SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: Hanrahan-Cox v. Cox, 2011 NSSC 182

Date: 20110511
Docket: 1204-003921, SKD-036896
Registry: Halifax

Between:

Catherine Pearl Hanrahan-Cox

Respondent/Petitioner

v.

James Roderick Cox

Applicant/Respondent

Judge: The Honourable Justice Beryl MacDonald

Heard: March 31, and April 1, 2011, in Halifax, Nova Scotia

Counsel: Yvonne M.R. LaHaye, Q.C., counsel for James Cox;
Chris Robinson, counsel for Catherine Hanrahan-Cox

By the Court:

[1] In April 2006 the parties to this proceeding negotiated an Agreement and Minutes of Settlement in contemplation of their divorce. They had been married for 15 years. Three children were born of their relationship. The Mother had not been employed outside of the home since their marriage. The agreement placed the children in their parents' joint custody in a shared parenting arrangement that would alternate weekly between the parents' homes. The Father was to pay $1,000.00 per month as child support to the Mother. He was to continue to maintain health, medical, and dental insurance coverage for the benefit of the Mother and the children. He was to pay the following expenses for the benefit of the children:

- sports equipment
- memberships, camps, golf
- hockey memberships, tournaments, hotel, food during trips
- soccer memberships
- school projects/supplies
- allowances ($20 per child per alternate week)
- cell phone
- Columbia House
- clothing/footwear
- Chapters
- Electronics
- Ecost.com
- Brilliance.com

[2] The Father agreed to pay $2,400.00 per month spousal support to the Mother. Spousal support was to be reviewed in August 2008. The parties also divided assets and debts. The Father retained the matrimonial home and provided the wife with an equalization payment of $20,000.00. The Mother retained RRSPs with an approximate value of $71,000.00.

[3] The agreement reached by the parties was incorporated into the Corollary Relief Judgment dated May 15, 2006.

[4] On June 18, 2008, the parties consented to an Order varying the Corollary Relief Judgment. In that Order spousal support was reduced to $1,400.00. The stated reason for the reduction was " in consideration of the father's agreement to pay all expenses associated with their oldest son's post secondary education." The Order stated that the Father's annual income was $104,846.00. Payment of the revised spousal support was to begin August 1, 2008.

[5] On December 14, 2009, the Father filed an application to vary the Corollary Relief Judgment and the Consent Variation Order. He requested a variation in child support. The shared parenting arrangement no longer applied. The parties' oldest son was in a university, the oldest daughter would soon be attending university and the youngest daughter was residing primarily with the Father. In addition she was attending private, rather than public school.

[6] On November 15, 2010, the Mother filed a Variation Application requesting the Court to:

- set aside the Consent Variation Order dated June 18, 2008;
- reinstate spousal support in the amount of $2,400.00 retroactive to August 1, 2008 and reassess that amount in light of the financial information filed with the court;
- reassess child support retroactively to May 1, 2006 for both table guideline and special expenses;

[7] Although the Father did not file a formal response to the Mother's Variation Application, nor amend his previous application, his opposition to the Mother's application and his request to vary spousal support were acknowledged at the Conference before me on February 3, 2011. I did not require him to file a response or an application for termination of spousal support. I did direct that termination of spousal support was an issue for this hearing.

Setting Aside the Consent Variation Order

[8] A court may set aside a Consent Variation Order. When considering whether to do so the court is to apply the directions provided in *Miglin v. Miglin*, 2003 SCC 24 and *Rick v. Bandsema*, 2009 SCC 10. [*Turpin v. Clark* 2009 BCCA 530]

[9] In this proceeding there are changed circumstances that justify both variation applications in respect to child support and spousal support. However, the wife

may be limited to changes that have occurred since June 18, 2008 because of her consent to the Variation Order on that date. This is why she seeks to have that Order set aside.

[10] Much of the Mother's argument in favour of a finding to set aside the Consent Variation Order relies upon her allegation that the Father grossly misrepresented his income.

Father's Income

[11] The Father has filtered all of his earned income through a professional corporation, a related company and a Family Trust. The utilization of these structures have substantially reduced his income tax liability. Most of the income that flows through these structures is paid out as dividends to the Father, his present spouse and the two oldest children. Little remains as retained earnings. No argument was made about the utilization of corporate pre tax income. As a result the major complaint made by the Mother is that the Father failed to include the dividends paid to other family members in his calculation of income. It is her request that the court do so and therefore impute this income to the Father.

[12] The Father alleges his spouse does provide services in return for the dividend income paid to her. The Mother's submissions request the Court to take note of the Father's source of income when examining the claim his spouse earns the dividends she receives.

[13] The services allegedly performed by the Father's spouse are listed in Tab 5 attached to his Statement of Income filed November 16, 2010. In that document he also provides information about what his spouse received in her last place of employment presumably to justify the amount of money she receives as dividend income. She was an Office Manager in Ohio earning an annual income of $44, 600.00 that included an attractive benefit package.

[14] It is difficult to analyze the services listed in Tab 5 without understanding how much time each requires. Until recently the majority, if not all, of the Father's income was paid from his employment with the Workers Compensation Board of Nova Scotia. It is difficult to accept that many of these tasks were truly required or that, if they were, they would take any significant amount of time to complete. She allegedly performs these tasks for the Father's professional corporation. However,

the financial statements for that company do not disclose any “employees,” likely because there is no direct payment to the wife from that company. Tab 5 merely is a statement prepared by the Father listing the “services (she) provides to support (the company)” for which he then provides her with a dividend from the Family Trust.

