

CANADA / JUDGMENT

O.T.H. v. S.L.H.

2003 BCSC 1270

COURT

Supreme Court of British Columbia

DECIDED

18 August 2003

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2003BCSC1270 IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: O.T.H. v. S.L.H. 2003 BCSC 1270 Date: 20030818 Docket: 15354 Registry: Dawson Creek Between: O.T.H. Plaintiff And S.L.H. Defendant Before: The Honourable Master Baker Reasons for Judgment Counsel for the plaintiff L. MacLean Counsel for the defendant J. Cluff Date and Place of Hearing: July 30, 2003 Prince George, B.C. THE APPLICATIONS

- [1] The parties have brought cross motions respecting their two children (S., aged 10 and T.L. ("T.L."), almost 14 years) and other family matters. Mr. Cluff objected to the plaintiff, Mr. O.T.H.'s motion being heard, arguing that it was not brought within the time constraints of Rule 51A, and that the consequence was that his client, Ms. S.L.H., was unable to consider the issues and to fully instruct him. I considered this an appropriate case in which the time limits should be waived under Rule 3(2) and permitted the motion. I did so for several reasons:
- a) both counsel will be taking holidays in August (in one counsel's case for the entire month) so that this is the last opportunity to hear the matter before school re-commences in September;
 - b) due in large measure to great effort by both counsel all, or substantially all, of the available information needed for decision had been presented (in fact the total materials probably exceeded seven to eight inches of paper);
 - c) one of the issues presented by Mr. O.T.H.'s motion, namely the choice of S.'s school in September, has been clearly an issue for some time, and was addressed by Ms. S.L.H. in her affidavit #2, para. 28. Moreover, I considered it in S.'s best interest that this issue be decided sooner rather than later;
 - d) some of Mr. O.T.H.'s motion are not really new issues, but simply his perspective on issues already in Ms. S.L.H.'s motion (e.g. his request for joint custody vs. her request for sole custody);

- e) I had in mind the comment of Parrett, J., in *Koles v. Koles* (2003 BCSC 1056) at para. 29: The purpose of R. 51A was never, in my view, to establish a procedure that was more important than the hearing of applications on their merits.
- [2] Ms. S.L.H.'s motion, therefore, seeks:
- i) sole custody and guardianship of the children; ii) child support; iii) spousal support; iv) retroactivity in respect of both child and spousal support;
 - v) relief consequent on Mr. O.T.H.'s alleged failure to disclose or produce documents as required by the Rules or by directions given by Mr. Justice Paris at a Judicial Case Conference on May 26th. Mr. O.T.H.'s motion seeks:
 - i) joint custody with specific terms re: week-to-week residency of the children; ii) joint guardianship; iii) specific calculation of child support, incorporating shared residency; iv) a custody and access report to be prepared by Dr. Michael Elterman pursuant to s. 15 of the Family Relations Act (R.S.B.C. 1996 ch. 128);
 - v) orders directing Ms. S.L.H. to apply for work forthwith and to report or account to the court in respect of her attempts. It should also be noted that at the Judicial Case Conference a trial date for November 24, 2003 was reserved, some four months from the date of this hearing.
- [3] For reasons given orally at the hearing July 30th, and because it was clear to me that the interests of the children demanded a quick decision regarding their week-to-week residence and S.'s school for September, I ordered that the children shall reside with Mr. O.T.H. and Ms. S.L.H. on a week-on, week-off basis, commencing Sunday, August 17th. Ms. S.L.H. is currently on holiday with the children and I directed that, when she returns August 4th, they will spend the following two weeks with Mr. O.T.H. for summer access, whereupon the residency regime will commence. I directed certain terms collateral to this issue, including the stipulation that all of the child residency terms are subject to T.L.'s wishes, given his age and relative independence in the issue. I also ordered that S.'s school will be the C.[] Elementary School.
- [4] I was not persuaded that Mr. O.T.H. had been so dilatory or in sufficient default under his disclosure obligations that he should be censured under the Rules. Ms. S.L.H.'s application in that respect was therefore adjourned generally.
- [5] The issues remaining, therefore, were solely relating to child and spousal support, including Mr. O.T.H.'s application re: Ms. S.L.H.'s applications for work (para. 2, above). Mr. O.T.H. has recognized his obligation to support the children for some time and has, since the summer of 2002, paid Ms. S.L.H. \$1,000.00 per month for the children.

