

IN THE SUPREME COURT OF NOVA SCOTIA  
(FAMILY DIVISION)

**Citation:** Adams v. French 2007 NSSC 57

**Date:** Decision Date: 2007/02/26

**Docket:** 1206-004583

**Registry:** Sydney

**Between:**

Phyllis Adams

Petitioner

v.

Robert French

Respondent

**Revised decision:** The text of the original decision has been corrected June 27, 2007 and replaces the previous distributed decision.

**Judge:** The Honourable Justice Darryl W. Wilson

**Heard:** June 21, 22, 23, 2006 and July 7, 2006, in Sydney, Nova Scotia

**Written Decision:** February 26, 2007

**Counsel:** Elaine Gibney-Conohan, Counsel for the Petitioner  
Candee McCarthy, Counsel for the Respondent

**By the Court:**

[1] Phyllis Adams, the Petitioner seeks an order for divorce and payment of spousal support pursuant to the **Divorce Act** and an equal division of matrimonial assets pursuant the **Matrimonial Property Act**. Robert French, the Respondent, seeks a denial of the Petitioner's claim for spousal support and requests an unequal division of matrimonial property. The Respondent also seeks compensation for his contribution to the Petitioner's business and costs.

[2] The parties were married on August 21, 1999 and separated October 1, 2003. This marriage is a second marriage for both. Each party has children from their prior relationships who are adults and no longer dependent.

**BACKGROUND:**

[3] The Respondent is a Chartered Accountant operating a public accounting practise in Sydney. Prior to the marriage the Petitioner pursued several careers. She was part owner with her former husband in a photograph and framing business in Sydney, owned and operated a Café and gift shop in Louisbourg, worked as a pastry chief for the Silver Dart Motel in Baddeck, a real estate agent in Sydney

and an event coordinator and assistant chef in Alberta. She also earned a degree from Cape Breton University in Musology which qualified her as a curator.

[4] The parties met in 1996 when the Petitioner was referred to the Respondent's business by a lending agency which provided financing for one of her business enterprises. They met again in the summer of 1997. The Respondent was waiting for a decision in his divorce proceeding. The Petitioner was separated from her husband. Although separated they maintained a cordial relationship and continued to operate a photography and framing business together. In addition the Petitioner was working as a pastry chef for the Silver Dart Motel in Baddeck. The Petitioner had decided to relocate to western Canada. The parties dated several times during the summer of 1997 before the Petitioner relocated to Alberta in October where she worked as an assistant chef and event coordinator.

[5] The Petitioner stated that the Respondent wrote many letters asking her to return to Cape Breton. He wanted to visit her in Alberta. In her opinion he was pursuing her and wanted a commitment for them to live together. She fell in love with him and in the summer of 1998 decided to return to Cape Breton.

[6] The Petitioner was still married to her former husband when she returned from Alberta in the summer of 1998. As stated they jointly owned and operated a business and owned a home in Mira. According to the Petitioner she resided in her home in Mira for a short time after returning from Alberta and then moved into the Respondent's home in Cantley Village. The Petitioner's former husband was in receipt of a pension from CBC. The Petitioner was named a beneficiary on his pension and medical and dental plans. The Petitioner has several medical conditions which prevents her from obtaining medical and dental coverage on her own. She was concerned about the loss of benefits if divorced from her husband. She stated that the Respondent told her he was doing very well with his business and she did not have to worry about medical bills since he would look after their future.

[7] The Petitioner was 52 when she married the Respondent and stated she had no debt. In order to get a quick divorce from her former husband she did not seek a share of their matrimonial assets. She received \$10,000.00 from her former husband for the sale of her interest in the photography and framing business. The Mira property which was subject to a mortgage had no equity and she conveyed her interest to her former husband.

[8] The Petitioner stated that at the time of the marriage she was totally dependent on the Respondent for her future security.

[9] The Respondent's evidence is that the Petitioner was keen on moving to Western Canada and he encouraged her to do so. He wrote her a number of letters after she provided him with an address. He was interested in a relationship but was not interested in marriage since he had just gone through a very bitter divorce proceeding. Although open to different living arrangements, he did not want someone dependent on him and discussed this with the Petitioner. According to the Respondent, the Petitioner said she was an independent person who always paid her own way and would pay 50% of the home and vehicle expenses.. The Respondent denied saying he would look after the Petitioner forever. The Respondent told the Petitioner that she was entitled to a share of her husband's pension. However the Petitioner told him she would not take anything from her husband. Against the Respondent's advice the Petitioner decided not to make a claim against the matrimonial assets in the possession of her ex-husband. The Respondent said he was not aware the Petitioner received \$10,000.00 from the sale of her interest in the photography business until she testified in these proceedings.

The Respondent also said the Petitioner told him they could not live together because it would give the wrong impression to her grandchildren. Eventually he agreed to marriage. According to the Respondent the parties began living together a few months before their marriage in 1999 and not in 1998 as stated by the Petitioner.

