IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: J.W.L. v. C.B.M. , 2008 NSSC 215

Date: 20080704
Docket: 1201 - 060431, SFHD - 044383
Registry: Halifax

Between:

L. (J. W.)

Petitioner

v.

M. (C. B.)

Respondent

Judge: The Honourable Justice Beryl MacDonald

Heard: March 25, 26 and 27, 2008, in Halifax, Nova Scotia

Written Decision: July 4, 2008

Counsel: M. Jean Beeler, for the Petitioner
B. Lynn Reierson, for the Respondent

By the Court:

[1] This is a divorce proceeding. The Husband and the Wife married July 25, 1981. They separated in January 2002. When they married the Husband was 38 years old and had never been married. The Wife was 43. This was her second marriage. At the time she had three teenage children living with her the youngest was 13. The Husband is now 65 and will soon be 66 years old. The Wife is 70 years old.

[2] I am satisfied that all jurisdictional requirements of the Divorce Act have been met and that there is no possibility of reconciliation between these parties. I am further satisfied that there has been a permanent breakdown of this marriage by reason of the parties having lived and continuing 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 with effective date March 25, 2008, the date upon which I orally informed the parties that the Divorce was granted.

[3] Prior to the marriage the Husband's assets of significance to this decision were:

- Real Property - Sackville Street, Toronto, Ontario - residential

- 1/4 interest in real property - Britain Street, Toronto, Ontario - warehouse/office building

- 60% Shareholder, officer and director of a publishing company (the Toronto Publishing Company)

[4] Prior to the marriage the Wife's assets of significance to this decision were:

- Real Property - Parkwood Terrace, Halifax, Nova Scotia - residential

[5] During the marriage the assets acquired of significance to this decision were:

- Purchase in 1982 of a Publishing company (the Halifax Publishing Company) owned by the parties in which each has

50% of the common shares with the Husband as President and the Wife as Secretary-Treasurer according to the public information provided through the Nova Scotia Registrar of Joint Stock Companies.

- Incorporation in 1989 of an Investment company (the Halifax Investment Company) owned by the parties in which each has 50% of the issued shares. The Wife is listed as President, and the Husband as Secretary according to the public information provided through the Nova Scotia Registrar of Joint Stock Companies. This Company provides typesetting/layout services to both the Halifax Publishing Company and the Toronto Publishing Company.

- Incorporation in 1990 of a Distribution company (the Halifax Distribution Company) as a subsidiary of the Halifax Publishing Company. The Husband and the Wife are both Directors according to the public information provided through the Nova Scotia Registrar of Joint Stock Companies. In this information the Husband is listed as the Secretary/Treasurer and the Wife as President. This company provides marketing and distribution services to both the Halifax Publishing Company and the Toronto Publishing Company.

- Purchase of real property located at Inglis Street, Halifax, Nova Scotia by the Halifax Publishing Company for use as an office and warehouse. This property was eventually purchased or transferred to the Halifax Investment Company.

- Purchase of real property located at Atlantic Street, Halifax, Nova Scotia by the Halifax Investment Company.

- Purchase of real property located at Elgin Avenue, Toronto, Ontario. The percentage of ownership details are confusing but it appears the Husband and Wife jointly have a 25% ownership interest in the entire property. The Husband also has a sole interest in this property through a partnership with others.

- Purchase of real property located at Caribou Island, Nova Scotia registered solely in the Wife's name.

[6] Additional assets for which classification, valuation and division are sought in this proceeding are:

- furniture
- RRSP's and RRIF's
- automobiles - a Volkswagen Golf and a Beetle
- a GIC in the name of the Husband only
- the Husband's shareholder's loan to the Toronto and Halifax Publishing Companies

[7] The Wife is seeking an equal division of all assets. The Husband seeks to have several of the assets classified as "business assets". If any of the assets are classified as sole business assets of the Husband, the Wife seeks remuneration for her contribution to those assets pursuant to section 18 of the Matrimonial Property Act. If she is not remunerated pursuant to section 18 she seeks a division of assets pursuant to section 13 of that Act.

[8] The Husband is requesting an equal division of matrimonial assets and that he, pursuant to section 18 of the Act, be given a greater share of jointly held business assets.

CLASSIFICATION

[9] In Nova Scotia all assets are matrimonial assets unless the party maintaining otherwise satisfies the court, on a balance of probabilities, that the disputed asset falls within one of the exceptions contained in s.4 (1) of the *Matrimonial Property Act R.S.N.S. 1989, c. 275* (*Adie v. Adie* (1994), 7 R.F.L. (4th) 54 (N.S.S.C.) Business assets are one of these enumerated exceptions but they may also be considered pursuant to section 13 and section 18 of the *Matrimonial Property Act*.

[10] Business assets are defined in section 2 of the *Matrimonial Property Act* as:

> ...real or personal property primarily used or held for or in connection with a commercial, business, investment or other income or profit producing purpose...

[11] The primary purpose for which an asset is used or held will generally determine whether it is categorized as a business asset or a matrimonial asset. In *Lawrence v. Lawrence* (1981), 25 R.F.L. (2d) 130 (N.S.C.A.), Justice Hart held that

> business assets must be purposely held for the production of income or profit. That gain or benefit may accrue is not sufficient. The asset must be working in a commercial, business or investment way.

[12] Justice Davidson in *Curren v. Curren* 1987 CarswellNS 189 (N.S.S.C.) restated this principle and said:

> to be excluded from the matrimonial assets by the exception of “business assets” it must be shown the asset is being purposely held to produce income or profit and that the production of income and profit is the primary purpose.

[13] In *Hebb v. Hebb* 1991CarswellNS 49 (N.S.C.A.) the Husband owned an office building. It was originally constructed to house his survey business which consisted primarily of records requiring secure storage. There were other rental units in the building and they generated rental income. The income produced from the rentals was significant. The trial judge decided the office building was a matrimonial asset. The Court of Appeal upheld this decision. In doing so the Court of Appeal confirmed that “intention” was a factor to be considered when determining whether an asset is or is not a business asset. As a result, even though an asset from appearance and use would ordinarily be considered to be a business asset, intention can change the categorization. In *Hebb, supra,* the evidence of the Wife that the building was:

> “...our retirement money or our nest egg if it was ever sold, which was the main purpose for it...”

[14] and of the parties’ son that:

> “... the building was security for the family and for their future”

[15] was accepted in respect to the Husband's intended use, the primary use, for the building.

[16] Reliance upon intention to classify an asset has its dangers. Unsophisticated entrepreneurs may refer to their business assets as security for retirement but that would not necessarily mean they would keep those assets if they continued to lose money. As a result income production could be important and may be the primary reason why an asset is retained. The primary purpose for keeping an asset, in such a situation, would be the production of that income even though the owner expects the asset to provide a retirement income or a profit on a sale that may be used to provide a financially secure retirement in the future. In this case the production of retirement income would be a secondary purpose not the primary purpose for retaining the asset.

[17] While intention is to be explored, it is essential to consider whether an asset is working or being worked in an entrepreneurial way. Key to this analysis is an examination of two important indicators of entrepreneurial activity - risk and management activity. There is a distinction between assets that are static, those for which ownership involves little financial risk and insignificant management, from those that are financially risky to own and require attention and management to ensure profitability. The extent of owner involvement must be analyzed carefully because some entrepreneurial activities do not require constant management activity. Investments in RRSP's would be an example of a static investment and these, as is known, are now considered to be matrimonial assets. However, there may be circumstances when even a static investment may be considered to be a "business asset". (*Roberts v. Shotton* 1997 CarswellNS 8 (N.S.C.A.))