BACKGROUND

- [6] Mr. O.T.H. and Ms. S.L.H. are, relatively speaking, young people; he is 37 years old and she is 34. They were both, until July 6th, in excellent health. On that date, as discussed below, Mr. O.T.H. suffered serious injuries in a motorcycle accident. They began cohabitation 1988 and were married in 1989, so that their relationship spans 15 years. They have, as I have said, two children, T.L. aged 14 and S. aged 10.
- [7] Neither Mr. O.T.H. nor Ms. S.L.H. completed their high school education; she is one credit short of her diploma, but he apparently did not proceed (his counsel advised in chambers) beyond grade 8. Neither has acquired any formal training or certification. Notwithstanding this, they have done extremely well economically in their life together. Even while a teenager, Mr. O.T.H. seems to have first formed his construction company (now called P.[] Ltd. ("P.[] Ltd")) and has worked almost exclusively and quite successfully in the oil fields of the P.[] region.
- [8] Ms. S.L.H. remained at home with the children in the marriage. There is dispute as to whether or not, or to what extent, she wanted to enter the job market, or whether Mr. O.T.H. encouraged or discouraged this, but the objective fact is that, outside the family company and some minimal involvement as an art teacher, her work has been entirely domestic. Mr. O.T.H., for his side, was focussed on his company, working very hard, often away in camps for extended periods. The company is the sole source of income for him and, vicariously, for the family.
- [9] When Mr. O.T.H. and Ms. S.L.H. decided to separate in February 2002, they agreed that Mr. O.T.H. would continue to occupy the family home, as the property was also used by the construction business. Ms. S.L.H. and the children therefore moved into a duplex in F.[] and, after approximately six months, purchased a detached home for approximately \$167,000. This sum was paid through the resources of the company, so that the home is mortgage-free. Ms. S.L.H. was also paid a wage through the company, and this continued after separation until December 31st, 2002, so that she was paid approximately \$38,500 post separation. With bank funds left to Ms. S.L.H.'s use, an RRSP contribution in her name, and the payment of vehicle and other expenses, Mr. O.T.H. estimates that approximately \$360,000 has been advanced to or to the credit of Ms. S.L.H. since separation much, as indicated above, through the company.
- [10] Both Mr. O.T.H. and Ms. S.L.H. are now in new relationships. In Mr. O.T.H.'s case it is with Ms. C., an employee at his bank. It has been alleged by Ms. S.L.H. (affidavit #1, para. 28) that this relationship may have preceded the separation, but this is specifically denied by Mr. O.T.H. and the evidence, presented as it is by Ms. S.L.H. is, in my view, inadmissible, being more innuendo than evidence. If it is admissible, it is of such low weight that I disregard it. Ms. C. now lives with Mr. O.T.H. in the family home. Ms. S.L.H. began a relationship with a Mr. Z. in the summer of 2002. Mr. O.T.H. characterizes this as a common-law or near common-law relationship. Ms. S.L.H. denies this.

- [11] As indicated in para. 6 above, on July 6th Mr. O.T.H. suffered serious injuries in a motorcycle accident. These injuries and a short-term prognosis are detailed in the letter and notes of Dr. Moody (Exhibit. "A" to affidavit #1 of Lise Gaudreault). Mr. O.T.H. sustained multiple compression fractures to the mid-thoracic spine, chest wall injuries, a lung contusion, and facial injuries. He was hospitalized for a time, but is now an out-patient and is required to take antibiotics and relatively serious analgesics. Dr. Moody, as at July 18th, felt that the fractures would take six to eight weeks to heal, but with residual (soft tissue) damage full recovery could take six to twelve months. He felt that any early return to work should be "on a very limited capacity and perhaps for only an hour or two a day" and that it would be eight to twelve weeks until he is "fit to return to his complete former duties". In other words, Dr. Moody does not anticipate Mr. O.T.H. will be able to return to full employment much before the trial date. THE PARTIES' POSITIONS
- [12] The sole issues remaining for decision are child and spousal support. Included in those issues are
- a) attribution of income to Mr. O.T.H.;
 - b) Ms. S.L.H.'s responsibility to become self-employed;
 - c) any responsibility by Mr. Z. to contribute to Ms. S.L.H.'s expenses;
 - d) the parties' expenses as listed in their respective Form 89 Property and Financial Statements; and
 - e) retroactivity and/or starting date for support payments. I will take these issues in turn.
- Attribution of income
- [13] Essentially, three elements arise in this question; the income the companies generate, the assistance given by personal expenses paid by the company, and Mr. O.T.H.'s health and ability to manage the companies. First and foremost is the income reasonably expected of the family companies. While there are two companies (P.[] Ltd and W.[] Ltd.) the only active company generating income is P.[] Ltd. This company, as I have said, has been in existence for approximately 14 years and is engaged in construction projects in the oil and gas fields of the P.[] region. Income is generated from a combination of regular clients and specific contracts upon which the company bids. The company has been generally successful operating from F.[] and Mr. O.T.H. expects, to remain competitive, that he will have to establish a further base of operations in Fort Nelson. The company's income, not surprisingly, has fluctuated over recent years with the markets in oil and gas, and as the company has succeeded (or not) in its bids on projects.
- [14] The company has, by bookkeeping methods, reduced its income annually to avail itself of the small business tax rates. It has done this by the relatively simple device of taking excess income and paying it to Mr. O.T.H. as a taxable bonus. This keeps the company's reportable income down and within the lowest available tax rate, but obviously increases Mr. O.T.H.'s reportable income. The company pays his tax on this income, and the remaining bonus is

