
CANADA / JUDGMENT

O.O. v. L.M

2020 BCSC 851

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Supreme Court of British Columbia

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2020 BCSC 851 O.O. v. L.M.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

O.O. v. L.M.,

2020 BCSC 851

Date: 20200608

Docket: E48389

Registry: New Westminster

Between:

O.O.

Claimant

And

L.M.

Respondent

Before: The Honourable Madam Justice Tucker

Reasons for Judgment

Counsel for the Claimant:

J.K. Broadhurst

Counsel for the Respondent:

M. Patton

Place and Date of Hearing:

New Westminster, B.C.

March 10, 2020

Place and Date of Judgment:

Vancouver, B.C.

June 8, 2020

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I. introduction

[1] As these are reasons for judgment on a family law application, I will refer to the parties as the "claimant" and the "respondent", and to the children by their initials.

[2] The parties began a marriage-like relationship in or about 2002-2003 and separated in 2015. There is one child of the relationship, K.M.O. ("KMO"), born April 1, 2010.

- [3] The family moved from Montreal to Surrey in the summer of 2014. The respondent, on completion of his Royal Canadian Mounted Police ("RCMP") training, was assigned a five-year posting in Surrey. In moving, the claimant left behind secure employment as a financial advisor with Desjardins.
- [4] The relationship did not long survive the move. The claimant moved into a separate residence on February 4, 2015, and filed a notice of family claim on March 9, 2015 (served September 2015). Among other things, the notice of family claim sought an order allowing her to relocate KMO to Montreal.
- [5] The parties' claims were determined by Justice DeWitt-Van Oosten (as she then was) following trial: O.O. v. L.M, 2017 BCSC 1411 ("trial decision"). The application to relocate was denied, and child and spousal support orders were made.
- [6] The trial decision provided for a review of the support orders:
- [189] The respondent's five-year commitment with the Surrey detachment of the R.C.M.P. expires in 2019. By that time, the claimant will have had a further two years to seek and obtain employment. Subject to an agreement to the contrary by the parties, both child support and spousal support are to be reviewed before the end of 2019.
- [7] The respondent has applied for a review of the support orders. (The application was not brought until 2020, but was set and heard without objection.) His notice of application also seeks orders in relation to the retroactive spousal support order made by Dewitt-Van Oosten J.
- [8] I will address the review issues first, and then the orders sought in relation to the retroactive spousal support award made at trial.

II. background and evidence

A. The Trial Decision

- [9] The trial order presently requires the respondent to pay child support of \$622 per month and spousal support of \$1,342 per month. These amounts were determined by deeming the respondent's gross annual income for 2018 and 2019 to be \$86,000, and imputing a gross annual income of \$20,657 to the claimant for those years. The trial order provided for the claimant's actual income to be used in 2018 and 2019, if it exceeded the imputed amounts; it did not.
- [10] As indicated, at trial the claimant sought to relocate KMO to Montreal, as well as an order for spousal support. The claimant's ability to work in English was a central point in both issues.
- [11] The trial decision includes the following passages:

- [118] The claimant's belief that Montréal holds better employment prospects is genuine. She was able to confirm the availability of a position relatively quickly once she began looking in 2015. She is entitled to pursue work that aligns with her educational background, career goals and expertise. I accept that limitations in the English language present difficulty in obtaining a position as financial advisor in British Columbia. I also appreciate that economic self-sufficiency and providing independently for K.M. are important to her, consistent with her demonstrated commitment to be a responsible and effective parent.
- [119] However, I am not persuaded that Quebec holds the only possibility of meaningful employment with income potential similar to what the claimant earned in Montréal. She testified at trial and was able to express herself well in English. She was articulate; able to make her point; and it was clear to me that she had an effective understanding of English when questions were put to her. I do not accept that the claimant is rendered unable to find work in British Columbia because of language barriers. Instead, I find as a fact that she has convinced herself that Quebec is the only option for her. Moreover, she is only prepared to work in a role that she considers consistent with "her qualifications". When the claimant filed her notice of family claim in March 2015 (before it was served), she had already reached the conclusion that returning to Montréal was a necessary pre-requisite to securing employment. This is reflected in the notice itself. I find that this determination has shaped her perspective since then, as well as her job-seeking conduct. The efforts she has made to seek work in British Columbia have been less than robust. They seem to have been largely limited to on-line applications, with little demonstrated follow-up.
- [120] In summer 2016, the claimant decided to stop looking for anything other than a position in her chosen field. Although I appreciate the assertion that returning to this type of work is important to her, and anything less may cause prospective employers to question her commitment (or perhaps even her capabilities), she has now been unemployed since the fall 2014, notwithstanding a strong educational background, a solid work history and obvious ability. I do not accept that employment is not available to her in British Columbia for anything other than a minimum wage role. She speaks three languages; has post-secondary education; considerable experience in business administration; and, in previous roles, she has been promoted more than once. She clearly has the capacity to learn, adapt and excel.
- [156] The respondent's 2015 income was \$74,839. His 2016 income was \$81,448. It is expected that for 2017, his income will be \$86,000. I understand that this latter amount represents the ceiling in his current role.
- [157] The claimant's 2015 income was \$12,336 (consisting of Employment Insurance benefits). She had no employment income for 2016. Instead, her income consisted of child support and government supplements. She is currently unemployed and in the absence of finding work within the next short while, I assume she will similarly have no employment income for 2017.

- [158] The respondent asks that the Court impute income to the claimant before determining the issue of child support. In his closing submission, he did not propose a specific amount.
- [159] Although I have rejected the claimant's assertion that meaningful work at more than minimum wage is not available to her in British Columbia, she did give up her financial advisor position to accommodate the respondent's career choice, and she has had to adapt to a new environment, with significant transitions, including language. This has impacted her employment prospects. The claimant's job-seeking efforts have not been robust, particularly since the summer of 2016, when she chose to restrict the scope of positions she is prepared to accept. However, she has made some efforts to find work and she has been working to improve her English skills post-separation. On balance, it is my view that it would be unfair to impute income to the claimant for the years 2015, 2016 and 2017. I decline to do so.
- [160] However, the claimant has a positive obligation to provide support for K.M: s. 147(1), FLA. She has no other dependents. K.M. attends school full time, leaving the claimant with the opportunity to seek employment. She is competent, educated and, based on her antecedents, I find she has the capacity to make good progress in the work force once initial adjustments have been made.
- [161] In light of these factors, I am satisfied that if the claimant is not employed by the start of 2018, income should be imputed to her for that year and beyond, in the minimum amount of \$20,657 (calculated on the basis of British Columbia's minimum wage of \$11.35 per hour effective September 2017, using a 35-hour work week).
- [163] If the claimant remains in British Columbia, the respondent must pay her \$801 per month in child support, commencing September 2017. Starting in January 2018, the monthly support is reduced to \$622 per month. If the claimant obtains employment by January 2018, the monthly amount payable that same month and moving forward, will be informed by her actual income.
- [178] Section 161 of the FLA sets out the objectives of spousal support. These include: (a) recognizing economic disadvantages arising from the relationship, or its breakdown; (b) apportioning financial consequences arising from the care of a child; (c) relieving economic hardship from the breakdown of the relationship; and (d) as far as practicable, promoting self-sufficiency within a reasonable period.
- [179] On the evidence, I agree with the claimant that her entitlement to spousal support has both compensatory and non-compensatory components.

