

**SUPREME COURT OF NOVA SCOTIA**  
**(FAMILY DIVISION)**

**Citation:** *MacLean v. MacLean*, 2017 NSSC 263

**Date:** 20171010

**Docket:** 1201-069737

**Registry:** Halifax

**Between:**

James Patrick MacLean

Petitioner

v.

Theresa Bernadette MacLean

Respondent

**Judge:**

The Honourable Justice Beryl A. MacDonald

**Heard:**

September 11 and 15, 2017

**Counsel:**

James MacLean with counsel, Sarah White

Theresa MacLean with counsel, Angela Walker

**By the Court:**

**Background**

[1] In July 2006, the parties were involved in a 3-day hearing pursuant to the *Maintenance and Custody Act* R.S.N.S. 1989, c. 160 s. 3, and the *Matrimonial Property Act*, R.S.N.S. 1989, c.275. An order was issued on July 6, 2006. It required an equal division of matrimonial assets and debt between the parties. Mr. MacLean's total annual income was \$80,699.00. His income had three components, \$61,463.00 from employment, \$4,236.00 from rental income and \$15,000.00 imputed income from a business. Ms. MacLean's income was \$32,000.00 from employment. The parties had employment pensions and benefits that were to be equally divided from the date of the marriage, June 12, 1981 until the date of their separation on August 5, 2003. Mr. MacLean was to pay spousal support in the amount of \$1,200.00 per month and he was to maintain Ms. MacLean on his health benefit plan through his employment "pending further Court Order". There never has been a further Court Order issued involving these parties.

[2] Although I do not have complete financial information about Mr. MacLean's circumstances since the date of the Order, what has been provided indicates Mr. MacLean's income increased after the parties separated. In 2014, his declared line 150 income was \$111,158.00.

[3] On August 15, 2016 Mr. MacLean filed a Petition for Divorce. As this matter progressed it became apparent the only issues between the parties were whether Mr. MacLean would continue to pay spousal support and whether Ms. MacLean was entitled to receive one half the sick benefits/retirement allowance he received when he chose to retire from his employment.

[4] Because this is an originating proceeding I am not required to consider whether there has been a material change of circumstances since the Order was granted under the Provincial Legislation in 2006. However, that Order does inform the court about the circumstances existing at the time and the obligations placed upon the parties as a result. Mr. MacLean stopped paying the required spousal support in June 2016. He did not ask the court to suspend that payment before doing so. It is evident he believed he was entitled to discontinue support because he had retired. Neither the Order nor the decision upon which it was based entitled him to do so.

## **Spousal Support Legal Principles**

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

[6] In *Bracklow v. Bracklow, supra*, the Supreme Court analysed the statutory objectives and held that they create three rationales for spousal support only two of which are relevant to this proceeding:

1. Compensatory support to address the economic advantages and disadvantages to the spouses flowing from the marriage or from the roles adopted in marriage.
2. Non-compensatory dependency based support, to address the disparity between the parties, needs and means upon marriage breakdown.

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

[7] A spouse suffers economic disadvantage arising out of the roles adopted in a relationship if he or she withdraws from the workforce, delays entry into the workforce or otherwise defers pursuing a career or economic independence to assume primary responsibility for a home, a partner or child care. When this occurs, the spouse has an entitlement to compensatory support.

[8] Spouses who have worked throughout a marriage can suffer economic disadvantage when that marriage ends. They also may have a compensatory claim. In such cases typically there is a spouse who has a higher income and there are children who are primarily parented by the spouse with the lower income. Such spouses do not spend time seeking out careers that would provide them with higher incomes because they have become dependent on the primary income earner and they place more emphasis on parenting the children and attending to their partner's needs than they do in obtaining personal economic security. Significant differences in incomes at the breakdown of the marriage may be used to determine whether a compensatory entitlement exists. (*Moge v. Moge* [1992] 3 SCR 813. and *Bracklow v. Bracklow* [1999] 1 SCR 420)

[9] Self sufficiency may eliminate entitlement to non-compensatory support. It does not necessarily eliminate entitlement to compensatory support. There is no

“duty” to achieve self-sufficiency although a spouse is to make reasonable efforts to do so. The Supreme Court of Canada made this clear in *Leskun v. Leskun*, 2006 SCC 25. Failure to achieve self-sufficiency is merely a factor to be taken into account in assessing a spousal support request.

[10] A spouse is not disentitled to support because he or she has formed a new spousal relationship but the benefits received under the relationship may be taken into account in assessing a dependent’s need in a non-compensatory claim or standard of living in a compensatory claim. Other factors to be taken into account are the length of the first marriage, the age of the recipient, the duration and stability of the new relationship.

