IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *S[redacted] v. S[redacted],*
2007 BCSC 264

Date: 20070228
Docket: E060572
Registry: Vancouver

Between:

T[redacted] S[redacted]

Plaintiff

And

R[redacted] S[redacted]

Defendant

Before: The Honourable Mr. Justice Sigurdson

Reasons for Judgment

Counsel for the Plaintiff:	A. Thiele
Counsel for the Defendant:	A. Ouellet
Date and Place of Trial:	November 21-23, 2006
Written Submissions Received:	February 9 & 12, 2007
	Vancouver, B.C.

INTRODUCTION

[1] This case concerns the division of family assets, spousal support and child maintenance.

[2] The parties were married in 2001. They ended their seven-year relationship when they separated in August 2005. The defendant, Mr. S[redacted] is a contractor

who inspects and maintains gas wells in the Fort St. John area. The defendant resides in the couple's home and also raises some buffalo there.

[3] The plaintiff, Ms. S[redacted], now Ms. H[redacted], works as a bookkeeper at a number of jobs, sometimes from home, and has the day-to-day care of the couple's one child, who was born in J[redacted] and is now [redacted] years of age.

[4] The family assets are the family home and a company called W[redacted] C[redacted] [redacted], which owns (or the parties own) a boat, the vehicles each party drives, a 2003 snowmobile, a quad and a trailer. The couple, as well as W[redacted] C[redacted], own buffalo and also have an investment in N[redacted] Company.

ISSUES

[5] At trial, I granted an order of divorce on the grounds of living separate and apart for the requisite period of time.

[6] Mr. S[redacted] carries on his contracting business through W[redacted] C[redacted] Ltd. as its sole employee. There is a dispute over the amount of his annual income for spousal and child support purposes. The main issue is whether his taxable income is the fairest measure. The key questions are whether deductions W[redacted] C[redacted] makes for tax purposes are appropriate in determining his income for support purposes. In terms of support, the defendant says that there should be no spousal support, but if there is, both sides agreed at trial that the order should be subject to review at the time the parties' daughter starts school full-time in Grade 1.

[7] A number of the issues between the parties were resolved by agreement at trial.

[8] The parties agree that the truck each drives should go to that person, together with responsibility for the loan associated with it. The plaintiff concedes that the defendant may retain the older snowmobile (it being acknowledged that the new snowmobile owned by Mr. S[redacted] is not a family asset) as long as he keeps the boat and the loan in connection with the boat. The plaintiff's lawyer suggests that the retention of the old snowmobile makes up for any loss in respect of the sale of the boat, and that was not seriously opposed by the defendant.

[9] The parties agree that the money in the Royal Bank account and the W[redacted] C[redacted] Ir[redacted] G[redacted] account should be divided equally.

[10] The family home located at [redacted], Fort St. John, the parties agree, is valued at $300,000. The parties agree that Mr. S[redacted] can pay Ms. H[redacted]ut her 50% interest after deducting the mortgage, currently $1[redacted], but there is a dispute as to whether other adjustments or compensatory orders should be made. The matters in dispute include: Mr. Sa[redacted]'s pay down on the principal of the mortgage since separation; whether Ms. H[redacted] should contribute to the Visa account after separation; and, whether there should be a lump sum payment to Ms. H[redacted] for retroactive child and spousal support. The defendant says that he has provided financial support in a number of ways since the parties separated and that any amount for retroactive support is not appropriate.

[11] The plaintiff seeks to have an RRSP of $1[redacted] reapportioned to her for her contribution to the family assets made prior to the marriage. The defendant opposes this and seeks to have this RRSP divided equally. He says that this claim for reapportionment was not pleaded, is made without notice and is not justified on the evidence.

[12] Ms. H[redacted] argues there was an unequal division of the chattels from the matrimonial home upon separation and seeks an adjustment in that respect. Ms. H[redacted] also seeks an adjustment for the retained earnings in W[redacted] C[redacted] that Mr. S[redacted] has taken or will retain as the sole owner following separation.

[13] There is also a dispute about whether the buffalo have any value and their appropriate division.

BACKGROUND

[14] The parties married in 2001, after being together for about three years. The plaintiff is 31 and has a high school education. She trained as a hairdresser but has worked, and currently works, as a bookkeeper after operating her own business called P[redacted] P[redacted], a picture framing business which folded a few years ago. It is acknowledged by her counsel that she has an income of approximately $37,000 at the current time. It appears on the evidence to be slightly higher and I fix it at $38,000.

[15] The plaintiff works at a number of jobs as a bookkeeper. She works Monday through Friday, but works out of her home on Tuesdays and Thursdays when she

does her work around her daughter's naps. Presently, her daughter goes to daycare on Monday, Wednesday and Friday at a cost of $31.50 per day. When the parties separated, the plaintiff moved in with her parents and since January 2006 she has paid $500 rent for accommodation in a trailer on her parents' property.

[16] The defendant is 32 years old and works as a contractor in the gas fields inspecting and maintaining gas wells. Until recently, he travelled to between thirty and thirty-five sites per day, driving up to 9,000 kilometres each month in order to inspect gas wells and provide maintenance and reactivate the wells if they stop working.

[17] I will discuss the issues in the following manner. First, I will determine the defendant's income for child support purposes. Then, I will decide the question of asset division, including any necessary adjustments, and finally I will decide the issues of child and spousal support.

