, rather than revert to $750 as provided for in the June 5, 2015 Interim Consent Order. This is based on the parties' agreement that the appellant's average income as reported in his tax returns was $47,867 and the appellant's agreement the spousal maintenance should be $1,500 per month based on that amount. The respondent should have the benefit of this increase starting immediately.

[55] I would allow the appeal without costs to either party, set aside the judge's June 6, 2016 Order, order a new hearing of the respondent's application by a different judge and, as agreed by the appellant, increase the spousal maintenance payable by the appellant to the respondent to $1,500 per month, retroactive to

January 2016, until the completion of the new hearing or otherwise agreed to by the parties.

Hamilton, J.A.

Concurred in:

Beveridge, J.A.

Farrar, J.A.