[15] The Father’s spouse was not called as a witness. The Father was not cross examined about her provision of services to the professional corporation. No documentary or other evidence was provided suggesting, if all the services listed were required, the income received by the Father’s spouse is substantially more than she would receive for the same work if she was employed by a non related company. The Father argues his evidence about his spouse’s employment is therefore uncontradicted.

[16] Credibility may be assessed in many ways. It is not always necessary to cross- examine on a point or produce some documentary evidence on a point to attack the credibility of a statement. As Justice Forgeron said in *Novak Estate, Re*, 2008 NSSC 283, at paragraphs 36 and 37:

> [36] There are many tools for assessing credibility:
>
> a) The ability to consider inconsistencies and weaknesses in the witness's evidence, which includes internal inconsistencies, prior inconsistent statements, inconsistencies between the witness' testimony and the testimony of other witnesses.
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> b) The ability to review independent evidence that confirms or contradicts the witness' testimony.
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> c) The ability to assess whether the witness' testimony is plausible or, as stated by the British Columbia Court of Appeal in ***Faryna v. Chorny***, 1951 Carswell BC 133, it is "in harmony with the preponderance of probabilities which a practical [and] informed person would readily recognize as reasonable in that place and in those conditions,” but in doing so I am required not to rely on false or frail assumptions about human behavior.
>
> d) It is possible to rely upon the demeanor of the witness, including their sincerity and use of language, but it should be done with caution ***R. v. Mah***, 2002 NSCA 99 at paragraphs 70-75).

> e) Special consideration must be given to the testimony of witnesses who are parties to proceedings; it is important to consider the motive that witnesses may have to fabricate evidence. ***R. v. J.H.*** [2005] O.J. No.39 (OCA) at paragraphs 51-56).
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> [37] There is no principle of law that requires a trier of fact to believe or disbelieve a witness's testimony in its entirety. On the contrary, a trier may believe none, part or all of a witness's evidence, and may attach different weight to different parts of a witness's evidence. (See ***R. v. D.R.*** [1966] 2 S.C.R. 291 at paragraph 93 and ***R. v. J.H.***).

[17] The Father bears a considerable financial burden and he has done so since his separation from the Mother. He has had significant income but the majority of that income has been used to support the Mother, their children, his present spouse and her children. He has few assets and now faces the uncertainty of self employment in a consulting business he has developed as a result of the loss of employment with the Workers Compensation Board. The Father's primary purpose in developing the corporate structures and family trust were to reduce income tax liability. Income splitting, which can further reduce tax, is a sensible decision in this context. I have decided this is what has driven the payment of dividends to the Father's spouse and I do not accept she "earns" this income. I will add it back to the Father's income. I will also add back the dividends paid to the children.

[18] The Mother has "grossed up" the amount of the dividends paid. In doing so she has started with the taxable amount of dividends disclosed on the Father's income tax return. However, the Federal Child Support Guidelines direct that dividend income is to be adjusted and in doing so section 5 of Schedule III requires a replacement of ". . . the taxable amount of dividends from taxable Canadian corporations received by the spouse by the actual amount of those dividends received by the spouse." These amounts may then be "grossed up" pursuant to section 19 for the purpose of imputing income. I have used the actual amounts received in my calculations. Section 19 states that a court "may" impute income if "the spouse derives a significant portion of income from dividends. If I intended to provide table guideline child support, where net disposable income (income after tax and mandatory deductions) is irrelevant I would gross up the dividends. However, as will become evident later in this decision, I will not be using the table guideline amount in respect to the Father's child support responsibilities. For spousal support I considered it appropriate to began with the actual dividends paid, real cash in hand, rather than begin with a grossed up amount.

[19] The Father's income is as follows:

2007	actual dividend to him	$ 82,000.00
	actual dividend to spouse	$ 41,000.00
	other income	$ 2,347.00
	Total	$125,347.00
2008	actual dividend to him	$ 79,812.00
	actual dividend to spouse	$ 44,416.00
	actual dividend to son	$ 26,028.00
	investment income	$ 83.00
	other income	$ 2,132.00
	Total	$152,471.00
2009	actual dividend to him	$ 80,630.00
	actual dividend to spouse	$ 40,999.00
	actual dividend to son	$ 20,377.00
	Total	$142,006.00
2010	actual dividend to him	$ 81,550.00
	actual dividend to spouse	$ 49,999.00
	actual dividend to son	$ 35,000.00
	actual dividend to daughter	$ 1,000.00
	Total	$167,549.00

[20] By June 2008, the fact that the oldest son was to attend university did entitle the Father to request a change in the amount he paid for child support in order to redirect money toward their son's university expenses. He also wanted to discuss enrolling their youngest daughter in private school. Also, at the time both parties could not help but be reminded that the Corollary Relief Judgment required a review of spousal support in August 2008.

[21] From information provided in exhibit "C", attached to the Father's affidavit filed March 18, 2011, and exhibit "B", attached to the Mother's affidavit filed April 9, 2010, the parties discussion about changes to the amount of support to be paid by the Father began with an e-mail sent by him to the Mother on April 20,

2008 at 8:20 p.m.. The thread of the e-mail exchange that ended with the Mother's response the morning of April 21, 2008 is as follows:

From the Father: "Cathy; Find attached (their son's) upcoming university costs. He has totaled his costs minus scholarship and gov't grant. I helped him to get on track for another scholarship increase but, as of yet, no word on this. I am inquiring as to your financial assistance for (their son) in the upcoming year. Please advise such that I need plan accordingly."