[11] Determining the basis of entitlement is a required first step to ensure proper utilization of the Spousal Support Advisory Guidelines. Ms. MacLean has used the guidelines to determine the quantum of spousal support she considers appropriate. Mr. MacLean wants to terminate spousal support and he has made no analysis of quantum.

## **Entitlement**

[12] The parties were married for 22 years and had been in a common-law relationship for approximately 17 months before their marriage. There is one adult child of their marriage. When the parties separated Ms. MacLean was 43 years old. Mr. MacLean was 45.

[13] Ms. MacLean is now 57 years old. Mr. MacLean is 58. When the parties separated Mr. MacLean was employed by the Halifax Regional Fire Service working as a driver. He did have other duties to perform that required physical labour. During their marriage and after, Mr. MacLean earned income from rental properties and from a construction company called JML Foundations Ltd. He is the sole shareholder and director of that company. Mr. MacLean has generally worked more than 35 hours a week. He frequently works 7 days a week. During their marriage Mr. MacLean worked these long hours and Ms. MacLean was the primary caregiver for their son. She looked after their home and attended to Mr. MacLean's needs including those related from time to time to the construction company.

[14] Ms. MacLean is employed for 10 months of the year as an administrative assistant with the Halifax Regional School Board. She has worked in this position since October 1983. The terms of her contract provide her with employment 10 months of the year. She is laid off from her employment in June during which time she collects Employment Insurance Benefits. She is then rehired in September. Her total annual income is \$41,310.00.

[15] Since November 2014 Ms. MacLean has been living with her common-law partner who contributes to their joint household finances. Ms. MacLean's standard of living has not been substantially improved because she now has a partner sharing expenses. Her living expenses were modest and remain modest. This relationship is relatively recent. Her partner is 65 years old and his employment is not guaranteed. He has earned more in 2016 than he has in previous years but his employment is not guaranteed.

[16] Mr. MacLean also has a common-law partner with whom he has been living since 2006. She also shares living expenses in their home. She has retired and is 56 years old. Her income is modest and the implication from her affidavit and testimony is that she is paying most of these household expenses because Mr. MacLean has very little income since he retired. That may be so but it appears he



has money to be involved in construction and renovation work. This may come from his Manulife investments but one would expect this should be declared as income eventually.

[17] In the spring of 2016, when he was 57 years old, Mr. MacLean retired. He did so by choice. His reasons for taking an early retirement related to changes in the pension plan available and his decision that he would achieve a more favourable economic benefit by retiring and taking his pension in a lump sum. When he made this decision, he ignored the spousal support responsibility he had pursuant to the court Order. He was under the illusion that he could stop paying spousal support and he did so delivering his last spousal support payment to Ms. MacLean in June 2016. When he retired Ms. MacLean's access to medical benefits also ceased.

[18] Both parties made reference to the fragility of their health. I acknowledge Mr. MacLean is finding it increasingly difficult to perform heavy labour. However, there is no indication that this required him to retire from his position with the Halifax Regional Fire Service. It may eventually effect the work he does on his rental units and in his construction company. There is no medical evidence before me to conclude he has any disability at this time.

[19] Ms. MacLean has suffered from cancer that presently is in remission. I accept her evidence about her struggles with this disease but it is not interfering with her employment. She does have significant medical expenses for drug therapies. Because of her pre-existing conditions medical insurance plans are very expensive.

[20] Mr. MacLean had significantly more income than Ms. MacLean when their marriage ended. Ms. MacLean is seeking compensatory spousal support. Mr. MacLean argues that when the parties separated she had a non-compensatory entitlement to spousal support that has ended. His arguments in support of this submission are:

- Ms. MacLean has always worked during the marriage and was not dependent upon him;
- Ms. MacLean has re-partnered and no longer has any “need” for spousal support;
- Ms. MacLean is or should be self-sufficient taking into account her income and a reasonable use and investment of her assets.

[21] As I noted in my review of the legal principles to be applied to a claim for spousal support, the mere fact that a spouse has worked during the marriage does not necessarily result in the conclusion there is no claim for compensatory spousal

support. Significant disparities in income can indicate there is a compensatory claim, particularly when one spouse performs the majority of tasks required to raise children and maintain a household. Under these circumstances career development is often ignored. There is no perceived need to become “self-supporting”. The lower income spouse becomes financial dependent upon the spouse who is the primary income earner. This certainly was what happened in this marriage. Ms. MacLean had a compensatory entitlement to spousal support when the parties separated and she still has a compensatory claim.

