FSUPREME COURT OF NOVA SCOTIA
Citation: *Pothier v Pothier*, 2017 NSSC 230

Date: 2017-08-24
Docket: No. 1204-005893
Registry: Kentville

Between:

John Thomas Pothier

Petitioner

v.

Suzanne Elizabeth Pothier

Respondent

Judge:	The Honourable Justice Gregory M. Warner
Heard:	June 20 to 24 and 30, 2016, in Kentville, Nova Scotia
Final Written Submissions:	July 22, 2016
Counsel:	Michael MacKenzie and Zachary Chisholm, for the petitioner
	Robyn Elliott Q.C., for the respondent

By the Court:

Introduction

[1] John and Suzanne Pothier were married in July 1981, when he was 25 and she was 24. They had been in a relationship since they were in high school.

[2] They separated on September 28, 2009.

[3] Theirs was a traditional marriage.

[4] John Pothier always worked in the Pothier Motors car dealership. It was owned by his parents from 1957. He became its owner in 1986 - at a time when the dealership was in financial distress. John Pothier worked long hours to build Pothier Motors into a substantial car dealership.

[5] Suzanne Pothier was a stay-at-home mother to their two children. Both children are now adults.

[6] Since 2009, their son, Chad, has been general manager of the car dealership. Their daughter, Brittany, has worked off and on as sales co-ordinator and service co-ordinator.

[7] The issues in this divorce are property division - the classification and division of assets, including Ms. Pothier's Section 18 of the *Matrimonial Property Act* ("*MPA*"), a claim for compensation of her contribution to the business, and Section 13 of the *MPA*, a claim for unequal division of matrimonial assets, and spousal support.

[8] The specific issues respecting property division are:

Whether some of the assets of Pothier Motors Limited ("PM"), a Chrysler Dodge Jeep new car dealership, and whether all or part of Pothier Real Estate Development Limited ("PRED"), which owns the real estate from which the dealership operates (which businesses are owned by a family trust controlled by John Pothier) are matrimonial assets.

The value of PM and PRED. (Opinion evidence was received from two business valuators.)

The value of the assets that are subject to division.

Whether Suzanne Pothier contributed to the businesses and, if so, the value of that contribution pursuant to s. 18 of the *MPA.*

Whether the matrimonial assets should be divided unequally pursuant to s. 13 of the *MPA.*

And respecting Ms. Pothier's spousal support claim:

The amount of income from the businesses that should be imputed to John Pothier for the purposes of calculating spousal support. (The court heard opinion evidence from the two business valuators.)

The amount of income that should be imputed to Suzanne Pothier from her share of the division of assets and otherwise.

The basis of entitlement to spousal support and calculation of quantum and duration of prospective spousal support.

Calculation of the retroactive spousal support claim, less credits.

[9] It appears that John Pothier owns the preferred shares in both companies, and that the family trust owns 100% of the common shares.

[10] The beneficiaries of the family trust are the parties, their children and their children's spouses. Both parties appear to agree that John Pothier is one of the trustees and controls the distribution of dividends by the family trust.

[11] Neither party addressed the definitions and treatment by CRA of the determination of the interests of beneficiaries of the family trust's assets and income, nor the determination of fair market value. (See: *Sagl v Sagl*, 1997 CarswellOnt 2144, and *Income Tax and Family Law Handbook*, (Toronto: LexisNexis, 1988), loose-leaf, c.15, para. 66.7.) Therefore, for purposes of this decision, I treat the family trust assets as assets of Mr. Pothier, and proceed on the basis that he is entitled to all the income from the trust's assets.

Matrimonial Property Act **regime**

[12] The May 2016 Discussion Paper of the Law Reform Commission of Nova Scotia, "Division of Family Property", proposes changes to the current Nova

Scotia family property regime. It starts its analysis with a useful description of the existing regime in Nova Scotia, as well as the models and various combinations and variations in the models and schemes in the remaining provinces in Canada and their philosophical foundation.

[13] Generally, the models fall into two categories: the ‘community of property’ regime and the ‘deferred sharing’ regime.

[14] Under the ‘community of property’ regime, each spouse is automatically deemed to have an interest in the property of the other spouse upon marriage.

[15] In contrast, the ‘deferred sharing’ regime is a spectrum extending from what is called the universal approach or integrated model to the economic partnership model.

[16] In the ‘deferred sharing’ regime, upon marriage, spouses continue to hold their property separately until an order for division is made. This is the existing scheme in Nova Scotia and most Canadian jurisdictions.

[17] At one end of this spectrum is the ‘integrated or universal’ model. It looks at the institution of marriage as giving rise to a level of personal and economic interdependence such that all property brought into or acquired during the marriage ought to be presumptively shared upon separation, subject to finite limited exclusions. Nova Scotia’s *MPA* falls close to this end of the spectrum.

[18] In the ‘economic partnership’ model of property division, the spouses share only the property, or the value of the deemed matrimonial property, acquired during the marriage. All other property is presumptively excluded; however, the increased or decreased value of the excluded or non-matrimonial assets may be shared at separation.

[19] In the ‘economic partnership’ regime, pre-marital property is usually excluded as non-matrimonial property. Property tends to be characterized in terms of when it was acquired, rather than how it was used. Most other Canadian jurisdictions began as ‘deferred sharing’ regimes but have moved to the ‘economic partnership’ end of the spectrum. Nova Scotia has not.

[20] Under the *MPA*, upon application, a couple’s **matrimonial** assets are presumptively divided 50-50. The presumption of equal division applies to matrimonial assets that are in the name of both or either spouse. Matrimonial assets

may only be unequally divided if a court is persuaded that an equal division would be unfair or unconscionable based on the factors enumerated in s. 13.

[21] Under the *MPA*, the matrimonial home, as well as all the real and personal property acquired by either or both spouses before or during their marriage, is presumptively divided. Excluded from division are business assets, reasonable personal effects, legal damage awards, insurance money paid to a spouse, property which the spouses have agreed to exclude from the division, gifts, inheritances, trusts or settlements received from a third party "except to the extent to which they are used for the benefit of both spouses or their children", and property acquired by a spouse after separation.

[22] The *MPA* has not been amended since its introduction in 1980. The writers of the Discussion Paper note that while Nova Scotia is one of the few provinces that includes pre-marital assets in the presumptive equal division of matrimonial assets on separation, it is also one of the few provinces that currently excludes business assets from divisible matrimonial assets. Only by s. 18 of the *Nova Scotia MPA*, where the non-titled spouse can show a tangible contribution of work, money or money's worth to the acquisition or operation of a business asset, may a court award money or a share in the business asset commensurate with the contribution.

[23] Ms. Pothier notes that Nova Scotia, New Brunswick and Newfoundland are the only jurisdictions to continue to exempt business assets from presumptive equal division. She submits that this scenario is unfair; therefore, this court should place a high burden of proof on Mr. Pothier to establish that PM and PRED and/or the assets held by those corporations are exempt from division as business assets.

[24] I agree with the following synopsis in Ms. Pothier's June 12, 2016, pre-trial brief:

> Pursuant to case law, assets which are denied the presumptive business asset exemption and deemed matrimonial, include, but are not limited to:
>
> assets that are not generating an income or profit in an entrepreneurial sense;
>
> savings, or investment not working in an entrepreneurial manner;
>
> assets used for family purposes;
>
> assets acquired by diversion of family monies;

> assets (i.e. land) held in the hope of gain;
>
> assets that are not "working assets";
>
> assets not working in a commercial, business or investment way for the production of income; and,
>
> assets being held or built up for retirement.
>
> …

In addition, in *L(JW) v M(CB)*, 2008 NSSC 215. Justice Beryl MacDonald stated:

> While intention is to be explored, it is essential to consider whether an asset is working or being worked in an entrepreneurial way. Key to this analysis is an examination of two important indicators of entrepreneurial activity - risk and management activity. There is a distinction between assets that are static, those for which ownership involves little financial risk and insignificant management, from those that are financially risky to own and require attention and management to ensure profitability. The extent of owner involvement must be analyzed carefully because some entrepreneurial activities do not require constant management activity.

Classification of Business Assets

[25] Mr. Pothier submits that PM and PRED, as well as all the assets held in these companies, together with his investment with a partner in a rental property on Wentworth Road, are business assets and therefore exempt from division.

[26] Ms. Pothier acknowledges that PM is a business asset (except for some of its assets). Otherwise, she contests Mr. Pothier's claim and puts him to strict proof on a balance of probabilities that any claimed business assets are exempt.

[27] In particular, she submits:

PRED is a real estate holding company, which "brings [its] status as a business asset seriously into question, as there is not much risk or management activity required with respect to the rental of the property by PRED to PM".

Alternatively, the surplus land held by PRED for development is not a working asset and not exempt.

In the further alternative, stock investments held by PRED, which had a market value as of December 31, 2009, of $199,143.00 are "akin to personal retirement savings" and not exempt business assets.

Mr. Pothier's half-interest in a rental property on Wentworth Road is not held for income, but for gain in the future.

Furthermore, several assets held in PM are not business assets. they include:

i. a 2008 Chaparral boat, purchased in 2008, moored at the matrimonial home at Marvin's Island Chester Basin, which was used for recreation and was not listed for sale until after the separation;

ii. Mr. Pothier's Harley Davidson motor cycle as of separation;

iii. Trailers, buggies and snowmobiles used for business and non-business purposes; and,

iv. Vehicles used personally by Mr. and Ms. Pothier.

A PRED

[28] The onus is on the respondent to prove that PRED is a business asset. It is clear that the business affairs of PRED are intricately tied to PM. Mr. Pothier controls both PM and PRED through the family trust. Mr. Pothier and, since 2009, the parties' son Chad Pothier, are the operating minds of both PM and PRED.

[29] The only source of income for PRED is rent paid by PM, which rent is adjusted to reflect the financial circumstances of PM. PRED owns the realty from which PM operates. It builds the facilities for PM as well as finances upgrades and expansions based on PM's needs.

[30] The lands that PRED acquired, that are not presently leased by PM, are adjacent or close to the dealership, and acquired for the benefit of and future development of the dealership.

[31] PRED generates significant current income from its dealing with PM.

[32] The financial statements for the last three years before separation - 2007, 2008 and 2009, show payments of dividends totalling $170,000.00 from PRED's income.

[33] The value of the dealership (PM) is dependent on the ownership by PRED of the realty; the value of the realty owned by PRED depends on the success of the dealership.

[34] The sole source of funding for PRED and its only business relationship is with PM. Matrimonial assets were not the source of any of the funding, income or worth of PRED.

[35] The matrix of this case is the opposite of that in *Hebb v Hebb*, 1991 CarswellNS 49 (NSCA) ("*Hebb*"). In that case a surveyor, through a holding company, constructed a professional building, financed the professional building through mortgages on matrimonial assets, and operated his survey business as one of the tenants in the professional building. The trial judge in that case found that the building was intended to be a retirement fund.

