SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: *Klefenz v. Klefenz*, 2015 NSSC 196

Date: 20150702
Docket: 1201-066790
Registry: Halifax

Between:

Dawn Marie Klefenz

Petitioner

v.

Byron Kees Klefenz

Respondent

Judge: The Honourable Justice Beryl A. MacDonald

Heard: April 20 and 21, 2015

Counsel: Jennifer K. Reid, counsel for the Petitioner;
Jean Beeler, Q.C. for the Respondent

By the Court:

[1] This is a divorce proceeding. The parties began living together in 1993. They married in 1996. They separated November 30, 2011.

[2] I am satisfied all jurisdictional requirements of the *Divorce Act* have been met and there is no possibility of reconciliation. I am further satisfied there has been a permanent breakdown of this marriage. The parties have lived and they continue to live separate and apart from one another for a period in excess of one year from the commencement date of this proceeding. A divorce judgment will be issued.

[3] The parties have one child born of their relationship. That child is now 18 years old, estranged from the Husband and lives with the Wife. He is expected to graduate from high school in June 2015. His plans after graduation are uncertain. The Wife is seeking child support and an order requiring the Husband to proportionally share the child's educational and living expenses should he become enrolled in university, community college, or other educational or skills training program.

[4] The Wife is seeking spousal support, and an equal division of matrimonial property and debt. She also is seeking an equal division of, or an interest in, any assets classified as business assets.

Background

[5] At the time the parties began living together the Wife had recently separated from her first husband. She had primary care of the two children born of that relationship. The Husband had just completed his electrical construction course and was working for a cable company. He worked for that company for 10 years learning how to do residential installations and some line construction. He learned how to splice and work with fibre optics. Initially he was paid $6.00 per hour but later was moved to a "piecework" compensation model.

[6] In 2002 the Husband accepted work with another company as a project manager for six months. After that he was self-employed for a short period of time until he became employed by V***C***, an unincorporated business owned by one person. That owner was not the Husband. This business had three aspects - the main office which operated out of the business owner's home; a construction division which operated out of another employee's home, and the fibre-optic

division that operated from the matrimonial home. In 2006 the main office and the two divisions moved to occupy a building acquired for that purpose. The Husband eventually became the general manager of V***C***.

[7] As a person working for the owner of V***C*** the Husband explained "I was hired and a month later was considered as a potential partner. My role was to establish and increase the fibre splicing capacity for this new endeavor." (Exhibit 5, Tab 4, para.15) However the Husband did not have any ownership interest in this business, nor in the Limited Company created by the original owner, until he was given shares in that Limited Company in approximately August 2011. In the fall of 2011 he acquired shares in the new corporate entity that purchased V***C***, (the transaction). The new corporate entity continued to use V***C***as its business name.

Custody/Access

[8] The parties are to have joint custody of their son who, because of his age, will determine his contact with the Husband. The Wife has primary care.

Child Support

[9] Because of the transaction the parties had difficulty determining the total annual income to be used for the calculation of child support. Nikki L. Robar, CA. CBV of PricewaterhouseCoopers LLP was hired to provide expert evidence about the calculation of the Husband's income after applying sections 15 through 20 as well as Schedule III of the Federal Child Support Guidelines.

[10] Both parties accept the total annual income calculated by Ms. Robar for 2014. It was $168,544.00. The Consent Interim Order granted in this proceeding required the Husband to pay table guideline child support based upon a total annual income of $167,880.00. His payments were to commence April 1, 2013. The difference in the monthly payment is $5.00 per month. Payments based upon $168,544.00 are $1,361.00 monthly and these are to commence July 1, 2015.

[11] The parties' son will be 19 years of age next year. Because I do not know what he will be doing next year I can make no comment about an extension of child support beyond his 19th birthday nor about any potential section 7 claim relating to educational expenses. This will need to be the subject of a variation application.

Classification of Assets

[12] The Wife has requested an equal share in the proceeds the Husband received from the transaction and an ownership interest in the shares he acquired in the new corporate entity because:

- she provided bookkeeping and other services to V***C***
- an office was created in the matrimonial home for use by the Husband and herself in providing services to V***C***
- She was instrumental in convincing the original owner of V***C*** to give the Husband an ownership interest in V***C***
- the Husband led her to believe that they both were developing this business to provide them with a "nest egg" for retirement
- During the marriage the parties split income for tax purposes
- The Husband gave her some of the money he received from the transaction and this is an indication he recognized that she had an ownership interest in the business entities known as V***C*** both before and after the transaction.
- The Interim Consent Order issued April 8, 2013 required the Husband to "…pay out with matrimonial property, all joint debt as between the parties, with the exception of the two mortgages associated with the jointly held real estate."

