

SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: Poirier v. Poirier, 2011 NSSC 170

Date: 20110502

Docket: SFSND1206-5796

Registry: Sydney, N.S.

Between:

Anne Marie Poirier

Petitioner

v.

Patrick Poirier

Respondent

Judge: The Honourable Justice Darryl W. Wilson

Heard: October 14, 2010 and November 8, 2010 in Sydney,
Nova Scotia

Counsel: Elaine Gibney, Counsel for the Petitioner
Darlene MacRury, Counsel for the Respondent

By the Court:

[1] The marriage of the Petitioner, Ann Marie Poirier, and the Respondent, Patrick Poirier spanned thirty-three (33) years, beginning in February, 1972 and ending with their separation in April, 2005. Mr. Poirier was 57 and Mrs. Poirier 54 at the time of separation. Mr. Poirier was retired from employment with the Sydney Steel Plant. Mrs. Poirier was employed as a youth worker with the Children's Aid Society.

[2] The parties are the parents of two children. Craig was 27 and Kyle 20 when their parents separated. Craig was employed in a job that required him to travel off Cape Breton Island. He lived with his parents when he was not away working. Kyle was enrolled in university, but he was not attending. His lifestyle and lack of pursuit of an education was a source of conflict between himself and his father, which contributed to his father leaving the matrimonial home in April, 2005. Both adult children continued to reside at their mother's residence after their parents separated. Craig purchased his own home in 2010. Kyle, who currently resides at his mother's residence, has resided off-and-on at her home since April, 2005.

[3] Mrs. Poirier wanted to keep the matrimonial home, which the parties built in 1972, for her children. According to her, Mr. Poirier was going to transfer his interest in the home to her provided she assumed responsibility for matrimonial debt. He changed his mind and demanded a payment of \$10,000.00 which was later increased to \$12,000.00. Eventually, she agreed. She arranged mortgage financing which was used to pay out the existing mortgage and several debts, as well as giving Mr. Poirier \$12,000.00. She had to borrow additional funds on a separate loan as she could not get all the money she needed through mortgage financing.

[4] In April, 2005, the matrimonial assets included:

(1)	Home and contents;
(2)	Motor vehicles, including a 2002 Chev Impala, valued at \$7,975.00, owned by Mr. Poirier and a 2002 Chev Alero, valued at \$7,050.00, owned by Mrs. Poirier;
(3)	The employment pensions of both Mr. and Mrs. Poirier;

(4)	Mr. Poirier was also in receipt of a disability pension from D.V.A.
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[5] The debt included:

(1)	Mortgage on the home in the amount of \$40,897.00;
(2)	A consolidated loan with the credit union in the amount of \$12,190.00;
(3)	The vehicle loan of Mrs. Poirier in the amount of approximately \$19,300.00; Mr. Poirier said he had a vehicle loan, but did not provide any documentation of the amount outstanding in April, 2005.
(4)	Sears and The Bay credit cards in the name of Mrs. Poirier in the amount of \$3,250.00;
(5)	Visa credit card in the name of Mr. Poirier.

[6] Mrs. Poirier guaranteed or co-signed a student loan taken out by Kyle in June, 2005, in the amount of \$6,135.70.

[7] The home was appraised at \$78,000.00. The mortgage pay-out was \$40,897.00.

[8] Household contents and personal items were divided in 2005 and neither party is seeking a review of that distribution. Each party retained motor vehicles they owned at the time of separation.

[9] Mrs. Poirier filed a Petition for Divorce on April 6, 2009, claiming a divorce pursuant to the *Divorce Act, 1985*; a division of property pursuant to the *Matrimonial Property Act* and a division of pension, pursuant to the *Pension Benefits Act* and the *Pension Benefits Division Act (Canada)*. She also requested an unequal division of assets. She claimed Mr. Poirier wasted matrimonial assets by excessive gambling and drinking.

MAIN ISSUES

[10] At the time of separation, Mr. Poirier owned a pension through his employment with the Sydney Steel Corporation. He was also in receipt of a

disability pension from the Department of Veterans' Affairs. Mrs. Poirier owned a pension as a result of her employment with the Children's Aid Society. Mr. Poirier's pensions were in pay, while Mrs. Poirier's pension was not.

[11] Mrs. Poirier seeks an equal division of Mr. Poirier's Sydney Steel and Department of Veterans' Affairs pensions from the date of separation in April, 2005.

