

SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: Hamilton v. Hamilton, 2010 NSSC 198

Date: 20100525

Docket: 1201-063091; 61449

Registry: Halifax

Between:

Lisa Elaine Hamilton

Petitioner

v.

Robert Michael Hamilton

Respondent

Revised Decision: The text of the original decision has been corrected June 2, 2010 and replaces the previously distributed decision.

Editorial Notice

Some identifying information has been removed from this electronic version of the judgment.

Judge: The Honourable Justice Elizabeth Jollimore

Heard: April 20-22, 2010

Counsel: Christine J. Doucet for Lisa Hamilton
Terrance G. Sheppard for Michael Hamilton

Revision:

- 1) Page 3, paragraph 11 and Page 4, paragraph 13 where it reads: “In *Dillon*, 2005 NSCA 155”, it should read: “In *Dillon*, 2005 NSCA 166”;
- 2) Page 7, paragraph 26 where it reads: “As would be expected of the *”should read: “As would be expected in such circumstances”;
- 3) Page 7, paragraph 28 where it reads: “Mr. Hamilton testified that the company’s main clients are *”, it should read: “Mr. Hamilton testified that the company has four main clients.”
- 4) Page 7, paragraph 28 where it reads: “...payment of \$1,500.00, paid to *...”, it should read “...payment of \$1,500.00 and this payment...”;

- 5) Page 12, paragraph 48 where it reads: "...the Guidelines:...", it should read "...the *Guidelines*...";

By the Court:

Introduction

[1] The most controversial issue in Lisa and Mike Hamilton's divorce is determining Mike Hamilton's income. The Hamiltons agreed on the division of their property. They agreed that their three children would live in a joint and shared custody arrangement. They agreed that Lisa Hamilton is entitled to spousal support. They agreed, albeit on the last day of their trial, how child support should be calculated. They have not agreed on Mr. Hamilton's income.

[2] Their inability to agree on Mr. Hamilton's income leaves me to determine his income and to determine the amount he will pay to Ms. Hamilton as spousal support. Their agreement on how child support should be calculated means that I am not required to perform the analysis otherwise demanded by section 9 of the *Federal Child Support Guidelines*, SOR 97-175.

Family History

[3] Lisa and Mike Hamilton married in 1993. At the time, Mr. Hamilton had been running a construction business as a sole proprietor for seven years. Ms. Hamilton had been working at a bank. Shortly after they married, they began their family and they had three children in a span of thirty months. Their children are now aged 15, 14 and 13. For some years, Mr. Hamilton's business operated from the family's home and Ms. Hamilton worked as its bookkeeper. Her labour was structured around meeting the children's needs.

[4] In 1996, Mr. Hamilton incorporated his sole proprietorship into Michael Hamilton Construction Limited. He is the sole shareholder, officer and director of the company.

[5] By the latter part of 2007, the parties' pending separation was apparent. Ms. Hamilton was looking for another home. She moved to an apartment in early 2008 and, with Mr. Hamilton's financial assistance, she bought a house later that year. She petitioned for divorce in 2009. Justice Lynch heard an interim application in March 2009 and, in the year following that application, Ms. Hamilton found full-time employment and a shared parenting arrangement came into being.

Mr. Hamilton's Income

[6] Mr. Hamilton's income is derived mainly from salary and dividends received from Michael Hamilton Construction Limited. He also receives a modest dividend payment as the result of a small shareholding in a publicly traded company. With the exception of this latter dividend payment (which amounts to less than \$500.00 per year), Mr. Hamilton's income is within his control.

[7] Mr. Hamilton's salary, in four of the last five years, was dependably in the range of \$51,000.00 to \$54,000.00. At its greatest, in 2008, his salary was \$54,080.00. In 2009, Mr.

Hamilton's salary decreased by \$12,480.00 to \$41,600.00. Mr. Hamilton's tax summaries show that in the decade from 2000 to 2009, his salary was at its lowest in 2009.

[8] The dividends that Mr. Hamilton receives from Michael Hamilton Construction Limited were the focus of most of the evidence I heard. The company annually pays Mr. Hamilton a dividend. On a biennial basis, the dividend is inflated by repayment of Mr. Hamilton's shareholder's loan. In the simplest of terms, the company regularly financed different expenses and advances which were not incurred for company purposes. These might include cheques payable to Mr. Hamilton or to Ms. Hamilton, third party bills paid by the company for the Hamiltons, and personal and family use of the company's credit card. These expenses and advances would be charged to Mr. Hamilton's shareholder's loan account. At his option Mr. Hamilton could repay his shareholder's loan. During the time period discussed in the evidence, Mr. Hamilton never did this. Alternately, if he did not repay the loan, on a biennial basis the company was required to declare a dividend paid to Mr. Hamilton in the amount of the outstanding shareholder's loan.