SECTION 18 OF THE MATRIMONIAL PROPERTY ACT

[18] Section 18 authorizes a court to compensate a spouse, by way of a monetary award or the grant of a share in the interest of the other spouse, for his or her contribution to the "acquisition, management, maintenance, operation or improvement of a business asset of the other spouse". In assessing the contribution the court is to do so "without regard to the relationship of husband and wife or the fact that the acts constituting the contribution are those of a reasonable spouse of the sex in the circumstances". This latter provision no doubt was meant to ensure that wives who worked in their husbands businesses, for example in a farming

business, would not be denied compensation merely because the work was to be expected from a “farmer’s wife”. Whether the legislature ever contemplated how this section would or should impact spouses who had a joint ownership in a business asset is unknown. Courts making decisions in matrimonial matters have decided that the share ownership in a business asset does not guarantee the interest in that asset will be in accordance with the share structure if the shareholder has little involvement in purchasing, managing and improving the asset. In *Leverman v. Leverman* 2007 CarswellNS 814, Justice Legere-Sears found that Ms. Leverman became the sole shareholder and principal of a company primarily to protect assets from creditors. Her involvement in the company was minimal. Her interest was assessed at 7.5%. The interest given in this company to a non shareholder - the Husband - was 92.5%. Such is the power of section 18 of the *Matrimonial Property Act* to rearrange the indicia of ownership so as to render it meaningless. Contribution, not the legal documents creating an interest in an asset, can determine the ownership interest, not in respect to third parties, but certainly as between spouses.

SECTION 13 OF THE MATRIMONIAL PROPERTY ACT

[19] In *Voiculescu v. Voiculescu* 2003 CarswellNS 252 Justice Dellapinna said the following about the meaning to be attributed to the wording of this section:

> 37 Matrimonial assets are to be divided equally unless there is strong evidence showing that an equal division would be clearly unfair and unconscionable based on the factors listed in s.13 (see *Harwood v. Thomas* (1981), 45 N.S.R. (2d) 414 (N.S. C.A.)). It is not enough to simply find a rationalization for an unequal division in s.13:
>
> . . . It is not sufficient, for an unequal division of matrimonial assets, that one of the s.13 factors be present. The judge must make the additional determination that an equal division would be unfair or unconscionable. The terms "unfair" and "unconscionable" do not have precise meaning. Lambert, J.A. wrote in *Girard v. Girard* (1983), 33 R.F.L. (2d) 79; B.C.J. No. 4 (Q.L) (B.C.C.A.) supra, at p.86:
>
> I come then to the legislative purpose expressed in the word "unfair". That word evokes ethical considerations and not merely legal ones. It is not a lawyer's word. The section does not give a judge a broad discretion to divide property in accordance with his own conscience. There can be no doubt about that. There must be uniformity and predictability of judgment. The question of unfairness must therefore be measured by an objective standard. The standard is that of a fair

> and reasonable person whose values reflect those generally held in contemporary British Columbia. Such a person, while not insisting that everyone adopt his or her behaviour preferences, can recognize unfairness in the form of a marked departure from current community values.
>
> As directed in *Harwood v. Thomas*, supra, the judge must look at all of the circumstances, not simply weigh the respective material contributions of the parties. In *S.B.M. v. N.M.*, [2003] B.C.J. No. 1142 (Q.L.) (C.A.), a recent decision of the British Columbia Court of Appeal, the court was asked to review the trial judge's unequal division of family assets. The *Family Relations Act*, R.S.B.C. 1996, c. 128, s. 65(1) permits a deviation from the *prima facie* unequal division of family assets, where an equal division would be "unfair". I would endorse the approach to the question of unfairness outlined by Donald, J.A. for the court. It is consistent with the direction in *Harwood, supra* and the cases in this province which have followed:
>
> ¶23 . . . The question is not whether an unequal division would be fair; that is not the obverse of the test in s.65(1). The Legislature created a presumption of equality - a presumption that can only be displaced by a demonstration that an equal division would be unfair. So the issue of fairness is not at large, allowing a judge to pick the outcome that he prefers from among various alternative dispositions, all of which may be arguably fair. He must decide, in accordance with the language of s.65(1), that an equal division would be unfair before he considers apportionment. Otherwise, although an equal division would be fair, a reapportionment could be ordered on the basis that it is more fair, and that, in my opinion, is not what the statute intends. (*Young v. Young* (supra) paragraphs 18 and 19

[20] In *Jenkins v. Jenkins* (1991), 107 N.S.R. (2d) 18 (T.D.), Richard J. reviewed the meaning of unfair and unconscionable as set out in s. 13 of the *Matrimonial Property Act* :

> I propose now to deal with the division of matrimonial assets in accordance with the law as set out in *Donald*, supra, while remaining mindful of the comments of MacDonald, J.A., in *Nolet.* To support a finding that a division is "unfair and unconscionable" it seems that there must be something more than mere inconvenience. The Random House Dictionary defines "unconscionable" variously as "unreasonable", "unscrupulous", "excessive" and "extortionate". These are strong words, and when coupled with the requirement that "strong evidence" must be produced to support an unequal division the burden upon the party requesting an unequal division of matrimonial assets is somewhat onerous.

[21] In *Young v. Young*, (2003) 216 N.S.R. (2d) 94 (C.A.) Bateman J.A. held that the trial judge erred in granting an unequal division of the matrimonial assets in favour of the husband after a twenty-five year marriage. The trial judge's reason for so doing was based on the fact that the husband had owned a farm prior to the marriage which farm was sold before separation. Bateman J.A. reviewed the discretionary limitations of s. 13 of the *Act* and said:

> 20. Section 4(1) of the Act expressly includes as a matrimonial asset (subject to the enumerated exceptions) all real and personal property acquired by either or both spouses before or during their marriage. Thus the mere fact of prior acquisition does not remove the asset from prima facie equal division. Section 13(e) entitles the judge to take into account "the date and manner of acquisition of the assets" when considering whether an equal division would be unfair or unconscionable. Under the s. 13 analysis the significance of the prior acquisition must be looked at taking into account factors such as the timing of the contribution of the particular asset to the marriage; the parties' use of the asset; the length of the marriage; the significance of the asset relative to the entire pool of matrimonial assets; and the age and stage of the parties at separation. This is not an exhaustive list. The judge failed to conduct a contextual assessment of the significance of Mr. Young's prior ownership of the farm.

[22] The subsections of section 13 relevant to this decision are:

a) the unreasonable impoverishment by either spouse of the matrimonial assets;

b) the length of time that the spouses have cohabited with each other during their marriage;

c) the date and manner of acquisition of the assets;

d) the effect of the assumption by one spouse of any housekeeping, child care or other domestic responsibilities for the family on the ability of the other spouse to acquire, manage, maintain, operate or improve a business asset;

e) the contribution made by each spouse to the marriage and to the welfare of the family, including any contribution made as a homemaker or parent;

f) whether the value of the assets substantially appreciated during the marriage;

g) the value to either spouse of any pension or other benefit which, by reason of the termination of the marriage relationship, that party will lose the chance of acquiring;

[23] Matrimonial assets can be considered to have been “unreasonably impoverished” if money is diverted from the family due to heavy drinking (*Mac Donald v. Mac Donald* 1993 CarswellNS 52 (N.S.S.C.) or by cashing in a matrimonial asset to invest in a business asset (*Baggs v. Baggs* [1997] N.S.J. No. 87(N.S.S.C.) or by incurring family indebtedness to preserve a business asset. (*Mac Donald v. Mac Donald* 2007 CarswellNS 262 (N.S.C.S.))

