SUPREME COURT OF NOVA SCOTIA
Citation: *M.S.C. v. T.L.C.*, 2013 NSSC 378

Date: 20131122
Docket: 1207-003938
Registry: Truro

Between:

M. S. C.

Petitioner

v.

T. L. C.

Respondent

Editorial Notice

Identifying information has been removed from this electronic version of the judgment.

Judge:	The Honourable Justice Patrick Duncan
Heard:	October 8, 2013, in Truro, Nova Scotia
Final Written Submissions:	November 15, 2013
Counsel:	Peggy Power, for the Petitioner T. C., Respondent, Self-represented

By the Court:

Background

[1] M. and T. C. were married on August 25, 1990 and separated on September 26, 2010. They have three children together:

1. N. S. C. born December […], 1993, now age 19;
2. Z. V. C. born October […], 1995, now age 18; and
3. B. M. C. born October […], 1999, now age 14.

[2] The parties entered into a Separation Agreement dated May 13, 2011. It addressed parenting arrangements, child support, spousal support and property division among other things. It provides that the parents have joint custody of the boys, with N. being in the primary care of his father, and the two younger boys in the primary care of their mother. Child support was calculated in accordance with section 8 of the **Federal Child Support Guidelines (FCSG),** on a set-off basis, having regard to each parent's income.

[3] Subsequently, N.' status as a child of the marriage came into question and Ms. C. made application in Family Court to vary the child support provisions of the Separation Agreement. The matter came on for hearing on October 31, 2012 and an interim order was issued directing that:

1. N. was no longer a child of the marriage and no support was payable on his behalf; and
2. Mr. C. was ordered to pay child support for Z. and B., who continued to be in the primary care of Ms. C., in the amount of $1,387 per month, based on his annual income of $103,535.95.

[4] The parties returned to Family Court on December 12, 2012 and a further order was issued by that court. It states in the recitals that the court was:

> "…not satisfied that T. L. C. has made sufficient effort to secure full-time employment, or obtain her own medical plan."

[5] It then sets out sixteen orders addressing issues of child and spousal support. I will address those provisions as the same issues arise for determination in this decision.

[6] M. C. filed a Petition for Divorce on June 17, 2013 in Halifax. An Answer was filed by the respondent on July 12, 2013. The file was transferred to Truro by order of this Court issued September 6, 2013, after a hearing conducted on August 20, 2013.

[7] This decision follows a trial of the divorce and corollary relief issues that was held on October 8, 2013. Following the conclusion of the hearing Ms. C. submitted, on two occasions in letter form, further information as to the calculation of her income, expenses and debts, as well as information addressing concerns over the exercise of parenting time. Counsel for Mr. C. objected to the introduction of new evidence in this way. To the extent that the evidence was already before the court then the additional submissions have been treated as that – a further submission. To the extent that the respondent seeks to introduce new evidence, I will not consider it as it has not been properly tendered and so is inadmissible.

Issues

[8] The issues to be resolved in this matter are:

1. Whether to grant the divorce petition;
2. Whether Z. is a "child of the marriage";
3. What parenting arrangement is in the best interests of any "child of the marriage";
4. What amount of child support is payable, retroactively and prospectively;
5. What provisions should be made for payment of expenses contemplated by section 7 of the **Federal Child Support Guidelines**;
6. Whether the respondent continues to be entitled to spousal support, and if so in what quantum and for what duration;
7. Whether the petitioner should be required to continue to provide medical insurance coverage for the respondent;
8. Determine an appropriate division of matrimonial property not otherwise resolved;
9. Costs

Divorce

[9] I am satisfied that the parties have lived separate and apart for a period in excess of one year immediately preceding the determination of the divorce and that there is no possibility of reconciliation. All statutory requirements have been fulfilled and I grant the petition for divorce.

Children of Marriage

N.

[10] The Family Court determined that N. was no longer a child of the marriage as of August 1, 2012. The parties agree that continues to be the case.

B.

[11] The parties agree that B. continues to be a child of the marriage.

Z.

[12] Z. has just turned 18 years of age. He has graduated from high school and has an application pending for admission to the Canadian Armed Forces. While he awaits the disposition of his application he has been working in Alberta, three weeks on, and nine days off.

[13] The petitioner submits that Z. no longer falls within the definition of a "child of the marriage". It is argued that while he is under the age of majority, Z. has withdrawn from the charge of his parents. *see,* section 2, **Divorce Act** R.S.C. 1985, c. 3 (2nd Supp.)

[14] The respondent submits that Z. continues to be a child of the marriage. Her position is that it is premature to conclude he has withdrawn from the charge of the parents. His current employment began September 11, 2013 and she believes that he intends to return home for 9 days per month, during which time he will reside with his mother. She sees her home as his "primary residence".

[15] Ms. C. also says that Z. has been recently diagnosed with Crohn's Disease, which may impact on his employment plans. For these reasons, she believes that

the court should continue to require support payments to be made by the petitioner and that the matter be reviewed in six to twelve months.

[16] I agree with the petitioner and conclude that Z. was no longer a child of the marriage as of September 11, 2013 and therefore support payments for him will be terminated as of that date.

[17] There is no evidence that Z. intends to return to school. To the contrary, the evidence is that he is pursuing a career and that he is already earning income of his own. His room and board form part of the compensation he receives at his current workplace and so he has no need for the financial support of his parents at this time.

[18] In response to the suggestion that support be paid to enable the respondent to maintain her home as Z.'s primary residence, I note that he has elected not to return to Nova Scotia on the first of his nine day breaks. This illustrates the difficulty in predicting what he will do in the future. If Z. chooses to come home for short visits on occasion and is generating costs for room and board while at his mother's then she can ask him to contribute to that cost since he appears to have the financial ability to do so. If, as Ms. C. fears, Z.'s circumstances change in a manner that may reinstate his status as a "child of the marriage" then an application to vary on that basis can be brought at that time.

[19] In conclusion, I find that B. is a child of the marriage; N. and Z. are no longer children of the marriage.

Custody and Parenting Time

[20] The Separation Agreement specifies that the parties will have joint custody of B. and that his primary residence is with his mother. *See*, Paragraph 4 (b). It then sets out a number of provisions stipulating the parenting arrangements including access.

[21] The petitioner applies for an order granting the parties "shared custody" of B.. The respondent does not agree with this proposed change.

[22] Section 16 of the **Divorce Act** sets out the court's authority to make an order providing for custody of, and terms of access with, a child of the marriage. I note

in particular the provisions for the principle of "maximum contact" set out in section 16(10).

