

CANADA / JUDGMENT

Neels v. Neels

2024 BCSC 720

COURT

Supreme Court of British Columbia

DECIDED

2 April 2024

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2024 BCSC 720 Neels v. Neels

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Neels v. Neels,

2024 BCSC 720

Date: 20240402

Docket: E18358

Registry: Chilliwack

Between:

Francina Neels

Claimant

And:

John Tony Neels

Respondent

Before: Associate Judge Krentz

Oral Reasons for Judgment

In Chambers

Counsel for the Claimant,

appearing via videoconference:

A.T. Briscoe

Counsel for the Respondent,
appearing via videoconference:

N. Aram

Place and Date of Hearing:

Chilliwack, B.C.

March 18, 2024

Place and Date of Judgment:

Chilliwack, B.C.

April 2, 2024

- [1] THE COURT: This is a family law proceeding. The parties were married for 43 years before they separated in May 2020. Both parties are 66 years of age. They had five children together and they adopted another child, all are now adults.
- [2] The claimant stayed at home to look after the children, while the respondent was the primary income earner. The respondent is the owner/operator of a construction company, Neel-Co Builders (2014) Ltd. ("Neelco"). The respondent has 51% of the shares and the claimant has 41%.
- [3] The respondent has another company, John Neels Holdings Ltd. ("Holdco"). Holdco owns a property in Chilliwack worth approximately \$2.5 million and Neelco operates its business on that property. The respondent consistently claimed an income in his personal tax returns of approximately \$127,000 per year.
- [4] The claimant continues to reside in the former family home. It was appraised at \$2.25 million. There is a mortgage registered against the title with an outstanding balance of approximately \$720,000. Following separation, the respondent took out an additional \$100,000 against that mortgage.
- [5] The claimant has been on the payroll of Neelco for years and usually received \$1,731.87 biweekly. In addition, she receives CPP and OAS payments. The claimant also works at a store that is owned by a daughter.
- [6] A judicial case conference ("JCC") was held on April 5, 2023. An order was made at that time that the respondent was to continue making the monthly mortgage payments on the family home and the claimant was to continue to receive her pay from Neelco. The JCC order also included a term that there would be a joint business valuation of both Neelco and Holdco, as well as a Guideline income report regarding the respondent.

- [7] In December 2023, the payment that was due on December 8 was not paid by the respondent until December 11. Subsequently, he reduced the payments from \$1,731.87 to \$1,500 biweekly.
- [8] As I indicated, the JCC order required the respondent to make the monthly mortgage payments. Following that order, the monthly payments significantly increased due to a change in the mortgage rate. It went from \$2,700 per month to \$4,877 per month. However, the respondent continued to pay the previous mortgage amount. As a result, the mortgage payments are in arrears of approximately \$14,000.
- [9] The family home has a fully finished basement and the claimant has rented it out for \$650 per month. The claimant's current annual income is as follows:

CPP:

\$13,998

OAS:

\$8,355

Employment in 2023:

\$7,407

Rent:

\$7,800

Total:

\$37,560

- [10] The respondent notes that the job at the daughter's farm paid the claimant \$13,642 in 2022. So, if that amount was imputed to the claimant, her annual income would exceed \$40,000.
- [11] Despite the order being made in April 2023, the business valuation and income report has not yet been prepared. It appears it took until August to retain the valuator, Ms. Daum. By October, some of the information requested by Ms. Daum was provided by the respondent. Then his counsel withdrew and when the respondent retained his current counsel at the end of January 2024, he provided further documents. Ms. Daum sent a letter to counsel on February 1, 2024, setting out what she still required. I am told that the respondent has provided the requested information and documents.
- [12] According to the respondent's personal income tax returns, he was paid from Neelco the following:

2019:

\$128,209

2020:

\$127,799

2021:

\$127,585

2022:

\$133,000

2023:

\$121,000

[13] Neelco has a fiscal year end of May 31, and its pre-tax income from 2019 to 2023 was as follows:

2019:

\$688,163

2020:

\$609,208

2021:

\$407,114

2022:

(\$111,153)

2023:

\$522,451

[14] As of February 15, 2024, the pre-tax income of Neelco was \$326,173.

