

**SUPREME COURT OF NOVA SCOTIA**  
**(FAMILY DIVISION)**

**Citation:** Calder v. Calder, 2011 NSSC 328

**Date:** 20110901

**Docket:** 1201-064532

**Registry:** Halifax

**Between:**

Jane Sadie Calder

Petitioner

v.

John Hugh Calder

Respondent

**Judge:** The Honourable Justice R. James Williams

**Heard:** June 28 and 29, 2011, in Halifax, Nova Scotia

**Written Decision:** September 1, 2011

**Counsel:** Deborah Conrad, Counsel for Jane Calder  
Robyn Elliott, Counsel for John Calder

**By the Court:**

[1] Jane Calder (born July 16, 1957) and John Calder (born April 4, 1956) married September 25, 1982. They separated October 28, 2008. They had a lengthy marriage, over 26 years. Ms. Calder is 54. Mr. Calder is 55 years of age. They are now divorcing. The main issues between them relate to money.

[2] Ms. Calder seeks retroactive child and spousal support, on-going child support and the right to review spousal support. The child support claims include claims for section 7 expenses.

**Background**

[3] The Calders have one child, Alexander, who was born October 20, 1993. He is approaching his 18<sup>th</sup> birthday. He has resided with Ms. Calder since the separation. The parties have agreed, at trial, to a parenting plan for inclusion in a Corollary Relief Judgment.

[4] Ms. Calder is a registered nurse. She is also qualified as a registered ultrasound technologist. She worked full-time as a nurse until Alexander's birth, and part-time thereafter until October of 2010.

[5] Mr. Calder has worked as a geologist with the provincial Department of Natural Resources throughout the marriage. He obtained a PhD during the marriage. Since 2004 he has worked teaching on a part-time basis at St. Mary's University (in addition to his full-time employment).

[6] The parties separated in late October, 2008 virtually immediately after Ms. Calder learned that Mr. Calder was involved with another woman, a coach of a sports team of their son.

[7] Mr. Calder moved out, and lived with his sister for five months, then got a small apartment. Ms. Calder and Alexander stayed in the matrimonial home for almost two years until they moved to an apartment in early September, 2010. The matrimonial home sold October 28, 2010.

[8] The separation has been stressful for all concerned. The evidence indicates that the Calder's marriage had deteriorated over a number of years, that divorce had been spoken of more than once well before their separation.

[9] After the separation (October 28, 2008) Mr. Calder provided what he describes as "significant financial assistance" to Ms. Calder and their son. He did so to help maintain and support them. He asserts that even a number of months after the separation Ms. Calder would not cooperate in transferring utility bills to her name, entering a consent order concerning spousal support (to provide some tax relief to him with a proposal that provided that he would pay any tax accruing to her as a result of the support order), and was less than cooperative around the sale of the matrimonial home. The evidence tends to support his assertions.

[10] The evidence indicates Ms. Calder was in a word, bitter. I conclude this resulted in her acting in a fashion that was difficult and less than constructive. Mr. Calder states at paragraph 45, 46 and 47 of his affidavit with respect to the monies he was voluntarily paying post separation and attempts to address monetary issues with Ms. Calder:

45. When I suggested to Jane that we had to address our finances as I could not continue, she responded with statements such as the following:
  - (a) threatening to call my elderly mother and tell her I was putting my wife and son out on the street;
  - (b) telling me in the presence of Alexander that his dog had to be put down because I was being stingy financially;
  - (c) that she had purchased blow up beds for she and Alexander because I was putting them out of the house (Jane told me she told Alexander that she had done this and that it was my fault).

Each time these types of statements were made they had the effect of my continuing the payments for Jane and Alexander a little longer. I did not want Alexander to be exposed to more comments and conflict that might be damaging to him.

46. Each time I tried to get the utilities out of my name (or even cancel the newspaper) Jane made it about Alexander. Jane refused to arrange to have the utilities reconnected and made it clear to me that she was prepared to let the services cease and that if they did cease, she would tell Alexander that I had cancelled his internet, cable TV, telephone or newspaper. In the Spring of 2010 (more than 1 ½ years after separation) there were interruptions in telephone and internet service to the home, when I had arranged for disconnection and various deadlines and extended deadlines passed without Jane arranging for the re-connection. I received (through my lawyer) two (2) letters from Jane (through Jane's lawyer), complaining that I had improperly disconnected these services. I also heard from Alexander on this issue.
47. The only utility Jane did eventually take responsibility for was her cell phone (in June 2009). Early on, I was receiving the bill and could see the numbers Jane was calling (such as repeated phone calls to Ms. Strecko's estranged husband). Then I did not receive the statements for several months and therefore did not pay the bill. In or about June 2009 I learned Jane had transferred this account into her name after not paying the bill for several months. It is my belief Jane transferred this bill to her own name

because she did not want me to see who she was calling. The result of the non payment of this account (during the period I was not receiving the statements) was that the account went into collections with a collection agency. There were charges and penalties, and my credit limit on my American Express credit card was reduced as a result of Jane's actions with respect to this account.