[22] The fact that Mr. MacLean is now retired does not affect her compensatory claim although it may affect the quantum of spousal support.

[23] The fact that Ms. MacLean has a partner does not affect her entitlement although that also must be considered in the analysis of the appropriate quantum of spousal support.

### **Quantum of Spousal Support**

[24] Mr. MacLean submits he has no ability to pay spousal support. He has not provided an analysis of his income sources to provide the court with what he considers is his total annual income on a go forward basis. His counsel has argued

that he has not failed to disclose income because he has provided 2014 and 2015 income tax returns and Notices of Assessment and the March 2017 financial statement for JML Foundations Ltd. He provided the first page of a 2016 income tax return and a Notice of Assessment that included the lump sum pay-out of his pension entitlement. I have no breakdown of the amount he declared on his 2016 income tax return for his rental or business income although the financial statement provided for JML Foundations Ltd for its March 31, 2016 year end does show a net income loss of \$30,532. In 2015, this company declared a net income of \$42,278.00. In 2015 retained earnings were \$ 281,016.00. In 2016, they were \$250,484.00. This company has very little debt. In 2016, it appears Mr. MacLean borrowed \$86,390.00 from the company. Mr. MacLean did testify that the equipment he uses in this business is old and the retained earnings are required to permit him to purchase new equipment. I have no specifics from which I could conclude this is an accurate analysis of the corporate need. The fact that he borrowed money from the company suggests it is a vehicle through which he expects to receive income although it would not appear to be “income” on the financial records but as a loan he must repay. Eventually he will have to do so but is clear from his own evidence that he did not expect his income to be significantly reduced when he retired. In his affidavit filed on August 15, 2016, sworn on July

28, 2016, attached as Tab 7 to Exhibit 1# filed in this proceeding the following appears:

8. I am 57 years old and I will be retiring as a firefighter on or before July 31, 2016.

9. Upon retirement I will have accumulated a pension that would allow me to draw approximately \$32,782.00 per year....

12. I am not able to cover my expenses based on the annual salary I would receive from my pension. In light of this, I anticipate I will take the commuted value of my pension and invested. Therefore I will not begin drawing any annual salary from the pension at this time...

17. I am hopeful that I will be able to continue with my business and make a profit, otherwise I will have to look for other employment. I am hopeful that I will be able to make an income of approximately \$40,000.00.

18. At this point in time my income is in flux and because I will be self-employed, my earnings are not guaranteed. I simply cannot afford to continue to pay the Respondent \$1,200.00 per month in spousal support.

[25] While employed Mr. MacLean's base salary was approximately \$90,500.00 per year. From the information I have before me he averaged approximately \$4,500.00 per year as income from rental properties. His income from his business was as high as \$18,880.00 in 2014 down to \$0 as recorded in the March 31, 2016 corporate financial statement. To have given up employment that provided him

with \$90,500.00 per year because he did not believe he could live on \$32,782.00 plus earnings from his business and rental income suggests he expected to be better off, not worse off, when he retired early to take the commuted value of his pension.

[26] In his Statement of Expenses sworn September 4, 2017, filed as Tab 5 attached to Exhibit #1 the only income provided is “rent from Hemlock property”. The amount is \$775.00 leaving him with a deficit each month of \$4,992.79. This document does not indicate which of the household expenses, if any, are shared with his current partner.

[27] In addition to his primary residence Mr. MacLean has several rental properties, 3 lots of land known as the Bambrick property and he is the owner of a residence in which his son resided. Many of these properties were acquired after the parties separated and although some have mortgages associated with them it does give an indication of the disposable income available to Mr. MacLean permitting him to purchase these properties. In addition, he owns several lots of land in Cape Breton that resulted from a family inheritance. He did not disclose those on his Statement of Property. He did not disclose a time-share property he owns in Florida, U.S.A. Furthermore, he has other investments not inclusive of the investments he made from his retirement funds. As a result, he has assets that

might be utilized to assist him in meeting his financial obligations. Yet he comes to this court alleging his only reliable total annual income will be \$777.00 rental income. In submissions, his counsel suggested he might earn \$44,000.00 per year. No analysis was given to support this amount.

[28] It is totally unacceptable for a litigant to provide the court with various pieces of information from which annual income could be calculated without providing the court guidance about what appropriately should be considered as total yearly income. Because Mr. MacLean has provided no such guidance the court is free to draw its own conclusions from the material that has been filed.

[29] Counsel for Ms. MacLean has attempted to determine what Mr. MacLean's total annual income is or should be. Four different scenarios have been provided. They all begin with imputing income to Mr. MacLean based upon what he had been earning when he was employed. Imputation may appear to be an artificial means by which to determine Mr. MacLean's ongoing income now that he has retired.