[12] Mrs. Poirier submits that she should retain ownership of the matrimonial home since Mr. Poirier already conveyed his interest to her in 2005. However, Mrs. Poirier claims Mr. Poirier should be responsible for one-half of the amount of matrimonial debts that exceeds the value of the home and her motor vehicle. Mrs. Poirier claims the 2005 value of the matrimonial home after disposition costs was \$71,118.00 and the 2005 book value of her motor vehicle was \$7,050.00, resulting in matrimonial assets valued at \$78,168.00 retained by her.

[13] The value of matrimonial debt advanced by Mrs. Poirier is \$108,710.00. This amount included mortgage funds of \$71,604.00 and a personal loan amount of \$30,970.00, which she obtained subsequent to their separation in order to refinance existing debt and pay Mr. Poirier \$12,000.00. She also included Kyle's student loan of \$6,135.70, which she co-signed in June, 2005. According to Mrs. Poirier, the value of the debt she incurred at the time of separation to purchase the home exceeded the value of the assets she retained by \$29,842.00. Therefore, she seeks a contribution of \$14,771.00 from Mr. Poirier.

[14] Mr. Poirier's position is that the Mrs. Poirier retain the matrimonial home and the existing mortgage on the property. Each party would retain the vehicles they had in their possession at the time of separation, which have since been replaced. Each party would retain their pension benefits and be responsible for the debt held in their own name. If the court divides the various pensions, Mr. Poirier seeks an award of spousal support.

CLASSIFICATION OF DEBT

[15] The mortgage and personal loan proceeds were used by Mrs. Poirier to pay out the existing mortgage on the home, the consolidated loan, the Sears and The Bay accounts, her personal loan and Mr. Poirier's \$12,000.00 buy-out. Part of the loan proceeds were used to pay various costs associated with obtaining the

mortgage and personal loan, including application fees, appraisal fees, legal fees, and life and disability insurance. The personal loan total included the entire interest costs she will incur over the life of the loan. Additional funds were also obtained and deposited to her bank account.

[16] In my opinion, the only debts claimed by Mrs. Poirier that can be classified as matrimonial debt are the mortgage payout, the consolidated loan balance, the Sears and The Bay accounts and her personal account. Although Mr. Poirier objected that he had no involvement with the Sears and The Bay accounts, I accept the evidence of Mrs. Poirier that these accounts were used for purchases that benefited the family and were used for family purposes.

[17] Each party owned a motor vehicle and were separately responsible for a loan associated with the purchase of their motor vehicles. The value attributed to each motor vehicle at separation was similar. Mr. Poirier did not provide particulars of his motor vehicle loan. Mrs. Poirier did not provide credible evidence that the amount of her motor vehicle loan that exceeded the motor vehicle's value was attributable to items other than the motor vehicle. Each party kept the motor vehicle they had in their possession at the time of separation and each party was responsible for the loans associated with purchasing their vehicles.

[18] Mr. Poirier held a Visa credit card account in his name at separation. I will have more to say about this account later but for now, I find that it is not a matrimonial debt.

[19] Likewise, Mrs. Poirier's payment of \$12,000.00 will be considered as part of the equalization calculation.

[20] Part of the debts claimed by Mrs. Poirier as matrimonial included the costs she incurred to obtain the mortgage and personal loan. Some of these costs such as legal fees, have already been considered as part of disposition costs which reduced the market value of the home. Other costs, including interest charges, life and disability insurance and various application fees, are personal costs of Mrs. Poirier to arrange for the purchase of a home. Some of the proceeds from the mortgage and personal loan were new funds deposited to her account. In my opinion, these expenditures are not matrimonial debt and I would exclude them.

[21] Likewise, Mrs. Poirier's obligation to repay Kyle's student loan if he does not pay the loan is not a matrimonial debt. Kyle had applied for and received a student loan to assist him with university studies. Rather than attend university, he entered a trade program, the cost of which was paid through an employment insurance program. Kyle used the student loan funds to purchase a motor vehicle and was required to repay the student loan. This loan was taken out in June, 2005 after the parties' separation and, in the circumstances, cannot be considered a matrimonial debt.

[22] I find the appropriate amount of matrimonial debt to be divided between the parties is \$56,337.00. This amount includes the mortgage pay-out of \$40,897.00, the consolidated loan balance of \$12,190.00 and the Sears and The Bay accounts of \$3,250.00.

