

CANADA / JUDGMENT

Maxim v. Maxim

2024 BCSC 641

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Supreme Court of British Columbia

DECIDED

19 April 2024

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2024 BCSC 641 Maxim v. Maxim

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Maxim v. Maxim,

2024 BCSC 641

Date: 20240419

Docket: E66604

Registry: New Westminster

Between:

Lani Janine Maxim

Claimant

And

Daniel Ivan Maxim

Respondent

Before: The Honourable Justice Matthews

Reasons for Judgment

Counsel for the Claimant:

D.P. Kuhn

Counsel for Respondent:

J. Hittrich

Place and Date of Hearing:

New Westminster, B.C.

February 2 and April 5, 2024

Place and Date of Judgment:

New Westminster, B.C.

April 19, 2024

Overview

- [1] Lani Maxim and Daniel Maxim separated in 2022, after a relationship of between thirty and thirty-two plus years, depending on whose dates are accepted. Ms. Maxim seeks interim spousal support on the basis that she limited her working career to care for their two children and because she has been dealing with cancer, cancer treatment and its aftermath since 2021. She asserts that cash income be imputed to Mr. Maxim on top of his business recorded income and that deductions he claims from his business income be added back in. She seeks interim spousal support at the high end of the level that falls out of the Spousal Support Advisory Guidelines.
- [2] Mr. Maxim asserts that Ms. Maxim's does not have a claim for spousal support based on compensatory support because the relationship did not require her to forego earning income, rather she did not work to her potential because she is lazy. He asserts she is currently not working to her potential and additional income should be imputed to her when determining non-compensatory support. He also submits that he does not earn as much cash income as Ms. Maxim asserts and his business deductions are bona fide and ought not be added back in.
- [3] The issues are:
- a) whether Ms. Maxim is entitled to interim spousal support;
 - b) if entitlement is established, how much additional income to impute to Mr. Maxim's on the basis that he has unreported cash income and/or claims expenses that do not reduce the amount of income available to him;
 - c) if entitlement is established, whether to impute greater income to Ms. Maxim on the basis that she could be earning more than she is; and
 - d) if entitlement is established, whether interim spousal support should be set at the low, medium or high range under the Spousal Support Advisory Guidelines.

Entitlement to Interim Spousal Support

- [4] Ms. Maxim asserts the parties began living together in 1990; Mr. Maxim's position is that it was not until 1992. They married on March 29, 1997. In Ms. Maxim's notice of family claim and affidavit on this application she asserts they separated in December 2022 while in her notice of application she asserts it was August 2022. Mr. Maxim asserts it was December 2022. In any case, they had a long relationship of between 30 and 32 plus years. They had two children, one of whom is in his late twenties. The other is twenty-three.

Legal Principles

- [5] The authority to grant spousal support is set out at ss. 160-162 of the Family Law Act, S.B.C. 2011, c. 25, and s. 15.2 of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.). These provisions are substantially similar and any differences between them are immaterial: *Dobson v. Dobson*, 2016 BCSC 1874 at para. 57. The parties did not expressly make submissions on which legislative regime should apply but the caselaw they relied was based, for the most part, on the Family Law Act.
- [6] Given the lack of material differences between the regimes, I will consider the application and make orders under the Family Law Act.
- [7] The Family Law Act provides for circumstances in which spousal support shall be paid in ss. 160-162. Section 161 describes the four objectives of spousal support:
- (a) to recognize any economic advantages or disadvantages to the spouses arising from the relationship between the spouses or the breakdown of that relationship;
 - (b) to apportion between the spouses any financial consequences arising from the care of their child, beyond the duty to provide support for the child;
 - (c) to relieve any economic hardship of the spouses arising from the breakdown of the relationship between the spouses;
 - (d) as far as practicable, to promote the economic self-sufficiency of each spouse within a reasonable period of time.
- [8] Compensatory support relates to the first two objectives and is intended to provide or address for economic disadvantage arising from the marriage or the conferral of an economic advantage on the other spouse. Non-compensatory support, which relates to the last two objectives, aims to narrow the gap between the needs and means of the spouses on marital breakdown: *S.L.N. v. D.G.N.*, 2018 BCSC 1778 at para. 16.
- [9] Pursuant to s. 216(1) of the Family Law Act, the court can make interim orders for relief.
- [10] The purpose of an interim order for spousal support is to provide for relief prior to the trial at which time the court will be in a position to make a decision on the merits: *M. (D.R.) v. M. (R.B.)*, 2006 BCSC 1921; *Goriuk v Turton*, 2011 BCSC 652.