I accept Mr. Calder's description of these events. Ms. Calder resisted his efforts to formalize or adjust financial accounts arrangements.

### The Parties Income(s)

[11] The (Line 150) income of the parties has been:

2008	\$83,153	Mr. Calder (\$73,294.47 Prov., \$9,737.53 St. Mary's)
	\$37,531	Ms. Calder
2009	\$91,170	Mr. Calder (\$81,245.15 Prov., \$9,924.96 St. Mary's)
	\$39,354	Ms. Calder
2010	\$97,768	Mr. Calder (\$79,486.86 Prov., \$18,281.81 St. Mary's)
	\$43,820	Ms. Calder
2011	\$93,590	Mr. Calder (est.)
	\$74,000	Ms. Calder (est. her pay stubs of March 26, 2011 indicates year to date income of \$18,693; \$18,693 X 4 = \$74,772)

[12] Ms. Calder worked half-time until October of 2010, and has worked full-time since then. Her full-time position became available when the person she was job sharing with ceased employment. There is no evidence she sought other full-time work post-separation (between October 2008 and October 2010). Her full-time position is "temporary"; not guaranteed to continue. Mr. Calder has worked full-time with the Province and part-time with St. Mary's. He took advantage of another instructor's temporary absence to teach an extra course in the fall of 2010, teaching her course and his in 2010. He expects possible extra income of \$10,000/year after 2011 from his teaching.

[13] Ms. Calder did not disclose that she had secured full-time work some months after doing so. Her sworn statement of income of April 13, 2011 states that she has an income of \$43,225. Her actual income was later disclosed.

### **Child Support / Retroactive Child Support**

#### **a. Retroactive Child Support - Table Amount**

[14] I conclude that Mr. Calder's income for child support purposes, and the child support payable by him (Table Amount) to be as follows:

<u>Time Frame</u>	<u>Income</u>	<u>Table Amount</u>	<u>Total Payable</u>
Nov, Dec 2008	\$83,153	\$712	\$1,424
2009	\$90,520	\$767	\$9,204
2010	\$97,616	\$822	\$9,864
2011	\$93,590	\$791	(dealt with separately)

[15] I have treated his 2011 income as \$93,590 accepting his evidence that he will not have as much part-time teaching in 2011, as 2010.

[16] The child support (table amount for one child) he should have paid to the end of 2010 is:

<u>Time Frame</u>	<u>Total Payable</u>
Nov/Dec 2008	\$1,424
2009	\$9,204
2010	\$9,864
	\$20,492

[17] Ms. Calder's counsel acknowledges that Mr. Calder paid her \$1,045.98 per month towards the expenses of Ms. Calder and their son from the time of separation through October 2010 - a total of 24 months:

$$24 \times 1,045.98 = \$25,103.52$$

[18] In addition Mr. Calder paid \$771/month for November and December 2010 - or \$1,542.

[19] To the end of 2010, then he paid \$26,645.52 in general voluntary support; or \$6,153.52 more than the Child Support Table Amount he would have been required to pay.

[20] It should be noted that Ms. Calder's calculation of payments by Mr. Calder credit him with half of his payments on items such as their joint lines of credit (one of which financed the home), house and "mortgage" insurance, property taxes, property and life insurance, and power. Arguably this is appropriate - the home was half his. The payments did however - when totalled - so as to include his half, strain his cash flow, his ability to pay beyond what he was doing.

[21] The amount of Mr. Calder's contribution to Ms. Calder and their son - as acknowledged by Ms. Calder - also includes half of her cell phone, Bell Aliant home phone, cable. These expenses were arguably all hers, not half his - I regard Ms. Calder's calculation of Mr. Calder's contribution as conservative.

[22] To the end of 2010, I conclude that there are no arrears arising from the table amount of child support he should have paid. (He should have paid the \$20,492 and did pay her \$26,645.52 according to Ms. Calder's numbers).

**b. Retroactive Child Support - Special Expenses**

[23] Ms. Calder has also claimed retroactive special expenses, section 7 expenses relating to tutoring (\$1,750) and summer school (\$325) - at total of \$2,075.00. Mr. Calder says he made payments for their son concerning counselling (\$1,660), soccer (\$2,046 + 97) a total of \$4,703.00. He also paid for their son's trip to Cuba in the spring of 2010 with a friend (which may not be a section 7 expense). I conclude there are no arrears concerning section 7 expenses, that Mr. Calder has paid his share, or more of these expenses.

