

SUPREME COURT OF NOVA SCOTIA

Citation: Richards v. Richards, 2014 NSSC 270

Date: 20140716

Docket: No. 1203-003189

SBWD 072167

Registry: Bridgewater

Between:

Sandra Lynn Richards

Petitioner

v.

Robert James Richards

Respondent

Judge: The Honourable Justice Michael J. Wood

Heard: March 18, 19 and 20 and May 16, 2014, in Bridgewater,
Nova Scotia

Written Decision: July 16, 2014

Counsel: Rubin Dexter, for the Petitioner
William L. Ryan, Q.C., for the Respondent

By the Court:

[1] Sandra and Robert Richards were married on September 25, 1976. They separated on March 13, 2010, and on March 18, 19, and 20, 2014 I presided over their divorce trial. Closing submissions took place on May 16, 2014. At the time of trial, the only matter in dispute was spousal support. Both parties sought support from the other.

[2] Assessment of entitlement to spousal support requires consideration of all of the circumstances of the spouses, including the history of the marriage and their present situation. One of the key issues which came up frequently during the trial was the family business, Jaylynn Enterprises Limited (“JEL”) and what role it should play in the determination of support.

CIRCUMSTANCES OF THE SPOUSES AND THEIR MARRIAGE

[3] When the parties married in September, 1976, Sandra Richards was 20 years old and had just finished her second year at Dalhousie University. Robert Richards was 29, had completed grade ten at the vocational school and had been employed in a variety of jobs. It was the second marriage for Mr. Richards and he had four young children from his earlier relationship.

[4] Shortly before they were married, the parties incorporated JEL. The business of the company consisted of buying, repairing and selling used mobile homes in Bridgewater. It also listed used homes for sale.

[5] In the early years, the Richards were the only employees of JEL and both worked on fixing up the used homes for sale. Ms. Richards had responsibility for the administration of the business, such as maintaining its books and records. Mr. Richards looked after sales and business development.

[6] Over time, the business of JEL grew and by the early 1980's it had expanded into the sale of new mobile homes and equipment. It also purchased a large mobile home park in Bridgewater, known as Eisenhower Place. JEL expanded the size of the park by developing new lots which were then available for rent.

[7] The various businesses of JEL were complementary in the sense that people who wished to live in Eisenhower Place would need to purchase a new or used home. By dealing with JEL, a single source could provide the home, any necessary repairs, as well as the lot where the home could be situated.

[8] In the mid-1980's, the Richards incorporated Holm Realty Limited to operate a conventional real estate business. Sandra Richards did the administration, paperwork and was the registered broker. Robert Richards managed the sales agents. The purpose of creating Holm was to serve clients of JEL who may have existing property which they needed to sell in order to purchase a new home.

[9] In 1984, JEL hired its first employee to assist Mr. Richards in sales. It also hired another employee to look after the operation of the mobile home parks, including lawn mowing, road maintenance, ditch maintenance, etc.

[10] From the time of their marriage until the mid-1980's, the Richards lived relatively frugally. They only took out enough money from JEL to get by. The retained earnings of the company started to build. They moved many times over those years as they would live in the homes they were fixing up for resale.

[11] In 1984, the Richards' first son, Jay, was born. He was followed by Jordan in 1987 and Ross in 1990.

[12] After Jay was born, Ms. Richards continued to do the administrative work for JEL, but did most of it from home. Often times she would do this in the evening after Jay had gone to bed. She continued to the administrative work for the business as the family grew. Three months after Ross was born, she returned to work full-time at JEL, and the children were placed in daycare.

[13] In the mid-1990's, JEL purchased an additional parcel of land for development of a project known as LaHave Heights. Following acquisition, the company proceeded to develop and lease home lots in both the LaHave Heights and Eisenhower Place projects.

[14] Around 1993, there was a corporate reorganization of JEL, the result of which was that the common shares were transferred to a family trust. Sandra and

Robert Richards received preference shares from the company. The restructuring was done on the advice of the company's accountants.

[15] Prior to the reorganization, Mr. and Ms. Richards took salary out of JEL which was determined by the profitability of the company. They would not take all of the profit out of JEL. The amount of salary was based, in part, on accounting advice.