[9] Mr. Hamilton's dividends from 2005 to 2009 ranged between \$40,000.00 and \$93,000.00. When the company was not required to declare a dividend paid to Mr. Hamilton in the amount of his shareholder's loan, his annual dividend from the company was \$40,000.00.

Applying the *Federal Child Support Guidelines*

[10] Determining Mr. Hamilton's income is governed by sections 16 to 20 of the *Federal Child Support Guidelines*. I start by using the sources of income under the heading "Total Income" on Mr. Hamilton's tax return. These are to be adjusted as required by Schedule III of the *Guidelines*.

[11] In *Dillon*, 2005 NSCA 166 at paragraph 23, Justice Bateman made clear that the *Guidelines* direct me to use the sources of income under the "Total Income" heading on the personal income tax return, and she reminded me that annual income for the purposes of child support is not necessarily the same as the total income reported on a personal income tax return.

[12] I first need to calculate Mr. Hamilton's income for child support purposes using the sources of income on his tax return. If the methodology of section 16 doesn't result in the fairest determination of Mr. Hamilton's income, then I'm to determine a fair and reasonable amount, looking - over the span of the last three years - at the pattern of Mr. Hamilton's income, any fluctuations in his income or his receipt of income which doesn't recur. This is provided for in section 17. Where Mr. Hamilton is a shareholder, director or officer of a corporation (as he is here), if I have concluded that section 16 doesn't result in the fairest determination of Mr. Hamilton's income, I may consider the situations described in section 17 and determine his income to include other amounts referred to in sections 18(1)(a) or (b). Additionally, I may impute income to him, pursuant to section 19 of the *Guidelines*.

Mr. Hamilton's Position on His Income

[13] Mr. Hamilton wants me to determine his income as dictated by section 16, using the sources of income on his tax return, using figures that are different from those provided on his tax return. This is consistent with Justice Bateman's comments in *Dillon*, 2005 NSCA 166 that annual income for the purposes of child support may not be the same as the total income shown on a tax return. Mr. Hamilton argues that I should look to his current situation: the company's earnings declined precipitously from 2008 to 2009; the company's line of credit and credit card are at their limits; and the company's net income to late March, 2010 is approximately \$25,000.00. Mr. Hamilton urges me to attribute an annual income of \$71,600.00 to him, comprised of a salary of \$41,600.00 and actual dividends of \$30,000.00. He ignores the small dividend payment from some stock he owns.

[14] To understand Mr. Hamilton's current situation, I need to put it in context. I have reviewed the company's financial statements to do this. In the period from 2004 to 2009, the company's net earnings were never more than seven percent of its gross revenue - except in the banner year of 2008, when net earnings were nine percent of the gross revenue. The decline in the company's earnings is less dramatic when viewed against its typical earnings, rather than against its record earnings in 2008.

[15] Mr. Hamilton explained that the company's earnings dropped in 2009 because there was less work to be done and the work that did exist was comprised of smaller jobs. One aspect of the company's poor financial performance is easily explained. In 2009, the company paid Ms. Hamilton a salary of \$52,000.00 while it simultaneously paid a bookkeeper an additional amount to do the work that Ms. Hamilton was not doing. Ms. Hamilton's salary will end with this decision, returning \$52,000.00 to the company's books, along with any other payments made for her benefit, such as the employer portion of CPP and EI contributions.

[16] Mr. Hamilton's second reason for asking me to use his estimate of his income is that the company's line of credit and credit card are at their limits. The company's credit card account accumulated Avion points and, to maximize those points, it was the only credit card the family used. I was provided with Visa records for the first nine months of 2008 when its limit ranged between \$21,000.00 and \$30,000.00. In some months, mid-month payments of tens of thousands of dollars had to be paid to keep the account operating because of the volume of transactions in the account. During one month, the account statement indicated there was no available credit. In another, the entire credit limit was available. For two months, there was less than \$1,000.00 in available credit. Based on the Visa records, it wasn't uncommon for the company to be at the end of its credit. I do not have statements for the company's credit line, so I cannot determine whether that is a similar situation. The limited information I have about the company's credit does not suggest that being near or at the end of its credit is an unusual circumstance.