DISCUSSION

Mr. S[redacted]s Income for Support Purposes

[18] Child support is based on annual income. This is determined by the income determination provisions of the ***Guidelines***. They rely on the sources of income in a spouse's T1 General form. However, as here, where the employment income of the defendant is earned through a company that the payor controls and uses almost entirely for the purposes of earning income, the court may determine how much of the company's pre-tax income to include for support purposes. Of particular

importance here is whether the expenses deducted by the company for tax purposes should, nevertheless, be included in the determination of the defendant's income for support purposes.

[19] The significant provisions of the ***Guidelines*** with respect to this issue are as follows:

> **2.**(1) The definitions in this subsection apply in these Guidelines.
>
> ...
>
> "income" means the annual income determined under sections 15 to 20.
>
> ...
>
> (2) Words and expressions that are used in sections 15 to 21 and that are not defined in this section have the meanings assigned to them under the Income Tax Act.
>
> ...
>
> **15.**(1) Subject to subsection (2), a spouse's annual income is determined by the court in accordance with sections 16 to 20.
>
> (2) Where both spouses agree in writing on the annual income of a spouse, the court may consider that amount to be the spouse's income for the purposes of these Guidelines if the court thinks that the amount is reasonable having regard to the income information provided under section 21.
>
> **16.** Subject to sections 17 to 20, a spouse's annual income is determined using the sources of income set out under the heading "Total income" in the T1 General form issued by the Canada Customs and Revenue Agency and is adjusted in accordance with Schedule III.
>
> **17.**(1) If the court is of the opinion that the determination of a spouse's annual income under section 16 would not be the fairest determination of that income, the court may have regard to the spouse's income over the last three years and determine an amount that is fair and reasonable in light of any pattern of income, fluctuation in income or receipt of a non-recurring amount during those years.

(2) Where a spouse has incurred a non-recurring capital or business investment loss, the court may, if it is of the opinion that the determination of the spouse's annual income under section 16 would not provide the fairest determination of the annual income, choose not to apply sections 6 and 7 of Schedule III, and adjust the amount of the loss, including related expenses and carrying charges and interest expenses, to arrive at such amount as the court considers appropriate.

18.(1) Where a spouse is a shareholder, director or officer of a corporation and the court is of the opinion that the amount of the spouse's annual income as determined under section 16 does not fairly reflect all the money available to the spouse for the payment of child support, the court may consider the situations described in section 17 and determine the spouse's annual income to include

> (*a*) all or part of the pre-tax income of the corporation, and of any corporation that is related to that corporation, for the most recent taxation year; or
>
> (*b*) an amount commensurate with the services that the spouse provides to the corporation, provided that the amount does not exceed the corporation's pre-tax income.

(2) In determining the pre-tax income of a corporation for the purposes of subsection (1), all amounts paid by the corporation as salaries, wages or management fees, or other payments or benefits, to or on behalf of persons with whom the corporation does not deal at arm's length must be added to the pre-tax income, unless the spouse establishes that the payments were reasonable in the circumstances.

19.(1) The court may impute such amount of income to a spouse as it considers appropriate in the circumstances, which circumstances include the following:

> (*a*) the spouse is intentionally under-employed or unemployed, other than where the under-employment or unemployment is required by the needs of a child of the marriage or any child under the age of majority or by the reasonable educational or health needs of the spouse;
>
> (*b*) the spouse is exempt from paying federal or provincial income tax;
>
> (*c*) the spouse lives in a country that has effective rates of income tax that are significantly lower than those in Canada;

(*d*) it appears that income has been diverted which would affect the level of child support to be determined under these Guidelines;

(*e*) the spouse's property is not reasonably utilized to generate income;

(*f*) the spouse has failed to provide income information when under a legal obligation to do so;

(*g*) the spouse unreasonably deducts expenses from income;

(*h*) the spouse derives a significant portion of income from dividends, capital gains or other sources that are taxed at a lower rate than employment or business income or that are exempt from tax; and

(*i*) the spouse is a beneficiary under a trust and is or will be in receipt of income or other benefits from the trust.

(2) For the purpose of paragraph (1)(*g*), the reasonableness of an expense deduction is not solely governed by whether the deduction is permitted under the Income Tax Act.

[20] The defendant contracts with his clients through W[redacted] C[redacted] Its fiscal year end is June 30. For the year ending June 30, 2003, the gross income received by W[redacted] C[redacted] was $160,594; in 2004, it was $146,672; in 2005, $169,939; and for the year ending June 30, 2006, the gross income was $165,228. In 2005 and 2006, Mr. S[redacted]'s wages and benefits, according to the financial statements of W[redacted] C[redacted], were respectively $76,625 and $52,836.

[21] Dealing with the most recent year for which financial statements are available, based on gross revenue of $165,228, after expenses of $189,297, including wages and benefits to Mr. S[redacted] at $76,625, W[redacted] C[redacted] suffered a net loss, before recovery of income taxes, of $24,069.