EQUALIZATION CALCULATION

[23] Mrs. Poirier retained the matrimonial home valued at \$71,118.00 after disposition costs. She also assumed responsibility for matrimonial debt valued at \$56,337.00. This leaves her with net matrimonial assets of \$14,781.00. Ordinarily, she would be required to pay Mr. Poirier \$7,390.00 to equalize the matrimonial assets. She paid him \$12,000.00. Therefore, Mr. Poirier owes Mrs. Poirier \$4,610.00 in order to equalize the division of matrimonial assets, other than pension funds.

UNEQUAL DIVISION OF ASSETS AND DEBTS

[24] Mrs. Poirier seeks an unequal division of matrimonial assets pursuant to Section 13(1)(a) of the *Matrimonial Property Act* - the unreasonable impoverishment by either spouse of the matrimonial assets.

[25] Mrs. Poirier has the onus of proving that an equal division of matrimonial assets would be unfair and unconscionable. I am satisfied that she has met that onus.

[26] Mrs. Poirier provided copies of Mr. Poirier's Visa account from January, 2000 to June, 2005 (see Exhibit 1, Tab 5). These records indicate many small withdrawals of cash and some large deposits. The account was held exclusively in Mr. Poirier's name. He acknowledged gambling but insisted it was not excessive.

The records belie that statement. His explanation for the many small withdrawals was not believable. Mrs. Poirier said the parties had remortgaged the home on two prior occasions to deal with the negative effects of Mr. Poirier's gambling on the family finances. I find Mr. Poirier's gambling wasted matrimonial assets that could have been used for family purposes and increased unnecessarily the amount of matrimonial debt over the years. Mrs. Poirier assumed responsibility for the matrimonial debt on separation.

[27] Mr. Poirier claims that Mrs. Poirier incurred unnecessary debt that he repaid from personal funds. I find this debt was debt incurred for appropriate family purposes and cannot be compared to the excessive gambling expenditures by Mr. Poirier. The Visa account in Mr. Poirier's name was not included in the matrimonial debt. However, I find that matrimonial debt at separation was unnecessarily increased because funds earned by Mr. Poirier that could have been used for family purposes were wasted through excessive gambling.

[28] In order to compensate for this wasting of assets, I direct that Mr. Poirier be responsible for the consolidated loan paid by Mrs. Poirier after separation. This would add an additional amount of \$6,095.00 to the equalization amount of \$4,610.00, previously calculated, bringing the total equalization amount owed by Mr. Poirier to Mrs. Poirier to \$10,700.00. Mrs. Poirier shall have judgment for this amount.

EMPLOYMENT PENSIONS

[29] As stated, Mrs. Poirier seeks an equal division of their employment pensions while Mr. Poirier requests that they retain their own pension benefits.

[30] Mr. Poirier's pension was in pay at the time of separation in the approximate amount of \$2,305.00 monthly. He continues to receive this pension, which has increased slightly due to indexing. Part of this pension includes a supplement in the amount of \$900.00, which will be eliminated when he turns 65 in April, 2013. Mrs. Poirier's pension is a defined contribution pension plan. It was valued at \$88,475.50 at the time of separation.

[31] What is the appropriate division of the parties' pensions?

[32] In **Clarke v. Clarke**, [1990] 2 S.C.R. 788 (S.C.C.), the Supreme Court of Canada affirmed the trial judge's decision respecting the division of Mr. Poirier's pension. The trial judge had considered the pension to be a matrimonial asset and had included the value of the pension payments Mr. Poirier received from the date of separation to the date of trial in calculating the equal division of property. Wilson, J., states at pages 11 and 12:

...MacDonnell, L.J.S.C., therefore ordered that the pension benefits received by Mr. Clarke between the date of separation and the date of trial be added to his matrimonial assets and that one half of the future pension payments he received be paid to Mrs. Clarke. ...

[33] And at page 51:

[92] In this case the trial judge included in the respondent's list of matrimonial assets the pension benefits he had already received and took their value into account when equalizing the matrimonial property. He also ordered that one-half of the value of future pension payments be paid to Mrs. Clarke on a continuing basis. No evidence was adduced at trial as to the capitalized value of the pension but this would only have been necessary had the trial judge concluded that the facts warranted an immediate valuation and accounting. I see no reason to interfere with the findings of the trial judge. His order reflects the spirit and intent of the legislation and, even although it does not result in a "clean break" between the parties, it enables both of them to enjoy the benefits of the pension as and when they fall due.