[36] In this case, PRED generates immediate income that was before separation and continues to be paid out on an annual basis. I accept the evidence that PRED and PM are interdependent. They are managed as one, and face the same financial risks. The vacant lands close to the dealership were held for the benefit of the expansion of the dealership. Both expert witnesses treated them as one.

[37] PRED generated before, at the time of, and since separation income in an entrepreneurial sense. Its success is dependant on the success of PM. In that sense, it is as much at risk as PM. PRED is an exempt business asset as defined in s. 2(a) of the *MPA*.

B Vacant Lots

[38] The evidence is that the vacant lands, not rented to PM, were adjacent or close to PM's dealership and were acquired for the future expansions of PM. The evidence established that the planned upgrade and expansion of the dealership's facilities as well as the addition of a related franchise is underway.

[39] The fact that the lands were recorded on the books of PRED at cost does not detract from the intention of the operating minds of PM and PRED with respect to the use of these lands. The vacant lands owned by PRED have a business purpose related to the business of the dealership operated by PM. They are business assets and not matrimonial assets.

C Investment Account

[40] The financial statements of PRED, produced for the years 2007 to 2015 inclusive, show investments in six public corporations. They were accounted from 2007 to 2011 using the cost method (ACB) and were described in the notes to the financial statements as investments "of a long-term nature".

[41] Beginning in 2011, they were recorded at their fair market value. The only change in the investment portfolio was the addition of 49 Nortel shares, recorded at the fair market value of $1.00 in 2011, two years after the separation.

[42] The business valuations of PRED, conducted by Ms. Robar for the petitioner and Mr. Wright for the respondent, calculated the fair market value of the six holdings, as of December 31, 2009, as $199,143.00, and their ACB as $81,303.00.

[43] It is apparent from the Schedules to the financial statements that three of the six holdings had no values whatsoever and that, of the three shareholdings with value - BCE, Bell Aliant and General Life Insurance Company Limited, only General Life Insurance Company Limited had increased in value (its FMV was $185,000.00 as of December 31, 2009).

[44] The fair market value of these same passive investments declined substantially, and, as of December 31, 2015, was $33,857.00.

[45] If PRED's investment account was simply a method to hold profits earned for a short term, the investment account may have been considered a business asset. However, the purpose in the financial statement was stated as "investments of a long-term nature". In fact, the holdings did not change (except for the addition of 49 Nortel shares at a value of $1.00 in 2011) from the year 2007 to the year 2015.

[46] I find that PRED's investment account was a passive investment - not a business asset in an active or entrepreneurial sense. For that reason, its net value outside of PRED is a matrimonial asset, and its value outside the company is equally divisible between the parties.

[47] Applying the analysis in *Simmons v Simmons*, 2001 CarswellNS 252 ("*Simmons*"), paras. 16 - 20, to this passive matrimonial asset, I must determine the appropriate date of valuation.

[48] The most appropriate date of valuation is the date of division, not the date of separation *(Simmons*, para. 20). The best evidence of the current value of the investment account, which declined every year since 1999, and which may presently be worth less than shown on the most recent financial statement of December 31, 2015, is the appropriate before-tax value of the PRED investment account. The most recent value in the investment account was $33,857.00.

[49] Since the value of the investment account as of December 31, 2015, is less than the ACB of the shares, there should be no tax cost to PRED. Ms. Pothier's interest in that investment account is $16,929.00.

D Rental Property

[50] The court heard evidence that 222 Wentworth Road was acquired by Mr. Pothier in his personal name with a partner in 2005. His share is fifty percent. This asset was not identified by Mr. Pothier in his sworn Statements of Property. There was no evidence as to the source of the funds used to acquire Wentworth Road.

[51] The Statements of Real Estate Rentals in Mr. Pothier's income tax returns contain the best evidence for this analysis. The gross annual income of the property was about $7,140.00. The gross expenses were fairly consistent except for 'maintenance and repairs'. When the latter were low (five of the nine years), Mr. Pothier's 50% share generated taxable income of about $1,300.00. In the four other years, his share of the loss was about $1,700.00. The tax returns show annual interest charges of about $1,400.00, so I infer that the income was applied to a loan (or mortgage) principal. Said differently, in nine years for which records are available, the property produced no free cash flow to Mr. Pothier.

[52] To be a business asset it is not required that the asset produce a profit every year; however, the fact that his income tax returns for the last nine years shows no net profit or cash flow suggests that the asset was not acquired for the purpose of generating an immediate gain, income or profit in an entrepreneurial sense, but rather as an investment held for and in the hope of a future gain. There was no evidence that Mr. Pothier's investment in this rental property required a degree of active management greater than any other types of retirement savings.

[53] Mr. Pothier has provided no evidence of the fair market value of his interest in this asset. Ms. Pothier requests an order that the property be appraised and that she be credited with one-half the net value of Mr. Pothier's fifty percent interest,

(less the usual disposition costs and any liens or encumbrances on the property). I agree.

E.I 2008 Chaparral Boat

[54] The Chaparral boat was purchased in March 2008 for US$81,200.00 (at that time approximately par with the Canadian dollar). The boat apparently was purchased in the name of PM. In June 2008, it was delivered to and moored at the matrimonial home at Marvin's Island, Chester Basin, where, for the summer seasons of 2008 and 2009 it was regularly used by the family recreationally, as well as to entertain business associates and customers in connection with their high-end residential water-front home.

[55] After the separation, the boat was listed by PM for sale for $79,995.00.

[56] Ms. Pothier claims this was a family asset acquired in the name of the company and not part of the business of the dealership. She claims that the fact that it was listed after separation for sale does not mean that as of the date of separation the asset should not be properly be classified as matrimonial.

[57] In the court's view, it does not matter if the vessel was listed for sale after the separation. I accept the evidence that PM would take trade-ins of whatever assets a customer may own in order to effect the sale of a vehicle. This boat was not a trade in. PM was not in the business of selling new boats as a dealer for Chaparral or any other recreation boat manufacturer.

[58] It is trite law that the criteria for what is a business asset for the purposes of the *Income Tax Act* is not the same criteria for an exempt-from-division business asset under Nova Scotia's *MPA*. It is irrelevant whether CRA allowed PM to record the Chaparral as inventory. The parties' actions speak louder than words in the determination of intention.

[59] The Chaparral was purchased in March 2008 for $81,200.00. It was used for two summers. The date of valuation of this depreciating asset is the date of separation. The fact that it was listed for $79,995.00 is only one indication of its fair market value. As a matter of common sense, assets are listed for more than the hoped-for sale price. I infer from all the evidence that its value for purposes of this proceeding at separation was $72,000.00.

E.II Harley Davidson Motorcycle

[60] Through PM, Mr. Pothier purchased Harley-Davidson motorcycles, which he used personally. Road trips were taken across North America on these motorcycles by Mr. Pothier. He regularly vacationed in Florida. For a few years, around the time of the separation, the motorcycle that he used was stored in Florida over the winter.

[61] Ms. Pothier submits that the motorcycles possessed by Mr. Pothier are matrimonial assets in all respects but legal ownership. She seeks that the Harley Davidson motorcycle purchased in 2009 for $28,000.00, used by Mr. Pothier for recreational purposes both before and after separation, be found to be a matrimonial asset.

[62] As noted above, it does not matter if the motorcycle was listed for sale after the separation. I accept the evidence that PM would take trade-ins of whatever assets were necessary, including motorcycles, to effect the sale of a vehicle. This was not a trade in. PM was not in the business of selling new motorcycles as a dealer for Harley-Davidson.

[63] As noted above, the criteria for what is a business asset for the purposes of the *Income Tax Act* is not the same criteria under Nova Scotia's *MPA* for an exempt from division business asset. It is irrelevant whether CRA allowed PM to record the motorcycle as inventory. Mr. Pothier's actions speak louder than words in the determination of intention.

[64] Based on the totality of the evidence, I conclude that Mr. Pothier was in the habit of purchasing motorcycles through PM, but they were for his personal use. Whether *CRA* included the use of the motorcycle in its 'standby' charge, which I treat differently respecting use of vehicles for which PM was a *bona fide* dealer, is not determinative of whether this was a matrimonial asset. Intent is determinative.

[65] The motorcycle, owned by PM as of the date of separation, which was for Mr. Pothier's personal use, is a matrimonial asset. Absent better evidence, I estimate the value of the motorcycle, purchased new at $28,000.00, to be worth 90% of that sum as the date of separation or $22,680.00.

E.III Trailers, Buggies and Snowmobiles

[66] Other than the travel trailer parked on the Arthur Hatt Road lot, I am satisfied that the use or benefit occasionally enjoyed by the family of other equipment of PM, such as trailers to haul vehicles and equipment, buggies or

snowmobiles did not convert their status from business assets to matrimonial assets.

[67] Evidence was produced to show that Mr. Pothier occasionally parked a travel trailer on the Arthur Hatt lot, along side a trailer owned by his parents. There was no evidence before the court that PM sold trailers, other than trailers it may have taken in on trade for a vehicle. It is obvious from the photographs that the trailer was primarily for his personal use, even if it may have been sold by the dealership eventually.

[68] Mr. Pothier testified that the trailer cost approximately $18,000.00. It is a depreciating asset. The date for valuation is the date of separation. No evidence of its value at separation was tendered. Somewhat arbitrarily, but based upon the photographs and evidence, I fix a value of $14,400.00 for the travel trailer.

E.IV Vehicles used by the Pothiers personally

[69] The court infers that it is likely that most owners of vehicle dealerships have the use of dealership vehicles in their inventory. I accept Mr. Pothier's evidence that, for that reason, CRA charges the dealer for this benefit. It appears that CRA now limits the value of the vehicle that the owner may have the personal use of, to $28,000.00.

[70] In my view, this does not make any motor vehicle used by Ms. Pothier or Mr. Pothier a matrimonial asset. Rather, it is a benefit because of the ownership of PM that is reflected in the income available to pay spousal support. Effectively, the court includes the value of this benefit as income. The value of the vehicle used by Ms. Pothier was included as income to Mr. Pothier in both experts' reports. I therefore treat the use of vehicles as income in the same manner as both experts.

Contribution to business asset by spouse (s. 18, *MPA*)

[71] Section 18 reads:

> **Contribution to business asset by spouse**
>
> **18** 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. R.S., c. 275, s. 18.

[72] The evidence of Ms. Pothier was generally that Mr. Pothier took over an insolvent or almost insolvent dealership from his father, devoting all his life to building up the business while she was solely responsible for the home front; that is, raising their children and providing his home base. She effectively says that she stood behind his efforts as they were, in her view, partners.