[24] In *Sproule v. Sproule* 1995 CarswellNS 52 (N.S.S.C.) reversed on other grounds 1986 CarswellNS 59 (C.A.) a large disparity in net worth and income was considered sufficient to justify an unequal division. However, Bateman J.A. in *Roberts v. Shotton* 1997 CarswellNS 8 (N.S.C.A.) remarked:

> 15 The Act was not, however, implemented as a tool to arbitrarily redistribute or equalize wealth between married persons....
>
> 23 Where the marriage is of reasonable duration, certain presumptions prevail: it is presumed that a spouse's non-monetary contribution to a marriage, through the assumption of child care and homemaking responsibilities is deserving of recognition; that in a marriage, parties generally operate as a team, pooling resources and making decisions in reliance on their joint means; that the disadvantage occasioned to a non-income earning spouse on marriage breakdown, should be alleviated to the extent appropriate through a fair distribution of the assets; that in most marriages it is unfair, undesirable and unnecessary to embark upon a tracing of the assets brought into the marriage by each party; that where one party assumes primary responsibility for the organization of the marital assets, that spouse should not be permitted to arrange the assets in a way that disadvantages the other spouse on dissolution of the marriage. This is far from an exhaustive list.
>
> 24 When, however, a marriage, falls outside the norm for which the general guidelines have been developed, it is necessary to carefully scrutinize the

> circumstances and determine whether a different approach is required to achieve a fair result. Adherence to the general rules is not to be at the expense of equity......
>
> 32 In most circumstances equitable division is achieved by applying a percentage to the total package of matrimonial assets, as the trial judge did here. On the facts of this case, however, where there was an exceedingly short marriage with virtually all of the assets contributed by one spouse and principally acquired prior to the marriage, equity can best be achieved through an individual assessment of the appropriate division of each asset.

VALUATION

[25] The *Matrimonial Property Act* has as its purpose "the orderly and equitable settlement of the affairs of the spouses upon the termination of the marriage relationship" (Preamble) It does not specify the date or time upon which an asset is to be valued for the purpose of division. This is to be determined in the discretion of the trial judge. (*Lynk v. Lynk* (1989), 92 N.S.R. (2d. 1); *Reardon v. Smith* (1999), 9 R.F.L. (5th 83)) In this case the parties have agreed upon the following values for assets under consideration:

- Furniture House and Cottage $ 10,165
- Volkswagen Beetle $ 10,000
- Volkswagen Golf $ 14,565
- Sackville St., Toronto $ 289,376
- Britain St., Toronto $ 60,040
- Husband's GIC $ 95,000
- Husband's RRSP $ 34,032

[26] They do not agree upon values to be assigned to the remaining assets. Their lack of agreement about the value of the assets requires an examination of the principles used when valuing assets in the family law context. Learned authors have suggested that the court should determine the asset's "fair value". In

Freedman & White, Financial Principles of Family Law, (Toronto: Carswell, 2001) the authors state at page 1-2:

> In the context of family law, the concept of value is really fair market value or fair value, though in some cases it is value to owner. Fair market value and fair value do not dictate what method one uses in arriving at the value of an asset, but rather they define the underlying goal of the valuation conclusion.
>
> Fair market value is, by definition, rigid. This is both its strength and its weakness. The rigidity leads to predictable and uniform results, which is an important and desired result in most valuations. However, in a family law matter, arriving at an equitable result is usually more important. Fair value, as distinct from fair market value, permits a departure from a rigid fair market value for unique circumstances.
>
> In light of the above, fair market value and fair value in certain family law cases may not yield the same value conclusion. The courts in provinces such as Ontario will generally look to fair market value as an initial guide, but ultimately look to fair value to achieve a just and equitable result.

[27] The authors suggest that the Ontario approach is used across the country when a court is mandated to provide a fair and equitable division of family assets. They also comment at page 3-12:

> All the financial circumstances of the family unit relevant to the property in question must be considered to arrive at a fair value. By restricting the definition of value to fair market value and by excluding other alternatives, a severe and inequitable penalty may be levied.
>
> For any given property there may be more than one fair value. Fair value must be a rational economic value. The fair market value will often be a good starting point and may, in fact, be a fair value. The adjustments or reconciliation between the two values must be identifiable and reasonable. Fair value does not include a punitive element or quantification of emotional attachments. It differs according to context. Thus, fair value for the purposes of ordering the affairs of separated spouses may well be different from fair value for commercial, succession, or other purposes.

[28] The authors consider a valuation based on "fair value" to be preferable to one based on "fair market value" because it:

...requires greater consideration and accommodation of:

i) All relevant surrounding circumstances – their value is circumstance specific, fair market value is not;

ii) The specific purpose of the valuation – different "triggering events" will dictate different fair values;

iii) The specific relationship and reasonable expectations of the spouses as opposed to an assumed relationship of the willing parties dealing at arms length as in fair market value;

iv) The reasonable expectations of each of the spouses during marriage. All the financial circumstances surrounding their relationship must also be examined before an appropriate fair value can be struck. None of this is relevant to fair market value;

v) Diverse values other than fair market value, including value to owner must be considered where a market for the asset is not broad and competitive enough to render a fair and reasonable price.

(page 3-14)

[29] In *McLeod & Mamo*, *Matrimonial Property Law in Canada*,, *(Toronto:Carswell) Volume I, Section V;* the authors *Cole & Freedman* , *Valuation Principles of Family Law* state at page V-14:

The Canadian legislative trend has been to view marriage, in many respects, as an economic partnership of broad scope. The various provincial acts all seek an orderly, equitable and fair settlement of property and financial matters on the marital breakdown.

It is our belief that fair market value is an inappropriate standard and that it should not be the generally accepted bases of property valuation in family law matters. The objective of an "orderly and equitable settlement" (contained in the preamble of the Ontario Family Law Act, 1986 and in the spirit of all provincial statutes) demands that a broader, more encompassing valuation approach be adopted and that the standard should be fair value.

Fair value describes a value that is just and equitable. All the financial circumstances of the family unit relevant to the property in question must be considered if a fair value is to emerge.

[30] In Nova Scotia there is support for the concept that valuation encompasses something more than an acceptance of the fair market values put forth in evidence. In *Nickerson v. Nickerson* 1983 CarswellNS 466 (N.S.S.C.) the husband and the wife owned shares in a business. 87 ½ percent of the 100,000 issued shares were registered in the husband's name and 12 ½ shares were registered in the wife's name. In valuing the shares Justice Nathanson received an opinion from Doane Raymond, chartered accountants, that the shares should be valued in the range of $40,000-$45,000. Charles F. McKenzie chartered accountant valued the shares at $95,000. In commenting on the Doane Raymond Report Justice Nathanson observed:

> [18] The Doane Raymond valuation stated that there were two basic approaches in valuing the shares of a closely held company. The first is a liquidation value and the second the value of the business as a going concern. Liquidation value is the minimum amount shareholders may expect to receive for the shares while valuation of the business as a going concern is the value to be assigned to the business if it continues to operate. This valuation is generally established by using the "earnings value method". The goal is to reflect the range of earnings the business can be expected to maintain based on current circumstances and its past earnings history. The higher of the two values is generally accepted as the fair market value. While these approaches seem "eminently sensible" to me, I am somewhat bothered by the general statement that appears at the beginning of the valuation:
>
>> For the purpose of our opinion, fair market value is defined as the highest price available in an open and unrestricted market between informed, proven parties acting at arms length and under no compulsion to act, expressed in terms of money or money's worth.
>
> [19] There was nothing in the evidence as to whether the market for the shares was opened and unrestricted. Moreover, the evidence concerned a sale in a very thin market in which it is probable that the respondent husband is the only likely purchaser of his wife's shares.