From the Mother: "Are you still planning a review of my economic status in August? I tried to download your file that was sent but it is not working. Please check it."

From the Father: "My preference is to settle this outside of the legal system. (Their son's) total costs are $13,374. This falls outside of my budget range such that I have been in essence paying and supporting the children far beyond any court mandated requirement. The other consideration is (their daughter) and whether or not it would be much better for her to attend KES rather than WHMS. Just for (their son), I would hope you realize that this is a tremendous expense on top of all other "needs" as they surface for the children and which typically fall on me, although this "needs" issue was to have been shared. I would anticipate just for (their son) a decrease in alimony of $557.25. This reflects shared expenses divided by two pro rated over 12 months. (Their son) will no longer be living with you while attending University starting in mid August of this year so one third of the $1,000.00 child support will no longer be considered. I will establish an account for him for six months (until he turns19). That would equal $333.33 x 6 months = $1999.99 (~$2,000). Again, this money was intended for the children to begin with and (their son) will require no board or lodging at your house for this time period.

From the Mother: I also agree that settling this outside the court system is preferable. I have also contributed to the children's expenses i.e. music, clothing, trips etc. Child support is based on each year and tax return. (Their son) will be spending summers here and university ends in April. When our agreement was signed I was a student and therefore did not have the same tax etc. issues. I am willing to forfeit

> $1,000.00 a month in spousal support in a signed addendum but if the child-support is to be changed, please forward this year's tax return after it is filed to my lawyers (names given). This will only cost you postage and we can go from there.

[22] The Father accepted the Mother's offer and both signed the Consent Variation Order on June 18, 2008. The Mother now alleges she made this offer under duress without having received any financial information from the Father and without legal advice.

[23] In *Miglin v. Miglin* and *Rick v. Bandsema* the Supreme Court of Canada provided direction about the principles to apply when considering whether to set aside a separation agreement. Justice Warner in *Day v. Day*, 2006 NSSC 111 (S.C.N.S.), set out a succinct summary of the directions provided by *Miglin* and I have considered his analysis in reaching this decision.

[24] The Mother will bear the evidentiary burden of establishing on a balance of probabilities:

> (1) the Consent Variation Order is invalid due to the circumstances of its negotiation and execution or it was not in substantial compliance with the objectives and factors governing spousal support and child support pursuant to the *Divorce Act* or;
>
> (2) there has been a significant departure from the range of reasonable outcomes anticipated by the parties since the negotiation and execution of the Consent Variation Order that now places it outside of substantial compliance with the objectives of the support provisions of the *Divorce Act*.

[25] The first requirement speaks to circumstances as they existed at the time the agreement was negotiated and signed. The second requirement examines changes that have occurred since the agreement was signed that would justify interfering with the terms of that agreement.

[26] Placing the Mother's complaints about the negotiation process within the framework of the factors outlined by *McLeod and Mamo,* as quoted in paragraph 39 of *Day v. Day* the following must be addressed:

- the Father failed to disclose material information, ie. his true income;
- the Mother was under duress;
- the Father took advantage of the Mother's financial dependency;
- the Father misrepresented a material fact, ie. his ability to pay for their oldest son's university expenses;
- the Mother did not receive legal advice;
- the agreement was not in compliance with the objectives of the *Divorce Act*.

Failure to Disclose

[27] The Mother testified that when she and the Father exchanged the e-mail previously described in this decision, the Father informed her his income was "roughly the same amount as he had been earning a few years earlier when our divorce was finalized" (Mother's affidavit filed April 9, 2010, para. 38) No amount is mentioned in the e-mail although his income is stated to be $104,846.00 in the Consent Variation Order. The Father denies any prior discussion about his income. He testified he and the Mother only communicate by e-mail. Given that this income amount appears in the Order, I take this to be his representation about his income. In her e-mail the Mother only requested the Father to provide his financial information if the child support amount was to be changed. He did make representations in his e-mail that his budget could not sustain a continuation of the previous support arrangements when their son attended university. The Mother did not question that assertion prior to signing the Order. She testified she trusted the Father's information that he could not afford a continuation of the previous arrangement.

[28] Even if the Father had told the Mother that his income was similar to what she earned at the time of their divorce, that income was, according to the Corollary Relief Judgment, $109,330.00 which was more than the income disclosed in the Consent Variation Order. In addition, if he had complied with the disclosure provisions of the Corollary Relief Judgment his Line 150 income for 2007 was $104,846.00, the exact income amount reflected in the Consent Variation Order.

[29] Under these circumstances I do not consider that the Father "failed to disclose material information." The Mother is an intelligent woman. She has been through the process of negotiating child and spousal support when her marriage to the Father ended. No doubt it was a lengthy and exhausting process but she did understand importance of receiving financial information. She asked for his income tax information "if the child-support is to be changed." Neither of these parties complied with the financial information exchange required by the Corollary Relief Judgement. While one party's failure to provide that information does not excuse the other's failure to do so, this fact can dilute the impact of the argument that a party failed to provide financial information. This may be particularly so in this case because the Mother knew her spousal support was to be reviewed in August 2008 and maintaining child support would provide her with a tax advantage.

Duress

[30] A court may set aside a contract if a party has entered into that contract under duress. In contract law duress generally involves a threat to person or property made by one of the parties to the other. In the family law context duress has an expanded definition to include circumstances where the complaint felt compelled to enter into an agreement to prevent a loss or achieve a gain. However, compulsion in this context must be differentiated from general anxiety or stress. It is not to be used as an excuse to later justify release from what may have been a bad bargain.