[23] When the parties appeared in Family Court, the resulting orders addressed payment of child support and section 7 expenses, among other things, and are premised upon the continuation of the custody provisions for B. as set out in the Separation Agreement. While never specifically incorporating those provisions into the court orders, the orders only make sense when interpreted that way. Practically speaking, the matter I am being asked to determine amounts to a variation of the terms of the Separation Agreement as relied upon and varied by the orders of the Family Court. For this reason I will consider the factors that arise upon a consideration of section 17 of the **Divorce Act** which states:

> 17. (1) A court of competent jurisdiction may make an order varying, rescinding or suspending, prospectively or retroactively,
>
> (a) …
>
> (b) a custody order or any provision thereof on application by either or both former spouses or by any other person.
>
> …
>
> Factors for custody order
>
> (5) Before the court makes a variation order in respect of a custody order, the court shall satisfy itself that there has been a change in the condition, means, needs or other circumstances of the child of the marriage occurring since the making of the custody order or the last variation order made in respect of that order, as the case may be, and, in making the variation order, the court shall take into consideration only the best interests of the child as determined by reference to that change.
>
> Maximum contact
>
> (9) In making a variation order varying a custody order, the court shall give effect to the principle that a child of the marriage should have as much contact with each former spouse as is consistent with the best interests of the child and, for that purpose, where the variation order would grant custody of the child to a person who does not currently have custody, the court shall take into consideration the willingness of that person to facilitate such contact.

[24] In *Gordon v. Goertz* [1996] 2 SCR 27 McLachlin J.: (as she then was) summarized the law in relation to a change of custody:

49 The law can be summarized as follows:

1. The parent applying for a change in the custody or access order must meet the threshold requirement of demonstrating a material change in the circumstances affecting the child.

2. If the threshold is met, the judge on the application must embark on a fresh inquiry into what is in the best interests of the child, having regard to all the relevant circumstances relating to the child's needs and the ability of the respective parents to satisfy them.

3. This inquiry is based on the findings of the judge who made the previous order and evidence of the new circumstances.

4. The inquiry does not begin with a legal presumption in favour of the custodial parent, although the custodial parent's views are entitled to great respect.

5. Each case turns on its own unique circumstances. The only issue is the best interest of the child in the particular circumstances of the case.

6. The focus is on the best interests of the child, not the interests and rights of the parents.

7. More particularly the judge should consider, *inter alia*:
(a) the existing custody arrangement and relationship between the child and the custodial parent;
(b) the existing access arrangement and the relationship between the child and the access parent;
(c) the desirability of maximizing contact between the child and both parents;
(d) the views of the child;
(e) the custodial parent's reason for moving, only in the exceptional case where it is relevant to that parent's ability to meet the needs of the child;
(f) disruption to the child of a change in custody;
(g) disruption to the child consequent on removal from family, schools, and the community he or she has come to know.

[25] O'Neil ACJ writing in *MacNutt v MacNutt* 2013 NSSC 267, at paragraphs 6-14, sets out a useful outline of the factors relevant to assessing the best interests

of the child when determining custody. In particular, starting at paragraph 15, he discusses the appropriateness of "shared custody", as is being requested here. He summarized in paragraph 19:

> 19 Within the assessment of the best interests of a child when shared parenting is proposed a number of factors frequently prove important. These factors are refinements to the best interests analysis discussed earlier. The factors are the following:
>
> 1. The proximity of the two proposed homes to each other is an important factor to consider. This is relevant to assessing how shared parenting will impact on all aspects of a child's life, including what school the child will attend, what recreational or social relationships will be disrupted or preserved and how available each parent will be to the other should shared parenting be ordered;
>
> 2. The availability of each parent to the child on a daily basis and the availability of step-parents is an important consideration. A court should also consider the availability of members of the respective extended families and whether a shared parenting arrangement impacts negatively or positively on a child's relationship with the extended family;
>
> 3. The motivation and capability of each parent to realize their parenting opportunity for the best interests of the child. If a parent is not truly motivated to use the parenting opportunity to enhance the child's relationship with him/her, that weighs against shared parenting;
>
> 4. Whether a reduction in transitions between households can be achieved by a shared parenting arrangement. This is particularly important when transitions frequently give rise to conflict between the parents;
>
> 5. Whether "mid-week" parenting time or contact with the other parent can be structured without disrupting the child. This contact might be after school or after supper time, for example, the objective being the elimination of extended periods without contact between the child (ren) and a parent and it is an opportunity for a child to share life's experiences with both parents in a timely way. The easier and less disruptive "mid-week" access is to arrange, the more attractive shared parenting becomes;
>
> 6. The opportunity, if any, that shared parenting provides for each parent to be involved in decisions pertaining to the health, educational and recreational needs of the child; the level of interest each parent has in

participating in decision making in these areas is relevant to this assessment. As the opportunity increases so does the case for shared parenting;

7. The extent to which shared parenting enhances the development of a routine in each parent's home. In many cases, the more traditional every other weekend schedule for the non-primary care parent means a routine cannot be developed;

8. Shared parenting imposes responsibility on each parent to share the parenting burden and to be involved in decisions pertaining to the health, educational and recreational activities of the child and requires an assessment of each parent's willingness to assume their share of that responsibility after entrusted with it. Shared parenting is about more than sharing the child's time, it is very much about sharing the daily responsibility of parenting;

9. Related to the preceding is a consideration of the employment and career benefits that may accrue to each parent as a result of a shared parenting arrangement and a more equal sharing of the parental responsibilities;

10. Whether improvements in the standard of living in either or both households may accrue as a consequence of a shared parenting arrangement;

11. The willingness and availability of parents to access professional advice on the issue of parenting;

12. The "elephant in the room" in many custody/access disputes is frequently the financial consequences of the court's custody/access order and the extent to which the allocation of parenting time creates a winner or loser. Three factors must frequently be assessed: a) whether a parent's proposed parenting plan is really about the child support consequences that flow from a shared parenting arrangement or the alternative; b) the manner in which a primary care parent can use his/her position to have power and control of parenting; and c) whether a parent will abuse the parenting opportunity as a result of anger or insecurity, for example. The parenting regime is often not changed to shared parenting because the parties are too conflictual, notwithstanding that the conflict may result from a power imbalance in the parents' relationship flowing from the parenting arrangement in place. Courts must be cognizant of this dynamic;

> 13. An assessment of the parenting styles. That assessment should consider the questions posed by Justice MacDonald in *C.(J.R.) v. C.(S.J.)* 2010 NSSC 85 at paragraph 12:
>
> -- What does the parent know about child development and is there evidence indicating what is suggested to be "known" has been or will be put into practice?
>
> -- Is there a good temperamental match between the child and the parent? A freewheeling, risk taking child may not thrive well in the primary care of a fearful, restrictive parent.
>
> -- Can the parent set boundaries for the child and does the child accept those restrictions without the need for the parent to resort to harsh discipline?
>
> -- Does the child respond to the parent's attempts to comfort or guide the child when the child is unhappy, hurt, lonely, anxious, or afraid? How does that parent give comfort and guidance to the child?
>
> -- Is the parent emphatic [empathetic?] toward the child? Does the parent enjoy and understand the child as an individual or is the parent primarily seeking gratification of his or her own personal needs through the child?
>
> -- Can the parent examine the proposed parenting plan through the child's eyes and reflect what aspects of that plan may cause problems for, or be resisted by, the child?
>
> -- Has the parent made changes in his or her life or behaviour to meet the child's needs, or is he or she prepared to do so for the welfare of the child?