- [180] While the respondent was undergoing training in Surrey in 2014, the claimant bore primary responsibility for K.M. She then gave up a good position to move to Surrey and support the respondent in the new endeavour. This position was aligned with the claimant's educational background and expertise. It was meaningful to her. The relationship fell apart not long after and the claimant has struggled since then, in part due to language barriers. The move and breakdown have resulted in economic disadvantage.
- [181] Since September 2014, the claimant has been unemployed, out of her chosen field and unable to continue her career growth, with its attendant economic benefits. In these circumstances, I consider it appropriate that spousal support be paid at a level that not only compensates the claimant for the economic disadvantages she has sustained, but assists her in gaining self-sufficiency as soon as practicable. If she remains in British Columbia, it may take some time before the claimant is able to achieve a position similar to the one she held at Desjardins, either salary-wise or with respect to the nature of the work.
- [182] Recognizing the respondent's already-heavy expenses, I award the claimant spousal support in the mid-range. Moreover, it is retroactive to February 2015. I do not accept that the respondent was entitled to hold off on spousal support until the claimant quantified an amount for him. Post-separation, the claimant was entitled to support that provided a standard of living "reasonably commensurate with that enjoyed during the [relationship] and which compensated [her] to the extent possible, for the losses she had suffered": *Tedham v. Tedham*, 2005 BCCA 502, at para. 52.
- [183] For the year 2015, the claimant is entitled to \$1,393 per month in spousal support. For the year 2016, she is entitled to \$2,154 per month in spousal support. For 2017, she is entitled to \$2,277 per month. These amounts are based on a "With Child Support Formula".
- [184] If the claimant remains in British Columbia, effective the start of September 2017, the respondent shall pay the claimant \$2,277 per month in spousal support. For the retroactive award, he must pay the difference between what he has paid from February 2015 to the end of August 2017, and the amounts shown above. I leave it to the parties to complete these calculations. The retroactive amount is payable forthwith.
- [185] Consistent with the approach to child support, if the claimant is not employed by the start of 2018, income should be imputed to her for that year and beyond, in the minimum amount of \$20,657. If she obtains employment by the start of 2018, her actual income will govern for that year and moving forward.
- [186] This means that for 2018, the respondent's spousal support obligation will be a minimum \$1,342 per month.
- [Emphasis added.]

B. The Claimant's Application Evidence

- [12] In her February 3, 2020, affidavit in response, the claimant attests that she has made the following efforts to rebuild a career since the trial decision.
- [13] Starting in August 2017, she sought employment in the field of finance, including even administrative positions with finance companies. She says that many positions had job language requirements that she did not meet.
- [14] In September of 2017, the claimant enrolled in an English class through Kwantlen Polytechnic University ("KPU"), called "English for Academic Purposes Level 3". The class was held 9 a.m. to 11:30 a.m. on Mondays through Thursdays during the fall term. She says she generally did group work or self-study for the course from noon to 2:00 p.m. after class, as well as some studying on the weekends. She obtained an "A" grade in the course.
- [15] The claimant enrolled in another KPU English class in the spring term of 2018, called "Introduction to University Writing". She obtained a "B" grade in the course.
- [16] Following a discussion with a former French immersion teacher, she attended a March 2018 information session held by Simon Fraser University ("SFU") regarding its Professional Development Program ("PDP"). The PDP takes four full-time semesters (i.e., 16 consecutive months) to complete and leads to a teaching certificate. The claimant says there is a high demand for French-speaking teachers and the position earns \$40,000 per year as a starting salary. She resolved to pursue this as a career path.
- [17] In April 2018, the claimant began volunteering at Umoja Operation Compassion Society ("Society"), a Surrey charity that works with newcomer immigrants and refugees. The Society provides its clientele with courses such as computer skills, basic English and life skills. The claimant assisted Society instructors twice a week, Wednesdays and Thursdays, from 10 a.m. to noon. She says she volunteered because a PDP advisor told her it would benefit her future career to have some form of teaching experience.
- [18] The claimant says she applied to the PDP in January of 2019 but was told that she needed to complete six prerequisite courses to be eligible.
- [19] On February 5, 2019, she emailed Thompson Rivers University ("TRU") inquiring about Math 1901, but there is no evidence she enrolled. There is evidence she enrolled in two other prerequisite courses in 2019, but no evidence she completed either of them or that the courses are ongoing.
- [20] The claimant's affidavit attaches a letter from SFU, dated August 8, 2019, informing her that she cannot be admitted into the September 2019 intake for the PDP because she lacks four prerequisite courses.

- [21] In September 2019, the claimant began working as an instructor in the Society's computer skills program, for which she is paid \$18 per hour for four hours each week. In November 2019, she applied to be an instructor in the Society's children's program but did not get the position.
- [22] The claimant attests she is currently enrolled in another PDP prerequisite course, "Literature and Composition 1", although no documentary evidence of enrollment was provided. The claimant attests that she is awaiting a decision on whether a course she took for her bachelor's degree in business administration will satisfy one of the other prerequisites.
- [23] The claimant attests her current spousal support does not cover her current cost of living, and that her mother provides her with additional support.

C. The Respondent's Application Evidence

- [24] The respondent's reported income in 2017 was \$94,418 and in 2018, it was \$88,990. He attests his 2019 total income was, as shown on his payroll statement, \$84,186.
- [25] Following his five year posting, the respondent succeeded in obtaining a permanent RCMP position and continued working in Surrey. He attests his current base income is \$86,110 per year.
- [26] The respondent and his new partner, A, began cohabitating in June of 2016. He and A now have two children together. The elder, who I will refer to as "KA", was born on March 10, 2017. The younger, who I will refer to as "KI", was born on April 5, 2019.
- [27] A works for the federal government. She had a permanent position with the Immigration and Refugee Board ("IRB") in Vancouver when she met the respondent.
- [28] The respondent and A bought a home together out in Abbotsford. A and her parents collectively paid \$350,000 towards the down payment.
- [29] As a federal government employee, A has many positions available to her through employee pools and transfers.
- [30] When KA was born, A took 10 months of maternity/parental leave. During her leave, she applied for federal government positions closer to Abbotsford. She obtained a temporary position with the Canada Revenue Agency in Surrey, starting January of 2018. When A returned to work in January of 2018, the respondent took two months of parental leave.
- [31] As federal employees, A and the respondent can, in combination, take extended parental leave of up to 18 months and can allocate the time between themselves as they see fit. However, the government's salary top-up benefit covers only 12 months. Where more than 12 months are taken, only Employment Insurance parental leave benefits are available during the additional months.