[31] The Mother's evidence of duress consists of statements attributed to her oldest son about his worry there would be insufficient funds to finance his university education. He allegedly told his Mother the Father informed him he could not afford to pay those expenses without a reduction in the amount of child support and spousal support he was paying to the Mother. Neither parent wanted to call their son as a witness in this proceeding. The Father denies having these conversations with their son. A review of the affidavits filed by the Father does make it abundantly clear he has resented the money he has been required to pay the Mother virtually since he signed the Agreement and Minutes of Settlement that were the foundation of their Corollary Relief Judgment. In the e-mail communication I have repeated in this decision, he makes reference to her responsibility to share in paying for the children's "needs". However the Corollary

Relief Judgment and attached Minutes of Settlement say nothing about the Mother's responsibility to share any expenses relating to the children but instead lists all of the expenses the Father was to exclusively pay. Whether or not the Father had direct conversations with his children about the lack of financial support they received from their Mother, I have little doubt they were quite aware this would be his opinion. I also have little doubt he would make them aware of the financial sacrifice he endures in order to continue to support them. Finally, even if no statements were made to the children and the parties oldest son suffered no anxiety about this situation (as the Father alleges) I still have to determine whether the statement made by the Father to the Mother that the university expenses fell "outside of my budget range" amounted to duress or compulsion.

[32] I am not satisfied these circumstances support a finding that the Mother acted under duress or compulsion when she signed the Order. She may have been concerned about how the son's university expenses were to be paid but concern or anxiety is not duress or compulsion. The Father's statements leading to a conclusion he considered himself in a situation that could justify readjustment to the child support payments were not without foundation even considering his true annual income. His concern that these university expenses were outside of his budget was not completely unjustified, given the number of people he was supporting.

Financial Dependency

[33] The Father knew the Mother was financially dependent upon him. This is one of his biggest complaints about her. He expected her to be financially independent by 2008. However, the facts do not support a finding that he used this dependency to coerce her agreement to change the amount of her spousal support.

Misrepresentation

[34] Did the Father misrepresent his income or his ability to pay for his son's university expenses? Misrepresentation requires both an intent and a fact. In this case I have decided the Father's income was, in fact, greater than $104,846.00 at the time the parties negotiated the change to their Corollary Relief Judgment in 2008. In 2007 (considering that parties often use a previous year's income to determine a subsequent year's financial obligation) his income in fact was

$125,347.00. However, his Line 150 income from his Income Tax Return was $104,846.00. I am satisfied this is what he believed his income was for the purposes of child and spousal support. Therefore, he had no intent to misstate his income. He believed his present partner deserved the money she received in dividends and considered this her money. I have disagreed with him on this point but this miscalculation on his part does not lead to the conclusion he was actively and deliberately attempting to "hide" income. He relied on Line 150 in his income tax return. Many do when calculating their support obligation without realizing to do so is not always legally correct.

[35] The Father knew he was providing significant financial support to the Mother. At the time they were negotiating I am not satisfied he had any personal information about her employment income. Looking at his own financial obligations and into the future, was it misleading for him to suggest total payment of his son's university was "outside of his budget range" if the Mother did not accept a reduction in child support? A court may have rearranged child support pursuant to Section 7 or Section 3(2)(b) of the child support guidelines. It may have rearranged the spousal support at the "review". This may have occurred whether or not the son's expenses were "outside of his budget range". The Mother chose not to challenge this statement by requiring proof. She now regrets the choice she made. I am not satisfied the Father told the Mother he could not afford the expense in order to coerce her into an agreement. He told her it was not something he had prepared for in his financial budget. His primary goal was to receive contribution from the Mother for their son's university expense. Perhaps, given his financial circumstances, this could be conceived as an unreasonable request but I am not satisfied their communication suggests any deliberate attempt to mislead to gain an advantage to which the Father knew he was not entitled.

Legal Advice

[36] The Mother did not seek legal advice before she made her offer to the Father in April 2008. She chose not to seek that advice because she believed she could not afford that advice. Not every agreement made without legal advice is set aside. In this case the Mother understood her financial circumstances. She understood her right to demand financial information from the Father. She was the person who made the suggestion she would reduce her spousal support in response to the Father's request they share their son's university expense. She did not ask for time

to consider the situation. Her response was immediate. I am satisfied she understood her suggestion would take $12,000.00 out of her budget. She did so freely and voluntarily.

Compliance with Objectives

[37] The agreement made by the parties in April 2008, and evidenced in the Consent Variation Order dated June 18, 2008, does not fail to comply with the provisions of the *Divorce Act*. The Mother's entitlement to spousal support remained. Only the quantum was reduced in recognition of a child's need. The Mother continued to receive the same amount of child support notwithstanding the oldest child would rarely be living in her household and the youngest was in her Father's primary care.

[38] I will not set aside the Consent Variation Order.

Retroactive Recalculation of Child Support

[39] Changes in income, from the amount it was understood would be earned at the time an agreement was made, may justify a retroactive variation of child support. The Mother had an opportunity to obtain income information from the Father when he requested a change to child support in April 2008. She choose not to do so. I have not set aside the Consent Variation Order she signed in June 2008. As a result recalculation will not be made for a time prior to that date.