[22] To put the positions of the parties in context, let me first set out W[redacted] C[redacted]s Statement of Loss and Retained Earnings for the year ended June 30, 2006:

INCOME:	**$165,228**
EXPENSES:	
Accounting and legal:	$1,650
Amortization:	$33,935
Insurance and licenses:	$5,991
Interest and bank charges:	$7,121
Office	$1,265
Rent:	$9,000
Sub-contracts:	$710
Supplies and small tools:	$1,528
Telephone:	$1,091
Travel and meals:	$11,052
Vehicle:	$39,329
Wages and benefits:	$76,625
	$189,297.00
NET (LOSS) BEFORE INCOME TAXES:	($24,069)
INCOME TAXES (RECOVERY):	- ($2,835)
NET (LOSS):	($21,234)
RETAINED EARNINGS, beginning of year	$27,921
RETAINED EARNINGS, end of year	$6,687

[23] Ms. Thiele argues that Mr. S[redacted] cannot, for child support purposes, write off about $75,000 of the expenses that are deducted or amortized by the company. She challenges the amount for his office and for rent, particularly when that amount exceeds the mortgage payment he makes. Ms. Thiele argues that the small tool expense is excessive, the telephone charge is unreasonable, and the travel and meal costs are simply for personal benefit and all should be included in income for support purposes. Most importantly, Ms. Thiele argues that the amortization charges for vehicles are unreasonable as they include amortization on the plaintiff's

vehicle as well as the defendant's vehicle, because the amortization is done over a very short time, fails to account for the defendant's personal use, and there is double counting as the company is also deducting the loan payments on both parties' vehicles.

[24] Ms. Thiele argues that for fairness, once the unreasonable expenses are removed, Mr. S[redacted]'s income should be determined based on the last three years' financial statements for W[redacted] C[redacted]. She argues that on this basis Mr. S[redacted]'s income for ***Guidelines*** purposes should be found to be approximately $150,000.

[25] The defendant's position is that even working from W[redacted] C[redacted]'s 2006 gross revenue of $165,000, it is incorrect to say that Mr. S[redacted]'s income for child and spousal support purposes is $150,000. Ms. Ouellet, counsel for Mr. S[redacted], argues that the expenses that are deducted by W[redacted] C[redacted] for tax purposes are legitimate, with the possible exception of amortization for the defendant's vehicle in the amount of $15,344.06, because it essentially duplicates the loan payments for the defendant's vehicle that are already being deducted. She agrees that the loan payments and the amortization on the plaintiff's vehicle are not appropriate deductions. Ms. Ouellet submits that some portion, say 10%, of the travel and meal expenses that were deducted are not for personal benefit and were properly deducted. The defendant's counsel argues that it is proper to deduct the loss that the company suffered in the year ending in June 2006 in determining Mr. S[redacted]'s true income.

[26] However, Ms. Ouellet says that, although the company is no longer paying the plaintiff's insurance, half the insurance amount claimed, including well head insurance, is an appropriate deduction. She accepts that the office and rent charge is not appropriate but contends that the interest and bank charges, subcontracts, supplies and small tools, and telephone expenses, as they appear in the statements, are appropriate deductions.

[27] Ms. Ouellet argues that in the last six months, her client's gross revenue has dropped by about $4,000 - $5,000 monthly, or about 30-35% per month. She acknowledges his expenses for items such as fuel will also decrease. The defendant explained that his new and more restricted schedule allows him to be no further than five minutes from home at any time, but it reduces his number of daily guaranteed hours from twelve to seven hours. Before July 2006, he was paid for a minimum of twelve hours for his eight days on and four days off, but says he would sometimes work for over thirty hours straight. Mr. S[redacted] testified that he found the previous work schedule to be extremely physically wearing on himself and his motor vehicle. He testified that in the future he is hoping to secure shared custody and become more available for his daughter.

[28] Ms. Ouellet also argues that given Mr. S[redacted]'s reduced schedule, his income starting in July 2006 will be at least twenty five percent less than what it has been, and if the court bases his income on the 2006 and earlier financial statements there should be a review when W[redacted] C[redacted]'s 2007 statements are completed. I will direct that the defendant prepare financial statements for W[redacted] C[redacted] as required and that he provide them forthwith to the plaintiff. I also direct that both parties, by May

15 of each year, provide a copy of their tax return together with attachments, to the other party.

[29] The defendant's counsel's position is that Mr. S[redacted]'s current income for child support purposes, after deducting appropriate expenses, deducting the net loss for 2006 of over $21,000 and adding back the retained earnings, is more properly in the range of $90,000.

[30] What is the defendant's income for ***Guideline*** purposes?

[31] As ***Egan v. Egan***, [2002] B.C.J. No. 896, 2002 BCCA 275 notes at ¶23:

> ... In imputing income to a spouse under s. 19, it is important to emphasize that the court must consider the reasonableness of expenses claimed by the spouse as an expense deduction (s. 19(1)(g)), and that, under s. 19(2), the reasonableness of an expense deduction is not governed solely by whether the deduction is permitted under the ***Income Tax Act***.

[32] The fact that certain expenses paid by the defendant's company have not been disallowed by the CCRA does not solely govern the reasonableness of that expense: see ***Dornick v. Dornick***, [1999] B.C.J. No. 2498, 1999 BCCA 627.

[33] The Court of Appeal in ***Egan*** describes the proper approach when determining if deductions are reasonable from a ***Guidelines*** perspective, at ¶25 and ¶30-32:

> [25] In my view, while it is clear that "an allowable capital cost allowance with respect to real property" must be included in income under the ***Guidelines***, it does not follow that an allowable CCA with respect to personal property is necessarily deductible from income for ***Guidelines*** purposes. (In this regard, "allowable" means allowable

under the ***Income Tax Act***.) Rather, the absence of any reference in Schedule III to CCA relating to personal property permits the Court to assess the reasonableness of the deduction of these expenses pursuant to ss. 19(1)(g) and (2) of the ***Guidelines***. Sections 19(1)(g) and (2) make it clear that the deduction is not automatically permitted for ***Guidelines*** purposes simply because it is permitted under the ***Income Tax Act***. Rather, the court is entitled to look at the nature and extent of the deduction claimed to determine whether it is reasonable from a ***Guidelines***, rather than an ***Income Tax Act***, perspective. In many cases, it may well be that deductibility under the ***Income Tax Act*** and deductibility under the ***Guidelines*** will coincide.

