IN THE SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)
Citation: Pitts v. Noble, 2009 NSSC 325

Date: 20091103
Docket: SFHMCA 28963
Registry: Halifax

Between:

Daniel Leon Pitts

Applicant

and

Shyra Noreen (James) Noble

Respondent

Judge: Justice Lawrence I. O'Neil

Heard: September 15, 2009, in Halifax, Nova Scotia

Counsel: Krista L. Forbes, for the Applicant
G. Douglas Sealy, Q.C., for the Respondent

By the Court:

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- Provincial Statutes, *Maintenance and Custody Act , Reciprocal Enforcement of Custody Orders Act*, para. 11
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Appropriate Forum: Child and "Spousal" Support Issues
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- Provincial Statute: *Maintenance and Custody Act*, *Interjurisdictional Support Orders Act*, para. 23
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Introduction/Background

[1] This is a written decision following a motion argued September 15, 2009. A ruling was delivered to counsel on October 2, 2009. The Respondent is hereinafter referred to as Ms. James. Ms. James is asking the court to join her application for a variation of child support with the application of Mr. Pitts for a variation of the custody and access order pertaining to the parties' child. Mr. Pitts resides in British Columbia and applied in Nova Scotia to vary the custody and access provisions of the Nova Scotia order. Ms. James resides in Nova Scotia with the child and seeks to vary the child support clause of the same order and she seeks to do so in the same proceeding.

[2] Mr. Pitts' variation application, affidavit and parenting statement were filed December 19, 2008 pursuant to s. 37 of the Maintenance and Custody Act, R.S. N.S. c. 160. He is seeking primary care of the parties' child. Under the provisions of the same statute ; the Respondent replied. She filed a parenting statement and affidavit on February 19, 2009 and a supplemental affidavit on May 27, 2009. In her February 19, 2009 affidavit, Ms. James stated that she was seeking a variation of the child support term of the parties' outstanding order dated July 28, 2004. She subsequently formalized her application to vary the child support clause of the order by filing a variation application on August 28, 2009.

Issue

[3] The court is being asked to decide whether Ms. James is limited to changing the child support provision of the July 28, 2004 order by compliance with the procedures of the *Interjurisdictional Support Orders Act*, S.N.S. 2002, c.9, because the Applicant, Mr. Pitts, resides in British Columbia and the Respondent, Ms. James resides with the child in Nova Scotia.

[4] It is argued on behalf of Mr. Pitts, that she may not consolidate her counter application on the support issue with Mr. Pitts' application on the custody issue. Ms. James' counsel argues against this assertion and for a joint hearing of the issues.

Division of Powers

[5] The answer to the issue raised is best understood by placing it in the Canadian legislative context; being that of a Federal state. Issues of custody, access and child support fall within Provincial jurisdiction unless they arise as incidental to the Federal power over Divorce. In either case, however, the exercise of the statutory power may be affected by common law principles and the court's exercise of its inherent authority, its *parens patriae* jurisdiction**.** For that reason, before dealing directly with the issue argued, I will make brief references to pertinent (1) Federal law: Divorce Act (2) Provincial statute law (3) common law principles and (4) the courts' inherent *parens patriae* jurisdiction. The text, Canadian Conflict of Laws, Castel and Walker, 6 th edition, Volume 2, Lexis Nexis Canada Inc. 2005 at Chapter 18 contains a comprehensive review of domestic and international conflicts law relevant to the issues of custody and access.

Appropriate Forum: Adjudication of Custody and Access

- Federal Law: *Divorce Act*

[6] Incidental to the Federal jurisdiction over divorce, s. 91(26) Constitution Act, 1867, the *Divorce Act* , S.C. 1985, C. 3 (2ND Supp.) hereinafter referred to as the *Divorce Act*, addresses custody and access issues that arise in a Divorce proceeding. Justice Bastarache in *D.B.S.* 2006 SCC 37 at paragraph 49 commented upon this Federal authority. The *Divorce Act*, s. 20 (2) expressly provides for legal effect of orders under that statute throughout Canada. Given the national scope of the *Divorce Act*, no issues arise as to the enforceability of rulings anywhere in Canada.