[73] There was no evidence that any matrimonial money was put into the businesses or that the parties' lifestyle suffered by the diversion of funds generated by the business that would otherwise have been available for family purposes. On the contrary, their lifestyle and personal wealth benefitted substantially from the success of the businesses. At separation, their combined personal worth exceeded the value of PM and PRED.

[74] The Section 18 analysis is confined to Ms. Pothier's actual tangible economic contribution in the form of work or money's worth to the businesses.

[75] For this Section 18 analysis, Ms. Pothier states that she made the following specific contributions to PM and PRED:

- She hosted corporate guests and social events, including staff parties, at their Marvin's Island, Chester Basin, home.

- She sometimes booked travel for PM employees.

- During one of PM's showroom upgrades, the company fired its consultant and she acted as an interior designer for the new showroom.

- She assisted with labour on occasions when they purchased and sold residences and real estate.

[76] It was not clear from Ms. Pothier's evidence which of their homes she had worked on; also, it is not clear whether the homes were the parties' personal residences or were owned by PM or PRED.

[77] Mr. Pothier testified that the social events hosted by them at their Marvin's Island home included their friends and not just business associates. It appears that their friends were also their customers and associates. He also testified that the functions were catered and PM's staff being assigned to assist during and after the events.

[78] With respect to the showroom renovation, he stated that she did assist with picking paint colour but otherwise suggests her involvement was minimal and less than what her evidence may suggest.

[79] The onus is on Ms. Pothier to establish her contribution by work or moneys worth to the companies, including the value of that work.

[80] Section 18 expressly states that her contributions must be determined and assessed "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." This point is made by Hamilton, J.A., in *Ryan v Ryan*, 2010 NSCA 2, at paras. 12 and 15.

[81] I exclude from consideration actions that one would expect from one's marital partner, made without an expectation of compensation other than the expectation to share in the benefits generated by those businesses.

[82] Since *Harwood v Thomas*, 1981 CarswellNS57 (NSCA) ("*Harwood*"), courts have granted relief for tangible contributions by a spouse to the exempt business assets of the other spouse.

[83] In an early decision, *Sproule v Sproule*, 1986 CarswellNS 59 (NSCA) ("*Sproule*"), the trial court found that over a lengthy period the wife kept all the business records for the husband's fishing business, did the banking and payroll, as well as helped with the maintenance of the vessel. The salary paid to her was not proportionate to her work. The trial judge awarded, pursuant to s. 18, $20,000.00 compensation respecting a business valued at $284,000.00. The Court of Appeal would have increased the award, but found that the s. 13 analysis made up for any under valuation of the s. 18 contribution.

[84] More recently, in *Hurst v. Gill*, 2011 NSCA 100 ("*Hurst*"), at paras. 25 to 28, the Court of Appeal upheld the trial judge's finding that the husband's claim for an interest in the wife's physiotherapist clinic should be rejected "despite its finding that he was heavily involved in the set up, overseeing construction … answering phones and other administrative duties" on an almost daily basis. The trial court justified its conclusion on the basis that the husband received other substantial indirect benefits.

[85] In *Murphy v Murphy*, 2015 NSSC 357 ("*Murphy*"), at paras. 55 to 73, the court noted that the respondent operated an auto repair shop. The petitioner claimed that for about 11 years she did administrative duties (banking and bill paying), constantly ran errands, booked appointments and greeted customers who contacted their home; and claimed that her services were worth $62,200.00 based on 17.5 hours per week x 50 weeks per year x 11 years. The respondent's evidence was that her involvement was minimal. At paragraph 70, Justice Dellapinna concluded:

> [70] I find that the Petitioner did contribute "monies' worth" to the operation of the Respondent's business in the form of her physical labor. Her contribution was more than the minimal contribution suggested by the Respondent but I believe the Petitioner has overstated her contribution and overestimated its value. I find that she did paint the Respondent's office at the Hatchett Lake location in 1998. I find too that she did make some bank deposits for the Respondent and there were occasions when she picked up "parts" for the business but not as often as she suggested. I find too that she did answer phone calls from the Respondent's customers at the home address – particularly before he moved the business to the Hatchett Lake property - and greeted customers at their home address. There were also occasions that she drove the Respondent so that he could retrieve a vehicle. Most if not all of these contributions were acknowledged by the Respondent.

He granted the petitioner compensation in the amount of $2,000.00.

[86] In *RWB v DCB*, 2015 NSSC 254 (*"RWB v DCB"*), at paras. 77 to 87, the parties moved to Nova Scotia, purchased a home, set up a line of credit secured by the home and together started a business involved in the purchase, renovation, and sale of real estate. Both actively worked in the business which was incorporated, at the husband's suggestion, in the wife's name with the husband as an employee. At paragraph 87, Justice MacDonald concluded:

> [87] The time and manner of acquisition, and the intention of the parties suggests B*** Homes could be described as a matrimonial asset. The purpose of its creation, to produce a profit, and the effort required to make it a successful

> corporation may suggest it is a business asset. That effort was required of both parties. However I have decided the effort provided by the Father and his contribution to the acquisition, management, maintenance, operation and improvement of assets owned by B*** Homes is more properly considered under section 18 of the *Matrimonial Property Act*. But for the original intention of the parties all other factors are more in favour of supporting a section 18 finding than to declare B*** Homes to be a matrimonial asset although the result is the same because I have decided the Father is entitled to a 50 % interest in B*** Homes. This decision could also be justified under a section 13 *Matrimonial Property Act* analysis. For similar reasons he has a 50% interest in K*** Custom Building and Renovation but this company is more of a liability than an asset.

[87] Mr. Pothier refers the court to *Bruce v Ramey*, 2016 NSSC 31 ("*Bruce*"), at para. 37, where the court held that Ms. Bruce's infrequent hosting of clients did not entitle her to s. 18 relief.

[88] The onus is on Ms. Pothier to establish the work she contributed to the businesses as well as provide sufficient particulars of her contributions so they could be valued. At best, her evidence was general in nature and contained few particulars with regards to the quantity and quality of her contributions. Mr. Pothier disagreed with her evidence regarding her contributions and argued that it was no more than one might expect from their marital relationship.

[89] Ms. Pothier has not established that her contributions to PM and PRED were more than minimal. The dividends paid to her from the business and family trust were primarily for tax-planning purposes, as Mr. Pother's spouse, and therefore not a set-off against her minimal work contributions to the businesses.

[90] For the purposes of s. 18 of the *MPA* I conclude $5,000.00 reflects the value of her s. 18 contribution.

Division of Matrimonial Property

Arthur Hatt Road lots

[91] At the time of the divorce hearing, there were two lots on Arthur Hatt Road. Neither party provided appraisal evidence as to their value, but the listing prices were $399,000.00 for Lot B and $299,000.00 for Lot A-X.

[92] Ms. Pothier complains that Mr. Pothier uses the lot (puts a travel trailer on it) and asks that he be directed not to use the lot. She further asks the court to direct that the listing agent be changed.

[93] Apparently, there is a Line of Credit outstanding since separation in the amount of $78,781.00, which is not being paid until the lots are sold.

[94] Mr. Pothier argues that the list prices are too high for the market but Ms. Pothier refuses to lower the prices. He presently pays the interest on the Line of Credit and the property taxes.

[95] It appears that this situation is one of many aggravations between the parties. The properties have been listed for a very long time and the parties are unable to agree on a selling price.

[96] The court's view is that the fairest way to resolve this issue is to divide the lots between the parties; that is, each will own one. They can sell or keep their lot according to their priorities. It is unlikely they will agree on the value; each will think the other's lot is worth more, and their lot is worth less than any of the figures placed before the court.

[97] Absent fair market value appraisals (or maybe dueling appraisals), the court concludes that the difference in the fair market value between Lot B and Lot A-X is about $100,000.00 (the difference in their current list prices), less disposition costs. Dispositions costs are usually calculated at a real estate commission of 5%, plus HST, plus $1,000.00 for legal costs.

[98] To minimize the equalization payment, I direct that Mr. Pothier become the sole owner of Lot B at its list price of $399,000.00 less disposition costs of $23,942.50 or $375,057.50. I direct that Ms. Pothier become the owner of Lot A-X at the list price of $299,000.00 less disposition costs of $18,192.50 or $280,807.50. I direct that Mr. Pothier assume responsibility for the Line of Credit of $78,781.00.

[99] The net difference between the parties is $15,469.00. I direct Mr. Pothier to make an equalization payment to Ms. Pothier of $7,734.50.

Household Contents

[100] Neither party provided a complete list or valuation of the contents that remained in the Marvin's Island matrimonial home after separation. Neither party obtained an appraisal of the contents. Ms. Pothier submits that the court should treat the matrimonial home contents as having been divided equally.

[101] Mr. Pothier, in his first two Statements of Property, claimed that the household items were worth $26,300.00 and he received only $1,000.00 (the bedroom set). In his last two Statements of Property, he says the matrimonial contents were worth $15,800.00 and he retained only the bedroom set at a value of $1,000.00.

[102] In oral evidence, Mr. Pothier acknowledged that the pool table, shown on the first two Statements of Property as being in the possession of Ms. Pothier and being worth $3,500.00, was sold by him for $1,500.00.

[103] Mr. Pothier and Ms. Pothier disagree on what Mr. Pothier removed from the home. Ms. Pothier says he removed a safe, which she speculated contained cash. She further stated that she was forced, when they were closing the sale of their home, to get rid of stuff, largely to their family, and she has boxed items that she says neither of them are interested in. She says he is welcome to the contents of the stored boxes.

[104] The court is satisfied, based on the brochure prepared by the realtor, including photographs (Exhibit 21A, Tab 1), that the home was well furnished and likely Ms. Pothier obtained the bulk of the value of the contents. However, absent any complete listing or evidence as to the value of these assets, there is no basis to make a determination regarding the value of what was retained by Ms. Pothier and what was retained Mr. Pothier.

[105] The court declines to quantify any inequality.

Life Insurance Policy

[106] It is not disputed that Mr. Pothier is the owner of two life insurance policies with a cash surrender value as of December 2011 of $32,642.62.

Air Mile Points

[107] Mr. Pothier seeks an equalization for the cashing in of travel reward points by Ms. Pothier in March 2010. Absent reliable evidence as to their value, the court declines to make any division of travel reward points.

RSPs

[108] Mr. Pothier held a Stonegate RSP as of November 2009 worth $294,000.00. Ms. Pothier held two RSPs with Stonegate on the same date worth $280,000.00 and $8,000.00 respectively. The $8,000.00 RSP was used by her to make improvements to the wharf on the matrimonial home before it was sold and, by agreement, is not included in the calculation of assets.

[109] As of May 19, 2016, Mr. Pothier's RSP was worth $427,529.00. As of Ms. Pothier's May 2016 Statement of Property, her spousal RSP was $340,247.33. Ms. Pothier acknowledges making a withdrawal of $29,000.00 from that account in January 2013.