[10] During the marriage the Respondent continued to work as a public accountant. The Petitioner attempted to operate a photography business out of the Cantley Village home but found it difficult to generate sufficient business. She took a refresher course which enabled her to work as a real estate agent for a local broker. Eventually she obtained her own certification as a real estate broker and established her own real estate business. The parties kept their income separate. The Respondent maintained three bank accounts in his name which existed at the time of the marriage. He paid the household and vehicle bills from these accounts. The Petitioner used her income to purchase groceries, personal items and gifts. These purchases were mostly paid by cash. A joint chequing and a joint savings account were opened at President's Choice but were rarely used.

**CREDIBILITY:**

[11] Counsel for the Petitioner submits the Respondent's evidence lacks credibility and the Petitioner's evidence should be preferred when deciding what evidence should be accepted. The trial was adjourned on two occasions at the request of the Respondent. The court was satisfied that the Respondent, due to a medical condition which required surgery, was not able to attend scheduled court hearings in September and then November 2005. Counsel for the Petitioner submits the Respondent misled the court about his medical condition and he should have attended the court proceedings because he wasn't completely incapacitated. Counsel for the Petitioner refers to the Respondent's evidence that he was not present when arrangements were made to have his boat moved from Soldier's Cove to Sydney and that he had trouble dressing himself. Counsel for the Petitioner called Mr. Eaves as a rebuttal witness. Mr. Eaves testified that he telephoned Mr. French and volunteered to move his boat. Mr. Eaves had difficulty locating the road from the main highway to the shore where the sail boat was moored. The Respondent met him at the road leading to the shore and accompanied him part way before resting at a Gazebo. Mr. Eaves said the Respondent looked gaunt and weathered.

[12] The evidence of Mr. Eaves does not convince the court as suggested by counsel for the Petitioner that the Respondent intentionally misled the court about his illness and availability for the previous court hearings or his credibility on issues in dispute between the parties.

[13] The court does have concerns about the credibility of the Petitioner's evidence. (1) The Petitioner did not dispute the Respondent's evidence that she did not want to live common-law with the Respondent because it would create a wrong impression for her grandchildren. Yet the Petitioner testified she moved in with the Respondent shortly after returning from Alberta while still married to their grandfather. (2) The Petitioner said she relinquished a claim to a share of her ex-husband's pension, her interest in the matrimonial home, and substantial income from a photography and framing business. She also stated that she owned a building in Louisbourg worth \$100,000.00 and a business on Bentinck Street which generated \$88,000.00 a year in income. The Petitioner was not able to provide documentation to support any of these claims.

(3) The Petitioner did not disclose to the Respondent she received \$10,000.00 from a sale of her business interest to her former spouse. (4) The Petitioner cashed in RRSPs from a spousal account which were contributed by the Respondent prior to



their separation without telling the Respondent. (5) The Petitioner claims she was unable to accept a lucrative business opportunity in British Columbia because of the trial adjournment but did not provide documentation to support this claim. (6) The Petitioner said the Respondent controlled the family finances and her ability to earn an adequate income from her businesses. The Petitioner said the Respondent wanted her to be a stay at home wife with a home base business which would allow her to prepare meals and look after the home. She said the Respondent purposely kept her income low by restricting her use of the motor vehicle. The Petitioner also said the Respondent wanted to reduce his tax liability by shifting part of his income to her. However the Petitioner was able to convince the Respondent to sell his home in Cantley Village and relocate 65 kilometres from his business which increased travel costs for both of them. The Petitioner was able to operate a photography business, resume her career selling real estate and eventually opened her own real estate firm during this very brief marriage.

[14] The Respondent denied limiting the Petitioner's use of the motor vehicle for business purposes. The Respondent stated he did not benefit financially by keeping the income earned by the Petitioner low. I agree with his comment that it did not make financial sense to limit the amount of the Petitioner's income. Both

were constrained in their business dealings because of the Petitioner's desire to live in Soldier's Cove which was a considerable distance from both their businesses.

The court finds the evidence of the Respondent to be preferable to the evidence of the Petitioner on facts in dispute between them.

**ISSUES:**

- [15] (1) Classification of assets.
- (2) Valuation of matrimonial home.
- (3) Treatment of RRSP - Pre-marital.
- (4) RRSP contribution during cohabitation.
- (5) Determination regarding furniture-contents.
- (6) Deferred tax liability of Respondent.
- (7) Classification of debts and responsibility for debts.
- (8) Contribution to the Petitioner's business
- (9) Occupational rent.
- (10) Unequal division regarding home and premarital RRSPs.
- (11) Entitlement to spousal support.
- (12) Costs.