...

[30] I respectfully agree with the interpretation of s. 11 adopted by the Saskatchewan Court of Appeal and with the pragmatic approach taken by that court in relation to the issue of deductibility of contested CCA claims for ***Guidelines*** purposes. In my view, that approach contemplates that if there is some evidence supporting the reasonableness of the expense (beyond the fact that it allowable under the ***Income Tax Act***), the court is unlikely to deny the deduction in calculating the payor's income. Similarly, the court will be unlikely to second-guess the rates permitted under the ***Income Tax Act*** and Regulations unless the allowable rate appears to be unusual, or based on a particular policy being pursued by the taxation authorities, rather than on the likely economic life of the asset in issue.

[31] The Manitoba Court of Appeal has also addressed the issue of the deductibility of CCA on personal property in ***Andres v. Andres***, [1999] M.J. No. 103. There, the payor husband was seeking to reduce his income for ***Guidelines*** purposes based on depreciation claimed with respect to assets in his trucking business. The issue in that case was clouded by the fact that the husband had failed to make proper financial disclosure. The husband argued that since s. 11 of Schedule III did not provide that CCA on personal property should be included in income, s. 19, which deals with imputed income, should not be read to permit the amount claimed as a deduction to be included in income for ***Guidelines*** purposes.

[32] Mr. Justice Monnin, writing for the court, rejected the husband's position. He noted that the authorities dealing with this issue at the trial level were not readily reconciled. At para. 29 of his reasons, he listed some of the factors the courts had taken into account in determining whether a particular CCA deduction should be "imputed" back into income under s. 19 of the Guidelines:

In summary, if one can extrapolate a summary, it would appear that the following are factors that have been considered in deciding whether or not CCA deductions should be imputed back into income:

1. Was the CCA deduction an actual expense in the year?

2. Was the CCA deduction greater than or less than the cost of acquisitions during the same time period?

3. Was the CCA deduction greater than or less than the repayments of principal with respect to the chattels in question?

4. Was the CCA deduction the maximum allowable CCA deduction?

5. Was it necessary to take the CCA deduction in that year?

6. How much of a loss in a business year resulted in that year?

7. Are the chattels for which the CCA was claimed truly needed for business purposes?

8. Do the chattels for which the CCA was claimed truly depreciated [sic]?

9. Is it foreseeable that future chattel purchases will not be required?

10. Is there a pattern of spending which establishes a greater real income than income tax returns indicate?

11. If the children were living with the spouse, would they benefit from the actual income earned by the spouse?

12. Is there a dire need for child support?

[34] In ***Luedke v. Luedke***, [2004] B.C.J. No. 1157, 2004 BCCA 327, the court considered whether the wife's income was artificially low because of the employment

of depreciation and expenses in connection with her graphics business. Hall J.A. said at ¶15 and 18:

> [15] To return to ***Egan***, *supra*, I note that in that case this Court found that a substantial portion of the capital cost allowance claimed was properly deductible from gross income. The Court noted at para. 25 that it will not always be the case that an allowable capital cost allowance with respect to personal property is necessarily deductible from income for ***Guidelines*** purposes. The Court noted that this is by no means an invariable rule, and that a court faced with such a situation, namely, a claim to reduce income based on capital cost allowance for personal property, would have to consider any such claim and assess its reasonableness. ...
>
> [18] The appellant in the present case suggests that because the respondent wife was paying business rent to her partner, with whom she was not in an arm's length relationship, this expense is questionable. The appellant also submits that the capital cost allowance taken by the respondent in the years under review appeared to be excessive. He also queries the car expense that the respondent utilized to reduce her income. When I have regard to the nature of the business of the respondent, a graphic arts business, it appears to me that capital cost allowance is a realistic factor to consider in this business because this is an area where technology is a salient factor. Assets required for the enterprise will often depreciate as they become outmoded and need to be replaced on a regular basis. The amount of rent paid for business premises, some $2,500, does not seem to me a questionable expense, having regard to the overall circumstances of this case. The business requires some premises to operate from. The monthly rental amount of $200 does not seem to me particularly remarkable and is what I would term a reasonable expense. Although the vehicle used by the respondent undoubtedly is required as well for personal usage, once again the nature of the enterprise seems to me to be one in which a vehicle is requisite. The expenses the respondent attributes to this do not seem to me to be at a level that should attract suspicion. This case seems to me to be factually at a considerable remove from cases such as ***Snow*** and ***Andres***, *supra*. In those cases the amounts claimed appeared so large relative to gross earnings as to invite scrutiny. In this case we have a small graphics printing business run by an individual out of a residence occupied by herself and her partner. The field that she works in has, as I observed, a technical component in which items used for the business would tend to depreciate perhaps more quickly than would be true of some types of industrial machinery. Depreciation and expenses claimed as deductions by this respondent do not appear to me to exceed the

> bounds of the appropriate. I do not therefore consider this a case in which the trial judge was bound to embark on any particularly searching examination of the items of capital cost allowance and expenses claimed by the respondent on her tax returns. I believe that in this case the following comment of Newbury J.A. in ***Egan***, *supra* at para. 49, cited above, is apposite:
>
> > ... unless the CCA schedule attached to the payor spouse's tax return or the answers to questions in discovery about claimed CCA, give rise to some concern that the equipment is not needed or used in the business, or that an inflated cost amount has been used, a judge sitting in a family law trial should not be expected to fulfill the role of a Revenue Canada tax auditor....