[110] Mr. Pothier argues that the RSP should be divided as of the date of separation by way of roll-over. Ms. Pothier argues they should be valued as of the date of trial.

[111] I agree with Ms. Pothier. Applying the *Simmons* analysis, RSPs are passive investments and should be valued as of the values tendered at trial (see: paras 47 to 48 of this decision). Mr. Pothier will receive credit for the $29,000.00 withdrawn by Ms. Pothier in 2013.

Investment Account

[112] Mr. Pothier listed on his first Statement of Property that he had an investment valued at $33,332.00 as of December 14, 2011. The court notes that Mr. Pothier's May 2016 Statement of Property contained a May 24, 2016, record showing the same investment account had a combined Canadian value of $61,659.97. Applying the *Simmons* principle to this passive asset, it should be divided equally between the parties as of its May 24, 2016 value.

[113] Mr. Pothier's first Statement of Property (Exhibit 25) showed a non-registered stock account with Assante having a value of $43,582.00. There is no

subsequent record of that account. The only evidence is the e-mail from TD Wealth Management (Exhibit 33) that shows a transfer in of stock investments in November 2014 in the amount of $88,772.00, which had a combined value of $96,654.00. That amount is added to Mr. Pothier's assets that are subject to an equal division.

Debt

[114] The only remaining debt, subject to division, is Ms. Pothier's VISA debt of $2,835.00 that Mr. Pothier paid after separation.

Summary

[115] In accordance with the determinations set out above, the court directs the following:

1. the parties will execute any documentation required by the financial institution to effect the RSP rollover;

2. the parties will execute any documents required to convey the Arthur Hatt lots;

3. Mr. Pothier will pay Ms. Pothier an equalization payment, which the counsel will calculate by reviewing the individual determinations of the court throughout the decision; and,

4. the parties will share equally the cost of an appraisal to determine the value of the 22 Wentworth Road rental property, with Mr. Pothier to pay Ms. Pothier one-half of his 50% interest in the rental property.

Unequal division of matrimonial assets claimed (s. 13 *MPA*)

[116] Ms. Pothier claims that an equal division of matrimonial assets would be unfair or unconscionable considering, among the exhaustive list of factors, the following:

> (d) the length of time that the spouses have cohabited with each other during their marriage;
>
> (e) the date and manner of acquisition of the assets;
>
> (f) the effect of the assumption by one spouse of any housekeeping, child care or other domestic responsibilities for the family on the ability of the other spouse to acquire, manage, maintain, operate or improve a business asset;
>
> (g) the contribution by one spouse to the education or career potential of the other spouse;
>
> …
>
> (i) the contribution made by each spouse to the marriage and to the welfare of the family, including any contribution made as a homemaker or parent;
>
> (j) whether the value of the assets substantially appreciated during the marriage;
>
> …

[117] Ms. Pothier's post-trial brief on this issue sets out its factual basis for the claim:

> The evidence has established that this is a long term traditional marriage. The parties began their relationship in an apartment. Their first owned home was a small A-frame – purchased, improved, and sold. Early in the marriage, Mr. Pothier acquired Pothier Motors (which was on the verge of failing due to his father's alcoholism). During the marriage, Ms. Pothier assumed responsibility for all of the housekeeping, child care, and domestic responsibilities. Mr. Pothier often worked late or stayed late at Pothier Motors in order to socialize. Mr. Pothier did not have to think about what clothing he would wear each day, as Ms. Pothier would lay it out for him. Mr. Pothier did not have to prepare meals or go shopping. All of this was taken care of by Ms. Pothier. By the date of separation, the parties owned a large home on Marvin's Island and the business had grown and was thriving.

[118] The only potential factual foundation for this claim is the fact that the family trust, controlled by Mr. Pothier, owns the business assets, except to the extent of this court's determination that some of the assets in the businesses were not exempt business assets but matrimonial assets.

[119] Most of the Section 13 factors relied upon by Ms. Pothier do not assist her claim. The length of the marriage does not support an unequal division. Neither

party contributed to the education or career potential of the other. Each contributed in their own way to the welfare of the family.

[120] The matrix of this case makes s. 13(f) of the *MPA* the most relevant factor: - the effect of Ms. Pothier's assumption of domestic responsibilities on the ability of Mr. Pothier to take over his father's struggling dealership in 1986; grow it substantially; and, as a by-product, provide the Pothier family with a high-end lifestyle with significant wealth outside of the businesses.

[121] It appears that their personal net worth exceeds three million dollars at separation. Also, the two companies owned by the family trust that generated this lifestyle and personal net worth, had a fair market value at separation, depending on whose appraisal one accepts, of between $2 million and $2.8 million dollars - less the value of the corporate assets found in this decision to be matrimonial.

[122] In *Harwood supra*, the court wrote at para. 7:

> [7] Equal division of the matrimonial assets, an entitlement proclaimed by the preamble to the *Act* and prescribed by s. 12, should normally be refused only where the spouse claiming a larger share produces strong evidence showing that in all of the circumstances equal division would be clearly unfair and unconscionable on a broad view of all relevant factors. That initial decision is whether, broadly speaking, equality would be clearly unfair not whether upon a precise balancing of credits and debits of factors largely imponderable some unequal division of assets could be justified. Only when the judge in his decision concludes that equal division would be unfair is he called upon to determine exactly what unequal division might be.

[123] In *Donald v Donald*, 1991 CarswellNS 58 (NSCA) ("*Donald*"), the wife had business assets of $46,000.00; the husband a dental practice valued at $185,000.00; and, the matrimonial assets totaled $564,000.00. At the time of the hearing, the wife earned $32,000.00 from her business; the husband earned $134,000.00 as a dentist. The Court of Appeal allowed the appeal from the trial judge's s. 13 unequal division order, purportedly based upon consideration of s. 13(d), (e), (f), (g), (i) and (j). The court wrote:

> [20] In *Archibald v. Archibald* (1981), 48 N.S.R. (2d) 361 Hallett, J. stated that the court is limited to considering the factors enumerated in s. 13 in determining in the first instance if it would be unfair or unconscionable to simply divide matrimonial assets equally, and then, applying the same factors determine what division thereof would be fair and conscionable. I agree. In examining the factors set out in s. 13 to see if one or more of them should displace the entitlement of

equality declared in the preamble of the *Act*, a court requires strong evidence showing that in all the circumstances an equal division would clearly be unfair and unconscionable on a broad view of all the relevant factors: *Harwood v. Thomas* (1981), 45 N.S.R. (2d) 414 at 417 per MacKeigan, J.A.. Thus the onus rested upon the respondent to produce this strong evidence.

[21] The reason offered by the trial judge, namely the great disparity in the earning capacity of the parties is not a factor listed in s. 13 expressly or by implication. Unequal earnings may be relevant in examining whose resources led to the acquisition of a matrimonial asset, but present earning capacity of the parties is a matter to be addressed on the subject of support and not division of matrimonial property.

[22] The respondent suggests that justification for an unequal division lies in ss. (d), (e), (f), (g), (i) and (j) of s. 13 of the *Act.*

[23] As to the length of co-habitation, emphasis is laid on the contribution of the respondent to the family advancement throughout this lengthy marriage. It has been seen that the respondent ceased work to assume the role of bringing up children and she moved from place to place as the husband's career dictated. No doubt all of this contributed to the acquisition of assets, but the appellant's contribution to the marriage and the acquisition of assets was not any less during this period. I agree with Hallett, J. when he said in *Briggs v. Briggs* (1984), 64 N.S.R. (2d) 40 that the length of time the parties cohabited with each other during the marriage is a factor normally only to be considered when that period is very short, making it unfair to divide assets equally if one party brought the majority of them to the marriage.

[24] As to the date and manner of acquisition of the assets, the history of this marriage and the contributions made by each of -the parties to it supports rather than detracts from an equal division.

[25] As to the effect of the respondent's assumption of domestic responsibilities on the ability of the appellant to acquire assets, there is no doubt that her contribution was significant. However, the appellant's contribution in the acquisition of these assets is equally significant, and when the evidence is weighed, the conclusion again points to equality of effort in the acquisition of these assets.

[26] The contribution of the respondent to the education or career potential of the appellant is not in dispute. She maintained the home, brought up the children and went wherever the appellant's career required. During that same period of time and up until the end of this 27 year marriage, the appellant made his contributions. This is not a situation where a wife has made the husband's career possible by supporting him only to be discarded shortly thereafter: *Arthur v. Arthur* (1985), 67 N.S.R. (2d) 323. The contribution made by each spouse to the

> marriage and the welfare of the family, as well as the increase in value of the assets during the marriage are, when examined against the background of this long standing marriage, elements which point to equality of contribution in the acquisition of assets by the parties. Indeed, the matrimonial assets which were agreed upon were more extensively held by the respondent. While the evidence is not complete in every respect, such information as is available as to the value of non-matrimonial assets, does not indicate any great disparity that would warrant an uneven division such as in the case of *Archibald v. Archibald, supra*, where the ratio of non-matrimonial assets in favour of one party was nine to one. There is no strong evidence indicating that the acquisition of matrimonial assets was sacrificed to enhance the accumulation of business assets by the appellant.
>
> [27] A review of the entire record and the submissions of counsel leads to the conclusion that an equal division of matrimonial assets should have been made. …

[124] In *Young v Young*, 2003 NSCA 63 (NSCA) ("*Young*"), the court allowed an appeal from an unequal division of matrimonial assets - specifically, two investment accounts derived from the sale of a farm inherited and operated by the husband for over 20 years before the parties' marriage. This was a second marriage for both parties. Justice Bateman wrote:

> [14] Sections 13 and 18 of the *Act* are conceptually distinct. …
>
> [15] There is no presumption that business assets be divided equally, or at all. Under s. 18, the division of a business asset is made solely in accordance with the contribution of the non-owning spouse to the business asset, ignoring the relationship of the parties. In contrast, the division of matrimonial assets is *prima facie* equal, with unequal division permitted only in limited circumstances. The inquiry under s. 13 is broader than a straight forward measuring of contribution. The predominant concept under the *Act* is the recognition of marriage as a partnership with each party contributing in different ways. A weighing of the respective contributions of the parties to the acquisition of the matrimonial assets, save in unusual circumstances, is to be avoided. Since the introduction of the *Act*, it has been repeatedly stressed by this Court, that matrimonial assets will be divided other than equally, only where there is convincing evidence that an equal division would be unfair or unconscionable. MacKeigan, C.J.N.S. wrote, for the court, in *Harwood v. Thomas* (1981), 45 N.S.R. (2d) 414; N.S.J. No. 6 (Q.L.) (A.D.), one of the first cases in which the *Matrimonial Property Act* was considered:
>
> > 7 Equal division of the matrimonial assets, an entitlement proclaimed by the preamble to the *Act* and prescribed by s. 12 should normally be refused only where the spouse claiming a larger share produces strong evidence showing that in all the circumstances equal division would be clearly

> unfair and unconscionable on a broad view of all relevant factors. That initial decision is whether, broadly speaking, equality would be clearly unfair - not whether on a precise balancing of credits and debits of factors largely imponderable some unequal division of assets could be justified. Only when the judge in his discretion concludes that equal division would be unfair is he called upon to determine exactly what unequal division might be made.

