

SUPREME COURT OF NOVA SCOTIA
Citation: Cole v. Luckman , 2012 NSSC 118

Date: (2012-03-28)
Docket: 1209-001119
Registry: Yarmouth

Between:

Kenneth Gary Cole

Petitioner/Responding Party

v.

Patricia Lee Luckman (Cole)

Respondent/Moving Party

Judge:

The Honourable Justice Pierre L. Muise

Heard:

May 25 and 26 in Annapolis Royal and July 13, 2011 in
Digby

**Final Written
Submissions:**

August 30, 2011

Counsel:

Kenneth Gary Cole represented by W. Bruce Willis, Q.C.

Patricia Lee Luckman (Cole) self-represented

A. INTRODUCTION

[1] K. Gary Cole and Patricia Lee Luckman (formerly Cole) were married on August 30, 1986, after 4 to 5 years of cohabitation, and separated, in or about, October 2006. Justice Duncan, in *Cole v Cole*, 2008 NSSC 189, released June 17, 2008, granted the divorce judgment and the change of Ms. Luckman's name. He also determined that neither party would pay child support.

[2] The parties reserved the right to later seek a determination of the issues of asset division and spousal support. Ms. Luckman filed this motion requesting that Mr. Cole be ordered to pay her: \$58,856.57 to effect an appropriate division of assets; and, retroactive and ongoing spousal support. Mr. Cole contested the motion and requested that Ms. Luckman be ordered to pay him: \$14,379.39 to effect an appropriate division of assets; and, a modest amount of spousal support.

[3] During the marriage, Mr. Cole trained as a farrier and worked in his own farrier business and farming business, as well as a school bus driver. Ms. Luckman, had completed a program in architectural drafting. During the marriage she only worked intermittently, mostly in retail. The majority of the marriage, she worked in the home, caring for the children and the household, and assisted in the farming operation. Mr. Cole continues to work in the same occupations. Ms. Luckman is now employed full-time with the Valley Credit Union. Her income tax returns show a much higher income than his do, after farming losses are deducted. She

alleges he earned and is earning more income than what is reflected in his income tax returns.

[4] Ms. Luckman seeks an equal division of farming/farrier business assets and matrimonial assets based on: her contributions to the business; and, the co-mingling of the household and farm operations. Mr. Cole seeks an equal division of only matrimonial assets based on: Ms. Luckman's contributions to the business having been minimal; and, her having been paid for her services.

[5] In her submissions, Ms. Luckman included references to factual points which were not in evidence. My decision is based on the evidence presented and agreed facts. I have ignored references to factual points which were not in evidence, nor agreed upon.

B. ISSUES

The issues to be determined on this motion are the following:

1. The credibility and reliability of the witnesses;
2. The appropriate division of matrimonial assets and debts;
3. The appropriate division of business assets and debts;
4. The payout to be made to effect an appropriate division of assets and debts; and,
5. Whether spousal support should be paid by either party.

C. LAW AND ANALYSIS

1. CREDIBILITY AND RELIABILITY OF WITNESSES

(a) Patricia Luckman

[6] During her examination for discovery, Ms. Luckman stated under oath that she had a second job in 2009 which she was unable to maintain. She said she had worked for a business called Laser Industries, which did consulting in the field of management and/or marketing. She worked as a consultant, researching, advising and making suggestions regarding any changes they may be looking at in the area of marketing. She provided this service to a specific client. She indicated she could not go into detail for reasons of confidentiality.

[7] At trial, she acknowledged that Laser Industries was owned by Edward Reagh, who she acknowledged had lived with her and not contributed financially to living expenses. She said he had hired her to help him in designing a house he was building and with staffing issues he had at the time. According to her, it started around the time that he moved out of her house.

[8] She indicated that, at the discovery examination, she thought it might be detrimental to him if she revealed what was going on. She was fearful that if she revealed too much, he might become angry and sue her. She clarified that she was, at trial, saying that she also helped him design a house, on top of the other services she provided. She said she considered herself to be consulted. He had asked her to look up things on the computer.

[9] In my view, the arrangement described by Ms. Luckman during the discovery examination was not a true and accurate account. It was misleading; and, she intended it to be misleading. It was made under oath. In my view, that is a factor which seriously undermines her credibility.

[10] There was also inconsistency within her explanation at trial. Initially she indicated that Mr. Reagh had her on payroll and she was paid direct deposit. Then she testified that it was all done in exchange for a 2001 Honda Civic. She indicated that Mr. Reagh bought the car and signed it over to her name. He was able to write it off as an expense. She had to pay the income tax bill associated with the value of car.

[11] Other inconsistencies, or apparent inconsistencies, in her evidence, include the following.

[12] Ms. Luckman's affidavit evidence was that, prior to their marriage in August of 1986, she and Mr. Cole lived together for four years. At trial, she testified that they lived together for five years before marriage.

[13] In her affidavit, Ms. Luckman indicated that Mr. Cole withdrew \$600 for a hay wagon and \$900 for a chainsaw. At trial, she testified that he had withdrawn \$900, \$600 of which was for a chainsaw and \$300 of which was for a hay wagon.

[14] Ms. Luckman swore an affidavit, on August 31, 2010, indicating that she and Mr. Cole shared the farming duties equally. However, in her oral evidence at trial, she testified that her part was not as extensive as his.

[15] Ms. Luckman testified that, while Mr. Cole was training with another farrier for free, she was working at Valley Drug Mart. She worked there until about one week before Zachary's birth and returned to work shortly after his birth. That does not appear to be consistent with her evidence that she gave up a career in architectural drafting to look after Zachary. Even if one accepts her evidence that Zachary had already been born when she refused drafting job offers, and rejects Mr. Cole's evidence that they were refused prior to Zachary's birth, it does not explain why she could not take a drafting job, but was able to work in retail.

[16] For the most part, Ms. Luckman readily answered questions relating to banking transaction records. However, when transaction 18, in the bank account she held jointly with Mr. Cole, was shown to her, and she was asked what it was,

she indicated that she was not really sure and that she could not recall. That transaction is a record of the \$1359.94 deposited by Mr. Cole on March 2, 2007, to pay the overdraft. When it was suggested to her that that's what it was, she simply responded that she believed that he had borrowed money from his common-law spouse, Susan Savoy (a.k.a. Judge). Her professed lack of knowledge and recollection in relation to that transaction, compared to her readiness in answering other questions regarding banking transactions, suggests that she was avoiding providing answers in Mr. Cole's favor.

[17] She explained that she could not recollect what happened years ago. That explanation appears inconsistent with her assertion that she recalled the amount Mr. Cole deposited in Codi's account from the sale of the horse Zippy.

[18] Ms. Luckman acknowledged that Mr. Cole was an experienced horse trainer and farrier. However, she initially denied that he was able to recognize common equine problems. She disagreed that, as a farrier, he could shoe horses in a way to correct foot problems. She was asked whether he did not do that every day. She responded, flippantly, that she did not know and that Mr. Gillis had led her to believe that Mr. Cole was not shoeing. On further questioning, she conceded that she did know that he did things to correct foot problems; but, added that she also knew he consulted with veterinarians on a regular basis. She further conceded that there were times that he did diagnose equine problems. She was asked whether she

ever challenged his diagnosis. She indicated that she questioned it at the time. She was asked to give an example. She responded by giving an example of when she disagreed with the treatment that he implemented, thus evading the question. She conceded that, on the occasion she was referring to, Mr. Cole had recognized the lameness problem with the horse and that it had been confirmed by a veterinarian. In my view, this exchange demonstrates an unreasonable reluctance to concede a point, and evasiveness, on the part of Ms. Luckman.

[19] Ms. Luckman testified, on direct examination, that her name was included as a joint account holder with her daughter, Codi, and that she had seen an entry of \$2000, not \$3500, representing the amount deposited into Codi's account from the sale of the horse "Zippy". Exhibit 13 is a Valley Credit Union Limited transaction history printout. It shows a deposit of \$3500 on September 2, 2008.

[20] After Mr. Cole introduced Exhibit 13, as a banking record, he provided evidence regarding the portions Codi wrote and marked in by hand. He said Codi had: written in the account number as being "41100-1"; and, marked the arrow pointing to the \$3500 deposit Mr. Cole testified he made on September 2, 2008.

[21] Ms. Luckman provided rebuttal evidence in relation to that transaction record. She indicated that she had a joint account with Codi and she did not recognize the account number, purportedly handwritten by Codi, as being from her account. She said she did not recognize it as the account they had together.

[22] On cross-examination, Bruce Gillis asked her whether she was saying it was not the joint bank account she held with Codi. She responded that it was not even a bank account number. She was asked what the joint bank account number was. She responded that it was "41100-1-01". Mr. Gillis then suggested to her that it was likely the same bank account. She responded that it could be and that anything could be likely.

[23] In my view, Ms. Luckman's evidence in relation to the account she jointly held with Codi was misleading, an attempt to hide the truth, and evasive.

[24] Ms. Luckman was then asked whether she had said, on direct examination, that Mr. Cole only deposited \$2000 into that account. Her response was: "If that's what I said, I stand by it." That demonstrates a reluctance to acknowledge when she may have been mistaken. In addition, her earlier evidence had been that she knew the amount deposited by Mr. Cole because she was joint on the account and was familiar with it. She testified that: her evidence that \$2000 was deposited was based on her memory; and, she did not recall going back to check. In my view, the transaction history shows that the amount deposited was \$3500, not \$2000.

Therefore, it calls into question the reliability of Ms. Luckman's evidence as to what was shown in the account statements.

[25] Ms. Luckman's inconsistencies, evasiveness, reluctance to make reasonable admissions against interest, and, flippant attitude, in my view, are factors which

significantly diminish her credibility. Her maintaining her position, in the face of clear evidence that she was mistaken, in my view, diminishes the reliability of her evidence.

(b) Gary Cole

[26] Mr. Cole's affidavit evidence was that, when Ms. Luckman moved out of the farm in July of 2007, there were eight wrapped round bales remaining on the farm. However, on cross-examination, he indicated that he did not know whether there was any haylage left when he moved back on the farm. I understood the reference to haylage to be the same as the reference to wrapped round bales. If my understanding is correct, that appears to be an inconsistency in his evidence.

[27] On May 25, 2011, Mr. Cole testified that he had not had a client's horse at his farm for training for a full month in the preceding two years. On July 13, 2011, he was asked how many horses he had on his farm training in the current year. He indicated that he had one for 30 days. At first blush, that would appear to be an inconsistency. However, it was not clarified whether or not he had taken in that horse after May 25. Therefore, it cannot be determined whether or not it was an inconsistency.

[28] The fact that Mr. Cole's income tax returns repeatedly show a net farming loss appears to be inconsistent with his statement, at paragraph 31 of his affidavit

sworn May 15, 2007, that he needed uninhibited access to the farm "to carry on the business which produces a substantial portion of [their] family income". However, if he meant gross income, as opposed to net income, that would explain the apparent inconsistency. The inconsistency is also, to some extent, explained by the comment, in paragraph 9 of Mr. Cole's affidavit, sworn February 28, 2008, that he has "had a drastic reduction in income over the past year", as well as his later evidence to the same effect.

[29] Mr. Cole estimated the value of the saddle retained and used by Ms. Luckman, at one point, as being \$2,500. However, in the list attached to his affidavit, he valued it at \$1500. There was no evidence that he included only a portion of the value of the saddle in the list attached to his affidavit. Therefore, that appears to be an inconsistency.

[30] Mr. Cole's answer to many of the questions regarding deductions from income in his income tax returns was that he did not know because he simply turns everything over to his accountant, who determines what can be claimed and deducted. I questioned whether that was simply a tactic to avoid having to answer questions about deductions. However, I noted that he indicated he was unable to answer, or was unsure about the answer, even where it would have worked in his favor to provide an answer. One example is when Ms. Luckman suggested that claiming identical amounts for motor vehicle expenses under both the business and

the farm in 2008 might be explained by a totaling of all the expenses and an equal splitting of them. He simply responded that was possible. He did not readily adopt it as the likely explanation, even though, in my view, it would have been in his favor to do so.

[31] In my view, his lack of knowledge regarding deductions, was genuine. In assessing the whole of his evidence, and observing his demeanor, it became apparent that he is not one to concern himself with financial details. That is highlighted by the fact that, in some years, there are no amounts noted for what should be deductible expenses, such as motor vehicle expenses. That suggests that he forgot to give his accountant the necessary documentation. In addition, in 2007 and 2008, he omitted indicating in his tax return that Susan Judge was his common-law spouse. That is a further example of lack of attention to those types of details. As he testified, he does not pay attention to details of expenses. He is told what is owing and he pays it. He is not good with the numbers. In my view, his focus and interest is simply to work the farm and work with the horses. While he was with Ms. Luckman, employment income supplemented the farm and business income. He continues to do that. Mr. Cole did not, and does not, overly concern himself with where the monies come from, as long as he is able to continue his farming operations.

[32] I find that his recurring answer that he did not know, and that his accountant determines what to include in his tax returns and statements of farming and business activities, was genuine, and not a tactic to evade questions.

[33] On the points that Mr. Cole did know the answer to, he gave direct and forthright answers, without evasiveness or reluctance to answer.

[34] Mr. Cole also demonstrated he had no difficulty agreeing with suggestions from Ms. Luckman. For instance, when she referred him to a Canada Life debit of \$186.76 he indicated he did not know what it was. He thought it must be an investment of some sort. However, when Ms. Luckman suggested that it could be additional life insurance, he agreed that he thought it was life insurance of some sort.

[35] As a general comment, I found Mr. Cole to be much more credible than Ms. Luckman. His lack of attention to financial detail negatively impacted the reliability of some of his evidence. However, due to my concerns over the credibility and reliability of Ms. Luckman, and my finding that Mr. Cole was a credible witness, where their evidence conflicted, I generally accepted that of Mr. Cole.

[36] However, a trier of fact may believe none, part or all of the witnesses' evidence, and may attach different weight to different parts of a witness' evidence. On some points, I accepted the evidence of Ms. Luckman over that of Mr. Cole.

2. APPROPRIATE DIVISION OF MATRIMONIAL ASSETS AND DEBTS

[37] Exhibit 4 contains various documents giving: valuations of assets; details of debts; amounts received for assets; information relating to whether services were provided or traded; and, information regarding items remaining in the matrimonial home when Ms. Luckman left. It was agreed that all of those documents were admitted as evidence of the truth of their contents.

[38] Ms. Luckman acknowledged that, other than the appraisal she obtained from Bean's Antiques, she had no independent appraisal of the value of any of the assets. Some of the figures were based upon discussions with Mr. Cole. Evaluation of the horses was based on the amount shown on the Credit Union Loan Application introduced into evidence as Exhibit 1.

[39] Mr. Cole testified that the values noted on the Credit Union Loan Application were picked out of the air amongst himself, Ms. Luckman, and the bank manager. As they were sitting together, filling out the loan application, they tried to figure out the appropriate numbers to insert. In his view, the \$5000 noted for the gun collection is not a valid valuation because he's not a gun appraiser. He indicated that the \$19,000 shown for horses would be the asking price, not the value.

[40] Mr. Cole testified that the values noted in the Statement of Property attached to his affidavit of January 10, 2011, came from him, based on what he thought the items were worth. He indicated some of the values were the amounts paid for the items in question. In relation to the silverware, glassware and dishes, he indicated that the values came from what it cost him to buy replacements at yard sales.

[41] Neither party is requesting an unequal division of matrimonial assets, and there is no indication that an equal division would be "unfair or unconscionable". In my view, they are to be divided equally.