[35] In determining whether the expenses and depreciation claimed by W[redacted] C[redacted] are appropriate it is important to consider the nature of the business from which the defendant earns his living. Mr. S[redacted] uses his vehicle, quad, snowmobile and trailer to inspect and maintain gas wells throughout the winter. He works long hours, in extreme conditions in the winter, has historically been on call 24 hours a day, travels off road, drives up to 9,000 kilometres each month, carries 500 pounds of tools and sometimes spends the night in his truck. Mr. S[redacted] uses a bulk fuel tank on the property to fuel up to save time. As he put it, the owners of the gas wells "want you to find a way to get the gas going". In the circumstances he said that a new vehicle is worthless in a couple of years. Both of these comments I find to be properly descriptive of his work and are relevant to assessing the reasonableness of the deductions and capital cost allowance in determining his ***Guidelines*** income.

[36] In determining Mr. S[redacted]'s income for ***Guidelines*** purposes, I would not allow either the amount claimed by W[redacted] C[redacted] for amortization or the loan payment for the plaintiff's vehicle, as the plaintiff's vehicle is not required by the company to earn

income. That is not in dispute. Second, the defendant cannot reasonably deduct both the loan payments and the capital cost allowance for his vehicle. In the most recent financial statement the defendant claimed vehicle expenses of $39,329, but after removing the portion attributable to the plaintiff's vehicle the possible deduction was $28,968, a figure that would have to be reduced by some portion, say 20%, to reflect Mr. S[redacted]'s personal use. The amount that was claimed in amortization for the defendant's vehicle was $15,344.09 in 2006. That figure if used would also have to be adjusted to account for personal use. Given that I accept the historical use by Mr. S[redacted] of his vehicle to earn income, and given that he will likely have to replace it after three years of use, and after making some adjustment for personal use, I have concluded that a deduction of $20,000 per annum for his vehicle expenses is reasonable.

[37] Otherwise, I think that from the sum of $165,228 the following are appropriate deductions: the amounts for accounting and legal; amortization (representing the tank to fuel the diesel truck and the fencing to contain the buffalo); and the office equipment, including the computer equipment, which on the evidence is almost entirely used for business purposes. I think that amortization taken on the quad and snowmobile is reasonable. Although the financial statements show expenses of $5,991 for insurance, only the amounts for well head insurance and the truck insurance are appropriate, and they total $4,052. Interest and bank charges, subcontracts, supplies and small tools appear appropriate; they certainly have not been shown to be inappropriate deductions. The telephone expense of $1,091 per month has not been shown to be unreasonable. Ms. Ouellet suggests that the

defendant should be able to claim 10% of the travel and meal expense of $11,052, rather than the whole of that deduction, acknowledging that he received personal benefit out of that. I agree that a deduction from gross income of $1,105.20 for travel and meal expenses is an appropriate deduction.

[38] By my calculation, the appropriate amount of expenses for 2006 was $36,574. Therefore, applying that conclusion to W[redacted] C[redacted]'s gross revenue for the period ending June 30, 2006, I have concluded that the net income available to Mr. S[redacted] for child support purposes for that period was approximately $128,600 per annum.

[39] The defendant says that it is appropriate to deduct the net loss incurred by the company before income tax is deducted and the retained earnings should be added on. I disagree. I do not think it is appropriate to deduct W[redacted] C[redacted]'s net loss for tax purposes as that does not really assist in determining the fair amount of income that is available to the defendant for child support purposes.

[40] I have concluded that the fairest basis to determine income for child support purposes is to examine the last three years' level of income for W[redacted] C[redacted], taking into account a similar level of reasonable deductions. They indicate, on an average, an annual income for Mr. S[redacted] for child support purposes of $125,000.

[41] However, I think that some further adjustment is needed to reflect that I accept that Mr. S[redacted]'s current work schedule will generate a lower gross income to W[redacted] C[redacted], and hence a lower income to Mr. S[redacted], but will also generate lower expenses. Taking that into account as well, in all of the circumstances, I consider it

reasonable to reduce the defendant's annual income for child support purposes by 15%. Accordingly, I have determined the defendant's income for child support purposes to be $106,250.

DIVISION OF FAMILY ASSETS, ADJUSTMENTS AND CHILD SUPPORT

Division of Assets

[42] The parties agree that the family home has a value of $300,000 and the net equity after the current mortgage of $137,772 should be divided equally. Each side seeks certain adjustments to that figure which I will discuss while dealing with the division of the rest of the assets. After taking into account the adjustments that I consider appropriate, the defendant will have sixty days to acquire the plaintiff's interest. Otherwise, the property shall be listed and sold and the net proceeds divided.

[43] As I noted in the introduction, the parties have agreed that each will keep the truck they drive and be responsible for the loan that is associated with the truck. The defendant will also have the snowmobile and the boat, as well as the loan that goes with the boat.

[44] I will next deal with a series of claims and cross claims together, as the decision on all of them will result in an amount that can be taken into account in determining the amount to be paid by Mr. S[redacted] to Ms. H[redacted] for her interest in the matrimonial home.