[16] According to Ms. Richards the purpose of the corporate reorganization was to allow income to be split amongst all of the family members, including the three boys. She said JEL would issue dividend cheques to the family trust and the trust would issue cheques to each family member. Cheques payable to the boys would be deposited into joint accounts which they had with Mr. and Ms. Richards, and used for family expenditures.

[17] The amount of dividends to be issued and how they would be allocated between family members was determined at the end of the year after discussions with the company's accountants. During the course of the year, money was taken out of JEL as required to pay household expenses. Ms. Richards described this as a "draw" account. It was also referred to as a shareholders' loan account. At the end of the year when dividend cheques were issued through the family trust, they would be used to pay down the draw/loan balance.

[18] Holm Realty was not included in the corporate reorganization. Neither Mr. or Ms. Richards ever took a salary from that company. Ms. Richards testified that at some point the parties received a dividend from Holm Realty to clear out the balance of the retained earnings.

[19] Ms. Richards testified that in the latter years of the marriage, the family lived a relatively affluent lifestyle. They lived in a large home on a lake, with a built-in swimming pool, took trips, had multiple vehicles and boats, and used the services of house cleaners and cooks. She estimated that the family income from JEL, after taxes, was \$285,000.00 per year on average. Copies of tax returns and notices of assessment from the Canada Revenue Agency were provided for all family members, although there were a number of gaps.

[20] Mr. Richards testified that the family lifestyle was not nearly as affluent as described by Ms. Richards and said that they rarely took more than one vacation trip per year, vehicles were driven for a number of years and were not luxurious in nature, and that the cooking and cleaning services were part-time. He also said that a significant portion of the money taken out through the family trust was reinvested in the business.

[21] According to my review of the exhibits, there are only two years when we have tax records for all of the family members, and these are 2002 and 2004. In those years, the income attributed to each of the family members was as follows:

	<u>2002</u>	<u>2004</u>
Robert Richards	\$ 60,326.00	\$ 94,595.00
Sandra Richards	60,416.00	84,196.00
Jay Richards	112,955.00	113,720.00
Jordan Richards	63,126.00	67,739.00
Ross Richards	61,577.00	57,178.00

[22] According to the notices of assessment, the total family income tax paid in 2002 was approximately \$42,000.00 and in 2004 it was appropriately \$42,500.00. In both of these years, that would have left well in excess of \$300,000.00 of after tax income for the Richards' family. It is important to note that all of the income from JEL came out as dividends, and the amount actually received is grossed up by a defined percentage to determine taxable income. This means that the actual cash received by the family would be the reported income reduced by the grossed up figure.

[23] I am satisfied that Ms. Richards' estimate of \$285,000.00 represents a reasonable average for the cash received by the family for the eight years prior to separation based upon the somewhat limited financial records provided by the parties.

[24] With respect to Mr. Richards' evidence that a significant portion of the dividend money was reinvested in the company, I note that the financial statements for JEL, which were entered as exhibits, cover the period from 2008 to 2013. For the fiscal years ended March 31, 2008, 2009 and 2010, there are no outstanding shareholders' loans shown, with the exception of \$100.00 as of March 31, 2008. I am not satisfied that there was any reinvestment of the family trust dividends in the company although, as noted previously, the proceeds were used to retire the outstanding balance in the shareholders' loan account. It may very well be that these transactions were the basis for Mr. Richards' evidence concerning reinvestment, although he was never asked that question.

[25] The evidence at trial indicates that the Richards' family enjoyed the fruits of the hard work they had put into JEL. They were not extravagant, but on the other hand they were able to do what they wanted and enjoyed a lifestyle that would be described as upper middle class. They were not constrained by a monthly budget and were able to enjoy life. This was the state of affairs as of the date of separation in March, 2010.

POST SEPARATION

[26] Following the separation of the parties in March, 2010, Ms. Richards essentially ended her active involvement in JEL and Holm Realty. As part of the division of property in 2013, her shares in Holm Realty were transferred to Mr. Richards and her preferred shares in JEL were redeemed by the company.

[27] As part of the property division, Ms. Richards acquired the matrimonial home where she continues to reside, although it is currently listed for sale.

[28] Since she no longer had access to money from JEL, Ms. Richards used a line of credit and her RRSP to cover living expenses until the time of the property division.