[13] In support of her claim the Wife makes reference to section 13 and 18 of the *Matrimonial Property Act*. She argues that the shares acquired by the Husband are matrimonial assets as were the proceeds from the transaction. The Husband argues

that these are business assets. If they are, the Wife alleges she should share in their value because of her contribution toward their acquisition.

[14] For several years the Wife worked as a retail accountant for a small business but she was laid off in 1999. Her income when employed never exceeded $30,000.00. In 1999 she began to offer private bookkeeping services under the business name *** Bookkeeping and Accounting Services. She has not had significant earnings from this business. She does not have a CMA designation.

[15] From 2003 until 2008 the Wife was hired by V***C*** to do invoicing and general accounting. She used accounting software and she worked from the matrimonial home. She was paid $15.00 per hour and that was increased to $20.00 per hour in 2008. In May 2008 her employment with V***C*** ended. She has not been employed for any length of time since 2008.

[16] The Wife alleged the owner of V***C***, prior to the transaction, after reviewing the success of the company in 2006, gave the Husband a "promissory note" guaranteeing the Husband would eventually be entitled to 27% of the shares in V***C***. This document, if it existed, was not entered as an exhibit in this proceeding. Even if it did exist neither the affidavit evidence nor the Wife's

testimony during the hearing convinced me that she had anything to do with the owner's ultimate decision to arrange for the Husband's acquisition of shares in V***C***. What is known is that the Husband had no ownership or controlling interest in this company until the transaction. The Wife can take no credit for the transaction. It was the Husband's skills and performance working for V***C*** that resulted in the opportunity for him to become an owner.

[17] The transaction was complex. The means by which the Husband obtained money to purchase the shares, and the means by which he was to be paid for the value of the shares he received, resulted in some assets that, if examined in isolation from the transaction itself, could be considered to be matrimonial. He received bonuses, promissory notes, invested in R.R.S.P's and G.I.C's and was required to provide shareholder's loans. However, to become a shareholder he did not use money that would have, absent the transaction, have been income to him to be used by the family. He did not mortgage a matrimonial asset to acquire the shares. They were not assets, to use the words of Hallett, J.A. in *Tibbetts*, supra, derived from "earnings surplus to the family's needs".

[18] The Wife's paid work for V***C*** did not contribute to the Husband's acquisition of the shares. Her work was done for V***C*** when it was solely

owned by another person. That person may have wanted the Husband as his partner and much of the success of V***C*** may have been because of the Husband's valuable contribution, but the Wife's work cannot give her an interest in a company in which the Husband had no interest. He obtained an interest at a time she no longer worked for V***C***. Even if she could have an interest in such a case, it is important to emphasize she was paid for her work. There is no evidence she was underpaid for the work she performed. In addition the fact that the Husband, for a period of time, did his work from the matrimonial home does not give her an interest in V***C***.

[19] I do not accept the Wife's assertion that the Husband's work in this business was to provide them "a nest egg for retirement". The business for which he worked was owned by another. There was no "nest" he owned at the time in which he could lay an "egg". The owner could have decided to dispense with his services at any time and his only compensation would have been that he receive proper notice as an employee.

[20] The circumstances leading to his acquisition of shares in V***C*** are explained by the Husband. "In the spring of 2011 an offer was made to purchase 70% of V***C*** on the condition that (another employee) and I remain on staff.

This was a very complex and difficult deal to close. The closing did come together and closed in January 2012. I have never understood the details of that sale and have always relied on my accountant, Sarah Veinot. C.A., to ensure that it was handled properly." (Exhibit 5, Tab 4, para. 20) The offer to purchase was made to the then sole owner of V***C***. The Husband at the time had no ownership interest in that business.

[21] The original owner of V***C*** was not a witness in this proceeding. Therefore I do not know why the Husband became, not only an employee of the corporate entity that took over V***C***, but also a shareholder. The Husband was not asked questions about this. However why this occurred is irrelevant. The fact is that the Husband had no ownership or shares in the business known as V***C*** until the transaction occurred. As a result of the transaction, the Husband became, first of all a shareholder in the entity incorporated by the original owner, and then a shareholder in a new corporate entity that purchased the old V***C***. The Husband did not have control in the previous corporate entity nor is he in a position to exercise control within the new corporate entity. There are several other shareholders and directors.