- [32] When A's temporary job with the Canada Revenue Agency expired, she went on maternity/parental leave with KI. KI was born on April 5, 2019.
- [33] The respondent and A opted to take 18 months' of parental leave when KI was born. A's leave period began at or around the date of birth. The respondent's January 17, 2020 affidavit indicates that he also took parental leave for the first three months following KI's birth, so he and A were both on leave for those three months (para. 21).
- [34] In October 2019, A accepted a temporary position with the Parole Board of Canada, with a start date of January 6, 2020, which resulted in her period of leave with KI being about nine months.
- [35] When A started at the Parole Board in January of 2020, the respondent began a period of parental leave, with the intention of using remainder up to the 18 month maximum. The respondent attests that he will be continuing with this leave through mid-August.
- [36] I note that given the respondent took 3 months' leave in 2019 and A also took about 9 months' leave, additional leave through mid-August 2020 appears to exceed 18 months' leave in total. However, the actual start and stop dates for these various leave periods are not all in evidence and that may account for the apparent excess.
- [37] The respondent attests that his only income during his leave through to mid-August 2020 will be Employment Insurance parental leave benefits of \$325 per week.
- [38] The respondent attests that it was important for A to return to work in January 2020 because her pool transfer rights might have expired before another suitable position came open. The respondent also says that once he and A opted to take 18 months' leave, they could not take less. (Neither the transfer policy nor the leave policy was put into evidence.)

III. review of support orders

- [39] The parties agree there is no need to establish a material change where the right of review is provided by order, and that support on a review is to be approached in the manner of an initial application: *Pereverzoff v. Pereverzoff*, 2017 BCSC 687 at para. 17; *Morck v. Morck*, 2013 BCCA 186 at paras. 16 and 17.
- [40] A review does not, however, entitle the parties or the Court to dispute or disregard the trial findings of fact. To some extent, the parties have attempted to re-litigate trial findings by putting additional evidence before me. For example, the respondent's affidavit includes new evidence about the claimant's position with Desjardins and attempts to re-open the issue of whether she actually worked as a financial advisor. I have disregarded this and other similarly purposed evidence.
- [41] The review issues are the claimant's income for child and spousal support purposes, the duration of spousal support, and the respondent's 2020 income for support purposes.

- [42] The respondent submits that: \$50,000 annual income should be imputed to the claimant; the spousal support order should be terminated or time-limited; and that his 2020 income for support purposes should be \$40,400.
- [43] The claimant opposes all of the adjustments sought by the respondent. She would have the support orders remain as they are (including the continued imputation of a minimum wage salary as her base income). She says the respondent's 2020 salary for support purposes should be his base salary \$86,110, regardless of his choice to take extended leave.
- [44] As the respondent's arguments on both the \$50,000 imputation to the claimant and the duration of the spousal support obligation centre on the concept of self-sufficiency, I will deal with them together.

A. Claimant's Income for Support and

Duration of Spousal Support

1. Parties' Positions

- [45] The respondent argues that the spousal support paid to date is all that is warranted, stressing that he has already paid 5 years of spousal support in respect of an 11-12 year relationship. He asserts the claimant "has had more than enough time to become self-supporting."
- [46] Citing *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420, at para. 29, he submits the claimant has a "duty" to become self-sufficient and mitigate her need for support. He describes her efforts to date as "woeful". He questions her claim that her English proficiency level makes it difficult for her to work in financial services, noting the trial judge's comments on her English in 2017 and the type of work the claimant does at the Society.
- [47] With regard to the PDP, he says a sincere effort to gain admission would have involved identifying and pursuing the prerequisites at the outset. He questions her claim that she is seriously pursuing the PDP. He submits that the TRU attachment indicates the claimant withdrew from the courses listed, and that prioritizing volunteer experience over finishing the prerequisites was unreasonable.
- [48] The respondent submits that the evidence shows the claimant will not be eligible for admission in time for the 2020 intake, meaning the earliest she can start the PDP is September 2021. He says with diligence she could have been admitted in September 2019 and been on track to graduate in April 2021.
- [49] The respondent relies on *Kontogiannis v. Langridge*, 2009 BCSC 1545, where the parties separated in 2007 after an 11-year relationship. Justice Russell concluded the wife could have been self-sufficient by the date of trial, but had made no effort. The husband was in a new relationship and had recently had a child. He cites, in particular, the following paragraphs:

[29] There is nothing in the circumstances of this case that modifies or limits the obligation to become self-sufficient, pursuant to s. 89(2) of the FRA. The plaintiff has 30 years' experience in the hospitality industry and has owned two businesses. She is also currently working at a volunteer job and attending school. This is inconsistent with an inability to work. She has ample ability to find herself gainful employment, she has had sufficient time to become financially self-sufficient and she has failed to satisfy this Court as to why she has not done so.

...

- [31] Finally, her ability to meet her own financial needs must also be weighed against the means of the defendant, which have decreased in light of his new financial obligations with respect to his new family.
- [50] The claimant submits that she has tried to "the best of her abilities" and that continuing the status quo is appropriate in the circumstances. She emphasizes that the trial judge found her entitled to support on both non-compensatory and compensatory grounds.
- [51] The claimant relies on the review analysis regarding spousal support set out in *Tedham v. Tedham*, 2005 BCCA 502. She says the promotion of self-sufficiency is only one of the objectives of spousal support and that there is no stand-alone "duty" to become self-sufficient.
- [52] The claimant says there is no merit to the respondent's assertion that five years of support is ample given the length of their relationship. She notes that a Divorcemate calculation (using 12.5 years as the relationship length) produces a range of 6.25 to 14 years' support.

2. Decision

- [53] As stated in *Tedham*, review orders permit the court to take into account anticipated changes (per Prowse JA, for the Court):
- [22] Since this Court's decision in *Schmidt*, review orders have become even more common, not only in this jurisdiction, but in other jurisdictions across Canada. The advantage of such orders is that, unlike variation applications, they permit the court to adjust its order to take into account the effect of significant changes in circumstances which are anticipated by one or both parties at the time of the original order but about which there is no certainty. They are often made where there is some expectation that the payee spouse will become partially or wholly self-sufficient within the time set for review. In this case, the order was also made to take into account the potential effect of Mr. *Tedham*'s failing eyesight on his ability to pay support.
- [54] The respondent views the provision for a 2019 review as a deadline for the claimant to achieve self-sufficiency. That is not correct. A review is not, as the respondent would have it, simply a review of the claimant's post-trial efforts to overcome any need for support. Further, as I read the trial decision, the most significant anticipated change for purposes of

the review order was the expiry of the respondent's five-year posting which would be followed by success or failure in getting a permanent position. As far as that anticipated change goes, the respondent succeeded and his position has thus improved since the date of trial.

- [55] All of the objectives of spousal support are relevant on review, just as at the time of the initial order. The promotion of self-sufficiency is but one objective. In particular, it is significant that the initial order was based on the trial judge's conclusion that the claimant was entitled on both non-compensatory and compensatory grounds.
- [56] Tedham arose out of a review application. The husband asserted the wife had failed to make reasonable efforts to become independent between the initial order and the review date. She had not gone back to university (a possibility in contemplation at the time of trial) nor retained an employment agency. The chambers judge accepted the husband's position and made an order for time-limited spousal support on a diminishing basis (to encourage the wife to become self-sufficient).
- [57] The chambers decision was overturned on appeal. In Tedham, Justice Prowse wrote:
- [37] Thus, even accepting that Ms. Tedham's efforts to obtain employment were less than reasonable in the circumstances, this fact alone could not justify the time-limited order with a three-year termination date. The other objectives of a support order, which were significant in this case, were overshadowed by the objective of self-sufficiency and the failure to fully recognize that the objective of self-sufficiency is qualified by the words, "in so far as is practicable".
- [38] It is apparent that the assumption underlying the time-limited order was that Ms. Tedham was capable of becoming economically self-sufficient; that is, capable of supporting herself at a level in keeping with the standard of living she enjoyed during the marriage without the aid of financial support from Mr. Tedham beyond the three-year cut-off date. In my view, the evidence simply does not support that conclusion.