[34] Likewise, in **Yaschuk v. Logan** (1992), 110 N.S.R. (2d) 278 (C.A.), the Court of Appeal affirmed a trial judge's decision to make the husband account for the pension income which he received from the date of separation to the date of trial. Chipman, J.A., states at page 285:

[25] Grant, J. referred to the fact that each party had a pension and it was agreed that these would be split equally, having regard to the Clarke, supra. The wife was therefore entitled to 50% of the gross pension of the husband.

[26] The husband disagrees that he agreed to split his pension equally. It was his position that he should continue monthly payments as ordered by Saunders, J., as the wife's share of his pension. I disagree with this position as it confuses support to which the wife may be entitled under the Divorce Act with the division of pension as a matrimonial asset pursuant to the Matrimonial Property Act.

[35] Justice Grant, in the trial decision, reported at (1991), 103 N.S.R. (2d) 371 (S.C.), stated that the gross pension income was to be equally divided, including that portion earned from the date of separation to the date of trial. Justice Grant states at page 374:

[19] Each has a pension and it is agreed that these be split equally per Clarke v. Clarke, [1990] 2 S.C.R. 788; 113 N.S.R. 321; 101 N.S.R. (2d) 1; 275 A.P.R. 1. The wife is entitled to 50% of the gross pension of the husband. She is entitled to these payments since the pension payments began to be paid to the petitioner. The [petitioner] is entitled to 50% of the [respondent's] pension as of the date of separation.

[36] And at page 380:

[71] The petitioner has been in receipt of pension payments prior to trial. This is a matrimonial asset belonging 50% to the respondent. She is therefore entitled to 50% of those payments. They are shown on Schedule 2 as six months @ \$1,625 - totalling \$9,750.

[37] Similarly, in **MacKay v. MacKay** (1995), 145 N.S.R. (2d) 115 (S.C.), Goodfellow, J., held that the U.S. Social Security disability pension was a matrimonial asset subject to division, including that portion which was paid out after separation and before the divorce trial. Goodfellow, J., states at pages 4 and 5:

The Nova Scotia Matrimonial Property Act which applies to both parties commences with a definition of matrimonial property in section 4 which deems all property to be matrimonial unless the person alleging to the contrary establishes that such property fits into the exemptions, i.e. after acquired, personal, insurance payments, inheritance, etc., which have not been brought into the marriage stream.

The first question to determine is whether or not the pension Mr. MacKay has been receiving is a matrimonial asset. The statement from a Social Security Administration Retirement, Survivors, and Disability Insurance sets out an entitlement to monthly disability benefits from Social Security beginning June 1991 and a lump sum of \$21,475.00 was paid in May 1993 covering payments to and inclusive April 1993 and thereafter payments were at least in the amount of \$965.00 per month plus any additional cost of living adjustments.

The evidence clearly establishes that this was a contributory pension plan and therefore funds earned by Mr. MacKay during the marriage that otherwise would have gone for the benefit of the marriage were in essence set aside for the future security of Mr. and Mrs. MacKay and this pension is therefore a matrimonial asset. This is not a non-contributive pension as the D.V.A. pension excluded from being a matrimonial asset by Roscoe, J. (as she then was) in MacDonnell v. MacDonnell, (1991) 103 N.S.R. (2d) 435.

[38] Further in **Hanna v. Hanna** (No. 1) (1994), R.F.L. (4th) 148 (N.S.C.A.), the Nova Scotia Court of Appeal held the learned trial judge erred when he ordered the wife's postponement of the husband's pension in pay until the child, who was in the custody of the husband, turned 18 years of age. Clarke, C.J.C.A., as she then was, held that such a ruling mixed two separate issues - that of property division as per provincial legislation and that of maintenance as per the *Divorce Act*. Clarke, C.J.C.A., as he then was, held as follows:

[para 5] The appellant contends, among others, that the trial judge failed to achieve the equalization sought by the parties. In addition, she argues the trial judge erred by treating the pension income as the equivalent of child support.

[para 6] In our opinion, the appeal should be allowed. In circumstances where the parties and the trial judge all sought to achieve an equal division, inequality resulted in three respects.

...