- [11] In *Santelli v. Trinetti*, 2019 BCCA 319, the Court of Appeal cited *Robles v. Kuhn*, 2009 BCSC 1163 with approval, a decision of Master Keighley in which, at para. 12, he reviewed and summarized the principles arising from British Columbia appellate and trial level authorities on interim spousal support. Several of those principles are pertinent to this case and have been repeated and expanded on in other cases.
- [12] The pertinent principles include Justice Ballance's observation, made in *I.F. v. R.J.R.*, 2015 BCSC 793 at paras. 13-15, that orders for interim spousal support are stop gap orders which require a cautionary approach because the evidentiary record may not be well developed, but the court should not be "so overly cautious as to be timid". On an interim application, the court does not go into an in-depth analysis, but rather takes a rough justice approach: *S.L.N.* at para. 21. In *Santelli* at para. 121, Justice Butler also affirmed the principle set out in *Robles* that on an application for interim spousal support, the needs of the applicant and the respondent's ability to pay take on greater significance. Justice Butler also explained that the court should not engage in an in depth analysis of the circumstances as that is better left to trial where a party may persuade the court to make a different order after an in depth analysis. Because of the under developed evidentiary context, the legal test governing interim support is not necessarily the same as the test applicable in reaching the final order: *Goriuk*; and *I.F.* The focus is needs and means of the parties: *Loesch v. Walji*, 2008 BCCA 214 at paras. 19-20.
- [13] The caselaw supports the use of the Spousal Support Advisory Guidelines as a tool to determine the quantum of interim support unless exceptional circumstances dictate otherwise: *Ladd v. Ladd*, 2006 BCSC 1280; and *Robles* at para. 12.

Evidence Pertaining to Ms. Maxim's Work History and Health Issues

- [14] The evidence is not detailed about Ms. Maxim's working history in the early part of her relationship with Mr. Maxim and through the period of time that their children were born.
- [15] Since I am of the view that prima facie entitlement to non-compensatory child support has been made out based on the parties' respective current needs and means, her historical work is not significant on the issue of entitlement but it is more significant with regard to quantum, especially when considering the low, medium and high range of support that comes out of the Spousal Support Advisory Guidelines, a matter I address below.
- [16] As noted above, the parties started living together in 1990 or 1992. They had their first child on February 19, 1995 and their second child on August 26, 2000.
- [17] Between approximately 2011 or 2012 and 2017, Ms. Maxim managed a Curves franchise. Ms. Maxim and Mr. Maxim do not agree how long she was engaged in this work. After that, until 2021, Ms. Maxim worked part time at the deli department of Otter Co-op. She was laid off in August 2021. In the same month, she was diagnosed with breast cancer.

- [18] Ms. Maxim deposed that she does not believe she has ever earned more than about \$25,000 in a year. She appended income tax returns from 2018 to 2022 to her affidavit. They show earnings of between approximately \$8,000 and \$21,000 per year.
- [19] In October 2021 Ms. Maxim underwent surgery for her breast cancer. She deposed to complications, further interventions and problems that caused her to be in and out of the hospital in late 2021 and up to July 2022. In May 2022 Ms. Maxim underwent radiation therapy for five weeks. She is currently on oral chemotherapy.
- [20] Ms. Maxim deposed that the cancer diagnosis and treatment has caused her ongoing pain and psychological problems. She deposed that her current medication causes her joint pain which is most pronounced in her hands, wrist, arms and shoulders; nausea, constipation, diarrhea, heartburn, stomach pain, weight gain, fatigue due to insomnia, headaches and swelling in her hands and feet. Ms. Maxim deposed that she has chest pain due to her surgery and a tingling sensation and itchiness due to nerve damage from the surgery. She deposed that she has post-mastectomy pain syndrome.
- [21] Mr. Maxim deposed that Ms. Maxim was diagnosed with cancer in August 2021 and "since then she has been in remission". He added that "she took some time off after surgery but after a while she seemed to have recovered". He deposed that she could do chores around the house and go to work.
- [22] Although Ms. Maxim asserts that they separated on August 30, 2022 in her notice of application, in her affidavit she deposed that they separated in December 2022. Mr. Maxim deposed that she moved out of the family home in December 2022.
- [23] Ms. Maxim commenced this litigation in January 2023 and asked Mr. Maxim to pay support at that time.
- [24] During the summer of 2023 Ms. Maxim worked at Krause Berry Farm for \$18 per hour for 3 months, earning \$3,297.60. She deposed that she was unable to do some of the work required by that job, including lifting boxes of syrup and jam.
- [25] Starting in July 2023, and up to the filing of this application in late 2023, Ms. Maxim has worked in the banquet and events division of the Fort Langley Golf Course. She earns minimum wage. In 2023, Ms. Maxim earned \$10,421 in gross wages from Fort Langley Golf Course. She did not depose what, if anything, she earns in tips. She and her boss both deposed she may be laid off because of the downturn of events and banquets during winter months of the first part of 2024.
- [26] Ms. Maxim deposed that she is almost always dealing with physical pain and struggling with aftermath of breast cancer and cannot work full time. She deposed she cannot work more than 20 hours per week because of her health.