(a) **Matrimonial Assets**

Matrimonial Home

[42] Two appraisal reports were obtained to determine the value of the matrimonial home. They are found at Tabs 1 and 2 of Exhibit 5. One gives a valuation of \$140,000. The other gives a valuation of \$160,000. The parties agreed that the actual value was the average between the two, \$150,000.

[43] Ms. Luckman agreed that both appraisals valued the entire property, including the portion used for farming and horse training, and all of the buildings on it, including the house and barn. She also agreed that she had already been paid approximately \$61,000 as her share of the net value of that entire property,

including the portion used for farming and horse training. Mr. Cole indicated that it was about \$62,000 that he had paid her. However, the document entitled "Matrimonial Property Breakdown for Equal Division", attached to his affidavit sworn January 10, 2011, indicates that the payment was made in July 2007 and was in the amount of \$61,126.34. I accept that amount as the amount paid. That amount must be included as a matrimonial asset received by Ms. Luckman and credited to Mr. Cole, as an equalization payment made by him, against the value of the matrimonial home retained by him.

[44] Mr. Cole conservatively attributed \$28,000 to the business portion of the total value of the lands and buildings. That estimate was based on valuing the 52' x 84' steel covered pole barn at \$10,000 and the approximately 63 acres of land at \$18,000. Mr. Cole indicated he had built it with telephone poles from the railway and steel he obtained for free when he tore down barns. He indicated that farmland was worth approximately \$500 per acre. He estimated he had about 38 acres of hay fields and approximately 7 acres of pasture near the house. The rest was Woodland. There are covenants on the land which limit its use to farming. He has since added an 18 foot roof on the side of the barn to cover equipment. However, that was not included in the value. The 38 acres of hay field alone, at \$500 per acre, would have a value of \$19,000. Therefore, I agree that the \$28,000 attributed to the business portion of the property is conservative, and, unless Ms. Luckman is

determined to have an interest of 50% or more in the business, is to her benefit. Yet, Mr. Cole accepts that amount as the value of the business portion of the property; and, that is the value which the Court attributes to it.

Vehicles

Truck With Non-Functioning Transmission/Chev Crew Cab

[45] There is a vehicle which Mr. Cole referred to as a truck with the transmission gone. I believe it to be the same truck that Ms. Luckman referred to as the Chev Crewcab. Mr. Cole referred to it as a business asset. Ms. Luckman referred to it as a matrimonial asset. There was no evidence to establish that it was a business asset. Therefore, I have found it to be a matrimonial asset. Mr. Cole valued it, in his Statement of Property, sworn May 15, 2007, at \$2000. He then, in his updated statement of property, and in the statement of property attached to his affidavit of January 10, 2011, valued it at \$1000 because the transmission was gone. Therefore, it appears that the transmission went at some point after May 15, 2007. A motor vehicle almost inevitably depreciates in value. The party retaining a motor vehicle gets the benefit of its use, and must therefore absorb the loss associated with its depreciated value. It is the valuation prior to the transmission going which is relevant. Ms. Luckman valued it at \$4000. I have no information to properly assess the value of the vehicle. However, as a general comment, Ms. Luckman appeared to overvalue the assets retained by Mr. Cole. With the

exception of the farm tractor, the parties did not appear to have vehicles of much value. As such, I assess the value of the crew cab truck at \$2000.

Other Vehicles

[46] I will address the other vehicles forming part of the matrimonial assets under the headings dealing with the household items and vehicles retained by each party.

Bank Accounts

[47] Ms. Luckman gave evidence regarding the bank account statements at Tab 3 of Exhibit 5. Account number 40622-10-5 was referred to as the parties' joint bank account. Account number 40622-24-5 was their joint savings account. Account number 44462-10-2 was Ms. Luckman's personal account. Account number 40622-20-25 was the hay account.

[48] Transaction 55 in the joint bank account showed a deposit of \$230.80 on December 13, 2006. Transaction 54 showed a transfer of that same amount on the same day. Ms. Luckman indicated that that represented the child tax credit that she transferred to her account. That amount is shown as having been transferred to her account on the same day as transaction 595. Ms. Luckman also transferred the

child tax credit, in the amount of \$230.80, from the joint bank account to her personal account, on January 22, 2007. The relevant transaction numbers are transactions 29 and 30 in the joint bank account, and transaction 531 in Ms. Luckman's account.

[49] Ms. Luckman's personal account was opened November 7, 2006. The opening deposit was a transfer deposit of \$2,468.73.

[50] Ms. Luckman's evidence was that, after separation, Mr. Cole approached her to withdraw money from the hay account to buy a hay wagon and a chainsaw. In Appendix A to her affidavit, she noted the value of the hay wagon as \$600 and the value of the chainsaw as \$900. She indicated that they were purchased in October 2006. She pointed to the note from Brian Foster indicating that Mr. Cole paid him \$150 for a chainsaw, and suggested that the Mr. Cole may have pocketed the balance. However, on cross-examination, she testified that Mr. Cole withdrew \$900, \$600 of which was for a chainsaw, and \$300 of which was for a hay wagon. The hay account statement shows a \$900 transfer withdrawal on October 5, 2006 and a \$1500 member direct transfer on October 23, 2006. It appears that Ms. Luckman's evidence may have been engineered so that the total cost of the chainsaw and haywagon would match a recorded transaction; but, was uncertain which transaction to base her evidence on.

[51] Mr. Cole confirmed on the witness stand that the receipt from Brian Foster was a receipt for the chainsaw he bought with the money that he obtained from Ms. Luckman.

[52] The hay account statement shows that the account was closed November 30, 2006. Mr. Cole testified that it was Ms. Luckman that closed that. All of the contents of the account were gone. He is not aware that any of it went to him. The statement shows transfer withdrawals on November 7 and 30, 2006, of \$380 and \$379.64 respectively.

[53] These are examples of amounts transferred by Ms. Luckman.

[54] Transaction 18, in the joint bank account, shows a transfer deposit of \$1359.94, on March 2, 2007, which reduced the balance to zero. Mr. Cole testified that he had made that deposit, from money he borrowed from Susan Judge, to pay off the overdraft. Ms. Luckman could not recall what the entry was; however, she did acknowledge that she believed that he had borrowed money from his current common-law spouse, Susan Savoy (a.k.a. Judge), to pay the overdraft.

[55] Mr. Cole indicated that Ms. Luckman transferred a total of \$4533.72 from their bank accounts to her personal account. That is supported by the banking statements and Ms. Luckman did not offer evidence to contradict it. I accept his evidence that she transferred that amount.

[56] I also accept his evidence that he paid the overdraft of \$1359.94. That amount will be added to the matrimonial debts he took responsibility for.

[57] The hay account statement does show a \$900 transfer withdrawal on October 5, 2006. I find that Mr. Cole withdrew that amount to purchase business assets, including the chainsaw he paid \$150 for and the hay wagon. The hay account was used primarily for income and expenses related to the farm. As such, in my view, it was a business asset. Therefore, this amount taken from the account to purchase further business assets, and/or for further business use, is not to be treated as matrimonial property retained by Mr. Cole. I treated the amounts removed from the account by Ms. Luckman as having been matrimonial assets because she was not extracting them for business purposes. Funds had been taken from that account for matrimonial purposes at times.

Pensions

[58] Mr. Cole's pension with the Annapolis Valley School Board had a value, at time of separation, of approximately \$22,000. He kept that pension.

[59] Ms. Luckman's pension with the Valley credit union had a value, at time of separation, of approximately \$200. She kept that pension.

Insurance Policies

[60] Ms. Luckman had life insurance with Clarica having a cash surrender value of \$3193.00.

[61] Mr. Cole also had life insurance with Clarica having a cash surrender value \$5058.70.

Dividends

[62] Mr. Cole retained \$22 in dividends.

Saddles

[63] In *Murphy v Cole*, 1994 CarswellNS 398 (S.C.), the Court classified saddles as matrimonial assets. In the case at hand, horseback riding was a family activity, even though each individual member of the family participated in varying amounts, and at varying levels. Therefore, it is appropriate that saddles used in that family activity be classified as matrimonial assets, rather than personal effects. I accept that the riding done by Ms. Luckman, as part of the horse training business, was significantly less extensive than her pleasure riding. Therefore, her saddle is properly characterized as a matrimonial asset.

[64] It was not established that particular saddles retained by Mr. Cole were used solely in the horse training business. There was evidence that he participated in weekend horse competitions. I consider those to be pleasure, rather than business activities. However, more likely than not, at least half of the saddles retained by Cole would be for business use, or at least half of the use of the saddles retained by him would be business related. Therefore, in my view, it is appropriate that half of the value of the saddles retained by Mr. Cole be classified as marital assets, and half as business assets.

[65] In my view, the bridles and accessories should be treated the same as the saddles.

[66] Mr. Cole estimated the value of the saddle retained and used by Ms. Luckman, at one point, as being \$2,500. However, in the list attached to his affidavit, he valued it at \$1500. Ms. Luckman testified that her saddle was not worth over \$1200. However, in her statement of property, sworn September 4, 2007, she valued the saddle retained by her at \$150.

[67] Mr. Cole valued the four saddles he kept at \$1200, and the bridles and accessories at \$100. In her statement of property, Ms. Luckman valued the four saddles at \$2850, and the bridles and harnesses at \$1500. In appendix A to her affidavit of August 31, 2010, she gave a combined value of \$4000.

[68] There is no additional evidence to assist me in determining the value of the saddles and accessories. In relation to the saddle retained by Ms. Luckman, I take the mid-point between her estimate of \$1200 and Mr. Cole's estimate of \$1500, i.e. \$1350, as the value of that saddle. I also accept Mr. Cole's evidence that Ms. Luckman kept a bridle and reins worth \$50. I find that Ms. Luckman had a greater tendency to overestimate the value of assets retained by Mr. Cole, than Mr. Cole did to underestimate that value. Therefore, I attribute \$1800 to the value of the saddles, bridles and accessories retained by Mr. Cole.

Guns

[69] In *Sproule v Sproule*, 1985 CarswellNS 52 (S.C., T.D.), the Court, at paragraph 11, found that the guns in question were purchased for personal use. Therefore, they were part of the "reasonable personal effects" of the spouse in question, and exempt from division as a matrimonial asset, pursuant to s. 4(1)(d) of the *Matrimonial Property Act*, R.S.N.S. 1989, c. 275.

[70] In addition, Mr. Cole testified that some of the guns had belonged to his father and it was his responsibility to split them up amongst the "boys" in the family. Thus, not only were they not matrimonial assets, they were not even personal assets belonging to him. He also indicated that the "50" was to go to Zack. I took that to mean the 50 caliber Hawkins black powder rifle.

[71] In the Credit Union Loan Application, both parties certified, in April 2006, that the gun collection was worth \$5000. Ms. Luckman testified that the only gun that was hers was a 50 caliber Hawkins black powder rifle which she has now returned to Mr. Cole. Mr. Cole valued that rifle at \$2500. However, a letter from Dale Young, of Trapper's Sports and Gun Shop, estimated its value at \$300. She indicated that it had a blued barrel; and, that Mr. Cole had a twin to it with a chromed barrel. In her view, Mr. Cole's 50 caliber Hawkins ought to be worth more than hers. That appears to be a reasonable view.

[72] Dale Young estimated the value of the 30–06 Remington Woodmaster model number 742 at \$200 for parts. He valued the 32 Winchester Special model 94 rifle at \$225.

[73] It was agreed that the two 22 caliber rifles in Ms. Luckman's possession belonged to the children.

[74] I find that the 50 Caliber Hawkins with the blued barrel is a personal asset belonging to Ms. Luckman. The two 22 calibre rifles belong to the children. The remaining firearms are either personal assets belonging to Mr. Cole, or he is holding them in trust for someone else. Therefore, he is to keep or distribute them according to the arrangement by which he is in possession of them.

None of the firearms are to divided as matrimonial assets.

Horses

In the Credit Union Loan Application entered as Exhibit 1, both parties certified, in April 2006, that they had horses with a total value of \$19,000.

Zippy

[75] Mr. Cole's affidavit evidence, at one point, was that the horse, Zippy, sold for \$3500 and the money was put into Codi's account for university tuition. At another point he testified that Zippy sold for \$4000, and that he deposited \$3500 of that into Codi's account. Both versions are consistent with the \$3500 deposit entry for September 2, 2008, noted in Exhibit 13, which is a Valley Credit Union Limited transaction history. Mr. Cole testified that Codi handed the transaction history to him. He saw her hand-write the number under the heading "Account Number". He also saw her mark the arrow, on the second page, pointing to the \$3500 deposit. The number inserted in handwriting under the heading "Account Number" was confirmed, by Ms. Luckman, as being the same number as account number for the account she held jointly with Codi, except that the last two digits, being "01", missing.

[76] I find that Mr. Cole did sell zippy for \$4000 and deposit \$3500 of that amount into Codi's account. Mr. Cole did not establish that anything increased Zippy's value after the date of separation. Therefore, I attribute \$4000 to Zippy's value.

Monty

[77] The letter from Donna Fraser, dated October 3, 2007, confirms that Monty was given to Mr. Cole to allow it to have a quality of life, with the understanding that, if the horse was sold, an agreed upon percentage of the sale price would be paid to them. They were sponsoring the horse financially under one of their businesses. They retained the ownership and registration papers for the horse. Ms. Luckman agreed that Monty had not been enjoying his life because he was used too much as a show horse. Mr. Cole indicated that he and Codi now have the registration papers for Monty. He indicated that Ms. Fraser was scared of Monty.

[78] Mr. Cole assigns no value to Monty. Ms. Luckman indicates that he is worth \$5000. There is a possibility that someone might come along and see something in Monty causing them to offer a significant purchase price. However, in my view, a horse that was given to someone to provide the horse a quality of life, more likely than not, has little or no value. I assign \$300 to the value of that horse.

Pontiac

[79] Ms. Luckman retained possession of the horse Pontiac, which was the horse that she rode during the relationship. Pontiac was euthanized in February of 2011. Mr. Cole stated that, when he and Ms. Luckman split up, Pontiac was not sound.

That would appear to indicate that Pontiac was of little or no value. However, in the document entitled “Statement of Property of Patti Luckman”, attached to Mr. Cole's affidavit of January 10, 2011, a value of \$1000 is attributed to Pontiac. Ms. Luckman, in her statement of property sworn September 4, 2007, assigns a value of zero dollars to Pontiac. I accept that Pontiac was of no market value.

Household Items and Vehicles Retained by Mr. Cole

[80] The evidence of the parties listed and valued the household items and vehicles retained by Mr. Cole as follows.

[81] Ms. Luckman, in her statement of property, included a pressure washer amongst the household items retained by Mr. Cole. Mr. Cole, included that amongst the business assets retained by him. There was no evidence as to what use was made of the pressure washer, from which I could determine whether it was a matrimonial asset, or a business asset. Since it has not been established that it is a business asset, I must treat it as being a matrimonial asset pursuant to section 4 of the *Matrimonial Property Act*.

[82] Ms. Luckman included, in her statement of property, a chain saw as a household item retained by Mr. Cole. However, from the evidence I heard, the

purpose of the chain saw was to earn income. Therefore, in my view, it is a business asset.

[83] Ms. Luckman agrees that she retained most of the contents of the matrimonial home. She left only; the living room furniture; a computer desk; a loveseat; and the contents of the children's bedrooms.