[29] Ms. Richards had completed her BA degree from Dalhousie University in the early 1980's by taking extension courses and some accounting courses through Acadia University. In September, 2011, she enrolled at Dalhousie in the Masters of Health Administration Program. She completed her MHA degree in April, 2013.

This included a paid sixteen week practice term with the Province of Nova Scotia, which provided additional money to assist with living expenses.

[30] Between March, 2013 and December, 2013, Ms. Richards submitted applications for 26 positions and was not successful in securing employment. Most were management positions in health administration and included a number of employers outside the Province. Since June, 2013, Ms. Richards has been working as a real estate agent in the Bridgewater area without much success. She has had no sales and her only listing was the matrimonial home.

[31] In addition to employment income, borrowed funds, RRSP's and the property settlement, Ms. Richards also received court ordered interim spousal support in the amount of \$6,000.00 per month from January, 2012 until September, 2013. Mr. Richards stopped paying interim support because he said that he no longer had the money to do so.

[32] Ms. Richards brought an application for an oppression remedy under the *Companies Act* against the companies, Mr. Richards, the family trust and her sons, which was not ultimately successful. As a result, she was required to pay costs to all of the respondents in that litigation.

[33] Following separation, Mr. Richards said that he used money from his RRSP for living expenses. He also incurred shareholders' loans from Value Added Investment Limited (VAIL). VAIL had been incorporated several years earlier and had been used to invoice JEL for consulting fees. Because VAIL had a different year end than JEL, the effect of invoicing for consulting fees, and taking shareholders' loans from VAIL, was that it deferred repayment of those loans or conversion of them to income. For example, in 2012, Mr. Richards had \$150,000.00 in shareholders' loans from VAIL classified as income. The loans had been taken by Mr. Richards prior to 2012.

[34] In 2012, Canada Revenue Agency reassessed Mr. Richards' 2010 tax return and attributed an additional \$100,000.00 in income to him from prior years. This created an arrears of taxes for Mr. Richards.

[35] In August, 2013, Mr. Richards began taking a monthly salary from JEL in the amount of \$3,000.00. This was the first time in many years that Mr. Richards

had been paid salary by that company. He said that the decision to take salary and the amount of it was based upon discussions he had with the directors of JEL, his sons, Jay and Dwayne (from his first marriage).

[36] Mr. Richards says that he has some health issues, including high cholesterol and partial blockage of some arteries. He has also been on anxiety medication for the last few years. He currently lives in a home owned by JEL and pays rent of \$1,100.00 per month to the company. JEL pays for the heat, property taxes and maintenance.

DIVISION OF PROPERTY

[37] In March, 2013, the parties reached an agreement on the division of property. The intent was to divide all assets equally between them. The net result was that Ms. Richards was required to make a \$21,000.00 equalization payment to Mr. Richards.

[38] As part of the equalization process, Ms. Richards transferred all of her shares in Holm Realty to Mr. Richards. She also transferred 237 preference shares in JEL so that each of them would hold an equal amount of that class of shares. The JEL preference shares were redeemed in June, 2013, resulting in an amount payable to Ms. Richards of \$1,532,789.90. This created an income tax liability for Ms. Richards in the amount of \$547,163.27 which was to have been paid by April 30, 2014.

[39] In order to generate the funds to redeem the preference shares, JEL sold most of its business, including the LaHave Heights and Eisenhower Place projects for a price of \$14,817,500.00, which included a vendor take back mortgage of \$1,000,000.00 payable on or before December 31, 2015, provided certain conditions were met.

[40] The balance received by JEL from the transaction after payment of bank debt and legal fees was \$5,087,529.62.

PRESENT CIRCUMSTANCES OF THE PARTIES

[41] Upon receipt of the proceeds of the share redemption, Ms. Richards paid off the mortgage on the matrimonial home, as well as a \$100,000.00 line of credit which had been used for living expenses. She paid a number of other debts and replaced money that she had taken out of her RRSP. The balance of approximately \$900,000.00 was put in a self-directed investment account with the Bank of Montreal.

[42] Ms. Richards also borrowed approximately \$500,000.00 from Harris Private Banking, which was placed in a managed investment account. This was secured by a \$500,000.00 mortgage on the matrimonial home.