**c. Ongoing Child Support**

[24] Mr. Calder's ongoing child support (for 2011) shall be based on income of \$93,590, a Table Amount of \$791 payable on the first day of each month commencing January 1, 2011. He shall provide Ms. Calder with his T4 slips for 2011 on or before March 1, 2012. Should his income for 2012 prove to be more than \$93,590 he shall pay the monthly shortfall in Table Amount (x 12 months) by May 1, 2012. Subsequent years will involve a similar adjustment. Any existing arrears for 2011 will be paid to Ms. Calder by September 30, 2011.

[25] With respect to future section 7 expenses - they will share receipted counselling, tutoring and soccer expenses in proportion to their annual incomes - each calendar year - based on yearly incomes, an adjustment if necessary being made each March 1 after T4's are exchanged, and child support payments adjusted by May 1 of the next year.

**Spousal Support/Retroactive Spousal Support**

**a. Retroactive Spousal Support**

[26] Ms. Calder seeks retroactive spousal support.

[27] Her counsel indicates that the Spousal Support Advisory Guidelines suggest at the low range of support that Mr. Calder would owe her - for the 24 months from November 2008 to, including October, 2010:

Nov/Dec 2008	224/mo X 2	\$448
2009	393/mo X 12	\$4,716
2010	406/mo X 10	\$4,060
		\$9,224

The average payment over the 24 months in question would be  $\$9,224 \div 24 = \$384.33$ .

[28] His payments to her over the same time period exceeded his child support obligation by \$6,153.52 or  $\$6,153.52 / 24 = \$256.40 / \text{mo}$ . This is the after tax amount received by Ms. Calder.

[29] Were I to now make a retroactive order, the after tax value for Ms. Calder (income est. \$70,000) would approximate 70% of \$384.33 or \$269.03.

This mere dollars off what he paid.

[30] The use of Spousal Support Advisory Guidelines is limited where debt is a significant factor (as it was here). Debt is listed as an exception within the SSAG. During the retroactive period in question the parties debt, especially that related to the matrimonial home had to be serviced.

[31] For this reason, the fact that Ms. Calder worked half time for the entire two years in question, Mr. Calder's ability to pay and Ms. Calder's delay in dealing with some of the financial issues any reference to the SSAG should, in my view, look at the low end of it's "ranges" - insofar as the SSAG are to be used as a reference point. (Ms. Calder's counsel did make submissions referring to higher ranges). I appreciate and have considered the fact that this is a lengthy marriage.

[32] Retroactive spousal support has recently been commented up by the Supreme Court of Canada in *Kerr v. Baranow*, 2011 SCC 10 at paragraph 201 (per Cromwell, J.):

While *D.B.S.* was concerned with child as opposed to spousal support, I agree with the Court of Appeal that similar considerations to those set out in the context

of child support are also relevant to deciding the suitability of a “retroactive” award of spousal support. Specifically, these factors are the needs of the recipient, the conduct of the payor, the reason for the delay in seeking support and any hardship the retroactive award may occasion on the payor spouse. However, in spousal support cases, these factors must be considered and weighed in light of the different legal principles and objectives that underpin spousal as compared with child support.

[33] Those other factors include the provisions of the *Divorce Act* dealing with spousal support.

[34] The *Divorce Act* (section 15(4)) directs that the Court consider when determining spousal support the condition, means, needs and other circumstances of each spouse including the length of time they cohabitated, the functions performed by each spouse during cohabitation, and any order or agreement relating to the support of the spouse.

[35] Here there was no agreement, but there was a defacto arrangement - he paid an amount to support his family. Ms. Calder did not embrace his attempts to formalize the support payments. Mr. Calder paid support (on a voluntary after-tax basis) consistent with his ability to pay.

[36] The *Divorce Act* (section 15(5)) also directs that the Court shall not consider any misconduct by a spouse in relation to the marriage when determining spousal support. However distasteful Ms. Calder finds Mr. Calder’s affair, the affair is not a factor in determining spousal support. Her threats to him, and delays, if not refusal, to deal with financial issues post separation were not behavior in relation to the marriage.

[37] The *Divorce Act*, section 15.2(6) provides that an order for the support of a spouse should:

- (a) Recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown.

Both spouses here have had careers, both are faced with having to work longer until retirement than they might otherwise have had to. They are sharing their pensions. Both have health issues. Ms. Calder, does not have the job security she would otherwise have had; absent the marriage. Both currently have incomes that allow them to maintain themselves.