[84] The documents in Exhibit 4 included a letter from Wayne Trimper dated March 25, 2011, stating the following. Ms. Luckman asked him to go into the matrimonial home to observe its condition on her last day there. Almost all of the furniture that had previously been in the house had been removed. The particular items he noted having been removed included: the kitchen table and chairs; the stove, refrigerator and freezer; the television and stand; the bed from the master bedroom; and, the computer. The only items he noted as having been left there included: the odd dish (otherwise the cupboards were empty); a really old Chesterfield; a computer desk; a bureau in the master bedroom; and, the contents of the children's bedrooms. He also noted that the sink was piled high with frozen meat. He was informed by Ms. Luckman that he could have as much of it as he wanted. However, he did not take any. His letter stated that this was in the summer of 2006. However, Ms. Luckman testified that it was in 2007, not 2006.

[85] Mr. Cole testified that Susan Judge brought a television, Chesterfield, chair, footstool, towels and washcloths. He had to purchase a bed, refrigerator, stove, and all of the other things that Ms. Luckman took, but Ms. Judge did not bring.

[86] The following is a table listing the items and vehicles retained by Mr. Cole I find to be matrimonial assets and the valuation of those items. There was little or no evidence to assist me in determining a fair valuation. Therefore, I had to base my valuation on my finding that, generally, Ms. Luckman was less credible and reliable than Mr. Cole, and, tended to exaggerate or minimize values to her benefit more than Mr. Cole, while bearing in mind that the assets were older and used.

Items Retained by Mr. Cole	Mr. Cole's Valuation	Ms. Luckman's Valuation	Value Assigned by Court
Honda car	\$1000	\$3000	\$1200
Tundra Skidoo	\$1000	\$1500	\$1000
Arctic Cat Snowmobile	\$300	\$400	\$300
Camper	\$800 to \$1000	\$1500 to \$2000	\$1100
Dune Buggy	\$1500	\$2500	\$1500
Lawnmower	\$200	\$300	\$200
Boat and Motor (With Trailer)	\$1000	\$2000	\$1000
Camp	\$400	\$800	\$500
Household Items (Furnishings)	\$350 to \$500	\$5500 (Broken down in the statement of property as: couch, chair and end	\$500

		tables - \$500; dresser, TV and VCR - \$300; and, bed - \$200, with no individual breakdown for the remaining amount.)	
Whipper-snipper	\$150	No valuation provided	\$150
Pressure Washer	No valuation provided	\$300	\$200
Lumber	No valuation provided	\$1000	\$400
Spare Motor for Dune Buggy	No valuation provided	\$1000	\$200
Spare frame for Dune Buggy	No valuation provided	\$500	\$100
			Total: \$8,350

Household items and Vehicles Retained by Ms. Luckman

[87] Ms. Luckman provided a total valuation of the items retained by her.

However, she did not provide valuations of all the individual items.

[88] Mr. Cole provided evidence that he paid \$500 for the antique ice chest. That is the value that I have assigned to it. In relation to the dishes, silverware and glassware, I have taken into account Ms. Luckman's evidence that they only had cheap items in those categories and Mr. Cole's evidence that he put the approximate amount it cost him to replace the items by shopping at yard sales.

[89] Otherwise, I have generally taken an approach to valuation that is similar to the approach I took in relation to the items and vehicles retained by Mr. Cole.

However, the values provided by Mr. Cole for the kayak, washer, dryer, refrigerator, stove, and, mattress with frame, seemed overly excessive for used items. Therefore, I have deducted more from his estimate of the value of those items than I would have using solely the general approach I took in relation to the household items and vehicles retained by him.

[90] The following is a table listing the items and vehicles retained by Ms. Luckman I find to be matrimonial assets and the valuation of those items.

Items Retained by Ms. Luckman	Mr. Cole's Valuation	Ms. Luckman's Valuation	Value Assigned by Court
Mazda 626 Car	\$1800	\$1500	\$1650
Kayak	\$800	\$500	\$600
Antique Ice Chest	\$500	No valuation provided	\$500
Camping Equipment	\$400	No valuation provided	\$350
Gardening Tools and Hoses	\$350	No valuation provided	\$300
Christmas Lights and Decorations	\$300	No valuation provided	\$250
Computer and Accessories	\$500	No valuation provided	\$500
Washer and Dryer	\$2000	\$750	\$1000
Refrigerator and Stove	\$1500	\$750	\$1000
TV and DVD Player	\$500	\$300	\$400

Freezer	\$250	\$150	\$200
Queen Size Mattresses and Frame	\$1200	No valuation provided	\$900
Vacuum Cleaner	\$350	No valuation provided	\$250
Antique Dining Set with Four Chairs	\$700	No valuation provided	\$600
Barbecue	\$300	No valuation provided	\$150
Kitchen Appliances	\$500	No valuation provided	\$450
Dishes, Silverware and Glassware	\$500	No valuation provided	\$400
Pots, Pans and Bakeware	\$450	No valuation provided	\$400
Towels, Linens and Blankets	\$300	No valuation provided	\$200
Bureau	\$200	No valuation provided	\$200
Household Decorations and Pictures	\$500	No valuation provided	\$350
			Total: \$10,650

(a) Matrimonial Debts

Trimper Excavating Invoice

[91] At page 9 of Exhibit 4 there is an invoice from Ian H. Trimper Excavating Ltd. totaling \$1501.71 for gravel sold to Mr. Cole. The invoice is dated October 31, 2007. That is after Ms. Luckman moved out of the matrimonial home, and Mr. Cole moved back in. Mr. Cole's evidence was that the driveway repairs were effected while Ms. Luckman was still living at the matrimonial home. There was no evidence: regarding why the invoice was only prepared some three months after Ms. Luckman moved out of the matrimonial home; nor, in relation to Trimper Excavating's usual practice regarding preparation of invoices. However, having found Mr. Cole to be the more credible and reliable witness, I accept his evidence that the gravel was supplied prior to Mr. Cole moving back into the matrimonial home. Therefore, it was an expense incurred to maintain the matrimonial property before it was sold. As such, in my view, it is a matrimonial debt for which each party is equally responsible. That debt was paid by Mr. Cole.

Home Hardware Credit Card

[92] Mr. Cole paid off a \$450 Home Hardware credit card debt.

[93] I accept his evidence that he did not use the credit card; and, that it must be for something Ms. Luckman purchased. There was no evidence of what was purchased. However, Mr. Cole has accepted it as a matrimonial debt, as opposed to

a personal debt of Ms. Luckman. Given the parties' practice of handing over all of the income to Ms. Luckman to manage, that appears to be a reasonable approach.

Firewood

[94] Mr. Cole did not know how many cords of wood they were left owing \$800 for. However, I accept his evidence that he had to pay a firewood debt in the amount of \$800 in relation to firewood obtained while the parties were still together.

Joint Bank Account Overdraft

[95] Mr. Cole indicated, in the statement of property attached to his affidavit of January 10, 2011, that he paid the joint bank account overdraft in the amount of \$1365. However, transaction 18, in the account transaction record, at tab three of Exhibit 5, shows that the amount paid was \$1359.94. I accept the amount shown in the transaction record. In my view, that is a matrimonial debt, and both parties are responsible to share it equally.

Mortgage

[96] The \$27,747.32 owing on the mortgage for the matrimonial home, and surrounding lands and buildings, was deducted from the value of the property to determine the amount owing to Ms. Luckman in July of 2007, when she was paid 1/2 of the net value of the property. Mr. Cole took over responsibility for that debt.

[97] The property was purchased in February of 1990. Only \$18,000 is attributed to the land today. There is no evidence as to what the purchase price for the land was in 1990. However, in my view it would, more likely than not, be no more than the \$18,000 at which it has now been valued for the purposes of this proceeding. Mr. Cole valued the farm buildings at \$10,000. However, they were constructed by Mr. Cole, using materials he scrounged for free. Therefore, none of the mortgage debt could have been incurred for the construction of the farm buildings. Further, in my view, from 1990 to 2007, most or all of the purchase price of the land would have been paid. Therefore, I attribute the entire mortgage debt owing to the matrimonial property.

Total Matrimonial Debt

[98] I have not included Zachary's student loan as a matrimonial debt, even though that was listed as a debt in Mr. Cole's Statement of Property sworn May 15, 1997. In my view, that is Zachary's debt, not a matrimonial debt. There was no evidence of other matrimonial debt remaining outstanding. Therefore, the total matrimonial debt was \$31,858.97, and was all assumed by Mr. Cole.

(b) **Net Matrimonial Assets**

[99] I find that the net matrimonial assets retained by each party are as indicated in the following table.

	Mr. Cole	Ms. Luckman
Assets Retained	Matrimonial Home \$122,000	Payment on Transfer of Matrimonial Home \$61,126
	Crew Cab Truck \$2000	Money Transferred from the Joint Bank Accounts to Her Personal Account \$4534
	Pension \$22,000	Pension \$200
	Insurance Policy Cash Surrender Value \$5059	Insurance Policy Cash Surrender Value \$3193
	Matrimonial Portion of the Saddles, Bridles and Accessories \$900	Saddle, Bridle and Reins \$1400
	Horses Zippy and Monty \$4300	Horse Pontiac \$0
	Household Items and Other Vehicles \$8350	Household Items and Vehicles \$10,650

	Dividends \$22	
Total Value of Retained Assets	\$164,631	\$81,103
Less Debts Assumed	Overdraft Payment \$1360	
	Trimper Excavating Invoice \$1502	
	Home Hardware Credit Card \$450	
	Firewood Bill \$800	
	Mortgage \$27,747	
Total Debts Assumed	\$31,859	
Less Credit for Equalization Payment Made against Value of Matrimonial Home	\$61,127	
Net Matrimonial Assets Retained	\$71,645	\$81,103

3. THE APPROPRIATE DIVISION OF BUSINESS ASSETS AND DEBTS

(a) Business Assets

Farmland and Buildings

[100] The value of the farmland and buildings has been determined to be \$28,000. They have been retained by Mr. Cole.

Tractor

[101] The Credit Union Loan Application notes the value of the 2002 New Holland tractor as being \$20,000. However, that was simply a figure selected quickly by the parties and the bank manager during the completion of the loan application. The tractor appraisal, prepared by Gene Elliott, gives a trade premium value for that tractor of \$11,826, at the point where it had 600 hours on it. Such an appraisal, is more reliable than the number picked out of the air while filling out a loan application. However, the appraisal was conducted at a time when there was some diminishment in value of the tractor from the time of separation. The appraisal is not dated. Ms. Luckman's evidence was that, when the tractor was removed from the farm, it had just over 200 hours on it. Further, while it was on the farm, it was stored inside. After it was removed from the farm, it was left outside, thus diminishing its value. Mr. Cole testified that the appraisal was probably done in 2007, at the point where he had to obtain values for the purposes of the divorce proceedings. Therefore, the diminishment in value would likely not have been extensive. Ms. Luckman values the tractor and chains at \$18,000. I attribute \$15,000 to the value of the tractor at time of separation. There no

evidence on which I could determine a separate value for the chains. I have subsumed the value of the chains in the value of the tractor.

Other Vehicles

1960 1 1/2 Ton Pickup

[102] Ms. Luckman testified that she used the 1960 GMC 1 1/2 ton pickup, including for traveling to and from work. That was not disputed by Mr. Cole. However, there was no evidence of any other matrimonial use of the truck. Mr. Cole's affidavit evidence listed it as a business asset. Given that it was a 1 1/2 ton truck, more likely than not, it was a vehicle used in the farming business. In my view it was a business asset which Ms. Luckman had used to travel to her work. The receipt at page 11, of Exhibit 4, indicates that Mr. Cole received \$800 for it. Mr. Cole indicated that the truck was broken, such that you could not haul loads with it anymore. In addition, he found it too expensive to insure. He acknowledged that the 1960 GMC 1 ton truck noted on the Credit Union Loan Application as having a value of \$1800 was the same truck. However, that value was ascribed to it at a time when they could still "get it on the road". I took that to mean that it was still feasible to obtain all the necessary registrations, inspections, permits and insurance required to drive it on a public road. Ms. Luckman testified that, at time of separation, she had received an offer of \$1000 for it. She had wanted to retain it

herself. In my view, the time of separation is the appropriate valuation time for an asset, such as this type of vehicle, which is most likely to decrease in value with use by one of the parties. Therefore, the party retaining possession, should be the party bearing the loss associated with any decrease in value. I assess the value of the 1960 GMC pickup, at time of separation, as being \$1000.

Lincoln Town Car

[103] The Lincoln town car was used by Mr. Cole as his shoeing car. Therefore, it is a business asset, not a matrimonial asset. In his Statement of Property, sworn May 15, 2007, Mr. Cole valued it at \$500. In his updated Statement of Property, he valued it at \$0 because it was not running. For the same reasons noted in relation to the crew cab truck and the 1960 GMC, the relevant valuation is the one closest to the time of separation. Ms. Luckman valued it at \$1500. For the same reasons noted in relation to the crewcab truck, I accept Mr. Cole's valuation of \$500.

Horses

[104] Mr. Cole listed Woody, Hank, Pony and Stitch as part of his business. In addition to training horses for other people, he also raised horses for sale. He has only listed four horses as part of the business. It makes sense that he would have at

least four horses as part of the business. I accept his evidence that these four horses were business assets.

Stitch

[105] Mr. Cole was of the view that the horse Stitch was of no value because it was lame as a result of degenerating hock disease. Ms. Luckman indicated that Mr. Cole removed Stitch from the farm in or about January 2007. According to her, at that point, Stitch was not lame. She is of the view that Mr. Cole should bear any loss of value that would have occurred after he removed Stitch. Exhibit 4 contains an Avon Animal Hospital invoice referencing Dr. Paul Johnston's diagnosis of lameness in Stitch. Dr. Johnston's opinion was admitted by consent. However, Ms. Luckman correctly pointed out that the reference to an examination for lameness of 1.5 years duration, would have been information obtained from Mr. Cole, not part of the Dr. Johnston's diagnosis. The date of the invoice was March 27, 2008. If Stitch had been lame 1.5 years, he would have been lame before he was removed from the farm.

[106] Mr. Cole testified that he had determined that Stitch was lame at a trot. He had noted the hitch, shortness of stride, ears back and kicking. In his training to become a certified farrier they had taught him what to look for. He had also learned it beforehand as a horse rider.

[107] Ms. Luckman valued Stitch at \$2500. Mr. Cole indicated that Stitch is of no monetary value.

[108] I accept that Mr. Cole was able to detect the lameness in Stitch. I also accept his evidence that Stitch was lame prior to separation; and, that he is of no monetary value.

Other Three Business Horses

[109] Mr. Cole valued Woody at \$3000, Hank at \$1000, and Pony at \$400. Ms. Luckman valued Woody at \$4000, Hank at \$2500, and provided no valuation for Pony. However, she provided a valuation for a horse by the name of May, at \$1500. That may be the same horse Mr. Cole referred to as Pony. No meaningful information was provided in relation to these horses to help the assess the reasonableness of the valuations given by each party. In my view, Mr. Cole's approximately 40 years' experience as a horse trainer would make him better placed to determine the value of the horses in question. In addition, I have found him to be more credible than Ms. Luckman. However, Mr. Cole testified that he sold Woody for \$4000. He did not establish that anything increased Woody's value after the date of separation. Therefore, I determine the value of these three business horses to be \$5400.

Horse Mats

[110] A letter dated March 23, 2007, from Paula Hicks, indicated that she gave Mr. Cole approximately 16 horse mats, four or five years prior, because he helped her with a problem horse. Ms. Luckman indicated they were worth approximately \$80 apiece. Mr. Cole indicated that they were seconds and could be purchased new for \$20 a piece. After they were used, in my view, they would be worth less. I, therefore, attribute \$200 to the value of the horse mats.

