

Date: May 6, 2002  
Docket: F.Y. No. 01Y0077

**THE FAMILY COURT FOR THE PROVINCE OF NOVA SCOTIA**  
[Cite as *S.A.C. v. M.A.B.*, 2002 NSFC 9]

BETWEEN:

S.A.C.

Applicant

and

M.A.B.

Respondent

**DECISION**

<p><b>Editorial Notice:</b> Identifying information was removed from this electronic version of the judgment.</p>
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**HEARD BEFORE:** The Honourable John D. Comeau, Chief Judge of the Family Court for the Province of Nova Scotia

**DATE HEARD:** April 3, 2002

**PLACE HEARD:** Yarmouth, Nova Scotia

**DATE OF DECISION:** April 26, 2002

**COUNSEL:**

Gregory M. Warner, Q.C. - for the Applicant

Andrew S. Nickerson, Q.C. - for the Respondent

COMEAU, CJFC:

**THE APPLICATION:**

[1] On August 21, 2001, the Applicant mother/spouse, S.A.C., applied for custody and maintenance for two children: B. born May \*, 1993, and A. born June

\*, 1990, with reasonable access to the Respondent. Following court appearance on October 24, 2001, the Applicant was granted interim custody with reasonable access to the Respondent. Child support in the amount of \$855.00 per month based on an annual income of \$64,504.00 was ordered to commence retroactive to September 1, 2001.

[2] The Applicant applied for further relief on October 10, 2001, spousal support and special expenses of medical/dental covered by the Respondent's medical/dental plan. Following this an application for corporate financial disclosure was made (the Respondent owns 49 % share of the company with which he is employed as manager) and by separate decision dated February 26, 2002, the Court found the Respondent not to be in control of the company. The Respondent and/or company were not under legal duty to make corporate financial disclosure.

### **THE FACTS:**

#### **Consideration Concerning Spousal Support**

[3] The Applicant Mother, S.A.C., lived with the Respondent in a common-law situation for fourteen years. There are two children of this relationship, namely, B., 8, and A., 11. When the relationship started the Applicant had her own \* business (Grade XII plus this trade). Three years ago she worked in \* and was working doing bookkeeping for the Respondent's company. She left this employment

shortly after the parties separated because she felt he would fire her in any event.

Since that time she worked at \* and a store, also filled in two months at the \*,

recently receiving a permanent part-time job at the \*.

[4] At the present time she is being treated for a disease that affects the skin and results in weakness of the muscle.

**FINANCIAL (Applicant):**

[5] Approximate Income -

30 hours a week at \$9.50 per hour

\$285.00 per week x 4.3 = \$1225.50 month

Child Tax Credit - \$450.00 per month

TOTAL per month is \$1675.00 less deductions for EI, CPP and Total

Monthly Expenses are \$2208.00

**FINANCIAL (Respondent):**

[6] Line 150 income as per Canada Customs and Revenue Agency individual income tax return:

- 1998 - \$37,800.00
- 1999 - \$104,908.00 (this included \$55,308.00 in RRSP income)

- T4 for Income in 2001 - \$26,000.00 - He says this has been his only income for the year and for the past four years has had income only from the company where he works as manager and is a shareholder.

[7] The Respondent explains that his income has been reduced because he and his brother are involved in a lawsuit with respect to the corporation (he owns 49%, his brother 49% and his mother 2%) and the assets of same are being used to pay counsel. He refused to explain what this was all about except that in 1999 his brother withdrew a loan guarantee from the bank and the Respondent and his mother had to take care of what was owed in the amount of \$175,000.00

[8] The withdrawal in 1999 in the amount of \$55,308.00 from his RRSP was to pay the company's line of credit at the bank. This is confirmed on page three of a trust document entered into evidence which totals \$42,257.02. A year ago these funds were paid back to him in total by the company. He says they were used by he and the Applicant for trips and household items before they separated in August 2001.

### **ISSUES:**

[9] Child support, special expenses medical/dental and spousal support and the determination of income for those purposes.

### **THE LAW:**

## Child Support

[10] The determination of child support with respect to unmarried spouses is made under the Nova Scotia Child Maintenance Guidelines.

### **Calculation of Annual Income**

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

17(1) If the court is of the opinion that the determination of a parent's annual income under Section 16 would not be the fairest determination of that income, the court may have regard to the parent's income over the last 3 years and determine an amount that is fair and reasonable in light of any pattern of income, fluctuation in income or receipt of a non-recurring amount during those years.

### **Spousal Support:**

[11] Spousal support is made considering the factors set out in Section 4.

"common-law partner" of an individual means another individual who has cohabited with the individual in a conjugal relationship for a period of at least two years.