- [27] Ms. Maxim testified that between October and December 2022 she withdrew \$96,000 from the home equity line of credit that she and Mr. Maxim had and about \$8,500 from a spousal RRSP. She used the funds to purchase a vehicle, buy furniture for a new home, put aside one year's rent and pay the rent on the family home that she no longer lived in from December 2022 until the summer of 2023.

Evidence Pertaining to Mr. Maxim's Earnings and Health

- [28] Mr. Maxim has worked in roofing for 40 years. He is currently 55 years old.
- [29] Mr. Maxim deposed that he owns a roofing business called Sea to Sky Roofing and Cladding Ltd. He does not draw a salary. His earnings are dividend earnings paid to him by Sea to Sky. As discussed below, he also has cash earnings from the business.
- [30] Ms. Maxim deposed that during their relationship, Mr. Maxim took cash profits from the business of about \$30,000 to \$50,000 each year in addition to "whatever the business made". Mr. Maxim acknowledges that he has done cash jobs over the years but he deposed that Ms. Maxim's evidence that they were in the range of \$30,000 to \$50,000 per year is absurd. He deposed the cash business average \$10,000 to \$15,000 per year and in 2023 it was probably only about \$5,000. Mr. Maxim deposed that due to problems with his arm and back he cannot work as hard as he used to and he does not know how much longer he will be able to be in the roofing business.
- [31] Ms. Maxim disputes this and deposed that Mr. Maxim has many cash jobs that he keeps off the books to avoid reporting the income to the tax authorities and that he hires people to do the physical work on the roofing jobs.
- [32] Sea to Sky's reported net corporate income varied significantly over the past five years. It has ranged from \$29,231 to \$76,069.

Entitlement

- [33] Mr. Maxim submits his income for spousal support should be set at \$60,000 and Ms. Maxim's should be set at \$30,000 based on what she could earn. I do not accept these incomes levels for reasons I explain below. However, even at those levels, Mr. Maxim earns twice what Ms. Maxim earns.
- [34] At the levels I will impute to them, he earns about four times what she is capable of earning. Her income is below the poverty line and she has been living out of the family home incurring housing costs as well as paying the mortgage on the family home from December 2022 to the summer of 2023.

- [35] Mr. Maxim asserts that her needs are not as great as she says because she took about \$100,000 from the family line of credit and the business before she left. I note that she withdrew that money in May 2022, before either of them asserted they separated. However, according to Ms. Maxim, she has used the money to support herself during their separation as I have described above. She deposed that by early December 2023, the funds were almost exhausted.
- [36] Ms. Maxim also deposed that Mr. Maxim withdrew a total of \$113,000 from the line of credit in October and December 2022. Mr. Maxim deposed that he withdrew funds "as a precaution" when he saw that Ms. Maxim was withdrawing funds but he disputes the amount and says he spent some of the money on renovating the family home.
- [37] The withdrawals from the line of credit will be addressed when determining division of family debt and/or family property: *Al-Jebaje v. El-Jaroudi*, 2023 BCSC 1099 at para. 22.
- [38] The parties' relationship spanned over 30 years. For at least the last five years, Mr. Maxim's income has outstripped Ms. Maxim's significantly, although neither of them are high income earners. Ms. Maxim has the added burden of having to pay for housing after she moved out of the family home. I note that one of the parties' children lives with Ms. Maxim and contributes to the household expenses by about \$1,000 per month.
- [39] Given the length of the marriage and the disparity of the parties' income and income earning potentials given Ms. Maxim's health, I conclude that Ms. Maxim has made out a prima facie entitlement to spousal support.