**CLASSIFICATION OF ASSETS:**

[16] At the time of entering the marriage the Respondent had a net worth of \$473,667.73. The Petitioner had a net worth of \$10,000.00 resulting from the sale of her interest in a photography business. The Respondent wasn't aware the Petitioner had this asset. The Respondent's assets and debt at the date of marriage are listed in the following table:

<b>Name</b>		
Personal chequing account, Scotiabank #06268 21		\$ 72.81
Personal savings account, Scotiabank #1263927		14396.97
CIBC Investors Edge Account #572-00671		9810.93
GIC from sale of private residence, 31 Andrews Ave., Sydney - Scotiabank #00552 71		29115.58
Land 13210 Hwy#4 Soldiers Cove (Cottage and land Respondent owned for 25 years)		22000
<b>Other Assets</b>		
Sailing yacht, Majam, owned for 20 years		15000
Vehicle, Honda Accord 1992, vehicle from previous marriage owned for 11 years		7500
Furniture/paintings/tools/ appliances/personal effects, majority from previous marriage		30000
Vacant land Harbour Grace, owned jointly with Lorraine French		NIL
<b>RRSP Funds</b>		

CIBC, self administered RRSP Plan, #590-65622	\$48,432.68	
TD Canada Trust RRSP	91518.11	
Clarica RRSP #GA25000-1	28535.85	
Canada Life RRSP #97034	111254.86	279741.5
Total personal assets, pre-marriage		<b>\$407,564.98</b>
<b>Business Assets</b>		
R. French, CA, Professional Accounting Practice		75000
<b>Total assets, pre-marriage</b>		<b>\$482,564.98</b>
<b>Liabilities</b>		
Scotiagold Visa #4538012321316	6238.94	
Scotialine, LOC #4538000579271	2658.31	<b>8897.25</b>
<b>Personal net worth, pre-marriage to Phyllis Adams</b>		<b>\$473,667.73</b>

[17] **Section 4(1)** of the Matrimonial Property Act states:

**4 (1)** In this Act, "matrimonial assets" means the matrimonial home or homes and all other real and personal property acquired by either or both spouses before or during their marriage, with the exception of

- (a) gifts, inheritances, trusts or settlements received by one spouse from a person other than the other spouse except to the extent to which they are used for the benefit of both spouses or their children;
- (b) an award or settlement of damages in court in favour of one spouse;
- (c) money paid or payable to one spouse under an insurance policy;
- (d) reasonable personal effects of one spouse;
- (e) business assets;

- (f) property exempted under a marriage contract or separation agreement;
- (g) real and personal property acquired after separation unless the spouse resume cohabitation.

**Damages or insurance proceeds**

(2) Notwithstanding clauses (b) and (c) of subsection (1), an award or settlement of damages in court or money being paid or payable under an insurance policy is a matrimonial asset to the extent that it is made, paid or payable in respect of a matrimonial asset.

[18] Therefore, matrimonial assets are property acquired before or during the marriage. Also, all assets are matrimonial assets unless a party otherwise satisfies the court on a balance of probabilities that an asset falls within one of the exceptions of the definition contained in Section 4(1) of the **Act**.

[19] At the date of separation, the following assets are determined to be matrimonial assets:

- (a) Matrimonial home at 13210 Highway #4, Soldier's Cove;
- (b) RRSPs - pre-marriage;
- (c) RRSPs - during marriage;
- (d) Bank accounts;

- (e) Sail boat;
- (f) 1992 Honda Accord;
- (g) Household contents.

[20] The bank account balances at date of separation totalled \$10,216.74.

[21] The 1992 Honda Accord was valued at \$500.00 at date of separation. This vehicle which was owned by the Respondent before marriage was used by the parties during the marriage and by the Petitioner for several months after separation until she purchased another vehicle. The vehicle was then re-acquired by the Respondent.

[22] The sail boat was owned by the Respondent at the time of marriage and was valued at \$15,000.00 at the time of his divorce from his first spouse. The sail boat was used by the parties for recreational purposes four or five times each summer during the period of the parties' marriage. I accept the Respondent's evidence that he was solely responsible for maintaining the sail boat without help from the Petitioner.

**VALUATION OF THE MATRIMONIAL HOME:**

[23] The Respondent purchased a home in Cantley Village in November 1995 while separated from his first spouse. He resided there with his adult son at the time of his second marriage. The Respondent moved into this residence prior the marriage. Both parties agreed the marriage was filled with conflict from the beginning. The Respondent stated the parties had an argument a few days before the wedding and he was not sure the Petitioner would show up for the wedding service.

[24] The Petitioner said she was not comfortable moving from her own residence to the Respondent's residence. She wanted a home common to them and she looked for land on which to construct a new home. The Respondent was reluctant to move from his residence because he recently paid \$10,000.00 to replace his well. He owned land in Soldier's Cove, Richmond County which contained a rustic cottage with no water services. It belonged to his family and he vacationed there with his first wife during the summers and maintained a sail boat on the

nearby Bras d'Or Lakes. The Petitioner wanted to build a home on this property. The Respondent resisted because of the distance (approximately 65 kilometres) from his work in Sydney. According to the Respondent, the Petitioner persisted and eventually he agreed to sell the Cantley Village property and build a new home in Soldier's Cove. According to the Respondent the Cantley Village property sold for less than market value because the Petitioner was insistent that they move quickly to build a new home.