[22] *The Matrimonial Property Act* requires the court to distinguish between assets that are matrimonial and assets that are business assets. In its Final Report "Reform of the Law Dealing with Matrimonial Property in Nova Scotia", the Law Reform Commission of Nova Scotia, March 1997, the authors recommended that the exempt status of business assets should end. In that report the authors commented:

> There is no doubt that the line between business assets and matrimonial assets has been a difficult one for Nova Scotia courts to draw. Without going into a lengthy discussion of the various case authorities, it is clear that there are many decisions which are difficult to reconcile. In particular, the courts have tried to draw line between assets held for long-term investment or appreciation, which tend to be categorized as providing security during retirement and are therefore matrimonial assets, versus assets held for short-term investment or speculation, which are treated as business assets and excluded from division. Any such classification, relying on intentions of the parties which may not be well formulated at the outset and which may change over time or which may not be shared by both parties, will give rise to problems of application."

[23] The Commission also commented, " The general principle behind exemptions is that the property in question is considered to have been acquired in a manner extraneous to the marriage relationship, or to be purely personal to one spouse.", and " Traditionally it has been the domestic services provided by one spouse which have allowed the other spouse to maintain a business." This latter comment would often be subject to criticism because many find it hard to draw a

bright line between domestic services and another person's ability to be successful in a business enterprise. Options such as doing domestic work oneself, as single parents do, hiring housekeepers, nannies and so on come to mind but of course this would not always be available if the business in question could not provide sufficient monies to permit these alternatives. However, the alternate argument is that the "business owner" did not have to address these concerns because his or her wife provided those services. Sometime would have been devoted by the business owner to attend to those matters and while doing so he or she could not attend to the business. Both arguments have merit but Nova Scotia has not changed the *Matrimonial Property Act*. As a result I am forced to attempt to undertake an analysis without a clear principled framework to follow that will assist in asset classification.

[24] There has been an attempt, in the case law, to restrict the category of business assets to property that has been used to generate income or profit in an entrepreneurial manner. Persons who spend time manipulating investment portfolios and who may do so by holding within a portfolio bonds, GICs, R.R.S.P's and mutual funds often are not considered to be persons who are acting in an entrepreneurial manner although it may take considerable skill and experience to

be a successfully investor. (*Tibbets v Tibbets* (1992),119 N.S.R. (2d) 26) However the Court of Appeal, in *Roberts v. Shotton* 156 N.S.R. (2d) 47, stated that the *Tibbets* decision is not authority for the proposition that "even in appropriate factual circumstances an investment portfolio cannot be classified as a business asset".

[25] In that decision the Court of Appeal used a form of tracing in coming to its decision and also relied on section 10 of the *Matrimonial Property Act* in concluding:

> 33 It is unnecessary, in these circumstances, to re-examine the classification of the Midland Walwyn margin and RRSP accounts and the share portion of the Offshore Interests, because, whatever their classification, Ms. Roberts is not entitled to a share. They were clearly accumulated by Mr. Shotten prior to the marriage. Ms. Roberts provided no contribution to their maintenance or improvement. They were not assets, to use the words of Hallett, J.A. in Tibbetts, supra, derived from "earnings surplus to the family's needs". Even if found to be matrimonial assets, the application of s. 13(d) and (e) of the Matrimonial Property Act leads, overwhelmingly, to the conclusion that, in these circumstances, it would be unfair or unconscionable to award Ms. Roberts any share.

[26] The timing of the Husband's acquisition of shares in V***C*** is an important consideration in the classification of the shares. It appears that the original owner of V***C*** arranged to incorporate that business and give shares to the Husband some time from August to October 2011. The parties separated on

November 30, 2011. I think it is fair to say this was not an asset acquired during the parties' relationship although it was acquired shortly before their separation. When I use the term "acquired during the relationship" I am considering a much longer timeframe than two or three months. Strictly speaking the term applies but it must be interpreted in context.

[27] Given the Husband's active involvement in managing and providing services to the corporation in order to develop and maintain its business activities how can one suggest his shares are not being used in an entrepreneurial manner? Shares are a static paper asset but I think it is important to understand what holding the shares means overall. The Husband will receive nothing for his shares if the company does not make a profit and he may suffer losses if the business is not as successful as he expected. There is risk in becoming a shareholder in this company and already the Husband has been required to accept a vendor take back mortgage, to make shareholder's loans and to defer payment he might otherwise be entitled to receive as a shareholder so the company could obtain required financing from a bank. I am satisfied at the time the husband obtained the original shares in V***C*** he received a business asset. The Wife has not proven she has a section

18 interest in that business asset. I make the same finding in respect to the shares the Husband acquired in the new corporate entity that purchased V***C***.

[28] The fact that the Husband shared some of his windfall from the transaction with the Wife and the reference to paying debt from matrimonial assets in the Interim Consent Order do not persuade me that the Husband received a matrimonial rather than a business asset. The reference to matrimonial assets, in the Interim Consent Order, was never satisfactorily explained during the proceeding. It cannot be taken as an admission by the Husband that the assets he received were matrimonial. Perhaps at the time the parties expected him to cash out RRSP's that were matrimonial to pay their debt. I do not know.