[15] According to its 2023 financial statement, Neelco had gross revenue that year of \$4,956,383. The net income, which is after salary was paid to the parties, was as indicated above \$522,451 and the retained earnings for that year were \$686,014. The book value of its assets as of May 31, 2023, comprised mostly of accounts receivables, were \$1,731,476. The liabilities as of that date were \$1,048,144.

[16] Holdco also has a May 31 year end and as of May 31, 2023, the book value, which is not necessarily market value, of its assets were \$3,526,035 and its liabilities were \$1,375,249, with retained earnings of \$1,873,695.

[17] Although it appears, based on the financial statements, that the companies are quite successful, the respondent deposes as follows in his Affidavit #2 at para. 22:

The company started having financial difficulty in the second half of 2023. The construction work that Neelco does is seasonal and not steady. I obtain work by bidding on government road construction projects. On completing a project and submitting invoices, the company usually gets paid 60-90 days later. Neelco had projects during March-December 2023, the payment for some of which may be received after the end of the 2024 fiscal year. Neelco's fiscal year ends 31 May 2024. Quarters 3 and 4 are depressed. Quarter 3 is dead. We have work starting in mid-March, but we will not get paid until 60-90 days later. There has been a shortage of work since 2023. As a result, Neelco has made a lot less money in the 2024 fiscal year than in the previous year.

[18] At para. 24:

Neelco and Holdco collectively have significant expenses, including the mortgage on Holdco's property on Prest Road which is approximately \$9,000 a month, and lease payments for demolition and concrete finishing equipment which is approximately \$17,000 a month. The cost of labour is significant. The crew are paid \$60 an hour. A single person on a project costs the company \$600 a day. During projects, the combined cost of operations of Neelco and Holdco is \$50,000 a month or more. Neelco needs to keep a lot of cash at hand to cover operating costs especially during projects.

[19] At para. 25:

With the shortage of work starting in 2023, I decided to reduce Neelco's payroll because the company has to pay payroll deductions and other expenses for them even when we have no work. I removed all the labour and staff from the payroll. Those who work for Neelco are now contractors and submit invoices to the company. I am the only one left on payroll. I also removed the claimant from payroll in December 2023 for the same reason.

[20] As I noted earlier, after paying an income to both parties, at least until December, the pre-tax income of Neelco from June 2023 to February 2024 was \$326,173.

[21] The claimant seeks the following orders:

- 1) That the respondent shall pay to her spousal support in an amount and commencing on a date as determined by the court.
- 2) The respondent shall pay the claimant pursuant to s. 213 of the Family Law Act, S.B.C. 2011, c. 25 [FLA], the sum of \$5,000 for failing to provide financial disclosure that was necessary to prepare the reports that were ordered at the JCC.

[22] In her submissions, the claimant says payments should start in February 2024, the application for the fine can be adjourned generally, and the spousal support amount can be reviewed upon the receipt of the Daum report.