2. In an effort to correct "imbalances" by the award to the appellant of a lump sum of \$10,000, the trial judge mixed the division of the respondent's pension income with child and spousal support. Based on Clarke v. Clarke, [1990] 2 S.C.R. 795, and Yaschuk v. Logan (1992), 110 N.S.R. (2d) 278 (C.A.), the gross pension income of the respondent should be divided as at the date of the separation of the parties, with such adjustments thereto as the evidence warrants. The pension benefit is to be included as a matrimonial asset. (See Chipman J.A. in Yaschuk, at p. 285, paras. 25 and 26.)

[39] **Hanna** involved a case where the husband was in receipt of disability pensions from CPP, American Social Security and a pension from the NHL. He

was also the custodial parent of the grandchild whom the parties had adopted. Ms. Hanna was a nurse and employed at the time of trial.

[40] A capitalization of Mr. Poirier's future pension income at separation was not provided. It would be expensive and not add that much to the proceeding. The value of his pension at separation is determined to be the gross monthly income he is receiving, including a supplement of \$900.00.

[41] The capitalized value of Mrs. Poirier's pension is \$88,475.50, which represents contributions and interest earned on those contributions to the date of separation. Sometime in the future this capital sum plus other amounts contributed after separation and interest earned on those contributions will be used to purchase a monthly income stream.

[42] Mr. Poirier has not shared his pension with Mrs. Poirier since the date of separation. She is entitled to 50% of the capital value since the date of separation. Mrs. Poirier is concerned she will not realize her share of Mr. Poirier's pension and requests that her share of his pension be offset against his share of her pension and that any balance not offset be awarded to her by way of lump sum compensation.

[43] Any final valuation of pensions should recognize the potential tax liability that attaches to pension payouts. The difficulty is determining, in each case, the appropriate tax liability. Counsel for Mr. Poirier did not make any representations or provide any calculations to the court on the appropriate tax rate. Counsel for Mrs. Poirier gave submissions on the taxed costs but did not provide the court with her calculations and, therefore, the court is not able to verify those calculations.

[44] Actual tax expenses should be used whenever available as opposed to estimated tax expenses. However, I am not satisfied I have enough reliable information on actual tax expenses. Therefore, I propose to reduce the pension values of Mr. and Mrs. Poirier by 24%, which represents the lowest tax rate in the Province of Nova Scotia. Mr. Poirier's disability pension income is not taxable. The only other income he is receiving besides his pension is his Canada Pension Plan benefits. Mrs. Poirier, on retirement, will only have Canada Pension Plan and Old Age Pension benefits, in addition to her pension. It is likely that both Mr. and Mrs. Poirier's pension income will be taxed at the low rate.

[45] Mr. Poirier has received gross pension income of \$153,638.00 from the date of separation in April, 2005 to October 31, 2010. Applying a 24% tax rate, results in a net valuation of \$116,765.00. Mrs. Poirier is entitled to 50% or \$58,382.50, representing her share of Mr. Poirier's pension.

[46] Likewise, I have reduced the gross value of Mrs. Poirier's pension by 24% from \$88,475.50 to \$67,241.00. Mr. Poirier is entitled to \$33,620.50, representing 50% of Mrs. Poirier's pension.

[47] In order to accomplish an equal division of the parties' pensions, Mr. Poirier's entitlement to Mrs. Poirier \$33,620.50 representing his share of Mrs. Poirier's pension, is offset against his obligation to pay Mrs. Poirier \$58,382.50. Mrs. Poirier is entitled to a judgment for the remaining balance of \$24,762.00.

[48] Mr. Poirier was directed to pay one half of his pension beginning November 1, 2010, pending completion of this matter. Mrs. Poirier is entitled to 50% of the gross amount of any paid pension amount by Mr. Poirier since that date. If Mr. Poirier incurs an income tax liability on Mrs. Poirier's share of his pension, the tax liability is to be deducted from the gross amount of her share. Future pension payments are divided at source and any future pension receipts received by Mr. Poirier are to be held in trust for Mrs. Poirier's benefit until the pension funds can be divided at source.

D.V.A. Pension

[49] Mrs. Poirier claims Mr. Poirier's D.V.A. pension is a matrimonial asset and, therefore, subject to an equal division from the date of separation. Mr. Poirier claims the D.V.A. pension is not a matrimonial asset.