[29] I was not provided with any evidence about the basis upon which the parties split the Husband's income for tax purposes. I do know that the Canadian Revenue Agency is now seeking additional money from the Wife in reference to that arrangement in 2012. The Husband has indicated his willingness to pay any additional amount she may owe as a result. (Exhibit 5, paragraph 12) If her tax liability is reassessed because of the income splitting arrangement and she owes money to the Canadian Revenue Agency the Husband is to pay this amount to her and she is to apply it to her tax liability. The fact that the Husband split income

with the Wife does not convince me that the shares he acquired in V***C***were not business assets.

[30] Having decided the Husband's shares are business assets I make the associated finding that payment to him for those shares, in whatever form it may have taken, resulted in assets that are business assets. If I am incorrect in this classification I consider them exempt by applying section 13 of the *Matrimonial Property Act*. If these assets are matrimonial they should be divided unequally in favour of the Husband. If they are business assets they are not to be divided. I realize there is some difficulty in respect to terminology. The Husband invested some of the money he received into an RRSP. He invested some in a GIC. These are generally classified as matrimonial assets. However I am satisfied the GIC was merely a place to park his funds until he could determine where he should next appropriately invest them and given that most of this was happening subsequent to the parties' separation I do not accept its categorization as a matrimonial asset.

[31] In respect to the RRSP I make two comments. The first is that its acquisition, and I do not have an exact date, was either after or very shortly before the parties separated. This and the manner of acquisition would give reason to refuse a division pursuant to section 13 of the *Matrimonial Property Act* in respect

to both the GIC and the RRSP. In my consideration of the section 13 argument I am also influenced by the fact that the Husband, from the proceeds of the transaction, has provided significant money to the Wife. He provided her with $277,192.00 and he paid $75,383.24 on debt much, if not all, of which could be categorized as matrimonial debt for which she was equally responsible. The Wife has argued that because the Husband gave the $75,383.24 to her and she used it to pay joint family debt he still owes her for his share of that debt. I consider this payment as a payment of family debt by the Husband that may lead to the conclusion that she still owes him for her share of that debt. I will address this later in this decision.

Division of Matrimonial Assets

[32] I have encountered several difficulties valuing the matrimonial assets. It appears the Husband has used separation date values for RRSP'S that were acquired during the marriage. These would normally be subject to equal division based upon estimates of current value. The Husband has made post separation contributions to one of these RRSP'S. The Wife has not objected to the value used and I do not intend to put the parties to the expense of determining the present value of that RRSP after excluding the post separation contributions. I do have

values for the Husband's other RRSPs to March 2015 and I have used those discounted for tax. I do not have any current values for RRSP'S owned by the Wife. One was of insignificant value; the other with Great West Life number *** 496 was valued at December 31, 2014. I have used that value discounted for tax.

[33] The parties do not agree about the value of Lot ** Madaskak Road and the Seadoo. There are no appraised values for these assets. The Lot was purchased in 2009 for approximately $10,000.00. The Husband has used this value with adjustments for disposition costs. The Wife has valued this property at $14,000.00 but has not applied disposition costs. The Husband wants to retain this asset. I accept it likely has appreciated in value since 2009 and as a result I have used the Wife's value after applying the same disposition costs used in respect to the other properties about which there is agreement on value. I have accepted the value given by the Husband for the Seadoo. I attach a matrimonial property division chart dealing only with the assets and debts directly relating to those assets. I will deal with other debt separately.

[34] I have noted the parties have used different amounts owing for the mortgage and the line of credit. I could not find current mortgage or line of credit statements.

However, the differences are not substantial. I have used the amounts disclosed in the Husband's Statement of Property (Exhibit 7, Tab 18).

[35] The division chart attached as Schedule "A" to this decision suggests the Wife should pay the Husband $13,062.75 to equalize the matrimonial property division. However there is other debt the parties have suggested must also be equally divided between them. Their inclusion of this debt on their property division charts results in the Husband claiming the Wife owes him $51,376.43 and the Wife claiming the Husband owes her $49,673.83. These charts only included what the parties agreed were matrimonial assets.

[36] As I mentioned earlier in this decision debt totalling $75,383.24 was paid by the Husband. He requests ½ of that debt be assigned to the Wife. That suggestion raised her claims about compensation for improvements she has made to the matrimonial home, resulting in present debt now owed by her. This resulted in questions about the deck and pool she build on the property and whether value was added as a result. Questions were raised about whether some of the money paid by the Husband to the Wife should be considered payment of spousal support and not payment of debt. I intend to view the entire issue of this debt from a global analysis

rather than try to do a dollar by dollar review of the lives of these parties since their separation.