- [23] The claimant submits the range of support may depend on the following Guideline incomes for the respondent. One calculation is based on employment income of \$121,000 with an additional pre-tax corporate income of \$522,451. In this calculation, as I indicated earlier, the claimant's income is set at \$37,560. The range for spousal support is from \$18,934 to \$24,964 per month.
- [24] A second calculation is based on the 2024 pre-tax corporate income for this fiscal year, again with employment income of \$121,000 and an additional pre-tax corporate income of \$326,173. The spousal support range is \$12,800 to \$16,786 per month.
- [25] A third calculation is based on the average pre-tax corporate income of \$424,312 and again, with employment income of \$121,000. The spousal support range is \$15,867 to \$20,875.
- [26] In his notice of application, the respondent seeks the following orders. On an interim without-prejudice basis, the respondent will pay spousal support in the sum of \$3,646 for the months of March and April 2024, to be paid in two monthly installments, pending determination of the parties' respective Guideline incomes.
- [27] Next, the parties will exchange their list of documents within 30 days and the claimant's list of documents shall include:
- a) T4 slips from all sources of income;
 - b) the last pay statement for 2023;
 - c) the most recent pay statements in 2024;
 - d) complete copies of her personal income tax returns from 2019 to 2023; and
 - e) bank account statements for all of her chequing and savings accounts from 2019 to date.
- [28] Next, following the exchange of the list of documents, either party would be at liberty to apply for a determination of Guideline incomes and the amount of spousal support to be paid on or after May 1, 2024.
- [29] Lastly, para. 2 of the JCC order be terminated to the extent that it provides:
- The respondent shall ensure the claimant continues to receive her monthly payment from Neelco.
- [30] In submissions, the respondent says he may not proceed with para. 4 of his notice of application, as presumably the order I make can be reviewed after the Daum report is received. The date that the report will be available is currently unknown.

THE LAW

[31] I will now analyze the law with respect to the issues before the court. This was a traditional marriage and has all the landmarks of a strong claim for compensatory support, along with non-compensatory support. The parties agree that although the analysis set out by the Court of Appeal in *Quinton v. Kehler*, 2020 BCCA 254 related to child support, the same analysis applies to a spousal support application, when the payor's income is derived from a corporation.

[32] The following is set out in the Court of Appeal's decision in *Quinton* starting at para. 76. Firstly, the court referred to s. 18 of the Guidelines:

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. [Emphasis added in *Quinton*.]

[33] The Court then referred to the decision of Justice Martinson in *Baum v. Baum*, [1999] B.C.J. No. 3025 (S.C.), wherein she stated the following:

[25] Section 18 of the Guidelines provides a mechanism for imputing income where income is earned through a corporation:

[28] The purpose of s. 18 is to allow the court to "lift the corporate veil" to ensure that the money received as income by the paying parent fairly reflects all of the money available for the payment of child support. This is particularly important in the case of a sole shareholder as that shareholder has the ability to control the income of the corporation. See *Bhopal v. Bhopal*, [1997] B.C.J. No 1746 (S.C.), *Blackburn v. Elmitt* (1997), 34 R.F.L. (4th) 183 (B.C.S.C.) and *McCrea v. McCrea*.

[34] Section 18 was further considered by the Court of Appeal in *Kowalewich v. Kowalewich*, 2001 BCCA 450. There, Justice Huddart stated the following:

[41] I note the use of pre-tax corporate income as a basis for the determination of child support does not strip a spouse of his available money. It is to use available money as a measuring rod for the purpose of fixing annual income and thus the amount of child support.

[35] In *Hausmann v. Klukas*, 2009 BCCA 32, another Court of Appeal decision, Justice Kirkpatrick addresses the onus on a party. She stated the following:

[51] While the purpose and application of s. 18 were outlined in *Kowalewich*, this Court has not heretofore established an onus test. Some post *Kowalewich* authorities from this province, however, have concluded that there is an "emerging presumption" that pre-tax corporate income will be assumed to be available to a payor unless evidence is led to the contrary. These authorities state that the onus in the circumstances is on the payor.

[36] In *Quinton*, the Court said the following at para. 85:

From these cases, I extract the following principles applicable to this case. First, the Guidelines should be interpreted in light of their stated objectives, including the ability to calculate child support in an objective manner that ensures consistent treatment of spouses and children who are in similar circumstances. Second, under a s. 18 approach, the corporate income method is likely to be the fairer method of determining income of an individual who wholly controls a corporation. This method allows a court to include all income available for child support an intact family would utilize. Third, where that approach is appropriate, pre-tax corporate earnings, not retained earnings or earnings after payment of taxes, are the starting point for an assessment of Guidelines income. Fourth, where a company is wholly owned by the payor, the onus is on the payor to provide evidence that his pre-tax corporate earnings are not available to him.