Position of the Petitioner

[26] Mr. C. is employed as […] with a commercial airline. His regular work schedule has a repeating twenty day cycle, that is, he works for five days, from 5 a.m. – 4 p.m.; then he has 5 days off; he then returns to work for five days from 4 p.m. – 3 a.m.; which is followed by another five days off.

[27] The petitioner was diagnosed with […] on July 19, 2013. Treatments for the symptoms of that condition began in May 2013 and Mr. C. has been off work effectively since June 20, 2013 while he has been undergoing assessment and […] treatments. His disability leave will continue until at least February 2014, at which

time it will be reviewed. During this period, Mr. C. is at home and so holds himself out as being more available than he is when working.

[28] The current parenting time provision directs that B. spend three days with Mr. C. during each of his five days off periods, hence a total of six days out of every twenty. Under Mr. C.'s proposal that will increase so that B. will be with him for all ten days off during the twenty day cycle. The effect is to increase B.'s time with his father from 30% to 50%.

[29] Mr. C. testified that he has a very close relationship with B., a point not in dispute. He is active in B.'s extracurricular activities and in particular, as a result of coaching B. in hockey, and his active support of B. in his football program. Therefore, father and son already spend more time together than just that time provided for by the parenting agreement in the Separation Agreement. The petitioner has also renovated his home which now has a room for his son. This was something he was unable to provide at the time of the separation.

[30] During the period of his illness Mr. C. is available most of the time, leaving aside times for attendance at treatments and during the recovery from those treatments.

[31] Finally, Mr. C. believes that a shared custody arrangement would reduce the amount of contact with the respondent and thus reduce the opportunity for conflict that is a basic fact of their relationship.

Position of the Respondent

[32] Ms. C. submits that there is no reason to change the *status quo*. She responds:

- B. is happy and thriving under the current arrangements;
- She provided child care as a stay at home mother during the marriage while Mr. C. pursued his education and career;
- This was true for all but two years during which she worked full time. (That ended when N. became such a behavioural problem

that she reduced her hours to part time work so as to be home more.);

- She has continued to provide primary care to B. after the separation;
- She too is actively involved in B.'s extracurricular activities;
- She has never denied access, even when requested on short notice;
- Any conflict between the parents is related to the inability of the parties to communicate in relation to the payment of section 7 expenses, and in relation to the scheduling of parenting time;
- That the conflict will not be reduced by the proposed change;
- That, in her opinion, the application is motivated by money, since Mr. C. already has substantial time with his son.

Analysis

[33] The overriding question is: "What is in the best interests of B.?". There is a threshold question though that I must address which is whether there has been a material change in circumstances that warrants a variation of the custody arrangements previously agreed to and in place since the separation.

[34] Both parents agree that B. is doing very well right now. There is no evidence that he has expressed a desire to change the existing arrangements. There is no evidence that B. is struggling academically, socially or in his relationship with either of his parents, under the current parenting arrangements. In particular I note that Mr. C., by his own comments, appears to have a reasonable amount of time with his son and a good relationship with him.

[35] There have been changes in the residency of the two older boys, but there is nothing to suggest that impacts materially on B.'s day to day care. There have been changes in the finances of the parties, but again there is nothing to suggest that B.'s

circumstances have been impacted in such a way as to merit consideration of a change in the *status quo*.

[36] Mr. C. has, as he states, significant contact with his son already and it appears that it works well for B.. Ms. C., despite the problems between the parents, continues to support maximum contact between father and son.

[37] Another event speaks to both a suggested change in circumstances, and also to the question of what is in B.'s best interests. The current increased availability of Mr. C. to care for his son is a change but it is one that has an unpredictable consequence. It is triggered by the petitioner's illness, which hopefully will respond positively to treatment in which case Mr. C. will be back to work in the near future, working the twenty day cycle outlined above. However if he is unable to return to work then B. will be spending increased time with his father, during a period when his father may be somewhat limited in what he is able to do with his son. The main difficulty, in my view, is the uncertainty that currently exists as to Mr. C.'s health, and flowing from that is whether these are the circumstances under which a significant change in B.'s routine should be ordered as being in his best interests.

[38] I am sympathetic to Mr. C.'s desire to increase his contact with his son, especially now when Mr. C. has serious health concerns and so seeks to maximize the time he spends with B.. However, I am concerned about bringing B. into the house at a time when his father is undergoing […] treatments and while suffering from the symptoms of a serious disease that renders him unable to work.

[39] The petitioner seeks to change B.'s living circumstances and routine in a fairly substantial way. Are these circumstances where it has been shown to be in B.'s best interests? I am not satisfied that is the case. It is hard enough for a young teenager to make adjustments to court ordered variations of their residency, but to order that he do so when his father's situation is both unpredictable and has the potential to be emotionally difficult for father and son, is of dubious benefit and may have detrimental consequences to B..

[40] It has been suggested that the proposed schedule is more favorable in that it will reduce the conflict between the parents. Under the current schedule B. moves to his father's residence on two occasions in a twenty day period. That does not change under the proposal. Issues of scheduling and disputes over section 7

expenses are not going to be changed by the proposed schedule. The five day on/ five day off schedule will not eliminate mid-week transfers. In fact it will continue to be a constantly moving day governed by the petitioner's work schedule.

[41] I am not satisfied that the problems created by the parents' failures to communicate should be visited upon their son by the disruption to his life that would result by, at the age of 14, starting a life of moving back and forth between the homes of his parents every five days, with the attendant changes in transportation to school arrangements, removal from his day to day routine, and including the neighbourhood in which he lives. The onus is on the parents to find a way to resolve their communication differences.