[37] When the parties separated the Husband continued for some period of time to deposit his pay into their joint account so the Wife was able to access funds to support herself and their son. By March 2012 the Husband had provided sufficient funds to the Wife to pay off all "matrimonial debt". The Wife did incur some debt that may properly be classified as justified improvements to the matrimonial home but she is now the owner of that property and had, because of other money she received from the Husband, sufficient financial resources to pay the expenses related to those improvements. I do feel compelled to mention that I do not consider the construction of the pool to be a justified improvement.

[38] The debt paid from the money the Husband gave to the Wife was, for the most part, accumulated during the parties' relationship. However, I do not intend to require the Wife to pay the Husband ½ that debt. This was a lengthy marriage. The Husband recognized his financial responsibility toward the Wife by gifting her money from the transaction. He knew she expected to benefit from his good fortune. The Wife knew the original owner of V*** C*** did suggest that the Husband might become a partner in the business.

[39] When the Husband gave the Wife money to pay the matrimonial debt there were no discussions about her sharing the payment of this debt. Likely the Husband did not turn his attention to her use of the money he gave her at that time and this accounting has only been developed because of this proceeding driven by the Wife's desire to receive more than she has already received from the Husband. Although section 13 of the *Matrimonial Property Act* speaks about an unequal division of assets, I apply its underlying principles to the division of debt and would consider it unfair under these circumstances to require her to pay her share of the previously paid matrimonial debt. I also note that the word unfair is used in conjunction with the word unconscionable. Decisions suggest these words are interchangeable and that there is only one standard for decision making in section 13. I agree. The Wife would have considerable difficulty repaying the Husband. Some of this is because she may not have wisely invested the money she did receive but this does not persuade me to ignore her present situation. The parties did not accumulate significant matrimonial assets during the marriage. Had the Husband's opportunity to become an owner of the business in which he was employed occurred earlier he would likely have accumulated additional

matrimonial assets. Finally, there may have been an argument that the Wife should have received more spousal support since separation than she did receive.

[40] For similar reasons to those I have used in respect to the debt reimbursement and in particular considering section 13 (d), (i), and (l) of the *Matrimonial Property Act*, I consider it unfair to require the Wife to pay the Husband $13,062.75 to finalize the division of assets and debts between them. Each will keep the assets listed under Husband and Wife in Schedule "A" without any payment from one to the other. Each shall pay and be responsible for paying any debt associated with a retained asset.

[41] I am aware that the Husband as part of his acquisition of shares in the original V*** C*** was advised and did incorporate a company solely owned by him and a family trust. These entities have no assets separate from those discussed in this decision and the parties did not make any representations that suggested any need to focus on those entities.

Spousal Support

[42] Both parties have made reference to the Spousal Support Advisory Guidelines in their submissions. In this province the Advisory Guidelines are often

referred to by counsel but the sophisticated analysis they require is frequently absent. The Advisory Guidelines are used to generate numbers without discussion about the nature and extent of the entitlement, compensatory or non-compensatory, or about how entitlement should effect quantum and duration. This likely has resulted because judges in Nova Scotia have had a less than enthusiastic acceptance of the Advisory Guidelines preferring to resort to the budgetary means and needs analysis from days of old. I too have resorted to this method of calculation because, without assistance from counsel and the evidence necessary to determine the existence and strength of the compensatory or non-compensatory claim, it can be difficult to apply the Guidelines.

[43] There is limited understanding about how to classify entitlement. *Moge v. Moge* [1992] 3 S.C.R. 813 suggested a feminist analysis was to prevail with an assumption that in all cases when a person (usually the wife) stayed home to raise a child or children, that person had a compensatory claim. Evidence could be provided to prove otherwise but generally the evidence provided focused on factors from which the strength or weakness of the compensatory claim could be established. This was important because the nature and extent of the compensatory claim was to be a primary factor in deciding the quantum and duration of the

claim. For example weaker compensatory claims may result in a lower spousal support payment or a shorter duration or both. The decision in *Moge* did raise questions about whether a wife in a lengthy childless marriage would have a compensable claim because she looked after the household and her husband. Many courts recognized that a wife in this situation would also be economically disadvantaged, or the husband advantaged, upon the breakdown of the marriage and as a result entitlement would be compensatory.

[44] L'Heureux-Dubé, J. wrote in *Moge v. Moge, supra,* at p. 39

> 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 (1991), 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)

[45] This comment raised the suggestion that the entitlement arising from a "pattern of dependence" is compensatory. A pattern of dependence may create a continuing compensatory claim 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. C.A.) 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. It was thought the essence of a compensatory claim is that eventually it may be paid out. However the trend in Ontario case law may suggest lifetime support for elderly spouses who have had lengthy marriages.