[25] Both parties were involved in the construction of the new residence. The Respondent looked after the financing. There were problems with building a supplier and the sewer and water services. The Respondent said the home cost \$140,000.00 to construct. The land was valued at \$22,000.00 at the time of his first divorce. A third party removed the old cottage at no cost. The Respondent contributed land (\$22,000.00), and proceeds from the sale of his home in Cantley Village (\$29,115.00) and premarital savings of \$14,396.00 toward the cost of constructing the Soldier's Cove residence. The construction of the home which started in May of 2000 was completed in October 2000. The property was assessed by a bank appraiser at \$148,000.00 upon completion. Landscaping costs of \$2,000.00 were incurred subsequent to the bank appraisal. For purposes of these



proceedings the market value of the property was assessed at \$150,000.00 by Mr. Walter Sawler, who was retained by the Respondent. The property was assessed by Jean MacCharles who was retained by the Petitioner at \$179,000.00. The well which services the property was drilled in error on Crown land adjacent to the subject property. This error triggered a Small Claims action which required the parties to pay the well driller. The property still receives water from the well on the adjacent property. The mortgage balance outstanding on October 1, 2003 was \$71,836.12.

[26] The difference in appraised values by the assessors can be attributed to the fact that Ms. MacCharles was not aware the well servicing the property was on adjacent land. Mr. Sawler assessed the property as a storey and a half residence, while Ms. MacCharles assessed the property as a two storey residence. There was a difference in the usable square footage calculated by each assessor. Each assessor selected different sales comparable and made adjustments to the comparables they selected to arrive at a market value for the subject property.

[27] The subject property is difficult to value because of its location and lack of comparable sales. Each assessor listed the comparables they thought most appropriate to arrive at their opinion of market value.

[28] The parties disagree on the value to be attributed to the matrimonial home. I have given due consideration to the opinion of both Mr. Sawlor and Ms. McCharles. Each appraiser identified factors that may have an impact on their opinion on market value. Mr. Sawlor noted that a full basement could add \$5,000.00 to the market value of the property. Ms. McCharles was not aware the well servicing the property was on adjacent land which would have an impact on her opinion of market value. The bank appraiser assessed the property at \$148,000.00 and there were landscaping improvements subsequent to that appraisal. The Respondent stated it cost \$140,000.00 to construct the building and the land was valued at \$22,000.00.

[29] I fix the value of the matrimonial property at \$160,000.00. Although the Respondent has continued to reside in the matrimonial home since separation, there is a good possibility the property will be sold considering the distance from the

home to the Respondent's business and his increased debt burden as a result of the marriage. Therefore, the court considers it appropriate to reduce the value of the matrimonial home by disposition costs of \$10,800.00, consisting of \$1,500.00 migration fees and \$8,000.00 real estate commission, plus H.S.T.

**TREATMENT OF RRSPs - PRE-MARITAL:**

[30] At the time of co-habitation, the Respondent has RRSPs totalling \$279,741.50, which were invested in the following accounts - CIBC Self-Administered Plan No. 590-65622, T.D. Canada Trust RRSP, Clarica RRSP No. GA25000-1, and Canada Life RRSP No. 97034. The T.D. Canada Trust RRSPs were transferred to the CIBC Self-Administered Plan. The Respondent contributed \$3,500.00 in 2000 and \$2,700.00 in 2002 to a Self-Administered Cash Account at the CIBC. Aside from these contributions, any increase in value of these assets during the marriage and post-separation related solely to market fluctuations and interest. The market value of these RRSPs at time of separation was \$319,808.78. The market value of these RRSPs at time of trial was \$537,622.00.

[31] The Respondent's RRSPs at time of marriage were his share of RRSP funds accumulated during his first marriage. These assets were accumulated over a period of 25 years. The Petitioner seeks an equal division of these funds while the Respondent seeks an unequal division to the full extent of these funds. This issue will be reviewed later in the decision. The RRSP funds are matrimonial assets.

**RRSP CONTRIBUTIONS DURING COHABITATION:**

[32] As stated the Respondent contributed \$3,500.00 in 2000 and \$2,700.00 in 2002 to his own Self-Administered CIBC RRSP. In addition he contributed \$7,500.00 in 2000, \$11,000.00 in 2001 and \$9,000.00 in 2002 to a spousal RRSP Plan in the name of the Petitioner.

[33] Counsel for the Petitioner submits that a review of the Respondent's income tax returns for the years 1999 to 2003 indicates the Respondent contributed \$58,106.00 to various RRSP accounts. The Respondent stated that he contributed \$33,700.00 into RRSP accounts while the parties cohabited and that the balance of funds were contributed when the parties were not cohabiting. I accept the evidence

of the Respondent and determine that he contributed \$33,700.00 to RRSP accounts during the period of cohabitation which include the \$6,200.00 to his own account and \$27,500.00 to the Petitioner's account.