[42] I conclude that it is in B.'s best interests that the current custody provisions continue. Therefore, I confirm that the parties shall continue to have joint custody of B. and that parenting time will continue to be allocated in accordance with Paragraphs 4(b) – (g) of the Separation Agreement, amended to eliminate references therein to N. and Z., and to reflect any amendments created by this decision.

[43] There has been difficulty in exercising certain aspects of the existing parenting time agreement.

[44] *Summer Vacation*: Each parent shall have 2 weeks with B. that is to be entirely free of any interference by the other parent. While there can be communication between parent and son, the parent who is not caring for B. during that 2 week time is not to entertain, encourage or otherwise discuss alternate plans for that vacation period. They are to say nothing to B. that could undermine the other parent's vacation plans for B..

[45] *Reasonable Access:* The petitioner will continue to have B. in his care at reasonable times upon reasonable notice, including three consecutive days (including overnights) out of the petitioner's scheduled 5 days off. During the time of Mr. C.'s disability, the three days will continue to follow the schedule that would, but for the illness, be followed. This permits continuity of the *status quo,* which will be resumed once Mr. C. returns to work.

[46] Testimony was given by both parties that speak to problems with the lack of consistency in pick up and drop off times for Mr. C.'s access. There are also

complaints with respect to the sharing of transporting B. to his activities. I also refer in particular to Exhibits 8 and 9 (emails) and paragraph 14 of Exhibit 13 (the respondent's affidavit).

[47] The evidence does not provide me with specific alternatives to consider. For example, since the three days may start or end on a school day, a weekend, a holiday or in summer vacation there is no one pick up and drop off time that I can determine to be appropriate. The parties will need to work that out, or return to court to have it resolved that way. However, some things are self-evident and so I direct:

(i) The intention of the Separation Agreement is to provide three full days and three overnight stays in each five day period. A full day includes the time B. spends at school if it falls on a school day.

(ii) Mr. C. is to provide a proposed schedule to Ms. C. for each twenty day cycle and to do so at least one week before the commencement of that cycle. The schedule will set out the times for pick up and drop off, the location of same and who will be responsible for that to occur;

(iii) Ms. C. will respond within 48 hours of receipt of the proposed schedule and she will identify any necessary appointments or extra-curricular commitments for B. to attend during that time period so that Mr. C. can ensure that they are met. Ms. C. is to refrain from scheduling appointments or events during Mr. C.'s parenting time, unless it is an emergency or part of an ongoing extra-curricular commitment, and then only after advising Mr. C. immediately of that fact;

(iv) The times for pick up and drop off may vary however once the 20 day schedule is set then the parties will follow it unless B.'s needs require a change, in which case the parties are to consult each other as soon as that has been determined;

(v) Mr. C. is to provide a complete schedule of hockey, football or other extracurricular activities that B. is engaged in and, where it impacts on the time that B. is to be picked up or dropped off, then to immediately

advise Ms. C.. Similarly, any changes to that schedule are to be communicated to Ms. C. immediately upon his learning of the change;

(vi) Reasonable notice, within the meaning of Paragraph 4(c) of the Separation Agreement, of an intention by Mr. C. to exercise other access time with B. will be 24 hours unless otherwise agreed to by Ms. C.;

(vii) Unless both parties agree to something different then all communications between the parties as provided for by this decision will be by email to an address provided by each party for such notice. Receipt of the email by the recipient will be deemed to have taken place within one hour of it being sent, unless delivery to the recipient by the service provider is proven not to have taken place.

[48] In making these directions, I recognize that they cannot address all real and perceived disputes that the parties complain of. The true guide to their conduct has already been agreed to by them in the Separation Agreement. If they comply with the letter and the spirit of the parenting provisions set out in that agreement, then court direction would not be necessary. However, as a result of their sometimes lack of success in doing so, these provisions will hopefully assist them.

[49] *Other holidays:* All other holidays shall be shared by the parties, subject to the continuation of (and I incorporate these provisions into this decision) Christmas and New Year's parenting arrangements set out in paragraph 4(d) of the Separation Agreement.

[50] *Other parenting requirements:* I affirm the statements of parenting principles agreed to by the parties and specifically incorporate the provisions set out in paragraph 4 of the Separation Agreement, to the extent that the law allows.

Child Support

[51] Section 17(1)(a) of the **Divorce Act** gives authority to vary child support payments. Factors to consider in making such a variation are set out in section 17(4):

Factors for child support order

> 17(4) Before the court makes a variation order in respect of a child support order, the court shall satisfy itself that a change of circumstances as provided for in the applicable guidelines has occurred since the making of the child support order or the last variation order made in respect of that order.

[52] There have been changes in the financial circumstances of the parties since the 2012 Family Court Order. Mr. C. has become ill and as of July 16, 2012 has been in receipt of Short Term Disability Benefits which are substantially less than the amount upon which his current child support payment is based. His current disability income is $1,289 gross per week which amounts to $67,028 per year.

[53] During the period July 16, 2013 to September 11, 2013 B. and Z. were children of the marriage. In accordance with the requirements of the **FCSG** the amount of support payable by the petitioner during that time for two children, based on his disability income of $67,028, is $929.38 per month.

[54] Since September 11, 2013 the **Guideline** amount payable by the petitioner for the support of one child on an annual income of $67,028 is $567.24 per month.

[55] I direct that a calculation be made of amounts paid since July 11, 2013 and child support payments be adjusted to reflect this retroactive variation. Any overpayment of support by the petitioner will be credited to future support payments. Any deficit will need to be set as arrears. If the parties are unable to reach agreement on the time frame in which to account for the adjustment, then I will hear them on the question and determine the issue.

[56] I recognize that this creates a retroactive variation of the child support order in addition to setting the amount payable on a prospective basis. In doing so I am mindful of the principles set out by the Supreme Court of Canada in *S.(D.B.) v. G.(S.R.)* 2006 SCC 37 which establishes the frame work in which a court shall consider the appropriateness of a retroactive award of child support.

[57] Having regard to the principles set out in that case I find that Mr. C. brought the application to vary in a reasonable timeframe, and only after he advised Ms. C. in advance of the impending drop of income. He asked for her consent to a reduction of support payable and she refused, necessitating a hearing of the issue.

Ms. C. had the opportunity to adjust her financial affairs to recognize the impending change of his circumstances.

[58] Mr. C. has a history of meeting his child support obligations. I am satisfied that the children's needs have been met and that B.'s care will not be unreasonably prejudiced by making this order.

[59] In view of the information contained in the disability documents it appears that Mr. C. may be able to return to work approximately 6 months from the commencement of his […] for […]. I direct Mr. C. to advise the respondent immediately upon any change of his income and that the respondent may bring an application to vary support payable to account for such changes in Mr. C.'s income status.