[17] Lastly, Mr. Hamilton asks me to look at the company's earnings to date. If the company's net earnings continue at their current rate, they will exceed \$100,000.00 in 2010. The company's best year was 2008, when it had net earnings of \$165,502.00. I was provided with financial statements for the company for five years, and 2008 was the only year when net earnings

exceeded \$100,000.00. The year-to-date income statement comes just near the end of the first quarter of 2010. It was Mr. Hamilton's evidence that he only knows the upcoming projects "week to week" and he wouldn't know "now" (when he testified on April 21) what work the company would have in May. As a result, he could not predict what the future would hold for the company. The situation to date is not dire if the year continues at its current pace.

[18] Mr. Hamilton doesn't suggest that his earnings of \$41,600.00 are in jeopardy. In fact, he urges me to use this figure to represent his earnings. So, his argument about the company's financial health is that his dividends will be reduced if the company performs poorly. I fully expect his 2010 dividends from Michael Hamilton Construction Limited will be lower than they were in 2009. As I have noted, on a biennial basis the company is required to declare a dividend paid to Mr. Hamilton in the amount of his outstanding shareholder's loan. In the years when this dividend is declared, his dividend is higher. A dividend was required to be declared in 2009 and one is not required to be declared in 2010.

[19] Mr. Hamilton says that I should attribute to him only the portion of the shareholder's loan account that he personally received. Looking at the shareholder's loan account, he says that I should deduct:

- (a) amounts that relate to withdrawals made by or expenses incurred by Ms. Hamilton which the company paid;
- (b) amounts used to pay his personal taxes and Ms. Hamilton's personal taxes;
- (c) the amount of an expense (which he describes as repayment of a corporate loan) that he says was incorrectly attributed to him; and
- (d) expenses incurred for the business which the business could not claim as expenses.

[20] I have already explained that the company regularly financed different expenses and advances which were not incurred for company purposes which might include cheques payable to Mr. Hamilton or to Ms. Hamilton, third party bills paid by the company for the Hamiltons, and personal and family use of the company's credit card. This practice was common and accepted.

[21] The withdrawals made by Ms. Hamilton are matched, almost simultaneously, with deposits of equivalent amounts to her bank account. The records for this account for the period from December 31, 2005 to end of couple's cohabitation are forty-nine pages long and are replete with payments to Sears, Zellers, Smart Set, Winners, Sobey's, Wilson's Gas, Pets Unlimited, Old Navy, Thrifty's, Superior Propane, the Liquor Commission, Nova Scotia Power, Shoppers Drug Mart, The Bay, Bedford Cinemas, Dairy Queen, Jungle Jim's, Reitman's, Clay Cafe, dollar stores, convenience stores, Canadian Tire, Foodland, ToysRUs, Mark's Work Warehouse, Black's Photography, McDonald's, Pizza Delight and Walmart. Mr. Hamilton had access to his wife's bank records for a few days before the trial began. It appeared he had not reviewed them.

He was reluctant to agree that the account was used for family purposes. He only admitted that "some" of the expenses paid from the account were for the family's benefit, saying he'd need time to review the records. Having reviewed the records, I accept that the withdrawals that Ms. Hamilton made from the company were for family purposes and are properly part of the shareholder's loan account.

[22] Equally, Ms. Hamilton's use of the company's Visa was also for family purposes and is properly part of the shareholder's loan account. The Visa records isolate her purchases and show she paid expenses at vendors such as Wilson's Gas Stop, Buckley's Music, Walmart, Canadian Tire, Swiss Chalet, Staples, Alpha Optical, Empire Theatres, Spryfield Aquatic Centre, Colonial Motors, Sobey's and Lululemon using the Visa.

[23] The same reasoning applies to the company's payment of the couple's personal tax liabilities. In *Selbstaedt*, 2004 NSSF 110 at paragraph 35, Justice Dellapinna had "no difficulty" in concluding that Mr. Selbstaedt's income tax debt was a debt of the family, writing, "Income tax on employment or professional income earned during the marriage will usually be considered "matrimonial"." In that case, as this, the tax liability arose prior to the parties' separation, though it was paid after separation. The couple's tax liabilities are family expenses.