[46] *Bracklow v. Bracklow* [1999] 1 S.C.R. 420 brought an addition to the spousal support analysis - non-compensatory entitlement. The seeds for this were present in *Moge* but the framework for analysis was not clarified by *Bracklow*. An interesting exploration of the various effects of *Moge* and *Bracklow* is contained in the article written by Carol Rogerson, Professor, Faculty of Law, University of Toronto, 2001, 19 Can. Fam. L.Q. 185, entitled "Spousal Support Post-*Bracklow*: The Pendulum Swings Again?" In this article she quotes with apparent agreement the comment of Quinn J. in *Keller v. Black*, 2000 CarswellOnt 74 (Ont. S.C.J.):

> [22] It seems that *Bracklow* has taken us to the point where any significant reduction in the standard of living of a spouse resulting from the marriage breakdown will warrant a support order – with the quantum and/or duration for the support being used to tweak the order so as to achieve justice in each case.

[47] In her article Professor Rogerson comments further at page 224:

> As Quinn J. recognizes, most of the action in spousal support cases is now with quantum and duration. And on that issue, *Bracklow* provides little guidance except to say that it is all discretionary. However, it may be slightly misleading to think that what goes on at the entitlement stage of analysis is not significant, given that the basis for entitlement will likely influence the subsequent analysis and the assessment of the appropriate award in terms of quantum and duration. It may still, therefore, be important to distinguish whether entitlement is based on compensatory or non-compensatory grounds. The way in which a court categorizes the marriage and the applicable models of spousal support may exert a significant influence on the actual outcome.

[48] Generally a non-compensatory claim in a short to mid length marriage is satisfied when a spouse becomes self-supporting and, in such a case, neither the payor spouse's greater income nor the inability of a recipient spouse to replicate a previous lifestyle, is a factor entitling a spouse to continuing support. When spouses have not had a lengthy relationship and the only effect of the relationship has been that a spouse has enjoyed a better lifestyle than he or she could afford alone, the duration of support will likely be for a period required to ease the recipient spouse's transition to economic independence. Self-sufficiency,

however, is a relative concept. It constitutes something more than an ability to meet basic living expenses. It incorporates an ability to provide a reasonable standard of living from earned and other income exclusive of spousal support.

[49] Determining the basis of entitlement is a required first step to ensure proper utilization of the Spousal Support Advisory Guidelines. Those who intend to apply these Advisory Guidelines are advised to read and digest "The Spousal Support Advisory Guidelines: A New and Improved User's Guide to the Final Version - March 2010 prepared by Professor Carol Rogerson and Professor Rollie Thompson. This Guide may be found on the Department of Justice Canada website.

[50] Because the parties have provided calculations based upon the Advisory Guidelines I do intend to make reference to them. Although I cannot profess to be a "sophisticated user" I am convinced they can provide a preferable means by which to determine the appropriate quantum and duration for spousal support. Courts in most of the provinces are requiring counsel to structure their submissions based upon the Advisory Guidelines. Superior courts are requiring trial judges to structure their decisions by referencing the Advisory Guidelines. Counsel in Nova Scotia will likely not develop detailed submissions about how the Advisory

Guidelines apply unless it is known that judges expect and require these submissions and will not resort, in the end, to a need and means analysis. Of course counsel could assist in this by arguing the exceptions discussed in the Advisory Guidelines which cover many of the situations that have caused judges to resort to that form of analysis.

[51] Before the Advisory Guidelines can be applied I have to decide each parties' total annual income for the relevant year in question. Both parties used the analysis provided by Nikki Robar, CA CBV to determine the Husband's 2014 income. They have not made any submissions about whether using post separation income is appropriate and as a result I will also make reference to his 2014 income. The Husband argues that his income for spousal support should be different from the income used for child support. Although the Advisory Guidelines do use the definition of "income" provided by the Federal Child Support Guidelines as the starting point for the determination of income, a different income may be used.

[52] In the "The Spousal Support Advisory Guidelines: A New and Improved User's Guide to the Final Version" the following comment appears under Chapter 5 "Income Determination"

> There are another set of difficult "income" issues, which can be succinctly characterized as "two incomes", one for child support and another, different income for spousal support. The question is not, "can a payor have two incomes?", but really "in what circumstances should a payor have two incomes?" These issues are difficult because they are not just about "income", but about more fundamental principles of support.