[7] Sections 3(1) and 4(1) of the *Divorce Act* provide:

> 3. (1) A court in a province has jurisdiction to hear and determine a divorce proceeding if either spouse has been ordinarily resident in the province for at least one year immediately preceding the commencement of the proceeding.
>
> 4. (1) A court in a province has jurisdiction to hear and determine a corollary relief proceeding if

> (a) either former spouse is ordinarily resident in the province at the commencement of the proceeding; or
>
> (b) both former spouses accept the jurisdiction of the court.

[8] Section 6 of the *Divorce Act* permits the transfer of the divorce proceeding to another Province (Territory) if requested to do so on the basis of a child of the marriage being most substantially connected with another Province/Territory. It provides:

> 6. (1) Where an application for an order under section 16 is made in a divorce proceeding to a court in a province and is opposed and the child of the marriage in respect of whom the order is sought is most substantially connected with another province, the court may, on application by a spouse or on its own motion, transfer the divorce proceeding to a court in that other province.
>
> Transfer of corollary relief proceeding where custody application
>
> (2) Where an application for an order under section 16 is made in a corollary relief proceeding to a court in a province and is opposed and the child of the marriage in respect of whom the order is sought is most substantially connected with another province, the court may, on application by a former spouse or on its own motion, transfer the corollary relief proceeding to a court in that other province.
>
> Transfer of variation proceeding where custody application
>
> (3) Where an application for a variation order in respect of a custody order is made in a variation proceeding to a court in a province and is opposed and the child of the marriage in respect of whom the variation order is sought is most substantially connected with another province, the court may, on application by a former spouse or on its own motion, transfer the variation proceeding to a court in that other province.
>
> Exclusive jurisdiction
>
> (4) Notwithstanding sections 3 to 5, a court in a province to which a proceeding is transferred under this section has exclusive jurisdiction to hear and determine the proceeding.

[9] The *Divorce Act* provides for child support and custody/access orders at s.15.1 and 16, and their variation at s.17:

> **15.1** (1) A court of competent jurisdiction may, on application by either or both spouses, make an order requiring a spouse to pay for the support of any or all children of the marriage.

****

16. (1) A court of competent jurisdiction may, on application by either or both spouses or by any other person, make an order respecting the custody of or the access to, or the custody of and access to, any or all children of the marriage.

****

Order for variation, rescission or suspension

17. (1) A court of competent jurisdiction may make an order varying, rescinding or suspending, prospectively or retroactively,

(a) a support order or any provision thereof on application by either or both former spouses; or

(b) a custody order or any provision thereof on application by either or both former spouses or by any other person.

****

Variation order by affidavit, etc.

17.1 Where both former spouses are ordinarily resident in different provinces, a court of competent jurisdiction may, in accordance with any applicable rules of the court, make a variation order pursuant to subsection 17(1) on the basis of the submissions of the former spouses, whether presented orally before the court or by means of affidavits or any means of telecommunication, if both former spouses consent thereto.

[10] The *Divorce Act* at s. 18 - 19 also provides for a two step confirmation process, permitting a party living in one province or territory to initiate or respond to a support variation application in another province or territory. The first stage involves an application for a provisional order that must be confirmed in another Canadian jurisdiction, where the Respondent will have an opportunity to appear and to respond. When the issue involves custody or access however the issue may be transferred to a court in the province to which the child is most substantially connected or a court may decline to exercise jurisdiction in favour of that jurisdiction (s. 6 of the Divorce Act and see *Lariviere v. Lariviere* [1999] N.S.J. No. 490) .

