

SUPREME COURT OF NOVA SCOTIA

Citation: *Armsworthy v. Boucher*, 2018 NSSC 209

Date: 20180926

Docket: SATD 095127

1210-001263

Registry: Antigonish

Between:

Jerry Armsworthy

Applicant

v.

Sandra Boucher-Armsworthy

Respondent

Judge: The Honourable Justice Ann E. Smith

Heard: December 5 and 22, 2017, in Antigonish, Nova Scotia

**Post-Trial
Submissions and
Further**

Disclosure: June 20, 2018; August 17, 2018; September 11, 2018

Counsel: Jeanne Sumbu, for the Applicant
Dianne Paquet, for the Respondent

By the Court:

Introduction

[1] This is a divorce proceeding under the *Divorce Act*, R.S.C. 1985 (2nd Supp.), c. 3, commenced by the Petitioner, Mr. Jerry Stanley Armsworthy on March 6, 2015. The Respondent, Ms. Sandra Boucher, filed an Answer on May 19, 2015.

[2] The Petitioner sought a divorce, a division of assets pursuant to s. 12 of the *Matrimonial Property Act* and no spousal support.

[3] The Respondent sought a divorce, spousal support, property division (pension) in accordance with a domestic contract dated July 3, 2013, and costs.

Background

[4] Jerry Armstrong is 63 years old. Sandra Boucher is 55 years old. The parties married on April 19, 2012, and separated in mid-August, 2013. This was a second marriage for both. There are no children of the marriage.

[5] Mr. Armstrong was widowed in 2011. He has adult children from this 33-year marriage.

[6] Ms. Boucher was married to ND for 17.5 years. Ms. Boucher and ND separated in 2003 and divorced in 2006. The Court granted an Order for Corollary Relief which provided that ND pay the sum of \$1,500 per month as spousal support to Ms. Boucher for as long as ND was employed with the Canadian Armed Forces. The Order further provides that should ND be released or retires from the military, the amount of support will be reviewed. The Order also provides that, “Spousal support shall terminate in the event that the Petitioner (Ms. Boucher) re-marries or resides common law with another individual.”

[7] The Petitioner and Respondent met on an online dating site. They first met in person in mid-September, 2011. Ms. Boucher's spousal support from ND terminated in May, 2012 following her marriage to Mr. Armsworthy.

[8] The evidence at trial was that Ms. Boucher was insistent that when they married she and Mr. Armsworthy would live in New Brunswick near her parents who were elderly and had health needs. Mr. Armsworthy agreed to this request.

[9] The parties entered into a Domestic Contract on July 3, 2013.

[10] In June, 2012, the parties moved into a mini-home which Mr. Armsworthy purchased. The mini-home was located at a mini-home park in Fredericton, New Brunswick. Prior to moving into the mini-home, Mr. Armstrong was living in a home located in Half Island Cove, Guysborough County, Nova Scotia, where he had lived with his late wife since 1978. Prior to the marriage, Ms. Boucher was living in a mini-home located in Fredericton, New Brunswick, which was owned by her brother who lives in British Columbia. The arrangement with her brother was that she would pay the home's lot rent, contents insurance, utilities, property taxes, as well as maintenance and repair expenses. Ms. Boucher's brother paid for the mini-home's insurance.

[11] At some point after Ms. Boucher moved into the mini-home with Mr. Armsworthy, her brother sold the mini-home where she previously resided.

[12] Within a week of the parties moving into the mini-home, there was an event which led to their separating. Mr. Armsworthy returned to his residence in Nova Scotia and Ms. Boucher went to stay at her parents' home in Fredericton.

[13] The parties reconciled in August 2012. Each returned to reside in the matrimonial home (the mini-home). The parties separated again in August 2013 for the second and final time.

[14] Mr. Armsworthy says that on approximately August 10, 2013, he asked Ms. Boucher to help financially following a workplace injury he suffered in April, that she refused to do so; and as a result, he told Ms. Boucher that they would have to sell the mini-home and move to Nova Scotia. Mr. Armsworthy says that on

August 12, 2013, Ms. Boucher moved out of the mini-home and began removing items from it, including appliances.

[15] Ms. Boucher says that on August 29, 2013, Mr. Armsworthy told her that he was selling the mini-home. Her evidence was that when she did not agree, he called her a foul name and told her to get out of the home.

[16] The parties agree that by September, 2013, they had both vacated the mini-home. Ms. Boucher's evidence was that she wanted to stay on in the home, but that option was not presented to her.

[17] Ms. Boucher says that she did take certain items from the mini-home; she says that she was told by an unidentified person that she had a right to half of the contents of the home. She says that she replaced the appliances that she took with better quality appliances. Mr. Armsworthy says the opposite – that Ms. Boucher replaced good appliances with shoddy ones. He says that an offer to purchase the mini-home fell through when the owners learned that the appliances they had seen when viewing the home had been replaced.

Credibility

[18] Before dealing with the issues before the Court, it is important that I make observations about credibility. The parties were each cross-examined on their affidavits and gave conflicting evidence on key points. Counsel for Ms. Boucher says that in the face of such conflicting evidence, I should accept the evidence of Ms. Boucher over that of Mr. Armsworthy.

[19] Before dealing with the credibility of each party, I will make a few general observations about credibility.

[20] There may be two relevant aspects to credibility. The first is whether a witness lied or purposefully misrepresented facts; i.e., was the witness truthful?

[21] The second aspect of credibility is whether the witness was factually accurate and reliable; i.e., was his or her evidence trustworthy in terms of his or her judgement and memory.

[22] This Court may reject or accept some or all of a witness' testimony, taking into account many factors, including, but not limited to, the witness' ability to recall, motivation, probability or plausibility, and internal or external consistency. Other factors include the circumstances of the witnesses' observations and whether the evidence is inherently reasonable.

[23] In determining whether a witness is credible, this Court should apply common sense, logic and its own knowledge and experience of human behaviour when deciding issues of credibility.

Mr. Armsworthy's Credibility

[24] In cross-examination, Mr. Armsworthy admitted that he has had a "girlfriend" for the past four (4) years (BB). He said that BB lives in Digby with her children. He admitted in cross-examination that he sometimes spends as much as two (2) weeks per month with her. He admitted that he does not receive an HST rebate because Revenue Canada considers that he and BB live together at his home in Half Island Cove, Nova Scotia. BB receives the HST rebate. Mr. Armsworthy did not indicate on his January 11, 2017 Statement of Expenses that he was living with anyone, or sharing expenses with anyone. He was required to provide this information and did not do so.

[25] On cross-examination Mr. Armsworthy said that BB receives \$155 per month from an old age security pension and receives an HST rebate in the range of \$68 to \$100 every 3-4 months.

[26] In his Affidavit sworn October 31, 2016, Mr. Armsworthy stated that prior to a workplace injury in April, 2013, he was earning a gross income of approximately \$50,000 - \$55,000 per year. In fact, his gross employment income was slightly over \$72,000 as is evident from his 2012 Income Tax and Benefit Return, attached as an exhibit to Ms. Boucher's Amended Affidavit sworn June 5, 2017.