- (b) Apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;

I cannot identify such consequences in this situation. Child support is being paid.



- (c) Relieve any economic hardship of the spouses arising from the breakdown of the marriage;

I have considered this - both in terms of their respective circumstances from the date of separation to trial; and their future circumstances, insofar as they can be anticipated.

- (d) In so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time;

[38] Ms. Calder in the relief requested asked that the order “state that she can retire at the age of 55.” At the close of the trial, during submissions, her counsel withdrew this request, acknowledging that it was not a request the court could address. Ms. Calder clearly is not happy with the prospect of having to work longer than she would like to. Mr. Calder faces the same prospect. Both have a responsibility to attempt to support themselves and contribute to the support of their son.

[39] Justice Cromwell (in *Kerr v. Baranow*) indicates retroactive spousal support claims are subject to considerations that are “similar” to that of a retroactive child support claim; the factors outlined in *D.B.S. v. S.R.G., L.J.W. v. T.A.R., Henry v. Henry, Hiemstra v. Hiemstra*, [2006] 2 S.C.R. 231. The *D.B.S.* factors include “blameworthy conduct” on behalf of either party. I have considered this, and other “*D.B.S.*” factors as well as the provisions of the *Divorce Act* related to spousal support, when reviewing the evidence before me.

[40] To the extent that there was need and ability to pay Ms. Calder spousal support to the end of October 2010 (when she began working full time), I conclude the monies paid by Mr. Calder satisfy any such obligation. He paid, I conclude, a reasonable amount.

[41] The Supreme Court of Canada in *Kerr v. Baranow (supra)* commented at paragraph 216:

Given the high financial, physical, and emotional costs of interlocutory applications, especially for a party with limited means and a significant disability such as Ms. Kerr, it was my respectful view unreasonable for the Court of Appeal to attach such serious consequences to the fact that an interim application was not pursued. The position taken by the Court of Appeal to my way of thinking undermines the incentives which should exist on parties to seek financial disclosure, pursue their claims with diligence, and keep interlocutory proceedings to a minimum. Requiring interim applications risks prolonging rather than expediting proceedings.

[42] I am not faulting Ms. Calder for not having brought an interim application. I am concluding that she did not demonstrate a need (retroactively), that her actions at times prolonged or exaggerated expenses, that she could have sought work that augmented her half time work before she did (I have considered the distress the separation caused her) and that Mr. Calder was paying post-separation expenses, including his own modest apartment that

approached the limits of his ability to pay. Ms. Calder would not assist in the expansion of the parties monetary pool through an interim spousal support agreement. Her request that the Court allow her to retire seemed disconnected from the financial reality this couple face. Finally she did not disclose her own full time work in a timely fashion.

**b. Ongoing Spousal Support**

[43] Ms. Calder has worked full time since October 2010. Ms. Calder's counsel acknowledged that there was/is no demonstrable need for spousal support since October 2010.

[44] Both Mr. Calder and Ms. Calder have health issues. Ms. Calder's full time position is not permanent, is subject to review this fall. Considering the length of this marriage, the time since separation, and the factors to be considered under the *Divorce Act*, it is appropriate that the right to apply for spousal support be reserved to both Mr. And Mrs. Calder for a period of two years from the date of this decision.

**Security for Support**

[45] Ms. Calder also asked that she be named the irrevocable beneficiary of Mr. Calder's life insurance. Both parties will name the other the beneficiary of fifty percent (50%) of the life insurance held at the time of separation - for so long as Alexander remains a child of the marriage as defined by the *Divorce Act* or spousal support is payable (should it be ordered within two years).

[46] The parties appeared at the end of the trial to have reached agreement on a parenting plan, division of assets and pensions, remaining issues. I expressly reserve the courts jurisdiction on these issues until this is confirmed. Their divorce has been proven and is granted.

**Summary**

[47] There shall be no retroactive (pre January 1, 2011) order of child support (table or section 7).

[48] Child support for 2011 will be payable by Mr. Calder based on a 2011 income of \$93,590; \$791 per month subject to adjustment as outlined herein. Special section 7 expenses for 2011 and subsequent years will be shared.

[49] There shall be no retroactive spousal support.

[50] Both parties shall have the right to apply for spousal support for a period of two years, until September 1, 2013; should their employment circumstances change.

[51] Both parties will name the other the beneficiary of fifty percent (50%) of the personal life insurance held at the time of separation - for so long as Alexander remains a child of the

marriage as defined by the *Divorce Act* or spousal support is payable (should it be ordered within two years).

**Costs**

[52] The parties have asked to be heard on costs. A date will be set in the month of September - with any written submission on costs to be filed by noon the day prior to the costs hearing.

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

Halifax, NS