(Emphasis added)

…

[18] As set out above, substantially different considerations are applied to a division of matrimonial assets than the basic contribution assessment applied to the division of business assets. It is not sufficient, for an unequal division of matrimonial assets, that one of the s. 13 factors be present. The judge must make the additional determination that an equal division would be unfair or unconscionable. The terms "unfair" and "unconscionable" do not have precise meaning. Lambert, J. A. wrote in *Girard v. Girard*, (1983), 33 R.F.L. (2d) 79; B.C.J. No. 4 (Q.L.) (B.C.C.A.) *supra,* at p. 86:

> I come then to the legislative purpose expressed in the word "unfair". That word evokes ethical considerations and not merely legal ones. It is not a lawyer's word. The section does not give a judge a broad discretion to divide property in accordance with his own conscience. There can be no doubt about that. There must be uniformity and predictability of judgment. The question of unfairness must therefore be measured by an objective standard. The standard is that of a fair and reasonable person whose values reflect those generally held in contemporary British Columbia. Such a person, while not insisting that everyone adopt his or her behavior preferences, can recognize unfairness in the form of a marked departure from current community values.

…

[21] The following facts, as found by the judge in the process of determining that the funds were a matrimonial asset, are particularly relevant to the s. 13 assessment:

Although a second marriage for both parties, this was one of meaningful duration. The parties were married for 25 years before separation;

The farm property no longer existed as such, having been converted to a capital fund;

> The funds were invested and used for the parties living expenses over an extended period of time;
>
> Ms. Young's contribution to the farm operation and assumption of household duties over the 10 years that the parties owned the farm;
>
> Ms. Young's assumption of all household duties freed Mr. Young to devote all of his efforts to the farm business;
>
> The purpose of the sale of the farm was to provide an income for the parties' retirement;
>
> For their 16 years of retirement the parties used the funds for common benefit and encroached upon capital;
>
> The parties relied on the funds as their principal retirement fund, neither having an independent means of support;
>
> The funds represented the significant cash asset of the parties, being almost half of the total value of the matrimonial assets;
>
> …
>
> [23] In these circumstances there was an absence of compelling evidence that an equal division would be unfair or unconscionable. The judge relied solely upon the fact that Mr. Young had brought the farm into the marriage in stating her conclusion that an unequal division would be unfair or unconscionable. The *Act* expressly includes, as matrimonial assets, those acquired both before and after the marriage. It cannot have been intended that matrimonial assets be routinely divided unequally in favour of the contributing spouse.

[125] See also *Ryan*, paras. 11-15.

[126] In summary, the onus is on Ms. Pothier to establish that an equal division would be unfair or unconscionable. There must be strong evidence showing in all the circumstances enumerated in s. 13 that an equal division would clearly be unfair or unconscionable.

[127] The Section 13 analysis is complicated by another significant consideration: the claim for spousal support and the related claim to attribute corporate income to Mr. Pothier on the before-tax income of the two corporations owned by the family trust. The foundation of the s. 13 claim in this case is, essentially, the ability of Mr. Pothier to have created a substantial business asset because of their respective roles

in the relationship. It is this same consideration that dominates the spousal support analysis.

[128] The preferred order of analysis in family proceedings is to assess the spousal support claim, based on the resources available to the parties to produce income after the property division. The assessment of the entitlement, quantum and duration of spousal support is impacted by many of the same factors (especially s. 13(f)) that are relevant to whether an equal division of matrimonial assets is unfair or unconscionable.

[129] I have not been referred to, and could not find, any caselaw that identified or attempted to reconcile how the determination of the quantum of spousal support, based on the value and ability of the exempt business asset to generate income, should impact the analysis of whether an equal division of matrimonial assets is unfair or unconscionable.

[130] Logic dictates that an order granting an unequal division of matrimonial assets, based on the exempt business asset that produces the income, should impact upon the issue of quantum of spousal support generated by the business, and *vice versa*.

[131] Effectively, an equal division of matrimonial assets, worth about three million dollars, out of the total assets (matrimonial and business assets) of five million dollars, means that Ms. Pothier would receive 30% of the total assets accumulated by the parties to separation.

[132] As noted by Justice Bateman in *Young*, there is no presumption that business assets be divided equally or at all.

[133] But for the fact that it is the exempt business asset that is the sole income source upon which spousal support is claimed, a 70-30 split in the total (matrimonial and exempt business) assets appears, at first blush, to be unfair.

[134] On the other hand, the evidence clearly shows that the acquisition of matrimonial assets was not sacrificed by the requirements of the business asset. As noted, the opposite is true.

[135] To the extent that the court was to make an unequal division of matrimonial assets because of s. 13(f) – the acquisition of the business asset upon which the

spousal support analysis is premised, the entitlement to or quantum of spousal support would logically be reduced.

[136] The court is not satisfied, taking into consideration the factors in s. 13 of the *MPA* and, in particular, s. 13(f), that an equal division of matrimonial assets is unfair or unconscionable. The effect of the assumption by Ms. Pothier of the domestic responsibilities for the family on the ability of Mr. Pothier to build up a business asset that, during their marriage has, and after their separation will, support a high-level lifestyle mitigates against any unfairness.

[137] This conclusion impacts on the court's analysis of the determination of Mr. Pothier's income, especially the imputed corporate attribution, and the location within the *Guidelines* range, in the spousal support analysis.

[138] Attached to this decision is the court's summary of the property division conclusion in a balance sheet like format.

Spousal Support

[139] Prospective and retrospective spousal support is claimed.

[140] Section 15.2 of the *Divorce Act* states that the court may order spousal support. The court is required to consider the condition, means, needs and other circumstances of each spouse, including the length of cohabitation, the functions of each spouse during cohabitation and any arrangement respecting support (*Divorce Act*, s.15.2(4)).

[141] The four objectives of spousal support are set out in s. 15.2(6) as follows:

> **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.

[142] Case law, notably *Moge v Moge*, [1992] 2 SCR 813 ("*Moge*"), and *Bracklow v Bracklow*, [1999] 1 SCR 420 ("*Bracklow*"), interpreted s. 15.2 as setting out three bases for spousal support:

(a) compensatory support for economic sacrifices by the lower income spouse and/or economic advantages to the higher income spouse arising from the marriage relationship;

(b) non-compensatory support – financial need of the lower income spouse if the higher income spouse has the ability to meet that need upon separation; and,

(c) where it exists, a reasonable agreement or arrangement between the parties respecting their finances.

[143] Because of significant divergence in court decisions and for the purpose of providing some predictability at separation, the Federal Government commissioned the *Spousal Support Advisory Guidelines* (the "*Guidelines*"). These *Guidelines* are not enacted in any statute or regulation. Unlike the *Federal* and *Provincial Child Support Guidelines* (which are enacted), these *Guidelines* are truly advisory, intended to provide some logic to the analysis.

[144] In the 12 years since the first draft of the *Guidelines*, trial and appellate courts have more or less come to accept that the *Guidelines* are helpful in determining issues of quantum and duration. Some courts, for example the Ontario Court of Appeal in *Fisher v Fisher*, 2008 ONCA 11 ("*Fisher*"), suggest that support orders outside the suggested *Guidelines* range require reasons explaining why the *Guidelines* do not generate the appropriate result.

[145] Quantum and duration are not the only analytical issues. The first is entitlement. The *Guidelines* do not purport to assist in respect of this issue.

[146] Spousal support is not automatic. It is a statutory remedy based on the factors in s. 15.2(4) and the objectives in s. 15.2(6), as interpreted in the case law.

[147] The threshold issue of entitlement to spousal support, whether based on compensatory principles discussed in *Moge* or non-compensatory principles discussed in *Bracklow*, is usually not a serious issue where the marriage relationship is of such length that economic merger occurs, or where one of the partners has (to borrow from the unjust enrichment analysis) been enriched at the expense of, and the other deprived by reason of, their respective roles in the marriage.

[148] Mr. Pothier acknowledges that Ms. Pothier is entitled to spousal support. The extent of her entitlement does impact upon the quantum of spousal support and is considered in this decision.

[149] For the initial threshold purposes, it is acknowledged that this was a long-term, 'traditional' marriage, in which the parties' roles were clearly divided. Ms. Pothier took complete care of the home front and Mr. Pothier was able to devote himself entirely to growing his business and providing the family with a high standard of living.

[150] The entitlement in this case is based on both the compensatory and the non-compensatory bases. The compensatory analysis is that Mr. Pothier had the advantage of building up a substantial business asset that is not divisible on separation by reason of Ms. Pothier's role in the household. Her claim is also non-compensatory by reason of the fact that Mr. Pothier, through his business, generated the only income of consequence to the family.

[151] While there is no evidence of an economic disadvantage or deprivation to Ms. Pothier from the marriage itself, the length of their marriage and the reliance upon the division of their responsibilities, means that at this stage in her life, Ms. Pothier is ill-equipped to support herself in a manner fitting of their marital standard of living. She is unlikely to generate, other than through the prudent investment of her share of the matrimonial assets, sufficient income to, for all practical purposes, become economically self-sufficient.

[152] The real issues in this analysis are:

1. The determination of the real or imputed income of each of the parties;

2. Fixing spousal support within the range set out in the *Guidelines*; and,

3. Determining the period for which retroactive spousal support is owed, the quantum and the off-setting credits.

Determination of Income

[153] Section 6.1 of the *Guidelines* provides, and case law confirms, that the starting point for determination of income for the purposes of spousal support is the definition of income in the *Federal Child Support Guidelines* ("*FCSG*"), in particular, ss. 15 to 20 as well as Schedule III.

[154] Both parties produced expert reports, whose authors testified at the trial. Both experts were aware of and purported to apply the determination of income provisions of the *FCSG* for the purposes of determining Mr. Pothier's income.

[155] Their reports were written (and oral evidence given) before this court's determination of the property issues which effectively transferred some value from the business ledger to the matrimonial ledger. This determination reduces the value of the business assets and, to a small degree, the imputation of income to Mr. Pothier.

[156] Ms. Pothier's expert, Nikki Robar, calculated Mr. Pothier's income for the period 2007 to 2014 and Mr. Pothier's expert, Aaron Wright, calculated his income for the period 2007 to 2015. His income for the years 2007, 2008 and 2009 are pre-separation calculations.

[157] Both experts appear to have applied the *FCSG*, ss. 15 to 20 as well as Schedule III, in a similar fashion to determine Mr. Pothier's income. However, there are two major areas in which they diverge.