[40] The Supreme Court of Canada in *S.(D.B.) v. G.(S.R.)* 2006 SCC 37, (D.B.S.) described the factors the court is to consider when a retroactive variation of child support is requested and they are:

1) whether there is or is not an existing court order or agreement
2) status of the child/children
3) delay by the recipient in seeking the award
4) conduct of the payor parent
5) financial circumstances of the child/children
6) hardship imposed by a retroactive award

[41] The majority decided that if a retroactive award is justified there are three possible commencement dates:

1) The date when the payor was given "effective" notice that child support or a change in child support was being requested. Effective notice "*does not require the recipient parent to take any legal action; all that is required is that the topic be broached." (para. 121)*

2) If there is delay and the matter has not been adjudicated upon, even where effective notice has been given, *"it will usually be inappropriate to make a support award retroactive to a date more than three years before formal notice was given to the payor parent*." (para.123)

3) However, the presence of "blameworthy" conduct by the payor will *"move the presumptive date of retroactivity back to the time when circumstances changed materially." (para. 124).* As a result, the date when the total income of the payor increased may be an appropriate date for the beginning of the retroactive order.

[42] The Supreme Court addressed the quantum to be awarded retroactively and agreed that the quantum must fit the circumstances. *"Blind adherence to the amounts set out in the applicable Tables is not required – nor is it recommended." (para.128)* The presence of undue hardship can yield a lesser award and there is a suggestion that undue hardship calculations required by section 10 of the child support guidelines are not required to make this finding. Sections 3(2), 4 and 9 are other areas where there is discretion to determine quantum. The majority also suggested courts could affect the quantum of awards by *"altering the time period that the retroactive award captures. . . For instance, where a court finds that there has been an unreasonable delay after effective notice was given, it may be appropriate to exclude this period of unreasonable delay from the calculation of the award." (para 130).*

[43] The rationale for the Supreme Court's decision to confirm the court's discretion when considering a retroactive recalculation is described in paragraph 95:

> [95] It will not always be appropriate for a retroactive award to be ordered. Retroactive awards will not always resonate with the purposes behind the child-support regime; this will be so where the child would get no discernible benefit from the award. Retroactive awards may also cause

> hardship to a payor parent in ways that a prospective award would not. In short, while a freestanding obligation to support one's children must be recognized, it will not always be appropriate for court to enforce this obligation once the relevant time period has passed.

[44] In respect to the benefit a child may receive from an award I adopt the comment of Judge Campbell in *I.G. v. R.A,* 2009 NSFC 1:

> [14] The circumstances of the child are also a relevant factor. The court made it clear that parents should try to make sure that their children receive support when they need it. A retroactive support order years later does little to help the child who had to make do for years without the kinds of things that a proper level of support might have provided. Yet, a child who now enjoys a high standard of living might benefit less from a retroactive support order then one who is in need.

[45] The fact that a retroactive payment may be considered to result in a "windfall" to a recipient does not necessarily defeat an argument in favor of that payment. Requiring the payment of retroactive awards should provide payor's with an incentive to provide the appropriate amount of child support in a timely fashion. Knowing that payment of the proper amount of child support will be ordered at a later date should encourage that timely payment. However, the court must be able to articulate some discernible benefit accruing to the children from that retroactive payment. (*Bonair v. Bonair,* [2007] CarswellOnt 4666 (S.C.J.); additional reasons at [2007] CarswellOnt 5089 (S.C.J.)).

Existing Court Order or Agreement

[46] In this case there is an existing agreement which has resulted in a Consent Variation Order.

Status and Circumstances of the Children

[47] In September 2008 the oldest son attended University and did not live with either parent except for brief periods of time. The youngest child began living exclusively with the Father and attending private school. The oldest daughter continued in a shared custody arrangement. This arrangement continued in 2009.

In September 2010, and continuing in 2011, the oldest son and daughter were attending University returning rarely to either parent's home. The youngest child remained in the care of her Father and she continued to be enrolled in private school.

[48] The children have lived in adequate homes with no discernable neglect of their financial requirements. There is no identifiable benefit accruing to the children from a retroactive award to their Mother. Given that their Father is paying the majority, if not all of their living, personal and education expenses, some benefit may accrue to them if he was granted a retroactive award.

Delay

[49] Neither party delayed filing his and her application for retroactive recalculation. The Mother's application may have been in response to the Father's application but I do not interpret her failure to make this request earlier to be "delay" as described in *D.B.S.* .

Conduct of the Payor Parent

[50] The Father has continued to pay $1,000.00 per month as child support directly to the Mother since June 2008, even though, based on the children's living arrangements, she may not have been entitled to receive that amount. He too has a claim for a retroactive recalculation at least since December 2009 when he filed his application.

[51] I have commented upon each parties' failure to provide the other with his and her annual income tax return previously in this decision. While it is "blameworthy" to fail to abide by court order, the impact of this failure must be analysed taking into account all of the other factors that require a court's attention when determining whether to grant a retroactive claim.

[52] Does the fact that the Father knew or should have known that his income would require an increased payment for child support pursuant to the uidelines constitute blameworthy conduct? It is important to note, at the time the Father was negotiating with the Mother, one of the children was to attend university in the fall and he wanted her to consider enrolling the youngest child in private school. Both

would have required another look at the appropriate amount of child support to be paid and it was not obvious that he would pay an increased amount to the Mother.

[53] One of the primary reasons why the Supreme and Court of Canada was called upon to make the decision it did in *D.B.S.* was the conflicting interpretation given to the impact of the Child Support Guidelines when applying these to retroactive claims. On the one hand were the strict constructionists who would retroactively recalculate child support whenever a change in income was shown to have occurred based on the principle that income receivers know or should be taken to know what his or her annual income is and must make the necessary change to child-support payments very shortly after those changes occur. If a parent has not done so the court must. Those who favored discretion in reviewing retroactive claims had many reasons for doing so and those are expressed within the judgment given in *D.B.S*. which upheld the exercise of discretion. Therefore, individuals are not required, as a matter of law, to increase child support as income increases. They may be ordered to do so retroactively if the court, in exercising its discretion, determines it is appropriate to do so.