[43] On September 26, 2014, Ms. Richards filed a sworn statement of property. The assets consisted of real estate valued at approximately \$710,000.00, motor vehicle and furnishings valued at \$22,000.00, RRSP of \$390,000.00, investments of approximately \$843,000.00 (after deduction of funds set aside for her tax liability). Ms. Richards also listed various loans with the Bank of Montreal, which totalled approximately \$587,000.00.

[44] Ms. Richards also filed a sworn statement of income as of February 26, 2014 which indicated that her sole source of income was her investments. She said they would generate \$2,100.00 per month based on an estimate of annual income received from Harris Private Banking.

[45] The statement of expenses filed by Ms. Richards indicated that, as of February 26, 2014, she was in a monthly deficit of \$6,368.00. The largest component of her expenses was the monthly mortgage payment of \$2,037.00. There are significant expenses associated with maintaining the matrimonial home as well as vehicle expenses in excess of \$1,000.00 per month. Ms. Richards budgeted \$700.00 per month for holidays, entertainment and gifts, as well as \$350.00 for real estate fees.

[46] Ms. Richards testified about work being carried out on the matrimonial home to create a rentable apartment in the basement. She did not include any estimate of income from that unit because it was not finished or rented as of the date of the statement.

[47] Mr. Richards filed a sworn statement of property as of February 26, 2014. It showed furniture, vehicles and a boat valued at a total of \$31,500.00. He had \$25,000.00 in a Tax Free Savings Account and \$33,000.00 in his chequing account. Mr. Richards valued his business interests as follows:

1.	JEL (Preferred shares)	\$ 1,263,000.00
2.	Home Realty	16,970.00
3.	3273094 Nova Scotia Limited (holding company)	238,024.00
4.	VAIL	14,000.00

[48] The debts listed by Mr. Richards included bank and credit card debts of approximately \$104,000.00, income tax liability of \$32,000.00 and shareholders' loans owed to JEL of \$185,845.00 and to VAIL of \$292,500.00.

[49] Mr. Richards' statement of income showed his wages of \$3,000.00 from JEL and monthly pension income of \$637.00, with a notation that it was being garnished by Canada Revenue Agency. Mr. Richards' statement of expenses indicated a monthly deficit of \$3,097.00. The largest monthly expense was rent of \$1,100.00.

[50] Mr. Richards said that he was unable to receive the value of his preferred shares in JEL because the company was not currently in a position to pay this. In support of that, Mr. Richards provided a one page document prepared with the assistance of his son, Jay, purporting to set out income and expenses for JEL. It indicates total monthly income of \$3,282.00 consisting primarily of lot rental, and expenses of \$17,170.00, for a total monthly loss of \$13,888.00. The statement does not include any revenue from sales of mobile homes, nor the \$1,100.00 in rent which he was paying the company for his current accommodation. No supporting documentation was provided for most of the items on the statement of income and expenses.

[51] According to Mr. Richards, JEL retained some undeveloped land when it sold most of its business in 2013. The expenses currently being incurred by JEL are primarily devoted to lot development. The company's future will depend on its

ability to generate income from the lot development, as well as the sale of mobile homes.

INTERIM SPOUSAL SUPPORT

[52] In November, 2010, Ms. Richards brought a motion for interim spousal support which was dismissed. In January, 2012, the Nova Scotia Court of Appeal allowed Ms. Richards' appeal from the dismissal and ordered interim spousal support in the amount of \$6,000.00, commencing as of November 1, 2010 (2012 NSCA 7). In doing so the court attributed income of \$157,000 to Mr. Richards.

[53] Mr. Richards paid the interim support as ordered by the Court of Appeal up until June, 2013. He stopped at that time because he said he no longer had the money to make those payments. In addition, Mr. Richards brought a motion which was heard in July, 2013 to vary the spousal support order. Shortly before that, Mr. Richards had reached an agreement with JEL that he be paid a salary of \$3,000.00 per month. This salary was relied upon by Mr. Richards to justify the variation motion. The motion was dismissed by order dated September 24, 2013.

[54] In September, 2013, Ms. Richards paid the costs ordered against her in the oppression proceeding from which she deducted the outstanding interim support payments due for July, August and September, 2013. There were no further support payments made by Mr. Richards prior to trial.