[34] The value of the spousal plan at time of separation was \$25,345.33. The Petitioner withdrew RRSP funds in the amount of \$988.50 in 2002 and \$2,000.00 in March 2003 without the knowledge of the Respondent. The balance of the spousal RRSP funds were withdrawn by the Petitioner after the separation.

**DETERMINATION REGARDING FURNITURE - CONTENTS:**

[35] The Petitioner requested the return of personal property that remains in the matrimonial home and the Respondent agreed to return the items requested. Therefore the following items shall be returned to the Petitioner: photograph

negatives, photography equipment, personal papers, poetry books, photo albums, CDs, skates.

[36] The Petitioner claimed she contributed \$10,000.00 toward the furnishings and contents in the home. She was unable to provide receipts for any of these purchases. The Petitioner seeks an equal division of the household contents and in particular requests each party choose on an alternating basis items that remained in the matrimonial home. The Respondent stated that the Petitioner took items that she wanted when she left the matrimonial home. He further stated that any items remaining in the matrimonial home aside from the personal items requested by the Petitioner, were contributed by him from his home in Cantley Village.

[37] There is very little credible evidence with respect to the value of the household contents. I am satisfied the parties have already made an equal division of contents as a result of the Respondent taking those items she valued on separation and that the value of the remaining items in the possession of the Respondent equals the value of those items taken by the Petitioner. There was no

reliable evidence to indicate the Petitioner should receive a further credit for the value of the household items in the possession of the Respondent

**DEFERRED TAX LIABILITY OF THE RESPONDENT:**

[38] In 1994 changes to the **Income Tax Act** required professionals to report income on a calendar year basis. In many cases this resulted in two years of income being reported in one calendar year. A grace period was allowed in order to defer reporting this income and the payment of the tax liability on that income. A deferred tax liability existed at the time of the parties' marriage and there was a balance owing as of the date of separation. This deferred tax liability which the Respondent calculated at \$15,291.00 is not a matrimonial debt and is the sole responsibility of the Respondent.

[39] The Respondent claimed current income taxes payable for the 2003 calendar year in the amount of \$5,248.89. The Respondent's total 2003 tax liability calculated by him was \$20,331.85. The Respondent prorated the total taxes payable for 2003 to cover the period prior to separation and reduced the prorated amount by

income tax installments paid prior to separation to arrive at the current income tax debt on date of separation for matrimonial property purposes. This amount represents a tax liability incurred during the marriage for which payment is deferred and therefore a matrimonial debt. However the court is unable to determine based on the evidence of the Respondent whether the total 2003 tax liability of \$20,331.85 prorated by the Respondent includes a sum reflecting the deferred tax liability which is not a matrimonial debt. The court therefore find that the Respondent has not established a current tax liability for matrimonial property purposes at the date of separation.

**CLASSIFICATION AND RESPONSIBILITY FOR DEBTS:**

[40] The Respondent listed the following debt owing at date of separation.

House Mortgage - CIBC		\$71,836.10
House Line of Credit - CIBC		5057.62



Visagold, Scotiabank - Scotiabank		15220.42
Line of Credit - Scotiabank		7354.38
Scotiabank Visa - Scotiabank		2948.67
CIBC Joint Line of Credit - CIBC		9910.46
Sydney Credit Union (Joint with Son)		5000
Aliant		123.71
NSPI service to Sept. 16, 2003		188.29
NSPI 1/4 of service from Sept. 16 <sup>th</sup> to November 18 <sup>th</sup>		44.55
Security System		30.51
Vehicle Insurance		887
Honda Canada Finance (excess milage charge due to Ms. Adam's use of motor vehicle for work purposes)		3710
Realty Taxes Harbour Grace, Newfoundland		2641.42
Income Tax Owing for 2003 to Separation		5248.89
Deferred Income Tax		15291

[41] The court dealt with the deferred income tax and current income tax liability in a separate section. The CIBC Joint Line of Credit will be dealt with in a later section. The Sydney Credit Union Loan, and realty taxes for property in Harbour Grace are not matrimonial debts. The Honda Canada finance charge was not a debt owing at the time of separation but an estimate of additional lease charges due to excessive use of the vehicle in the first year of a four year lease.

(1) The CIBC House Line of Credit of \$5,057.62 was incurred in September 2000 to pay for extra costs associated with building and maintaining the matrimonial home. This account also included charges for repairs and maintenance of a vehicle operated by the Petitioner.

(2) Scotiabank Visa Classic Credit Card in the amount of \$2,948.67 was used to purchase household appliances.

(3) Scotia Bank Line of Credit in the amount of \$7,354.38. The Respondent owed \$2,658.31 at the time of marriage. This debt included a charge of \$4,000.00 which represented a payment on the Visagold account . However the account charges relate mostly to house renovations and the cost of the wedding. The difference between the balance owing at the date of separation and the date of marriage is a reasonable estimate of the matrimonial debt outstanding on this account. The matrimonial debt is therefore fixed at \$4,696.07. The Respondent continues to pay accumulated interest charges on this account which are not claimed.