The chambers judge was held to have erred in focussing almost exclusively on self-sufficiency (para. 46).

- [58] Justice Prowse also addressed the relationship between self-sufficiency and compensatory support at some length in Tedham:
- [48] The leading authorities which are almost invariably referred to in cases involving spousal support are *Moge v. Moge*, [1992] 3 S.C.R. 813, and *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420.
- [49] In *Moge*, Madam Justice L'Heureux-Dubé, speaking for the majority (McLachlin J., as she then was, wrote separate concurring reasons), made it clear that the objective of self-sufficiency was not to be given overriding significance in determining the entitlement to spousal support, its quantum or duration. At p. 853, she also stated that:

It is also imperative to realize that the objective of self-sufficiency is tempered by the caveat that it is to made a goal only "in so far as practicable". This qualification militates against the kind of "sink or swim" stance upon which the deemed self-sufficiency model is premised. [Citations omitted.]

[50] The limited-term order made in this case reflects an aspect of the "sink or swim" philosophy and assumes that Ms. Tedham is capable of swimming; that is, of making her own way without relying on Mr. Tedham for support. While she has proven that she can contribute to her own support, there is no evidence that she is capable of earning anything resembling the income which would permit her to live in accordance with the standard of living of the parties during marriage (even after adjusting for the contributions the parties received from her parents and Mr. Tedham's inheritance). Mr. Tedham, on the other hand, with his track record as a successful businessman with substantial income, has the ability to sustain a standard of living commensurate with that enjoyed during the marriage.

[51] In *Moge*, Madam Justice L'Heureux-Dubé went on to observe (at p. 864) that the Act promoted "[t]he doctrine of equitable sharing of the economic consequences of marriage or marriage breakdown" by recognizing and accounting for both the economic disadvantages incurred by the spouse who made sacrifices by staying home to care for the home and children, and the economic advantages conferred on the other spouse. She elaborated on this view in the following passage (at p. 870) of her reasons:

Although the doctrine of spousal support which focuses on equitable sharing does not guarantee to either party the standard of living enjoyed during the marriage, this standard is far from irrelevant to support entitlement [citations omitted]. Furthermore, great disparities in the standard of living that would be experienced by spouses in the absence of support are often a revealing indication of the economic disadvantages inherent in the role assumed by one party. As marriage should be regarded as a joint endeavour, the longer the relationship endures, the closer the economic union, the greater will be the presumptive claim to equal standards of living upon its dissolution [citation omitted].

[52] In this case, a 16-year marriage in which Ms. Tedham stayed home to take care of the home and the children called for a support order which, after taking into account Ms. Tedham's ability to contribute to her own support, provided a standard of living reasonably commensurate with that enjoyed during the marriage and which compensated Ms. Tedham, to the extent possible, for the losses she had suffered by remaining out of the paid work-force for so many years. In that regard, the court in *Moge* discussed (at p. 867) the nature of the loss suffered by spouses (like Ms. Tedham) who removed themselves from the work-force in order to assume a homemaking role:

The financial consequences of the end of a marriage extend beyond the simple loss of future earning power or losses directly related to the care of children. They will often encompass loss of seniority, missed promotions and lack of access to fringe benefits such as pension plans, life, disability, dental and health insurance [citations omitted]. As persons outside of the work force

cannot take advantage of job-retraining and the upgrading of skills provided by employers, one serious economic consequence of remaining out of the work force is that the value of education and job training often decreases with each year in comparison to those who remain active in the work force and may even become redundant after several years of non-use. All of these factors contribute to the inability of a person not in the labour force to develop economic security for retirement in his or her later years.

[53] In summary, the Moge decision distanced itself from the clean-break theory of divorce which had elevated the objective of self-sufficiency to the governing factor in making a spousal support order.

[54] The significance of the Moge decision is referred to by the authors of the Spousal Support Advisory Guidelines: A Draft Proposal (Ottawa, Dept. of Justice: 2005) (the "Advisory Guidelines") at p. 7:

In the ground-breaking Moge decision in 1992, the Supreme Court of Canada clearly rejected the Pelech trilogy and the clean-break model of spousal support. The Court emphasized that all four support objectives in the 1985 Divorce Act had to be given weight and that the clean-break model of spousal support unduly emphasized only one of those objectives - the promotion of spousal self-sufficiency after divorce - at the expense of all the others. Former spouses were obligated to make reasonable efforts to maximize their earning capacity and contribute to their own support but the Court recognized that some spouses, despite their best efforts, would not be able to become self-sufficient. In the Court's view, the clean-break model went too far in deeming spouses to be self-sufficient when they were not. In Moge the Court endorsed an expansive compensatory basis for spousal support, portraying its purpose as the equitable distribution between the spouses of the economic consequences of the marriage - both its economic advantages and disadvantages. While the Court recognized that many different circumstances could give rise to compensatory claims, the decision focused on the most common situation - that where a spouse has sacrificed labour force participation to care for children, both during the marriage and after marriage breakdown. Under the compensatory approach of Moge, spousal support came to be understood primarily as a form of compensation for the loss of economic opportunity - or in the language of the Divorce Act, the economic disadvantage - resulting from the roles adopted during the marriage.

[55] The authors of the Advisory Guidelines went on to note that, in the cases following Moge, "need" became a convenient way of measuring economic disadvantage and that, at least in longer marriages, need came to be measured against the marital standard of living. (In that regard, see *Yemchuk v. Yemchuk*, 2005 BCCA 406, at para. 50.)

[56] In my view, the time-limited order in this case appears to reflect the clean-break philosophy in circumstances of a long-term marriage where the compensatory aspects of support had only been partially achieved.