[27] Mr. Armsworthy's Affidavit evidence was that the parties did not start living together until June 2012 when he purchased the mini-home which became the marital home. Ms. Boucher's evidence was that after they married on April 19, 2012, Mr. Armsworthy took additional days off work and thereafter he returned to work for four (4) weeks, returning late May 2012.

[28] When sworn in prior to giving evidence before this Court, Mr. Armsworthy was asked his occupation. He replied, "I'm semi-retired." Yet, his evidence before this Court was that he was totally disabled and unable to work. He provided the Court with no evidence supporting total disability, apart from evidence that he is in receipt of workers' compensation benefits. He offered no medical evidence in support of total disability. He admitted in cross-examination that he had tried three times to qualify for Canada Pension Plan disability benefits and was denied each time.

[29] Mr. Armsworthy said that after his lawyer had drafted the Domestic Contract, he signed it right away, but that it took "months" for Ms. Boucher to sign the document. In fact, Ms. Boucher executed the document on July 3, 2013, and Mr. Armsworthy executed it on July 4, 2013.

Ms. Boucher's Credibility

[30] Ms. Boucher gave a detailed and straightforward account of the events leading to her marriage to Mr. Armsworthy. She readily admitted that she had removed items from the mini-home after the final separation and that these were not appliances and furnishings which she had brought with her to the marriage. Ms. Boucher's evidence was generally consistent with the documentary evidence before this Court. I find her evidence was credible.

Conclusions on Credibility

[31] Mr. Armstrong has shown himself to be an untrustworthy witness, either because he is prepared to be untruthful or because he has a faulty memory, or both. Where the parties have given conflicting evidence on key issues, I accept the evidence of Ms. Boucher over that of Mr. Armsworthy.

Issues:

1. The Granting of a Divorce
2. The Interpretation of the Domestic Contract dated July 3, 2013
3. The Division of Property
4. Continuation of Medical and Dental Coverage for Ms. Boucher

5. Spousal Support

6. Costs

Issue 1: The Granting of a Divorce

[32] The parties agree that all the jurisdictional and procedural requirements to grant a divorce have been met. The evidence led at the start of the hearing established that the parties have been living separate and apart for more than a year, and that there has been a breakdown of the marriage with no possibility of reconciliation.

[33] I granted the divorce on December 5, 2017.

Issue 2: The Interpretation of the Domestic Contract dated July 3, 2013

[34] As noted earlier in this decision, the parties entered into a Domestic Contract on July 3, 2013. Each had independent legal advice prior to executing the contract. In August 2013, only a short time after signing the contract, the parties separated.

[35] Both parties rely on the Domestic Contract. They agree that the contract is valid and binding.

[36] The parties agree that, but for the Domestic Contract, certain of the provisions of the New Brunswick *Marital Property Act* S.N.B. 2012, c. 107 would apply to the matters in dispute.

[37] Prior to reviewing key provisions of the Domestic Contract, I will refer to relevant provisions of the *Marital Property Act*.

[38] I note that section 1 of the New Brunswick *Marital Property Act* states that a “domestic contract” means a domestic contract as defined in Part 3. Part 3 of the *Marital Property Act*, under the heading “Definitions” provides:

33 The following definitions apply in this Part

“domestic contract” means a marriage contract, separation agreement or an agreement entered into under section 35.

“marriage contract” means an agreement entered into under section 34.

“separation agreement” means an agreement entered into under section 36.

[39] Under the heading “Marriage contract” s. 34(1) of the New Brunswick *Marital Property Act* provides:

34(1) Two persons may enter into an agreement, before their marriage or during their marriage while cohabiting, in which they agree on their respective rights and obligations under the marriage or on separation or the annulment or dissolution of the marriage or on death, including:

- (a) Ownership in or division of property,
- (b) Support obligations, and
- (c) Any other matter in the settlement of their affairs.

[40] Paragraph 37A of the *Marital Property Act* provides that a domestic contract and any agreement to amend or rescind it must be in writing, be signed by the parties and witnessed.

[41] The *Marital Property Act* provides in s. 42 that provisions of the domestic contract prevail over the provisions in the *Act*. However, s. 43 provides that a Court may disregard any provision of a domestic contract if the Court is of the view that to apply the provision would be inequitable, if the spouse entered into the contract without independent legal advice.

[42] I return now to the Domestic Contract. Key provisions of the contract are as follows:

[43] Paragraph 1(b) provides:

“This is a Domestic Contract as defined by s. 35 of the Marital Property Act S.N.B. 2012, c. 107.”

[44] The parties specifically agreed that the Domestic Contract would prevail over the *Marital Property Act*. In that regard, para. 2(g), under the heading, “*Marital Property Act*” states:

(g) Marital Property Act

(i) The rights and obligations of Jerry and Sandra, whether arising during marriage, either before or after cessation of cohabitation, or upon and after divorce or annulment, including the rights and obligations of each of them with respect to:

- (A) Possession of property; and
- (B) Ownership in or division of property, are governed by this Agreement which prevails over all provisions of the Marital Property Act.

(ii) Jerry and Sandra Agree that this Agreement is a Domestic Contract under the provisions of the Marital Property Act and is in replacement of the rights and obligations arising from the relationship which are set out in the Marital Property Act.

[45] Paragraph 2(k) addresses the payment of spousal support as follows:

(k) Spousal Support

- (i) If the parties separate, Sandra shall be entitled to spousal support.

[46] Paragraph 2(l) provides that the law governing the interpretation and implementation of the contract was the “prevailing from time to time in the Province of New Brunswick.”

[47] With this review, I conclude that the Domestic Contract is a marriage contract as defined in the *Marital Property Act*. Both parties had independent legal advice prior to signing the contract. I find that the provisions of the Domestic Contract apply. If there is a conflict between the *Marital Property Act* and the Domestic Contract, the provisions of the Domestic Contract will prevail.

Issue 3: The Division of Property

[48] The Domestic Contract provides that real or personal property acquired by either party prior to the marriage remains the property of the owner. Paragraph 2(c)(i) of the Domestic Contract under the heading, “Before Acquired Property” states:

- (i) Before Acquired Property
 - (A) Jerry shall not have any claim either in law or in equity to any Before Acquired Property of Sandra’
 - (B) Sandra shall not have any claim either in law or in equity to any Before Acquired Property of Jerry:
 - (C) During the continuance of cohabitation or marriage, both Jerry and Sandra shall have full rights to own, control and dispose of their Before

Acquired Property as if cohabitation or marriage did not exist, and this without the necessity of the other party joining in any transaction.

[49] The definition of “Before Acquired Property” in the Contract includes reference to personal and real property acquired by either party before marriage, as well as any income or proceeds from the sale or disposition of such property.

[50] The Contract also defines “After Acquired Property” as follows in s. 2(a)(iii):

“After Acquired Property” shall mean and include property acquired by either party after the day of marriage as well as any income or proceeds from the sale or disposition thereof or any other property acquired or purchased with such proceeds or income or any income earned from such proceeds or income.

[51] Paragraph 2(c)(ii) of the Contract addresses “After Acquired Property” as follows:

(A) Except as provided in this Agreement, Jerry and Sandra will each retain sole ownership, control and enjoyment of all of his or her property, free from any claim by the other;

(B) All After Acquired Property, which is not held in both their names, will belong exclusively to the one in whose name the property is held, free of any claim by the other.