credited back to his shareholder's loan account. There is nothing unusual or suspicious in this, and the process is explained in the letter of the company's accountant, Mr. Daneluk, of July 24th (Exhibit "A", Gaudreault affidavit #2). The result of this is a T-1 Income Tax form line 150 income for Mr. O.T.H. that can significantly exceed his actual income from the companies. In the past two years, for example, the income has been: Year Line 150 Employment Bonus/Business 2002 \$ 571,636 \$ 71,000 \$ 500,000 2001 \$ 221,693 \$ 141,693 \$ 80,000

- [15] Ms. S.L.H.'s position is that there should be strict adherence to s. 16 of the Child Support Guidelines (for the calculation of child support, or in any event) and that Mr. O.T.H.'s income should be attributed at \$571,000 or more. Mr. O.T.H.'s position, on the other hand, is that s. 18 of the Guidelines should apply, that a reasonable income for him as the companies' director or officer should apply, and that the appropriate sum is a combination of the paycheque sums, so to speak, paid by the companies to him and Ms. S.L.H.. This sum, he argues, is very close to \$100,000.
- [16] As to the general profitability of the companies, Mr. Cluff, for Ms. S.L.H., submits that they are doing extremely well, that recent years' financial reports demonstrate that, and that the companies had at least \$900,000 cash in the bank at separation. He points as well to the prospective expansion of the companies' activities to the Fort Nelson area as evidence of their profitability and success.
- [17] Mr. MacLean, for Mr. O.T.H., argues quite the contrary. He submits that the companies' fiscal year end (October 31) for 2002 was the best in the companies' history and included the sale (for more than \$1 million) of a significant amount of aging equipment that must now be replaced. To respond to Ms. S.L.H.'s view of the companies' profitability, Mr. Daneluk also prepared interim financial statements, for the partial year November 1st, 2002 - May 31st, 2003. Mr. Daneluk addresses both of these statements (2002 and the partial year) in his letter of July 24th. Some of this letter (and most of his earlier letter of July 23rd regarding personal expenses paid by the company) is argument, and those portions I ignore. Much of what Mr. Daneluk explains, however, makes sense to me. The use of bonuses, shareholder loan accounts, and bookkeeping to affect tax rates, the necessity of replacing expensive machinery in a timely way, and the vicissitudes of operating in a changeable natural resource environment with active competitors all suggest to me that it is hard to assess the income the company has generated or can generate in the future or, just as important, how much of that income will be available to Mr. O.T.H..
- [18] I have tried to divide the company's income available to Mr. O.T.H. and Ms. S.L.H. by adding its net income from statements, any bonuses or commissions paid, sums paid as salary to Mr. O.T.H. and Ms. S.L.H., and a notional sum for personal expenses paid by or through the company (see para. 20, below) which sum I have fixed at \$30,000.00. I have added these sums for the years 2000 - 2002: 2000 2001 2002 Company net income \$ 404,138 \$ 188,449 \$ 236,719 Bonus/management \$ 80,000 \$1,000,000 Salary \$ 111,400 \$ 169,000 \$ 103,000 Expenses Paid \$ 30,000 \$ 30,000 \$ 30,000 TOTAL \$ 545,538 \$ 467,449 \$1,369,719