[54] Bastarache, J. discusses blameworthy conduct in *D.B.S.* at paragraphs 105 to 109 of that decision. Too much emphasis has been placed on his comment " ... courts should take an expansive view of what constitutes blameworthy conduct in this context. I would categorize as blameworthy conduct anything that privileges the payor parents own interests over his/her children's right to an appropriate amount of support." These words must be interpreted with the assistance of the examples he later provides about what may or may not be considered blameworthy conduct. He says:

> [106] . . . thus, **a payor parent cannot hide his/her income increases** from the recipient parent in the hopes of avoiding larger child-support payments:. . . . **A payor parent cannot intimidate** a recipient parent in order to dissuade him/her from bringing an application for child support . . . And **a payor parent cannot mislead** a recipient parent into believing that his/her child-support obligations are being met when (s) he knows that they are not.
>
> [107]. . . Even where a payor parent does nothing active to avoid his/her obligations, (s) he might still be acting in a blameworthy manner if (s) he consciously chooses to ignore them. Put simply, **a payor parent who knowingly avoids or diminishes his/her support obligation** to his/her children should not be allowed to profit from such conduct: . . .

> [108] **On the other hand, a payor parent who does not increase support payments automatically is not necessarily engaging in blameworthy behavior. . .** (my emphasis).

[55] What a person knows or should be taken to know about his or her income does have relevance to the question about "blameworthy" conduct but there must also be evidence of attempts to "hide" that income, or to "mislead" another about that income or evidence of "intimidation" or "knowing avoidance or diminishment" of a support obligation . It is said that ignorance of the law is no excuse but I have already made a finding that the Father did not realize the dividend amounts paid to his new partner and to his children must be added back to his income.

[56] It could be argued, because of the Father's experience gained at the time the original Corollary Relief Judgment was negotiated, he knew or should have known what would happen with dividend income etc. However, the Corollary Relief Judgment gives no insight into that issue and no evidence was produced on cross-examination about his specific knowledge about the appropriate calculation of income for child support purposes at the time he and the Mother were negotiating a change. In response to a question about what he would give the Mother if he was asked to provide financial information he did suggest he would include information from the corporate structures over which he has control. However, that answer was given after he has been required to provide that information in this proceeding as a result of a disclosure request. He now has that knowledge. I'm not satisfied he had that knowledge at the time he and the Mother were discussing a variation in 2008. There has been no conscious deliberate attempt by the Father to hide income or to mislead the Mother about his income.

[57] I find there has been no blameworthy conduct either by the Father or the Mother.

Hardship

[58] Given that the Father is supporting all three children with little assistance from the Mother, and will be required to continue to pay spousal support, a retroactive award will cause him financial hardship, particularly if he cannot earn what he has in the past.

[59] I dismiss the Mother's request for a retroactive recalculation of child support.

[60] The Mother's present financial circumstances will be reviewed in respect to my analysis of spousal support, but the conclusion is she would face significant financial hardship if faced with a retroactive award payable to the Father.

[61] I dismiss the Father's request for a retroactive recalculation of child support.

Spousal Support

[62] Entitlement to spousal support and the factors to consider in making an award is governed by section 15.2 of the *Divorce Act,* R.S. 1985, c.3. Section 15.2(6) creates four statutory support objectives. The Supreme Court of Canada in *Moge v. Moge* [1992] 3 SCR 813. and *Bracklow v. Bracklow* [1999] 1 SCR 420 confirmed that all four objectives are to be considered in every case but no one objective has paramountcy. If any one objective is relevant upon the facts, a spouse is entitled to receive support.

[63] These same factors and objectives are to be considered when a request is made to vary a support order. (*Divorce Act*, section 17(7))

[64] In *Bracklow v. Bracklow* the Supreme Court analysed the statutory objectives and held that they create three rationales for spousal support:

1. Compensatory support to address the economic advantages and disadvantages to the spouses flowing from the marriage or from the roles adopted in marriage.
2. Non-compensatory dependency based support, to address the disparity between the parties, needs and means upon marriage breakdown.
3. Contractual support, to reflect an express or implied agreement between the parties concerning the parties' financial obligations to each other.

These rationales take into account both the factors set out in S. 15.2 (4) and the objectives set out in S. 15.2 (6).

[65] The Supreme Court did recognize that many claims have elements of two or more of the stated rationales. It confirmed that analysis of all of the objectives and factors is required. Pigeonholing was to be avoided.

[66] In this decision I will not comment on the contractual objective because it is not a factor in the case before me.

[67] McLachlan, J. in *Bracklow* indicated that the basis for a spouse's support entitlement also affects the form, duration, and amount of any support awarded.

[68] Examples of circumstances that may lead to a decision that a spouse is entitled to compensatory support are:

a) a spouse's education, career development or earning potential have been impeded as a result of the marriage because, for example:

- a spouse has withdrawn from the workforce, delays entry into the workforce, or otherwise defers pursuing a career or economic independence to provide care for children and/or a spouse;
- a spouse's education or career development has been negatively affected by frequent moves to permit the other spouse to pursue these opportunities;
- a spouse has an actual loss of seniority, promotion, training, or pension benefits resulting from an absence from the workforce for family reasons.

b) a spouse has contributed financially either directly or indirectly to assist the other spouse in his or her education or career development.