Section 7 Expenses (FCSG)

[60] B. enjoys football, hockey and historically has attended a summer camp in […] which is near to his mother's relatives. The expenses associated with these activities are not substantial but disputes have arisen over qualification as section 7 expenses, the proportional contribution required, and the timeliness of reimbursing the other parent for the required payment of these expenses.

[61] The Family Court order sought to address these disputes. I will make a similar effort.

[62] The Separation Agreement states in paragraph 5(c) that: "The parties agree that all section 7 Extraordinary Expenses shall be shared in proportion to the parties' respective incomes."

[63] The Family Court Order dated February 19, 2013 states:

> 3. M. S. C. and T. L. C. shall share the cost of football registration and hockey registration proportionate to income as they have in the past.…
>
> 4. Graduation fees, student fees and school supplies are considered regular expenses to be paid through monthly child support and are not section 7 expenses.
>
> 5.…

> 6. Any expenses that are to be considered as section 7 expenses requiring the other party to contribute shall be discussed between the parties. The party requesting the contribution shall discuss the cost with the other parent prior to incurring it. Agreed upon section 7 expenses shall be paid proportionate to income, M. S. C. shall pay 72% and T. L. C. shall pay 28%. If either party takes unilateral action to enroll the children in activities, or incur section 7 expenses without discussing it with the other parent, that party will incur those costs.

[64] The Order, in the balance of paragraph 3, and in paragraphs 5, 7, 8 and 9, provided a specific resolution to the payment of expenses by the parties related to already incurred football and hockey costs; and in relation to the cost of flights for Z. and B. to Alberta in 2012. Notwithstanding these efforts, the parties still allow this issue to generate mutual aggravation.

[65] The parties disagree with each other's choices as to what activities should be covered as a section 7 expense. The amounts of money being fought over are small relative to the incomes of the parties. They have allowed their animosity for each other to get in the way of common sense.

[66] It seems, therefore, that the only way to remove this irritant is by very specific direction of the court. I have reviewed the provisions of Section 7 of the **Federal Child Support Guidelines** in light of the disputes that seem to plague these parties. In making these orders I am guided solely by what I perceive to be in the best interests of B.. A part of that is to reduce the points over which the parties can argue with each other since that has the potential to impact negatively on B..

[67] All section 7 extraordinary expenses shall be shared in proportion to the parties' respective incomes.

[68] These expenses shall include, for so long as B. chooses to participate, all registration and equipment fees required for him to play football and hockey. The parent who pays for the item or the fee is required to provide a receipt for payment issued by the third party recipient. The non-paying parent is required to pay the paying parent their proportionate share within 30 days of receipt of the proof of payment. There is to be no set-off of the payment of one expense against another. I make this direction because the parties do not communicate well and it seems likely that any attempts by them to negotiate set-offs will simply promote conflict. If one party fails to make their payment as directed then it may open them to complaints of contempt for failure to comply with the order of the court.

[69] Travel to […] to attend camp was historically part of B.'s summer plans. It coincidentally permitted visits with the respondent's family. I have previously outlined the terms for summer vacations and so the following is based upon compliance with those parenting arrangements.

[70] If B. expresses a desire to attend camp in […] then the cost paid to the camp is designated as a section 7 expense, the cost of which is to be shared proportionately by the parties.

[71] Mr. C. can arrange, and has arranged in the past, for his children's flights to […] through his employment. It represents a significant cost saving to the parties. To facilitate this arrangement the respondent is to submit the travel plans for B. by June 1 of each year and Mr. C. will make the travel arrangements. Mr. C. is only responsible for payment of his proportionate share to the maximum payable if the flight is provided by his employment. If the respondent incurs any additional flight costs without Mr. C.'s agreement in advance, then she will be solely responsible for paying those costs.

[72] As with other section 7 expenses, the non-paying parent is to remit payment of their share to the paying parent within 30 days of proof of payment being provided. That proof is to be provided by the third party recipient. There is to be no set-off of costs against other section 7 expenses.

[73] Any other expenses that may be considered as section 7 expenses requiring the other party to contribute shall be discussed between the parties. The party requesting the contribution shall discuss the cost with the other parent prior to incurring it. Agreed upon section 7 expenses shall be paid proportionate to income. If the parties do not agree, then it is open to the requesting parent to apply to court to have it determined whether a particular expense is eligible for contribution under section 7. If either party takes unilateral action to enroll B. in activities that may incur section 7 expenses that party will incur those costs unless and until a court directs otherwise.

Medical Insurance Coverage for the Respondent

[74] The petitioner has a responsibility under Paragraph 7 of the Separation Agreement to maintain medical insurance for the respondent so long as certain

conditions are met. While it initially appeared that there may be some conflict on this issue, the parties advised at the outset of the trial that Ms. C. has arranged her own medical coverage and is to provide a letter to counsel for the petitioner to confirm this. If this issue is not resolved as intended, the parties may return to court upon application to address it.

[75] The petitioner agrees to maintain medical coverage under his employer's plan, for any eligible child of the parties.

Spousal Support

[76] The Separation Agreement required Mr. C. to pay to Ms. C., for her maintenance, the sum of $400 per month. At that time, Mr. C.'s income was stated to be $103,535.95 per year, while Ms. C.'s was set at $20,817 per year. Mr. C.'s child support payment at that time was $1,219 per month for the support of two children after accounting for the set off.

[77] Section 8 of the Agreement specified:

> (b) The parties acknowledge that the quantum of spousal support is less than the range suggested by the Spousal Support Advisory Guidelines and is being used by T. [T. C.], in part, to obtain medical insurance for herself. Either party may apply for a variation of spousal support without showing a significant or material change in circumstances of either or both parties.
>
> (c) Both parties acknowledge that the spousal maintenance is compensatory in nature as well as based on needs and that the compensatory characterization of the maintenance shall be considered in the event of an application to vary spousal maintenance.

[78] The Family Court Order issued February 19, 2013, states, in part:

> AND UPON the Court not being satisfied that T. L. C. has made sufficient effort to secure full-time employment, or obtain her own medical plan.…
>
> IT IS ORDERED THAT:
>
> 12. M. S. C. shall continue to pay spousal support to T. L. C. in the amount of $400 per month, pursuant to the Separation Agreement signed between the parties on May 13, 2011…

> 15. T. L. C. shall make every effort to secure full-time employment, or will upgrade her employment skills. She will also make every effort to obtain her own medical insurance.
>
> 16. The matter is set to review the issues of spousal support and medical coverage and shall return to Court on December 11, 2013 at 10:00 a.m.