[24] Mr. Hamilton says one expense that was debited from his shareholder's loan account was actually repayment of a corporate loan which was incorrectly attributed to him. This expense was the subject of testimony by Mr. Hamilton. He said the amount was to be re-allocated and withdrawn from his shareholder's loan account. The company's accountant is Hugh Davidson, C.A. of Lyle Tilley Davidson. Mr. Davidson was asked to provide the electronic version of Mr. Hamilton's shareholder's account ledger when he was discovered in March 2010. This most recent version of the ledger was introduced as exhibit. It continued to attribute this expense to Mr. Hamilton. Mr. Hamilton provided no explanation of why the expense ought not be attributed to him and ought be attributed to the company. He could not explain why it remained on his loan account ledger after a point when the ledger was to have been corrected. Mr. Davidson was not asked to explain why the posting remained. Ultimately, I have no evidence which persuades me this expense is not properly part of Mr. Hamilton's shareholder's loan account.

[25] Lastly, there is the issue of amounts attributed to Mr. Hamilton's shareholder's loan account which he says are expenses incurred for the business which the business couldn't claim as expenses. Specifically, Mr. Hamilton says that the company is required to hire workers and pay them "under the table". He says that this expense could not be shown on the company's books as its expense, so it was shown on his shareholder's loan account ledger as his personal expense. Mr. Hamilton said making cash payments to workers is "customary" in the commercial construction business. He said that this occurred when working on large projects with strict deadlines. He did not offer any witnesses who could testify to this practice being customary. Mr. Davidson said that Mr. Hamilton had told him of this practice - just in the past few weeks prior to his discovery, but never before in their decade-long working relationship. Mr. Davidson

had not heard of this custom in the thirty-five years of his career, during which time he's worked with ten to twenty construction companies.

[26] As would be expected in such circumstances, the paper work leaves much to be desired. To support his contention of cash payments, Mr. Hamilton testified that he sat down with his shareholder's loan account ledger which showed the cheques he had received from the company and he matched the cheques against a jobs list showing the work his company was doing at the approximate time he received the cheque. Remembering the job, he would try to recall the materials that were bought for it and this, he said, would remind him of the workers he would have had to hire to do the job. He then allocated certain cheques to the payment of under the table wages. The documents themselves do not provide or confirm any information. The whole exercise depends entirely on the reliability of Mr. Hamilton's memory, prompted by a cheque and the jobs list.

[27] Mr. Hamilton prepared two lists outlining the payments that he determined were made to cash employees. The first list was written by hand and attached to a Statement of Income which he prepared and swore in December 2008. The second list was contained in his affidavit of March, 2009 (and reproduced in his affidavit of April 2010). Comparing these lists with the 2008 shareholder's loan account ledger identifies various discrepancies. For example, the handwritten list refers to cheques dated February 2, February 15, April 4, July 4, July 11, August 14, September 12 and November 14. These dates do not appear in the list in the affidavits. The list in the affidavits refers to cheques dated February 20, February 14, March 14, March 27, April 8, December 5 and December 16 for which there is no match on the handwritten list. Mr. Hamilton noted the job on both the handwritten and affidavit list. In a number of cases, the job doesn't match. In other cases, a location is shown on one list and an individual's name on the other. There's no evidence to tell me if or how the name relates to the location. The inconsistencies between the lists demonstrate the frailty of Mr. Hamilton's memory. His memory of cash payments made to workers is not reliable.

[28] Mr. Hamilton says that a finder's fee must be paid for the work the company gets. He did not explain how he was able to allocate the finder's fee. Mr. Hamilton testified that the company has four main clients. He also testified, when asked about his efforts to develop new business, that Halifax is a very tight-knit community and it's nearly impossible to get a foot in the door. Once a company has found its construction team, it "sticks" with that team. He testified that contracts were put to tender and awarded to the lowest bidder. Given this testimony, it is difficult to understand why a finder's fee would be paid. Despite testifying that he paid at least \$20,000.00 in finder's fees, the list in the affidavits notes only one finder's fee payment of \$1,500.00, and this payment does not match, by date, amount or notation, anything shown on the handwritten list. Neither Ms. Hamilton nor Mr. Davidson was asked about finder's fees.

[29] Ms. Hamilton argues that Mr. Hamilton bears the burden of proving that under the table payments and finder's fees were paid and she suggests the lists are too different to serve that purpose. Ms. Hamilton agrees that sometimes it was necessary to pay workers under the table. She estimated that half of the amount Mr. Hamilton claimed was actually paid to these workers.