[37] The respondent submits that in the *Quinton* case, the Court had the assistance of expert evidence in determining Guideline income. However, in my view, that does not appear to have altered the calculations when the Court applied s. 18:

[97] It might have justified a decision, as contemplated by s. 18, to use only part of the corporation's pre-tax income as the measuring rod. However, neither expert witness examined the cash flows to the payor with a view toward determining whether there was a significant lag in realization of the allocated earnings of the partnership to the law corporation such as to warrant the exercise of the discretion given to a judge to depart from the general rule.

[98] In my opinion, and again bearing in mind the objectives of the Guidelines, including consistency, predictability and consistent treatment of spouses in similar circumstances, we should not depart from the general rule; Guidelines income in this case should be set at the corporation's pre-tax earnings plus salaries, wages and benefits paid to the respondent.

[38] In *Hathaway v. Hathaway*, 2015 BCSC 1485, the court stated at para. 59:

- (a) the court is not limited to a consideration of income alone when determining child and spousal support. It may also consider financial means. The reference in section 1 of the FCSG to the parents' "means" expands the calculation of income beyond income. The word "means" has been liberally interpreted to include all pecuniary resources, capital assets, income from employment or earning capacity, and any other source from which gains or benefits are received, together with, in certain circumstances, money that a person does not have in possession but that is available to such person: *Leskun v. Leskun*, 2006 SCC 25 at para. 29; *Griffiths v. Griffiths*, 2006 BCSC 1077 at para. 25; *C.A.B. v. M.S.C.S.*, 2006 BCSC 1393 at para. 11; *S.M. v. V.V.*, 2014 BCSC 565 at para. 118.
- [39] The respondent submits, relying upon *I.F. v. R.J.R.*, 2015 BCSC 793 [I.F.], that on an interim application and in the absence of expert evidence, the court should not engage in an in-depth analysis of corporate financial statements, as that would best be left to the trial.
- [40] However, in *I.F.*, the recipient sought in her application that a 'bad debt' expense be added back, in part, to the corporate pre-tax income. In the case before me, the claimant does not challenge any of the line items that are set out in the corporate financial statements. Rather, she seeks to apply s. 18 to use pre-tax corporate income in determining the respondent's Guideline income. In essence, for the purposes of an interim application, she has accepted all of the business expenses set out in the financial statements.
- [41] The respondent also relies upon *Mitchell v. Mitchell*, 2010 BCSC 1404, in support of his argument that pre-tax corporate income should not be used. However, in my view, *Mitchell* does not assist the respondent for the following reasons.
- [42] Mr. Mitchell was a construction project manager operating under a corporate entity. He was the only shareholder and its operating mind. Mr. Mitchell's annual income according to his personal income tax return was \$21,731, which consisted of \$15,000 in RSP income, \$6,516 in CPP benefits, and \$215 in dividends from his corporation.
- [43] Mr. Mitchell stated that his employment income is derived from his ownership in the corporation and that income is typically paid as an annual dividend. The corporate gross income was \$211,162 and after deducting expenses, the corporate pre-tax income was \$139,531.
- [44] The claimant argued that Mr. Mitchell's income should be imputed at \$225,000, based on the average gross income of the corporation. The court responded as follows:
- [17] Again, the respondent has provided a detailed explanation of his income. Mr. Mitchell acknowledges that the reported income of \$21,000 does not accurately reflect his ability to pay support. However, he submits that neither is the gross revenue of the corporation a fair assessment of his actual income.