Chainsaw

[111] The note from Brian Foster indicates that Mr. Cole paid him \$150 for a 353 “Husky” chainsaw. That would have been purchased after separation. Ms. Luckman valued it at \$900, based on what she purported, at least at one point, to be the amount taken from the account by Mr. Cole to purchase it. I accept the receipt as legitimate, and value the chainsaw at \$150.

Hay

[112] Mr. Cole’s affidavit evidence was that, at the end of the 2006 hay season , they had 48 wrapped round bales and 1000 square bales. They began using some of the hay themselves in August. Ms. Luckman sold 20 round bales during the winter of 2007, keeping the \$900 she received for herself. He used 20 round bales to feed

horses he had taken off the farm. When Ms. Luckman moved out of the farm, in July of 2007, there were 8 wrapped round bales remaining on the farm. However, on cross-examination, he indicated that he did not know whether there was any haylage left when he moved back on the farm. I understood the reference to haylage to be the same as the reference to wrapped round bales. That is an apparent inconsistency. However, it did not appear to be disputed that there were 8 round bales left on the farm when Mr. Cole returned to it in July of 2007. I accept that those 8 round bales did remain. Mr. Cole's evidence was also that the square bales produced were used to feed the horses that stayed on the farm, as well as Ms. Luckman's new colt. When she left in July, Ms. Luckman took 100 square bales with her, leaving only 30 on the farm. The round bales sold for \$45 each, and the square bales sold for \$3.50 each. That left Mr. Cole with hay having a resale value \$470, and Ms. Luckman with hay having a resale value of \$350.

[113] Ms. Luckman suggested that Mr. Cole used some of the hay to feed Susan Judge's horses. Mr. Cole testified that he did not feed any of that hay to her horses. He said that Ms. Judge bought hay from David Bent for her horses. Ms. Luckman questioned Mr. Cole in detail about how much he believed it took to feed a horse and how many horses he was feeding. Mr. Cole gave direct and forthright answers to questions. He concluded by saying that the hay they went through that winter was normal and that they do not skimp on feed, so their animals look good.

[114] Ms. Luckman's evidence confirmed: the amount of hay harvested; and, that she removed 100 square bales when she left the farm. She also indicated that the remainder of the square bales were used to feed the horses on the farm, with the exception of some that Mr. Cole had fed horses he had removed from the farm. That was inconsistent with her evidence that Mr. Cole removed all of the square bales. However, I infer that she meant that Mr. Cole had removed all but 100 of the square bales, being 900 square bales with a total value of \$3150. Since the square bales were being used to feed the horses on the farm, including Ms. Luckman's horses and the horses used by Codi, Mr. Cole could not have removed 900 bales and left Ms. Luckman with 100 bales to take with her when she left.

[115] I accept Mr. Cole's evidence in relation to the square bales.

[116] There was no evidence that Mr. Cole had directly observed Ms. Luckman selling 20 round bales during the winter of 2007. However, it is agreed that only 48 round bales remained after the 2006 haying season . I accept Mr. Cole's evidence that he removed 20 round bales to feed the horses he had taken off of the farm. I also accept his evidence that only eight round bales remained when he returned. Ms. Luckman confirmed that she and Codi used square bales to feed the horses that remained on the farm. Therefore, it was reasonable for Mr. Cole to infer that Ms. Luckman sold or traded the remaining 20 round bales. It is possible that they were stolen. However, most likely, they were sold or traded.

[117] Consequently, I accept that, a large part of the hay that the parties were left with after the 2006 hay season, was used to feed the horses that remained on the farm, and Mr. Cole's business horses. The remainder was divided between Mr. Cole and Ms. Luckman, with Mr. Cole receiving \$470 worth, and Ms. Luckman receiving \$350 worth. I will treat those amounts as the value of business assets retained by each spouse.

[118] In my view, the hay used by Mr. Cole remained in the farming business because it was used to feed the horses he was keeping. Similarly, I will not consider the hay used to feed Codi and Ms. Luckman's horses as a business asset taken by Ms. Luckman for her personal use. The practice had been to feed the family's horses with hay harvested as part of the farming business. The hay in question was harvested while the parties were still together. Therefore, in my view, it was appropriate that it continue to be used as it had been in the past. However, in converting 20 round bales to \$900, and keeping that money for her personal use, in my view, Ms. Luckman retained \$900 from the farming business.

Other Business Assets

[119] Ms. Luckman listed all of the assets as matrimonial assets because she saw the farm and farrier operations as being a joint family venture. However, in my

view, it is most appropriate to separate them and determine what, if any, interest or compensation, Ms. Luckman may be entitled to.

[120] The following is a table of other business assets referred to and valued by one or both of the parties, along with the value assigned by the Court. The Court's approach to valuation was the same as that used in relation to the matrimonial assets.

Item	Mr. Cole's Valuation	Ms. Luckman's Valuation	Value Assigned by Court
Stock Trailer	\$2000	\$2000	\$2000
Horse Treadmill	\$500	\$1500	\$600
Tractor Accessories	\$2450	\$2000 (for accessories which included tedder, rake, disc harrow, and plow) she also gave the following valuations for items that can also be classified as tractor accessories: \$1500 for a tractor snowblower \$3000 for a Bush hog \$300 for a spike for the tractor	\$3000
Lean to	\$300	\$500	\$300
Hay Wagon	No valuation provided	\$600	\$600
Hay Elevator	No valuation provided	\$200	\$200
Electric Fencer	No valuation	\$150	\$100

	provided		
Road Grader	No valuation provided	\$1000	\$500
Electric Welder	No valuation provided	\$500	\$250
Fencing	No valuation provided	\$200	\$100
Steel Gates	No valuation provided	\$300	\$150
Canvas and Tarps	No valuation provided	\$300	\$100
Assorted Sheet-Metal	No valuation provided	\$500	\$200
Farrier Equipment	\$2000	No valuation provided	\$2000
			Total: \$10,100

[121] I highlight that this table values only the equipment used in the farrier business. It does not assign a value to the farrier business itself. Ms. Luckman questioned Mr. Cole about a conversation he had with Dwayne Caldwell in which a figure of \$60,000 was discussed as being the value of Mr. Cole's client list and having Mr. Cole travel with the purchaser for a year. Mr. Cole responded that they were just talking, and he asked Mr. Caldwell how much he thought it would be worth. He testified that he has never thought about placing a value on his farrier business. There was no evidence regarding whether Mr. Caldwell had any expertise in the valuation of the farrier businesses; and, he did not testify. Thus,

there was no evidence upon which I could assign any value to the farrier business, apart from the equipment used in it.

(b) **Business Debts**

[122] Ms. Luckman questioned Mr. Cole about the business debts listed in the appendix to his affidavit of January 10, 2011. He agreed with her suggestion that he was saying those were incurred while they were together. When questioned about when Charles Lewis had done the custom hay work, he answered that it was before he returned to the farm.

[123] Ms. Luckman gave evidence that it was their practice to always pay the haying contractors first. Mr. Cole agreed with her suggestion that it was the practice to take money from the hay sales to pay the haying contractors right away. When questioned about whether he was saying that the hay contractors were not paid for 2006, he said he really did not know. However, on redirect, he testified that he prepared his statement property based on amounts owing as of October, 2006; and, that the custom hay work had been completed before October 2006.

[124] The amount of debt attributed to haying contractors is \$2631. That is approximately 35% of the amount shown in his 2006 statement of farming activities, in line 9798, for custom or contract work, and machinery rental. It is

approximately 77% of the same entry in his 2007 statement of farming activities. Given that the debt in question is a smaller percentage of the 2006 custom or contract work, it would appear more likely that the business debts shown for hay contract work would have been incurred in 2006.

[125] Although it had been the practice to pay off those debts first, Ms. Luckman was the one taking care of the payment of bills during that period of time. Mr. Cole left it to her to handle. He would only have become aware of unpaid bills after-the-fact. However, he would know what work they related to. During the fall of 2006, Ms. Luckman handled the accounts differently than she had before. For instance, she transferred significant amounts into her own personal account. Consequently, it would not be unreasonable to conclude that she also handled the payment of haying contractor work differently than she had before hand.

[126] Ms. Luckman, having had the opportunity to do so, did not testify that she had paid all of the haying contractors for 2006. She only testified that it was their practice to do so the first thing after they received the haying income.

[127] I, therefore, accept Mr. Cole's evidence that he was left with an unpaid debt in the amount of \$2631 owing to haying contractors, for work done prior to October, 2006.

[128] Mr. Cole's statement of property sworn May 15, 2007, indicates that the outstanding tractor loan, at that time, was in the amount of \$18,000. That is the

closest valuation in time to the date of separation. I accepted it is the amount owing at separation.

[129] I also accept Mr. Cole's evidence that, at time of separation, he was left with business debts for fertilizer, totaling \$1250, \$1000 of which related to fertilizer for the hay field, and the remaining \$250 which was owing to Cavendish Farms.

[130] Similarly, I accept his evidence that he was left with a \$600 bill for straw bedding. Although the parties used wood shavings when they were available, at times they had to purchase straw bedding.

(c) **Net Business Assets**

[131] The following is a table showing business assets retained by each party, deducting the business debts Mr. Cole was left with, and showing the net amount of business assets.

Business Assets Retained by Mr. Cole	Farmland and Buildings	\$28,000
	Tractor (With Chains)	\$15,000
	1960 GMC 1 1/2 ton Pickup	\$1000
	Lincoln Town Car for Shoeing	\$500
	Business Horses	\$5400
	Horse Mats	\$200
	Chainsaw	\$150
	Hay	\$470
	Total from Table of Other	\$10,100

	Business Assets	
	Business Portion of Saddles, Bridles and Accessories	\$900
Business Assets Retained by Ms. Luckman	Value of Hay Sold or Traded	\$900
	Hay	\$350
	Total Business Assets	\$62,970
Business Debts	Haying Contractor Debt	\$2631
	Tractor Loan	\$18,000
	Fertilizer Debt	\$1250
	Straw Bedding Debt	\$600
	Total Business Debts	\$22,481
	NET BUSINESS ASSETS	\$40,489

(d) Proportionate Sharing of Business Assets

[132] Ms. Luckman argued that all of the assets should be treated as matrimonial assets, because she saw it as a family venture and all of the money went in and came out of the same pot. Therefore, in her notice motion, she only indicated that she was moving for an order "to settle the division of matrimonial assets".

[133] Alternatively, she argued that she was an equal partner in the business. In her notice of motion, she referred to section 18 of the *Matrimonial Property Act*, regarding awarding compensation, or a share of business interests as compensation, for a contribution to a business asset.

[134] Considering the position taken by Ms. Luckman and that she was self-represented; and, given that she did refer to section 18 of the *Matrimonial Property Act*, in my view the contents of the Notice of Motion provided sufficient notice to Mr. Cole to permit me to consider what, if any, entitlement to compensation or business assets Ms. Luckman may have.

[135] S. 18 of the *Matrimonial Property Act* states:

“Where one spouse has contributed work, money or moneys worth in respect of the acquisition, management, maintenance, operation or improvement of a business asset of the other spouse, the contributing spouse may apply to the court and the court shall by order

(a) direct the other spouse to pay such an amount on such terms and conditions as the court orders to compensate the contributing spouse therefor; or

(b) award a share of the interest of the other spouse in the business asset to the contributing spouse in accordance with the contribution,

and the court shall determine and assess the contribution without regard to the relationship of husband and wife or the fact that the acts constituting the contribution are those of a reasonable spouse of that sex in the circumstances.”

[136] S. 13 also provides for the division of business assets, or other non-matrimonial assets, “where the court is satisfied that the division of matrimonial assets in equal shares would be unfair or unconscionable taking into account”

factors which include "the effect of the assumption by one spouse of any housekeeping, childcare other domestic responsibilities for the family on the ability of the other spouse to acquire, manage, maintain, operate or improve a business asset".

[137] The Court in *Ryan v. Ryan*, 2010 NSCA 2, at paragraph 12, stated:

“The final words in s. 18 indicate that the determination and assessment of the contribution to be made to the other spouse from a business under that section is to be made ‘without regard to the relationship of husband and wife or the fact that the acts constituting the contribution are those of a reasonable spouse of that sex in the circumstance.’ These words, together with the fact that s. 13(f) specifically provides that the effect of the assumption by one spouse of child care and household responsibilities for the family on the ability of the other spouse to manage, maintain, operate or improve a business asset is to be taken into account under s. 13 and that s. 13(i) specifically provides that the respective contributions of each spouse to the marriage is to be taken into account under s. 13, satisfy me that the Legislature did not intend that such an assumption of responsibilities is also to be considered under s. 18, under the guise of a contribution of ‘money’s worth ... in respect of the management, maintenance, operation or improvement of a business asset of the other spouse’, as the judge did.”

[138] At paragraph 15, the Court stated:

“...[W]here applications for division of a business asset are made under both sections, indirect contributions to the asset (such as assumption of child care and responsibility for the household) are properly considered under s. 13(f), while direct contributions to the asset (such as bookkeeping) are properly considered under s. 18 .. .”

[139] In the case at hand, neither party has submitted evidence or argument “that the division of matrimonial assets in equal shares would be unfair or unconscionable”. Ms. Luckman's position is that her contribution to the farming and farrier businesses entitles her to a 50% share in those businesses, or

compensation for that share. Therefore, I must determine what, if any, share of business assets or compensation, her contribution entitles her to.

[140] In *Fullerton v. Fullerton*, 1988 CarswellNS 361 (S.C., T.D.), the Court awarded the wife 25% of the farming business, under both section 13 and section 18 of the *Matrimonial Property Act*. Her contribution included: bookkeeping; banking; paying bills; assisting with the haying; feeding farmhands, and doing laundry and mending for them; tending the vegetable garden; helping to feed the cattle in the first two years; helping with the calving; tending chickens; processing chickens; selling eggs; and, doing general farm errands. After the third of their three children was born, she became increasingly disillusioned with her husband and the farming operation, and her contribution to the farming operation diminished. However, she handled most of the domestic responsibilities, including preserving, cooking, cleaning and caring for the children.

[141] In *Fullerton*, the home the parties lived in was treated as being part of the farming operation. In the case at hand, it is agreed that the home the parties lived in, along with a reasonable amount of land around it, is a matrimonial asset. With great respect for the approach taken in *Fullerton*, in my view, the approach agreed upon by the Parties in the case at hand is the proper way to deal with a home on a farm property.

[142] According to Ms. Luckman's affidavit sworn August 31, 2010, she and Mr. Cole shared the farm duties equally, for the most part. The farm income arose mainly from the sale of hay and the boarding and training of horses. She and their daughter, Codi, would help ride the horses. She indicated that when Mr. Cole was traveling to exhibitions, she was left to take care of bringing in the hay.

[143] In her affidavit sworn April 30, 2007, she also indicated that she would: take business calls; entertain clients; look after general business errands; help clients load hay onto their vehicles; load hay into the barn; feed horses; clean out stalls; and, turn horses out and in.

[144] Her affidavit evidence was also that, in the beginning, Mr. Cole traveled to Newfoundland for farrier work, and would be gone for a week at a time. In addition, she stated that he would be gone for work in the movie business and for other shoeing business. She did not specify where. I took it to be within Nova Scotia. Further, she indicated that he went on one occasion for a month to Mexico. During these times, she indicated that she took care of everything.