She agreed that would mean \$12,500.00 to \$15,000.00 was paid to them, though she was not confident about this. There was no confirmation of any sort for the finder's fee.

[30] In many regards, Mr. Hamilton's evidence about financial matters was uncertain: he said he relied on his accountant or the company's bookkeepers and didn't pay attention to financial matters. He didn't know how things were posted to the ledgers or where expenses were allocated. Mr. Hamilton's evidence about under the table payments and finder's fees was detailed, but unsupported. It is difficult to have confidence in this evidence, given its inconsistency and his overall lack of certainty about financial matters generally.

[31] After all I heard from Mr. Hamilton about cash employees and finder's fees, it was his ultimate submission that in the "big, big picture" there is no current expense for under the table payments because work is so poor. I accept that no under the table payments were made in 2009 and none have been made to date in 2010.

[32] Mr. Hamilton failed to prove the amount the company paid to its cash employees. His evidence in this regard was inconsistent. I prefer the evidence of Ms. Hamilton as to the amount that would have been paid to cash employees. She acted as the company's bookkeeper for over a decade. It appears, and I rely more heavily on the evidence of Ms. Hamilton than Mr. Hamilton in this regard, that there were expenses for under the table payments in 2008 and that these were on the order of \$12,500.00 to \$15,000.00. I was given no evidence of under the table payments in any year other than in 2008. Mr. Hamilton says the company did 265 jobs in 2008. To manage that volume of work, it makes sense that the business would have had to hire additional employees to work evenings and weekends. Considering the company's payroll for wages and benefits in 2008 was \$430,282.00, I am prepared to accept that payments of \$15,000.00 were made to cash employees.

[33] The sole aspect of Mr. Hamilton's evidence and argument that is relevant to determining his income is the 2008 allocation to his shareholder's loan account of the payments to cash employees. I accept that \$15,000.00 which had been allocated to his shareholder's loan account was an amount that wasn't for the benefit of the family. It should be deducted from his loan and the resulting dividend declared to him. This adjustment leaves a total income of \$105,517.93, comprised of \$41,600.00 in salary, \$317.93 in actual dividends from his bank stock and \$63,600.00 in actual dividends from the company. While \$105,517.93 is not the annual income proposed by Mr. Hamilton, it is the amount I calculate when I assess the evidence he has offered to support his argument that his income ought to be fixed at \$71,600.00. In summary, I accept his salary figure, I do not accept the amount he proposes as dividend income from Michael Hamilton Construction Limited which is much lower than the sum that has been utilized for the support of his family and I note that he ignores the dividends he derives from his stock.

Ms. Hamilton's Position on Mr. Hamilton's Income

[34] Ms. Hamilton does not accept that Mr. Hamilton's income should be fixed as he proposes. She says it is appropriate that her husband's income "be averaged over four years, as a three-year average would capture two years in which the higher dividend was paid."

[35] Ms. Hamilton's comments about the pattern of dividend payments to her husband are accurate. I acknowledge the requirement that his shareholder's loan account be cleared biennially with the declaration of a dividend to him. The evidence has shown the amounts which comprise the shareholder's loan were, largely, used for the family.

[36] Ms. Hamilton opposes the application of section 16 because of its requirement that I consider actual dividends, rather than taxable ones. In her brief, Ms. Hamilton argues that using the "net" (she means actual) amount of dividends "creates an unfair result when [Mr. Hamilton] derives his income largely by [sic] a company he controls." She continues "Therefore section 19(1)(h) permits a Court to impute income where 'the spouse derives a significant portion of income from dividends' " and argues that "the appropriate step is to gross up the net [again, she means actual] dividend by twenty-five percent". She proposes a twenty-five percent gross up because this is equal to the gross up used when calculating the taxable amount of these dividends.

[37] Ms. Hamilton referred me to a number of cases dealing with support payors who earned dividend income. In *Austin*, 2007 CanLII 46719 (ON S.C.), the father was the sole shareholder of his company. Mr. Austin elected to have the company pay taxes on the company's profit and paid the balance of the company's funds to himself as dividends. In doing this, he chose not to pay the company's total profits (less any reserves reasonably required for the company's capitalization) to himself as a salary. Ms. Austin argued that Justice Smith should impute income to Mr. Austin equal to the actual amount of the dividends he received plus the dividend tax credit he received. At paragraph 25 of the decision, Justice Smith wrote that either section 18 or section 19(1)(h) could be used to determine income and fixed Mr. Austin's income for child support purposes at an amount equal to the funds available to the company, other than the company's necessary reserve. The other cases Ms. Hamilton offered repeated the analysis outlined in *Austin*, 2007 CanLII 46719 (ON S.C.).