- [18] Mr. Mitchell suggests that the corporation's average net income over the past three years fairly represents his income and earning capacity. That figure is just under \$175,000, but Mr. Mitchell is prepared to "round up" to that number for the purposes of a spousal support order.
- [45] In Mitchell, the court confirmed that on an interim spousal support application the onus is on the payor to provide the necessary evidence that the corporate pre-tax income is not available to the payor. While I agree that the court did state that the submission of the claimant requires an in-depth analysis and that it was not appropriate on an interim application, it should be kept in mind that in Mitchell, the respondent acknowledged that \$175,000 which is the total pre-tax corporate income averaged over a period of time, should be imputed to him.
- [46] If that same formula was applied in the case before me, I have calculated the following. The average pre-tax income of Neelco from 2021 to 2023 is \$272,804. As required under s. 18(2), for the same years the income paid to the parties is added back in, which I calculate is as follows:
- 2021:
- \$127,585 to the respondent and \$45,000 to the claimant;
- 2022:
- \$133,000 to the respondent and \$45,000 to the claimant;
- 2023:
- \$120,692 to the respondent and \$45,000 to the claimant.
- [47] The average income paid by Neelco to the parties for those three years was \$172,092. The total average income for 2021 to 2023 is \$444,896, which is \$272,804 for pre-tax corporate income and \$172,092 for salaries paid to the parties.
- [48] As set out in s. 18(2), all amounts paid as salary to non-arm's length parties should be added back, so that would apply to the claimant.
- [49] The respondent deposes in an affidavit that Neelco needs to maintain a significant amount of cash to cover its operating costs. However, from 2018 to 2024, Neelco achieved significant profits, as outlined earlier, despite its high operating costs, including a large mortgage payment.
- [50] At best on an interim application, the court seeks to achieve rough justice. To do so, I will set the respondent's Guideline income at \$375,000 which is significantly lower than the calculation of \$444,896. I will set the claimant's Guideline income at \$43,285 as I have imputed additional employment income to her.

- [51] I find that following a marriage of 43 years, it is appropriate to equalize the parties' income. The DivorceMate calculations, based on imputed incomes of \$375,000 to the respondent and \$43,285 to the claimant, indicate the monthly spousal support at the low end is \$10,366; mid is \$12,094; and high is \$13,408. In order to equalize those incomes, spousal support should be paid at the high end.
- [52] Accordingly, I order that commencing on March 1, 2024, which is the first month after the application was filed, the respondent shall pay interim spousal support to the claimant in the sum of \$13,408 per month. Pursuant to s. 226 of the FLA, commencing the same month, the claimant will be solely responsible for the mortgage payments.
- [53] I also terminate the order that was made in para. 2 of the JCC order. I am adjourning generally para. 2 of the claimant's notice of application, which is the application for a fine. While I am dismissing paras. 2 and 4 of the respondent's application, I do order that the parties shall exchange their list of documents within 30 days and the claimant is to include all of the documents that are set out in para. 3 of the respondent's notice of application, if they have not already been provided. The last order is that the quantum of spousal support may be reviewed upon receipt of the Daum report.
- [54] Does counsel need any clarification? Are there any submissions on costs?
- [55] CNSL A. BRISCOE: Your Honour, so that was--the list of documents, I am sorry, is that--was that 60 days? 30 days? I--
- [56] THE COURT: 30 days.
- [57] CNSL A. BRISCOE: And a couple--just two things that I would--I would mention, then. I know this is probably an obvious point, but the order dated April 5, 2023, the existing order, you had cancelled paragraph 2, but I just want to make it clear that the--any arrears pursuant to that order prior to March 1st are still outstanding by Mr. Neels.
- [58] THE COURT: Yes, they would still be outstanding. So to clarify, that order--that paragraph in the JCC order is terminated as of March 1, 2024 and replaced by my order.

(SUBMISSIONS ON COSTS)

- [59] THE COURT: Thank you. The main issue that was litigated and took the time required by the court was the interim spousal support. I find on that application that the claimant was largely successful. The claimant is entitled to costs of the application in the cause.

"Associate Judge Krentz"

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