[158] First, Ms. Robar added to Mr. Pothier's income dividends paid by the family trust to Ms. Pothier and their two adult children Chad and Brittany. Mr. Wright added to Mr. Pothier's income the dividends paid to Ms. Pothier, but only a portion of the dividends paid to the two adult children on the basis that they were employed by the company and their compensation was below the going rate for their work, or what he determined to be their market value.

[159] The second and more complex divergence was that Mr. Robar added to Mr. Pothier's income 35% of the net corporate pre-tax earnings of PM and PRED. She attributed this income as it was the amount of net corporate pre-tax earnings that

exceeded the **minimum** net working capital requirements set out by Chrysler Canada for PM.

[160] Mr. Wright made no corporate attribution of income to Mr. Pothier on the basis that the dealership was required to do, and working on, an upgrade of its facilities, and had determined, primarily on the efforts of Chad Pothier, that the dealership needed to add the Fiat franchise (Chrysler's small car franchise) in order to maintain the dealership as a viable dealership.

[161] Witnesses were examined respecting documents and communications containing estimates, and applications for funding, for the upgrade of the existing dealership and the addition of the Fiat franchise.

[162] Separately from these two issues, Ms. Pothier argued that the court should impute income by reason of the personal benefits to Mr. Pothier from the use of corporate assets. Because of the property decision transferring most of those assets from the exempt business category to the matrimonial category, and the fact that both experts' analysis added to Mr. Pothier's income some corporate benefits, no further imputation has been proven.

[163] Ms. Pothier's expert opined that Mr. Pothier's income, inclusive of all the family trust dividend distributions and with corporate income attribution, averaged $365,000.00 a year from 2007 to 2014. Mr. Pothier's expert opined that Mr. Pothier's income, including only part of the family trust dividend distributions and no corporate attribution, averaged about $201,000.00 between 2007 and 2015 and, since separation, averaged about $154,000.00.

Imputing Income to John Pothier

[164] As noted, the two major areas of difference between the parties' experts are the payments from the family trust of dividends to Chad and Brittany Pothier, and the attribution of corporate income to John Pothier.

[165] While not entirely without ambiguity, the two sections of the *FCSG* relevant to this analysis are ss. 17(1) and 18(1) and (2). They read:

> **Pattern of income**

> **17** **(1)** If the court is of the opinion that the determination of a spouse's annual income under section 16 would not be the fairest determination of that income, the court may have regard to the spouse's income over the last three years and determine an amount that is fair and reasonable in light of any pattern of income, fluctuation in income or receipt of a non-recurring amount during those years.
>
> **Shareholder, director or officer**
>
> **18** **(1)** Where a spouse is a shareholder, director or officer of a corporation and the court is of the opinion that the amount of the spouse's annual income as determined under section 16 does not fairly reflect all the money available to the spouse for the payment of child support, the court may consider the situations described in section 17 and determine the spouse's annual income to include
>
> **(a)** all or part of the pre-tax income of the corporation, and of any corporation that is related to that corporation, for the most recent taxation year; or
>
> **(b)** an amount commensurate with the services that the spouse provides to the corporation, provided that the amount does not exceed the corporation's pre-tax income.
>
> **Adjustment to corporation's pre-tax income**
>
> **(2)** In determining the pre-tax income of a corporation for the purposes of subsection (1), all amounts paid by the corporation as salaries, wages or management fees, or other payments or benefits, to or on behalf of persons with whom the corporation does not deal at arm's length must be added to the pre-tax income, unless the spouse establishes that the payments were reasonable in the circumstances.

[166] With respect to the dividend payments to Chad and Brittany Pothier, the evidence shows that between 2009 and 2015 Chad received actual dividends of about $303,000.00, or about $43,000.00 per year, and Brittany received dividends of $123,000.00, or about $18,000.00 per year.

[167] John Pothier was the sole shareholder of PM and PRED. At some point before the parties separated, ownership was transferred to the family trust and dividends were paid to members of the Pothier family, including Ms. Pothier. A family trust is a tax-planning tool. The distribution of dividends is controlled by Mr. Pothier and is discretionary.

[168] Mr. Pothier seeks to exclude from his income since 2009 the bulk of the dividends paid to Chad and Brittany Pothier. His evidence is that they worked for the companies - Chad Pothier as the general manager since 2009, and Brittany Pothier as a sale coordinator and service coordinator. The dividends were part of their compensation based on the going rate for their positions.

[169] The evidence of all witnesses was that Chad Pothier has been general manager of PM since 2009, as well as the driving force behind the growth of the company since 2009. Ms. Pothier did not dispute this. She added that John Pothier was taking much more time off from work, and not as active in the business as before 2009.

[170] The evidence of the role of Brittany Pothier as service coordinator and now sale coordinator - sometimes full time, sometimes part time, was less clear. There was an absence of evidence with respect to her contribution to the business.

[171] With regards to Chad Pothier's salary, exhibits were entered, including a communication from PM's business manager to the effect that Chad Pothier's salary was reasonable, and other communications from other Chrysler dealers in the same performance group as PM that described the going market rate for general managers as significantly higher than Chad Pothier's salary.

[172] Based on all the evidence, I am satisfied that Chad Pothier has been the main reason that PM's sales have significantly grown since 2009 – from $18,000,000.00 in 2009 to $38,000,000.00 in 2015, necessitating the upgrading of the physical facility. It is also his application on behalf of PM to Chrysler to add the Fiat franchise; the purpose being to add a line of small vehicles to remain competitive with other car dealerships.

[173] Ms. Pothier submits that I should rely upon the business manager's memo and treat with skepticism the e-mails from the Chrysler dealers as to the going rate for general managers in positions like Chad Pothier.

[174] The issue is whether the salary paid to Chad Pothier of $51,078.00 in 2009, which increased to $96,884.00 in 2015, or the combination of salary and actual dividends paid, which increased from $116,655.00 in 2009 to $131,004.00 in 2015, was, as Mr. Pothier claims, compensation for Chad Pothier's value to the business and not simply an attempt to divert income from himself.

[175] I conclude from the totality of the evidence that Mr. Pothier has established on a balance of probabilities that Chad Pothier's value to the company and the likely going rate for a general manager of his caliber, who is responsible for the substantial sales increases evident from the financial statements, supports Mr. Wright's analysis. John Pothier has discharged the onus of showing that for whatever purpose the family trust dividends may be otherwise utilized, the value of Chad Pothier to the business as general manager justifies the payment to him of the family trust dividend not as a gift or diverting of income from John Pothier, but as part of Chad Pothier's reasonable compensation.

[176] Ms. Robar noted that compensation for a general manager does not normally include family trust dividends. It may be that there are few matrices where this tax-advantaged tool is available. If the relationship of the general manager to the trustee is such that part of his compensation can be in the form of a dividend that receives preferential tax treatment, it does not make that form of payment inappropriate.

[177] The evidence with respect to the role and involvement of Brittany Pothier is different. There is no credible evidence that her salary from PM was any less than the contribution or value of her work for the dealership. The court is not satisfied that John Pothier has discharged the onus of showing that the family trust dividend payments to her were reasonable additional compensation for her services.

[178] Mr. Wright's analysis of this issue is at pp. 8 and 9 of his report and quantified in the notes to Appendix A at pp. 13 and 14. He shows that, over the seven years (2009 to 2015) Chad Pothier has been the general manager, he received dividends. In three years, Mr. Wright found that the dividends exceeded his fair market compensation as general manager, substantially in 2009 but to much lesser degrees 2012 and 2014. In the other four years, he found that his compensation from salary and dividends was less than the market value of his services as general manager.

[179] I conclude that the actual dividends paid by the family trust to Chad Pothier are reasonable deductions from John Pothier's income for determining his income in these circumstances. I make no such finding with respect to the dividend payments to Brittany Pothier.

[180] The corporate attribution issue is also analysed pursuant to s. 18 of *FCSG*. The difference between the parties' experts appears as follows:

(a) Ms. Robar calculates the minimum net working capital requirement set forth by Chrysler for PM from 2007 to 2015 as sufficient to maintain the normal course of operations for both PM and PRED. She concludes that the companies would be able to distribute up to 35% of their combined annual pre-tax earnings to Mr. Pothier without breaching Chrysler Canada's minimum net working capital requirement for PM. She has included these amounts as income to Mr. Pothier (See her report, p. 9 and Schedule I).

(b) Mr. Wright concludes that there was no significant excess earned surplus available to distribute between 2009 and 2015. He reaches this conclusion after considering the following five factors:

- The minimum net working capital requirements per year as set out by Chrysler Canada Inc.;
- A comparison of working capital levels to industry averages;
- The economic conditions during 2009 when Chrysler was under bankruptcy protection and in the midst of a corporate restructuring;
- The company's use of bulk cash balances to offset the floor plan financing, which reduces interest costs; and,
- Chrysler Canada Inc.'s requirement that PM start carrying the Fiat brand and undertake a substantial upgrade to the building it currently occupies.

[181] Mr. Wright was cross-examined on his opinion. With respect to the fifth factor, Mr. Wright made a factual error. PM's application for the Fiat franchise from Chrysler was not forced on PM by Chrysler but rather a business decision of PM, primarily by Chad Pothier, to add small cars to PM's vehicle mix. It was a prudent business decision to add small vehicles to PM's line in today's environment, but it was not compelled by Chrysler.

[182] The court's analysis of corporate attribution involves more than one component.

[183] First, the parties' experts reached their opinions based on an analysis of nine years of operations of the companies. Neither expressly determined Mr. Pothier's income from PM/PRED on the basis of all or part of the companies' pre-tax

income for the most recent taxation year, as provided in s. 18(1)(a) *FCSG*, or commensurate with John Pothier's services to the companies per s. 18(1)(b) *FCSG*.

[184] Contrary to Section 17 of the *FCSG* (assessing "the pattern of income"), Ms. Robar did not determine John Pothier's pattern of income over the last three years. All Mr. Pothier's income comes from the businesses; therefore, the analysis of the pattern of his income, which included attribution of corporate income, required an analysis of PM/PRED's pattern of income for the last three years. Ms. Robar's pattern of income analysis was for 8 years from 2007 to 2014 (she did not have the 2015 corporate statements before she completed her report dated February 11, 2016). Mr. Wright included in his analysis both 9 years (2007 to 2015) and the last three years (2013 to 2015).

[185] Appellate courts have, in the context of child support analysis but equally applicable to the spousal support analysis, confirmed the proper approach to the "pattern of income" analysis in s. 17, and in the corporate attribution of all or part of pre-tax income to the shareholder for "the most recent taxation year" in s. 18(1)(a). One of the most comprehensive examples of the analytical approach is found in *Mason v Mason*, 2016 ONCA 725 ("*Mason*"), at paras. 115 to 186.