[50] Mr. Poirier was a member of the militia as a teenager and eventually a member of the Armed Forces. When he obtained full-time employment with the Sydney Steel Plant in 1971, he was granted a discharge from the Armed Forces. While a member of the Armed Forces, he suffered a fracture of the right clavicle. Mr. Poirier eventually applied for a disability pension. A letter from Mr. Peacock, Director of the Communications Division of the Canadian Pension Division forwarded to Mr. Poirier on February 15, 1985, indicated that Mr. Poirier's disability from the fracture of the right clavicle was assessed at 5% with effect from June 6, 1984. According to Mr. Peacock, disabilities for pension purposes

are assessed on a percentage scale and the end-date depends entirely on the degree of disability from pensionable conditions as found on medical examination. The *Pension Act* also made provision for the payment of additional pension for married pensioners and dependent children. According to Mr. Poirier, his continued receipt of the pension was subject to regular interviews with medical personnel. The pension rate remained at a low percentage throughout the parties' marriage, but was increased substantially after the date of separation as a result of additional disabilities identified by medical examination attributed to his military service. Mr. Poirier also received an amount for his children while they were dependent and an amount for Mrs. Poirier, which continued after their separation until recently when the amount was removed because they were not living together.

[51] In **MacKay v. MacKay** (1995), Carswell NS 499 (S.C.) Goodfellow J. held that the disability pension received by the husband which was similar to the CPP disability pension, was a matrimonial asset at paragraphs 18 to 23:

18 The Nova Scotia Matrimonial Property Act which applies to both parties commences with a definition of matrimonial property in section 4 which deems all property to be matrimonial unless the person alleging to the contrary establishes that such property fits into the exemptions, i.e. after acquired, personal, insurance payments, inheritance, etc., which have not been brought into the marriage stream.

19 The first question to determine is whether or not the pension Mr. MacKay has been receiving is a matrimonial asset. The statement from a Social Security Administration Retirement, Survivors, and Disability Insurance sets out an entitlement to monthly disability benefits from Social Security beginning June 1991 and a lump sum of \$21,475.00 was paid in May 1993 covering payments to and inclusive April 1993 and thereafter payments were at least in the amount of \$965.00 per month plus any additional cost of living adjustments.

20 The evidence clearly establishes that this was a contributory pension plan and therefore funds earned by Mr. MacKay during the marriage that otherwise would have gone for the benefit of the marriage were in essence set aside for the future security of Mr. and Mrs. MacKay and this pension is therefore a matrimonial asset. This is not a non-contributive pension as the D.V.A. pension excluded from being a matrimonial asset by Roscoe, J. (as she then was) in *MacDonnell v. MacDonnell*, (1991) 103 N.S.R. (2d) 435.

[52] In **MacDonnell v. MacDonnell** (1991), Carswell NS 55 (T.D.) Roscoe J. As she then was, excluded a disability pension from division. The D.V.A. pension was excluded at paragraphs 15 and 16:

15 Clarke v. Clarke is clearly founded upon the facts of that case, in that the pension was an occupational pension based upon contributions which were made by the husband, which were diverted from the income otherwise available to the family during the marriage, and, in my view, its application should be restricted to cases where the pensions are of that nature. In this case the D.V.A. pension is not based on contributions made during the marriage, nor is it based on years of service or salary level. I agree with the suggestion of Professor Bissett-Johnson that disability insurance should be exempted from matrimonial assets, if not under s. 4(1)(c) of the Act, then because it would be unfair to the disabled spouse to include it. The D.V.A. pension is meant to replace earnings lost as a result of a disability and should receive the same treatment as payments from a disability insurance plan.

16 In Nevin v. Nevin and Jarvis v. Jarvis, *supra*, D.V.A. disability pensions were excluded from the matrimonial assets. I have reached the same conclusion in this case.