-Provincial Statutes: *Maintenance and Custody Act*, *Reciprocal Enforcement of Custody Orders Act*

[11] *The Maintenance and Custody Act*, R.S.N.S. c.160 does not specifically address the issue of the court's jurisdiction to make a custody and access order. The statute does not require that a child live within the province. The court's power to make a custody and access order is contained in s.18(1) and is subject to an assessment of what is in the child's best interests:

> 18 (1) In this Section and Section 19, "parent" includes the father of a child of unmarried parents unless the child has been adopted.
>
> (2) The court may, on the application of a parent or guardian or other person with leave of the court, make an order
>
> > (a) that a child shall be in or under the care and custody of the parent or guardian or authorized person; or
> >
> > (b) respecting access and visiting privileges of a parent or guardian or authorized person.
>
> (3) This Section does not apply
>
> > (a) where there is an adoption agreement respecting the child pursuant to the *Children and Family Services Act*, that has not expired or been terminated except with leave of the court upon application of a parent who is not a party to the adoption agreement;
> >
> > (b) where the child has been placed for adoption and adoption proceedings under the *Children and Family Services Act* have not been dismissed, discontinued or unduly delayed; or
> >
> > (c) where there is an order respecting custody of or access to the child made pursuant to the *Divorce Act* (Canada) or by the Supreme Court or the county court or a judge thereof.
>
> **(4)** Subject to this Act, the father and mother of a child are joint guardians and are equally entitled to the care and custody of the child unless otherwise
>
> > (a) provided by the *Guardianship Act*; or
> >
> > (b) ordered by a court of competent jurisdiction
>
> (5) In any proceeding under this *Act* concerning care and custody or access and visiting privileges in relation to a child, the court shall apply the principle that the welfare of the child is the paramount consideration.

[12] As a general principle, a court “shall” enforce a custody order made in another Province. Most Provinces have enacted legislation giving effect to the custody and access orders of other Provinces.

[13] In the case of Nova Scotia, the legislation is the *Reciprocal Enforcement of Custody Orders Act*, R.S. N.S. c.387. Only in the case of a risk of serious harm to the child, will an order not be enforced. Sections 3-5 of the *Act* provide as follows:

> Enforcement of custody order of reciprocating state
>
> 3 A court, upon application, shall enforce, and may make such orders as it considers necessary to give effect to, a custody order made by a tribunal in a reciprocating state. R.S., c. 387, s. 3.
>
> Variation of order
>
> 4 (1) Notwithstanding Section 3, where a court is satisfied that a child would suffer serious harm if the child remained in or was restored to the person named in a custody order, the court may vary the custody order or make such other order for the custody of the child as it considers necessary.
>
> Considerations in varying order
>
> (2) In varying a custody order or making another order pursuant to subsection (1), the court shall
>
> > (a) give first consideration to the welfare of the child regardless of the wishes or interests of any person seeking or opposing the variation or other order; and
> >
> > (b) treat the question of custody as of paramount importance and the question of access or visitation as of secondary importance. R.S., c. 387, s. 4.
>
> Requirements of application for enforcement
>
> 5 An application under this *Act* shall be accompanied by a copy of the custody order to which the application relates, certified by the proper officer of the court to be a true copy, and no proof is required of the signature or appointment of the proper officer. R.S., c. 387, s. 5.

-Common Law

[14] Generally issues of custody and access relating to children must be adjudicated in the most convenient jurisdiction. This is most often the jurisdiction where the children are living.

[15] In the Annual Review of Family Law, McLeod and Mamo, 2008, at p.28, the principles are explained as follows:

> At common law, courts had jurisdiction to entertain custody and access proceedings if a child was present, resident, or domiciled in the jurisdiction at the time proceedings were commenced . . .
>
> While jurisdictional requirements vary among provincial custody statutes, in general, a court in a province has jurisdiction to entertain custody/access proceedings if (a) a child is ordinarily/habitually resident in the jurisdiction; (b) a child is present in the forum, has a real and substantial connection with the forum, no proceeding are pending in the place of habitual/ordinary residence, and the forum is the forum conveniens; or © a child would be at risk if a court did not assume jurisdiction . . .
>
> While it is trite law, it always bears to be reminded that the parties cannot confer jurisdiction or take away jurisdiction from a court by agreement when it comes to child related issues . . .
>
> There is a heavy onus on a party seeking to convince a court to take custody jurisdiction if the child is not ordinarily/habitually resident in the province to explain why the child's welfare necessitates the court overriding its basic ordinary/habitual residence jurisdictional principle . . .
>
> A court may decline jurisdiction that it possesses under the relevant custody legislation where it is not the forum conveniens . . .