- [57] In Bracklow, the issue before the court was one of entitlement to spousal support. The court took the opportunity, however, to elaborate on the Moge decision by reference to three models of spousal support: compensatory, contractual and non-contractual (needs-based), any or all of which may come into play in a particular case. In this case, Ms. Tedham's claim to ongoing support is based on both compensatory principles and need.
- [58] An interesting discussion of the relationship between self-sufficiency (taking into account the marital standard of living) and time-limited orders is found in *Allaire v. Allaire* (2003), 35 R.F.L. (5th) 256 (Ont. C.A.). There, the court upheld an award of support of unlimited duration in relation to a 24-year marriage in which the parties had raised three children and both parties worked outside the home. The wife had suffered economic disadvantages flowing from the marriage by delaying her education and giving the husband's employment priority over her own. The husband argued that because the wife was earning \$68,000 at the time of the hearing (as compared with the husband's income of approximately \$190,000), she was self-sufficient and that support should be either terminated or limited in duration.
- [59] The Ontario Court of Appeal noted that the award of support in that case was made not only to redress the economic consequences of the breakdown of the marriage, but also to compensate the wife for "the likely" permanent economic consequences of having had to postpone her post-secondary education. At paras. 21-22 of the judgment, the court stated:

Mr. Allaire's [sic] submits that any disadvantages flowing from the marriage must defer to the fact that Ms. Allaire now earns a reasonable income that makes her "self-sufficient". This ignores the reality that self-sufficiency is not a free-standing concept. It must be seen in the context of the standard of living previously enjoyed by the parties. Where, as here, the economic consequences of the marital relationship were to permanently reduce Ms. Allaire's income, it is inappropriate to consider Ms. Allaire's annual income of \$68,000 as "sufficient" without considering whether Mr. Allaire can financially assist her to live a lifestyle closer to what they shared as a couple.

For the same reason, the trial judge did not err in failing to apply a time limit to the spousal support award. As the Supreme Court of Canada stated in *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420 at para. 57, a result of the need to balance the objectives set out in the Divorce Act is that there is no obvious or inevitable cut-off date for a spousal support order. It is recognized that in situations such as this, "where a former spouse will continue to suffer the economic disadvantages of the marriage and its dissolution while the other spouse reaps its economic advantages", long-term compensatory support is appropriate regardless of the self-sufficiency of the disadvantaged spouse: *Moge v. Moge* (1992), 43 R.F.L. (3d) 345 (S.C.C.), at 383. Where, as here, the award is crafted to compensate Ms. Allaire for the long-term impact of the marriage on her career advancement and earning capacity, the trial judge was within her discretion in declining to limit her support to a defined period.

[Emphasis added.]

- [60] While Allaire is what I will refer to as a "non-interference" case, it makes the point that an order of spousal support which is based on compensatory principles should continue until adequate compensation has been made, even if the spouse has achieved a degree of self-sufficiency. It also reinforces the point that self-sufficiency must be viewed in the context of the marital standard of living.
- [59] Here, the trial judge expressly found the claimant was entitled to both non-compensatory and compensatory support. The compensatory support arose from the economic disadvantage suffered by the claimant.
- [60] The claimant gave up a secure position in her chosen profession in a Francophone area of Canada in order to enable the respondent to advance his RCMP career in British Columbia. The claimant had six years' service with Desjardins when she left. The position she gave up had career growth potential and provided a pension. Although it was contemplated that the claimant might have difficulty obtaining a position comparable to the one she left behind, they were an economic unit and the family plan was that the respondent would obtain more than off-setting advantages by becoming a permanent member of the RCMP.
- [61] The respondent trained for and entered the RCMP in order to increase his income and to obtain a better quality of life (trial decision, para. 60). The move to Surrey enabled him to achieve those goals. His five year posting came with a significant base salary that increased over the period of the posting. His base salary could be (and, in fact, was) increased by overtime and night shifts. Most significantly, at the end of his five-year posting, the respondent successfully secured a permanent position. As a result, he now enjoys, in addition to increased income, the significant job security and employment-related benefits that come with having a permanent RCMP position.
- [62] In *Moge v. Moge*, [1992] 3 S.C.R. 813, 43 R.F.L. (3d) 346 (cited to R.F.L.), the Court recognized that a variety of circumstances might give rise to compensatory claims. A compensatory claim is most classically recognized where one spouse left the workforce in order to look after children and household for a considerable period of time, thereby supporting and enabling the other spouse to progress in their career over that period of time. However, that common scenario is far from the only way economic disadvantage can arise (at p. 389):

It is important to note that families need not fall strictly within a particular marriage model in order for one spouse to suffer disadvantages. For example, even in childless marriages, couples may also decide that one spouse will remain at home. Any economic disadvantage to that spouse flowing from that shared decision in the interest of the family should be regarded as compensable. Conversely, the parties may decide or circumstances may require that both spouses work full-time. This in and of itself may not necessarily preclude compensation if, in the interest of the family or due to childcare responsibilities, one spouse declines a promotion, refuses a transfer, leaves a position to allow the other spouse to take advantage of an opportunity for advancement or otherwise curtails employment opportunities and thereby incurs economic loss. Such a situation occurred in *Heinemann v. Heinemann*, *supra*, where the court recognized

that, despite the fact that the wife had worked full-time for nearly the entire duration of the marriage, she had foregone her own career aspirations in the interest of the family. The family had made three major moves occasioned by advancements in the husband's career. This caused a lack of continuity to the wife's career and in the result, the wife had no seniority, had obtained no promotions in her original career and would have returned to it "at the bottom of the pile", thus obviously disadvantaged in comparison to her husband.

A spouse may contribute to the operation of a business, typically through the provision of secretarial, entertainment or bookkeeping services, or may take on increased domestic and financial responsibilities that enable the other to pursue licenses, degrees or other training and education. (See N. Bala, "Recognizing Spousal Contributions to the Acquisition of Degrees, Licences and Other Career Assets: Towards Compensatory Support" (1989), 8 Can. J. Fam. L. 23; J. M. Krauskopf, "Recompense for Financing Spouse's Education: Legal Protection for the Marital Investor in Human Capital" (1980), 28 Kan. L. Rev. 379, and Payne, "Management of a Family Law File with Particular Regard to Spousal Support on Divorce", *supra*, at pp. 441-42.) To the extent that these activities have not already been compensated for pursuant to the division of assets, they are factors that should be considered in granting spousal support.

- [63] In this case, neither the claimant's economic disadvantage nor the respondent's economic advantage arise from long-term arrangements in place over the course of the relationship. Here, both crystallized in a small window of time. The claimant looked after KMO, enabling the respondent to attend RCMP training in another province. Shortly thereafter, in the interest of the family, the claimant moved to Surrey - losing her secure position and its benefits, and also acquiring the obstacle of having to work in the English language. As a trade-off for the disadvantage the claimant suffered in making that move, the family unit gained the advantage of the respondent's new career, posting, and chance of a permanent position.
- [64] While the facts are here are atypical, they fit squarely within the concept of spousal support as compensation for economic disadvantage resulting from roles respectively adopted by the parties during the marriage for the collective benefit of the family.
- [65] Less than a year after the move, the parties' separated. Thus, the period of time during which the parties' shared the economic benefit of the advantages obtained by the adoption of those roles was exceptionally brief. This is a factor that distinguishes the present case from the classic scenario. Here, unlike the classic case, absent spousal support, virtually all of the benefits, reaped and continuing, as a result of the advantage conferred on the respondent will accrue to him to the exclusion of the claimant.
- [66] The unusual facts also make it challenging to gauge standard of living as a measurement of the ongoing impact of the roles adopted of the parties. The parties were a two-income family and owned their own home in Montreal. Had the parties not separated on the heels of the crystallizing events, their marital standard of living would have been higher than in Montreal, and likely similar to that presently enjoyed by the respondent and A. (While A and

her parents have contributed to the respondent's current standard of living, the claimant's mother has made a comparable contribution to hers: see trial decision, para. 39 and the claimant's evidence on this application.)