[52] Paragraph 2(c)(i) of the Contract confirms the parties’ intention to each keep for themselves the property they brought into the marriage. Under the heading, “Separate Property” in para. 2(c)(iii) each lists the property which shall remain in their exclusive possession, free of any claim of the other.

[53] The separate property of Sandra Boucher is listed as follows:

- (1) Bank Accounts in the sole name of Sandra;
- (2) RRSP’s in the sole name of Sandra;
- (3) Investments in the sole name of Sandra;
- (4) Assorted furniture provided by Sandra situate at the marital home.

[54] The separate property of Jerry Armsworthy is listed as follows:

- (1) Real Property at RR #2, Guysborough Cove, Half Island Cove, Nova Scotia;
- (2) Real Property at Indian Lake, Nova Scotia;
- (3) 2012 Ford F150 motor vehicle;
- (4) 2010 Ski-Doo 600E snowmobile;
- (5) 2001 Kawasaki ATV;
- (6) 2010 snowmobile trailer.

Pension/RRSP Division

[55] Mr. Armsworthy did not attach copies of his personal income tax returns for the preceding three tax years when he swore his December 11, 2014 Statement of Income. In his sworn Statement of Property prepared on December 11, 2014, Mr. Armsworthy did not list any Registered Retirement Savings Plan; nor did he list a pension. However, his 2012 Income Tax Return (which was attached to Ms. Boucher's amended Affidavit of June 5, 2017) attaches receipts from a Royal Bank Retirement Savings Plan indicating a contribution amount of \$2,711.97.

[56] During closing arguments, counsel agreed that Ms. Boucher was entitled to one-half the growth in Mr. Armsworthy's pension from April 19, 2012 to June 20, 2012 and from August 22, 2012 to August 29, 2013. However, as a result of inquiries this Court made of counsel after the hearing had concluded, and resulting efforts on the part of counsel for Mr. Armsworthy to obtain information from Mr. Armsworthy's employer, Secunda Canada, about the pension, it was revealed for the first time that Mr. Armsworthy seems not to have a pension plan.

[57] On June 20, 2018, Ms. Sumbu filed with this Court (on consent of both counsel) extensive disclosure which included information about Mr. Armsworthy's employer group RRSP and income tax information. I agreed to accept this as evidence.

[58] I requested counsel provide submissions to this Court as to the impact of the new disclosure on their client's positions and each did so on August 17, 2018.

[59] Counsel agree that despite Mr. Armsworthy's admittedly confusing testimony about having a pension with his employer, Secunda Marines Services Limited, that the recent disclosure does not indicate that such a pension exists.

[60] Counsel provided me, on consent, with a form of order providing for the division of pension benefits, pension benefit credits, supplementary benefits and other benefits earned during the marriage, should it be determined that Mr. Armsworthy does in fact have a pension. I will sign that Order.

[61] What the new documentation from Mr. Armsworthy does show is that prior to the marriage (in 2011) Mr. Armsworthy received employer contributions to a group RRSP identified as "Secunda Marine Services Limited." In 2011, Mr. Armsworthy withdrew monies from this RRSP, suggesting that it was not vested. There were no employee contributions to the group RRSP in 2011.

[62] At some point in 2012, the holder of the group RRSP changed to the Secunda Canada LP. The total value of the RRSP near the end of the first separation in June, 2012, was \$3,698.45.

[63] The total value of the group RRSP in early August, 2012, when the parties reconciled was \$4,798.55.

[64] As noted previously, the parties separated finally in August, 2013.

[65] The documentation shows that Mr. Armsworthy withdrew \$4,300 from the RRSP at some point in the second quarter of 2013. By September, 2013, the total value of the RRSP was \$2,934.8

[66] Mr. Armsworthy made a further withdrawal from the RRSP so that by December 31, 2013, the value of the RRSP was \$1,443.23.

[67] Counsel agree that the Domestic Contract provides for the division of contributions to Mr. Armsworthy's RRSP's during the marriage. They have attempted to calculate the total employer contributions to the RRSP during the marriage. The petitioner's counsel says the total contributions were \$4,000.09 and suggests that the value owed to Ms. Boucher is \$2,000.05. Counsel for Ms. Boucher

calculates the total contributions at \$2,838.28 and suggests the amount payable to Ms. Boucher is \$1,419.14.

[68] After reviewing the documentation and submissions of counsel, I find that Mr. Armsworthy must provide Ms. Boucher with the sum of \$1,500.00 as representing an equal division of employer contributions made to the RRSP during the marriage.

The Marital Home and Debt Distribution

[69] The Domestic Contract refers to 46 Glenmar as the parties' matrimonial home at para. 1(a) and provides as follows at para. 2(b):

- (i) Jerry and Sandra currently occupy a home located at 46 Glenmar Drive, Fredericton, New Brunswick, aforesaid, which home is registered in Jerry's name solely, and which home is financed by Jerry solely, and it is agreed by the parties the equity of such home and fixtures, chattels and leased equipment attached to the property is to be shared equally between them should a separation occur. A bill of sale will be executed between the parties wherein the title of the home will be held by the parties as tenants in common. Should Jerry predecease Sandra, she shall have the option to reside in the home for her lifetime or for however long she prefers; when Sandra gives up her residency in the home or dies, whichever first occurs, title to the property shall revert to Jerry's children.
- (ii) Jerry and Sandra are to share equitably for the payment of the telephone, power, cable, groceries, water & sewer, and garbage collection related to the home, upon discussion.

[70] The undisputed evidence is that Mr. Armsworthy purchased the mini-home which became the marital home in June, 2012. Mr. Armsworthy's Affidavit evidence was that he purchased the mini-home new for \$92,000. He provided no other evidence to support the purchase price.

[71] Mr. Armsworthy's evidence was that the mini-home was paid for with a mortgage in the amount of \$95,000 from the Royal Bank. He did not provide any documentary evidence in support of the amount of the mortgage. Ms. Boucher, however, attached to her Amended Affidavit of June 5, 2017, a Statement of

Adjustments for the purchase of the home, prepared by a lawyer, and showing a balance due of \$98,065.26.

[72] Mr. Armsworthy's evidence was that he listed the mini-home for sale with a realtor in Fredericton in September, 2013. His evidence was that when the mini-home was listed for sale, the mortgage on the home was approximately \$88,000 to \$89,000. He said that the mini-home was fully furnished, with good quality appliances and furniture when listed and that the listing price was initially \$115,000. The furniture and appliances were included in the listing price.

[73] In his Affidavit, Mr. Armsworthy says that his realtor received an inquiry about the mini-home from a couple from Ontario. The couple viewed the mini-home in September 2013, and scheduled a second visit a week to ten days later. Mr. Armsworthy's evidence was that, unbeknownst to him, prior to the second viewing by the Ontario couple, Ms. Boucher entered the mini-home and removed what he describes as all of the good quality furniture and appliances, damaged the interior of the home in the process, and replaced the good quality furniture and appliances with what he says were cheap furniture and appliances.