CREDIBILITY OF THE PARTIES

[55] Neither party struck me as being particularly credible or forthright in their evidence. Each characterized themselves as somewhat of a victim who was in dire financial circumstances while the other continued to live in luxury.

[56] Ms. Richards claimed to have no income other than what she expected to earn from the investments in her managed account which was roughly equivalent to the mortgage payment for the money in which she borrowed to invest. She does not include any anticipated revenue in her sworn income statement for the apartment which she was on the verge of renting. She does not suggest that she will earn any income from her real estate business but claims thousands of dollars in annual fees. Despite the fact that she had many years of experience as a broker, she

has generated no sales and her only listing is the matrimonial home. It is difficult to believe that someone with her business and real estate experience could be so unsuccessful if they had made reasonable efforts.

[57] Although Ms. Richards applied for 26 jobs in 2013, she only received interview opportunities for four of them. A number of them appear to be beyond her qualifications in the healthcare field, which included four years as a board member of the South Shore District Health Authority and her recent MHA Degree.

[58] It is not completely surprising that Mr. Richards was of the view that Ms. Richards was not seriously looking for work and was content to live on the \$6,000.00 per month interim spousal support.

[59] In her direct examination, Ms. Richards talked about an affluent lifestyle, including purchasing new cars with cash whenever they wished, multiple annual vacations at all inclusive resorts, having four fur coats and expensive jewelry. In cross-examination, she acknowledged that generally they drove cars for quite awhile, and in 2010 she was driving a nine year old Lincoln. They only replaced a car when it began having problems.

[60] In her statement of property, Ms. Richards gave a value of \$3,000.00 for household items which would have included all household furnishings, as well as any jewelry. There is no reference to fur coats.

[61] Ms. Richards' attempt to depict a luxurious lifestyle is somewhat inconsistent with her evidence on cross-examination and her sworn statement of property. I conclude that she is prepared to over or understate matters if it suits her overall objective of obtaining support from Mr. Richards.

[62] Mr. Richards suffers from the same problem as Ms. Richards in his evidence. In his direct examination, he said that he had to take money out of his RRSP in order to live; however, in cross-examination he acknowledged that the first \$30,000.00 he took out was to prepay a lease on a luxurious Jaguar motor vehicle.

[63] Mr. Richards said that he stopped paying spousal support in June of 2013 because he did not have the money to do so. This is completely inconsistent with

the facts. At the time of trial, he had over \$50,000.00 in his bank account and tax free savings account. In addition, in the fall of 2013 he sold the family cottage he received on the division of property for \$86,000.00. He took the payment in cash and gave over \$40,000.00 to his son, Jay, and \$15,000.00 to his girlfriend. He said this was to repay money they had previously lent to him. He cannot recall what the remaining money was used for. Also in the fall of 2013, he sold his shares in Holm Realty to his son, Jay. He received an initial payment of \$5,000.00, with the rest payable over time.

[64] In 2013, Mr. Richards took more than \$250,000.00 out of JEL and VAIL in the form of shareholders' loans. Some of this was used to pay legal accounts and some for the spousal support which he paid to Ms. Richards for part of the year. The remainder was used to pay his own expenses. Between April and September, 2013, the amount which he took from the companies was \$124,000.00. In November, 2013, Mr. Richards took \$51,000.00 out of VAIL and cannot recall what the money was used for. In November and December, 2013, Mr. Richards took \$17,000.00 out of JEL. In the face of these acknowledgments by Mr. Richards in cross-examination, his statement that he did not have the money to pay interim spousal support is simply not credible.

[65] Mr. Richards also said that the financial future for JEL is precarious, and yet in July, 2013, he caused the company to purchase his girlfriend's home for \$153,000.00. His explanation for doing so was that her money was tied up in the property and they couldn't build a new home for themselves until she sold her existing home.

[66] I have no confidence that any of Mr. Richards' testimony concerning his finances or that of the companies is reliable or credible. My impression is that he will say whatever it takes to avoid paying any more support to Ms. Richards.