[53] In **Hanna v. Hanna** (No. 2) (1996), Carswell NS 62 (C.A.) Bateman J.A. states as follows at paragraph 34:

34 It is not necessary, on this appeal, to decide the status of “disability pensions” under the Matrimonial Property Act. Indeed, there is no evidentiary basis upon which to do so. Because classification of the pensions was not in issue, there was no evidence before the trial court as to the exact nature of the so-called “disability pensions”. Such evidence is essential if the court is to determine whether an asset is, by its characteristics, exempt from division within the meaning of s. 4(1) of the Matrimonial Property Act, *supra*. A court might consider, for example, whether the “pension” is contributory or non-contributory, whether it emanates from a policy of insurance or from employment, whether it is truly a disability pension or simply early payment of a retirement pension, and countless other factors. (See for example, MacDonnell v. MacDonnell (1991), 103 N.S.R (2d) 435 (T.D.) And Macaw v. Macaw, as yet unreported, No. 1206-002214, September 26, 1995, N.S.S.C.) The onus is on the party seeking exemption to

put that evidence before the court. (See Yaschuk v. Logan, *supra* [(1992), 39 R.F.L. (3d) 417 (C.A.)])

[54] In the case of **Rutherford v. Rutherford** (2004), 225 N.S.R. (2d) 293, Warner J. had to consider whether a D.V.A. pension was a matrimonial asset. In addition to receiving monthly pension payments, Mr. Rutherford received a lump sum payment after separation that related to the period of disability before the separation.

[55] Warner, J. stated:

71 Mr. Rutherford applied for several disability pensions arising out of his military service. The pension is paid as a D.V.A. disability pension. One of his four entitlements included (i) an indefinite monthly tax-free payment and (ii) a lump sum payment in the amount of \$19,000.00 paid to him after the separation but relating to the period of entitlement before the separation. Ms. Rutherford claimed this disability pension was a matrimonial asset — both the lump sum paid after separation but for the period before separation, and the continuing monthly payments.

72 Counsel for Mr. Rutherford submits that the disability pension is not vested and is subject to review on a periodic basis and was not the result of any plan for which Mr. Rutherford made any contributions during the marriage. He further argues that this pension is in the nature of an award or settlement for damages (an excluded class under the Matrimonial Property Act, s. 4(1)(b)).

73 The evidence was that while the disability pension was payable for life it was subject to review on a periodic basis depending on whether or not Mr. Rutherford's medical condition improved. In other words it is not vested

74 Neither party cited any law to support their position. The court has reviewed several decisions of our courts with respect to employment benefits received by an employee either before or after separation and which had been the subject of litigation under the Matrimonial Property Act. The types of benefits include severance pay, vacation pay, pay equity and public service awards. Some of the decisions included Yaschuk v. Logan (1992), 110 N.S.R. (2d) 278 (N.S. C.A.); Bellemare v. Bellemare (1990), 98 N.S.R. (2d) 140 (N.S. T.D.); Connolly v. Connolly (1998), 169 N.S.R. (2d) 344 (N.S. S.C. [In Chambers]); Smith v. Smith, 2001 NSSC 5 (N.S. S.C.), Simmons v. Simmons (2001), 196 N.S.R. (2d) 140 (N.S. S.C.) and O'Brien v. O'Brien (2002), 207 N.S.R. (2d) 241 (N.S. S.C.).

75 Directly on point is the decision in **MacDonnell v. MacDonnell (1991)**, 103 N.S.R. (2d) 435 (N.S. T.D.), which was referred to in **MacKay v. MacKay (1995)**, 145 N.S.R. (2d) 115 (N.S. S.C.). In **MacDonnell**, *supra*, the court found that a D.V.A. disability pension was excluded from matrimonial assets. The facts in the case at bar are almost identical to those described in paragraph 11 in **MacDonnell**.

76 The one difference is that in this case Mr. Rutherford received, shortly after the separation, a \$19,000.00 payment under the D.V.A. disability pension that related to the period of disability before the separation. This fact situation does not appear in the **MacDonnell** decision. I have considered whether the lump sum received after the date of separation for the period before the separation would be a matrimonial asset. The receipt of money based on the disability of Mr. Rutherford, if not explicitly excluded by s. 4(1)(b)(c) of the Matrimonial Property Act, should, in principle, be excluded; it would be unfair to divide it. The lump sum was not received before the date of the separation and therefore was not converted into a matrimonial asset during the period of co-habitation.

77 Based on the reasoning in **MacDonnell**, *supra*, I exclude both the lump sum payment and the monthly payment received by Mr. Rutherford under the D.V.A. disability pension from division under the Matrimonial Property Act.