[74] Mr. Armsworthy states in his Affidavit that as a result of the removal of the furniture and appliances by Ms. Boucher, the potential Ontario purchasers refused to purchase the mini-home after their second viewing. That evidence is hearsay. Mr. Armsworthy does not state the basis of his knowledge and belief that the purchasers refused to purchase because of the furniture removal. He did not file either their Affidavit evidence or that of his realtor in support of the assertion.

[75] Mr. Armsworthy says that from September, 2013 until November 2014, the realtor did not receive any offers on the mini-home. He attributes, in large part, the lack of offers to Ms. Boucher's removal of the appliances he purchased. His Affidavit evidence was that, as a result of the lack of offers, the listing price was dropped in stages, until the mini-home sold in November 2014 for \$85,000. Mr. Armsworthy provided no other evidence in support of the selling price.

[76] Mr. Armsworthy's evidence was that he was forced to borrow \$9,000, by way of a personal loan from Citifinancial, to cover the payout of the mortgage, the realtor's commission and legal expenses of the sale. He says that he made payments

on the \$9,000 loan until August, 2016, when he consolidated various debts by way of a personal loan.

[77] There is insufficient evidence before this Court to conclude that there was a loss on the sale of the mini-home, let alone to conclude that Ms. Boucher's alleged conduct caused the loss. The evidence provided by Mr. Armsworthy concerning the supposed chance to sell the mini-home to the Ontario couple which was allegedly thwarted by Ms. Boucher's removal of household items, was ripe with hearsay and I give it no weight.

[78] Further, no supporting documentation whatsoever was provided to the Court as to the sale price of the home or the amount of the outstanding mortgage.

[79] I note that in his Statement of Property prepared on December 11, 2014, Mr. Armsworthy indicated that the mortgage on the mini-home stood at \$85,181.53. The home was sold for \$85,000. Any deficiency resulting on the sale was very small.

[80] Mr. Armsworthy seeks a contribution from Ms. Boucher of \$4,500 as her share of what he says is a matrimonial debt, arising from the so-called loss on the sale of the mini-home. I decline to so order because there is an insufficient evidentiary basis to support a loss on the sale of the home.

Issue 4: Continuation of Medical and Dental Coverage for Ms. Boucher

[81] The Domestic Contract provides for the continuation of medical and dental plan coverage for Ms. Boucher on separation. Paragraph 2(c)(vii) provides:

If the parties separate, Jerry agrees to maintain Sandra on his medical/dental plan for as long as his employer/insurer allows him to do so.

[82] Following the separation, Mr. Armsworthy took no steps to find out, and advise Ms. Boucher, whether his employer or insurer would allow for Ms. Boucher to have ongoing coverage.

[83] As a result, Ms. Boucher advanced a claim for reimbursement of medical expenses (identified in her financial statements and in her Affidavit) in the amount of \$9,443.85.

[84] Counsel for Ms. Boucher outlined this claim in detail in her June 2017 pre-trial brief. (The trial was adjourned and did not proceed until December 5, 2017).

[85] Mr. Armsworthy filed a Reply Affidavit on July 31, 2017, which, for the first time, provided evidence from his employer, Secunda Canada, by way of letter dated June 16, 2017, that the group benefit insurer's definition of "spouse" precluded Ms. Boucher from being eligible for spousal benefits. No explanation was given by Mr. Armsworthy as to why it took him nearly four years to provide evidence that Ms. Boucher was ineligible to receive group medical and dental benefits under this employer's group plan.

Issue 5: Spousal Support

[86] It is to be recalled that the Domestic Contract provides that, "If the parties separate, Sandra shall be entitled to spousal support." The Contract does not provide how the amount of spousal support will be calculated, whether it will be paid periodically and for how long, or whether support will be paid by way of lump sum.

[87] Ms. Boucher claims prospective spousal support until Mr. Armsworthy turns 65 years of age (and presumably retires) in the amount of \$1,350 per month. This amount represents the maximum amount of income she says will permit her to continue to live in low-income housing. The figure does not come from application of the Spousal Support Advisory Guidelines (SSAG). Ms. Boucher also claims retroactive spousal support by way of lump sum payment of \$35,000. This figure is reached by considering periodic spousal support of \$1,350 per month for four (4) years (date of separation to the approximate date of this Court's decision) and applying a discount rate to account for the fact that the lump sum is not taxable in Ms. Boucher's hands. The figure of \$35,000 is slightly less than the likely exact figure that calculating the precise amount would be.

[88] Ms. Boucher asks the Court to incorporate a review of spousal support into the Court's order to account for the possibility that Mr. Armsworthy may not retire at age 65 years.

[89] Mr. Armsworthy says that he cannot afford to pay Ms. Boucher spousal support and that an order requiring him to pay support will push him to personal bankruptcy.

[90] Spousal support is governed by s. 15.2 of the *Divorce Act*. The applicable provisions are as follows:

Spousal support order

15.2(1) A court of competent jurisdiction may, on application by either or both spouses, make an order requiring a spouse to secure or pay, or to secure and pay, such lump sum or periodic sums, or such lump sum and periodic sums, as the court thinks reasonable for the support of the other spouse.

...

Terms and Conditions

(3) The court may make an order under subsection (1) or an interim order under subsection (2) for a definite period or until a specified event occurs, and may impose terms, conditions or restrictions in connection with the order as it thinks fit and just.

Factors

(4) In making an order under subsection (1) or an interim order under subsection (2), the court shall take into consideration the condition, means, needs and other circumstances of each spouse, including

- (a) the length of time the spouse cohabited;
- (b) the functions performed by each spouse during cohabitation; and
- (c) any order, agreement or arrangement relating to support of either spouse.

Spousal Misconduct

(5) In making an order under subsection (1) or an interim order under subsection (2), the court shall not take into consideration any misconduct of a spouse in relation to the marriage.

Objectives of spousal support order

(6) An order made under subsection (1) or an interim order under subsection (2) that provides for the support of a spouse should

- (a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;

- (b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;
- (c) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and
- (d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.

Case Law

[91] Two key decisions of the Supreme Court of Canada set out the principles which govern spousal support: *Moge v. Moge* [1992] 3 S.C.R. 813 and *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420.

[92] Jesudason J. in *Gates v. Gates*, 2016 NSSC 49 (NSSC), notes that the principles in these two decisions have been considered and applied by courts across Canada, including the Nova Scotia Supreme Court and the Nova Scotia Court of Appeal. At para. 63 of his decision, Jesudason J. usefully provides a summary of the principles from the authorities on the issues of entitlement, quantum and duration.

[93] I quote from his decision as follows:

63 a) Entitlement

i) Generally

* The starting position is that marriage is a “joint endeavour”. The default presumption of this socio-economic partnership is mutuality and interdependence. Absent indications to the contrary, marriages are generally premised on obligations and expectations of mutual and co-equal support (*Bracklow*, at para. 20);

* When a marriage breaks down, however, the presumption of mutual support that existed during the marriage no longer applies. This is reflected in the *Divorce Act* which requires the court to determine issues of support by reference to a variety of objectives and factors (*Bracklow*, at para. 21);

* The *Divorce Act* recognizes three conceptual bases for entitlement to spousal support, namely: compensatory, non-compensatory and contractual. These three bases of support flow from the statutory

provisions and arise from different philosophies and theories of marriage and marital breakdown (*Bracklow*, at para. 15);

* The overarching principle that must be kept in mind on spousal support is “equitable sharing” of the economic consequences of marriage or marriage breakdown (*Moge*, at paras. 73-77). It is not a question of choosing either one model of spousal support or another. Rather, it is a matter of applying the relevant factors and striking the balance that best achieves justice in the particular case before the court. (*Bracklow*, at para. 32); and

* “Condition” of the spouses includes such things as their ages, health, employability, obligations, dependants and overall situation in life.