[69] Non-compensatory support incorporates an analysis based upon the concepts of economic dependency, need and ability to pay. If spouses have lived fully integrated lives, so that the marriage creates a pattern of economic dependence, the higher-income spouse is to be considered to have assumed financial responsibility for the lower-income spouse. In such cases a court may award support to reflect the pattern of dependence created by the marriage and to prevent hardship arising from a marriage breakdown. L'Heureux-Dubé, J. wrote in *Moge v. Moge* at p. 390:

> Although the doctrine of spousal support which focuses on equitable sharing does not guarantee to either party the standard of living enjoyed during the marriage, this standard is far from irrelevant to support entitlement (see *Mullin v. Mullin (1991),* , and *Linton v. Linton,*). Furthermore, great disparities in the standard of living that would be experienced by spouses in the absence of support are often a revealing indication of the economic disadvantages inherent in the role assumed by one party. *As marriage should be regarded as a joint endeavour, the longer the relationship endures, the closer the economic union, the greater will be the presumptive claim to equal standards of living upon its dissolution (see Rogerson,* "*Judicial Interpretation of the Spousal and Child Support Provisions of the Divorce Act, 1985 (Part I)*", at pp. 174-75). (emphasis added)

[70] It is not clear from Justice L'Heureux-Dubé's, decision whether entitlement arising from a "pattern of dependence" is compensatory or non-compensatory. A pattern of dependence may create a compensatory claim because it can justify an entitlement even though a spouse has sufficient income to cover reasonable expenses and might be considered to be self-supporting. This often is described as the "lifestyle argument" - that the spouse should have a lifestyle upon separation somewhat similar to that enjoyed during marriage. (*Linton v. Linton* 1990 CarswellOnt 316 (Ont. C.A.) A lengthy marriage generally leads to a pooling of resources and an interdependency even when both parties are working. Usually the recipient spouse will never be able to earn sufficient income to independently provide the previous lifestyle. This would form the basis of a compensatory claim but does not necessarily entitle a spouse to lifetime spousal support. The essence of a compensatory claim is that eventually it may be paid out. This leads to a discussion about the quantum and duration of the claim.

[71] Once it is decided that a spouse is entitled to spousal support, the quantum (amount and duration) is to be determined by considering the length of the relationship, the goal of the support (is it compensatory, non-compensatory or both), the goal of self-sufficiency, and the condition, means, needs and other circumstances of each spouse. In considering the condition, means, needs and other circumstances of each spouse one may examine the division of matrimonial property and consider the extent to which that division has adequately compensated for the economic dislocation caused to a spouse flowing from the marriage and its breakdown and any continuing need the spouse may have for support arising from other factors and other objectives set forth in S. 15(2). (*Tedham v. Tedham* 2005 Carswell BC 2346 (B.C.C.A.)

[72] There will be cases when the analysis may indicate that the only way to adequately address the compensatory or non-compensatory claim is to continue support for significant periods of time possibly during the entire life of the recipient or payor. (*Rondeau v. Kerby*, 2004 Carswell NS 140 (N.S.C.A.) This most often will occur in respect to lengthy marriages where there is significant income disparity.

[73] Generally a non-compensatory claim in a short to mid length marriage is satisfied when a spouse becomes self-supporting and, in such a case, neither the payor spouse's greater income nor the inability of a recipient spouse to replicate a previous lifestyle, is a factor entitling a spouse to continuing support. When spouses have not had a lengthy relationship and the only effect of the relationship has been that a spouse has enjoyed a better lifestyle than he or she could afford alone, the duration of support will likely be for a period required to ease the recipient spouse's transition to economic independence. Self-sufficiency, however, is a relative concept. It constitutes something more than an ability to meet basic living expenses. It incorporates an ability to provide a reasonable standard of living from earned and other income exclusive of spousal support.

[74] The Mother and the Father had a 15 year relationship. This might be classified as a mid length marriage. Three children were born of this relationship. During the entirety of that relationship the Mother was a "stay at home Mother". This is the objective reality of their relationship whether the Father wanted or encouraged her to work or not. As a result the Mother became dependent upon the Father. She had both a compensatory and non-compensatory entitlement to receive spousal support at their date of separation.

[75] The Mother describes her lifestyle during her marriage as luxurious. The Father suggests it was middle class at best. I accept the parties had a lifestyle that, while not luxurious, was very comfortable, without worry about debt when purchases were made for consumption or for recreational activities. The Mother certainly cannot replicate that lifestyle, not now, perhaps never. However, replication of lifestyle is not the standard against which entitlement or quantum is judged in a case such as this where there is a 15 year relationship in which the parties, at separation, were middle aged. The issue at this stage is whether the Mother has, or should have, become self-sufficient. In this case she has not. She cannot meet her reasonable needs without spousal support. She still has not overcome the disadvantages of her marriage.

[76] The Husband suggests income should be imputed to the Mother. Presently she has some casual employment available to her but she will not likely earn more than $8,000.00 in 2011. The Father requests the court to impute income at least at minimum wage for a 40 hour work week. This would provide an annual income of $20,000.00. The Father considers the Mother to be underemployed. He asserts she could work as a waitress in a bar (one of the types of employment she pursued prior to their marriage) or in some capacity with Tim Horton's . The Husband did not bring detailed evidence of any actual work opportunities with Tim Horton's that could realistically be accessed by the Mother. He merely provided a printout from the company's web site that invited applications for positions in its retail stores in various locations. There was no indication that there actually were vacant positions to be filled in any of these stores nor in any of the general employment categories listed. The essence of his submission is that the Mother likely could be employed in the service industry and she should seek out this employment. Because she has not done so, income should be imputed to her.