[56] I agree with the reasoning in the cases of **MacDonnell v. MacDonnell**, *supra*, and **Rutherford v. Rutherford**, *supra*, that Mr. Poirier's D.V.A. Pension is exempt from division within the meaning of Section 4(1) of the *Matrimonial Property Act*. The pension is non-contributory and not vested. It is subject to being reduced or increased depending on ongoing medical examinations. Although pension funds received were used for family purposes, this alone does not make them a matrimonial asset. The D.V.A. pension is more in the nature of an award of money for an injury than a pension.

[57] Likewise, Mr. Poirier's receipt post-separation of an amount for a spousal component, does not entitle Mrs. Poirier to receive this amount. If Mr. Poirier received more than he was entitled after the parties' separation, that is a matter for him and the Department of Veteran's Affairs to resolve.

SPOUSAL SUPPORT

[58] Mr. Poirier claim's spousal support if his pension is divided. Section 15.2(1) of the *Divorce Act* provides authority for the payment of spousal support, "as the court thinks reasonable for the support of the other spouse." The basis for an entitlement to spousal support maybe compensatory, non-compensatory, or contractual (**Bracklaw v. Bracklaw** [1999] 1 S.C.R. 420). Mr. Poirier has not established a compensatory claim for spousal support. The oral agreement the parties made on separation concerns the transfer of Mr. Poirier's interest in the matrimonial home and had nothing to do with spousal support. The agreement is not enforceable pursuant to s. 24 of the *Matrimonial Property Act*, S.N.S. 1980, c.9.

[59] It is possible that Mr. Poirier has a non-compensatory claim for spousal support. The court ordered a division of his employment pension which could put him in a position of need. While he is retired and receiving the pension, Mrs. Poirier, who will receive a portion of his pension, continues to be employed. This is one of those situations described by Saunders, J., as he then was, in **O'Hara v. O'Hara**, 34 R.F.L. (3d) 222, although the facts in this case are different than the facts in **O'Hara**, *supra*. After separation, Mr. Poirier was in receipt of a non-taxable disability pension from the Department of Veterans Affairs, in addition to his employment pension. At different times from 2005 onward he also had some employment income, and E.I. benefits. He began receiving Canada Pension Plan benefits in 2008. His D.V.A. pension was substantially increased in 2007 or 2008. He is currently in receipt of his employment pension, non-taxable D.V.A. pension, and Canada Pension Plan benefits.

[60] Mr. Poirier is residing with a partner who is in receipt of pension income. They share expenses.

[61] Mr. Poirier's statement of expenses, which was filed July 15, 2009 and not updated to the time of trial, shows monthly expenses of \$3,266 plus income tax of \$375 for a total monthly expenditure of \$3,641. His income is \$4,730, which leaves him with a monthly surplus of \$1,089. If his pension income is reduced by 50% or \$1,165, he will have a deficit of \$76. However, his income tax liability will also be lower. His budget also includes \$466 for gifts, holidays, and entertainment, which can be reduced. His motor vehicle payment of \$832 was high because he was trying to pay off the loan quicker. His expenses also include \$650 a month on debt payments.

[62] Mrs. Poirier continues to be employed with the Children's Aid Society earning \$55,000 per year plus over time. She has re-mortgaged the matrimonial home of two or three occasions since separation. The matrimonial home has increased in value since separation. She has assisted her adult children with living expenses since separation. She claims to be financially burdened by the debt left behind by Mr. Poirier. The value of her own pension is small and is not yet in pay. She will be receiving approximately \$1,165 per month as her share of Mr. Poirier's pension plus her employment income. Many of the debts she incurred after separation cannot be attributed to the marriage and are personal choices of her own. She is nearing retirement age although she says she cannot think of retirement yet with the debt she has accumulated.

[63] Pursuant to s. 15.2(4) a court shall take into consideration in making a spousal support order, "the condition, means, needs and other circumstances of each spouse, including '(a) length of time the spouses co-habited (b) the functions performed by each spouse during co-habitation and c) any order or agreement or arrangement relating to support of either spouse.

[64] I have considered Mr. and Mrs. Poirier's condition, means, needs, and other circumstances. I have reviewed Mr. Poirier's circumstances since 2005 as well as his current circumstances. Mr. Poirier has not established a need for support and I decline to order spousal support at this time.

[65] The jurisdictional and procedural requirements for divorce have been met, the grounds have been proven, and there is no possibility of reconciliation. The divorce is granted.

[66] Although success has been divided, I am prepared to receive brief written submissions as to costs within 20 days which are to include any offers made. Each side has five days to respond to the submissions of the other.

J.