Imputing Income

Legal Principles

- [40] Section 19(1) of the Federal Child Support Guidelines, SOR/97-175 permits the court to impute income to a spouse in circumstances where the spouse is intentionally under-employed or unemployed. The Spousal Support Advisory Guidelines provide that s. 19(1) is the starting point for imputing income in spousal support cases.
- [41] Section 19 of the Federal Child Support Guidelines reads as follows:

Imputing income

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.

[42] The party asking the court to impute income must establish an evidentiary basis: *Marquez v. Zapiola*, 2013 BCCA 433 at para. 36.

Mr. Maxim

[43] Mr. Maxim concedes that his business net income after expenses, plus cash income, should be the income for the purposes of spousal support. He asserts that should be set at \$60,000, taking into account \$54,000 average reported business net income over the last five years and cash income.

Adding Back in Expenses

[44] Pre-tax corporate income will be assumed to be available to a payor unless evidence is led to the contrary: *Hausmann v. Klukas*, 2009 BCCA 32 at paras. 51-52. In other words, the obligation to justify the deduction of expenses from a party's income lies on that party: *Riecker v. Parton*, 2024 BCCA 114 at para. 46.

[45] The court may add back in business expenses under s. 18 or s. 19 of the Federal Child Support Guidelines, depending on the circumstances. In either case, the goal is to ensure that the actual income available to the payor party to pay support is the basis for determining the support to be paid: *M.T. v. J.S.*, 2023 BCCA 64 at paras. 9-10.

[46] The Court of Appeal has further commented on the burden of establishing the reasonableness of business expenses in *M.T.*:

- [8] The spouse asserting that expenses should be added back to income must put that in issue in their pleadings by identifying the specific expenses being challenged, but it will then be for the other spouse to assume the burden of proving the reasonableness of deductions from business income, whether in the context of self-employment or within a wholly-owned corporation.
- [47] In this case, Ms. Maxim identified category of expenses being challenged in a letter to counsel for Mr. Maxim. She has not set them out in the notice of family claim. Ms. Maxim submits that M.T. is distinguishable because that was a case where the order for support was sought to be varied after trial.
- [48] I am not persuaded by this point of distinction. Specific and formal notice of the expenses sought to be deducted provides the responding party with information of what exactly needs to be responded to in order to discharge the onus of establishing that the expenses are reasonable. In this case, that plays out to a certain expense for at least one of the expenses.
- [49] The expenses that Ms. Maxim raised in her counsel's letter to counsel for Mr. Maxim are:
- a) professional fees in 2021 and 2022 which Ms. Maxim asserts are legal fees pertaining to a Human Rights complaint brought by a woman who worked for Sea to Sky Roofing and Cladding and with whom Mr. Maxim had an affair as well as legal fees for this matter;
 - b) real estate rental expenses; and
 - c) amortization of tangible assets.
- [50] With regard to professional fees, in the letter Ms. Maxim stated that the issue was legal fees on the human rights complaint. However, on this application, she also argued that legal fees pertaining to this proceeding are being improperly deducted. A third category of fees, accounting fees, is also included in the expenses claimed.
- [51] With regard to the professional fees for the human rights complaint, the complainant was a person who worked for Sea to Sky Roofing and Cladding with whom Mr. Maxim had an affair for many years. It does not strike me as unusual or unreasonable for Sea to Sky Roofing and Cladding, which is a named respondent in that complaint, to deduct legal fees. I have not received more than cursory submissions on that point.
- [52] With regard to legal fees for this proceeding, Ms. Maxim did not put them in issue in either the letter or her notice of application. The fact that there is more than one professional fee, and no pleading advising which are in issue, leads to this kind of problem.
- [53] I will not add back in professional fees for the purpose of this interim application given that proper notice has not been given and I am not persuaded that it is inappropriate to deduct professional fees for a human rights complaint relating to the business which was named in the complaint.