* “Means” is a broad term and should be generously interpreted to give effect to the statutory purpose of spousal support. It would include all financial resources, capital and income, as well as earning capacity. It also takes into account capital acquired after the marital breakup (*Leskun v. Leskun*, 2006 SCC 25; *Richards v. Richards*, 2012 NSCA 7, at para. 45);

* “Needs” is a flexible concept that may vary according to the circumstances of the parties and the family unit as a whole. It does not necessarily end when the spouse seeking support achieves a subsistence level of income or any level of income above subsistence (*Yemchuk v. Yemchuk*, 2005 BCCA 406);

* While all relevant circumstances must be considered, in long term marriages in which the party seeking support has not been in the workforce as a result of assuming domestic and child care responsibilities, demonstrated need and a significant disparity in standards of living between the former spouses are strong indicators that a support order is required to address the financial consequences of the breakdown of the marriage (*Fisher v. Fisher*, 2001 NSCA 18, at para. 86).

ii) Compensatory Support

* Compensatory spousal support is grounded in the “independent clean-break” model of marriage which sees each party to a marriage as an autonomous actor who retains his or her economic independence throughout the marriage. This model suggests that a former spouse, having compensated the other spouse in a restitutionary sense for any economic costs of the marriage on the

other spouse, should be entitled to move on with his or her life without further financial obligation (*Bracklow* at para. 24);

* Compensatory support should be awarded where it would be just to compensate a spouse for his or her contribution to the marriage or for sacrifices made or hardships suffered as a result of the marriage (*Bracklow*, at para. 18).

* Examples of circumstances that may lead to an award of compensatory support could include, but are not limited to, where a spouse's education, career development or earning potential have been impeded as a result of the marriage, or the spouse has contributed financially either directly or indirectly to assist the other spouse in his or her education or career development (*Shurson v. Shurson*, 2008 NSSC 264, para. 13);

* Often, the most significant economic consequence of marriage or marital breakdown arises from the birth of children. Traditionally, this would often result in the wife cutting back on participating in the workforce in order to care for the children potentially jeopardizing her ability to ensure her own income security and independent economic well-being. In such situations, compensatory support may be a way to compensate for such economic disadvantage (*Moge*, at para. 80); and

* When considering entitlement to compensatory support, 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. A 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 (*Moge*, para. 84).

iii) Non-compensatory support

* Non-compensatory support is grounded in the “basic social obligation” or “mutual obligation” model of marriage which stresses that marriage creates interdependencies which cannot be easily unravelled. These interdependencies create expectations and obligations that the law recognizes and enforces. It holds that a mutual obligation of support may arise after the marital “break” and places the primary burden of support for a needy partner who cannot attain post-marital self-sufficiency on the former spouse rather than the state (*Bracklow*, at paras. 23, 27, 30 and 31);

* Non-compensatory support acknowledges that even if a spouse has not foregone any career opportunities or has not otherwise been disadvantaged by the marriage, the court is required to consider that spouse's actual ability to fend for himself or herself and the effort that was made to do so, including efforts after the marital breakdown (*Bracklow*, at para 40); and

* Non-compensatory support focusses on the “needs” and “means” of the parties. It recognizes that spouses may have an obligation to meet or to contribute to the needs of their former spouses where they have the capacity to pay, even in the absence of a contractual or compensatory foundation for the obligation. Need alone may be enough (*Bracklow*, at para. 32, 43 and 44).

iv) Contractual support

* Contractual support obligations take into account support agreements, express or implied, between spouses. They recognize that spousal support, whether on a compensatory and/or non-compensatory basis, can be subject to individual variation by the parties by contract. Thus, consensual considerations may either create or negate an obligation to support, under appropriate circumstances (*Bracklow*, at paras. 18, 25 and 38);

b) Quantum

* The factors that go to entitlement also have an impact on quantum although, for practical purposes, it is often useful to proceed by establishing entitlement first and then effecting necessary adjustments through quantum. The real issue, however, is what support, if any, should be awarded in the situation before the judge on the factors set out in the *Divorce Act* (*Bracklow*, at para. 50);

* Fixing the amount of spousal support is a discretionary exercise after considering the factors set out in s. 15.2(4) of the *Divorce Act* and the objectives of spousal support orders as set out in s. 15.2(6) (*Bracklow*, at para. 18);

* All four objectives enumerated in s. 15.2(6) of the *Divorce Act* are to be borne in mind in making an award of spousal support, and none is paramount. (*Bracklow*, at para. 35);

* There is no hard and fast rule. The judge must look at all the factors in the light of the stipulated objectives of support, and exercise his or her discretion in a manner that equitably alleviates the adverse consequences of the marriage breakdown (*Bracklow*, at para. 36);

* While some factors may be more important than others in a particular case, the judge cannot proceed at the outset by fixing on only one variable. The quantum awarded, both in the sense of amount and duration, will vary with the circumstances and practical and policy considerations affecting any given case (*Bracklow*, at para. 53);

* The fundamental principles in spousal support cases are balance and fairness. The goal is an order that is equitable having regard to all of the relevant circumstances (*Fisher v. Fisher*, 2001 NSCA 18, at para. 82);

* The duty of support is on the payor to provide “reasonable support”. The key question is what is reasonable support having regard to all the circumstances (*Saunders v. Saunders*, 2011 NSCA 81 at para. 53; *Read v. Read*, 2000 NSCA 33 at para. 12; and *Mosher v. Mosher* (1999), 177 N.S.R. (2d) 236 (S.C.) at p. 238);

* It does not follow that the quantum of spousal support must always equal the amount of the need which is established. For example, nothing forecloses making an order for support for a portion of a spouse's need, whether viewed in terms of amount or duration (*Bracklow*, at para. 54); and

* As marriage should be generally 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 (Moge at p. 870). However, length of marriage is only one factor which the judge must consider. Thus, the general expectation for long-term marriages towards a more equal standard of living upon marital breakdown is not an immutable rule constraining the factors applicable to determining quantum of spousal support (*Bracklow*, at para. 54).

c) Duration:

* While each case must be decided upon its own facts, in many cases involving lengthy marriages, courts have imposed indefinite orders for support. Indefinite support is often appropriate after a long-term marriage because the dependent spouse is often at an age which makes it difficult to achieve economic self-sufficiency (*Fisher v. Fisher*, [2008] O.J. No. 38, at para. 35); and

* Marriage involves the potential for lifelong obligation (*Bracklow*, at para. 57). After a long and traditional marriage, the ability of a

dependant spouse to retrain or reintegrate into the workforce in order to become self-sufficient may be irreparably damaged. In such cases, it is often appropriate to issue an indefinite, long-term spousal support order (*Moge*, at para.69; *Riad v. Riad*, 2002 ABCA 254, at para. 43;).