(4) Scotiabank Visagold Credit Card in the amount of \$15,220.42. The Respondent owed \$6,238.94 at the time of marriage on this account. This account includes charges for business related expenses of the Respondent and gifts purchased by the Respondent for the Petitioner. However the bulk of the charges

relate to matrimonial expenses incurred on behalf of the family. It is difficult to determine whether a portion of the balance owing at the date of separation is a business debt. However, the Respondent testified any business purchases through this account were immediately reimbursed from his business account. Therefore, I am satisfied the amount of \$8,981.48 which is the difference between the balance owing at the time of separation and the time of marriage is a reasonable estimate of the matrimonial debt outstanding on this account. The Respondent continues to incur interest charges on this account which are not claimed. Gifts purchased by the Respondent for the Petitioner through this account are in the possession of the Petitioner. These gifts are considered matrimonial assets. The debt incurred to purchase them is matrimonial debt.

[42] The Respondent has been making payments on all these debts which are incurring interest charges without compensation from the Petitioner. The Respondent has not claimed a contribution for the interest charges.

[43] Matrimonial debts at the time of separation also include the Aliant account \$123.71, Nova Scotia Power accounts of \$188.29 and \$44.55, the security system

account of \$30.51. Vehicle insurance of \$887.00 relates to a period post separation for two vehicles. The total amount of matrimonial debt at the date of separation aside from the mortgage is \$22,070.88.

[44] The parties had a joint account with NCO Financial Services which accumulated an overdraft in the amount of \$790.26 post separation. The Petitioner had the sole use of this account which did not have overdraft privileges. The Petitioner stated the bank card was lost. She was unable to explain how this charge was incurred. The Respondent has been notified of his liability for payment of this account. This is not a matrimonial debt but the sole responsibility of the Petitioner and the Respondent is to receive credit for payment of this account.

[45] The CIBC Joint Line of Credit in the amount of \$9,910.46 was taken out for the benefit of Adam's Realty, the Petitioner's real estate business and was guaranteed by Mr. French. The Petitioner used these funds for personal use rather than business use or matrimonial purposes. The Respondent has been paying the balance owing on this account plus interest charges of \$1,826.00 which have accumulated to June 2006. This is not a matrimonial debt and is the sole

responsibility of the Petitioner. The Respondent is to receive credit for payment of this account.

**CONTRIBUTION TO THE PETITIONER'S BUSINESS:**

[46] The Respondent listed various items he contributed to the Petitioner's business. Many of these items were contributions *in species* from his own business. At trial the Respondent indicated that he was not seeking any contribution for these items. He was seeking credit from the Petitioner for his payment of the joint line of credit debt plus interest charges on the line of credit.

**OCCUPATIONAL RENT:**

[47] The Petitioner's claim for occupation rent is denied. Title to the property was held in the name of the Respondent. There were discussions between the parties about conveying the property from the Respondent to the Petitioner and Respondent jointly. The Respondent gave instructions to counsel to prepare a deed. The

Petitioner stated that she did not receive a copy of the deed conveying title to the Soldier's Cove property to her and the Respondent although she executed the mortgage. It is unclear whether she executed the mortgage as a mortgagor. Neither party provided the court with a copy of the deed conveying the property to the parties jointly or a copy of the mortgage. The court is left with the conclusion that the Petitioner does not have a legal interest in the Soldier's Cove property other than a claim pursuant to the **Matrimonial Property Act**.

[48] The Respondent was responsible for all expenditures to maintain the property after separation without contribution from the Petitioner. If the Petitioner had a legal or equitable interest in the property, any claim for occupational rent would be offset by the Respondent's assumption of the costs to maintain the property. The Petitioner left the property voluntarily and did not seek an order for exclusive possession and was not prevented from returning to the property although this would be impractical given the parties' situation.

[49] Alternatively the Petitioner requests the mortgage be valued at the date of division because she was required to pay rent for accommodations and she should

benefit from the increase in equity as a result of the pay down of the mortgage principle. The Respondent wants the mortgage valued at the date of separation. The Respondent was responsible for the mortgage payments after separation without contribution from the Petitioner. The Respondent was responsible for payment of all other matrimonial debt after separation without contribution from the Petitioner. This is an appropriate case where the value of the mortgage should be at the date of separation and not the date of division. The Petitioner benefited from any increase in value from the date of separation when the property was valued at the date of division. Any increase in equity due to payment of principle and interest post separation was entirely due to the efforts of the Respondent.

**UNEQUAL DIVISION OF RRSPs AND MATRIMONIAL HOME:**

[50] The **Matrimonial Property Act** creates a presumption in favor of an equal division of matrimonial property. The burden of establishing entitlement to an unequal division of matrimonial property rests with the party who seeks the unequal

division. A claim for an unequal division should only be granted in circumstances where an equal division of matrimonial assets is unfair and unconscionable.