- [54] With regard to rent, it is not clear why, in the letter, it is complained about as an expense that is "personal in nature". On this application I heard submissions that Sea to Sky Roofing and Cladding does not rent property but that came from counsel, not either of the parties. In the Canada Revenue filings, \$4,000 was claimed for rent for the 2022 fiscal year and \$5,000 for the 2023 fiscal year. In Mr. Maxim's affidavit he referred to a shop that he uses for the business and which is located on the same property as the family home. The rent expense has been claimed over years including prior to the parties' separation. In my view, whether the rent pertains to that shop, whether it is a personal expense, and whether that is a bona fide business expense is a matter for trial.
- [55] I would decline to add back in rental expense, without prejudice to Ms. Maxim's right to make that argument at trial.
- [56] With regard to amortization, the capital cost allowance for personal property (as opposed to real property) may be allowed in certain circumstances: *Jadavji v. Khadjieva*, 2021 BCSC 2267 at para. 89 citing *A.A. v. C.A.*, 2012 BCSC 1419 at paras. 43, 47-49, citing *Luedke v. Luedke*, 2004 BCCA 327.
- [57] In *Jadavji*, Justice Ahmad held that the capital cost allowance claimed for personal property had been relatively consistent and declining over the years and therefore was not unreasonable, with the exception of the capital cost allowance for a vehicle that the party used personally: at paras. 90-91.
- [58] In her counsel's letter, Ms. Maxim takes issue with amortization on "tangible assets". It is not possible to determine which assets she takes issue with, or whether they are all of them. In my view, this is an example of why the Court of Appeal has asserted that particulars must be given so the responding party can address with specific evidence.
- [59] I would decline to add back in capital cost allowance, without prejudice to Ms. Maxim's right to make that argument at trial.
- [60] In my view, notice of exactly what deducted expenses are sought to be added back in should be the subject of formal notice in a pleading. For the purposes of an interim application, it may not be realistic to set it out in a pre-discovery notice of family claim or counterclaim, but it can and should be set out in a notice of application which I would consider to a pleading as referred to in *M.T.*
- [61] Given the lack of formal notice and particulars, I will not order that expenses be added back in, without prejudice to any future applications or trial.

Cash Income

- [62] Mr. Maxim does not deny that he has cash income from the business, but says it is around \$10,000 to \$15,000 per year most years, and was only \$5,000 per year over the last year due to his poor health.

- [63] Accordingly, there is no dispute that there is cash income and it should be added to Mr. Maxim's income for spousal support purposes. The question is the quantum. Ms. Maxim submits \$50,000 should be added. She points to the parties' lifestyle, and the second relationship that Mr. Maxim was supporting that gave rise to the human rights complaint.
- [64] Mr. Maxim asserts it should be \$5,000, based on his evidence that it was the cash earnings he had in the last year and his declining health.
- [65] I do not take into account Mr. Maxim's assertion of poor health dampening his income earning ability. There is no corroboration for it. It is not supported by the reported income of his business which has shown ups and downs but with a recent year, 2022, being one of the highest years of gross sales in the last five years. It is also contrary to Ms. Maxim's evidence that he hires others to do the physical work. That evidence is corroborated to a certain extent by the description of Mr. Maxim's evidence at the human rights hearing on who did what work on his job sites.
- [66] Ms. Maxim's estimate, derived in part from lifestyle, is beyond the scope of analysis on an interim application.
- [67] I accept as common sense that when a person who is not reporting cash income then gives an estimate of the range, it should be regarded with some circumspection given that the person has demonstrated a willingness to be dishonest about those very earnings.
- [68] Using the rough justice approach, I impute additional income of \$25,000 per annum to Mr. Maxim.

Ms. Maxim

- [69] Ms. Maxim's position is that she is working to her maximum capacity and is earning about \$15,000 per year.
- [70] Mr. Maxim asserts that Ms. Maxim is lazy and could earn up to \$30,000 per year.
- [71] Based on Ms. Maxim's evidence, I accept that her income, before tips, if any, was \$15,000 in 2023.
- [72] Ms. Maxim's description of her cancer diagnosis, treatment and current state of health are compelling and has some corroboration from objective evidence such as photographs of the aftermath of her surgery and her current prescription.
- [73] There is a stark evidentiary contest: Ms. Maxim says her health is compromised and renders her unable to work full time and do certain physical work. Mr. Maxim asserts she has been in remission since her diagnosis and other than some time off after surgery, she has functioned well and can work.

- [74] Imputing income by assessing earning capacity and opportunities, especially if the evidence conflicts on important issues, is not appropriate on an interim application: *Nankivell v. Nankivell*, 2002 BCSC 778; and *Campbell*. This accords with one of the established considerations cited in *Robles* that, on an interim application, the ability and capacity of a spouse to become self-supporting should not be scrutinized as closely as it might be on the final determination of entitlement to permanent maintenance.
- [75] However, there is evidence that the \$15,000 Ms. Maxim earned in 2023 may not be the limit of her earning capacity. She worked three months for Krause Berry Farm ending in June 2023. She worked the rest of the year at the Langley Golf Course. There is evidence that she might have reduced shifts in the first part of 2024 due to slow season at the golf course, but there is no evidence that she will not have any work at all. She earned approximately \$10,500 for six months of work in 2023. On that basis, I expect that she can earn about \$20,000 in 2024.
- [76] Ms. Maxim's job is described as being in the banquet events department. Mr. Maxim points that she has not provided any information about tips. It is not obvious to me that working in banquets at a golf course is a source of tip income. It is not appropriate to speculate on that matter on this interim application.
- [77] On this interim application, Mr. Maxim's assertion that income ought to be imputed to Ms. Maxim on the basis that she could be working full time earning at least \$30,000 per year amounts to a bald claim or speculation and therefore does not meet his burden: *Al-Jebaje* at para. 40.
- [78] I accept that Ms. Maxim had income of \$15,000 in 2023 and will have income of about \$20,000 in 2024.