[79] The petitioner takes the position that the respondent is no longer entitled to spousal support or that in the alternative it should be reduced to reflect his reduced income during his period of disability. He also seeks a date certain for termination.

[80] The respondent points to the deficit created by the amount that her expenses exceed her income, and submits that she is still in need of support. She also notes her improving employment and income status as evidence of her diligence in pursuing self-sufficiency. She says that she requires continued support for 10-12 months from the date of hearing to allow her to complete her transition to self-sufficiency.

[81] The power of a court to vary a spousal support order is found in section 17(1)(a) of the **Divorce Act**. The factors a court must consider in deciding such an application are set out in section 17(4.1):

> (4.1) Before the court makes a variation order in respect of a spousal support order, the court shall satisfy itself that a change in the condition, means, needs or other circumstances of either former spouse has occurred since the making of the spousal support order or the last variation order made in respect of that order, and, in making the variation order, the court shall take that change into consideration.

[82] The objectives are set out in s. 17(7) of the **Act**, the relevant portions of which are:

> (7) A variation order varying a spousal support order should
>
> (a) recognize any economic advantages or disadvantages to the former spouses arising from the marriage or its breakdown;
>
> (b) apportion between the former 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 former spouses arising from the breakdown of the marriage; and
>
> (d) in so far as practicable, promote the economic self-sufficiency of each former spouse within a reasonable period of time.

[83] The Supreme Court of Canada in *Moge v. Moge* [1992] 3 S.C.R. 813 and in *Bracklow v. Bracklow* [1999] 1 S.C.R. 420 confirmed that all four objectives are to be considered in every case. No one objective has paramountcy. If any one objective is relevant upon the facts, a spouse may be entitled to receive support.

[84] The analysis involved in the application of these provisions has been summarized by B. MacDonald J. in *S.(T.L.) v. M.(D.J.)* 2009 NSSC 79, at paras. 60-72:

> [60] In *Bracklow v. Bracklow, supra*, the Supreme Court analysed the statutory objectives and held that they create three rationales for spousal support:
>
> > 1. Compensatory support to address the economic advantages and disadvantages to the spouses flowing from the marriage or from the roles adopted in marriage.
> >
> > 2. Non-compensatory dependency based support, to address the disparity between the parties, needs and means upon marriage breakdown.
> >
> > 3. Contractual support, to reflect an express or implied agreement between the parties concerning the parties' financial obligations to each other.
>
> [61] …
>
> [62] The Supreme Court did recognize that many claims have elements of two or more of the stated rationales. It confirmed that analysis of all of the objectives and factors is required. Pigeonholing was to be avoided.
>
> [63] …
>
> [64] 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.

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

> a) a spouse's education, career development or earning potential has been impeded as a result of the marriage because, for example:
>
> -- a spouse has withdrawn from the workforce, delays entry into the workforce, or otherwise defers pursuing a career or economic independence to provide care for children and/or a spouse;
>
> -- a spouse's education or career development has been negatively affected by frequent moves to permit the other spouse to pursue these opportunities;
>
> -- a spouse has an actual loss of seniority, promotion, training, or pension benefits resulting from an absence from the workforce for family reasons;
>
> b) a spouse has contributed financially either directly or indirectly to assist the other spouse in his or her education or career development.

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

> Although the doctrine of spousal support which focuses on equitable sharing does not guarantee to either party the standard of living enjoyed during the marriage, this standard is far from irrelevant to support entitlement (see *Mullin v. Mullin* (1991), [1991] P.E.I.J. No. 128, *supra*, and *Linton v. Linton*, [1990] O.J. No. 2267, *supra*). Furthermore, great disparities in the standard of living that would be experienced by spouses in the absence of support are often a revealing indication of the economic disadvantages inherent in the role assumed by one party. As marriage should be regarded as a joint endeavour, the longer the relationship endures, the closer the economic union, the greater will be the presumptive claim to equal standards of living upon its dissolution (see Rogerson, **"Judicial Interpretation of the Spousal and Child Support Provisions of the Divorce Act**, 1985 (Part I)", supra, at pp. 174-75).

[67] It is not clear from Justice L'Heureux-Dubé's decision whether entitlement arising from a "pattern of dependence" is compensatory or non-compensatory. A

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

[68] Once it is decided that a spouse is entitled to spousal support, the quantum (amount and duration) is to be determined by considering the length of the relationship, the goal of the support (is it compensatory, non-compensatory or both), the goal of self-sufficiency, and the condition, means, needs and other circumstances of each spouse. In considering the condition, means, needs and other circumstances of each spouse one may examine the division of matrimonial property and consider the extent to which that division has adequately compensated for the economic dislocation caused to a spouse flowing from the marriage and its breakdown and any continuing need the spouse may have for support arising from other factors and other objectives set forth in s. 15(2). (*Tedham v. Tedham*, [2005] B.C.J. No. 2186, 2005 CarswellBC 2346 (B.C.C.A.))

[69] There will be cases when the analysis may indicate that the only way to adequately address the compensatory or non-compensatory claim is to continue support for significant periods of time possibly during the entire life of the recipient or payor. (*Rondeau v. Kerby*, [2004] N.S.J. No. 143, 2004 CarswellNS 140 (N.S.C.A.). This most often will occur in respect to lengthy marriages where there is significant income disparity.

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

> [71] Every case involving a parent who has withdrawn from the workforce to raise a child will invoke a claim for compensatory support….. However today's parents must recognize that, irrespective of their personal preferences or the circumstances from which dependency evolved, if there are children and one parent has stayed at home the other parent will be required to assist by paying spousal support until the compensatory and non-compensatory claim of the stay at home parent has been satisfied or until some other factor intervenes justifying termination of spousal support.
>
> [72] Critical to a proper analysis of spousal support is what each party will have in his or her pocket to pay reasonable living expenses after paying or receiving child support and spousal support. Even if the spousal support guidelines are used to suggest various possible amounts of spousal support, what a person might actually retain must be examined in respect to what is required for that individual to pay for housing, heat, food, etc. (see also, B. MacDonald J., in *L.(J.A.) v. L.(S.B.J.)*, 2009 NSSC 87, at paras. 5-18.)

Change in circumstances

[85] The Separation Agreement provided that a variation could occur without "a significant or material change of circumstances." In fact, there have been changes in circumstances which merit re-visiting the spousal support provisions.

[86] There is now only one child of the marriage whose support is ongoing, whereas there were three at the time of entering into the Agreement.

[87] Mr. C.'s income is significantly reduced and Ms. C.'s income has increased and stabilized.

Means, Needs and Conditions of T. C.