[31] Justice Nathanson was inclined to believe that the Doane Raymond valuation more closely reflected the true value of the shares. However, he had reservations about both of the evaluations presented and decided that:

> [27] ...the only way in which this matter can be resolved is for me to exercise my best judgment and determine a share value; therefore I set the total share value at $50,000. Although neither Mr. Nickerson nor Mr. MacKenzie allowed for a minority discount, I will discount the value of Mrs. Nickerson's minority interest by 20% in accordance with normal practice in these matters.

CLASSIFICATION / CONTRIBUTION / VALUATION

Application of Principles to Party Assets

Matrimonial Home - Parkwood Terrace, Halifax, Nova Scotia

[32] The property at Parkwood Terrace is a matrimonial asset. After their separation the Wife in November 2002 requested the Husband's consent to place a collateral mortgage on this property to secure an independent line of credit to her. The usband consented to do so but required that, as between them, the liability be limited to $50,000.00. They signed a document evidencing this intent although it was not formally prepared and there are no witnesses to their signatures. The Wife does not deny signing this document (Exhibit EE attached to the affidavit of the Husband at Tab 5 of court Exhibit 3).The amount outstanding on her line of credit is now $90,000**.** She seeks to have the Husband share this debt equally because:

- He was not paying her spousal support and the income paid to her by the Halifax Publishing Company was insufficient to support her financial need.

- She was responsible for expensive repairs and upkeep to the matrimonial home and the cottage at Caribou Island.

[33] The document signed by the Wife was to pay her then existing debt in the total amount of $48,500. The Husband was prepared to recognize this amount as a joint debt up to a total amount of $50,000 .

[34] The debt incurred on the line of credit after November 2002 is a post separation debt. I am not satisfied that any of this debt was incurred because of repair and maintenance required for the matrimonial properties. In Exhibit 13 at tab 7 there is a Statement of Property sworn by the Wife on February 16, 2007. Under debts the following appears:

Category	Institution	Particulars	Amount Owing
Personal Loan	Family Member	New Furnace / Parkwood Terrace	$20,000
Personal Loan	Family Member	Parkwood Terrace 2004 - 2007 Misc. Operating / Maintenance Caribou Island Roof, well, pump, furnace, oil tank	$48,000

[35] This information suggests the debt for upkeep and repair is not in the Line of Credit. I do not know what was purchased for the additional $40,000 charged to the Line of Credit. The debts to family members have not been proven before me.

[36] In 2002 the Wife received income from the Halifax Publishing Company in the amount of $35,000. In addition, to cover debts she incurred to November 2002, the Husband agreed to jointly share a debt of up to $50,000. I do not know what the Wife's expenses were in 2002, 2003, 2004, 2005 and 2006. I do know that in 2003 she became eligible to receive both Old Age Security and Canada Pension Plan benefits. In 2003 her total income was $47,838. In 2004 it was $49,058. In 2005 it was $49, 303. In 2006 it was $49,618. The Husband's total income for these same years was $50,893, $84,377, $94,100, $62,878. In 2002 the Husband's total income was $40, 998.

[37] In an unsworn financial statement in Exhibit 13 tab 5 the Wife's total expenses including those for the matrimonial properties are shown at $5,135 per month exclusive of debt payments. In this statement she included $1, 018 monthly for house repairs, maintenance etc. , $500 monthly for food, $ 350 monthly for clothing, $458 for gifts. I consider these expenditures to be unrealistic. I also know that the Husband had encouraged the Wife to sell the matrimonial home and seek less expensive accommodation.

[38] In her sworn financial statement in Exhibit 13 tab 6 the Wife's total monthly expenses include: $515 for food, $350 for clothing, $515 for gifts. These may well be higher than she can realistically afford.

[39] The Husband's income relative to the Wife's since their separation has not been so disparate to justify his assumption of one-half of her post separation debt beyond the amount he has agreed to assume.

[40] The Husband has suggested that the Parkwood Terrace property can be subdivided and the present house moved to permit the sale of a lot upon which a new home can be built. He has provided an assessment valuing this property at $700,000 because of this potential. The Wife argues that it is by no means certain the lot can be subdivided or that the house moved without materially effecting its condition. I agree. The Husband's figure is speculative. The appraised value of this property without subdivision is $500,000. The Wife's son has signed a purchase and sale agreement to purchase this property for this amount and he will cover all the disposition costs. As a result the Wife requests the property be valued at $500,000. I have done so.

Cottage and Lot Caribou Island, Nova Scotia

[41] This is a matrimonial asset. There is no appraisal for this asset. The Husband suggested it was worth $125,000 in his Statement of Property in Exhibit 3 tab 7. In her Statement of Property in Exhibit 13 tab 7 the Wife suggests this property is worth between $125,000 and $150,000. The Husband wishes to use the higher of these figures. I have nothing in evidence to assist me in choosing between these estimates. I have decided to pick the mid value of $ 137,500. The Husband argues that because this property is not to be sold notional disposition costs should not be deducted. This argument has frequently been made in courts in Nova Scotia and it has generally failed. In this case the underlying assumption is that the Wife will keep the property and will it to her children. I have no definitive evidence on this point and given the Wife's age and her need for financial security she may choose to sell the property. Sale is not an unrealistic proposition. Notional costs are deducted as follows: Real Estate Commission at 5 % - $6,875, Migration $1,000, Legal Costs $500, HST $1,256.25. The net value is $127,869.

RRSP / RRIF

[42] The parties agree that the Husband's RRSP is to be valued for division at $34,032. They do not agree on the value of the Wife's RRIF. The Husband's valuation of the Wife's RRIF is from a November 2007 statement. The Wife's valuation (Exhibit #40) is from a February 2008 statement. This is the most current statement provided. With a 30% discount for tax the value is $163,974. In general it is considered equitable to value RRSP accounts and investments in corporations to the date of the actual cash in, transfer, or rollover between the parties (division date) after taking tax consequences and disposition costs into consideration. (*Simmons v. Simmons* [2001] N.S.J. No. 276). As a result I assign a value of $163,974 to the Wife's RRIF.

Sackville Street, Toronto, Ontario

[43] This real property was purchased by the Husband many years before his marriage to the Wife. He states he purchased it as an income producing investment although there were years when there were losses. The Wife alleges his intent in retaining this asset during the marriage was for retirement. He was not in the "business" of real estate development or rentals. The Husband disagrees. Although he was not required to manage this asset daily it did demand his attention. In 1997 he had it subdivided when he saw an opportunity to take some profit from this investment. The original house and a subdivided lot was sold and two units built on the remaining lots, one of which was sold. The remaining unit he manages as a rental property. The original house was briefly occupied by the Wife during the two years she worked in Toronto but this occupation was not sufficient to justify a finding that this is a matrimonial asset. I do not accept the Wife's statement about the Husband's intention in retaining this asset and I am satisfied that his use of the asset was entrepreneurial. It is a business asset.

[44] The Wife made no contribution to the acquisition, management, maintenance, operation or improvement of this asset.