- [67] On the evidence before me, the claimant has a reduced standard of living not only compared to that the parties would have had if they stayed together a short while longer, but also as compared to Montreal. This is the case even after accounting for the fact that the claimant does not, in fact, have the actual benefit of the full salary imputed to her.
- [68] There is no evidence before me that persuades me the claimant has been adequately compensated for the economic disadvantage incurred.
- [69] The cases cited by the respondent in support of a termination of spousal support are factually distinguishable. In the present case, the claimant was found to be entitled to compensatory support.
- [70] Kontogiannis was an initial application in which the wife's claim for compensatory support was dismissed (para. 24). The wife had failed to become self-sufficient notwithstanding her capability to do so, but was awarded limited non-compensatory support due to a medical issue (paras. 29 and 32). In *Fisher v. Fisher*, 2008 ONCA 11, the wife suffered no economic disadvantage, but had nonetheless failed to become self-sufficient (paras. 58 and 60). Again, the court ordered time-limited (seven years) non-compensatory support (para. 91).
- [71] While the trial judge commented on the quality of the claimant's conversational English, she did not dismiss her concerns about professional proficiency. It was reasonable to take English courses in 2017/2018 in an attempt to be comfortable providing financial advice in English, although the claimant ultimately concluded language was still an issue. The decision to pursue the PDP is not an unreasonable change of tack. It makes a positive out of a perceived negative in terms of her language skills, and it builds on her existing bachelor's degree (as opposed to rendering it superfluous).
- [72] I agree that the claimant has failed to pursue the prerequisites or the PDP with diligence. Indeed, I would describe her approach as rather lackadaisical. However, the trial judge's imputed minimum wage salary applied throughout that period of time and the claimant does argue against a continued imputation.
- [73] The Spousal Support Advisory Guidelines based calculation adopted by the trial judge should continue, but with an updated minimum wage income.
- [74] Under the Employment Standards Regulation, B.C. Reg. 396/95, s. 15 [ES Regulation], the minimum hourly wage as of June 1, 2020 is \$14.60. Using the same salary parameters used by the trial judge, that hourly rate results in an annual salary of \$26,572. I impute that amount as the claimant's gross salary as of date of this decision. As under the trial order, should the claimant's actual earnings be higher, her actual earnings should be used. The same applies regarding the claimant's income for purposes of child support.

[75] The mid-range of spousal support continues to be appropriate. For purposes of calculation, the length of the parties' relationship is deemed to be 12 years (i.e., roughly mid-point between the parties' positions).

B. The Respondent's 2020 Income for Support Purposes

1. The Parties' Position

[76] The respondent has chosen to take parental leave in 2020. The respondent submits the under-employment resulting from this 2020 leave is warranted in the circumstances, and that his reduced (i.e., actual) 2020 income should be used for support purposes for the year 2020.

[77] The respondent relies on the law as set out in *Arnett v. Arnett*, 2018 BCSC 1982:

[6] He submits the reduction in his income resulted from taking justifiable parental leave following the birth of his child with his new wife. I am told the mother of that child took parental leave for two months following the child's birth and could take no more because she is a dentist with a contract position with a hospital. The respondent intends to take nine months parental leave to be with the newborn child until at age one year the child can be placed in a daycare.

[7] The claimant is critical of the respondent for taking parental leave in these circumstances. The claimant takes the position the respondent is deliberately underemployed and ought to have an annual income imputed to the level he was earning before he took parental leave, namely \$83,413.

[78] After reviewing the facts in *Arnett*, Justice Affleck stated:

[10] I am unwilling to criticize the respondent for taking parental leave. During a newborn child's first year of life, the attention at home of one parent is valuable. The respondent's present wife ought not to be required to risk her employment contract with a hospital by staying at home for a year until her child can go to daycare.

[11] *McCaffrey v. Paleolog*, 2011 BCCA 378, addressed the application of s. 19 (1)(a) of the Federal Child Support Guidelines, which permits a court to impute income where a spouse is intentionally underemployed or unemployed "other than where the underemployment or unemployment is required by the needs of the child of the marriage or a child under the age of majority". Justice Chiasson, writing for the court, stated the following:

49 This Court has concluded that a desire simply to stay home with children is not sufficient to invoke the exception in s. 19(1)(a). There must be evidence of needs of a child which require the parent to remain home and unavailable for employment. The chambers judge agreed with the mother's position that a newborn child has needs beyond the usual as is evidenced by Employment Insurance maternity leave and other maternity leave programs. This may have been the basis of the judge's reference in para. 15 to the "societal requirements for the first needy months following the birth of a child".

53 The Alberta courts appear to treat the imputation of income as somewhat of an anomaly; that is, that it is discretionary and should not occur if a parent falls within the "exceptions" in s. 19. With respect, in my view, this approach does not take into account adequately the positive obligation on a parent to support a child. The court is authorized to impute income to meet that objective. If a parent is intentionally under-employed or unemployed, income may be imputed unless the parent establishes that he or she falls within an exception under s. 19(1)(a); in this case, unless the mother establishes that the needs of other children require her unemployment. She has the obligation of satisfying the court that this is so.

58 In summary in a case like this:

1. income may be imputed to a parent who is intentionally under-employed or unemployed unless the parent establishes under s. 19(1)(a) of the Federal Child Support Guidelines that the needs of a child require the parent to remain at home;
2. it is recognized that generally a newborn child or a child of very young age is a child who needs care at home in the context of s. 19(1)(a), but
3. childbirth does not provide an automatic relief from a parent's child support obligations;
4. the circumstances of each situation must be evaluated using all of the criteria articulated in *Donovan v. Donovan* (2000), 190 D.L.R. (4th) 696 (Man. C.A.) as adopted by this Court in *Watts v. Willie*, 2004 BCCA 600;
5. any period of non-support must be reasonable in the circumstances.

59 In my view, the circumstances to be considered include a consideration of the financial condition of the payor parent's present family. It is the needs of the child of that relationship that are in issue. In some situations the financial circumstances of the first family may be relevant: for example, where the second family is very affluent and the first family is destitute. The circumstances may compel an almost immediate return to work or may provide for full or part-time in-home assistance. Assisted care or day-care may not be available readily or be available only on a limited basis. In considering the applicability of s. 19(1)(a), the court should be given every assistance by the parties so as to take into account all relevant factors that bear upon the reasonableness of a period of relief from child support, always recognizing that in a case like this the burden is on the parent who seeks an hiatus from the obligation to provide child support to prove that a period of underemployment or unemployment is required by the needs of a child.

[12] I accept that, in the circumstance where the mother of the newborn child of the respondent risks losing her contract with a hospital if she takes parental leave beyond two months, which is the time I understand she was contractually entitled to, and where the needs of the newborn child are such that the attention of the respondent as the stay-at-home parent is desirable until the newborn child can be placed in daycare at the age of one year, there ought not to be a finding under s. 19(1)(a) of the Child Support Guidelines Regulation that the respondent is intentionally underemployed.