[145] However, at trial, she testified that her part in the farming operation was not as extensive as Mr. Cole's. She also agreed that, out of concern for her own safety, she did not handle horses she did not feel comfortable with. She indicated she helped out more with the horse training as the children got older. Nevertheless, she indicated that she assisted him with the day-to-day operations and scheduling, and

general farm duties. In addition, if anything went wrong while Mr. Cole was away, such as injury or escape, she would have to take care of those matters.

[146] She further indicated that she assisted Mr. Cole in his farrier work by holding horses, and passing nails and tools, while he was shoeing.

[147] Ms. Luckman indicated that after Mr. Cole left, as part of their separation, and before he moved back into the matrimonial home, she and the children, for the most part, took care of the horses that were left on a farm. She indicated she maintained a calendar showing which days Mr. Cole assisted and which days he was not around. However, that calendar was not produced.

[148] Ms. Luckman indicated that all of their bank accounts were joint. She took care of all the banking, accounting and bill paying. Mr. Cole simply gave her his income, from every source, to deposit and manage.

[149] Ms. Luckman submitted that: she was a partner in the family business; and, the business would not have developed as much without her contributions. She saw it as "their" business.

[150] Mr. Cole's evidence was that: he only went to Newfoundland once; and, has never been to Mexico.

[151] Mr. Cole confirmed that he left the farm on October 15, 2006, and moved directly to a movie set where he worked for a month. However, he returned to the farm on weekends and on other days, during the week, to care for the animals and

cut and stack firewood for Ms. Luckman. After that month, he moved to his mother's home, which was about a 5 minute drive from the farm. At that point, he took care of the animals daily. He indicated that, although Ms. Luckman objected to him being on the farm, she did not provide care for the animals herself. To make it easier for him to take care of the animals he removed four of the horses to another location in January 2007. One month later, he removed a further horse. That left three horses on the farm. Two belonged to Codi. The other belonged to Ms. Luckman.

[152] Mr. Cole's evidence was that Ms. Luckman did very little to help with the business and farm, other than to take care of the finances. She did look after the financial records. According to him, that took one or two days per year, and he assisted. He acknowledged that she would occasionally assist the children with their chores. In addition, she would occasionally drive the truck or tractor while the hay was being loaded onto the wagon. Once the children got older, they did the driving. In addition, when he switched from making square bales to making round bales, he did not need as much help with the haying. At times, she would also check on the horses in the pasture.

[153] Mr. Cole testified that he had wanted a farm all his life. There were times, during the summer, that Ms. Luckman would take the children and go to the beach, telling him that he wanted the farm, not them.

[154] Ms. Luckman testified that Mr. Cole had no income for the first year after completing his farrier course. She indicated that, at page 11 of the transcript of the discovery of Mr. Cole, he acknowledged that he traveled with another farrier for about one year without getting paid. In addition, she assisted with the household expenses when he was taking his farrier course at the Nova Scotia Agricultural College.

[155] At the time, Ms. Luckman was working at Valley Drug Mart. She worked there until about one week before Zachary's birth and returned to work shortly after his birth. She indicated that Mr. Cole asked her to quit working outside the home to assist him with establishing the business and the farm, and to raise a family. Mr. Cole disputed that, he indicated that he encouraged her to take a drafting job outside the home. After she refused two job offers, he bought her the equipment she needed to work from home. She did not do so.

[156] I accept Mr. Cole's evidence that: he did not ask Ms. Luckman to quit working outside the home; and, he encouraged her to pursue a career in drafting.

[157] I also accept Mr. Cole's evidence that Ms. Luckman did little to help with the business and farm, aside from taking care of the finances. When he was home, she would occasionally assist the children with their chores and assist with the haying. I find that, when Mr. Cole had to be away, he would return to the farm as often as he could and do what he could to minimize what Ms. Luckman and the

children had to do. However, there were a few times when Mr. Cole was away and could not attend to the daily farm duties. During those times, Ms. Luckman had to oversee the farm and keep an eye on the livestock. She occasionally had to take care of livestock when something went wrong. Some of that would have been done along with checking on the family horses. I find that the hands-on work, during these times that Mr. Cole was away, was done largely by the children, once they became of age to do so. However, Ms. Luckman did also help out. Overall, I find that Ms. Luckman's contribution to the farm operation was minimal compared to that of Mr. Cole.

[158] Her contribution to the ongoing farrier work was even less. I find that she rarely assisted directly with the shoeing horses at the home property, and almost never when Mr. Cole was shoeing on the road. However, for the one-year period when Mr. Cole was traveling with another farrier without getting paid, Ms. Luckman contributed significantly to his farrier business by earning the income required to support the household during Mr. Cole's apprenticeship, and, to some extent, during his training, thus allowing him to start his farrier business.

[159] Ms. Luckman testified that farming business monies were co-mingled with monies for family use. They were used to pay both farming expenses and personal living expenses. That was not disputed. An example of that co-mingling, is that the tractor loan payments were made from the joint bank account. However, she also

testified that, for the most part, the joint checking account (also referred to as the joint bank account) was separate from the hay account. In *Rushton v. Rushton*, 2006 NSSC 149, the Court found that the use of a business account for personal and household expenses did not make a business account for a service station a matrimonial asset. The service station was clearly a business asset. Ms. Rushton, had not incurred any personal risk for the acquisition of the property. She had been paid for the hours she worked. Mr. Rushton had acquired the property in his own name, incurring all of the personal risks himself, and operated it as a commercial venture for the sole purpose of making profit. She was not awarded any amount under s. 18 of the *Matrimonial Property Act* for any contribution to the business.

[160] The Parties' Statements of Property, sworn in May of 2007, indicate that the real property on which the farm is located was held by the Parties in joint tenancy. I, therefore, infer that they were co-mortgagors of the property. As such, Ms. Luckman did incur personal risk in the acquisition of the farm property.

[161] Ms. Luckman acknowledged that the books showed that she took a fee for the services she provided to the farming operation. However, in her view, she did not get paid for those services. Mr. Cole's evidence was that he paid her and claimed her as an expense on his returns. The household and business monies were co-mingled. All of the farming and business income, as well as Mr. Cole's

employment income, went into the co-mingled account and was managed by Ms. Luckman. Therefore, in my view, it is an artificial distinction to say that Ms. Luckman was not paid for the services she provided, just because the money simply stayed in the same account that all other monies were put in. It was not established that any amounts she took as a fee were artificially inflated and beyond an amount reasonable for the services provided. In my view, any amounts shown as a fee taken by her, is the same as her having been paid for her services.

[162] In *Whitty v. Whitty*, 2008 NSSC 243, the Court assessed the wife's contribution to the husband's fishing business at 7.5% of the total value, based on her doing the office work and incurring personal risk by cosigning the loan for the business.

[163] In *MacDonald v. MacDonald*, 2007 NSSC 174, at paragraph 112, the court stated:

"After reviewing the case law is clear that the courts are reluctant to divide the business assets to compensate in any significant way for the exposure to liability that results from a spouse signing as libel for the business debts. Except for *Lynk v. Lynk* the % allowed for this involvement is minimal."

[164] In *MacDonald* the matrimonial assets had been impoverished because priority was given to paying off the business debts. The wife had played a primary role in ensuring that the business debts were paid, sacrificing the matrimonial

standard of living to do so. At paragraph 104, the court described her contribution as follows:

"Her contribution really was to the family. She diligently managed the home, was the primary parent in the day-to-day care, as well as the major decision maker and the primary participant in the children's extracurricular activities. Her management meant that the business and family loans were paid. She took supplementary jobs to earn income, took less of the maternity leave that she was entitled to and sustained the family through the difficult times with the petitioners alcohol even when he could have but did not, seek supplementary employment during his off seasons."

[165] As a result of her contribution, business loans were not called in. At the time of separation, the business debts had been paid off, leaving the husband with over \$320,000 worth of business assets. However, the matrimonial home, following separation, had to be remortgaged to pay off debts. The court concluded that would it would be unfair and unconscionable to equally divide the matrimonial assets in those circumstances, and that compensating the wife for her contribution to the business asset would not necessarily rectify the injustice that would result from an equal division of matrimonial assets. Therefore, the court divided the matrimonial assets unequally, pursuant to section 13 of the *Matrimonial Property Act*.

[166] Considering: the contribution made by Ms. Luckman to the farming and farrier businesses; the risk incurred by her for the acquisition of the farm property; and, the fact that she received a fee for at least some of her services, I am of the view that Ms. Luckman is entitled to a 15% share of the farming business net assets, and a 10% share of the farrier business net assets. Ms. Luckman contributed

significantly less than Ms. Fullerton; but, more than Ms. Whitty. I have also considered the observation, in the *MacDonald v. MacDonald* case, that, generally, only a minimal share entitlement is gained by incurring financial risk for the acquisition of a business asset.

[167] The entire property, including the farm portion and the matrimonial home portion, was in the joint names of Ms. Luckman and Mr. Cole. As such, according to the Court in *Soubliere v. MacDonald*, 2011 NSSC 98, at paragraphs 21 to 24, there is a presumption of equal sharing of the property's value. However, I have found that Mr. Cole and Ms. Luckman were not equal partners in the farming operation, nor contributed equally to it. The farm property was acquired for the farming business. The land is zoned as agricultural land. Mr. Cole had to obtain permission to build the matrimonial home on the property. No other residential dwellings can be built on the land. In my view, the presumption of equal sharing that arises from the joint tenancy has been rebutted, and it is to be divided in the same proportionate shares as the remaining farming assets.

[168] Mr. Cole's affidavit sworn May 15, 2007, indicates that, over a 4 to 5 month period, in the Winter and Spring of 2007, Mr. Cole had to board his horses off the farm, at a cost of \$350 per month, over and above the cost of medication, feed, bedding, and forage. That is a total of approximately \$1575. He had to pay that amount because of actions taken by Ms. Luckman which prevented him from

continuing to enter the farm property. She made allegations that had him charged and placed under conditions that hampered his ability to attend the farm. Based upon the evidence of Mr. Cole, which I accept, those actions were not justified in the circumstances, and the charges were ultimately withdrawn. Therefore, given Ms. Luckman's unreasonable actions, in my view, that amount should be deducted from the farm assets before a proportionate division occurs.

4. PAYOUT TO BE MADE TO EFFECT AN APPROPRIATE DIVISION OF ASSETS AND DEBTS

(a) Net Asset Values Received by Each Spouse

Matrimonial Assets

[169] Ms. Luckman has received net matrimonial assets valued at \$81,103. Mr. Cole has received net matrimonial assets valued at \$71,645. Thus, Ms. Luckman has received \$9,458 more than Mr. Cole. Mr. Cole is entitled to an equalization payment of 50% of that amount, which is \$4729.

Business Assets

[170] Mr. Cole has retained farrier business assets worth \$2000. I have found that Ms. Luckman is entitled to 10% of that amount, which is \$200.

[171] The net farming business assets were \$38,489. I have found that Ms. Luckman is entitled to 15% of that amount, which is \$5773. I find it equitable to deduct, from the amount which Ms. Luckman would otherwise be entitled, the \$1575 for the off-farm board Mr. Cole had to pay for his horses, post-separation, as a result of Ms. Luckman's actions. In addition, Ms. Luckman has already retained \$1250 worth of business assets (\$900 plus hay worth \$350). That leaves a balance of \$2948 in the farming business assets to which Ms. Luckman is entitled.

[172] Therefore, Ms. Luckman's total entitlement to business assets is \$3148.

(b) Credit for Child Support Overpayment

[173] Justice Duncan, in *Cole v. Cole*, 2008 NSSC 189, concluded that an offsetting calculation would result in Ms. Luckman paying Mr. Cole \$33 per month in child support. However, Mr. Cole was not requesting that she pay him child support. Therefore, no order was made requiring her to do so. Justice Duncan's order was made retroactive to the time it had previously been ordered that Mr. Cole's child support obligation began. Mr. Cole had already paid Ms. Luckman approximately \$965.05 in child support. The previous child support order had been based on the income Ms. Luckman had asked the Court to impute for Mr.

Cole, in the amount of \$44,475.23, in October 2007. At that time Mr. Cole had not been in a position to demonstrate that that was not an appropriate amount to impute. Justice Duncan, with the benefit of all the necessary evidence, accepted Mr. Cole's 2007 line 150 income as an accurate reflection of his income. That amount was \$14,319.86. Mr. Cole's lawyer recognized that, at the time, it was impractical to expect Ms. Luckman to be able to refund that amount. However, Justice Duncan left it open to Mr. Cole to seek to collect that amount at the time of an ultimate division of matrimonial property. Mr. Cole, through his counsel, has now asked for that to occur. In my view, it is appropriate that this amount received by Ms. Luckman be deducted in full from any amount that would be owing to her, or added to any amount that would be owing from her to Mr. Cole.

(c) Payout Required for Proper Division

[174] I find that: Ms. Luckman owes Mr. Cole \$4,729 to equalize the matrimonial assets retained by each of them; and, Mr. Cole owes Ms. Luckman \$3,148 as her share of the business assets retained by him. That leaves Ms. Luckman owing Mr. Cole a balance of \$1,581, plus the child support overpayment of \$965, for a total of \$2,546.

[175] Therefore, a proper division of all assets will have been effected if each party retains the assets in their possession, and Ms. Luckman pays Mr. Cole \$2,546.

[176] This division does not include the 50 caliber Hawkins rifle belonging to Ms. Luckman, which is currently in Mr. Cole's possession. I have found that that is a personal asset, not a matrimonial asset. It is up to Ms. Luckman what she decides to do with that personal asset. She may retrieve it or leave it would Mr. Cole as a gift, trade or sale.

5. WHETHER SPOUSAL SUPPORT SHOULD BE PAID BY EITHER PARTY

(a) Mr. Cole's Income

[177] Ms. Luckman alleges that the business and farm income reported by Mr. Cole is less than the actual income.

[178] She alleged bartering that he had engaged in while they were together. He had traded a horse for a motorcycle. He had traded horse training for a saddle and a whippersnapper, on one occasion, and for a horse on another occasion. He had traded hay for a car and received a receipt for about one third of the value of the hay provided.

[179] Mr. Cole testified that he had paid \$500 cash for the car and that there was no trading of hay.

[180] According to Ms. Luckman, she and Mr. Cole argued about how much income to show. She said she wanted to show more income so that it would demonstrate business growth.

[181] Ms. Luckman's evidence was that, while she and Mr. Cole were together, the demand for his farrier and horse training services grew to the point where he was able to select which clients he wanted to service. He also provided teeth floating and de-worming services. They serviced 150 or more horses. They charged: \$30 for trimming; \$65 or more for shoeing; \$800 hundred dollars per month for training and board; and, travel fees ranging from \$10-\$25.

[182] According to Ms. Luckman, in the summer of 2006, Mr. Cole received a total of \$14,800, for horse training and board, which was not included in his 2006 tax return. She listed the nine horse owners involved and the length of time Mr. Cole had their horses. One of those listed was Karen Sabean. Karen Sabine of Riverdale Road, near Weymouth, Nova Scotia, provided a Fax Transmittal Form, noted as having been sent March 28, 2011, stating that she had never had any of their horses at Mr. Cole's place for training. Ms. Luckman testified that Karen Sabean was a different person, from a different area. She specified that Karen Sabean had a Newfoundland pony that was sickly and had quite a buck. She

believed that this lady lived in the vicinity of the Frenchy's in Saulnierville, and had one child. Mr. Cole indicated that he only knew of the Karen Sabine from the Weymouth area. He did not know any Karen Sabean, and had not trained, nor boarded, a horse for a person by that name. In addition, his affidavit evidence was that the list of clients provided by Ms. Luckman was inaccurate. He had never worked for some of the clients on the list. The amounts alleged in relation to the clients that he had done work for, seemed questionable to him. I accepted his evidence. However, other than Karen Sabean, he did not provide any details of which names were inaccurate, nor which amounts did not appear accurate.