[88] The respondent's income is stated to be $2,762.32 per month from employment. This is an annual salary of $33,147. In addition, she receives a child tax benefit and GST credit amounting to $490.59 per month. Finally, she receives spousal and child support payments.

[89] Ms. C. acknowledged that she has been in a relationship with a man for about two years. She outlined his living arrangements at a house he owns saying that he rents out the upstairs and shares the basement with his son and his

girlfriend. The respondent denies that she is engaged, or that they are living in a common law relationship. He owns his own company, but he does not contribute to her household expenses.

[90] Ms. C. indicated that she was gifted trips to Montreal and to Alberta. She says she saved money for 3 years to go to Cuba.

[91] Ms. C.'s Statement of Expenses filed July 12, 2013, shows the monthly total to be $5,330.20 or $63,962.40 per year out of after tax money. The amount of pre-tax income that would be necessary to support this expense budget far exceeds her immediate means. Irrespective of whether she receives spousal support, or not, she needs to reorganize her finances to reflect her means.

[92] Elements of her expenses are not accurately represented. In cross examination she admitted this. She lives in a 7 year old home. She claims $1,440 per year for repairs. Ms. C. was largely unable to account for this amount.

[93] The claimed clothing allowance of $3,600 per year she clarified as including clothing for herself, Z. and B.. Similarly her food budget of $10,200 per year included an amount for her and the two boys.

[94] Ms. C. claims $450 per month for gas but lives "5 minutes from work". There is evidence that Mr. C. does the bulk of transporting B. for extracurricular activities and for exercising access. When asked what she was using gas for, she indicated that she needed it to travel for work purposes: showing properties and banking for her employer in Halifax. She acknowledges that the banking trips have not taken place in 2013 and that the properties to be shown are nearby in […]. It is difficult to know for sure what her true costs are. It is possible that this amount is entirely justified. The evidence however as to why is vague.

[95] I have critically assessed all aspects of the expenses claimed, not just those discussed herein. Many are reasonable, and others are legitimate but perhaps overstated.

[96] Ms. C. has no apparent burdensome debt load. The respondent says that she owes $1,000 over and above her mortgage.

[97] It is very difficult to reconcile the respondent's income and expenses without suspecting that she either is overstating her expenses or has sources of financial assistance that she did not identify in the evidence. Perhaps it is both.

[98] Ultimately the question is whether I am satisfied that she has a financial need and why that is so, that is, whether it a product of the breakdown of the marriage. I am satisfied that the respondent is very close to being self-sufficient when the excess of claimed expenses is parsed out. That finding does not resolve the question.

Condition, means and needs of M. C.

[99] Mr. C.'s income while on disability is $67,028 per year and when working his 2013 income is $113,400. I do not have a Statement of Expenses for him and very little testimony on his expenses or debts. The evidence suggests that he is in a common law relationship but there is no evidence of the financial impact, positive or negative, that the relationship has upon his ability to pay support.

[100] The petitioner's child support obligations have been reduced to reflect the support of one child instead of two, and reduced according to Guideline requirements to reflect his current income. He is no longer responsible to pay medical insurance for the respondent.

[101] In conclusion, there is no evidentiary basis upon which to conclude that the petitioner is unable to pay spousal support.

Entitlement

[102] Ms. C. was married for 20 years during which time she was almost exclusively a stay at home mother, fulfilling all the needs of the children and freeing Mr. C. to pursue his career.

[103] The petitioner worked part time between 2007 and 2010, earning approximately $20,000 per year. Part time hours permitted her to be available to parent her children during that time. She later began working for two related companies and has, over the past three years increased her hours and income steadily. At the time of the Separation Agreement her income was said to be $20,817 per year. Her 2013 income will be in excess of $33,000 per year. She

believes that she "has a future" with her current employers and is content to stay there and make it her career.

[104] Ms. C. submits that she gave up a lot to stay at home over the course of the marriage and that she has proceeded as diligently as possible in transitioning to being self-sufficient. She says that she is almost there and so requests that spousal support continue for another 10- 12 months from the date of hearing. i.e., October 2013.

[105] I am satisfied that entitlement on a compensatory basis is justified. This was a 20 year marriage and in 4 years following the marriage breakdown the respondent will, by her own assessment, have resolved the economic disadvantages that flowed from her role in the marriage. Such a conclusion is consistent too with the original agreement for spousal support set out in the Separation Agreement.

[106] I am also satisfied that the evidence supports a conclusion that some non-compensatory support is warranted.

Quantum and Duration

[107] I accept the submission of Ms. C. that she will be self-sufficient no later than October 2014.

[108] In the absence of evidence of an inability by the petitioner to pay support, I will set the amount of spousal support payable as a product of the amount paid before disability, the currently reduced income, the income when working and what I conclude are the circumstances of the respondent.

[109] In conclusion, I direct that the petitioner will pay spousal support to the respondent during a period terminating on September 30, 2014. The amount to be paid commencing August 1, 2013 is $300 which will continue so long as the petitioner remains in receipt of Disability payments equal to at least $60,000 per year. If the petitioner returns to work and his full time pay, then the monthly payment will increase to $450 per month.

Matrimonial property division not otherwise resolved

[110] The parties dispute the ownership of the property interest in a utility trailer. There were initially questions raised about the proposed disposition of three dirt bikes, but that was resolved as recited below.

2004 Utility Trailer

[111] A 2008 Certificate of Registration shows the parties to have joint ownership of a 2004 utility trailer that was intended to transport the dirt bikes used by the children. The trailer has been located on the petitioner's property since the separation and he has denied the respondent the use of it.

[112] Mr. C. submits that the Separation Agreement provides that the trailer is his property and that Ms. C. was obligated to transfer title to him solely, which she has refused to do. He says that at that time of separation there were some vehicle registrations that needed to be signed to give effect to the agreement as to which party would retain which vehicle. When the parties were executing the transfers, Ms. C. refused to do so for this trailer.

[113] Ms. C. says that the Separation Agreement was intentionally silent on the disposition of the trailer as there was an oral agreement between the parties to keep the trailer in both names and share the use of it. She says she was surprised when Mr. C. suggested that she sign over her interest in the trailer to him and so she continues to refuse to execute such a transfer. The respondent submits that it is matrimonial property subject to an equal division of the value. She proposes that Mr. C.: (i) give the trailer to her; or (ii) sell it and divide the proceeds; or (iii) buys out her half interest in the trailer.

[114] The division of personal property is set out in Paragraph 13 of the Separation Agreement. Paragraph 13(c) provides for two cars and two motorcycles to be divided with each party receiving sole ownership of one car and one motorcycle. There is no reference to the trailer.