- [79] The respondent asserts that the increase from 12 months leave eligibility to 18 months leave eligibility reflects an evolved social acknowledgment of the benefit of staying home longer with children and, in particular, recognizes the social value realized through adequate bonding.
- [80] The respondent also says if he had not taken leave in 2020, he and A would have incurred daycare costs for three children (KMO, KA and KI) in the amount of \$2,100 per month. He argues that as he and A will not incur these costs while he is on leave, his 2020 leave is a financially prudent decision.
- [81] The claimant submits that it is not reasonable for the respondent's 2020 income for support purposes to be reduced by his choice to take leave as there is no evidence that the additional leave is required.

2. Decision

- [82] The respondent submits that his earnings for 2020 will amount to approximately \$40,400. The respondent's calculation uses the end of August as the leave end date, whereas his affidavit states it will end mid-August. Using mid-August, the respondent will have 33 weeks at the \$325 Employment Insurance benefit (33 week x \$325 = \$10,725). The respondent's base salary is \$86,110, which amounts to \$1,656 per week for the remaining weeks (19 weeks x \$1656 = \$31,464). Thus, the respondent's anticipated gross actual income for 2020 is \$42,189 ("Reduced Income").
- [83] The respondent seeks an order that his Reduced Income be used for purposes of KMO's 2020 child support. What the respondent seeks is an adjustment to an existing child support order in light of an existing and continuing period of underemployment. I consider the issue can be raised on review. However, the fact it is raised on review does not displace the burden on the respondent, the parent who is and will be under-employed by reason of leave, to establish that his under-employment is "required by the needs of a child under the age of majority" for purposes of s. 19(1)(a) of the Federal Child Support Guidelines, SOR/97-175 [Guidelines]: *McCaffrey v. Paleolog*, 2011 BCCA 378 at para. 59.
- [84] I agree that the increase in parental leave to a maximum 18 month period reflects a social recognition of the value of staying at home with a new child. However, as when the maximum 12 month period applied, the desire to stay home for the entire period permitted is insufficient to engage s. 19(1)(a) of the Guidelines. The *McCaffrey* approach still applies, it simply applies to longer period of leave eligibility.
- [85] KI was nine months old when A returned to work at the Parole Board. The respondent had already taken three months' leave following KI's birth. During that three month period, he and A were both at home with KI. Thus, although KI was 9 months' old when the respondent began his 2020 parental leave, 12 months' of parental leave had already been taken. Further, the 12 months' leave taken in 2019 had been taken with a salary top up from the federal government. It is because 12 months' with salary top-up had already been taken, that the

additional 2020 leave would be covered by only the Employment Insurance benefit. In other words, had the respondent not taken overlapping leave with A in 2019, he would have had three months' leave with salary top-up available to him in 2020.

- [86] There is no evidence that KI needed to be older than nine months to attend daycare. To the contrary, there is evidence from the respondent about the cost of all of the children, including KI, being provided childcare. There is also no evidence that KI has any special care or development needs. In short, there is no evidence that the respondent needs take leave in 2020, let alone take leave until KI is 18 months' old.
- [87] The respondent's net monthly earnings more than offset the \$2,100 expenditure of childcare and the loss of the Employment Insurance benefit. Further, paying less child support for KMO will virtually always advantage the respondent and A economically. The relevant question is whether the respondent has established a need to pay less than KMO's full entitlement to child support. The childcare expenses establish no such need.
- [88] The respondent argues a positive social value is achieved by his taking the remaining portion of the 18 month period with KI. I have no doubt that is so. However, a positive social value is also achieved by supporting one's legal dependents.
- [89] The respondent submits that if A had not taken the Parole Board position, her pool transfer rights might have expired before another suitable position came open. Since it has not been established that KI needs to have a parent on leave with him in 2020, the question of which parent it should be does not arise.
- [90] There is no need for the respondent to take additional 2020 parental leave with KI. The respondent can, of course, take the additional leave. I find only that the choice to do so does not bring him within the exception provided under s. 19(1)(a) of the Guidelines.
- [91] It is unclear from the respondent's materials whether he was also seeking to have his reduced income applied to spousal support as well as child support. In any event, if that is the case, my conclusion is the same. The respondent's voluntary choice does not justify a lower level of spousal support.
- [92] For child and spousal support purposes, the respondent's income during any time spent on additional parental leave for KI during 2020 will be imputed in accordance with his annual base salary of \$86,110.

C. Further Review

- [93] I conclude it is appropriate to set a further review towards the end of 2023, subject to an agreement otherwise by the parties. As noted in *Tedham*, review orders involve expense and lack closure. However, the anticipated change in circumstances now involves the claimant's intent to enrol in the PDP and obtain a teaching position.

IV. retroactive spousal support tax issue

[94] The additional orders sought by the respondent under the notice of application are:

- a) an order or declaration that the respondent's 2017 and 2018 retroactive spousal support payments, made in relation to the period of February 1, 2015 through August 1, 2017 inclusive, were periodic spousal support payments; and
- b) an order that the claimant repay (and/or the respondent be credited with) corresponding amounts if the respondent is denied a deduction for lump-sum retroactive spousal payments under his 2017 and 2018 income tax returns.

[95] The key passages of the trial decision in relation to this issue are paragraphs 177, 183 and 184, which I produce again for convenient reference:

[177] The respondent did not pay spousal support until February 2017. At present, he pays \$1,200 per month. He has acknowledged that shortly following separation, he was aware the claimant was in need of spousal support. However, he asked that she quantify the amount. She did not do so and, as such, he did not pay until the issue was formally pursued during the course of these proceedings.

[183] For the year 2015, the claimant is entitled to \$1,393 per month in spousal support. For the year 2016, she is entitled to \$2,154 per month in spousal support. For 2017, she is entitled to \$2,277 per month. These amounts are based on a "With Child Support Formula".

[184] If the claimant remains in British Columbia, effective the start of September 2017, the respondent shall pay the claimant \$2,277 per month in spousal support. For the retroactive award, he must pay the difference between what he has paid from February 2015 to the end of August 2017, and the amounts shown above. I leave it to the parties to complete these calculations. The retroactive amount is payable forthwith.

[96] The filed trial order includes the following terms:

13. The Respondent shall pay to the Claimant retroactive spousal support in the amount of \$50,987 for the period of February 1, 2015 to August 31, 2017.

["RSS Term"]

[97] The respondent still owes \$3,675 under the RSS Term. He says he intended to pay the outstanding amount with his 2017 tax refund, but his deduction for periodic spousal support payments was disallowed. The same deduction was also disallowed in 2018.

[98] He seeks an order (or declaration) that the monies owed under the RSS Term represent an amount of support that was payable periodically. The order is sought for the purpose of establishing to the satisfaction of the Canada Revenue Agency that the respondent is entitled to a tax deduction. The respondent cites *James v. The Queen*, 2013 TCC 164 [James TTC] for the proposition of tax law, and also cites a number of court decisions where the nature of the payments owing were specifically addressed in the family law court order.