[183] There was no evidence from which I could determine whether any of the listed clients paid amounts to Mr. Cole for horse training which he did not claim, nor Ms. Luckman's basis for alleging that he had not claimed such income.

[184] Ms. Luckman agreed that she had no personal knowledge of the income earned by Mr. Cole from hay, shoeing and training, since 2008.

[185] She had seen Mr. Cole ride past her house on horses she did not recognize. However, she provided no details of the frequency of those sightings; and, she did not provide information to establish what if any income Mr. Cole earned in relation to those horses. Appendix B to her affidavit sworn August 31, 2010, contained a partial list of clients for which Mr. Cole provided shoeing, trimming and teeth floating services while they were together. However, she acknowledged that she

knew some of those clients were no longer using Mr. Cole. She opined that some of them would never leave him because they were loyal clients. Others, she indicated she had seen in the yard. She did not provide a sufficient basis for her opinion regarding the loyal clients remaining with him. She did not provide sufficient evidence to establish which, if any, of the clients on the list in appendix B have remained with Mr. Cole. The Court is unable to determine that the income earned from the clients that have remained with Mr. Cole is not part of the income Mr. Cole has been reporting to Revenue Canada.

[186] She acknowledged that she did not know how many bales of hay Mr. Cole made in 2008, 2009 and 2010.

[187] Both parties agreed that: Mr. Cole would be handed cash or cheques for hay purchases and horse training payments; and, would turn them over to Ms. Luckman to manage. Mr. Cole also testified that he would sometimes tell the clients to give the cash or cheques directly to Ms. Luckman at the house, because he was out working in the field.

[188] Ms. Luckman pointed out that the Credit Union Loan Application entered as Exhibit 1 indicates that, in April 2006, they both certified that Mr. Cole had a monthly income of \$520 from shoeing horses. Mr. Cole's 2006 tax return showed a net income from the farrier business of \$6,077.64. That amounts to a monthly

income of approximately \$506, which is close to the \$520 noted in the loan application.

[189] Ms. Luckman questioned Mr. Cole about whether he provided New Holland with information indicating a higher income, in order to obtain the loan for his new tractor. He indicated that he did not. He indicated that, in his view, they gave him the loan based on him making the tractor payments for the previous tractor, and that the payments for the new tractor were cheaper. He gave them whatever they asked for.

[190] A statement of Mr. Cole's credit union account was entered as Exhibit 2. Ms. Luckman pointed out that the ending balance was around \$4700. She suggested that was an indication that Mr. Cole was earning more money than he was indicating. Otherwise, he would not have been able to accumulate money in his account. Mr. Cole pointed out that the account statement showed a deficit of around \$400 in September of 2010, prior to his first fall payment as a bus driver. The closing balance of around \$4700, in April of 2011, was the amount that he had saved up from his bus driving income since September. That amount, he indicated, gets used up throughout the summer, when he has no bus driving income, to pay his tractor loan, mortgage, insurance, taxes, and any other expenses he may have. In addition, he testified that the school board had overpaid him by about \$900.

That amount will have to be recaptured in some way. He anticipated that, by September 2011, it would again show a deficit.

[191] Ms. Luckman's view is that what Paula Hicks described as a gift of horse mats to Mr. Cole, because he helped her with a problem horse, was a trading of services for goods. Mr. Cole indicated that the mats were seconds and only cost about \$20 apiece. He said that she only gave him the horse mats perhaps because she liked him. She told him that she had no use for them and asked him if he wanted them. He told her he did and accepted them. I accept that the circumstances were as described by Mr. Cole. In those circumstances, in my view, the horse mats were a gift, not a trade.

[192] Even if it had been a trading of goods for services, I accept that the horse mats were seconds and could be purchased for \$20 apiece. Since they were used, all 16 mats would only have been worth \$200 or less. That would add little to his farming income.

[193] However, he did acknowledge that he had bartered goods and services in the past, including by trading hay for cosmetic surgery to improve the appearance of some of Ms. Luckman's veins.

[194] He also agreed that he had accepted cash for payment. However, he added that he reported it, irrespective of whether the customer wanted a receipt. He marks it down with his monthly slips. He did not deny that it was possible to forget to

record a cash payment. However, he indicated that, if it happened, it was not intentional.

[195] Mr. Cole testified that: all income from his operations were shown on his income tax returns; and, there were no amounts received by barter or trade that were not accounted for from 2007 on. He indicated that one would have to ask Ms. Luckman about whether there were any amounts received by barter trade before 2007 that were not accounted for, as it was her who looked after the financial accounting.

[196] More likely than not, some income was carelessly omitted. It is impossible to estimate how much, and it has not been established that it would even approach the portion of the farm loss which Mr. Cole has been unable to claim. As such, it would have no effect on the net income reported on his tax returns.

[197] Mr. Cole described his haying operation and stated that it left very little profit margin. He does not have the equipment required to carry out all aspects of the haying operation himself. He has to hire someone else to do the round baling and wrapping because he does not have a round baler, a clamp, nor a wrapper. After deducting the costs associated with fertilizing, mowing, tethering, raking, baling, wrapping and stacking, he is left with a profit margin of only about \$15 per round bale and \$1 per square bale. Those are part of the expenses shown on his tax returns.

[198] Mr. Cole testified that he had to purchase a new-to-him tractor because his old tractor was too small and would not run the baler. He has a loan for the new tractor. That loan creates expenses for his business.

[199] He specified that the amount allowed for food in his statement of expenses includes the amounts he spends in bringing clients out to eat as his guest.

[200] He agreed that he claimed for heat and other things on his tax returns, saying that he was entitled to claim a portion of it as part of his business. He indicated that his common-law spouse, Susan, inserts the amounts into the ledger and sends them off to the accountant. He indicated he claimed such expenses associated with the running of the household in accordance with the rules allowing a portion of such expenses to be claimed against business and farm income.

[201] At line 9802 of the statement of farming activities, in his 2006 tax return, there is \$426.64 claimed for heating fuel. Mr. Cole indicated that he thought he allowed for heating fuel he got from Ms. Luckman's mother. He had paid for the work and fuel associated with getting wood. He indicated that it might also be wood that he purchased .

[202] In 2007, he claimed \$1,126.06 for heating fuel. He was asked to explain the difference. He indicated that he did not know. He offered that it might be a result of the difference in the price of wood. Sometimes he cuts his own. Sometimes he buys it. He was asked why there was no amount claimed for heating fuel in 2008.

He answered that he must have had some wood left over. He was asked why there was no amount claimed for heating fuel in 2010. He explained that it was because Zack, who did not have a job, had helped him cut wood and he still had wood left over from the previous winter.

[203] In my view, the explanations given for the fluctuations in amounts claimed for heating fuel are reasonable, and, when one considers the total amounts claimed over all of the years in question, they are well within a reasonable range.

[204] Ms. Luckman engaged in detailed questioning of Mr. Cole in relation to the amount shown in his income tax returns for veterinarian fees from 2006 to 2010. In my view, the amounts claimed were reasonable and Mr. Cole's explanation of what they included was reasonable. Further, the amounts claimed from 2007 to 2010 are consistent with the amount claimed in 2006, when Ms. Luckman was handling the books.

[205] Mr. Cole indicated that the car he uses for shoeing is used solely for shoeing. It has no backseat. If he has to go anywhere he uses Susan's vehicle.

[206] He was questioned about being allowed to deduct capital costs to account for depreciation of capital assets. He indicated that he simply gives his accountant the documents and leaves it to him to determine what the capital cost allowance should be. Capital cost allowance item 1 in his 2006 tax return was valued at \$18,204.05. Mr. Cole did not know what it was for. However, he offered that the only item he

paid that much for was the tractor. Various capital cost allowances claimed and the amounts noted for un-depreciated capital cost from 2006 to 2010 were pointed out to him. He was unable to explain them. He advised Ms. Luckman that she would have to talk to the accountant. He indicated he did not sell anything, including the tractor. He suggested that there may be an amount related to Susan's truck and trailer because he believed that he could register them with the farm registered in his name. He indicated that he did not know, he was only speculating.

[207] When Ms. Luckman resumed cross examination on July 13, 2011, Mr. Cole indicated that the accountant had advised him that when he receives documentation regarding expenditures, and he does not know what it pertains to, he puts it under the farm.

[208] He did not know why there was a difference of over \$2000 between the amounts shown for phone and utilities in 2007, as compared to 2008. He guessed that it must've cost more. He also testified that the heaters used in the water tanks, and the school bus plugged in, draw extra power in the winter.

[209] In relation to claiming vehicle expenses, he indicated that, instead of keeping a mileage log, he keeps track of all the vehicle expenses, and he believes the accountant claims a certain part of that.

[210] He could not explain why he claimed nothing in 2006 for machinery expense. He did not know why there was no amount claimed for motor vehicle

expenses at line 9281 of his 2010 T2125A Comparative Summary of Business and Professional Income. He simply indicated he must have forgotten it. In 2007, motor vehicle expenses of \$8833.28 were claimed under his business, and nothing was claimed under the farm. In 2008, \$2196.46 in motor vehicle expenses were claimed under the business, and the same amount was claimed under the farm. He did not know why there was such a difference between the two years.

[211] Such inconsistencies and/or errors, in my view, do not demonstrate that Mr. Cole has greater income than reported. Rather, it demonstrates a lack of attention to detail in financial matters.

[212] Ms. Luckman asked Mr. Cole to explain why, in his 2006 Statement of Business Activities, he showed motor vehicle expenses of \$10,928.31. He did not know. He suggested that something may have broken down. I note that Ms. Luckman was the one primarily handling the record-keeping in 2006. Therefore, if the amount included as a motor vehicle expense was excessive, it is more likely to have been because of Ms. Luckman's actions than those of Mr. Cole.

[213] Mr. Cole agreed that, in 2010, he purchased a wood splitter, post hole digger and building roof, with a total value of \$10,918, for the farm. He indicated the money had come from: his income tax return of \$1800; savings of \$4800 he had accumulated over a four-year period; and, money he had borrowed from Susan Judge. He indicated that he was able to save money, even though he showed a

deficit, because he sold a truck. He also indicated that Ms. Judge helps pay some of the farm expenses. For instance, she pays for groceries, some utilities, livestock feed, plastic wrap, fertilizer and other production costs. That compensates for the deficiency.

[214] Mr. Cole agreed that each year, since 2006, he has shown a farming loss on his income tax return. In my view, Ms. Luckman has not established that those were not legitimate losses. Justice Duncan, at paragraph 40 of *Cole v. Cole*, 2008 NSSC 189, stated: "I am satisfied that the expenses incurred are justifiable and not generated for the purpose of artificially reducing income." I echo those comments in relation to expenses claimed since Justice Duncan's order. The showing of a farming income loss is nothing new for Mr. Cole. He showed a farming income loss in 2006, while Ms. Luckman was still with him for most of the year. He also showed farming income losses in 2004 and 2005, while Ms. Luckman was with him for the entire year.

[215] That appears to be somewhat inconsistent with his statement, at paragraph 31 of his affidavit sworn May 15, 2007, that he needed uninhibited access to the farm "to carry on the business which produces a substantial portion of [their] family income". However, he may have meant gross income, as opposed to net income. If so, that would explain the apparent inconsistency.

[216] Mr. Cole indicated that he considers his business to be his farrier business, and the farm is under it. Since he has been in business he has considered that everything is together, including, his farrier work, horse training, and hay production. However, he acknowledged that, for the purposes of his income tax returns, the income associated with shoeing is claimed under business income and the hay and cattle income is probably claimed under farm income. The money he earned from bus driving, guiding and movie work was treated separately.

[217] Mr. Cole indicated that the income from training horses is also included in his tax returns. He writes down all the training work income he earns and it gets reported.

[218] It would appear that, if Mr. Cole's only the farming activity was hay production and sales, he would likely show a profit. However, much of the hay produced goes to feeding the many horses and other livestock on the farm, including Codi's horses. Therefore, the profitability of the farm continues to be curtailed as some of its produce is used to maintain personal horses, which are unlikely to ever be sold, and to maintain the business horses, as the herd is being improved to increase the value and saleability of the horses raised on the farm. If more horses are brought onto the farm for training and boarding, that might also result in the farm realizing a profit. In the meantime, I accept Mr. Cole's evidence that horse sales have been minimal.

[219] Mr. Cole agreed that some of the expenses shown on the statement of expenses he filed in the within proceeding overlap with the expenses that he's claimed on his tax return. Viewed in light of his comment that he is allowed to claim portions of certain expenses, I infer that the overlap is mostly in relation to expenses related to business use of home. He indicated he did not know why phone expenses were also shown on his personal expense statement. He guessed that part of the expenses were personal and part were business. The amount of the overlap was not specified. Ms. Luckman has not established the amount. In my view the amount, together with any amounts innocently and unintentionally omitted from inclusion as income, would not amount to the portion of the farming losses Mr. Cole was unable to claim against his income.

[220] Therefore, even if one were to add, to Mr. Cole's income, an amount to reflect the expense overlap, that additional amount would not be significant enough to increase Mr. Cole's net income and ability to pay support.

[221] Mr. Cole indicated that, particularly starting in the Spring of 2007, the horse training portion of the farm income reduced drastically. He attributed that to comments purportedly made by Ms. Luckman to clients. However, the purported comments were hearsay and inadmissible. Therefore, I was unable to consider them in determining whether the reduction in income was due to such comments being made. However, I do accept that there was a reduction in horse training

income. I also accept Mr. Cole's evidence that Ms. Luckman told him, numerous times, that she was going to ruin in his business and reputation. In addition, I accept Mr. Cole's evidence that Ms. Luckman had him arrested when he went on the farm and that any charges laid were dropped. Therefore, more likely than not, Ms. Luckman's words or actions impacted negatively on Mr. Cole's horse training income.

[222] During the May 2011 hearing dates, Ms. Luckman asked Mr. Cole whether he had done any horse training in the last couple of years. He indicated that he had not. Brian Lewis had sent him a horse, he thought, about three years prior. He had trained his own; but, no others, with the exception of the odd horse that may have come in for a day. However, he had not done any monthly training in the last couple of years. Nevertheless, he felt that he would start getting some.

[223] Justice Duncan, in *Cole v Cole*, 2008 NSSC 189, was satisfied that the expenses noted in Mr. Cole's 2007 statements of farming and business activities were "justifiable and not generated for the purposes of artificially reducing income". He accepted Mr. Cole's 2007 line 150 income, in the amount of \$14,319.86, as being an accurate amount upon which to base child support. I indicated I would not revisit that finding. In addition, based on the materials I have seen on file, and the evidence I have heard, it is a proper finding.

[224] Justice Duncan noted that the farm and the farrier businesses had not been profitable, and had detracted from Mr. Cole's ability to earn more income as a bus driver. Justice Duncan was of the view that, if Mr. Cole was unable to generate a profit within a fairly short time, it would be reasonable to expect him to wind down the businesses so that he could earn additional money as a bus driver. He estimated that Mr. Cole could earn an additional \$10,000, for a total of \$25,000 or more per year, as a bus driver, if he eliminated these businesses.