[94] Before determining the spousal support to be paid by Mr. Armsworthy, I start with a review of each party's employment income prior to the marriage.

The Parties' Respective Conditions, Means, Needs and Other Circumstances ***Ms. Boucher***

[95] Ms. Boucher has suffered from serious health concerns since a young woman. She was diagnosed with Type 1 Diabetes at four (4) years of age and has been insulin-dependent since that time. Unfortunately, at 21 years of age she lost 90% of her vision due to complications from the diabetes; she is considered legally blind.

[96] As a result of her disabilities, Ms. Boucher has not been employed for many years. Accordingly, she did not earn sufficient CPP credits to support an application for a CPP disability benefit. However, following the breakdown of her marriage to ND and the division of pension credits, she was approved for CPP disability benefits and has been in receipt of these benefits since July, 2005.

[97] Upon divorcing ND, Ms. Boucher received 50% of his Department of National Defence pension which she invested as a LIRA (Locked In Retirement Account). The evidence disclosed that the opening balance of the LIRA in 2005 was \$148,207.02. Ms. Boucher provided a statement for the LIRA for the period July 1, 2011 to December 31, 2011. The statement shows an opening balance on July 1, 2011 as \$161,805.17 and a closing balance on December 31, 2011 of \$143,791.19.

[98] In November, 2011, Ms. Boucher converted the LIFA to a LIF (Life Income Fund). At that time the funds in the LIFA were \$153,037. Ms. Boucher directed that the maximum annual payment in a lump sum be made. Ms. Boucher's reason for the conversion and the drawing down of the fund was that she wanted to have funds to buy Christmas gifts for what she said were the thirteen (13) new family members she enjoyed as a result of her relationship with Mr. Armsworthy.

Ms. Boucher said that her plan before her marriage to Mr. Armsworthy had been not to draw on the LIRA until age 65.

[99] Every year after 2011 Ms. Boucher drew the maximum amount permitted from the LIF which was in the \$8,900 range in 2012 (the maximum amount decreased by a few hundred dollars each subsequent year).

[100] A 2015 Comparative Tax Summary shows 2015 income as \$18,010; 2014 income of \$17,954; 2012 income of \$23,509; and 2011 income of \$36,450. Ms. Boucher's evidence on cross-examination was that 2011's income was an anomaly resulting from her receipt of monies following her divorce from ND.

[101] Ms. Boucher's Statement of Income prepared on November 2, 2016, attached a copy of her 2015 personal income tax return and 2015 Notices of Assessment. These show income of \$9,370.32 from the CPP disability benefits and annuity payments from the LIF of \$8,302.32. Total income is indicated at \$18,009.64.

[102] Ms. Boucher's Statement of Income sworn March 18, 2017 shows monthly CPP disability income of \$790.23, monthly income from her LIRA in the amount of \$632.53. She lists total monthly income of \$1,486.76. In terms of expenses, in her Statement of Expenses sworn March 18, 2017, Ms. Boucher lists monthly rent (subsidized housing) of \$429, food costs of \$400 (diabetic/celiac diet), bus passes and taxes (the latter once per week) in the amount of \$102. She lists \$240 per month payments on a credit card with a balance of \$7,600. Her total income less expenses (\$1,667.14) nets a total deficit of \$220.88 per month.

[103] Ms. Boucher updated her financial situation in her Affidavit sworn June 5, 2017 and in her evidence at trial. She testified that to try to live within her monthly income of \$1,486.76 she has reduced her living expenses. For example, she reduced her grocery budget by \$200 per month, stopped physiotherapy treatment and servicing of her glass eye. She relies on her credit card to help meet her basic needs. Prior to her marriage to Mr. Armsworthy she said that she usually paid her credit card balance monthly. Her affidavit evidence was that her credit card balance was \$7,835.91.

[104] Taking all of that into account, the evidence shows that Ms. Boucher's budget is currently underfunded in the range of \$800 per month.

Mr. Armsworthy

[105] Mr. Armsworthy was cross-examined on his Affidavits. When asked his occupation after being sworn, Mr. Armsworthy said that he was “semi-retired.” However, during his cross-examination, he said that he could not work at any occupation and was totally disabled.

[106] This Court was not provided with any medical evidence that Mr. Armsworthy is totally disabled. While he is in receipt of workers’ compensation benefits, he provided no evidence as to the basis for his receipt of those benefits, apart from his own evidence that he was unable to work.

[107] Mr. Armsworthy claims that he is totally disabled as a result of a workplace injury in April, 2013. The evidence discloses that he receives non-taxable workers’ compensation benefits of approximately \$34,097 per year. If he continues to receive those benefits, they will end at age 65.

[108] From 2005 to date Mr. Armsworthy has been employed as an engineer three with Secunda Canada. A T4 issued by Secunda and attached to Mr. Armsworthy’s 2012 income tax return shows T4 earnings of \$58,038.66. A T4 attached to the same income tax return shows T4 earnings of \$14,293.59. Mr. Armsworthy’s total income for income tax purposes on his 2012 tax return is \$76,011.93.

[109] I note that Mr. Armsworthy’s 2012 return was attached as an exhibit to Ms. Boucher’s amended Affidavit, sworn June 5, 2017, and not provided by Mr. Armsworthy himself.

[110] Mr. Armsworthy did not attach copies of his personal income tax returns filed with Revenue Canada to his Statement of Income prepared on December 11, 2014. Attached to Mr. Armsworthy’s Statement of Income prepared on January 11, 2017, he attached a 2014 Tax Return Summary which showed workers’ compensation benefits of \$34,297.82, employment income of \$1,321.50 from Secunda Canada, and CPP benefits of \$6,758. The latter benefit is a CPP survivor’s pension relating to his widow. RRSP income is indicated to be \$960.

[111] Comparative Tax Summaries show Mr. Armsworthy’s 2013 income as \$73,353, his 2014 income as \$43,338 (CPP from his widow and WCB benefits), and

his 2015 income as \$43,074 (CPP from his widow and WCB benefits). A Tax Assessment attached as an exhibit to Mr. Armsworthy's Reply Affidavit sworn on July 31, 2017, shows total income of \$43,765, once again, a combination of CPP benefits and WCB benefits, the latter in the amount of \$34,029. There is also a small amount of monthly income resulting from his re-partnering with BB.

[112] Mr. Armsworthy swore a Statement of Property on January 20, 2015. He lists real estate valued at \$75,000 (where he lives with BB) at Half Island Cove, Nova Scotia. He also owns land he values at \$10,000 in Indian Harbour, Nova Scotia. His evidence is that he is the sole owner of both properties.

[113] Mr. Armsworthy said that he re-mortgaged the Half Island property two to three years ago. At the time the property had been mortgage free. He did not provide this Court with copies of the mortgage documents. He said he re-mortgaged the property for approximately \$80,000. He said he borrowed the money to pay back loans and bills from when he was living in New Brunswick with Ms. Boucher. He described these as credit card debt, the mortgage on the matrimonial home, lawyer's fees and a line of credit.

[114] I note that Mr. Armsworthy's Statement of Expenses does not list any mortgage payments, although his affidavit evidence was that after re-financing the Half Island property and consolidating other debt, he made monthly mortgage payments of \$480.