[38] I note that it is only with the release of my decision that the company will stop paying an annual salary of \$52,000.00 to Ms. Hamilton. For many years, the couple split their income to minimize taxes and Ms. Hamilton has received a salary from Michael Hamilton Construction Limited that has ranged between \$32,000.00 and \$52,000.00. The company now pays a bookkeeper an hourly wage of \$30.00 for the work Ms. Hamilton did. Currently, the bookkeeper is paid less than \$8,000.00 per year. He is provided with no benefits. This means that Mr. Hamilton will be able to take the money previously paid to his wife as a salary, less the new bookkeeper's wage, into his own income if he wishes.

My Determination of Mr. Hamilton's Income

[39] I start with the sources of income on Mr. Hamilton's tax return. His 2009 tax return identifies three sources of income: his salary, his dividends from Michael Hamilton Construction Limited and his dividends from the other shares he owns. These three sources of income appear consistently on his tax returns from 2005 to 2009 and no other sources of income appear on those returns.

[40] In 2009, Mr. Hamilton's salary was \$41,600.00 and that continues to be his rate of pay. His dividends from Michael Hamilton Construction Limited were reported on his 2009 tax return at \$96,000.00 and his dividends from the other shares he owns were reported on his 2009 tax return at \$461.00. The dividends reported are the taxable amounts of the dividends.

[41] The applicable Schedule III adjustment is found in section 5 of the Schedule: the taxable amount of dividends is to be replaced by the actual amount of the dividends Mr. Hamilton received. The taxable amount of a dividend is equal to its actual amount, multiplied by a gross up factor. Where complete tax returns are filed, it's simple to determine the actual amount and the taxable amount of a dividend: they're both identified on the T5 statement issued for the dividend. However Mr. Hamilton did not provide complete tax returns and without these statements I am left to calculate the actual dividends from the taxable ones reported on his tax return.

[42] To calculate the actual amount of a dividend from the taxable amount of the dividend means knowing what sort of dividend is being considered: different types of dividends are grossed up by different amounts before they are reported on a tax return. Schedule 4 of a tax return distinguishes between "eligible dividends" and "other than eligible dividends". Eligible dividends are grossed up by forty-five percent before they are reported, while the "other than eligible dividends" are grossed up by twenty-five percent before they are reported.

[43] Here, since I know the reported amount, instead of grossing up the actual amount by the appropriate percentage, I discount the reported amount by that same percentage. For ease of reference, my calculations are shown in the table below.

Dividend Source	Taxable Amount (reported on tax return)	Gross Up (here, used to discount the taxable amount)	Actual Amount of Dividend
Michael Hamilton Construction Limited	96,000.00	Divided by 1.25	78,600.00
Other shares	461.00	Divided by 1.45	317.93

[44] After this adjustment, the actual dividend from Michael Hamilton Construction Limited is \$78,600.00 and the actual dividend from the shares is \$317.93. While it is useful to review these steps in detail so that they are clear, it is far preferable that parties supply their complete tax returns, with all schedules and attachments, when they file their Statements of Income. The T5 statements disclose the dividend tax credit that is available and the schedules that accompany a tax return show the calculation of tax and the utilization of the dividend credits when taxes are calculated.

[45] In terms of his dividend income, the income from Mr. Hamilton's other shares has increased in every year since 2005. I find it is appropriate to use the current amount of these dividends when calculating Mr. Hamilton's annual income. It is also appropriate to use the amount of his current salary as a component of his income.

[46] I acknowledge that Mr. Hamilton's dividends from his company fluctuate on a biennial basis to reflect the dividend declared to him when he does not repay his shareholder's loan. In 2009, based on my acceptance that his shareholder's loan account was credited with \$15,000.00 paid by the company to cash workers, I find that the actual dividend he received was \$63,600.00.

[47] Since 2005, in those years when a dividend is not declared to return the shareholder's loan account to a zero balance, the company pays Mr. Hamilton an actual dividend of \$40,000.00. The history of dividends Mr. Hamilton has received from Michael Hamilton Construction Limited since 2006 is shown below. The amount shown for 2009 has been adjusted to match my finding about amount paid to cash employees: I have deducted \$15,000.00 from the amount of the actual dividends Mr. Hamilton received.