[225] Mr. Cole took heed of Justice Duncan's warning. He and Ms. Judge have been making efforts to make the farm more profitable. They are not letting a portion of the farm be used by Mr. Bent for growing corn anymore. They are using the entire farm to grow hay. Ms. Judge has purchased sheep because of the rise in the price of lamb meat. He is getting into custom selling of beef. He is now 58 years of age and cannot handle as much of the physical demands associated with shoeing horses as he used to. In addition, the price of fuel has made it less feasible to travel long distances to shoe horses. Further, he has grown weary of driving the school bus all week, and then spending his whole weekend shoeing horses.

Therefore, he shoes less; but, expects to be getting more work training horses. He indicates that breaking horses is also hard on him physically. They are acquiring better horses and breeding them. He starts horses; and, Ms. Judge shows them.

Potential customers get to see how good they are; and, that builds his reputation as

a horse trainer. They are trying to do things differently and diversifying to make the farm business more profitable. In addition, he drove the bus later in April of 2011 than he had in prior years.

[226] However, I accept his evidence that he is still propping up the farm operation with income from his farrier business and his bus driving. Based on the income tax returns on file, it appears that that has been the case since at least 2004, well before the parties separated.

(b) Ms. Luckman's Income

[227] Ms. Luckman's 2010 income tax return shows a line 150 total income of \$29,466.55. That appears to include little, if any, of the \$107.92 she receives in benefits paid biweekly for: dependent life benefits; life/salary insurance, which provides children with her salary for a while if she dies; a pension adjustment matching contribution; critical illness insurance; and, a Great West Life matching contribution. However, my view, those are not amounts I need to factor in when considering her income for purposes of determining spousal support. They are not amounts she can currently use for her own support, nor for the support of anyone else. In my view, it is appropriate that I consider her income to be as noted in line 150 of her income tax return.

[228] The other tax returns provided for Ms. Luckman show the following line 150 amounts: \$37,534.03 for 2009; \$25,096.61 for 2008; and, \$11,609.32 for 2006.

There is no tax return for 2007 on file. However, Justice Duncan, in *Cole v. Cole*, 2008 NSSC 189, found that a reasonable approximation of her 2007 income was \$16,550.00, inclusive of employment and investment income. Based on the materials on file, I also accept that amount as her income for 2007.

[229] Ms. Luckman's income includes a "variable pay" amount which is a bonus added to the base salary. The amount of the bonus is based on sales. Her income also includes a Christmas bonus.

(c) **Entitlement**

[230] Section 15.2 of the *Divorce Act*, R.S.C. 1985, c. 3(2nd Spp.) provides for spousal support orders and states as follows:

“15.2 (1) A court of competent jurisdiction may, on application by either or both spouses, make an order requiring a spouse to secure or pay, or to secure and pay, such lump sum or periodic sums, or such lump sum and periodic sums, as the court thinks reasonable for the support of the other spouse.

Interim order

(2) Where an application is made under subsection (1), the court may, on application by either or both spouses, make an interim order requiring a spouse to secure or pay, or to secure and pay, such lump sum or periodic sums, or such lump sum and periodic sums, as the court thinks reasonable for the support of the other spouse, pending the determination of the application under subsection (1).

Terms and conditions

(3) The court may make an order under subsection (1) or an interim order under subsection (2) for a definite or indefinite period or until a specified event occurs,

and may impose terms, conditions or restrictions in connection with the order as it thinks fit and just.

Factors

(4) In making an order under subsection (1) or an interim order under subsection (2), the court shall take into consideration the condition, means, needs and other circumstances of each spouse, including

- (a) the length of time the spouses cohabited;
- (b) the functions performed by each spouse during cohabitation; and
- (c) any order, agreement or arrangement relating to support of either spouse.

Spousal misconduct

(5) In making an order under subsection (1) or an interim order under subsection (2), the court shall not take into consideration any misconduct of a spouse in relation to the marriage.

Objectives of spousal support order

(6) An order made under subsection (1) or an interim order under subsection (2) that provides for the support of a spouse should

- (a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;
- (b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;
- (c) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and
- (d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time. “

[231] The Supreme Court of Canada in *Bracklow v Bracklow*, [1999] 1

S.C.R. 420, at para 49, concluded as follows:

“ In summary, the statutes and the case law suggest three conceptual bases for entitlement to spousal support: (1) compensatory, (2) contractual, and (3) non-compensatory. Marriage, as this Court held in *Moge* (at p. 870), is a "joint endeavour", a socio-economic partnership. That is the starting position. Support agreements are important (although not necessarily decisive), and so is the idea that spouses should be compensated on marriage breakdown for losses and hardships caused by the marriage. Indeed, a review of cases suggests that in most circumstances compensation now serves as the main reason for support. However, contract and compensation are not the only sources of a support obligation. The obligation may alternatively arise out of the marriage relationship itself. Where a spouse achieves economic self-sufficiency on the basis of his or her own efforts, or on an award of compensatory support, the obligation founded on the marriage

relationship itself lies dormant. But where need is established that is not met on a compensatory or contractual basis, the fundamental marital obligation may play a vital role. Absent negating factors, it is available, in appropriate circumstances, to provide just support.”

[232] *Bracklow* thus established a broad basis for entitlement to non-compensatory spousal support.

[233] The *Annual Review of Family Law, 2010*, McLeod and Mamo, in the second from last paragraph of Part 3(I), “Spousal Support, Generally”, notes that: compensatory support is “to address the economic advantages and disadvantages to the spouses flowing from the marriage (or the roles adopted in marriage)”; and, non-compensatory support is “to address the disparity between the parties’ needs and means upon marriage breakdown”.

[234] The starting point in determining a spousal support dispute is the objectives set out in Subsection (6) of Section 15.2 of the *Divorce Act*. “No single objective is paramount; all must be borne in mind.” [*Bracklow*, para 35]

[235] “There is no hard and fast rule. The judge must look at all the factors in light of the stipulated objectives of support, and exercise his or her discretion in a manner that equitably alleviates the adverse consequences of the marriage breakdown.” [*Bracklow*, para 36]

[236] A spouse who was being supported within the marital relationship can be considered to have suffered economic hardship arising from the breakdown of the marriage simply because, following separation, they lose the benefit of the support they have become dependent on. [*Bracklow*, para 41]

[237] However, after separation, “the presumption of mutual support that existed during the marriage no longer applies.” [*Bracklow*, para 21]

Ms. Luckman’s Entitlement to Ongoing Spousal Support

[238] Ms. Luckman's affidavit evidence was that, prior to their marriage in August of 1986, she and Mr. Cole lived together for four years. At trial, she testified that they lived together for five years before marriage. During that pre-marriage period of cohabitation, Mr. Cole attended Nova Scotia agricultural College weekdays to become a certified farrier. While he did that, she took care of the animals, rent, and household expenses.

[239] At the beginning of their marriage, Ms. Luckman was working in retail, including after she returned to work following the maternity leave she took when Zachary was born. She had obtained a diploma in architectural drafting; and, was seeking employment in that field. She did receive two job offers. However, she turned them down. She estimates she would have earned \$35,000-\$40,000 from that employment. Mr. Cole’s evidence was that the rejection of the job offers

occurred prior to the birth of their first child, Zachary. Ms. Luckman indicated that it was after Zachary's birth; and, that Mr. Cole was not happy with the prospect of her taking a job drafting. It was difficult to look after a new business while looking after an infant.

[240] Her evidence was that she stayed home for five years after that, then went back to work part-time in the evenings and on weekends. She did that for eight years, then worked full-time for two years, and stayed home for three years.

Following that three-year period, she started working part-time at the Valley Credit Union.

[241] Mr. Cole indicated that the reason Ms. Luckman gave for turning down the jobs was because she was not interested in traveling to Annapolis Royal for work.

[242] Mr. Cole indicated that he purchased the drafting supplies she needed to work from home and provided a room for her to work in. However, she did not do so.

[243] Ms. Luckman indicated that she decided not to work outside of the home, at Mr. Cole's request, so that she could help him establish his farrier business and raise their family. Mr. Cole indicated that, after Zachary was born, Ms. Luckman told him she was finding it difficult to be home all day with their son. She asked for respite. So, on many occasions, he took Zachary to work with him. He would bring along bottles and have them warmed in his clients' homes to feed Zachary.

His clients would also assist in caring for Zachary while he worked on their horses. That also happened with Codi, after she was born.

[244] However, he did acknowledge that Ms. Luckman was a great mother, cook and housekeeper. In addition, he commented that children do need their mother when they are young. Therefore, more likely than not, even though he did bring along the infant children to work with him at times, Ms. Luckman would care for them the great majority of the time that she was not working outside the home. I accept Mr. Cole's evidence that there were times when Ms. Luckman worked outside the home and that he brought the children to work with him.

[245] They later purchased a farm property, upon which they built a barn, pens and fences, as well as the matrimonial home.

[246] Ms. Luckman indicated she did return to part-time work outside the home. However, she was involved in the business on a daily basis. When Mr. Cole traveled as part of his farrier business, movie horse wrangling or weekend horse riding competitions, she looked after the farm and the family. She alleges she did the same thing when he went on vacation for a month.

[247] As the children got older they also helped with farm chores.

[248] She looked after the financial matters relating to the business, farm and household, including banking, bookkeeping and paying bills.

[249] As I have already indicated, I find that Ms. Luckman did contribute to the farm operation, but it was minimal compared to Mr. Cole's contribution, and her contribution to the farrier business was even less.

[250] I find that it is Ms. Luckman who unilaterally made the decision not to pursue a career in drafting. She could have done so despite the parties having children to care for. Mr. Cole encouraged her to do so. He arranged for her to have the necessary tools and workspace at home. However, he accepted Ms. Luckman's decision. The decision allowed Ms. Luckman to care for the children while Mr. Cole built the farming and farrier businesses. He benefited from Ms. Luckman's decision in that way. Both suffered the disadvantage of having to forego the income Ms. Luckman would have earned from a drafting career. However, if she had pursued and continued in a drafting career, more likely than not, she would be earning a better income now.

[251] In *Crandall v. Crandall*, 1996 CarswellNB 233 (C.A.), the Court, at paragraph 18, stated:

“I do not believe there is any possibility of fixing a value on the development of an ability or any merit to the notion that each ability developed should be valued as a distinct asset. The compensatory aspect of the award is related to the economic hardship resulting from the lack of opportunity of Mrs. Crandall to develop her own potential during the marriage. The fact that her husband was able to pursue a career and to develop other skills is evidence of the fact that Mrs. Crandall was in a less advantageous position, and has now the right to claim compensatory support. It does not form the basis for a distinct claim.”

[252] Thus, Ms. Luckman foregoing a career in drafting, and Mr. Cole being freed to develop his businesses, are to be considered in assessing the respective economic disadvantages and advantages arising from the marriage.

[253] A spouse who would otherwise have been entitled to compensatory support may lose that entitlement if his or her unreasonable conduct results in foreseeable loss of business income which the payor spouse is unable to prevent. [*Sibbet v. Sibbet*, 2001 MBQB 40, paragraphs 76 to 91.] There was some evidence in the case at hand that Ms. Luckman's post-separation actions negatively impacted Mr. Luckman's horse training business and, to some extent, his farrier business. However, Mr. Cole did not provide sufficient evidence for the Court to conclude her conduct caused foreseeable and un-preventable business losses to such an extent as to warrant her losing entitlement to compensatory support she would otherwise have.

[254] Mr. Gillis, on behalf of Mr. Cole, presented the case of *Cerget v. Cerget*, 1994 CarswellOnt 445 (C.J., G.D.), in support of a suggestion that Ms. Luckman's unilateral decision to not pursue a career in architectural drafting should disentitle her to compensatory spousal support. However, in *Cerget*, the Court only refused to make a lump sum compensatory support award based on the wife's decision to refuse a teaching position while they were engaged to be married. The Court was of the view that it would be an error to isolate such an act and grant a

compensatory claim in relation to it. However, the Court did order periodic spousal support on the basis that the wife had sacrificed a secretarial career to raise the children through a lengthy marriage, leaving her in economic hardship attributable to the breakdown of the marriage. As such, it is not an authority justifying denying Ms. Luckman compensatory spousal support simply because she chose, during the marriage, to forego a career in drafting and stay home to care for the children.

[255] Mr. Gillis also presented the case of *Johnson v. Johnson*, 1988

CarswellBC301(C.A.). In that case, the wife worked to support the husband when he was a medical student and later assisted him in his practice and managed the home. The Court did not order "compensatory maintenance". The parties had enjoyed a high standard of living during the relationship and were left with no net assets to divide. The Court was of the view that a compensatory spousal support award would effectively have amounted to a division of assets. It reasoned that the wife had already received the benefit of the elevated standard of living during the marriage. She had remarried. She was working on her Masters degree in nursing. She was teaching at a nursing school. However, she did not have a permanent teaching position yet. Spousal support was ordered to continue until her teaching position became permanent. Support was not ordered to continue indefinitely as it would have been with a compensatory support award. The circumstances of the

Johnson case are sufficiently different from those in the case at hand that it does not justify denying compensatory spousal support in the case at hand.

[256] Mr. Gillis presented the case of *French v. French*, 1996 CarswellNB 385 (Q.B.), in support of his submission that no compensatory spousal support should be paid to Ms. Luckman based on any contribution she may have made towards Mr. Cole's training and the development of his business. However, in the *French* case, both the husband and the wife were retired, and in receipt of pensions, when the wife assisted the husband in studying photography and setting up a photography business. It was not a situation where one spouse supports the other through his or her education and that other spouse works in that field through a long marriage.

[257] In *Worst v. Worst*, 1997 CarswellBC 1985 (S.C.), the Court concluded that any economic disadvantage the wife had suffered as a result of the relationship or its breakdown was compensated by delaying the sale of the matrimonial home until the child reached the age of majority and allowing the wife to live there in the meantime. As such, no compensatory spousal support was ordered. Up until the time of separation, the wife had been the manager of the band in which the husband was a musician. She had not sought employment in the same field. Rather, she had returned to school; and, would likely have a more secure future than the

husband. He was only earning approximately \$20,000 per year. His income in the past had fluctuated a lot.

[258] Ms. Luckman testified that she spent the bulk of her life with Mr. Cole working towards retirement. She is of the view that the fruits of that work have been removed from her, and that she will not be able to retire much before the age of 80. She cites that as a further reason to order Mr. Cole to pay her spousal support.

[259] Ms. Luckman suggests that, since Mr. Cole has the benefit of a common-law spouse to assist in sharing of expenses, while she is on her own, it is unfair that Mr. Cole not assist her with spousal support.

[260] Ms. Luckman also testified that she would have purchased a smaller home if she did not have to consider providing a place for the children to live when they were with her. She indicated that, her financial situation would be different if she had not had that responsibility.

[261] Both parties have cosigned loans for their children, to assist them in paying for their education. Mr. Cole's evidence was that he also assists the children financially to help them with their university. He gave as an example that he sold the horse Zippy and put \$3500 in Codi's account for her first year university tuition. He indicated he also provided her with a car and continued to look after her two horses on the farm. He estimates that costs him approximately \$1500 per year.

[262] The need to purchase a larger home to accommodate the needs of the children is a financial consequence arising from the care of children of the marriage, over and above any support obligation. Therefore, it is a financial consequence which Ms. Luckman has suffered. However, since the children went back and forth between the homes, each party had to have a home that was appropriate to accommodate them. The children are now both in university. Therefore, Ms. Luckman can now sell that home, ending any economic disadvantage relating to it. Mr. Cole could as well. However, his farm and business are tied to the property on which the home is located. Ms. Luckman has a home of greater value than she would otherwise have, and, she has it for sale at a significantly higher price than she paid for it. The successful sale of the home would compensate her for any economic disadvantage she experienced as a result of having to purchase a larger home.