[51] Neither the functions assumed by the Petitioner during the marriage or the contribution of the Petitioner to the marriage resulted in a financial or economic disadvantage to her. The Respondent used his income during the marriage to benefit the Petitioner including contributions to a spousal RRSP plan and guaranteeing a line of credit for her business. There is no indication the Respondent attempted to accumulate assets in own name to the detriment to the Petitioner during the marriage. The Petitioner concealed from the Respondent the fact that she received \$10,000.00 from her former spouse at the time of the marriage. The Petitioner unwisely and against the advice of the Respondent gave up a claim to a share of her former spouse's pension and other matrimonial assets. The Petitioner was not able to substantiate the value of the assets or lost income given up at the time of the marriage.

[52] The RRSPs brought into the marriage by the Respondent were accumulated over an extended period of time. This marriage was a very short marriage in



duration. Aside from the \$6,200.00 contribution to a cash account, any increment in the value of the RRSPs at the time of separation was solely due to fluctuations in the market values of the investments. The Respondent shall retain 100% of the premarital RRSPs including any increase in value during the marriage. This is not a case of granting an unequal division solely on the basis on an asset being brought into the marriage. In my view an equal division of the RRSPs is unfair and unconscionable pursuant to s. 13(d) the length of time the spouses cohabited and s. 13(e) the date and manner of acquisition of the assets. The Respondent clearly benefited from contributions by the Respondent to a spousal RRSP plan during the marriage.

[53] The Respondent seeks an unequal division of the matrimonial home. Shortly after entering the marriage the Respondent disposed of his home and contributed the proceeds from the sale and savings towards the construction of the matrimonial home. He also contributed the land on which the home was built. These expenditures and contributions totalled \$65,500.11. There was no equity contributed by the Petitioner. The equity in the matrimonial home at time of separation less the mortgage outstanding and disposition costs was approximately \$78,000.00. The Respondent made such a substantial contribution to this asset that

in my view it is clearly unfair and unconscionable not to provide some sort of relief pursuant to s.13(e), the date and manner of acquisition of the asset and s. 13(d) the length of time the spouses have cohabited. I am satisfied that there should be an unequal division of matrimonial home to recognize the significant contribution of the Respondent to that equity. Therefore I would grant an unequal division of 66.6% of the market value of the home less disposition costs to the Respondent.

[54] The sail boat was used by the parties for matrimonial purposes. Considering the value of this asset and its use for matrimonial purposes the Respondent has not established it would be unfair and unconscionable to order an equal division of this asset.

**SPOUSAL SUPPORT:**

[55] The Petitioner seeks an order for spousal support . Pursuant to s. 15(2) of the **Divorce Act, 1985**, the court may make an order for spousal support.

[56] Pursuant to s.15(5) in deciding whether to make an award for spousal support, the court is mandated to consider the conditions, means, needs and other circumstances of each spouse for whom support is sought and specifically the length of time the spouses cohabited, functions performed by the spouse during cohabitation and any, order, agreement or arrangement relating to the support of the spouse.

[57] This is a short four year marriage with a period of cohabitation not exceeding four and a half years. It is a second marriage for both which occurred later in their life.

[58] There were no child care responsibilities.

[59] The Respondent continued his employment as a professional accountant. The Petitioner who operated a photography and framing business and sold real estate prior to the marriage continued this employment with mixed success during the marriage. The Petitioner was able to obtain a license as a real estate broker during this very short marriage. Both parties contributed equally to maintaining the home

with the Petitioner primarily responsible for purchasing groceries and preparing meals. Both parties were equally involved in the construction of the matrimonial home.

[60] The Petitioner stated she would look after her own needs and contribute on an equal basis towards the maintenance of the home and vehicle. I find there was no agreement whereby the Respondent promised that he would look after the Petitioner's future financial security. The Petitioner was solely responsible for waiving any claim to matrimonial assets from her first marriage.

[61] During the marriage the Respondent earned \$47,510.00 in 2000; \$45,643.00 in 2001; \$52,718.00 in 2002 and \$60,097.00 in 2003 from his professional practise.

[62] The Petitioner earned \$12,004.00 in 2000 while she was attempting to operate a photography business out of their home in Cantley Village and \$21,438.00 selling real estate in 2001. The Petitioner's total income for 2002 was \$10,152.00 which included \$988.00 from spousal RRSP. The Petitioner's total income in 2003 was \$28,106.00 including \$12,777.00 from an RRSP.

[63] Post separation the Respondent earned \$53,375.00 and the Petitioner \$21,901.00 in 2004. The Respondent earned \$68,615.00 and the Petitioner earned \$23,875.00 in 2005.

[64] The Petitioner's business is generating more income post-separation than before separation.

[65] The functions assumed by the Petitioner during the marriage did not assist or contribute to success of the Petitioner's business. The Respondent assisted the Petitioner establish a real estate brokerage business by guaranteeing a line of credit and providing professional advice and assets from his own business. By the time the marriage ended the Petitioner was in a position to begin a successful career as a real estate broker. It would appear that her income from this business has increased. The Petitioner has not established a claim for compensation for loss of employment or other career opportunities as a result of the marriage.