PRINCIPLES OF SPOUSAL SUPPORT

[67] Section 15.2 of the *Divorce Act*, R.S.C., 1985, c. 3 sets out the jurisdiction of the court to award spousal support. Such an award may be a lump sum or periodic payment for a definite or indefinite term. The factors to be taken into account in deciding whether to make an order for spousal support are found in s-s. (4), which provides as follows:

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

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

[68] The objectives of a spousal support order are found in s-s. (6), which says:

- (6) An order made under subsection (1) or an interim order under subsection (2) that provides for the support of a spouse should
- (a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;
 - (b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;
 - (c) relieve any economic hardship of the spouses arising from the breakdown of the marriage;
 - (d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.

[69] A request for spousal support requires the court to consider a broad range of circumstances. The purpose of the exercise is to consider the economic impact of the marriage and its breakdown, and to apply the relevant factors to the statutory objectives of the *Divorce Act* by striking a balance that best achieves justice between the parties. For marriages of longer duration, the economic consequences (both good and bad) should be shared equitably.

[70] The nature of the judicial discretion which must be exercised in considering spousal support is described in Payne, *Canadian Family Law* (4th ed.) at pp. 261-262:

On the dissolution of a long marriage, a spouse is not automatically entitled to a spousal support order solely because that spouse stayed home with the children. The right to, duration, and amount of spousal support, if any, is dependent on all the circumstances of the particular case. Spousal support in Canada is frequently referred to as (1) compensatory; (2) contractual, or (3) non-compensatory. These categories reflect the combined operation of sections 15.2(4) and (6) of the *Divorce Act*. The law of spousal support continues to evolve, particularly with respect to the balancing of the factors and objectives contained in these subsections to determine whether, and how much, support should be ordered. The following principles may nevertheless be extrapolated from the judgments of the Supreme Court of Canada in *Moge v. Moge*, and *Bracklow v. Bracklow*:

- 1) The focus of the inquiry is on the economic consequences of the marriage for each spouse.
- 2) There is no single model of support and no stipulated objective is paramount. The right to support and its quantum involve a balancing of all the factors and objectives specified in section 15.2 of the *Divorce Act*. This involves analysis of a wide range of issues, such as the length of the marriage, spousal contributions, means, needs and self-sufficiency.
- 3) A fair distribution of the economic consequences of the marriage through the medium of spousal support does not require a detailed accounting of the spousal day-to-day financial and other contributions to their married life nor does it require expert evidence as to the economic consequences of the marriage.

Courts are entitled to take judicial notice of the economic effects of the division of labour during the marriage when the spouses divorce. A spouse's homemaking contributions and child-care responsibilities are highly relevant in terms of their ongoing economic impact on the spouses after the divorce but they must be addressed in the context of all of the attendant circumstances that fall within the ambit of sections 15.2(4) and (6) of the *Divorce Act*. Applications for retroactive and prospective spousal support should take account of the assets, income, and earning capacity of the spouses following the breakdown of the marriage. Lump sum retroactive spousal support orders made after or contemporaneously with an order dividing matrimonial property can be especially problematic in that the payment of lump sum spousal support has an impact on the property that would or should have been available for division. The global means and current net worth of the spouses must be considered when determining the right to and quantum of

spousal support, if any, in light of the factors and objectives specified in sections 15.2(4) and (6) of the *Divorce Act*.

[71] In some cases, the spouses may have worked together in developing a successful business. Marriage breakdown and divorce will usually result in one of the spouses retaining the business, which could justify a significant equalization payment to the other spouse. It is important to recognize the purpose of such a payment and its impact on spousal support.

[72] Compensation paid to a spouse for their interest in a family business is a recognition of their past contribution to the enterprise over the course of the marriage. It must be differentiated from ongoing spousal support which is directed to the future. Receipt of a large amount on division of property may affect spousal support to the extent that it may generate income to be taken into account in assessing the spouses' respective needs and ability to pay. A useful discussion of these principles is found in the decision of Justice Coutu in *Brown v Rae*, 2001 ABQB 809.

[73] In *Brown*, the parties had been married for 37 years and were in their early sixties. Both had been actively involved in the family business which the husband retained on the division of property. The wife received slightly more than \$2,000,000.00 in property and assets as part of the agreed property division.

[74] Ms. Rae had worked for the company for 19 years prior to separation, and during this time she received a salary as well as bonuses and dividends. She stopped work following the separation and had not sought new employment. At the time of trial, she testified that she had no future employment plans. She claimed spousal support on the basis that the return on her investments was not sufficient to cover her expenses or maintain her lifestyle.