- *Parens Patriae*

[16] The court has *parens patriae* jurisdiction to decline jurisdiction and will do so if it determines there is a more appropriate forum for the issue of custody and access to be adjudicated. Justice Williams of this court relied upon this jurisdiction, in part, as a basis for assuming jurisdiction of a child in Nova Scotia who was "subject" to a Texas divorce proceeding (see Quigley v. Willmore [2008] N.S.J. No. 552 at page 23 and page 66-68). He concluded that the child was endangered emotionally by the jurisdictional uncertainty, given divorce proceedings in Nova Scotia and Texas and this was a rationale for invoking the court's parens patriae jurisdiction (paragraph 78).

[17] The Supreme Court of Canada in *Re Eve* [1986] 2 S.C.R. 388 thoroughly discussed the genesis and development of the courts' *parens patriae* jurisdiction. In that case the court was asked to *inter alia* authorize the sterilization of a mentally challenged person. The court held that it had *parens patriae* jurisdiction to consider the issue. At paragraph 73 Justice Laforest stated :

> 73. The *parens patriae* jurisdiction is, as I have said, founded on necessity, namely the need to act for the protection of those who cannot care for themselves. The Courts have frequently stated that it is to be exercised in the "best interest " of the protected person, or again, for his or her benefit or "welfare".
>
> ******
>
> 75. ....I might add that the jurisdiction is a carefully guarded one. The courts will not readily assume that it has been removed by legislation where a necessity arises to protect a person who cannot protect himself.

[18] Our Court of Appeal in *M. (N.N.) V. Nova Scotia (Minister of Community Services)* 2008 NSCA 69 at para. 37 affirmed the jurisdiction of the Supreme Court to rely upon the doctrine of *parens patriae* to address gaps in legislation and for the purpose of judicial review. At the trial level Justice Lynch discussed the existence of the *parens patriae* jurisdiction (see paragraph 19 *M. (N.N.) V. Nova Scotia (Minister of Community Services)* 2008 NSSC 72).

[19] Section 32 A (1) (t) of the *Judicature Act*, R.S.N.S. 1989 C. 240. expressly states that the *parens patriae* jurisdiction of the Supreme Court also exists in the Supreme Court (Family Division). Section 32 (10) of the same statute provides that "in questions relating to the custody and education of infants , the rules of equity shall prevail".

[20] In *Yassin v. Loubani* , 2006 CarswellBC 2763 (B.C.C.A.) the trial judge relied upon his *parens patriae* jurisdiction to Order custody to the mother. The children and parents were Canadian Citizens but the children were neither physically present nor habitually present in Canada at the time of the application. The children were in Saudi Arabia. (This decision is described as very troubling by Philip Epstein and Aaron Franks whose annotation appears at p. 2 of the case report.)

[21] In *A. (A.) V. B. (B.)* 2007 CarswellOnt 2 (O.C.A.) the court filled the legislative gap that affected a same sex couple by exercising the court's *parens patriae* jurisdiction.

Appropriate Forum: Child and "Spousal" Support Issues

- Federal Law: *Divorce Act*

[22] The discussion supra beginning at paragraph 6 also addresses support issues across domestic Provincial/Territirial boundaries as part of a Divorce proceeding.