[45] These claims are: lump sum retroactive child and spousal support; the plaintiff's claim for payment for her interest in the retained earnings of W[redacted] C[redacted]; and, the defendant's claim for an adjustment to reflect the benefit of family assets that the plaintiff has received since separation and the burden of the debts that the defendant says that he has paid. These claims are as follows.

[46] The plaintiff claims retroactive child and spousal support for the period since separation in the lump sum of approximately $10,000. Ms. Thiele suggested that it was appropriate to deal with the matter of retroactive support collectively.

[47] The defendant claims compensation for about $7,300, made up of one-quarter of the Visa debt of $6,629 on separation, one-half of the plaintiff's Scotiabank Account at separation, one-half of the plaintiff's non-registered investment account kept by her, and one-half of the amount used by the plaintiff from her Investment Group account since separation.

[48] The plaintiff says that there were retained earnings of $27,921 in W[redacted] C[redacted] when she left the marriage, and they were reduced to $6,687 by the year ending June 30, 2006. After deduction of tax, say at 25%, on $21,000, 50% of that, Ms. Thiele argues, should lead to an entitlement of Ms. H[redacted] of $8,000.

[49] I will deal firstly with the claim for retroactive support. Martinson J. summarized the recent decisions of the Supreme Court of Canada on the ability to make retroactive child support orders in ***C.A.R. v. G.F.R.***, [2006] B.C.J. No. 2102, 2006 BCSC 1407 at ¶ 5 and 9:

> [5] The Supreme Court of Canada has recently confirmed the ability of judges to make retroactive child support orders and provided direction as to how the discretion to do so should be exercised. It did this in appeals from four Alberta cases, ***D.B.S. v. S.R.G; L.J.W. v. T.A.R.; Henry v. Henry;*** and ***Hiemstra v. Hiemstra***, [2006] S.C.J. No. 37, 2006 SCC 37. ...
>
> [9] When deciding whether to make a retroactive order, judges must consider all the relevant circumstances, including these four factors: reasonable excuse for delay; conduct of the payor spouse; circumstances of the child; and hardship. None of the factors is determinative. The Court said, by way of example, that retroactive support could be ordered where there was no blameworthy conduct on the part of the payor parent. ...

[50] Here there was a need for the child support and an ability on the part of Mr. S[redacted] to pay during the period of separation. However, there was no application for child maintenance. The evidence is that the defendant has been making payments that are for the benefit of the plaintiff since the separation. Mr. S[redacted] paid the following expenses totalling approximately $1,625 each month: $863 for truck payments, $227 for insurance, $300-400 for gas, $75 for the phone and $108 for MSP. The MSP payment stopped in April, 2006 and the defendant continued to pay for the plaintiff's gas until October, 2006. Notwithstanding any tax benefit that the defendant got from the deduction of any of the expenses, the benefit to the plaintiff was significant.

[51] The claim for spousal support was not advanced until the morning of trial. Would a retroactive order be to redistribute capital in the guise of child support as Ms. Ouellet suggests? The defendant says that if some lump sump retroactive support is appropriate, then it is proper to take into account at least some of the joint funds of $5,100 and $6,000 that the plaintiff respectively used and kept.

[52] Taking into consideration all of the factors that I have described, including the fact that the defendant made payments for the benefit of the plaintiff during the period of separation and the plaintiff had access to and used some joint funds for her benefit during that period, I have concluded that it is appropriate to dismiss the plaintiff's claim for retroactive spousal support. However, I think that child support, in addition to the monies that were received by the plaintiff, ought to have been paid by the defendant and in all the circumstances a retroactive award is appropriate. I fix retroactive lump sum child support at $5,000.

[53] I make no adjustment based on Mr. S[redacted] paying the mortgage payments, as he has had the benefit of possession of the home and he has deducted rent payments from his income.

[54] The next two proposed adjustments are the defendant's claims to various adjustments totalling, Mr. S[redacted] says, $7,300, and the claim by the plaintiff for some compensation for the value of her interest in W[redacted] C[redacted] or the retained earnings of W[redacted] C[redacted]. Both of these claims are not clearly established on the evidence. The plaintiff's claim appears based on the reduction in retained earnings over the period of separation and the defendant's on family debts and assets that he says should have been shared. Part of the defendant's claim relates to the Visa bill, but it appears to have been essentially paid off in full within months of the plaintiff leaving the marriage. Upon a consideration of all of the evidence, I think that the defendant's claim is roughly set off by the plaintiff's claim. Both claims, to the extent that they are proven, appear to be worth about the same amount. I have concluded

that the fair and appropriate approach to dividing these family assets is to deal with them as if they are worth the same and to make no order in respect of either.

[55] The plaintiff also complains that there has been an unequal division of the other chattels and that she should be paid for any of the buffalo that the defendant or the company retains. Although there was some dispute in this respect, I am not satisfied that there was an unequal division of the chattels between the parties and I make no further order in connection with the division of the chattels other than I specifically describe.

[56] The parties have about 30-35 head of buffalo, 10 of which belong to the N[redacted], which is a company held by a number of members of the defendant's family and others. Some of the cattle on the family farm also belong to the plaintiff's father. It appears for a number of reasons that the buffalo market has not been strong. The company, N[redacted], which has about a dozen shareholders, has suffered a loss each year, and the cost of raising the buffalo presently exceeds the revenue from the business. The problem is compounded because the meat packing plant only takes a limited number of buffalo each week.