[75] In considering the factors set out in s. 15.2(6) of the *Divorce Act*, Justice Coutu concluded that Ms. Rae suffered an economic disadvantage arising from the breakdown of the marriage. Her rationale for this conclusion is found in the following passage from her decision:

[64] On the other hand, Ms. Rae argues that she is entitled to compensatory support as she is economically disadvantaged for reasons *arising from the breakdown* of the marriage. I accept this argument. In 1997, before the separation,

both Ms. Rae and Mr. Brown earned a salary in excess of what they would earn as an employee of another company (considering their limited education). This is not an unusual phenomenon in well-established, owner-operated companies.

However, the economic result of the breakdown of this type of marriage (where both spouses are employed by the company) is that the spouse who no longer works for the company, if she is nearing retirement as Ms. Rae is, is unlikely to replace his or her income. In most owner-operated companies, and in this case, if the owners are having marital difficulties and no longer get along, the owners cannot realistically carry on running the business. They are forced to decide which spouse will continue to run the company. Here, Mr. Brown continued to operate the business and not only kept, but increased, his salary. The other owner, Ms. Rae, is left, at the age of 60, to “fend” in the marketplace with limited education and no recent job experience outside of Shippers Supply.

[65] I find that Ms. Rae is economically disadvantaged by the *breakdown* of the marriage as it led her to lose her future earning power. Further, she lost the fringe benefits associated with being a shareholder of the company. As L’Heureux-Dubé J. stated in *Moge, supra*, at p. 388: “The financial consequences of the end of the marriage extend beyond the simple loss of future earning power or losses directly related to the care of children. They will often encompass loss of seniority, missed promotions, and lack of access to fringe benefits, such as pension plans, life, disability, dental, and health insurance...”

[76] The impact of the division of assets on spousal support was described by Justice Coutu as follows:

[67] As I stated in my introductory comments, the crux of this case is the extent to which Ms. Rae’s capital pool affects her entitlement to support. In dividing up the assets of the marriage, it is the past that is being considered (*i.e.*, the accumulation of assets acquired during the marriage). In making an award of maintenance it is the future that is being considered (*i.e.*, the impact of present earning potential on the future standard of living).

[68] The capital pool that Ms. Rae is entitled to from her half of the business is a consideration in the determination of spousal support. The division of assets, although a separate matter, is related to spousal support as the *Divorce Act* requires the court to consider the “means and needs” of the parties. Ms. Rae’s capital will generate some income to offset some of the economic disadvantage resulting from the marriage breakdown. However, Ms. Rae requires support as the income her capital will generate will not totally alleviate Ms. Rae’s economic disadvantage. Spousal support is required so that Ms. Rae can maintain a standard of living equal

to that of Mr. Brown and to maintain the standard of living that they had before separation.

[77] It is clear from the authorities, including the leading case of *Moge v. Moge*, [1992] SCJ 107 that the overarching principle for spousal support orders is to fairly distribute the economic consequences of the marriage and its breakdown between the spouses.

APPLICATION OF SPOUSAL SUPPORT PRINCIPLES TO THE RICHARDS' CIRCUMSTANCES

[78] Both spouses seek spousal support from the other. Ms. Richards says that her monthly expenses exceed her income by \$6,400.00. She also says that Mr. Richards continues to draw significant financial benefits from JEL, allowing him to maintain his extravagant lifestyle.

[79] Mr. Richards, on the other hand, says that he is only earning \$3,000.00 per month from a company that is on the verge of going out of business, and that his financial future is bleak. He says that Ms. Richards has the ability to earn income, but has chosen not to do so and has incurred unreasonable expenses in order to maintain her lifestyle and justify a claim for spousal support.

[80] This is a marriage of long duration during which both parties contributed to the business of JEL. Despite having three small children, Ms. Richards continued to work in the business, including doing administrative work at home. She was able to finish her Bachelor's degree on a part-time basis and became a licensed real estate broker. I am satisfied that neither spouse made personal sacrifices for the benefit of the other during the marriage. They contributed equally to the success of their family business.