[53] In discussing some situations when two incomes may be justified the Guide comments:

> • Section 14 of the *Child Support Guidelines* fixes a very low threshold for an application to vary child support, on the view that child support should readily adjust up and down with the payor's income, at least for table amounts, often on an annual basis. By contrast, the threshold for variation is more demanding for spousal support and some judges will thus attempt to determine more of a "steady-state" income, smoothing out fluctuations or predicting anticipated increases: e.g. *K.D. v. N.D.*, [2009] B.C.J. No. 1482, 2009 BCSC 995 (fluctuating income).

> • There are often strong policy reasons to impute income to a payor for child support purposes, for the child to obtain the full benefit of the earning capacity of the payor, while the rationale is much weaker for spousal support. For an example of this, see *Martin v. Orris*, [2009] M.J. No. 383, 2009 MBQB 290 (various corporate payments to family members and expenses treated as not reasonable to deduct from child support income, but reasonable to recognize such long-standing payments in determining income for interim spousal support). Similarly, a court may be prepared to attribute pre-tax income from the payor's corporation as income for child support purposes under s. 18 of the *Child Support Guidelines*, but less so for the determination of spousal support.

> • Finally, there may be situations where the inter-relationship between property division and spousal support for spouses may mean a different, and lower, payor income is used for spousal support. For example, if stock options are valued and divided as part of the property divisions, the same stock options may not be treated as income for spousal support purposes, even in cases where the stock options might be considered as income for child support purposes. On such

> benefits as stock options and bonuses, see Cole, "The Dual Character of Employment Benefits" (2009), 28 Can.F.L.Q. 95.

[54] In Wilton & Semple Spousal Support Commentary from **MacDonald & Ferrier, Canadian Divorce Law and Practice, 2nd edition** reported in Westlaw Next Canada Chapter 8-WS — Determination of Income - the following comment appears:

> However, there are certain salient distinctions between income calculation methods for child support and spousal support. Chapter 11.3 describes a number of alterations which must be made to the FCSG calculations when the SSAG are being used. In one sense, income is less important in spousal support law than in child support law. While determination of income is often effectively dispositive of a child support dispute, it is only one component of needs and means analysis in a spousal support dispute. On the other hand, income determination can be seen as *more* important in spousal support law in the sense that two incomes (that of the recipient and that of the payor) are always in issue.
>
> Some courts may be less willing to impute income for the purpose of spousal support than they are for the purpose of child support. This reflects the idea that children have a more compelling claim on a payor's income than former spouses do, a principle which is reflected in s. 15.3 of the *Divorce Act*. For commentary on s. 15.3 and a general discussion of the relationship between spousal support and child support, see s. 9.3 of this volume. Note that income from stock options or income which can arguably be characterized as capital property may also be included for child support but not spousal support.

[55] The Husband received payment for his shares in V***C***, not in a complete lump sum payment but by having several investments provided to him that would eventually compensate him for the value of his shares. He received a promissory note also referred to as a "vendor take-back note" and shareholders

loans. Portions of the payments received by the Husband in respect to these investments are taxable and must be included as income for child support purposes. However these are capital property. They are the means by which he received payment for his shares. Without these Ms. Robar calculated the Husband's total 2014 annual income is $106,826.00. This is the appropriate income amount to use to determine spousal support.

[56] During the marriage the Wife provided bookkeeping services for others. She testified she suffers from anxiety, has arthritis and will require a double knee replacement, for which she is wait-listed. However, no medical or other evidence was provided to explain the extent to which any of these conditions will limit her ability to provide bookkeeping services. Exhibit 6 contains her complete Income Tax Returns from 2008 until 2013. Her earned income from bookkeeping excluding the income received as a tax split with the Husband was as follows:

2008	-	$ 5,005.00
2009	-	$ 8,667.00
2010	-	$24,642.00
2011	-	$ 3,760.00
2013	-	$ 900.00

[57] In 2013 the Wife's income came primarily from spousal support. However the pattern suggests she has a skill that could augment her income in the future and perhaps with careful attention may provide significant income.

[58] With the money provided to her by the Husband, the Wife purchased a residential property that she is renovating to provide two rental units. To date she is not making money on this investment. She hopes it will provide her a yearly profit from $10,000.00 to $12,000.00 but that may be wishful thinking on her part. Her best opportunity to contribute to her own support may be to nurture her bookkeeping business.

[59] The Wife was prepared to have income imputed to her in the amount of $20,000.00 per year but that was opposite a much higher yearly income for the Husband than I have used. The Husband suggested limiting her earned income to $3,500.00 but he is seeking a stepped down award with a termination date in December 2018. I have decided income should be imputed to the Wife in the amount of $5,000.00

[60] The Husband submits the Wife's entitlement is non-compensatory. The Wife considers it to be compensatory and non-compensatory. Neither party elaborated on why the Wife's entitlement should be classified as they suggest.