- [19] Again, what is made clear by these sums is the variability of income, by any measure. Moreover, of course, both the company net income and the bonus/management fees are pre-tax and, realistically, would have to be reduced substantially to reflect funds actually available (*Titchener v. Titchener* (2003 BCSC 1120 at para. 15).
- [20] Funds are more restricted in their availability due to other acceptable reasons, principal of which, in my view, is the need for a company such as P.[] Ltd to retain a reasonable amount of capital to cushion periods in which little income might be anticipated (particularly in a seasonal business such as construction in the oil fields of the P.[], normally a winter activity), to off-set bad debts (such as one for over \$200,000 as described in Mr. Daneluk's letter), or to provide for expansion to Fort Nelson.
- [21] Finally, Mr. Daneluk points out that Mr. O.T.H. is currently in breach of one of the terms of his lending agreement with his bank; that term requires that the shareholder loan account be maintained at \$700,000 or more. Due to the draws against this account for taxes, the purchase of Ms. S.L.H.'s home and the like since separation, the account at May 31st was about \$233,000 well below the bank's requirement.
- [22] I will address the subject of personal expenses paid by the company. Ms. G., Ms. S.L.H.'s sister, was the company bookkeeper for about six years, ending in 2000. She alleges that, as bookkeeper, she routinely paid personal and family expenses for Mr. O.T.H. and Ms. S.L.H. through the companies, and claimed them as company expenses. These expenses, she says included fuel, groceries, utilities, trips (vacations and hunting), vehicles, clothing, furniture, and occasional gifts. She deposes that a very small proportion of these expenses were eventually attributed back to the H.s via the shareholder loan account. Finally, she tallies these expenses to roughly \$50,000 to \$60,000 annually. Given that she is relying on her general recollection, while accepting that expenses were definitely paid as alleged, I regard these sums as general estimates at best. Mr. Daneluk's responding letter is unhelpful; firstly he was not the accountant at the time and does not seem to have reviewed the books or statements for 1994 - 2000. Secondly, his letter is more by way of argument than response. I have reviewed, briefly, some of the expenses of the companies, and find them curious. "Advertising and promotion", for example, was \$30,501 in 2002 and \$26,903 in 2001. "Travel and meals" was \$29,392 and \$21,108, respectively. "Office expense" was \$31,040 and \$46,481, and "Property tax" approximately \$12,000 for each year. These latter expenses are particularly interesting, as much of the companies' operations were conducted from the family home. "Telephone" and "utilities", together, are approximately \$73,000 and \$85,000 for 2002 and 2001 respectively. Even allowing that the company was busy and profitable, with revenues of approximately \$7.5 million and \$11.4 million for these two years, I expect there is some substance to Ms. G.'s allegations. To be cautious, however, I have fixed \$30,000 as a reasonable sum for personal and family expenses to be attributed as benefits paid by the companies.

- [23] Trying, then, to attribute to Mr. O.T.H. the companies' pre-tax income is likely unreliable. I have concluded that the more appropriate approach is that directed by s. 18(1)(b), and to attribute to Mr. O.T.H., instead, ". . . an amount commensurate with the services that the spouse provides to the corporation. . . ." This approach was followed by our Court of Appeal in *Kowalewich v. Kowalewich* (2001 BCCA 450), and this court in *Bartkowski v. Bartkowski* (2001 BCSC 1724) and *Bartkowski v. Bartkowski* (2003 BCSC 490).
- [24] Considering the successful history of the companies, therefore, Mr. O.T.H.'s essential role in creating that success, and the income (both through paycheques and other collateral benefits) that have accrued through his role, I regard an annual salary of \$200,000 as being a reasonable sum to attribute in an interlocutory application.
- [25] Mr. O.T.H. has, as I have said, been seriously injured recently in a motorcycle accident. Mr. Cluff seemed, in argument, to either disregard or downplay the extent of Mr. O.T.H.'s injuries. I do not accept that they are in any way trivial. Dr. Moody's report convinces me of the seriousness of the injuries and the necessity of a recuperation time. On the other hand, it is clear that Mr. O.T.H. is a very self-directed and hard working individual. While he may be limited for a period from physical work, I have no doubt that his experience, contacts, and managerial skills will continue to benefit the company, such that no immediate interruption in an attributed income is justified.
- [26] Before discussing actual sums for child or spousal support, I will address some of the other issues argued. Ms. S.L.H.'s Obligation to Become Self-Employed
- [27] Mr. O.T.H. presents a very emphatic argument that Ms. S.L.H. could, relatively easily, find gainful employment in the F.[] area. His affidavit attaches a veritable plethora of advertisements, newspaper articles, or the like, confirming the availability of work in the P.[] area. Moreover, the ages and shared residence of the children would free her from parental duties, allowing her to work. She, on the other hand, is not yet decided whether to take community college courses to qualify her in a chosen field.
- [28] On balance, and particularly given that this application precedes a trial by only four months, I regard it as premature to place heavy weight on the duty to become self-supporting (*Short v. Short* (1996) 21 R.F.L. (4th) 429; *Parsons v. Parsons* (1985) 48 R.F.L. (2d) 98). Rather, I regard the issue, as with most applications of this nature, as the balance between means and needs. Mr. Z.'s Contributions
- [29] Mr. O.T.H. alleges that Ms. S.L.H. and Mr. Z. are, or until very recently were, in a marriage-like relationship, and that a notional contribution by Mr. Z. to Ms. S.L.H.'s support is therefore justified. I do not accept this argument. Firstly, on the evidence I accept Ms. S.L.H.'s perspective, namely that while Mr. Z. may "stay over" occasionally, he owns and maintains his own separate residence (purchased, apparently, this past June). The evidence of a marriage-like relationship is simply not before the court. Secondly, even if Ms. S.L.H. was in such a relationship with Mr. Z., its duration would clearly be less than two years, the time required before he might have an obligation to her. At the very best, one-half of the