[30] The discretionary authority to impute income must be exercised judicially. It is not to be exercised arbitrarily. There must be a rational and solid evidentiary

foundation upon which to impute income. The analysis requires the court not only to consider the amount of income a spouse actually earns, but also the amount of income that spouse could earn if he or she was working to capacity. The age, education, experience, skills and health of the payor are factors to be considered in addition to such matters as the availability of work, the freedom to relocate and other obligations. Persistence in unremunerative employment may entitle a court to impute income.

[31] The burden of proof rests with the person seeking to impute income. In this case that burden rests upon Ms. MacLean. She considers Mr. MacLean to be underemployed. I agree. I also consider it is appropriate to impute income to Mr. MacLean because:

- He provided no direction to the court about what may be a reasonable income for him to earn on a go forward basis.
- He has not clearly shown on his Statement of Expenses what living expenses are paid entirely by him or by his partner.
- He failed to disclose assets.
- After retirement he expected to be able to earn at least what he was earning before retirement and cannot under these circumstances place the burden of his miscalculation upon Ms. MacLean.



- He does have the training, skill, experience and assets to provide him with much more income than he has disclosed.

[32] I impute income to him based upon his base rate of pay before retirement - \$90,566.00 - as shown on his 2015 Income Tax Return. I will not add rental income or business income to this amount. He will need either to sell investments or make other arrangements to supplement the income he has lost because he took early retirement. If in subsequent years he earns more than this amount that may be a justification for an upward variation. A reduction in his income, because he sold income producing or passive assets to which I have made reference will not necessarily be a justification for a downward variation.

[33] Counsel for Mr. MacLean made some reference to the question of double dipping as described in (*Boston v Boston*, 2001 SCC 43). However, in the Spousal Support Advisory Guidelines: The Revised User's Guide the following appears:

Where a pension is divided at source when it is paid out, as is the case under British Columbia or Nova Scotia legislation, then the problems of *Boston* can usually be avoided, e.g. *Trewern v. Trewern*, [2009] B.C.J. No. 343, 2009 BCSC 236. In these cases, both spouses simply include the pension payments in their income and the previously divided portions of the pension effectively cancel each other out.

[34] In this case, each party received a lump sum representing the commuted value of Mr. MacLean's pension. Neither are presently receiving income from the

investments each made when these sums were received. *Boston* is of no assistance to Mr. MacLean in this case.

[35] Based upon the parties' incomes the Spousal Support Advisory Guidelines provide a range for spousal support from \$1,500.00 per month to \$2,000.00 per month. Counsel for Ms. MacLean requested spousal support at the higher end of the range because she now must pay \$180.00 per month for her medical benefit plan, coverage that had previously been provided under the terms of Mr. MacLean's employment. A further argument presented in favour of an award at the higher end of the range is the strength of Ms. MacLean's compensatory claim and her inability to meet her reasonable expense budget based upon her income alone after taking into account the contributions made by her common-law partner.

[36] Factors that argue in favour of an award at the mid or lower range level are the number of years during which Mr. MacLean has been paying spousal support although under different legislation. Compensatory support can eventually be terminated and given Ms. MacLean's relatively young age at the time these parties separated she cannot assume spousal support will continue until she feels financially secure. Her compensatory claim is not strong enough to justify spousal support at the higher end of the range.

[37] At the end of every month commencing September 30, 2016 Mr. MacLean is to pay Ms. MacLean \$1,500.00 for spousal support.

**Arrears under the Previous Order**

[38] Mr. MacLean must pay the arrears owing under the MCA order. He has not paid the required amount on July 31 and on August 31, 2016. His payment in June was for June 2016 not July 2016. The total arrears owing are \$2,400.00.

**Sick benefits/Retirement Allowance**

[39] During the hearing of this proceeding Mr. MacLean acknowledged Ms. MacLean must receive ½ of the value of his Pre-Retirement leave benefit. The parties have confirmed the amount he is to pay and that amount is to be reflected in the order to be prepared by counsel for Ms. MacLean.

**Costs**

[40] Costs remain as an issue. Ms. MacLean is the successful party. She must file her written submissions about costs within 10 days from her receipt of this decision. Mr. MacLean must file his written submissions about costs within 5 days from his receipt of Ms. MacLean's submissions. If Mr. MacLean has made a

submission on costs not contemplated in Ms. MacLean's submissions, she may file additional submissions with the court within 2 days from her receipt of those submissions.

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Beryl A. MacDonald, J.