[61] As L'Heureux-Dubé, J said in Moge, quoted earlier in this decision, " …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". In this case there will be a great disparity in the standard of living affordable by the Wife as compared to the Husband because of her diminished earning capacity. That diminished earning capacity occurred because of the role she accepted during the marriage. She stopped being concerned about "how she would earn a living" because she was performing an important role within the parties marriage by staying at home, doing what work she could from the home, and tending to the needs of the parties child, the Husband and the household. This is what women, and increasingly men, often do. At one time, and possibly even now, this is what women were expected to do. It is also known that many women who do work full time often carry a disproportionate share of the care responsibilities for children, husbands and household. The usual result of this burden is that the caregiver devotes no or less

time and attention to employment or to improving his or her place in the workforce. If this has happened it becomes a reality of the relationship and should not be discounted by statements made by those who have received advantage such as:

- I wanted her/him to go to work but she/he refused.
- I did not stop her/him from going back to school.
- She/he could have worked more if she/he wanted to.

[62] Most women or men who stay at home full or part time, and who defer or reduce their presence in the work force as a result, do so because they believe this is best for the family. They do not think about what will happen if their relationship with their partner ends. They do not realize they may become impoverished. Had they done so they may have refused to enter into the relationship, refused to have children, or continued working even though this may not have been financially beneficial to the family because of the cost of child care or other costs. When the relationship ends the examination must be about the actual role played by the spouse in the relationship and its consequences not about what may have happened under the rubric of "choice" with the comment, so often

heard – "It was her/his choice to stay home and so I do not have to provide spousal support and if I do then it should soon be terminated!"

[63] In this relationship the Wife cared for two children from a previous marriage. I have no information about what if any support was provided by their father but I do know the Husband would have been providing financial assistance to them because they lived together. This is an advantage received by the Wife but, given that the child of her relationship with the husband was younger than his step-siblings, the fact that she was primarily a stay at home spouse related as much or more to his needs than those of his step siblings. The Wife supported the Husband's work in any way possible and their relationship continued for 18 years. She has a significant compensatory entitlement. She has limited income and limited earning capacity at the present time. These factors would suggest spousal support at the higher level of the range.

[64] The Wife has received a division of matrimonial property that has left some assets with her in particular the matrimonial home. She also has received enough money to purchase another property that she hopes will become income producing. She may be able to augment her income by providing bookkeeping services to

others and to move toward self-sufficiency. She is encouraged to do so. These factors suggest some movement toward the middle of the range suggested.

[65] I have followed the instructions provided by the Divorce Mate software program to decrease the Husband's income for spousal support under the with child formula. In determining his net income decrease I have deducted the mandatory payments for income tax, CPP and EI from the income amount $106,826.00. There may have been other deductions that should have been included but I have no information to suggest what they should be. The program suggested spousal support in a range from $2,200.00 to $2,756.00.

[66] The Husband is to pay spousal support in the amount of $2,600.00 per month, commencing July 1, 2015. Given the significance of the Wife's compensatory entitlement the duration is indefinite.

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Beryl A. MacDonald, J

Attached: Schedule "A"

PROPERTY DIVISION CHART

DESCRIPTION	VALUE	OWNERSHIP	
ASSETS		HUSBAND	WIFE
** Charlie Drive	$ 201,637.50	$ 201,637.50	$
** Parkdale Ave	$ 272,325.00	$	$ 272,325.00
Lot ** Mudusak Road	$ 12,195.00	$ 12,195.00	$
BMO RRSP ** 649	$ 1,359.00	$ 1,359.00	$
Great West Life RRSP **4497	$ 1,952.05	$ 1,952.05	$
Great West Life RRSP **9797	$ 1,965.69	$ 1,965.69	$
Great West Life RRSP **4496	$ 6,159.00	$	$ 6,159.00
Honda Civic	$ 7,000.00	$	$ 7,000.00
SeaDoo	$ 3,500.00	$ 3,500.00	$
TOTAL ASSETS	$ 508,093.24	$ 222,609.24	$ 285,484.00
DEBTS			
Mortgage Parkdale	$ 195,950.52	$	$ 195,950.52
LOC 17 Charlie	$ 159,201.26	$ 159,201.26	$
TOTAL DEBTS	$ 355,151.78	$ 159,201.26	$ 195,950.52
EQUITY/Balance	$ 152,941.46	$ 63,407.98	$ 89,533.48
Each entitled to ½ equity $	$ 76,470.73	+$ 13,062.75	-$ 13,062.75
EQUALIZATION PAYMENT Wife to Husband	$ 13, 062.75	$ 76,470.73	$ 76,470.73