common costs of housing and utilities might be charged to him but, as I say, I do not regard him as cohabiting with Ms. S.L.H. such that the attribution can fairly be made. That attribution, however, between Mr. O.T.H. and Ms. C., who clearly cohabit, is justified. The Parties' Respective Expenses

- [30] I view both parties' Form 89 expenses as being excessive to the point of being unhelpful. I will discuss Mr. O.T.H.'s expenses first. He cites annual expenses of approximately \$98,500, or \$8,200 per month, while maintaining (despite Ms. S.L.H. and Ms. G.'s allegations) that the family has not enjoyed a particularly lavish lifestyle. I make the following deductions, for analysis, from his list: Compulsory deductions \$ 1,444 Rent (contribution by Ms. C.) \$ 600 Utilities (contribution) \$ 300 Food \$ 100 Restaurant Meals \$ 100 Furniture replacement \$ 50 Housecleaning \$ 100 Vacation \$ 100 Pet \$ 200 Toiletries \$ 50 Pilot's Training \$ 650 Children's expenses (no evidence, e.g. of insurance) \$ 300 RRSP, RESP \$ 300 TOTAL: \$ 4,294 This leaves needs of approximately \$3,900 per month net.
- [31] Ms. S.L.H.'s report of expenses, however, is not as direct. She has sworn and filed two separate Form 89 statements, radically different. Her first, sworn February 11th, 2003, reports expenses of \$6,257.04 per month, or \$75,084.48 per annum. These expenses include compulsory deductions of \$152.31. Her second statement, sworn July 8th, 2003 totals her expenses at \$19,882.82 per month or \$238,593.84 per annum, increases of \$13,625.78 and \$163,509.36, respectively. These changes were pointed out and, in part, addressed by Mr. O.T.H. in his affidavit #1.
- [32] Ms. S.L.H. addressed Mr. O.T.H.'s affidavit in her affidavit #2, but was clearly pressed for time in doing so. Nevertheless, entirely independent of anything said by Mr. O.T.H., Ms. S.L.H. bears a heavy onus to explain such profound changes in her listed (and, it must be repeated, sworn) expenses. In fact, her first statement clearly states that she does not anticipate any significant changes to her expenses. Monthly expense entries for vacation (\$2,000), flowers and yard (\$250), toiletries (\$250), entertainment (\$1,175) and gifts (\$1,000), as examples, seem almost fanciful and "pulled from thin air". In all the circumstances, I regard Ms. S.L.H.'s second statement as completely unhelpful and more a response to Mr. O.T.H.'s position than an informed, bona fide attempt to inform the court of her and the children's true and reasonable needs. I will therefore rely instead upon her first statement.
- [33] That statement, as I indicated, lists monthly expenses of approximately \$6,250 for her and the children.
- [34] On a review of Ms. S.L.H.'s expenses, the following deductions can be made, because the expenses are uncorroborated, unexplained, or are inappropriate for an interlocutory application: Compulsory deductions \$ 152.31 House repairs \$ 350.00 Cell phone (mobility) \$ 100.00 Furniture/equipment \$ 200.00 Vehicle lease* \$ 400.00 Charity \$ 20.00 Vacation \$ 300.00 Pet costs \$ 135.08 Hair \$ 45.00 Toiletries/cosmetics \$ 100.00 Education \$ 60.00 Gifts \$ 100.00 Children: Activities Lunches Life insurance \$ 100.00 \$ 150.00 \$ 100.00 RRSP \$ 100.00 TOTAL: \$ 2,412.39 *Vehicle lease: the cost of Ms. S.L.H.'s vehicle, in excess of \$800, seems