[57] Although the plaintiff says that the defendant can keep the buffalo and pay her $7,000, I do not think that is a reasonable proposition on the evidence.

[58] The plaintiff is entitled to half of the buffalo owned by the two of them *in specie*, but there is debt associated with them, which I understand to be in excess of $16,000. If the plaintiff wishes to take half of the buffalo, she is responsible for half of the existing debt. Otherwise, the defendant will account to the plaintiff for any

buffalo he disposes of. I make no order in respect of the buffalo belonging to the plaintiff's father as this is a matter between the plaintiff's father and the defendant. In terms of the plaintiff's interest in N[redacted], the defendant shall hold 50% of any profit he earns in trust for the plaintiff and at her request, transfer one-half of the shares to her when they are issued. If there are any further issues concerning the buffalo that I have not decided, the parties may apply for further directions by letter, if they are unable to agree.

[59] The Investors Group W[redacted] C[redacted] portfolio, currently with a value of $1,289.67, should be divided equally, as should the RBC Investment Action Direct account with a current balance of $1,200.

[60] The plaintiff has an RRSP with a value as of September 30, 2006 of $11,322.82. That should be divided equally by way of a spousal rollover. In terms of this RRSP, I do not think that it should be reapportioned. Ms. Thiele says that her client, in a relatively short marriage, contributed the equity from the sale of her condominium in 1998 but I think that both parties have made significant early contributions. As Ms. Ouellet pointed out, this particular claim was not pleaded and was only advanced in argument after the evidence was heard. For all of those reasons, I think the RRSP should be divided equally.

[61] The Investors Group RESP for the parties' daughter should remain intact and held for her.

[62] If I have overlooked any matter counsel may apply in writing for directions.

Child Support

[63] The defendant shall pay child support to the plaintiff in accordance with his ***Guideline*** income and will also pay his share of extraordinary expenses, namely the child's daycare expenses, on the basis of the plaintiff's income being $38,000 per annum. Based on the ***Guidelines***, the monthly amount of child support is $957.

SPOUSAL SUPPORT

[64] The defendant argues that no order for spousal support should be made. However both parties suggested at trial that if there is an order, it would be appropriate for there to be a review of spousal support at the time the child enters Grade 1.

[65] The criteria for granting spousal support appear in s. 15.2(4) of the ***Divorce Act***, R.S.C. 1985, c. 3 (2nd Supp.):

> (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.

[66] The objectives of a spousal support order are set out in s. 15.2(6) of the ***Divorce Act***:

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

[67] The authorities establish that a spouse may be entitled to support on compensatory principles (***Moge v. Moge***, [1992] 3 S.C.R. 813), but also on non-compensatory or needs-based principles, and contractual principles (***Bracklow v. Bracklow***, [1999] 1 S.C.R. 420).

[68] The plaintiff seeks an amount of spousal support generally in line with the ***Spousal Support Advisory Guidelines***. In ***Redpath v. Redpath***, [2006] B.C.J. No. 1550, 2006 BCCA 338, Newbury J.A. made these comments that are of interest in that respect, at ¶37-38:

> [37] The last area of contention is the award of $3,500 per month ordered to be paid to Ms. Redpath by way of spousal support, an order to be reviewed in three years' time. The wife's first ground of appeal on this point is that although she relied at trial on the ***Spousal Support Advisory Guidelines*** and did a "Support Mate" calculation, the trial judge did not refer in his reasons at all to the Advisory Guidelines or to any calculation he had done in reaching this amount. In the wife's submission, this alone is an error of law. Counsel naturally refers to ***Yemchuk v. Yemchuk***, [2005] B.C.J. No. 1748, 2005 BCCA 406, in which Prowse J.A. stated for this court:

This brings me to the question of whether, and to what extent, I should rely on the Guidelines in determining the quantum of support. In answering that question, I will briefly describe the Guidelines, as I understand them.

(e) The Spousal Support Guidelines

In my view, the best source of the history and nature of the Advisory Guidelines is the report prepared by Professors Carol Rogerson and Rollie Thompson dated June 2005 entitled Spousal Support Advisory Guidelines: A Draft Proposal (which I commend for its clarity to any writer embarking on this subject).

An important point to make at the outset of this discussion is that the proposed Advisory Guidelines are just that - proposed advisory guidelines. They are in a draft form and are subject to ongoing consultation with various interest groups. Further, unlike the Federal and Provincial Child Support Guidelines (which, in fact, are not guidelines at all, but form part of the substantive law), there is no plan to draft legislation to implement these Advisory Guidelines as law. Rather, their purpose is to be advisory only, with a view to bringing more certainty and predictability to the determination of spousal support under the Act. They are a response to what has been perceived as a significant lack of predictability in spousal support awards, which commentators suggest are even less predictable following the ***Bracklow*** decision, [1999] 1 S.C.R. 420.

It is also important to note that the Advisory Guidelines do not deal with entitlement to support, but are only relevant to issues of quantum and duration of support once entitlement has been resolved. Nor do they address situations in which there are prior agreements between the parties dealing with spousal support.