[263] Otherwise, in my view, neither party has suffered "any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage". Neither party was required to forego any income earning opportunity, nor pay any child care in order to be able to earn income, after separation. In my view, any amounts paid towards the children's maintenance, education, and extracurricular activities, are part of the parents' obligation to support their children.

[264] Ms. Luckman has charged the children some rent when they were living with her. Mr. Cole has never charged them anything, not even anything to maintain their horses. However, he has had the benefit of their help on the farm. The value of that help, would at least equal the rent charged by Ms. Luckman.

[265] Ms. Luckman suggests that she lives a modest lifestyle, and has had assistance from her parents, but is still accumulating debt at a rate of \$5000 per year, while Mr. Cole's reported deficit is much less than that. She adds that she has not seen evidence to support Mr. Cole's contention that he is accruing debt to cover the deficit he reports. Therefore she questions whether he actually has a deficit. She indicates that, unless she receives support from Mr. Cole, she will not be able to keep her home.

[266] Mr. Cole, in his oral evidence, confirmed the truth and accuracy of his May 2011 statements of income and expenses, including that he had a deficit. He indicated that his common-law spouse, Susan Judge, helps him with the deficit. If he is short on money to pay household bills, she covers him.

[267] Ms. Luckman acknowledged that she did have a horse, Zephyr, which she started boarding at the Greenwood Saddle Club on February 5, 2011. She explained that her parents had purchased the horse for her as a colt. Her prior horse, Pontiac, was euthanized on February 1, 2011. Zephyr was not doing well on his own, and he needed training, so, for those reasons, she brought him to the

Saddle Club. She only spent \$120 in total for training. She paid \$275 per month for board.

[268] Ms. Luckman's evidence was that the only monies she received from people living with her for rent, board or accommodation were:. \$350 she received from her daughter Codi; \$400 she received from her son Zack; and \$250 she received from Greg and Sara Williams when they stayed with her for two weeks. She indicated that she did not receive any money from Edward Reagh, even though he lived with her from the last day of November or some time in December of 2008, until April of 2009. He assisted her only by preparing meals and effecting repairs and property improvements.

[269] She was questioned about trips she had taken. Her father paid for her, Zack and Codi to go to her brother's wedding in Mexico in February 2008. Her trip to New York, in October of 2008, and her trip to Jamaica, in March of 2009, were paid for by Mr. Reagh. She was his guest. The two other trips were to Fredericton, and involved minimal expense.

[270] Ms. Luckman indicated that she was a financial services representative with the Valley Credit Union and was in training to become a loans officer. She has been working with that organization since before the date of separation. I infer that her employment is now relatively secure.

[271] The marriage exceeded 25 years duration. Thus, if entitlement to spousal support is established, it should be on an indefinite basis, according to the Spousal Support Advisory Guidelines.

[272] Irrespective of the reason why Ms. Luckman chose not to pursue a career drafting, the end result was that her role during the marriage was primarily one where she worked in the home, caring for the children and the household. Any income earning role she undertook during her intermittent times in the workforce was secondary to her primary role in the home. As indicated, her income earning capacity would be greater now if she had pursued a career in drafting. In addition, the fact that she has not remained consistently in the workforce throughout the marriage has limited her ability to: advance; gain seniority; improve job security; and, accumulate a pension and other benefits associated with long-term employment. Therefore, she has suffered economic disadvantage from the marriage.

[273] In contrast, Mr. Cole has been able to continue his work as a bus driver, and pursue his farming and farrier businesses, throughout the marriage. Ms. Luckman taking care of the household has made it easier for him to do those things. He has gained the economic advantages associated with being able to do them.

[274] At the breakdown of the marriage, Ms. Luckman lost the benefit of Mr. Cole's income, which she had become dependent on during the marriage. That

created a hardship which Mr. Cole initially remedied by paying most of the expenses associated with the matrimonial home.

[275] When one considers the pre-separation income of Mr. Cole which Ms. Luckman benefited from, which will be discussed in greater detail later, and Ms. Luckman's current income of approximately \$30,000 per year, it is reasonable to conclude that her current income is sufficient to provide her a reasonable standard of living. As such the objective of promoting economic self-sufficiency has been satisfied.

[276] However, considering the economic disadvantages suffered by Ms. Luckman as a result her role during the marriage, and the economic advantages gained by Mr. Cole, Ms. Luckman has shown an entitlement to spousal support, subject to Mr. Cole's ability to pay. If Mr. Cole earned a materially higher income than Ms. Luckman, he would have an ability and an obligation to pay spousal support.

[277] This conclusion is supported by *Ferla v. Ferla*, 2007 NSSC 30. In that case, the Court found that the wife had established entitlement to compensatory support where she raised the children and stayed at home during most of the 31 year relationship, even though the post-separation income of the parties was roughly equal. However, the Court concluded that the husband was unable to pay support. His yearly income was \$22,200. Her yearly income was \$20,200.

Ms. Luckman's Entitlement to Retroactive Spousal Support

[278] Mr. Cole's income tax return showed a bus driver income of: \$17,395.21 for 2004; \$16,207.73 for 2005; \$13,304.78 2006; and, \$19,612.69 for 2007.

[279] The returns showed farrier business income of: \$5224.58 for 2004; \$6981.11 for 2005; \$6077.64 for 2006; and, \$948.69 for 2007.

[280] They showed farming losses of: \$5257.65 for 2004; \$8305.77 for 2005; \$5885.43 for 2006; and, of \$6,625.71 for 2007.

[281] Mr. Cole's net line 150 incomes are fairly consistent from 2004 to 2007. As indicated, I am not revisiting Justice Duncan's finding that Mr. Cole's line 150 income for 2007, in the amount of \$14,319.86, is a fair reflection of his net income for 2007.

[282] Ms. Luckman's tax returns showed a total income of: \$7526.34 for 2004; \$10,288.80 for 2005; \$11,609.32 for 2006. Her 2007 income tax return was not on file. However, I am not revisiting, and I accept, Justice Duncan's finding that her 2007 income was \$16,550, which is consistent with the pattern of income showing a continual rise since 2004.

[283] Thus, the incomes of Mr. Cole and Ms. Luckman were roughly equal in 2007, with Mr. Cole having the lower income; and, it would be inequitable to order retroactive spousal support for that period.

[284] I accept Mr. Cole's evidence that, from time of separation, until Ms.

Luckman was paid for her share of the matrimonial home, he continued to pay the

mortgage in the amount of \$543 per month, plus taxes of \$57 per month and

insurance on the property, and half of all household bills. In addition he provided

her with money for groceries, while she continued to live rent free in the

matrimonial home. Ms. Luckman's affidavit evidence was that she paid the

household bills during that period of time. Neither she, nor Mr. Cole, specified

what they meant by "household bills". I took it as a reference to expenses related to

utilities and heat. As indicated, I accept that Mr. Cole paid one half of those.

Therefore, even if Ms. Luckman was entitled to retroactive spousal support for that

period of time, in my view Mr. Cole has already fulfilled more than his support

obligation by paying a large part of the living expenses for Ms. Luckman.

[285] Any economic hardship Ms. Luckman may have suffered, as a result of the

breakdown of the marriage, was overcome and remedied by the voluntary expense

payments Mr. Cole made. Further, comparing Ms. Luckman's postseparation

income with the portion of Mr. Cole's pre-separation income that she would have

benefited from, and with Mr. Cole's post-separation income, her post-separation

income was sufficient to provide her a reasonable standard of living, thus the goal

of self-sufficiency was already achieved, during that period.

[286] Further, even though the children were going back and forth between the homes of each parent as they wished, Ms. Luckman was receiving the entire child tax benefit. Thus, she had the benefit of that additional income, and Mr. Cole did not.

[287] However, the significant economic disadvantage suffered by Ms. Luckman as a result of the role she adopted during the marriage, has not been compensated. Thus, Ms. Luckman has an entitlement to retroactive spousal support; but, that entitlement is subject to Mr. Cole's ability to pay spousal support from 2008 to the present.

[288] As will be discussed in further detail, under the heading “Ability to Pay”, Mr. Cole had no ability to pay spousal support during that period. Therefore, in my view, there is no need for any retroactive spousal support order to equitably divide the economic consequences of the marriage and its breakdown.

Mr. Coles’ Entitlement

[289] In *Farrar v. Farrar*, [2003] O.J. No. 181 (C.A.) the Court found that a claimant spouse showing he or she earned significantly less than the other spouse post-separation was not enough to establish entitlement, when the claimant spouse suffered no economic disadvantage from the marriage and had earned more than

the other spouse through most of the marriage. In such a situation, no pattern of economic dependency develops during the relationship.

[290] In my view, Mr. Cole suffered no economic disadvantage from the marriage. He was the higher income earner throughout all of the marriage, except during the time that he trained and apprenticed to become a farrier. He did not, at any point, after finishing his apprenticeship, develop an economic dependency on Ms. Luckman. As such, he has not shown an entitlement to spousal support.

[291] Mr. Gillis suggested that losing the benefit of having Ms. Luckman assist him with his farming business would be an economic disadvantage arising from the breakdown of the marriage which would entitle him to spousal support, where Ms. Luckman has a higher post-separation income than he does. However, the objective in s. 15.2(6)(c) of the *Divorce Act* seeks to relieve economic "hardship ... arising from the breakdown of the marriage". There was no evidence that Mr. Cole suffered such economic hardship from the breakdown of the marriage. Not long after the breakdown of the marriage, he commenced living common-law with Ms. Judge, who both helps him on the farm and contributes financially. Therefore, the breakdown of the marriage has put him in at least as good an economic situation as he had been during the marriage.

[292] In my view, Mr. Cole is not entitled to spousal support from Ms. Luckman, either ongoing or retroactive.

(d) Ability to Pay

[293] Justice Duncan, in his decision, noted that, in 2007, Mr. Cole showed a bus driver income of \$19,612.69. He pointed out that if Mr. Cole did not take time off from bus driving to attend to his farming activities, he could earn more as a bus driver.

[294] According to his tax return information, Mr. Cole earned, from bus driving : \$17,304.53 for 2008; \$18,569.88 for 2009; and, \$18,994.65 for 2010. That is an average of \$18,289.68 per year. Those amounts were earned roughly from early September to early April, a period of seven months, amounting to approximately \$2613 per month worked. If he did not give up bus driving work to look after farm activities, he could work about another 2 1/2 months, and earn approximately \$6500 more. Therefore, if he gave up the farm, as showing no real prospect of becoming profitable, he could earn approximately \$25,000 per year from bus driving.

[295] His income tax returns show a net farrier business income of: \$5103.50 for 2008; \$4624.45 for 2009; and, \$5018.19 for 2010. That averages out to \$4915.38 per year.

[296] With his bus driver income and his farrier income, free from the burden of farming losses, Mr. Cole could be expected to earn approximately \$30,000 per year.

[297] According to her tax return information, Ms. Luckman earned line 150 income of: \$25,096.61 for 2008; \$37,534.03 for 2009; and, \$29,466.55, for 2010. That is an average of \$30,699.06 per year.

[298] Even taking the best reasonably possible income earning scenario for Mr. Cole, he is still earning less than Ms. Luckman. Therefore, in my view, he does not have the ability to pay her spousal support, and it would be unjust order him to do so.

[299] Mr. Cole does live common-law with Ms. Judge. However, according to her 2010 income tax return, she only has a total yearly income of \$21,817.22. As such, her ability to share expenses is, to some extent, limited. In my view, that sharing, would not justify a spousal support award even if one were to impute a \$30,000 per year income to Mr. Cole.

[300] Further, because of the farming losses, even though they are restricted to an amount less than the actual farming losses, Mr. Cole's annual income is much less than \$30,000.

[301] Since Mr. Cole's farming activities are not his chief source of income, he is restricted to claiming a yearly farming loss of up to \$8750. According to his

income tax returns, he claimed restricted farming losses for 2008, 2009 and 2010. That leaves him with an annual income of approximately \$21,250. That is significantly less than Ms. Luckman's income, and does not include the full farming losses.

(e) **Spousal Support Determination**

[302] Courts have taken different approaches in situations, such as the case at hand, where entitlement to spousal support is found to exist, but there is no ability to pay. In *Ferla v. Ferla*, 2007 NSSC 30, the husband was ordered to pay \$1 per month pending resolution of the matrimonial property issues. In *Shurson v Shurson*, 2011 NSSC 163, the Court ordered \$1 per month spousal support on the basis that the obligation to pay compensatory support continued indefinitely, given the long term marriage, and the husband was going to be employed in the future. In *MacDonald v. MacDonald*, 2007 NSSC 174, the Court reserved, to the wife, the right to apply for spousal support should there be a material change in circumstances. In each of those cases, the incomes of the respective parties, at time of trial, were roughly equal.

[303] In the case at hand, Mr. Cole's income is consistent with his pattern of income since at least 2004. Therefore, it is unlikely to significantly increase in the

near future. In contrast, Ms. Luckman's income has significantly increased since separation. She is now training for a new position. Her future with the Valley Credit Union appears promising. She is likely to continue to earn a higher income than Mr. Cole. That is a testament to her intelligence, ability, determination and resilience. She is to be commended for her success in achieving self-sufficiency. However, in the unlikely event that Mr. Cole manages to earn a materially higher income than her, she may be in a position to reapply for spousal support.

[304] In the circumstances of this case, the most reasonable approach is to order that there be no spousal support paid, but that Ms. Luckman continue to be able to apply for spousal support in the event of a material change in circumstances.

6. LIFE INSURANCE POLICY

[305] Mr. Cole testified that he had no idea of the value of the insurance policy on his life. He indicated it was for the children when he died. He believed that it went to Susan Judge to distribute in accordance with the directions in his will. His

Statement of Property, sworn May 15, 2007, shows Susan Savoy (a.k.a. Judge) as the beneficiary, and the cash surrender value as being \$5058.70.

[306] Ms. Luckman's Statement of Property, sworn September 4, 2007, shows a life insurance policy with Zachary and Codi as the beneficiaries, and a cash surrender value of \$3193.

[307] Ms. Luckman submitted that: the Court should take into consideration the "money lost for herself and her children from the removal of their names as beneficiaries" of the whole life insurance policy on Mr. Cole; and, order that the children be named the sole and joint beneficiaries of the policy.

[308] In my view, the life insurance policies have been adequately dealt with by factoring their cash surrender values in the division of assets equation. There was no request for an order for child support in this motion; and, neither party pays child support. Therefore, there is no need to direct the naming of the beneficiaries of Mr. Cole's life insurance policy to ensure continued support for the children. Further, I accept Mr. Cole's evidence that the proceeds of his life insurance policy are for the children when he dies.

D. CONCLUSION

[309] Based on the foregoing, I conclude the following:

1. Each party shall retain the matrimonial and business assets in his or her possession;
2. Mr. Cole shall be solely responsible for the matrimonial and business debts;
3. Ms. Luckman shall pay Mr. Cole \$2,546; and,
4. There shall be no spousal support payable by either party.

E. COSTS

[310] Mr. Gillis, on behalf of Mr. Cole, has requested that a reasonable amount of costs be awarded to him because Ms. Luckman pursued "a claim which is poorly focused and fundamentally flawed". Ms. Luckman has not made submissions on costs. If she wishes to make such submissions, I ask her to submit them in writing to the Court. If not, I ask her to advise the Court that she will not be making such submissions. I also ask Mr. Gillis, now that he is aware of the ultimate result in the matter, to make further written submissions on costs, based on the outcome, if he chooses to do so; and, if not, to advise the Court that he will not be making such further submissions.

PIERRE L. MUISE, J