excessive to me, with much less expensive vehicle leases available.

- [35] Ms. S.L.H.'s net needs therefore are $(\$6,257.04 - 2,412.39 =) \$3,844.65$. With an attributed income of \$200,000, the Child Support Guidelines require child support of \$2,212; as Mr. O.T.H. and Ms. S.L.H. will share the residence and care of T.L. and S. equally, this support will be reduced by one-half, pursuant to s. 9 of the Guidelines to \$1,106. This sum is therefore deducted from \$3,844.65, for a net-of-tax need of \$2,738.65. Tax tables indicate that a party with two children and no other taxable income needs \$3,000 support to meet that need. I therefore order spousal support of \$3,000 per month.
- [36] Assuming, again, an annual income of \$200,000 for Mr. O.T.H., the same tax tables indicate to me that, after paying tax-deductible support of \$3,000 per month, he will have notional income of \$8,894 per month. Reducing this further by the child support of \$1,106 leaves Mr. O.T.H. \$7,788, a sum ample, in my view, for his monthly needs. Starting Date
- [37] Ms. S.L.H. seeks retroactivity in the support payments, though Mr. Cluff was not particular or specific as to a proposed starting date in the past. I assume Ms. S.L.H. wants the payments ordered effective as at the parties' separation in February 2002. Not surprisingly, Mr. O.T.H. is opposed to any retroactivity, and emphasizes that P.[] Ltd continued to pay Ms. S.L.H. her regular paycheque until the end of 2002, and that, largely with the company as a financial vehicle, benefits worth \$360,000, including the \$167,000 to purchase her home.
- [38] Both Mr. Cluff and Mr. MacLean referred the court to the leading case in British Columbia on retroactivity, *L.S. v. E.P.* (1999 BCCA 393), a decision of our Court of Appeal. It should be noted that the issue in *L.S. v. E.P.* concerned child support only. At paras. 66 and 67 of that decision Rowles, J.A. canvassed some of the principal reasons for or against retroactivity: 66 A review of the case law reveals that there are a number of factors which have been regarded as significant in determining whether to order or not to order retroactive child maintenance. Factors militating in favour of ordering retroactive maintenance include: (1) the need on the part of the child and a corresponding ability to pay on the part of the non-custodial parent; (2) some blameworthy conduct on the part of the non-custodial parent such as incomplete or misleading financial disclosure at the time of the original order; (3) necessity on the part of the custodial parent to encroach on his or her capital or incur debt to meet child rearing expenses; (4) an excuse for a delay in bringing the application where the delay is significant; and (5) notice to the non-custodial parent of an intention to pursue maintenance followed by negotiations to that end. 67 Factors which have militated against ordering retroactive maintenance include: (1) the order would cause an unreasonable or unfair burden to the non-custodial parent, especially to the extent that such a burden would interfere with ongoing support obligations; (2) the only purpose of the award would be to redistribute capital or award spousal support in the guise of child support; and (3) a significant, unexplained delay in bringing the application. I will consider these individual factors as they apply to Mr. O.T.H. and Ms. S.L.H.'s circumstances. IN FAVOUR OF RETROACTIVITY Need and Ability to Pay