[66] The Petitioner has not established an entitlement to spousal support on either the compensatory or contractual grounds as set out by Chief Justice McLaughlin of the Supreme Court of Canada in **Brickle v. Brickle** (1999) S.C.J. No. 114, March 25, 1999.

[67] The third grounds of entitlement for spousal support in **Brickle** is non-compensatory.

[68] The financial statement of the Petitioner listed monthly expenses of almost \$4,000.00 and monthly income of \$1,316.00 based on an average of her prior three years income leaving her a monthly deficit of approximately \$2,677.00. The Petitioner's post separation income indicates she is earning approximately \$2,000.00 per month. Many of the items claimed by the Petitioner in her statement of expenses appear to be excessive including \$300.00 for Christmas, birthday, events and gifts and the motor vehicle charges which appear to represent business expenses.

[69] The financial statement of the Respondent listed monthly expenses of \$4,680.00 and income of \$4,617.00 for a deficit of \$63.00 before income tax and a deficit of \$1,492.00 after a provision for income tax. The Respondent's expenses include a spousal support order of \$400.00 for his first spouse. I have already considered the Respondent's obligation toward monthly payments on the matrimonial debt as well as the guaranteed loan for the Petitioner's line of credit in the division of matrimonial property.

[70] A review of the Respondent's income and expenses indicates that he has limited ability to pay spousal support based on his own level of income and reasonable needs.

[71] The Petitioner was forced to cash in RRSPs after separation in order to acquire a motor vehicle for use in her business. The Petitioner had the use of motor vehicles during the marriage and was in need of a new vehicle. The Petitioner should not be forced to dispose of capital assets in order to meet this need. The Petitioner has established a need for transitional support in order to acquire a new motor vehicle.

[72] The *Spousal Support Advisory Guidelines* suggest a support award in the range of \$250.00 to \$330.00 per month for a period of two to four years.

[73] The objectives of a spousal support order should recognize any economic advantages or disadvantages to the spouses from the marriage or its breakdown, relieve any economic hardship of the spouses arising from the breakdown of the marriage and insofar as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.

[74] A satisfaction of the objectives of a support order in this circumstance can be achieved by ordering the Respondent to pay the Petitioner a lump sum of \$7,500.00 to meet this need to acquire a motor vehicle. The spousal support payment can be set-off against any money owed by the Petitioner to the Respondent resulting from the division of matrimonial property.

**COSTS:**



[75] Each party seeks an order for costs. An award of costs is in the discretion of the court depending upon the circumstances of each case. While generally not awarded in matrimonial matters there is no policy against the award of costs. The Respondent was successful in resisting the Petitioner's claim for an equal division of all matrimonial assets. This was a substantial component of the hearing. The Petitioner made factual assertions about her premarital circumstances which were not supported. The Respondent was put to additional effort to deal with these claims. I am satisfied the Respondent is entitled to costs of \$1,500.00 which can be set-off against the Petitioner's lump sum spousal support award.

**SUMMARY:**

<b>Asset</b>	<b>Petitioner</b>	<b>Respondent</b>
Bank Account		\$10,217.00
Sail Boat		\$15,000.00
1992 Honda Accord		500.00
RRSPs (Discounted by 1/3 for tax costs)	\$16,897.00 (\$25,345.00)	\$ 4,163.00 (\$6,200.00)

<b>Total</b>	<b>\$16,897.00</b>	<b>\$ 29,880.00</b>
Equalization payment due to Petitioner	\$ 6,491.00	
Petitioner's share of equity in matrimonial home (1/3 of \$149,200.00)	\$49,733.00	
<b>Subtotal</b>	<b>\$56,240.00</b>	
Less Petitioner's share of matrimonial debt and mortgage (1/2 of \$93,907.00)	\$46,953.00	
<b>Subtotal</b>	<b>\$ 9, 271.00</b>	
Less credit due Respondent for payment of line of credit and President's Choice overdraft	\$12,527.00	
<b>Balance owing to Respondent (rounded)</b>		<b>\$ 3,260.00</b>

[76] The Respondent owes the Petitioner spousal support of \$7,500.00. The Petitioner owes the Respondent a payment of \$3,260.00 resulting from the division of matrimonial property and \$1,500.00 in costs. The net balance owing by the Respondent to the Petitioner is \$2,740.00 which is to be paid in full within 60 days of the issuance of the Corollary Relief Judgment. Each party shall retain the personal property in their possession at the time of trial except for those items requested by the Petitioner which are in the possession of the Respondent and referred to earlier in this decision. If necessary the Petitioner shall quit claim her

interest in the matrimonial home to the Respondent. The Respondent will continue to make all payments on the matrimonial debt and the Petitioner's line of credit

**DIVORCE:**

[77] All the jurisdictional and procedural requirements have been met. There is no possibility of reconciliation. The grounds pursuant to s. 8 (2)(a) of the **Divorce Act** has been proven. A Divorce Judgment is granted.

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**Justice Darryl W. Wilson**

**Sydney, Nova Scotia**  
**February 23, 2007**