Britain Street, Toronto, Ontario

[45] In 1971 the Husband purchased this real property with a friends they formed a partnership for that purpose. The Toronto Publishing Company occupied the building on this land, as did the business of his partners in the purchase. The Husband sold part of his interest in 1990 when he required cash for other

purposes. After separation he sold his remaining interest . I do not accept the suggestion that this investment was for "retirement". This was an important investment at the time of purchase to provide a commercial residence for the Toronto Publishing Company. The profit or gain aspect of the investment was long term both for the Husband as an owner of the Toronto Publishing Company and personally. This investment is not similar to an RRSP. It was not a static investment. It required attention and management. When the potential to realize on this investment became available it was taken. It is a business asset.

[46] The Wife made no contribution to the acquisition, management, maintenance, operation or improvement of this asset.

Elgin Avenue, Toronto, Ontario

[47] In 1985-1986 two of the Husband's friends invited him to invest with them in a three flat residential apartment building. The owners were the Husband, the Wife, and the Husband's two friends independently and as partners with the Husband in the Britain Street Partnership. The share ownership essentially gave a 25% joint ownership share to the Husband and the Wife and another share to the Husband through his partnership interest. A portion of this latter interest was sold by the Husband in 1990. The Husband has assessed the value of the interests in this property by the square footage of the unit to be occupied by each owner. The Wife argues that the value should be the appraised value of the entire property and the percentage ownership interest then applied. While this is an attractive proposition, it does appear that these units can be sold separately and would likely, because of size, each carry a different value. In addition if I were to take the Wife's approach I do not have information about the mortgage on the entire building which would have to be deducted in order to assess value in this manner. I am accepting the value calculated by the Husband which is $325,466 for the joint interest he shares with the Wife and $41,588.00 for the interest he holds with other partners.

[48] The Wife has a legal 12.50% interest in the Elgin Avenue property. She seeks a determination that the Husband's interest derived through the Britain Street partnership is a matrimonial asset. She resided in one of the flats during her stay in Toronto but that derived from her own ownership interest in that flat. The Husband would also occasionally reside in that flat when he was in Toronto when it was vacant. The majority of use was as a rental property. The Wife did not make

any direct investment to purchase this property. She has paid nothing towards its maintenance and upkeep. The Husband alone has been responsible for this and he has used the profit and covered the losses this investment has generated since its purchase. He has been directly involved in the leasing and management of this asset. He chose voluntarily to give the Wife an interest in this investment and he did not require or request her direct or indirect involvement in its management. I do not accept the proposition that this asset was acquired as security for retirement. This is a business asset in which each party has a share. I am not satisfied that either should have a greater or lesser interest in this asset than is provided by their registered legal ownership. I dismiss the Husband's section 18 claim in respect to the Wife's interest in this asset as I do hers in respect to the interest he derives through the Britain Street Partnership. I will not deduct the net cash deficiency incurred by the Husband since separation to maintain this property. He has always claimed the profit and loss on this investment and the Wife, until now, has had not benefit from her ownership of this asset.

The Toronto Publishing Company

[49] This company was created in 1969-1970 by the Husband and two other partners. By 1971-1972 he had acquired sole ownership but in 1987 it appears CW , a former employee, had gained a 40% interest in the company. The Husband eventually managed to purchase that share and is once again sole owner of this company. This company, although it has a close relationship with the Halifax group of companies (because of a common owner, the Husband) is not a subsidiary of the Halifax companies. It is and remains a separate legal entity in which the Wife has no ownership interest. The Husband is actively involved in this Company and derives annual income from its operations. It is a business asset.

[50] The Wife argues she made a significant contribution to the management, maintenance, operation and improvement of this asset. In the summer of 1987 the company was in a financial crisis and the Wife was asked to move to Toronto to work full-time in the company's office as its marketing and de facto manager while the Husband continued to divide his time between the Halifax Publishing Company and the Toronto Publishing Company. The Wife continued to work in Toronto for approximately 2 ½ years. She believes she did so productively and that her work kept the company viable. The Husband suggested her alcoholism (a tragic affliction from which the Wife suffered) was by then interfering with her

effectiveness so that her contribution, though provided, was not as significant as she alleges and may have in the end result made a bad situation worse.

[51] The Wife was paid for her work in Toronto. It is not completely clear whether the salary came in its entirety from the Toronto Publishing Company or whether a portion was paid by the Halifax Publishing Company. I do not consider the source of payment to be relevant to my decision. The fact of payment is a relevant consideration. I have no evidence before me to suggest the amount paid was not in keeping with salary levels then existing for the type of work performed by the Wife. The Wife's counsel suggests the Husband would have had to employ additional staff to operate this business if the Wife had not taken this position. This is speculation. There is no factual information to support this assertion. He did have other employees who may have taken on these responsibilities if requested.

[52] The Wife has provided services to the Halifax Companies of which she is a joint owner. Those companies have provided services to the Toronto Publishing Company. I do not accept the proposition that by doing so this is a direct or indirect contribution by the Wife to the management, maintenance, operation or improvement of the Toronto Publishing Company for which she is to be compensated. Those arrangements are commercial transactions between the companies involved. Her compensation arises as a result of her interest in the Halifax Companies. Those commercial arrangements do not provide her with the foundation for a compensatory claim pursuant to section 18 of the Matrimonial Property Act.

[53] I dismiss the Wife's claim to an interest in or compensation for contribution to the Toronto Publishing Company pursuant to section 18 of the Matrimonial Property Act.

[54] The Husband did not provide a value for this business. However, he suggests that it's value, at best, is its liquidation value. My analysis of the value to be assigned to the company is contained within the analysis of the value of the Halifax companies since similar principles apply.

The Halifax Investment Company and the Halifax Distribution Company

[55] The Husband and the Wife jointly own these business assets. My analysis about the contribution to and value of these companies is found within my analysis of the Halifax Publishing Company.

The Halifax Publishing Company

[56] The Husband and the Wife jointly own this business asset. It was purchased in 1982 and initially the Wife was actively involved in the business. This has not been the case since 1997. The Husband suggests that from 1990 until 1997:

> she "attempted to carry on a work role in .....Publishing. What her affidavit does not acknowledge is that her active, serious alcoholism during that period meant that the few significant positive contributions she was able to make in the workplace were more than fully offset by her many destructive, damaging and disruptive actions. (paragraph 18, affidavit of the husband Exhibit 3 tab 5)

[57] The Wife has described in some detail her effort in developing and marketing a series of children's books that are still sold by the Halifax Publishing Company today. She does not agree that her efforts on behalf of the company from 1990 until 1997 were few in significance. However, aside from her role in developing and promoting the children's books, and serving as a volunteer in a number of publishing related organizations she gives little content to this submission. She does say:

> ....I worked as best and hard as I could throughout the 1990's, however my illness was progressing with serious hurtful consequences for everyone when I drank. While the fundamental nature of the illness is powerlessness over choosing whether to drink I caused a tremendous amount of grief to my family and friends because of my alcoholism. (paragraph 24, Exhibit 13, Tab1)

[58] The Wife has always received income ($35,000 per year) from the Halifax Publishing Company notwithstanding her lack of involvement since 1997.

[59] The Husband has detailed the challenges he has faced in operating this Company since 1990. I am satisfied that he had a greater involvement than did the Wife since that time. He has been managing the Company without any involvement of the Wife since 1997. The Husband has requested that he be awarded the entirety of her interest in the company either because of her lesser involvement since 1990 and non involvement since 1997 or because he has

purchased her interest by paying her a yearly income notwithstanding her lesser involvement since 1990 and non involvement since 1997.