[115] Paragraph 13(a) addresses household furnishings and personal effects. Paragraph 13(b) deals with bank accounts. Paragraph 13(d) allocates share holdings. The Paragraph concludes:

> 13(e) Henceforth, each of the parties shall own, have and enjoy, independently of any claim or right of the other, all items of personal property of every kind, now

> or hereafter owned or held by him or her, with full power to dispose of same as fully and effectually, in all respects and for all purposes, as if he or she were unmarried.

[116] At the time, Mr. C. "held" the trailer, an item which falls within the general description of "personal property of every kind".

[117] To find for the respondent it would be necessary to consider parol evidence that speaks to the intention of the parties at the time of entering into this contract.

[118] In **The Law of Contracts**, 1st ed., (McCamus) (Toronto: Irwin, 2005), the author says at p. 202 that:

> Subject to the rules of interpretation of agreements, evidence of oral or written pre-contractual communications may be admissible for the purpose of aiding in the proper interpretation or construction of ambiguous provisions of the agreement.

[119] The issue of intention was considered in the case of *Toronto-Dominion Bank v. Leigh Instruments Limited (Trustee of)*, [1998] O.J. No. 2637 (Ont. Gen. Div.); aff'd. 124 O.A.C. 87. Winkler J., as he then was, stated the following at paragraphs 403-405, 407 and 410:

> PRINCIPLES OF CONTRACTUAL INTERPRETATION
>
> 403 The aim of the court, in construing a written agreement, is to determine the intentions of the parties to the agreement, and in this regard, the cardinal presumption is that the parties have intended what they have said. Their words must be construed as they stand. See: **Chitty on Contracts Volume 1, General Principles**, 27th ed. (1994) at 580.
>
> 404 Where the agreement has been reduced to writing, the parol evidence rule operates to prohibit the introduction of extrinsic evidence to vary the written contract. This rule of interpretation is enunciated in **G.H.L. Fridman, The Law of Contract in Canada**, 3rd ed. (Toronto: Carswell, 1994) at app. 455-456:
>
> > The fundamental rule is that if the language of the written contract is clear and unambiguous, then no extrinsic parol evidence may be admitted to alter, vary, or interpret in any way the words used in the writing. See also: *Hawrish v. Bank of Montreal*, 1969 CanLII 2 (SCC) [1969] S.C.R. 515 per Judson J.

405 This is consistent with the principle that where a document purports on its face to be the final and conclusive expression of the parties' agreement, the document will be taken to be a reliable record of the parties' latest agreement, and evidence of the negotiations leading up to it will not be admissible...

407 The court need not be confined to a strict, literal interpretation of the language of the document however, and may admit evidence of the "factual matrix" or circumstances surrounding the conclusion of the agreement as an aid in interpretation. ...

408 The Supreme Court of Canada has adopted the notion that a court may look at evidence of the surrounding circumstances when construing a document. In *Hill v. Nova Scotia (Attorney General)*, 1997 CanLII 401 (SCC), [1997] 1 S.C.R. 69, the court cited with approval the dicta of LaForest J. (as he then was), in *White, Fluhman and Eddy v. Central Trust Co. and Smith Estate* (1984), 54 N.B.R. (2d) 293 at 310-311:

> What the statement quoted means is that in determining what was contemplated by the parties, the words used in a document need not be looked at in a vacuum. The specific context in which a document was executed may well assist in understanding the words used. It is perfectly proper, and indeed may be necessary, to look at the surrounding circumstances in order to ascertain what the parties were really contracting about.

409 From these authorities can be gleaned certain principles which should guide the court in interpreting an agreement. The document should be looked at as a whole, with each contractual term considered in the context of the entire document. See: G.H.L. Fridman, **The Law of Contract in Canada**, 3rd ed. (Toronto: Carswell, 1994) at 469. The court should make every effort to construe the document on its face, without regard to extrinsic evidence.

410 Where an agreement is clear and unambiguous on its face, the parol evidence rule operates to prohibit admission of evidence to alter or vary the written terms of the contract. However, the court may admit evidence of the surrounding circumstances, including evidence of the commercial purpose of the contract, the genesis of the transaction, the background, the context, and the market in which the parties were operating. In this regard, evidence to be admitted must be objective in the sense of what reasonable persons in the position of the parties would have had in mind, rather than subjective evidence of the parties' actual intentions.

(emphasis added)

[120] Paragraph 1(d) of the Separation Agreement states that the parties "…acknowledge that each… is fully advised and informed of the estate and prospects of the other and of [their] rights and liabilities against and to each other." They confirm in Paragraph 26 that they have had full disclosure of assets, debts, and property.

[121] In Paragraph 27 the parties acknowledge that they have had the opportunity of obtaining independent legal advice. In fact, Ms. C.'s then legal counsel drafted the Agreement and certified having given advice to Ms. C.. Mr. C. executed the Agreement without the benefit of independent legal advice, which he waived in writing.

[122] In Paragraph 1(e) states: "We desire that this Agreement finally determine our rights and obligations on property…"

[123] I conclude that the Agreement is not ambiguous and that there is no basis upon which to admit the parol evidence of the parties speaking to their intentions with respect to the disposition of the trailer.

[124] The Agreement, when read in its entirety, was intended by its language to finalize the allocation of all property, of whatever nature or kind. It is clear that that the trailer was held by Mr. C. at the time and that was the precondition to determining the ultimate ownership of property not otherwise specified in the Agreement. Therefore I find that the 2004 Utility Trailer is the sole property of the petitioner.

[125] I order the respondent to comply with Paragraph 28 of the Separation Agreement which requires that:

> T. and M. will, at any time, and from time to time execute and deliver to the other any document or documents that the other reasonably requires to give effect to the terms of this Agreement.

[126] In consequence thereof, Ms. C. is ordered to sign the ownership/ registration papers necessary to transfer title to Mr. C. solely.

Three dirt bikes identified as a […].

[127] In pre-hearing submissions there was discussion of the use and disposition of these three dirt bikes. The parties advised the court at the outset of the trial that it is agreed that the […] would be sold and the monies put into an account to the benefit of B.. The remaining bikes will continue to be made available for use by any of the boys. There is an agreement entered into by the parties dated June 5, 2011 which sets out the terms of ownership and use of the bikes.

Costs

[128] Both parties made oral submissions as to costs. I am not prepared to resolve the issue on the basis of those submissions as the results have been mixed. If the parties are unable to agree as to costs, then I will receive their written submissions which should be filed with the court by December 11, 2013.

[129] Order accordingly.

Duncan J.