- Provincial Statute: *Maintenance and Custody Act, Interjurisdictional Support Orders Act*

[23] Unlike the *Divorce Act*, 1985, c.3 (2nd Supp.) at s.18-20.1, which has a two stage confirmation process provided for in its legislation for "inter provincial territorial" support orders, the *Maintenance and Custody Act*, does not outline the procedure by which parents in different jurisdiction may initiate or vary court ordered support provisions governing their domestic relationship and their support obligations. The process is now defined in legislation, namely the *Interjurisdictional Support Orders Act*, S.N.S. 2002, c.9. This is relatively recent legislation that replaced, the *Maintenance Orders Enforcement Act*, R.S.N.S. 1989, c.262. The new legislation was the product of a national effort by all governments across Canada to establish a uniform method and system for parties seeking to obtain; to challenge or to vary child or spousal support orders issued, pursuant to the provisions of provincial legislation.

[24] Given that the issue of child or spousal support does not always arise as the sole issue in a proceeding, the question arises whether the support issue must always be pursued in a manner outlined in the *Interjurisdictional Support Orders Act*, regardless of there being a related proceeding, involving the same parties.

[25] In the case before the court, Mr. Pitts resides in British Columbia and he has counsel in Nova Scotia. He is seeking a variation of the custody and access aspect of the parties' July 28, 2004 order issued by the court. Both counsel cite two cases for the court's consideration and argue that they have different meanings.

[26] The Ontario Court of Appeal in *Jasen v. Karassik*, 2009 ONCA 245 (leave to appeal to the Supreme Court of Canada denied September 17, 2009), and the British Columbia Supreme Court decision in *Kendregan v. Kendregan*, 2009 BCSC 23, are cited by both counsel. The Ontario Court of Appeal had the benefit of the British Columbia court's reasoning.

[27] The fact situation in both of these cases involved a father residing in New York State and a mother in Ontario or British Columbia applying to vary the child support obligation of the father. In neither case was the mother seeking to vary a preexisting order. Note that the case herein involves a British Columbia resident seeking to vary a Nova Scotia custody and access order in the Supreme Court of Nova Scotia and the Respondent, a Nova Scotia resident is seeking to vary the child support provision of the same order as part of that proceeding.

- Common Law

[28] In the absence of authorizing legislation support orders of a "foreign" jurisdiction would be of no force and effect outside that jurisdiction. The *ISO Act* provides a uniform method for different jurisdictions in Canada to give effect to each other's support orders.

[29] The Ontario Court of Appeal concluded the *Interjurisdictional Support Orders Act of Ontario* S.O. 2002, provided prospective litigants with a means of seeking, or applying to vary a support order. The court found however, that the regime was not a complete code excluding prospective litigants from recourse to other avenues to seek redress. The following is stated at paragraph 57, 58 and 59 of the decision by A.C.J. O'Connor:

> 57 There are three reasons why I conclude that the ISOA does not constitute a "complete code". First, the issue of whether a particular statute provides a "complete code" for the resolution of particular claims is ultimately a question of legislative intent: Regina Police Assn. Inc. v. Regina (City) Board of Police Commissioners, [2000] 1 S.C.R. 360, at para. 31. There is nothing in the ISOA to suggest that it was intended to remove the right of applicants to proceed under the FLA by effecting service ex juris and demonstrating that the Ontario court has jurisdiction to hear the application.
>
> 58 Second, the ISOA expressly preserves the continued availability of remedies under other legislation. Section 51 of the ISOA reads:

> This Act does not impair any other remedy available to a person, the Province of Ontario, a province or territory of Canada, a jurisdiction outside Canada or a political subdivision or official agency of the Province of Ontario, of a province or territory of Canada or of a jurisdiction outside Canada. [Emphasis added.]

59 Third, the broader interjurisdictional support regime contemplates that applicants will not be precluded from seeking remedies in their own domestic courts. The statutes in reciprocating jurisdictions have provisions similar to s. 51 of the ISOA. The American Uniform Interstate Family Support Act, which was drafted by the National Conference of Commissioners of Uniform State Laws and adopted in reciprocating U.S. states, explicitly acknowledges the continuing availability of remedies under laws such as the FLA in Ontario. Section 104 provides:

> (a) Remedies provided by this [Act] are cumulative and do not affect the availability of remedies under other law, including the recognition of a support order of a foreign country or political subdivision on the basis of comity.
>
> (b) This [Act] does not:
>
> (1) provide the exclusive method of establishing or enforcing a support order under the law of this State; [Emphasis deleted.]