[60] It is difficult for me to determine what value the past work undertaken by the Wife has contributed to the Company. I am satisfied she was an enthusiastic participant in the Company and her contributions were considered productive for some period of time.

[61] The income paid to the Wife was paid by the Company, not by the Husband. There were no agreements about the purpose of the payment. The Wife had no understanding that her interest was being "purchased". I am directed by section 18 of the *Matrimonial Property Act* to consider compensation "without regard to the relationship of husband and wife or the fact that the acts constituting the contribution are those of a reasonable spouse of the sex in the circumstances". The Husband may not have continued to provide income to a shareholder who was not contributing to the business. However, if he believed the shareholder had contributed significantly in the past and may do so in the future he might continue an income stream for that shareholder. In this case the possibility that the Wife would recover from her alcoholism and return as a productive member to the business continued as an option until the Husband determined the marriage could not be sustained. Although her involvement in the Company had to be discontinued in 1997, the Husband was an active participant in his Wife's search for recovery. They continued to reside together until their separation. After considering all of the evidence before me, I dismiss the Husband's suggestion that he has already "purchased" the Wife's interest in the property. Paying her an income through the company after their separation was his decision and he cannot now unilaterally declare it to be a purchase of her interest. I am satisfied however that the Husband has contributed more to the maintenance and development of this asset than has the Wife and as a result he is to receive a 15% interest in the Wife's share of the business. This will give him a 65% ownership interest.

[62] The Husband suggests the only dollar value in this company is the value of its real estate to be calculated at fair market value and other assets at liquidation value. There are no outside purchasers for his Wife's shares. She and he cannot continue in the business together and he is the only purchaser for the Wife's shares.

[63] The Husband's testimony, supported by other evidence provided during the hearing, is that there is no ready market for the sale of a Canadian publishing company. If it can be sold the most likely scenario for a sale is by way of "an earn out" rather than a sale to a purchaser with third party financing. This would mean the company would be sold to a person who agreed to take it over and annually pay the previous owner a set sum for its purchase over time. A significant amount, if not all of the payout would need to come from the earnings of the company. In addition, the previous owner would likely be asked to remain involved in the business to mentor the new owner. The most likely purchaser would be a previous employee of the company. One of the reasons these publishing companies would be difficult to sell is their heavy reliance upon Government funding for which they must regularly apply. There no guarantee Government funding will always be available although the Companies have received this funding for several years. The Internet and other publishing vehicles, and the resulting competition, have fundamentally changed the nature of the publishing business. As a result many publishing companies have gone out of business entirely.

[64] In a publishing business receivables should be reduced in value because books can be returned if unsold. Banks are therefore not reliable sources of funding on operations alone. Shareholder injections of cash from other sources are often required. Without real estate ownership there is little "value" in a publishing business. The Husband considers his knowledge of the industry as a critical ingredient in the search for a purchaser. He is 67 years old and if he died tomorrow the business would likely have to be liquidated. He does intend to continue to operate the publishing companies as going concerns and will look most likely for internal purchasers. He may need to subsidize the purchase of the companies. He wishes to purchase his Wife's interest but not at a price from which he will never realize a comparable return.

[65] For a dollar amount calculation of liquidation value the Husband relies upon two reports. The first is from Debbie J. Peverill C.A.. Her company has prepared the audited financial statements for the Toronto Publishing Company, the Halifax Publishing Company and the Halifax Investment Company for several years. She prepared a report, Exhibit #26, in which she comments on the valuation done on all of these Companies by Mark Crossman, C.A., C.B.I on behalf of the Wife, (Exhibit #31). Although business valuation is not her area of expertise she did make some appropriate corrections to figures used by Mr. Crossman. He eventually adjusted his figures in his final valuations outlined in Exhibit #33.

[66] Ms. Peverill does not have specific expertise in assigning value to a business. However, as a C. A. and as the person who has prepared the annual financial statements for these companies she has useful information about values that might be assigned to some of the assets and she does understand the process of valuing assets at their "liquidation value". In addition the valuations provided by Mr. Crossman, Mr. Robinson and Mr. Mac Dougall were based on the financial statements prepared by Ms. Peverill. She provided an initial liquidation value for the assets in these companies.

[67] The second report upon which the Husband relies was prepared by Grant C. Robinson, F.C.A. He is a member of a company called Success Care Solutions Inc. This company prepared a report commissioned by the Association for Canadian Publishers called "Guiding Publishers to a Successful Transition" .The purpose of this report was to "assist its members with developing their individual succession financing plans". Mr. Robinson's report, with supplementary material is found in Exhibit #27, #28,#29. He is of the opinion that the appropriate valuation methodology to use when valuing these companies is to establish the fair market value of the real estate and use the liquidation value for the publishing and distribution assets. Mr. Robinson is a person who has the training, skill, and background required to assist the court in determining what may be an appropriate valuation methodology. The methodology he has chosen does take into consideration the factors described by the Husband. However, this type of valuation does give a "fire sale" price and does not consider that the Company operates as a going concern before and after sale.

[68] Mark Crossman, C.A.,C.B.I. prepared a valuation of these Companies for the Wife. He suggests the valuation methodology to use is a net asset approach excluding intangibles. He did not consider the publishing industry to be different from other "small businesses" and admits that a purchase of these companies likely will require the seller to remain involved and to provide financing. He admitted he knows nothing about the Publishing Industry or the challenges it faces. He has not factored into his valuation the likelihood that a purchaser may be difficult to find.

[69] Although in his testimony Mr. Crossman spoke of using the net asset approach, in this report dated May 30, 2007, Exhibit #31, the following appears:

> It is my opinion that a prudent owner, wishing to retire or to divest of the operating companies, would sell them as going concerns and would in all likelihood achieve values at or above the values I have determined in this analysis.

[70] His final analysis placed these values on the assets:

The Halifax Publishing Company	$812,948
The Toronto Publishing Company	$284,922
The Halifax Investment Company	$173,242

[71] Andy Mac Dougall, C.A. CBV is employed by Grant Thornton. He is experienced in preparing business valuations. He prepared a Critique Report (Exhibit #35 and #36) of the reports prepared by Debbie J. Peverill and Grant C. Robinson. Mr. Mac Dougall was asked to "comment on the method, assumptions and calculations made by Ms. Peverill and Mr. Robinson in relation to the fair market value of (the Halifax and Toronto Publishing Companies) and to comment on the assumption and calculations with regard to the personal taxes applicable in distributing the proceeds to shareholders." (page 1 of the report).

[72] The report prepared by Mr. Mac Dougall "does not contain an opinion as to the fair market value of the companies" (page 2 of the report) . In testimony Mr. Mac Dougall emphasized he gave no opinion about which valuation method would be appropriate for these companies. To do so he would require more information and he may consider the factors listed as concerns by the Husband in doing so. He did suggest that the most likely methods to use would either be the "going concern approach" or the "orderly liquidation approach".

[73] In reviewing the numbers generated by Mr. Mac Dougall it is clear that different assumptions can lead to very different conclusions and that reasonable people can disagree about the assumptions to be used. This confirms Mr. Crossman's remark in testimony that business valuation is more an art than a science.

[74] I consider the valuations provided by Mr. Crossman to be the most reasonable dollar amounts produced in valuing these assets. I do not accept the

very much lower values produced by Ms. Peverill and Mr. Robinson because they give no consideration to the fact that these companies will continue to operate, baring some tragic event, and the benefit of this to the Husband must be valued. I do not accept the very much higher values produced by Mr. Mac Dougall and note that in calculating these various values he was not giving an "opinion on value". I consider Mr. Crossman's valuations to be fair based on all of the material provided to me in this hearing.