[186] It is appropriate, following the analysis in *Mason,* for this court to focus on the pattern of income for the years 2013 to 2015 and, in particular, with respect to s. 18(1)(a), to determine whether to include in Mr. Pothier's income all or part of the pre-tax income of the corporations for the most recent taxation year (2015).

[187] The second component relating to the corporate attribution analysis is Ms. Pothier's submission, and Ms. Robar's analysis, that the companies would be able to distribute up to 35% of their combined net annual pre-tax earnings to Mr. Pothier without breaching Chrysler Canada's minimum net working capital requirements. The minimum net working capital requirements were $905,257.00 in 2013; $998,257.00 in 2014; and, $1,051,317.00 in 2015.

[188] The analysis of corporate attribution should not be restricted to the minimum working capital requirements imposed upon a corporation by third parties, whether creditors, franchisors or others.

[189] The analysis of corporate attribution under s. 18 does not, and should not, require the inclusion in income of all funds in excess of the minimal requirements of others who deal with the business. The purpose of s. 18 is to prevent unfairness by the sheltering or manipulation of income through incorporation. The judicial

discretion to attribute corporate income to a spouse mandates an analysis of the corporation's needs and plans. (See: *Chekowski v Howland*, 2013 ABCA 299 ("*Chekowski*"), at para. 34)

[190] There was clear evidence, based upon the increasing sales of PM (and the policy of Chrysler), that PM needed to upgrade both its sales and service facilities. The evidence supports this as a *bona fide*, long-standing intent, based upon the growth of the business since 2009.

[191] There was evidence, which I accept, that an application had been made to Chrysler for the Fiat franchise in order to include in PM's new vehicle inventory small vehicles, not otherwise available to PM.

[192] Mr. Pothier testified that, when he started, there were several new car dealerships in Hants County, but they all went out of business. Only PM had survived.

[193] I accept the evidence that it is not reasonable business conduct to only retain the minimum net pre-tax earnings that Chrysler requires PM to maintain. Chrysler itself had gone into bankruptcy protection in 2009, and the car business is a 'notoriously cyclical business' (Exhibit 19F).

[194] Additionally, I accept that there should not be attributed to Mr. Pothier's personal income the pre-tax net earnings of PM/PRED that a prudent dealer would maintain to fulfill the reasonable business plans, as described by Mr. Pothier and corroborated by the exhibits.

[195] The onus is on John Pothier to establish the quantum of the earnings that are needed to meet its reasonable business plans. It appears that the initial estimated cost for the upgrade to PM's facility was about four million dollars, with about three million dollars to be financed. It is clear from the evidence, and a matter of common sense, that the original estimate is out of date and costs have increased. Ms. Pothier asked the court to treat with skepticism the communication from the TD Bank Business Officer regarding the most recent estimate of the costs of the project.

[196] The evidence on behalf the respondent is that the upgrade in the facilities should generate more income for PM, which income would offset the increased cost. Mr. Pothier says that the upgrade in the facilities is to meet and maintain the increase in business that has already occurred.

[197] The evidence is that the total revenue of PM had increased from 18 million dollars in 2009 to 33 million dollars in 2014 to 38 million dollars in 2015. The net income before income and other taxes went from $217,000.00 in 2009 to $436,000.00 in 2014 and over $1,000,000.00 in 2015. I accept that the upgrade is necessary to service PM's already increasing business, and that the cost of the plans has increased since initially planned.

[198] A third issue with respect to the imputation of income to Mr. Pothier is the determination of when Mr. Pothier's income should be determined for the purposes of calculating spousal support. Seven years have passed since the separation without a determination of, or agreement on, the amount of spousal support.

[199] The case law suggests that the analysis is contextual. Where the payor's income flows from an activity that commenced during the marriage, is a continuation of that activity (especially in long-term marriages), and includes a compensatory element, the trend is to determine entitlement and quantum at the time of the trial.

[200] I determine the income of John Pothier for the purposes of spousal support, in the context of ss. 17 and 18 of the *FCSG*, as follows:

1. from Mr. Wright's analysis, Mr. Pothier's income in 2013 was $150,796.00; in 2014, $143,813.00; and, in 2015, $137,638.00, resulting in an average of $144,082.00.

2. I add $20,340.00, being the average amount of the family trust dividend allocations to Brittany during those three years ($61,021.00 in three years).

3. I attribute some net pre-tax corporate to Mr. Pothier, as explained next.

[201] Of the five reasons that Mr. Wright opines that there should be no corporate attribution, I am not satisfied that he has established the working capital levels in the industry. I do accept his opinion that the volatility and economic conditions in the automobile industry (Chrysler went bankrupt in 2009) create a requirement for more than the minimum requirements of Chrysler. I accept the petitioner's evidence that PM is required to undertake substantial upgrades to its facilities by reason of the substantial increase in its sales since 2009 to maintain the business it now has and to remain a viable dealership.

[202] Ms. Robar identified undistributed pre-tax corporate income that is available to pay spousal support that averages $152,000.00 ($143,118.00 in 2013 and $161,764.00 in 2014).

[203] I discount Ms. Robar's analysis that PM's retention of income should be limited to the minimum net working capital requirements of Chrysler. It leaves no margin for volatility. It did not consider the substantial capital requirements to carry out the planned facility upgrade or the Fiat franchise as a necessary or reasonable requirement to maintain PM as a viable business and source of income for the payment of spousal support.

[204] Exhibit 22, a letter from PM's certified general accountant dated March 21, 2015, in respect of his analysis of proposed TD Bank financing and covenants, identifies the risks associated with operating with minimum equity and debt servicing ratios.

[205] Based on the totality of the evidence, I attribute $75,000.00 per year of PM/PRED's pre-tax net income to the family trust, and therefore to John Pothier.

[206] I conclude that Mr. Pothier's income from the businesses is $144,082.00 plus $20,340.00 plus $75,000.00 or $240,422.00, rounded to $240,000.00.

[207] Mr. Pothier will have more than one million dollars in investable matrimonial assets upon the sale of the Arthur Hatt Road lot. He has the same obligation to invest those assets prudently as Ms. Pothier has. I impute to him a conservative long-term rate of return of $50,000.00 per year on his matrimonial investable assets.

[208] Mr. Pothier's imputed income for calculating spousal support is $290,000.00**.**

Suzanne Pothier's Income

[209] Ms. Pothier is 60 years old. She has not had an occupation or employment outside the home since the marriage. She has no employment related training or qualifications due to her role in a long-term, traditional marriage. For that reason, I impute no employment income to her now or in the future.

[210] Ms. Pothier has a duty to invest her share of the matrimonial assets in a prudent manner.

[211] As a result of the property division in this decision, she will have received more than one-and-a-half million dollars. She reinvested $340,000.00 in a home in Falmouth. Part of her share of the divisible property is one of the lots on Arthur Hatt Road, with a net value of about $280,000.00. She will receive retroactive spousal support. I estimate that she will have investable assets, from which she can earn income, of significantly more than one million dollars. This includes her RSP.

[212] Based on her age, the fact that spousal support will be indefinite and it will be secured by life insurance, it is reasonable to require her to use the income generated by her RSP principal as well as the income from her non-registered investments.

[213] Based on her investable assets of more than one million dollars, the court imputes to her investment income of $50,000.00 per year.

[214] This is less than the 6 to 7 percent long-term rate of return accepted by the investment industry in conservative portfolios.

Application of *Spousal Support Advisory Guidelines*

[215] The range for spousal support generated by the Childview software program, when one inputs: income for Mr. Pothier of $290,000.00, income for Ms. Pothier of $50,000.00, a 28-year marriage, Ms. Pothier's age as 52 at the time of separation, and an indefinite duration, is: high end, $9,797.00; mid range, $8,649.00; and, low end, $7,500.00, per month.

[216] In her post-trial submissions, Ms. Pothier sought on-going spousal support in the mid-range, based on her calculation that Mr. Pothier had income of at least $350,000.00 and her having no income. She imputed no investment income to either spouse. This support claim would be reduced in exchange for Ms. Pothier's continued use of a PM vehicle (at the rate of $700.00 per month).

[217] In his post-trial submissions, Mr. Pothier proposed he pay spousal support in the mid-range and continue to provide Ms. Pothier with use of a PM vehicle as well as paying vehicle maintenance costs (so long as Ms. Pothier refrained from smoking in the vehicle). This was premised on that his income being $150,000.00.

He further proposed to continue her comprehensive medical coverage, including dental coverage.

[218] The issue for the court is the location of spousal support within the *Guidelines* range.

[219] Factors that may favour a support award in the higher end of the range include a strong compensatory claim, an older recipient, a long-term marriage and where the recipient has limited means to support herself including little or no property.

[220] Factors that may favour an award at the lower end of the range include a recipient with a weak compensatory claim, who is young, who has significant assets arising from the marriage, or the ability to support herself.

[221] Ms. Pothier filed in 2016 a sworn Statement of Expenses (Exhibit 20, Tab 5) wherein she lists all her expenses (including a mortgage on her post-separation residence), but not including the use of a company vehicle (except gas) or income tax, of $4,247.25 per month or $50,967.00 per year.

[222] In this case, the primary basis for an award at the higher end of the range is the length of the marriage and the strong compensatory entitlement. This is balanced with the fact that, as a result of Mr. Pothier's business success, Ms. Pothier has acquired significant financial resources that should provide her with financial security without entering the work force.

[223] Application of the mid-*Guidelines* range, according to my Childview calculation, would result in Ms. Pothier having gross annual income of $153,782.00 less income taxes of $53,692.00, for net after-tax cash of $100,090.00 per year. This is significantly higher than the expenses set out in her 2016 Statement of Expenses.

[224] I conclude that Mr. Pothier should pay prospective spousal support for an indefinite period in the mid-range ($8,649.00) less the estimated value to Ms. Pothier of the use of a company vehicle ($700.00 per month) on the terms proposed by Mr. Pothier and the medical and dental plan (which the court estimates as $200.00 per month) or $7,749.00 per month. He will continue to provide use of a company vehicle and medical/dental coverage as he has until now.

[225] Spousal support in the *Guidelines'* mid-range is significantly higher than Ms. Pothier's current expenses, which is justified in part by the court's decision not to order an unequal division of the matrimonial assets.

[226] With respect to life insurance, for several years Mr. Pothier has maintained two life insurance policies with Manulife in the face amount of $225,000.00. The court orders that he shall name and maintain Ms. Pothier as the beneficiary of the two existing life insurance policies in the amount of $225,000.00 for so long as there is a spousal support obligation payable by him to her.

Retroactive Spousal Support

[227] Ms. Pothier claims retroactive spousal support for 81 months from October 2009 to June 2016, in the amount of $672,138.00, less:

1. family trust dividends at $2,500.00 per month times 81 months;
2. $75,000.00 she withdrew from a joint line of credit;
3. $3,107.00 paid by Mr. Pothier on her VISA post-separation;
4. $56,700.00 for the use of a new vehicle (at $700.00 per month); and
5. $15,000.00 Mr. Pothier paid for her medical bill.