[81] The agreement reached between the parties at the time of the division of property was that Mr. Richards would carry on with JEL and Ms. Richards would leave the company. As part of that agreement, it was necessary to sell a substantial portion of JEL's ongoing business in order to fund Ms. Richards' share redemption. This meant that the asset which Mr. Richards retained was not the same as the one which had been operating during the marriage. This is a significant distinction from the situation which existed in *Brown v. Rae* where the ongoing business retained by Mr. Brown continued to grow post-separation.

[82] Ms. Richards did suffer an economic disadvantage from the breakdown of the marriage because she lost employment with JEL where she had worked for more than 30 years. This meant that she needed to return to the job market which can be difficult for someone at her stage in life and career. In accordance with the promotion of the principle of self-sufficiency, Ms. Richards completed a further university degree, although this has not yet resulted in employment.

[83] Because of the economic disadvantage suffered by Ms. Richards in losing her source of employment, I believe she is entitled to spousal support on a compensatory basis. In order to consider the nature of the support required to achieve the equitable distribution contemplated by the jurisprudence, I need to consider a number of factors. First, I must recognize that Ms. Richards developed important management and employment skills through JEL and Holm Realty. During the marriage, she was able to complete her university degree and shortly after separation obtained her MHA degree. Her time with Holm Realty gave her experience in real estate, including as a registered broker. Although her age will work to her disadvantage to some extent, Ms. Richards is equipped to return to the job market and, in my view, will be successful in securing beneficial employment provided she is diligent in her efforts.

[84] The parties' relative needs and abilities to pay are matters which need to be considered even if spousal support on a compensatory basis is appropriate. If no compensatory order is to be made, need and ability to pay is relevant in considering support on a non-compensatory basis. Part of the equitable distribution of the economic consequences of the marriage and its breakdown is the desire to avoid circumstances where there are drastic differences in post-marriage standards of living, particularly with long term marriages.

[85] It is very difficult to assess the financial position of the parties because of concerns over the reliability and credibility of their evidence. I have concluded that Ms. Richards has not made reasonable attempts to seek employment and that her budgeted income is probably understated. Her expenses seem unreasonably high in a few areas, such as entertainment, travel and gifts, mortgage and automobile expenses. In addition, claiming \$350.00 a month for real estate fees when no income is being generated is questionable.

[86] Mr. Richards' evidence concerning his financial situation is also problematic. His statement of income suggesting he is only earning \$3,000.00 per month lacks credibility. He testified that he has received more than \$250,000.00 through shareholders' loans from JEL and VAIL in 2013. Historically, such payments would ultimately be classified as dividends or income at the end of the year. That was the pattern during the marriage and appears to have continued thereafter. I am satisfied that these amounts should be treated as income for spousal support purposes.

[87] Mr. Richards raises a legitimate issue about the extent to which JEL's business has changed as a result of the sale of its assets in order to fund the share redemption. I accept that JEL is not the same company as existed over the last several years of the marriage. Whether it will continue and what income it will generate for Mr. Richards remains to be seen. I am not prepared to accept Mr. Richards' dire predictions at face value given my conclusions concerning his credibility.

[88] Although the evidentiary record is somewhat weak, I am satisfied that Mr. Richards should be considered to have income in the range of \$250,000.00 for the year 2013. I also conclude that this amount will be less in 2014 and subsequent years because of the change in JEL's business. Quantification of the reduction is somewhat speculative however, I believe \$80,000.00 is a reasonable estimate based upon the information that I have.

[89] With respect to Ms. Richards, she should have been able to earn more than she apparently has and her ability to do so should increase with each passing year. Again, it is somewhat difficult to quantify what her income should be. For purposes of spousal support I believe that using a figure of \$35,000.00 for Ms. Richards is appropriate.

[90] Taking into account Ms. Richards' entitlement to compensatory spousal support in order to assist in her transition to economic self-sufficiency, as well as the parties' needs and Mr. Richards' ability to access income from JEL and VAIL, I will order payment of spousal support as follows:

1) Up until March 31, 2014, Mr. Richards shall pay Ms. Richards support in the amount of \$6,000.00 per month. With interim support payments that have been made this leaves arrears as of trial of \$36,000.00.

2) From April 1, 2014 Mr. Richards shall pay Ms. Richards support in the amount of \$1500.00 per month. This is based on their imputed incomes of \$80,000.00 and \$35,000.00.

[91] If the parties are unable to reach an agreement on costs, I will receive written submissions from them.

Wood, J.