Husband's GIC

[75] When the Husband sold subdivided lots from the Sackville Street, Toronto, Ontario property he placed his profit into a GIC that had a value at separation of $95,000.00. After separation the Husband cashed out this GIC to purchase a home. In classifying assets the court should look first at the asset itself to determine its character. In these circumstances, and in most others, the source of the funds used to purchase the asset should not be used as a means by which to classify the asset as a matrimonial or business asset. The Matrimonial Property Act has provided a definition of "business asset" and tracing is not part of that definition. There have been cases in which the concept of tracing appears to have been used to determine classification. (for example, *Tibbetts v. Tibbetts* 1992 CarswellNS 85 (NSCA)). In many of these cases other factors could have lead to the decision that an asset was matrimonial without resort to tracing. In others the use of a section 18 or section 13 analysis may have righted any injustice occurring if the asset or assets remained classified as "business assets". If the intent of these decisions is to confirm tracing as a significant classification factor then there could be no foundation upon which to suggest that this GIC was anything other than a "business asset" . No funds were diverted from family assets to purchase this investment. The money came from the sale of a business asset. However, although the money used to purchase the GIC came from the sale of a business asset, the GIC itself is a static asset. It is similar to a savings account. It is not working in an entrepreneurial way. It carries little risk and requires no management. It is a matrimonial asset. I have made this determination notwithstanding the comments of the Court of Appeal in *Roberts v. Shotton , supra,* that a static asset may in appropriate circumstances be classified as a business asset. I do not consider these appropriate circumstances in which to determine that the GIC is a business asset. The facts of this case are quite different from those in *Roberts v. Shotton, supra.*

Husband's Shareholder's Loan to the Toronto and Halifax Publishing Companies

[76] During the marriage the Toronto and Halifax Publishing Companies owed money to the Husband pursuant to a shareholder's loan. After separation the Husband received payment from the Companies to satisfy the debt owing to him.

[77] I have not been provided with cases that suggest a shareholder's loan <u>must</u> be classified as a matrimonial asset. In this case, the Husband was required to invest in these Companies and he continued to do so over time. Had he not done so the Companies would have required additional third party financing. I am not satisfied that financing would have been available when it was required. There was risk involved in investing this money. The Companies may never have been able to repay the loans. These are loans from a principle officer of the Companies and I am satisfied the money invested was being worked in an entrepreneurial way. The money was not merely being "parked in the Companies" as a type of savings vehicle. It is true that the removal of this money does not seem to have threatened the Companies at present but there may be a need for a further injection of cash in the future. On the other hand the payout of these loans may make purchase more attractive.

[78] If tracing is a factor to be considered, I accept the Husband's information that the money invested in these loans came from his other business assets and borrowing from his family. The shareholder's loans are business assets. The total paid to the Husband was $115,000.

Volkswagen Golf

[79] This vehicle had been purchased by the Husband in 2001 to be used as a second family vehicle. The Wife lost her right to drive for a significant period in 2002, the year in which the parties separated. The Husband took the car to Toronto and after separation sold it the Toronto Publishing Company for $14,565.00. The car is not a "personal effect of one spouse" and since it meets no other exemption criteria of Section 4 (1) of the Matrimonial Property Act, it is a matrimonial asset.

<u>DIVISION AND CONSIDERATION OF SECTION 13</u>

[80] The division of the matrimonial property is contained in Table 1 attached to this decision. This division would require the Wife to pay the Husband the sum of $299,206 . However, the Husband owes the Wife a total of $507,900 to purchase her interest in the business assets (Table 2). Setting one amount off against the other would require the Husband to pay the Wife the sum of $208,694. This payment will leave the Husband with assets worth at least twice as much as those retained by the Wife. The Wife argues that she should receive an unequal division either of the matrimonial assets, or by dividing property that is not a matrimonial asset or both.

[81] These parties had been married for twenty years prior to their separation. However, this was not a traditional marriage. The children raised within the unit were not the Husband's children. Their father provided financial support and maintained a relationship with them. The Wife's education, career development and earning potential were not impeded in any way as a result of the marriage. She has been compensated for her interests in business assets. The Husband did not use matrimonial assets to invest in business assets. He may have used earned income to do so but I do not consider that decision to have been an "unreasonable impoverishment" of the matrimonial assets. Both the Husband and the Wife loved the publishing business. Both wanted this business to thrive. Injections of cash were needed to ensure this result. It is also important to consider the fact that many cash injections came not from earned income but from other business assets owned by the Husband. The matrimonial home and the cottage did not fall into disrepair because the Husband failed to use his income to maintain these assets. He has provided receipts to prove repairs for which he was responsible. He used money received from the sale of a business asset to pay off the mortgage on the cottage. The matrimonial home was owned by the Wife prior to the marriage and has substantially increased in value but this was a marriage of 20 years. Much of the increase in value occurred during the years of the marriage.

[82] The Husband has no pension or other similar benefit except for his RRSP which has been divided with the Wife. The Wife argued that his interest in business assets and the income and "perks" derived therefrom, which benefitted her during the marriage, is an "other benefit" she now will lose. I do not accept this interpretation of the words "other benefit". I consider these words to refer to benefits such as death benefits and benefits provided under other instruments or entitlements similar to pensions.

[83] The parties were mature when they married. The Husband had a career path that he would have pursued irrespective of the marriage. He had considerable business assets entering the marriage which he continued to manage without contribution from the Wife. The Wife was an active participant in supporting and encouraging the Husband's involvement in the publishing business. This was not a marriage in which one would have expected the parties to favour purchase of matrimonial assets instead of business assets. Both were initially very actively involved in the business asset, the Halifax Publishing Company from which each hoped to derive financial security.

[84] I find nothing in the history of this relationship to justify an unequal division. The primary reason for this request appears to relate to the differences in the parties' net worth. This is not a factor directly enumerated in section 13 but it may be a reason for deciding an equal division is unfair or unconscionable if an enumerated factor is present. There are two enumerated factors that may bear on this decision and they are the length of the marriage and the Wife's pre marital ownership of the matrimonial home. After a marriage of twenty years, with this difference in net worth, should the Wife be required to divide the value of the matrimonial home with the Husband? However, why should the Husband be deprived of his interest in this home, or in other assets, after a twenty year marriage in which the Wife has received payment for business assets also owned by her and in which she may have had an opportunity to have amassed greater assets, the failure of which was not "caused" in any active sense by the marriage itself. An unequal division in this case would amount to a redistribution of wealth. I am not satisfied that the length of the marriage and the Wife's pre marital ownership of the matrimonial home is sufficient reason to justify a finding that an equal division is unfair or unconscionable. No other section 13 factors exist to justify this finding.

SPOUSAL SUPPORT

[85] Entitlement to spousal support and the factors to consider when making an award is governed by section 15.2 of the *Divorce Act R.S. , 1985, c.3.* Section 15.2(6) creates four statutory support objectives. The Supreme Court of Canada in *Moge v. Moge* (1992), 43 R.F.L. 345 (S.C.C.) and *Bracklow v. Bracklow [1999] 1 SCR 420* confirmed that all four objectives are to be considered in every case and that no one objective has paramountcy. If any one objective is relevant upon the facts, a spouse is entitled to receive support.