[30] Section 51 of the Ontario legislation corresponds verbatim to section 53 of the Nova Scotia statute. In addition, the Nova Scotia act, at section 6(1), states as follows:

> A claimant who ordinarily resides in the province and believes that the Respondent ordinarily resigns in a reciprocating jurisdiction may start a process in the province that could result in a support order being made in the reciprocating jurisdiction.

[31] I am persuaded that the Ontario Court of Appeal decision of Associate Chief Justice O'Connor in *Jasen supra*, correctly describes the legal considerations I must make in resolving this issue. At paragraph 16, he identifies three circumstances when jurisdiction may be asserted against an out of province father. They are:

> (1) the father is physically present in the jurisdiction, in this case Nova Scotia;
>
> (2) the father consents, agrees or attorns to Nova Scotia's jurisdiction; and
>
> (3) Nova Scotia has a real and substantial connection to the parties; the matter being litigated and service ex juris has been properly perfected.

[32] The parties agree that service is not an issue.

[33] It is not in dispute that the father is not present in Nova Scotia for proceedings involving the support issue. I also find that the father neither consents or agrees to accept the jurisdiction of the Nova Scotia court in so far as the support issue is concerned. For the reasons that follow, I need not decide whether the father having initiated his custody and access application thereby has attorned to the jurisdiction of the Nova Scotia court, regardless of his desire not to do so.

[34] In my view, this case can be resolved on the basis of an application of common law principles that require an assessment of whether Nova Scotia has a real and substantial connection to the matter being litigated.

[35] At paragraph 18, Associate Chief Justice O'Connor delves into the considerations that a court must make before determining whether this threshold is met; that is, whether the court should be satisfied that there is a real and substantial connection among the parties, the subject matter of the application and the Nova Scotia court. He adopts considerations identified by Justice Sharpe in *Muscutt V. Courcelles* (2002) , 60 O.R. (3d) 20 (O.C.A.) At para.19-20, he describes these as the *Muscutt* factors. The relevant text of his decision is as follows:

> [18] I will return to the import of these cases below. Before doing so, it is helpful to consider the following: (a) the development of assumed jurisdiction, which allows plaintiffs to serve out-of-province defendants with claims for damage sustained in Ontario; (b) the evolution of the law relating to recognition and enforcement; © the relationship between assumed jurisdiction and recognition and enforcement; and (d) the distinction between assumed jurisdiction and *forum non conveniens*.
>
> (a) The Development of Assumed Jurisdiction
>
> [19] There are three ways in which jurisdiction may be asserted against an out-of-province defendant: (1) presence-based jurisdiction; (2) consent-based jurisdiction; and (3) assumed jurisdiction. Presence-based jurisdiction permits jurisdiction over an extra-provincial defendant who is physically present within the territory of the court. Consent-based jurisdiction permits jurisdiction over an extra-provincial defendant who consents, whether by voluntary submission, attornment by appearance and defence, [page29] or prior agreement to submit disputes to the jurisdiction of the domestic court. Both bases of jurisdiction also provide bases for the recognition and enforcement of extra-provincial judgments.

> [20] This appeal raises the issue of assumed jurisdiction. Assumed jurisdiction is initiated by service of the court's process out of the jurisdiction pursuant to rule 17.02. Unlike presence-based jurisdiction and consent-based jurisdiction, prior to Morguard and Hunt, assumed jurisdiction did not provide a basis for recognition and enforcement.

[36] I must now apply these factors to the situation before the court.