[228] Ms. Pothier submits the net amount owing is $346,252.00. (I could not make her arithmetic work.)

[229] She notes that the retroactive lump sum spousal support payment is not tax deductible by Mr. Pothier or taxable to Ms. Pothier. She blames Mr. Pothier for the failure to pay spousal support at the rate she claimed for prospective spousal support (over $12,000.00 per month); therefore, Mr. Pothier should suffer the tax consequence.

[230] Mr. Pothier commenced these divorce proceedings in June 2013. An Answer was filed in August 2013. There was no evidence before the court as to when Ms. Pothier expressed dissatisfaction with the in-kind and cash payments made by Mr. Pothier for her support.

September 2009 to December 2013

[231] From September 2009 until December 2013, Ms. Pothier had exclusive possession of the matrimonial home at Marvin's Island, for which Mr. Pothier paid virtually all the property related expenses. She had the use of a new vehicle (the value of which has been imputed as income to Mr. Pothier). She received from the family trust actual cash of $23,500.00 per year ($1,958.00 per month in actual dividend payments). She withdrew from the parties' line of $75,000.00 in November 2010 (this is separate from the $78,781.00 outstanding on the joint line of credit as of trial). Mr. Pothier paid one of her VISA bills of about $3,100.00 and a medical bill of hers in the amount of $15,000.00.

[232] Ms. Pothier's income tax returns for the years 2009, 2010 and 2011 show no income, other than the family trust dividends, and no withdrawals from her RSPs. The family trust dividend payments were tax free; her tax returns show that she paid no tax on the amount reported. In 2012, she withdrew about $9,000.00 from her RSP, which she testified was used to build a second wharf at Marvin's Island.

[233] A Statement of Expenses sworn in 2012 (not filed with the court until 2015) by Ms. Pothier sets out that her gross expenses were $3,145.00 per month. This excludes housing costs (listed as paid by Mr. Pothier) and vehicle expenses (except gas).

[234] I conclude that Ms. Pothier was able to maintain a standard of living in the matrimonial home on the same basis as the parties lived before the date of separation until the sale of the matrimonial home in December 2013. She has not established any basis for retroactive spousal support before December 2013 irrespective of any of the factors enumerated by the Supreme Court of Canada in the *DBS* case, 2006 SCC 37 ("*DBS*").

[235] If I am wrong in this conclusion, then I would consider the *DBS* factors.

[236] In *Kerr v Baranow*, 2011 SCC 10 ("*Kerr*"), the Supreme Court of Canada stated that the factors relevant to retroactive child support claims discussed in *DBS* (the need of the recipient, conduct of the payor, reason for the delay in seeking support, and, any hardship to the payor by the delay) apply. The factors are to be considered and weighed in light of different legal principles and objectives that underpin spousal support. Unlike child support, a spouse is not under a legal obligation to look out for the other spouse's legal interest.

[237] The primary considerations with respect to retroactive spousal support claims are the issues of notice, delay and misconduct. In this case, there was no misconduct by Mr. Pothier. He effectively paid enough - in kind as well as through the continuation of the tax-free dividend, the assumption of responsibility for the $75,000.00 withdrawn by Ms. Pothier from the line of credit, and the payment of other bills, which enabled her to maintain their pre-separation standard of living.

[238] Where there is no misconduct by the payor, the date of effective notice is usually the starting point for any retroactive claim. The date of effective notice is usually the date when the recipient indicates that the *status quo* is not acceptable.

[239] The start date for retroactive spousal support is a matter of discretion based on the relevant legal factors.

[240] There is no evidence of notice by Ms. Pothier at any time before December 2013. I find there is no basis for the payment of retroactive spousal support before December 2013.

December 2013 to June 2016 (and the date of this decision)

[241] Ms. Pothier's sworn Statement of Expenses of June 6, 2016, appears to set out her actual expenses after the sale of the Marvin's Island property and her purchase of a home in Falmouth. In the Statement of Expenses, she continues to benefit from the free use of a new vehicle (except gas). She swears that her gross expenses are $4,247.00 per month. Throughout this period, she continued to receive the tax-free monthly dividend payments of $1,958.00.

[242] Disregarding any income that she could have earned from her registered and non-registered savings after the sale of Marvin's Island, her monthly short fall is about $2,400.00.

[243] The court notes that the low-end of the *Guidelines* range for prospective spousal support is $7,500.00 per month (less $900.00 for use of a vehicle and insurance). Deducting from that the $1,958.00 per month which had no tax consequences for either party, and the $900.00 per month value of the vehicle and insurance which again had no tax consequence for the parties, Ms. Pothier received $4,642.00 per month less than the low-end of the *Guidelines* range.

[244] Ms. Pothier submits that Mr. Pothier should eat the tax consequences of having to pay in a lump sum spousal support that is not tax deductible to him.

[245] The case law says otherwise. Several cases in the *Annual Review of Family Law, 2016–2017*, by Alfred Mamo (Toronto: LexisNexis, 2017), state that the *Guidelines* are calculated on the assumption that spousal support is deductible. Retroactive awards are not tax deductible to the payor or taxable to the recipient. Other sources relied on for the court's conclusion include: *Samoilova v. Mahnic* 2014 ABCA 65 (and cases in other jurisdictions citing this decision or cited in it); *CED Family Law – Divorce V.16*(d), and *Epstein's This Week in Family Law*, Fam. L. News. 2014-42.

[246] Absent a demand by Ms. Pothier before 2016, or blameworthy conduct by Mr. Pothier (such as concealment of income by Mr. Pothier) – none of which was established, the court sees no reason not to follow the case law. This caselaw provides that retroactive spousal support, based on the *Guidelines*, should be 'netted down', for the payor's tax obligation. Since *Guideline*s support calculations are premised on tax deductibility to the payer and as taxable income to the recipient, there is no harm or loss to the recipient by netting down for taxes. To do otherwise would give a windfall to the recipient for which no juridical basis exists.

[247] It appears that Mr. Pothier paid tax in 2013 of about $36,000.00 on taxable income of $119,000.00 or at the rate of 31%; in 2014, taxes of $39,000.00 on taxable income of $130,000.00 or at the rate of 30%; and, in 2015, taxes of $38,000.00 on taxable income of $130,000.00 or at the rate of 30%. These tax rates are in respect of income that is almost half the income the court imputes to Mr. Pothier for this decision, and which he will have to receive to fulfill his spousal support obligation.

[248] Deducting 50% from $4,642.00 per month (assuming this to be his marginal tax rate on the additional income) would require Mr. Pothier to pay retroactive spousal support to Ms. Pothier of $2,321.00 per month (tax free to her).

[249] Ms. Pothier's shortfall without reliance on any income from her own investments, is $2,400.00 per month. Her 2015 tax return shows Line 150 income of $39,321.00; I infer she had investment income of about $10,000.00.

[250] I order retroactive spousal support, non-taxable to Ms. Pothier, in the amount of $2,321.00 per month from December 1, 2013 to and including August 31, 2017 or 45 months, totalling $104,445.00.

Costs

[251] The court will receive written submissions on costs if the parties are unable to agree.

Warner, J.

Schedule "A"
Determination of Business Assets

	Value	Husband	Wife
A. PRED (business asset - no value assigned)			
B. Vacant Lot (business asset - no value assigned)			
C. Investment Account (matrimonial)	$ 33,857.00	$ 33,857.00	
D. Rental Property (not business asset (Note #1))			
E.1 2008 Chaparral Boat (not business asset)	$ 72,000.00	$ 72,000.00	
E.II Harley Davidson (not business asset)	$ 22,680.00	$ 22,680.00	
E.III Trailers, Buggies and snowmobiles (only the travel trailer is not a business asset)	$ 14,400.00	$ 14,400.00	
E.IV Vehicles used by the Pothiers for personal use (business asset relevant for income purposes)			
	$142,937.00	$142,937.00	$ -
Equalization Payment from Mr. Pothier to Ms. Pothier		$ 71,468.50	$71,468.50
One-Half	$ 71,468.50	$ 71,468.50	$71,468.50

Note #1 (D. Rental Property)

As neither party provided an appraisal or valuation of the rental property, an appraisal will need to be completed. From the appraisal valuation will be deducted any registered mortgages and/or liens, as well as the usual disposition costs (5% real estate commission, 15% HST and legal fees of $1,000). Ms. Pothier shall be entitled to one-half of Mr. Pothier's one-half share of the value after the identified adjustments.

Schedule "A"
Division of Matrimonial Property

		Value	Husband	Wife
Real Estate				
30 Hazel Lane		$1,318,223.62	$659,111.81	$659,111.81
Arthur Hatt lots				
Lot A-1X - unsold	$299,000.00			
Disposition Costs:	$18,192.50	$280,807.50		$280,807.50
Lot B - unsold	$399,000.00			
Disposition Costs:	$23,942.50	$375,057.50	$375,057.50	
Investments				
Stocks - RBC #7067		$61,659.97	$61,659.97	
Stocks - Assante #2126		$96,654.00	$96,654.00	
Life Insurance Cash Surrender Value				
(as of December 2011)		$32,642.62	$32,642.62	
Total Assets		$2,165,045.21	$1,225,125.90	$939,919.31
Debts				
Scotiabank Visa		$2,835.00	$2,835.00	
Line of Credit (Arthur Hutt Lots)		$78,781.00	$78,781.00	
Total Debts		$81,616.00	$81,616.00	$0.00
Net Equity:		$2,083,429.21	$1,143,509.90	$939,919.31
Amount paid by Mr. Pothier to Ms. Pothier			$101,795.30	$101,795.30
			$1,041,714.61	$1,041,714.61
RSP equalization				
RSP - CIBC #3094		$340,247.33		$340,247.33
(January 2013 withdrawal by Mrs. Pothier)		$29,000.00		$29,000.00
RSP - TD #8155		$427,529.00	$427,529.00	
		$796,776.33	$427,529.00	$369,247.33
Amount of RRSP Rollover			$29,140.83	$29,140.83
			$398,388.17	$398,388.17

Schedule “A”
Division of Matrimonial Property

Schedule "A"
Equalization

	Value	Husband	Wife
Business Assets	$142,937.00	$142,937.00	$0.00
Matrimonial Division	$2,083,429.21	$1,143,509.90	$939,919.31
Total Assets:	$2,226,366.21	$1,286,446.90	$939,919.31
Equalization Payment:	$1,113,183.11	$173,263.80	$173,263.80
Section 18, contributions to the business			$5,000.00
Retroactive Spousal Support			$104,445.00
Total Payable to Suzanne Pothier:			$282,708.80
Equalization RRSP Rollover:			$29,140.83
One-half of Mr. Pothier's interest in 222 Wentworth Road (to be determined)			