Year	Taxable Dividends	Actual Dividends
2006	50,000.00	40,000.00
2007	96,625.00	77,300.00
2008	50,000.00	40,000.00
2009	79,500.00	63,600.00

[48] Ms. Hamilton argues that I should use the taxable amount of dividends, rather than the actual amount, to better reflect the tax advantage of structuring the receipt of income through dividends, rather than salary. I accept this argument, based on section 19(1)(h) of the *Guidelines*: Mr. Hamilton's receipt of income by way of dividends provides him with income which is subject to the dividend tax credit (thereby reducing the tax he pays on this income). His receipt of dividends from Michael Hamilton Construction Limited also allows him to defer declaring this income on his tax return and to delay paying income tax on the income.

[49] To recognize the biennial fluctuation of Mr. Hamilton's dividend income from Michael Hamilton Construction Limited I have looked at his income over a four year period, as suggested by Ms. Hamilton. On this basis, I determine the dividends from Michael Hamilton Construction Limited to be \$69,000.00, which is an approximate average of the taxable amount of dividends he received in those four years.

[50] Overall, I determine Mr. Hamilton's annual income to be \$111,061.00: \$69,000.00 received as the taxable amount of dividends from Michael Hamilton Construction Limited, \$41,600.00 received as his salary from the company and \$461.00 received as the taxable amount of dividends from his other shares. I find this to be the fairest determination of Mr. Hamilton's income. Mr. Hamilton's income is within his control and he has structured the receipt of income to finance a comfortable lifestyle for his family. The 2009 year was a poor one for his company, but the current year is not following the trend of 2009, based on the company's year to date earnings. Ceasing to pay Ms. Hamilton's salary and benefits will provide more money for the company to pay Mr. Hamilton, whether by salary or by continuing to provide advances through a shareholder's loan account.

Spousal Support

[51] Mr. Hamilton concedes his wife is entitled to receive spousal support.

[52] Ms. Hamilton seeks monthly spousal support of \$1,200.00. She earns an annual income of \$27,300.00 and, in the Statement of Expenses she filed in February 2009 for the interim support application, she outlined monthly expenses of \$4,970.00.

[53] Mr. Hamilton says that giving priority to his payment of child support means that he should pay no spousal support at this time, though this would be reviewable in the future if his income increased. The parties have agreed that they will determine child support on their own, after I have fixed Mr. Hamilton's income. Because of this arrangement, I can't accept the argument that Mr. Hamilton's ability to pay is exhausted by his child support obligation. I don't know whether the parents have yet set the amount of Mr. Hamilton's child support obligation or what the amount of that obligation is. I don't know that his ability to pay spousal support is exhausted by his financial obligation to his children.

[54] At an organizational pre-trial conference held approximately two months prior to the trial, each party was directed to file current financial disclosure, which would include a Statement of Expenses. Statements of Expenses were needed to address the child support claim in the context of the children's shared parenting arrangement: *Contino v. Leonelli-Contino*, 2005 SCC 63 at paragraphs 52 and 57. Even when the child support claim was resolved (which occurred during final argument), the Statements of Expenses remained relevant to determining Ms. Hamilton's claim for spousal support.

[55] As well, Rules 70.09(3) and 70.09(7) of the *Civil Procedure Rules (1972)* make clear that there was an obligation on each party to file a Statement of Expenses, in addition to the direction I gave at the organizational pre-trial conference. Where each party elected to ignore that direction and neither objected to the other's failure to file a current Statement of Expenses, I am left to exercise my discretion with regard to quantum with the incomplete evidence I have. If the support claim related to child support, I would adjourn the matter until the parties provided the evidence, as directed by Justice Bastarache at paragraph 57 in *Contino v. Leonelli-Contino*, 2005 SCC 63. However, this is a claim for spousal support and I don't have the same obligation to protect a spouse's claim to support that I have to protect a child's: *Richardson*, 1987 CanLII 58 (S.C.C.).

[56] As noted, I have a dated Statement of Expenses from Ms. Hamilton. She was questioned about it so I have some information about how the settlement of the *Matrimonial Property Act*, R.S.N.S. 1989, c. 275, claim will reduce her debt payments and, possibly, her mortgage payments. However, Ms. Hamilton was not questioned about the new expenses she will have because the company will no longer pay certain expenses related to her vehicle, nor about her need to save for her retirement. Appropriately, her interim budget did not reflect expenditures for long-term needs such as retirement. Mr. Hamilton has never filed a Statement of Expenses

and he was not questioned about his expenses. While Mr. Hamilton argues he cannot afford to pay spousal support after satisfying his child support obligation, his failure to file a Statement of Expenses means that his argument is unsupported by evidence.