[115] Mr. Armsworthy listed the matrimonial home mortgage on his Statement of Expenses at \$85,181.53. The home sold for approximately \$85,000, so the majority of the mortgage debt was paid off.

[116] During cross-examination Mr. Armsworthy at first denied consolidating his debt with the \$80,000 mortgage on the Half Island property (saying the bank would not allow him to do so) but when pressed, he admitted that he had consolidated his debt and paid off the line of credit (listed at \$48,594.92 on his Statement of Expenses) with the \$80,000 borrowed.

[117] Mr. Armsworthy lists as an expense a car loan of \$28,424.40

[118] He purchased a new vehicle in 2014. This is a more expensive vehicle than he owned when married to Ms. Boucher.

[119] He lists credit card debt of \$1,200; \$8,553.05; and \$1,000 all of which he said he consolidated into the \$80,000 re-financing.

[120] When it was put to him in cross-examination that the debt listed on his Statement of Expenses totals approximately \$60,000 and not \$80,000, he said he borrowed either \$10,000 or \$20,000 to pay his lawyer after he separated from Ms. Boucher.

[121] Mr. Armsworthy denied that the \$48,594 on his line of credit had accumulated before he met Ms. Boucher.

[122] Mr. Armsworthy said he paid \$2,600 for an engagement ring. He denied owing anything on his line of credit prior to meeting Ms. Boucher apart from \$1,000 or \$2,000. He produced no documentary evidence in support of this evidence.

[123] Rather, his evidence was that during the two and one-half years he was with Ms. Boucher he ran up close to \$50,000 in debt on his line of credit. One again, he provided no documentary evidence in support.

[124] Mr. Armsworthy's Statement of Property lists a snowmobile valued at \$7,000; an ATV valued at \$1,500 and a snowmobile trailer valued at \$1,400.

[125] His evidence was that he did not use any of this equipment; rather, he was keeping it for the use of his grandchildren.

[126] Mr. Armsworthy's Statement of Expenses lists a monthly mortgage of \$480 as well as \$150 per month for house repairs and maintenance. He said that he paid to put a new deck on the Half Island Cove property two years ago. He denied using money from the \$80,000 re-financing to pay for the new deck.

[127] Mr. Armsworthy admitted that the \$600 per month he listed on the Statement of Expenses was for him and BB.

[128] Mr. Armsworthy did not list his car loan on his Statement of Expenses. He said that the car loan was "in with" the \$875 he lists as a "personal loan payment."

He said he borrowed money to make car payments and to pay off two credit cards, and that this loan was separate from the \$80,000 re-financing. He said that he thought he borrowed \$48,000, but denied that amount was the same \$48,000 (\$48,594.92) listed on his Statement of Property.

[129] Mr. Armsworthy was unable to say how much he owes on the mortgage (\$80,000) or the personal loan. He provided no documentation in support of the amounts owed.

[130] In his Affidavit sworn October 31, 2016 Mr. Armsworthy said that during his marriage to Ms. Boucher and during the period after their final separation and the sale of the matrimonial home (approximately 15 months) he accumulated further personal debts in the amount of approximately \$30,000, as a result of increased expenses related to the mini-home and “my decreased income, as a result of my injury.” On cross-examination he admitted that the \$30,000 may not be accurate.

Analysis

[131] Given the principles enunciated in the case law, the factors set out in s. 15.2(4) of the *Divorce Act* and the objectives of spousal support orders as set out in s. 15.2(6) of the *Divorce Act*, the questions I must answer on the issue of spousal support are as follows:

1. Has Ms. Boucher established an entitlement to spousal support on a compensatory, non-compensatory and/or contractual basis?
2. If so, what amount of spousal support should Ms. Boucher be awarded?
3. If spousal support is awarded, how long should it continue?
4. Should there be a retroactive award of spousal support and if so, in what amount?

Question 1: *Has Ms. Boucher established an entitlement to spousal support?*

[132] Ms. Boucher claims spousal support on a non-compensatory and contractual basis.

[133] Despite the short duration of the marriage, I find that in all of the circumstances, this is an appropriate case to order spousal support on a non-compensatory basis. Non-compensatory spousal support focuses on the needs of the spouses and their respective means, as well as the nature and duration of the marital relationship (*Bracklow v. Bracklow*, [1999] 1 S.C.R. 420 at para. 53).

[134] By marrying Mr. Armsworthy, Ms. Boucher became ineligible to receive spousal support from ND in the amount of \$1,500 per month. She lost the ability to live rent-free in the home owned by her brother. It is impossible for her to make up either the \$1,500 in income, or secure rent-free housing.

[135] Following separation, Mr. Armsworthy returned to his home in Nova Scotia. He continues to receive workers' compensation benefits and CPP benefits (from his widow) of approximately \$43,074 per year. The workers' compensation benefits are tax-free in the approximate amount of \$34,000.

[136] Sixteen months after separation, Ms. Boucher secured low-income housing with rent of approximately \$460 per month. She has a LIF and receives annuity payments from it of approximately \$8,300 per year. Her reported income is in the range of \$17,000 to \$18,000. Prior to the marriage, her income was in the range of \$24,000 to \$25,000 and she did not pay rent. She relies upon the food bank each month to subsidize her grocery order. She borrows money from her parents to help make ends meet. Ms. Boucher's June, 2017 Affidavit discloses a balance of \$7,835.91 on her credit card.

[137] Ms. Boucher has no earning capacity. While Mr. Armsworthy says he has no ability to work, unlike Ms. Boucher, he proffered no evidence to support that he is totally disabled.

[138] When I consider all of the evidence, I conclude that Ms. Boucher has suffered a clear economic hardship arising from the marriage and its breakdown. She has made out a case for entitlement to non-compensatory spousal support.

[139] I do not accept that Mr. Armsworthy lacks the means to pay spousal support. He clearly has the ability to borrow money. He said there was a mortgage on the Half Island property. The property he owns located at Indian Lake is mortgage free and valued by him at \$10,000.

[140] There is also a contractual basis for spousal support. The parties agreed that Ms. Boucher was entitled to spousal support upon separation.

[141] Paragraph 2(K) of the Domestic Contract provides:

If the parties separate, Sandra shall be entitled to spousal support.

[142] Despite this contractual provision, Mr. Armsworthy has not paid any spousal support to Ms. Boucher since their separation.

Questions 2 and 3: What amount of spousal support should be awarded to Ms. Boucher and how long should such support continue?

[143] Ms. Boucher says that she is entitled to retroactive spousal support from the date of separation (mid-August, 2013) to the date of this decision. She seeks a lump sum payment in the amount of \$35,000 for retroactive spousal support. Thereafter, she seeks periodic spousal support of \$1,350 per month until Mr. Armsworthy reaches 65 years of age, and presumably ceases to be eligible to receive the workers' compensation benefits he currently receives. Ms. Boucher requests that spousal support be judicially reviewed at that time.

[144] The \$1,350 per month that Ms. Boucher claims in periodic spousal support is not based upon application of the Spousal Support Advisory Guidelines (the "SSAG"). Rather the sum of \$1,350 is the maximum amount Ms. Boucher may receive and still remain eligible for low-income housing where she resides.