[77] Since the parties separation the Mother returned to University to complete her Bachelor of Arts Degree. She completed computer courses and with these she was able to find regular steady employment until May 2009 when she became unemployed. Since then she has not been regularly employed. To improve her employability the Mother completed an ESL Diploma in December 2010 and she has taken every available opportunity to volunteer in the schools needing this service to obtain the experience she hoped would result in a full time position.

[78] The Mother acknowledged she has been looking for employment that would provide greater remuneration than does work in the service industry. She has re-educated herself to pursue a career teaching English as a second language. She realizes she will have to explore other options if this does not provide her with significant employment in the near future. I am satisfied she has made reasonable efforts to find employment. I will not impute income to the Mother at this time.

[79] The Father suggests the Mother has had sufficient time to become self sufficient and spousal support should be terminated. He considers the following factors supportive of this request:

- The parties separated in August 2004 and the Father has been paying spousal support for almost 7 years.

- The Mother is maintaining a home that has more space than she requires and is costly to own.

- The Mother's compensable claim was satisfied by the property division.

[80] The Mother did receive a property division but it did not satisfy her compensable claim. The parties assets were not extensive then, nor are they now.

[81] While the Mother's expenses could be reduced, and she may need to consider the sale of her home, she still would be unable to support herself, even at a just above basic needs level upon her present income. While termination may loom in the future I am not prepared to set a termination date at this time and her entitlement to spousal support continues.

[82] Spousal support is income for child support purposes and this must be a consideration in determining the proper quantum of spousal support. Ideally the Mother, after paying child support, will have sufficient net income to meet her identified needs. Practically, this cannot be achieved based upon the Father's expected income taking into account his legal obligations to support himself, his spouse and the children of his relationship with the Mother. However, these obligations do not completely take precedence over the Mother's entitlement to spousal support. Her years of marriage as a stay at home mother placed her at an observable disadvantage in any attempt to become self supporting. Reinventing oneself as an economically independent human being at middle age is not easy. An entitled spouse should not be required to resort to accepting service industry jobs with little income, no security, and few if any benefits in preference to taking some time to become reeducated for more remunerative employment. The result may be unsuccessful but time to explore this option must be provided. It is understandable that the Mother requires additional time to achieve her goal. She may not and the consequences of that failure, as I have said, are for another day. In the meantime, the children who are in university may have to take a greater financial responsibility for their education, pursuing scholarships, bursaries , and student loans, which may be available notwithstanding their Father's income. No doubt they would prefer to complete their education debt free but this is not to be accomplished at their Mother's expense.

[83] The Father may have to seriously examine the necessity that their youngest daughter attend private school. It is an expense for which the Mother does not have the means to contribute.

[84] I am satisfied that, with necessary adjustment to the expenses he is paying, the Father has the ability to pay and shall commence paying $2,000.00 per month spousal support to the Mother commencing June 1, 2011. This does not meet her identified need but the Father does not have the ability to pay more than I have ordered.

Retroactive Recalculation Spousal Support

[85] *D.B.S* . was about child support. Whether to grant a request to retroactively recalculate spousal support is also a discretionary decision. Some of the factors utilized in *D.B.S.* such as delay, blameworthy conduct, financial and other circumstances of the recipient, and hardship, provide a useful framework in which to discuss the exercise of discretion in these cases. (*Kerr v. Baranow* 2011 S.C.C. 10) However, that analysis must occur within the context of the objectives for spousal support contained in the *Divorce Act*, R.S. 1985, c.3. because ". . . there is no presumptive entitlement to spousal support and, unlike child support, the spouse is in general not under any legal obligation to look out for the separated spouse's legal interests. Thus, concerns about notice, delay, and misconduct generally carry more weight in relation to claims for spousal support..." (*Kerr v. Baranow* , supra, para. 208).

[86] The Mother did not delay in filing her request for a retroactive recalculation of spousal support. The Father did not engage in blameworthy conduct although I have decided that he has more income than is disclosed in Line 150 of his income tax returns. In this jurisdiction it is common to take post separation increases in income into account in variation and retroactive recalculation applications. The Mother would clearly benefit from a retroactive recalculation because she continues to have financial need that cannot be addressed with her own resources. However, this determination cannot be made without considering her continuing receipt of child support for periods of time when none of the children were living with her except for limited occasions when the older children were home from university and the Father's assumption of the majority of the children's living, personal, and educational expenses. Given his ongoing financial obligations the Father would have difficulty paying a retroactive award.

[87] I dismiss the Mother's request for a retroactive recalculation of spousal support.

Child Support

[88] The Mother's Line 150 income (which includes spousal support but excludes RRSP withdrawals) for 2010 was $25,018.00. Her expected earned income in 2011 is $8,000.00. Her spousal support from January to May at $1,400.00 per month is $ 7,000.00. From June to December the total spousal support payment will be $14,000.00. Total 2011 income will be $ 29,000.00. Table Guideline support for three children on this income is $579.00 per month. This amount is to be paid by the Mother for the support of the children. I have determined pursuant to section 3 of the Guidelines that, under these circumstances, the table amount is appropriate. As I have said earlier in this decision, the Mother does not have the means to contribute to the section 7 expenses. But for spousal support she would not be required to pay Table Guideline support.

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Beryl MacDonald, J.