[86] In *Bracklow v. Bracklow, supra*, the Supreme Court analysed the statutory objectives and held that they create three rationales for spousal support:

1. Compensatory support to address the economic advantages and disadvantages to the spouses flowing from the marriage or from the roles adopted in marriage.

2. Non-compensatory dependency based support, to address the disparity between the parties, needs and means upon marriage breakdown.

3. Contractual support, to reflect an express or implied agreement between the parties concerning the parties' financial obligations to each other.

[87] McLachlan, J. in *Bracklow, supra*, indicated that the basis for a spouse's support entitlement also affects the form, duration, and amount of any support awarded.

[88] As I said earlier in this decision, this was not a traditional marriage. The Wife's education, career development and earning potential were not impeded in any way as a result of the marriage. There is no compensatory or contractual entitlement.

[89] The Wife is 70 years old. There is no suggestion she should seek employment to meet her financial need. However, the Husband argues that she can meet that need from her own resources. The Wife suggests her own resources are insufficient to meet her expenses which she calculates at $5,000 per month without any payment for rent or for the majority of her debt, a significant portion of which is owed to family members. I have already commented upon the fact that her expense statements appear inflated. I have no statement that provides a reasonable budget from which I can comfortably understand her need.

[90] The Wife presently has a total annual income of $25,400 consisting of :

- Canada Pension Plan $ 7,825

- Old Age Security $ 5,952

- RRIF $11,623

[91] The Husband has produced a report from Sinclair Financial Limited (Exhibit 3 Tab 4) that suggests the Wife might receive a better return from the RRIF than at present. However the gross amount did not reflect the value I have assigned to this RRIF. I am not satisfied that the Wife can attain these increased values. I do recognize that she will receive the sum of $500,000 from her son for the purchase of the matrimonial home and the sum of $208,694 from the Husband as a result of this decision. It is not clear from the evidence whether the Wife intends to purchase a condominium or enter into a lease. One would expect her purchase to be modest in price so as to maximize her ability to support herself from the assets she has received. If I make the assumption that the $208,694, once invested, will provide her an annual income similar to her RRIF an annual income from this investment in the amount of $12,000 may be reasonable. Her annual income, excluding any investment of the $500,000 would then be $37,400. Her monthly income would be $3,117.

[92] In 2006, because the Halifax Publishing company was paying her an income the Wife had a total annual income of $49,618. She a had similar annual income in 2004 and 2005. This income provided the lifestyle to which she has become accustomed although it appeared insufficient to meet her need as is evidenced by the debt to family and for credit card purchases. Does this lifestyle create an entitlement to non-compensatory dependency based support?

[93] L'Heureux-Dubé, J. wrote in *Moge v. Moge, supra,* at p. 390:

> Although the doctrine of spousal support which focuses on equitable sharing does not guarantee to either party the standard of living enjoyed during the marriage, this standard is far from irrelevant to support entitlement (see *Mullin v. Mullin (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)

[94] The standard of living enjoyed by these parties during their marriage was not particularly lavish. There is no suggestion they took frequent trips to exotic places, drove expensive cars or purchased expensive art. They did eat out frequently but this generally had something to do with their business responsibilities. Perhaps the Wife could then afford to pay $500 per month for food to entertain family and friends, $350 per month for clothing, and $458 per month for Christmas and other gifts. If I leave these items in the Statement of Expenses she filed as Exhibit 46 in this proceeding excluding only the $1,018 per month she has listed for house and other repairs, her monthly expenses would be $3,589. This figure does also exclude income tax liability and debt repayment other than for the line of credit payment which is included. I estimate her Income Tax on an income of $37,400 to be $622 per month and if she repaid credit card debt at $100 per month her expenses would then be $4,311. If she invests none of the $500,000 she will need an additional $1,194 per month ($14,328 per year) to meet her expenses. Of course income to cover this amount will attract tax which would require of more than that amount to match the expense.

[95] The question is whether the Wife's financial need relates to a legitimate "standard of living" issue or a "living beyond one's means" issue which would not attract support entitlement. I have no evidence there will be "great disparities in the standard of living" to be experienced by these parties. The Husband has a home and a vehicle but I have no evidence to suggest his "lifestyle" will be considerably more comfortable than the Wife's. She may not be able to afford to live in a three bedroom house but is this what providing her an appropriate lifestyle after this 20 year marriage requires?

[96] L'Heureux-Dubé, J. refers in *Moge,supra,* to a presumptive claim to equal standards of living. In this case though the marriage was long, it was not traditional in any sense and while I do find that the Wife has an entitlement to non-compensatory dependency based support it will not be for the purpose of equalizing the parties standard of living but will be for the purpose of providing her with a standard of living appropriate to her circumstances at a time when it appears she cannot provide this lifestyle on her income alone. This may change in the future when she has in fact invested the money provided to her as a result of this decision and has found alternate accommodation. She does have a present financial need but it is not substantial.

[97] The Husband is able to pay support. He has a person living with him who should be contributing to their joint living expenses. As a result his Statement of Expenses filed in this proceeding is inflated. He has a projected income for 2008 at $70,000 (rounded). He has assets that may be utilized to produce greater income.

[98] The spousal support guidelines would suggest a range of support between $815 and $1,087 per month if the Wife's income is $37,400. Her income likely can be higher than this if she uses some of the $500,000 as an income producing investment. However, she has not yet made these investments. I also note that because of the Husband's tax bracket, if he paid $815 per month as spousal support, with no tax deductions other than the norm, his net disposable income is only marginally higher than the Wife's. Having taken all of the information I have reviewed into consideration I have determined that the Husband is to pay spousal support to the Wife in the amount of $800 per month until such time as the parties consent to a change or one succeeds in a variation application.

[99] The Husband did not pay the Wife spousal support after their separation. The Wife did go into debt and suggests this happened because the Husband was not paying needed spousal support. However, she made no application to receive this support until now. The Wife insisted on trying to maintain two expensive properties - the matrimonial home and the cottage. Exclusive of these costs, her expenses appear inflated. The Husband had agreed to share a joint debt of up to $50,000 to assist her. I dismiss the Wife's application for retroactive spousal support.

[100] Since there clearly has been divided success by each of the parties each shall bear his and her own costs of this proceeding.

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Beryl MacDonald, J.

See attached
Table 1 and Table 2

TABLE 1

DIVISION OF MATRIMONIAL ASSETS			
DESCRIPTION	VALUE	OWNERSHIP	
		HUSBAND	WIFE
Matrimonial Home	$500,000		$500,000
Cottage	$127,869		$127,869
RRIF	$163,974		$163,974
GIC	$ 95,000	$ 95,000	
Volkswagon Golf	$ 14,565	$ 14,565	
RRSP	$ 34,032	$ 34,032	
Furniture, House & Cottage	$ 10,165		$ 10,165
Volkswagon Beetle	$ 10,000	$ 10,000	
Sub-Total	$955,605	$153,597	$802,008
Less: Matrimonial Debt	$ 50,000		$ 50,000
Sub-Total	$905,605	$153.597	$752,008
Equal Division	$905,605 ÷ 2 = $452,802.50		
Wife to pay Husband $299,205.50			

TABLE 2

CALCULATION OF WIFE'S INTEREST IN BUSINESS ASSETS			
ASSET	VALUE	% INTEREST	VALUE TO WIFE
Halifax Publishing Company	$ 812,948	35%	$ 284,532
Halifax Investment Company	$ 173,242	35%	$ 60,635
Elgin Street Toronto	$ 325,466	50%	$ 162,733
TOTAL	$1,311,656		$ 507,900