The Parties' Connection to this Forum

[37] It is my view that the plaintiff's claim, and that of the child's mother has a substantial connection to Nova Scotia. The mother is resident here; the child has always been resident here with her mother; the order sought to be varied is a Nova Scotia order; the father lived in this province until 2007; the father initiated legal proceedings in this province to address the custody and access issues; the mother is a party to that proceeding and has filed a response, placing the child support clause of the same order in issue. The mother and the father both seek to apply section 37 of the *Maintenance and Custody Act.* It is worthy of note that the *Court Jurisdiction and Proceedings Transfer Act*, 2003 (2nd session), S.N.S. c. 2 at s.11 defines the presumption of real and substantial connection for civil (non family) matters in similar terms , see *Bouch v. Penny* 2009 N.S.C.A. 80.

Unfairness in Assuming or Not Assuming Jurisdiction

[38] There will be substantial inconvenience to both parties should the court not assume jurisdiction of the support issue. The fact that the father may be prepared to accept that inconvenience for strategic reasons does not nullify the fact of the inconvenience. Certainly in the case of the mother, refusal by the court to accept jurisdiction would require her to initiate a potentially parallel proceeding under the *Interjurisdictional Support Orders Act*. That *Act* does not provide for the custody and access issue to be litigated under its provisions. To effect a merger of the litigation, the "merged" action must be done under the *Maintenance and Custody Act supra* and in Nova Scotia. There is no unfairness to the father, should the issues be considered together. He will have the opportunity to provide his financial information and to have it considered and to be heard as part of the Nova Scotia litigation he commenced.

[39] Other parties to the suit: there are no other parties.

[40] Canadian courts regularly enforce extra provincial orders and there is no concern that an order flowing from the subject proceedings would be less enforceable, should it also address the issue of child support.

[41] Similarly there is no reason to believe that the order dealing with child support, which will be in the same form as the order dealing with custody and access, would be less enforceable, or recognizable in a reciprocating jurisdiction.

[42] This case is interprovincial and has no international aspect to it that might give rise to confusion at an administrative level.

[43] The court also has an overriding responsibility to effect an efficiency in the court process where possible. This includes an obligation to limit a multiplicity of proceedings. This is a significant fact in seeking to merge these proceedings.

[44] Finally, one must consider the strong legal nexus between custody and the obligation of the noncustodial parent to contribute child support to the custodial parent. The court is mandated when dealing with a custody issue to also consider the child-support implications of the order. The legal reality of the child support obligation was described by the court in *D.B.S.* as follows:

> For the Majority
>
> 36. It is trite to declare that the mere fact of parentage places great responsibility upon parents. Upon the birth of a child , parents are immediately placed in the roles of guardians and providers...
>
> 37. The parent-child relationship engages not only moral obligations, but legal ones as well. Canadians will be familiar with these legal obligations as they have come to be refined, quantified and amplified through contemporary legislative enactments. But the notion of child support , as a basic obligation of parents , is in no way a recent concept.....The obligation of support was thus seen to arise automatically, upon birth; in one 1879 case, this meant that a child support award that included a period pre-dating the institution of the mother's action was confirmed on appeal...

For the Minority

161. The law is clear that separated parents are obliged to pay child support in accordance with their ability to do so. Only the payor parent knows when there has been a change in income that would warrant an adjustment to child support. That, therefore, is the parent with the major responsibility for ensuring that a child benefits from the change as soon as reasonably possible. A system of support that depends on when and how often the recipient parent takes the payor parent's financial temperature is impractical and unrealistic.

. . . . .

163. So long as the change would warrant different child support from what is being paid, the presumptive starting point for the child's entitlement to a change in support is when the change occurred, not when the change was disclosed or discovered.

[45] Section 9 of the *Maintenance and Custody Act supra*, provides as follows:

9 Upon application, a court may make an order, including an interim order, requiring a parent or guardian to pay maintenance for a dependent child. 1997 (2nd Sess.), c. 3, s. 4.

Conclusion

[46] The issues of custody, access and child support will therefore be heard together as part of the same proceeding in Nova Scotia, being SFHMCA 028963.

J.