Application of the Spousal Support Advisory Guidelines

[145] Although the SSAG have been described as a useful tool, they are advisory and not binding.

[146] Counsel for both parties provided this Court with calculations based on the SSAG. Mr. Armsworthy's counsel calculated a range of \$53 (1.5%) to \$71 (2%) per month, for each of six months and one year. Ms. Boucher's counsel calculated a range of \$44 to \$58 per month. She suggests that this Court should not apply the SSAG which she says do not recognize the detrimental impact the marriage and breakup of the marriage have had on Ms. Boucher.

[147] I note that although Ms. Boucher had limited means before the marriage, she lived rent-free and received \$1,500 per month in spousal support from ND. She described living comfortably.

[148] After the marriage Ms. Boucher lives in subsidized housing, has lost the \$1,500 monthly spousal support and relies upon the food bank to subsidize her grocery order. She has no ability to replace the \$1,500 of spousal support lost on marriage to Mr. Armsworthy nor to obtain the rent-free housing status she enjoyed prior to the marriage. Although she had started drawing from her LIF prior to the marriage, I accept her evidence that she did so in a limited way to finance non-essential needs (i.e. gifts for family members). After the breakdown of the marriage, Ms. Boucher relies on LIF withdrawals to meet her basic needs. The LIF continues to shrink (it was valued at approximately \$144,000 at the end of December, 2011; as of the end of November, 2016 its value is approximately \$119,000, a decrease of some \$24,000) and will be substantially less than if she had let it grow and was only to draw on it at age 65 years, which had been her plan prior to marrying Mr. Armsworthy.

[149] Ms. Boucher will never achieve financial independence given her disability and the adverse impact the marriage and its breakdown has had on her.

[150] I am not satisfied that Mr. Armsworthy fully disclosed the amount of his debt or accurately described his expenses. He provided little documentation to support many of his assertions concerning debt. He gave a very confusing account of the re-financing of his Half Island property, and could not account for how all of the \$80,000 he borrowed on consolidation of his debt was used. He could not say how much debt is left on the \$80,000 loan or on another personal loan.

Conclusion of Questions 1 and 2:

[151] When I consider the totality of the evidence and balance the factors and objectives of the *Divorce Act*, I conclude that Ms. Boucher is entitled to spousal support of \$1,350 per month until Mr. Armsworthy reaches the age of 65 years on May 20, 2019. At that time Ms. Boucher or Mr. Armsworthy may apply to the Court for a reconsideration of the spousal support payable.

Question 4: Is Ms. Boucher entitled to retroactive spousal support; and if so, for how long?

[152] In determining whether an award of retroactive spousal support is appropriate, the court should consider the factors set out in *D.B.S. v. S.R.G.*, 2006 SCC 37 at paras. 99-116, which are:

- (a) whether there is a reasonable excuse for why spousal support was not sought earlier;
- (b) the conduct of the payor;
- (c) the circumstances of the recipient spouse; and
- (d) any hardship caused by a retroactive award on the payor spouse.

[153] In *Kerr v. Baranow*, 2011 SCC 10 it was noted that while *D.B.S.* was concerned with child as opposed to spousal support, the factors identified by the Court are also relevant to retroactive spousal support. However, the weighing of factors will differ in the context of spousal support; for example, concerns about delay or misconduct carry more weight in spousal support claims: *Ducharme v. Rempel*, 2016 BCCA at para. 16. Not one of the *D.B.S.* factors is determinative. The court should “strive for a holistic view of the matter and decide each case on the basis of its particular factual matrix”: *D.B.S.* at para. 99.

[154] Mr. Armsworthy filed his Petition for Divorce on March 6, 2015, approximately 18 months after the parties separated. Ms. Boucher filed an answer on May 19, 2015. She sought a divorce, spousal support and property division in accordance with the Domestic Contract. Mr. Armsworthy was on notice as of May 19, 2015 that Ms. Boucher was claiming entitlement to spousal support pursuant to the Domestic Contract. I find that Ms. Boucher did not delay in seeking spousal support.

[155] The trial of this matter was adjourned twice and eventually heard by this Court on December 5 and 22, 2017.

[156] Delay does become a factor when I examine the conduct of the payor.

[157] Mr. Armsworthy failed to pay any spousal support to Ms. Boucher despite that he knew she was claiming spousal support and was entitled to such support. His evidence that he was given legal advice prior to signing the Domestic Contract which led to a belief that his monthly spousal support obligation to Ms. Boucher would be \$26.00 per month, should they separate.

[158] Had he paid even that small amount, Mr. Armsworthy could have demonstrated that he recognized his agreement that Ms. Boucher was entitled to receive spousal support.

[159] Ms. Boucher was in need of spousal support through the time period after the separation to date, when Mr. Armsworthy had refused to pay her any amount. During this same time period she accumulated credit card debt of close to \$8,000 and has drawn down her LIF.

[160] I note that from the time this trial was heard to June of this year, there has been delay occasioned by Mr. Armsworthy's failure to produce information concerning his receipt of an RRSP or pension.

[161] On the evidence, Mr. Armsworthy has not made out significant hardship as a result of the obligation to pay retroactive support. Mr. Armsworthy has benefited financially from years of ignoring his spousal support obligations.

[162] Having regard to the *D.B.S.* factors, the evidence presented at trial and the unique circumstances of this case, I conclude that a retroactive award is appropriate.

[163] I find that the effective date of spousal support is the date when Mr. Armsworthy was put on notice of Ms. Boucher's claim on March 6, 2015.

[164] An award of retroactive spousal support in the form of a lump sum must recognize that, unlike current spousal support payments, the payor does not benefit from a tax deduction and the recipient does not pay tax.

[165] Counsel for Ms. Boucher asks for a retroactive award of \$35,000. As noted earlier in this decision, this amount is far less than the actual amount which would result from a mathematical calculation of retroactive support, even after deduction for income tax in the range of 30 per cent.

[166] Taking into account all of the circumstances, I am ordering lump sum retroactive spousal support in the amount of \$20,000. In doing so, I recognize that Mr. Armsworthy is not a wealthy man and will need to organize his affairs in a manner so as to meet this obligation. Based on the less than clear evidence he presented to this Court, and as noted previously, I am not satisfied that he gave this Court an accurate account of his current debts and obligations.

[167] Mr. Armsworthy must pay at least \$10,000 to Ms. Boucher on or before December 31, 2018, and the remainder on or before March 31, 2019.

Conclusions

[168] I order as follows:

1. Spousal support to be paid by Mr. Armsworthy in the amount of \$1,350 per month commencing October 1, 2018, until Mr. Armsworthy reaches the age of 65 years, after which time either party may apply to the court for a variation;
2. Lump sum spousal support to be paid by Mr. Armsworthy in the amount of \$20,000 on or before March 31, 2019;
3. The sum of \$1,500 to be paid by Mr. Armsworthy on or before October 30, 2018 as representing an equal division of employer contributions made to Mr. Armsworthy's RRSP during the marriage;
4. Costs payable to Ms. Boucher.

[169] I ask counsel to provide me with a draft form of order.

Issue 6: Costs

[170] If counsel are unable to agree on costs, I will receive written submissions within 30 calendar days of this decision.

Smith, J.