Calculation of Interim Spousal Support

- [79] Ms. Maxim started demanding spousal support in January 2023 and seeks interim spousal support commencing January 1, 2023.
- [80] Mr. Maxim submits that interim spousal support should commence January 2024 because Ms. Maxim has supported herself from the funds she withdrew from the line of credit and the spousal RRSP for the first year.
- [81] I do not accept this argument. As I have stated, the funds both parties withdrew will be otherwise addressed.
- [82] I order spousal support to commence effective January 1, 2023.
- [83] With regard to income, over the last three fiscal years, Mr. Maxim's pre-tax corporate income has averaged \$57,165. I add \$25,000 in cash income, for a total of \$82,165.

[84] Ms. Maxim's 2023 income was approximately \$15,000 and I have found she has the capacity to earn \$20,000 for 2024 going forward. I average her income to be \$17,500 for the purposes of interim spousal support.

[85] Based on DivorceMate, those incomes support spousal support in range of low: \$2021; mid: \$2,358; and high: \$2,525.

[86] Ms. Maxim submits that the interim spousal support should be based on the high end of the range because of her needs due to her health and because she has a strong compensatory claim.

[87] Chapter 9 of the Spousal Support Advisory Guidelines addresses the factors which may be considered in determining where spousal support should fall within the applicable range including:

- Section 9.1: The strength of the compensatory claim. A spouse who has suffered significant economic disadvantage as a result of the marital roles and whose claims are based on both compensatory and non-compensatory grounds may have a stronger support claim under the without child support formula than a spouse whose economic circumstances are not the result of marital roles and who can only claim non-compensatory support based upon loss of the marital standard of living.

- Section 9.2: Recipient's needs. In a case where the recipient has limited income and/or earning capacity, because of age or other circumstances, the recipient's needs may push an award to the higher end of the ranges for amount and duration.

- Section 9.4: Needs and ability to pay of payor. The needs and limited ability to pay on the part of the payor spouse may push an award to the lower ends of the ranges.

[88] In *Al-Jebaje* at paras. 36-43, the Court ordered spousal support at the high end of the range based on the claimant's strong compensatory claim and her limited earning capacity. She had remained at home to care for the children while her spouse supported the family, she continued to be the children's primary caregiver, and had health issues which limited her ability to work.

[89] In *Jadavji*, Ahmad J. awarded interim spousal support at the lowest end of the range, given the payor's valid concern that the payee had not fully disclosed information relating to her means and needs, including her new partner's income and contribution to her expenses.

[90] I cannot discern the strength of Ms. Maxim's compensatory claim because she has not provided any evidence about her work history or career trajectory prior to marriage and the birth of the children and how that changed, if it did, with the arrival of the children. The lack of evidence and fluid situation weigh against finding a strong compensatory claim on this interim application.

- [91] With regard to the present needs and ability to pay, I have found Ms. Maxim's needs and Mr. Maxim's means are such that Ms. Maxim has established entitlement. On the other hand, on this interim application I have not found that Mr. Maxim has the high level of income that Ms. Maxim asserts he should be imputed by adding back in expenses. In addition, I consider that Ms. Maxim's ability to work is in flux - she may have more capacity to work and earn as her recovery progresses. There is the possibility that she has non-disclosed tip income. Her son is contributing \$1,000 per month towards living expenses.
- [92] Given that my interim determination is that Mr. Maxim's income is modest although much higher than Ms. Maxim's extremely modest income, a mid range award is appropriate.

Disposition

- [93] I order that Mr. Maxim pay Ms. Maxim interim spousal support of \$2,358 per month commencing January 1, 2023 until further order of the court or agreement between the parties. This order is without prejudice to the parties to argue for a different result on the myriad of factors that pertain to the determination of entitlement, quantum and duration of spousal support.

"Matthews J."

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