- [99] The claimant submits the notice of application fails to set out a legal basis for the relief sought. She says the slip rule does not apply and there is no legal basis for a variance, either directly or indirectly by further order or declaration. The claimant also submits that the third order sought (i.e., repayment/credit dependent on tax outcomes) demonstrates that the second order seeks to vary, not clarify, the trial order. Finally, she asserts the respondent has a tax issue, and should appeal his tax ruling rather than seeking indirect relief through this court.
- [100] It is unnecessary to address the jurisdictional issue. Assuming without deciding that I have jurisdiction, I decline to exercise it.
- [101] The parties settled and approved the terms of the trial order. While it might have been convenient to describe the obligation under the RSS Term, a description was not required for this Court's purposes. Without commenting on what might be the case where the sole means of resolving a tax issue is by order of this Court, here the respondent can and should deal with the matter as a tax issue.
- [102] The respondent has cited the Spousal Support Advisory Guidelines: The Revised User's Guide (April 2016) [RUG]. However, as noted in *Charron v Carrière*, 2016 ONSC 7523, where parties fail to address the tax issue in settling an order, the RUG indicates the matter can be raised with Canada Revenue Agency:
- [34] In Rollie Thompson's and Carol Rogerson's recent paper: Spousal Support Advisory Guidelines: The Revised User's Guide" (RUG) (April 2016), they discuss the tax ramifications of retroactive lump-sum payments at page 110:

Retroactive spousal support is paid in the form of a lump-sum. Ordinarily, lump-sum spousal support is neither deductible to the payor, nor taxable in the hands of the recipient. This means that any calculation of periodic spousal support, or increased support, must be discounted or netted down to arrive at an after-tax amount.

For cases where this discounting is discussed, see *Hume v. Tomlinson*, 2015 ONSC 843; *Samoilova v Mahnic*, 2014 ABCA 65 (retroactive lump-sum support 2004-08 calculated using mid-point SSAG, initially no adjustment for tax, subsequently discounted by 30%; appeal dismissed; the discount rate the judge chose was an average of the parties' respective marginal tax rates and was reasonable, based on the evidence); *Robinson v. Robinson*, 2012 BCCA 497; and *Patton-Casse v. Casse*, 2011 ONSC 6182 (supplementary reasons to 2011 ONSC 4424) (balance between respective tax positions of parties necessary). See also the discussion of discounting lump-sums arrived at in restructuring prospective support under "Restructuring", above.

There is now an additional method of resolving these tax issues in the case of retroactive support. In 2013, the Tax Court ruled in *James v. Canada*, 2013 TCC 164, that a large lump-sum retroactive top-up payment ordered by the B.C. Court of Appeal could be deducted by the husband. The Canada Revenue Agency has now accepted the policy underlying this decision, in its Income Tax Folio S1-F3-C3, which was updated effective March 5, 2015 (these Folios replace the older

Interpretation Bulletins, in this case IT-530R). The payor is permitted to deduct the lump-sum payment where it can be identified that:

- the lump-sum payment represents amounts payable periodically that were due after the date of the order or written agreement that had fallen into arrears, or
- the lump-sum amount is paid pursuant to a court order that establishes a clear obligation to pay retroactive periodic maintenance for a specified period prior to the date of the court order.

In these cases, the recipient who must pay tax can complete Form T1198 (Statement of Qualifying Retroactive Lump-Sum Payment) and CRA will adjust the recipient's relevant prior year taxes, to reduce the impact of the one-time payment. At the time of any settlement or order, it will be necessary to make an estimate of the tax implications for both parties, if this option is chosen. For a judicial reference to this tax method, see *Frank v. Linn*, 2014 SKCA 87.

[Emphasis added.]

[103] In *James TTC*, the Tax Court of Canada looked at the British Columbia Court of Appeal reasons to discern the nature of the support obligation. This is evident in the following paragraph from the *James TTC* reasons. I note, in particular, the Tax Court's use of defined terms:

[5] On June 10, 2009, the British Columbia Court of Appeal allowed Ms. James' appeal from the Holmes Order and stated in its reasons the following:

When the parties entered into the consent order in March 2004, it was considered that the sum to be payable as spousal maintenance was appropriate having regard to the then estimated income of the respondent husband in the range of \$500,000. The chambers judge found a significant enhancement had occurred in the income level of the respondent husband, albeit some of the income attributed was in the form of a dividend or bonus payment declared for tax reasons by the corporation. Giving the best consideration I can to the matter, I consider an increase in the monthly sum to be paid as spousal maintenance should be ordered. I would vary the sum to \$9,000 per month and I would order this increased sum to be payable retroactive to January 1, 2005, the date stipulated in the application for variance filed by the appellant wife.

I will refer to this as the BCCA Court Order.

[12] In the case before me, does the BCCA Court Order provide that the monies are payable on a periodic basis, when it says:

I would vary the sum to \$9,000 per month and I would order this increased sum to be payable retroactively to January 1, 2005.

Obviously, the amounts cannot be paid on a periodic basis as the time has passed, though payments are required to be payable going forward and indeed were. The retroactive monthly amount is indicated to be payable - it is by necessity paid in a lump sum. I do not see how the character of periodic payments payable has changed. There is nothing else the British Columbia Court of Appeal could have done to retain that character.

[28] So, while the Appellant argues that the British Columbia Court of Appeal created a retroactive legal obligation and, therefore, effectively legally created an arrears of support payments that would have the Sills principle apply, even if I conclude that is not the case but that the British Columbia Court of Appeal created a new legal obligation, I find that such a new obligation is dissimilar from the one in Peterson. Justice Sharlow's statement that "a legal obligation to pay retroactive child support is the converse of a legal obligation to pay arrears of child support" must be taken in the context of the specific facts of the Peterson case. The Federal Court of Appeal found this was not arrears but was a legal obligation to pay a lump sum, not a payment that retained the nature of periodic payment obligations. But here, the British Columbia Court of Appeal was clear, the parties, according to Mr. Rose, were clear: there was no ambiguity as in Peterson. There was no mention of a lump sum payment. The payment ordered was meant to be, and I find was, a payment in the nature of periodic payments paid in a lump sum and the requirements of the definition of support payment are satisfied.

[Emphasis added.]

[104] The RUG indicates a payor will be permitted to deduct a lump-sum payment where the nature of the payment can be identified. Nothing in James TTC indicates that the obligation to pay retroactive periodic maintenance for periodic payments owing prior to the court order must be reflected on the face of the order itself, as opposed to in the accompanying reasons.

[105] I find the respondent has no need for a further order or declaration as sought. The second and third orders sought under the notice of application are denied.

V. summary

[106] The claimant's income for purposes of support is, as of the date of this decision, \$26,572. As in the trial order, should the claimant's actual income exceed the imputed amount in any year, her actual income is to be used instead.

[107] Absent agreement of the parties, a review of the spousal support and child support terms of the order may be brought at any time after September 30, 2023.

[108] The respondent's base salary of \$86,110 per year will be proportionately imputed as the respondent's income for support purposes with respect to any period of parental leave taken by the respondent in 2020 with regard to KI.

[109] If the parties are unable to agree on the support calculations, they are at liberty to appear before me.

[110] The parties are ordered to exchange: (a) copies of their respective income tax returns for the previous year, including all attachments, not later than June 1 of each year; and (b) copies of any Notice of Assessment or Reassessment provided by the Canada Revenue Agency or equivalent, immediately upon receipt.

[111] The claimant shall have the costs of the application.

"Tucker J."

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