It should also be stressed that the Advisory Guidelines are intended to reflect the current law, rather than to change it. They were drafted by the authors after extensive analyses of the authorities regarding spousal support across the country, particularly the ***Moge*** and ***Bracklow*** decisions and those following thereafter. ... While decisions can undoubtedly be found in which the result would not accord with the Advisory Guidelines, I am satisfied that their intention and general effect is to

> build upon the law as it exists, rather than to present an entirely new approach to the issue of spousal support. For that reason, like Madam Justice Martinson and many other judges, I have no hesitation in viewing the Advisory Guidelines as a useful tool to assist judges in assessing the quantum and duration of spousal support. They do not operate to displace the courts' reliance on decided authorities (to the extent that relevant authorities are forthcoming) but to supplement them. In that regard, they do not constitute evidence, but are properly considered as part of counsels' submissions. (Paras. 60 - 64; emphasis added.)

> [38] I do not read ***Yemchuk*** as indicating that the Guidelines must as a matter of law be used by a judge in determining support. The same is true of this court's judgments in ***Tedham v. Tedham***, [2005] B.C.J. No. 2186, 2005 BCCA 502 (see especially paras. 75-6), and ***Kopelow v. Warkentin***, [2005] B.C.J. No. 2412, 2005 BCCA 551 (see especially paras. 75-6). However, as a "useful tool", the Guidelines may indicate whether a proposed award is "in the range" of what should be a pattern of predictable maintenance awards across the province and across Canada. If one assumes an income of $260,000 for Mr. Redpath, counsel for the wife calculates the Guideline range as between $4,542 and $5,510 per month, a range materially higher than the $3,500 that was awarded.

[69] Both parties, the evidence shows, were hard workers during the marriage. The defendant worked long hours inspecting gas wells and the plaintiff worked very hard in her own business until it dissolved in December 2003, and continues to work hard as a bookkeeper. Ms. H[redacted] presently has the largest share of the responsibility for childcare and it appears during the latter years of the marriage, after their child's birth, that the defendant was able to work long hours because the plaintiff took the lead responsibility for childcare.

[70] I find the plaintiff here is entitled to compensatory support to "relieve economic hardship that results from 'marriage or its breakdown'" (***Moge*** at ¶43). The plaintiff's career opportunities and income earning ability have been and

continue to be affected by the fact that she has been and continues to be the primary caregiver for the parties' child.

[71] The plaintiff has demonstrated that she is entitled to spousal support.

[72] Although both counsel suggested a review of spousal support, if I award spousal support, when the child begins Grade 1, I asked for further submissions in light of the Supreme Court of Canada's decision in ***Leskun v. Leskun***, [2006] 1 S.C.R. 920. ***Leskun*** indicated that a review order may be justified by "genuine and material uncertainty at the time of the original trial" on a specific aspect of the original order. See ***Stein v. Stein*** (2006), 56 B.C.L.R. (4th) 245, 2006 BCCA 391 at ¶59.

[73] The parties provided me with further submissions. Plaintiff's counsel reconsidered the position that she took at trial and submitted that the spousal support order should be indefinite and not subject to a review. She submitted that the potential increase in the plaintiff's income and the potential decrease in child care costs were not sufficiently material and that an appropriate order would be an indefinite award of $1,250 spousal support including the defendant's contribution to daycare expenses. If not, the plaintiff's counsel submitted that a review should take place six months after the child has started Grade 1.

[74] The defendant says that the plaintiff's earning ability and daycare requirements are sufficiently uncertain that a review as suggested by the Spousal Support Advisory Guidelines in the circumstances is appropriate. The defendant submitted that what is appropriate is an order of $800 per month, reviewable in or

after September 2008 on a terminating basis; alternatively a time-limited order ending no later than July 2011 (six years after separation) with a review as to quantum in or after September 2008; or, in the further alternative, an indefinite order with a review to occur in September 2008.

[75] This is a difficult issue because it arises from a marriage of relatively short duration. The marriage was four years long and the total period of cohabitation was seven years. The plaintiff is still relatively young and the child is very young. Both parties worked outside the home during the marriage although the plaintiff had and continues to have the largest childcare responsibility.

[76] I do not think that a terminating order or a time-limited order is appropriate at this time, nor is an indefinite order without a review is appropriate in these particular circumstances. Upon reflection, I have concluded that the parties' original positions that there should be a review of spousal support when the young child is in elementary school were well considered and were consistent with the principles in ***Leskun***.

[77] In the particular circumstances of this marriage, particularly its length, the issues of Ms. H[redacted]' income earning ability (after the child is in school), the impact of that change on her daycare expenses, and the future income of the defendant are all genuine and material uncertainties that justify a review when the child reaches Grade 1. I agree with the plaintiff's counsel that the appropriate time for the review is six months after the child enters Grade 1, which I understand will be in September 2009.

[78] I find, based on the defendant's income of $106,250 and the plaintiff's income of $38,000, that the appropriate amount of spousal support is $1,000 per month.

[79] I direct as well that the parties each deliver to the other copies of tax returns and supporting documents by May 15 of each year.

SUMMARY

[80] The defendant will be entitled to acquire the plaintiff's interest in the matrimonial home by paying her 50% of the net equity, based on the agreed value, within sixty days, together with the sum of $5,000 for retroactive child support. Otherwise the assets will be divided in accordance with these reasons.

[81] The plaintiff is also entitled to monthly child support in accordance with the ***Guidelines*** of $957 per month and spousal support of $1,000 per month. Spousal support shall be subject to a review six months after the parties' daughter enters Grade 1.

[82] The defendant shall pay the plaintiff his proportionate share of the daycare expenses for their child.

[83] The parties may make written submissions on the issue of costs if they are unable to agree.

"J.S. Sigurdson, J."
The Honourable Mr. Justice J.S. Sigurdson