- [39] Certainly until December 31st, 2002 the need for support was less than in many other cases; Ms. S.L.H. continued receipt of her company paycheque, and other benefits (para. 9, above) were substantial. In addition, commencing in the summer of 2002, Mr. O.T.H. began to pay child support of \$1,000 per month. Blameworthy Conduct
- [40] Much was made in these proceedings about Mr. O.T.H.'s refusal or dilatoriness in disclosing documents or financial information. I do not accept that Mr. O.T.H.'s conduct in that respect was so censurable or, as described in *L.S. v. E.P.*, "blameworthy". I can see no active misrepresentation or dissembling on his part. Encroachment on Capital
- [41] It may be that some encroachment has taken place (I gather Ms. S.L.H. has used RRSP funds since separation) but that has occurred respecting both parties' assets. In other words, by tapping funds from the company to purchase a home for Ms. S.L.H., a family asset notionally belonging to both parties has been devalued, to Ms. S.L.H.'s direct benefit. I do not regard the encroachment that may have occurred, then, as alarming, or justifying retroactivity. Excuse for Delay
- [42] I doubt that Ms. S.L.H. can explain the delay sufficient to trigger retroactivity. The parties attempted mediation in the summer of 2002, but it was clear early on that the efforts would be unsuccessful; they resolved that, at least, Mr. O.T.H. would pay \$1,000 monthly child support, as above. This he has done. There is no evidence of Mr. O.T.H. actively or impliedly delaying these proceedings, or holding out false hope or promises that have delayed or hindered Ms. S.L.H.'s application. Notice of an Intention to Pursue Support
- [43] I accept that Ms. S.L.H.'s intentions in this regard were clear from the start. If she did not threaten litigation outright, it was a clear issue from the start: witness the parties' temporary agreement regarding child support after mediation. AGAINST RETROACTIVITY Unfair Burden
- [44] Probably any retroactive payments would come from the company, and, as I have indicated, Mr. Daneluk's evidence is that the resources of the company are probably already stretched (viz. the reduction of the shareholder's loan account substantially below the level required by the bank, paras. 18 and 19 above). His Form 89 discloses some liquid assets (Royal Bank GIC \$28,112.77, savings account \$4,300, RRSPs totalling \$130,010) and various assets that could probably be sold easily (boat, camper, sleds, garden tractor: total value \$64,500) so that a degree of retroactivity could be met without becoming an undue burden on Mr. O.T.H.. Moreover, assuming an income of \$200,000 per annum as above, Mr. O.T.H. would have some excess income to meet a retroactive obligation. Redistribution of Capital
- [45] While Mr. O.T.H. may have some excess income, as above, it is likely that any significant retroactive obligation would involve liquidation of capital assets and, effectively, the redistribution of capital. In a case wherein the parties have already agreed to the use of capital to secure Ms. S.L.H. and the children (viz. the direction of \$360,000 to her), I regard any further redistribution as something probably best left to a trial judge. Unexplained Delay

- [46] This is, I think, a corollary to para. 39, above. If there is not an excuse for any significant delay in bringing the matter, the need for a payor to explain the delay is, one presumes, lessened. Ms. S.L.H., in my view, did not bring the matter on earlier because matters were financially acceptable; with direction of funds to her use she was able to provide for a home and security for her and the children. As well, her paycheque and some child support were assisting. I conclude, therefore, that, until quite recently, any delay in bringing this matter on is explained. More recently the matter may have been delayed by financial disclosure (a factor militating in favour of retroactivity), but there is also an off-setting factor in Mr. O.T.H.'s serious injuries.
- [47] On balance, therefore, I do not find a case here for significant retroactivity. Recognizing the change in Ms. S.L.H.'s income situation, however, that occurred December 31st, and the recent difficulties in bringing the matter on, I direct that payments of child and spousal support be made retroactive to June 1st, 2003. Because the shared residence of the children commenced this month (August) Mr. O.T.H. will pay the full amount of child support (\$2,212.00) for the months of June and July, and the reduced amount (\$1,110.00) will commence August 1.
- [48] Payments made by Mr. O.T.H. either to child support or as directed at the hearing of this matter will be credited to his obligation. SUMMARY
- [49] On an attributed income of \$200,000.00, Mr. O.T.H.'s Guideline child support obligation of \$2,212.00 will commence June 1st, 2003 and will be reduced by one-half to \$1,106 effective August 1 as above to reflect the parties' shared care of the children. Mr. O.T.H. will also pay spousal support of \$3,000, also effective June 1st, 2003. Any payments made by Mr. O.T.H. since June 1st will be credited against these obligations. Mr. O.T.H.'s application for an order directing Ms. S.L.H. to apply for employment and to report her results is dismissed.
- [50] Since, taking all of the issues that Mr. O.T.H. and Ms. S.L.H. brought to the court, there is divided success, the parties will bear their own costs. "Master D. Baker"

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