[57] Ms. Hamilton's Statement of Expenses was prepared for her interim application. It reflects the short term expenses she expected to finance during the period prior to trial. I have noted a few areas where it fails to reflect current and long-term expenses. Her budgeted expenses are modest. She testified that her current debts exceed those shown on her Statement of Expenses. Accepting that she will repay all her debts with her property settlement, as she says she will, she is still left with a monthly pre-tax deficit of \$1,425.00. I accept her request for monthly spousal support of \$1,200.00 and order that Mr. Hamilton make monthly spousal support payments in that amount. This payment will not cover her deficit and the taxes that result from its receipt.

[58] Ms. Hamilton asks that I award her spousal support on an indefinite basis. Mr. Hamilton offered no comment on the duration of an award, instead repeating that child support exhausted his ability to pay spousal support. I have no evidence which suggests there is an appropriate time (either in terms of the occurrence of a particular event or the passage of a particular period of time) to terminate spousal support payments, so I order spousal support on an indefinite basis.

[59] Ms. Hamilton also asks that I specify that her return to school to pursue post-secondary studies be treated as a material change in circumstances entitling her to seek a variation in spousal support. I decline to pre-determine that Ms. Hamilton's return to school is a material change in circumstances. Such a pre-determination presumes factors which have not been discussed in the evidence. Whether a return to school constitutes a material change in circumstances properly remains the decision of a justice hearing a variation application if and when Ms. Hamilton chooses to further her education.

Life Insurance

[60] Ms. Hamilton asks that I order spousal and child support be secured by life insurance of \$500,000.00 which irrevocably names her as its beneficiary. The Hamiltons' oldest child is 15 and their youngest child is 13. Ms. Hamilton is 44. I heard no evidence about the prospect the children would pursue post-secondary studies or the possibility these studies might be funded by scholarships. I am aware there are Registered Education Savings Plans available for them, but I do not know what funds they will produce.

[61] Mr. Hamilton suggested that life insurance in the range of \$150,000.00 to \$250,000.00 would be a more appropriate amount to provide for the children and Ms. Hamilton if he dies while he is still obliged to pay support.

[62] If all the children pursue university studies immediately after graduating from high school, there will be a six year period when at least one of the Hamilton children is in university: for two of those years there will be two children in university and for another two years all three

children would be in university. Even at a modest annual contribution of \$5,000.00 toward a child's university expenses, this means \$60,000.00 of the life insurance would be used to fund Mr. Hamilton's portion of the children's post-secondary education. If Mr. Hamilton was obliged to provide support for his wife until their oldest child reach age 19, this would cost, pre-tax and without any present-value discount, \$57,600.00. Since the parties will be determining child support on their own, I cannot estimate what amount would be needed to finance that obligation. On the basis of the incomplete information I have, I order that Mr. Hamilton designate his wife as the beneficiary of life insurance paying an amount of \$250,000.00 upon his death.

Conclusion

[63] All the jurisdictional requirements of the *Divorce Act*, R.S.C. 1985 (2nd Supp.) c. 3, have been met and I am satisfied that there is no prospect the parties can reconcile. I grant Ms. Hamilton's request for a divorce.

[64] I was provided with a partial Corollary Relief Judgment when the trial began. This contained the relief on which the parties agreed. It shall be modified to reflect my finding that Mr. Hamilton's income for child support purposes is \$111,061.00. The order shall provide that Mr. Hamilton will pay monthly spousal support of \$1,200.00.

[65] Mr. Hamilton shall secure his payment of child and spousal support by designating Ms. Hamilton as the beneficiary of life insurance policies. The policies shall have a total value of \$250,000.00, payable to Ms. Hamilton on Mr. Hamilton's death. The Judgment shall provide that Mr. Hamilton authorize his insurer to respond to all inquiries from Ms. Hamilton about the policies. If this amount of life insurance is not maintained, the portion of \$250,000.00 which is not funded by the policies shall form a first charge on Mr. Hamilton's estate. The amount of life insurance may be varied as child support and spousal support are varied.

[66] If the parties wish to make submissions on costs, they shall arrange a time with the scheduling office.

J.S.C. (F.D.)

Halifax, Nova Scotia