In determining whether to order a person to pay maintenance to that person's spouse or common-law partner and the amount of any maintenance to be paid, the court shall consider

- (a) the division of function in their relationship;
- (b) the express or tacit agreement of the spouses or common-law partners that one will maintain the other;
- (c) the terms of a marriage contract or separation agreement between the spouses or common-law partners;
- (d) custodial arrangements made with respect to the children of the relationship;
- (e) the obligations of each spouse or common-law partner towards any children;
- (f) the physical or mental disability of either spouse or common-law partner;

- (g) the inability of a spouse or common-law partner to obtain gainful employment;
- (h) the contribution of a spouse or common-law partner to the education or career potential of the other;
- (i) the reasonable needs of the spouse or common-law partner with a right to maintenance;
- (j) the reasonable needs of the spouse or common-law partner obliged to pay maintenance;
- (k) the separate property of each spouse or common-law partner;
- (l) the ability to pay of the spouse or common-law partner who is obliged to pay maintenance having regard to that spouse's or common-law partner's obligation to pay child maintenance in accordance with the Guidelines;
- (m) the ability of the spouse or common-law partner with the right to maintenance to contribute to his own maintenance. *R.S., c. 160, s. 4; 1997(2nd Sess.), c. 3; 2000, c. 29, ss. 5,8.*

#### **Obligation of Maintained Spouse**

A maintained spouse or common-law partner has an obligation to assume responsibility for his own maintenance unless, considering the ages of the spouses or common-law partners, the duration of the relationship, the nature of the needs of the maintained spouse or common-law partner and the origin of those needs, it would be unreasonable to require the maintained spouse or common-law partner to assume responsibility for his maintenance, and it would be reasonable to require the other spouse or common-law partner to continue to bear this responsibility. *R.S., c. 160, s. 5; 2000, c. 29, s. 8.*

In **Moge v. Moge** (1992) 43 R. F. L. (3d) 345 the Supreme Court discussed economic self-sufficiency as it relates to **Marriage** and the **Divorce Act**. These comments are relevant to this fourteen year common law relationship and Section 5

of the **Maintenance and Custody Act**. The Applicant has a job, however, given her salary and reasonable expenses she is not self-sufficient and may never be.

Justice L'Hevreux-Dube in **Moge** refers to the practicality of this goal.

“It is also imperative to realize that the objective of self-sufficiency is tempered by the caveat that it is to be made a goal only “in so far as is practicable.” This qualification militates against the kind of “sink or swim” stance upon which the deemed self-sufficiency model is premised. (See Bailey, at p. 633, and Droit de la famille - 623, [1989] R. D. F. 196, (sub nom. G. (J. Y.) v. G. (R.)) 34 Q. A. C. 97 (C. A.), at pp. 201 - 202 [R. D. F.].)”

## **CONCLUSIONS/DECISION:**

### **Child Support**

[12] The Respondent's income average is the fairest way to determine his annual income. Section 17 of the Guidelines is applicable having regard to the pattern of income.

[13] Counsel for the Applicant asks the Court to consider the non-recurring amount from RRSP's included in 1999 income. Evidence is that the amount paid on behalf of the corporation for which he is a shareholder paid him back approximately \$42,257.02. The Respondent admits there were funds paid to him, but that he spent them with the assistance of the Applicant prior to their separation.

[14] The fairest determination of income for the Respondent is an average of the last three years without the use of the non-recurring amount.

1999 - \$49,600.00

2000 - \$64,504.00

2001 - \$26,000.00

Average - \$46,701.33

[15] The table amount for two children is \$638.00 commencing May 1, 2002, which takes into account the Respondent is obliged to pay amounts under an Interim Child Support Order dated October 24, 2001, until May 1, 2002. Judgement is also granted for costs in the amount of \$300.00 ordered by Judge Black on November 14, 2001. The Respondent shall provide for medical/dental coverage for the children.

### **Spousal Support**

[16] The Court has considered Section 4 of the **Maintenance and Custody Act** as well as Section 5. The Applicant has always worked and has obtained employment at the \* on a permanent part-time basis. There has been a period of financial adjustment and the Respondent has failed to pay interim child support ordered many months ago. Consequently, the Applicant has had difficulty complying with the requirement of Section 5.

[17] The Applicant is entitled to spousal support for the following reasons (as outlined in **Moge** supra.)

1. She has sustained economic disadvantage from the dissolution of

the fourteen year common law relationship. This includes expenditure for new living accommodations.

2. There is a long-term responsibility for the upbringing of the children that is not totally compensated by child support. This responsibility interferes with her ability to improve on the potential to earn higher income by further training and the time such a task requires.
3. The Applicant has not become self-sufficient as described in the discussion of the evidence earlier.

[18] An exercise involving financial information is required to determine the amount of spousal support. One method is to determine the standard of living of both parties from the evidence. Because the Applicant's household contains three parties it is impossible to balance out the parties' standard of living. However, the parties' total household adjustment income can be balanced by a quantum of spousal support that the Court has determined to be Three Hundred (\$300.00) Dollars a month commencing May 1, 2002 through maintenance.

**ENFORCEMENT:**

[19] Maintenance Enforcement is requested to issue a garnishee of wages forthwith to the employer of the Respondent for child and spousal support as well as costs ordered.

[20] The parties agree on joint custody with reasonable and liberal access.

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