

SUPREME COURT OF YUKON

Citation: *NMK v JJM*,
2025 YKSC 35

Date: 20250616
S.C. No.24-D5591
Registry: Whitehorse

BETWEEN:

N.M.K.

PLAINTIFF

AND

J.J.M.

DEFENDANT

Before Chief Justice S.M. Duncan

Counsel for the Plaintiff

Christiana Lavidas

Counsel for the Defendant

Josélynn E.K. Fember

REASONS FOR DECISION

Overview

[1] This is a decision after a binding judicial settlement conference, which successfully resolved the outstanding property issues but did not resolve the spousal support issues. This decision addresses the plaintiff's request for retroactive and ongoing spousal support.

[2] The plaintiff and defendant were married for 14 years and were together for 20 years. They separated in November 2023.

[3] The plaintiff seeks retroactive spousal support on compensatory and non-compensatory grounds from December 2023 in the amount of \$1,200 per month until

September 2024, when she requests an increase to \$1,500 per month on the basis of increased need due to her disability status, for a total of \$24,300. On the same basis, she claims ongoing spousal support for an indefinite duration, which she would like to receive by lump sum. She seeks monthly payments of either \$2,336 per month or \$1,124 per month, depending on my findings of the defendant's earnings.

[4] The defendant opposes any order for spousal support based on the plaintiff's lack of entitlement on compensatory or non-compensatory grounds; his lack of ability to pay; the absence of any causal relationship between her disability and the marriage or its breakdown; and her conduct post-separation that he claims has affected his earnings. He also opposed her targeting of his day-school award payment, but the plaintiff clarified she only raised it to show his overall financial circumstances. If support is ordered, the defendant states it should be time-limited and not lump sum.

[5] I find that the plaintiff is entitled to a time-limited support award, on a non-compensatory basis, given her living circumstances and her long-term disability status. I order a review of the circumstances in October 2025 to determine the reasonableness of ongoing entitlement to support payments.

Brief Factual Background

Length of relationship and children

[6] The parties lived together as a couple from July 2003 to November 2023. They were married in July 2009. Both are First Nation citizens – the plaintiff is a citizen of [redacted], originally from Edmonton, Alberta, and the defendant is Ojibwe from [redacted], Ontario. Both have children from previous relationships – the defendant has a son who is now 31 years old and was 11 at the beginning of the relationship, and the

plaintiff has a daughter who is now 26 and was 6 at the outset of the relationship. The parties have no children together.

Employment

[7] Both parties worked in the areas of First Nations' traditional teachings. When they met, the plaintiff was a recreation director and the defendant a traditional parenting coordinator at [redacted], a non-profit organization committed to improving the spiritual, emotional, mental, and physical well-being of First Nations peoples.

[8] In 2013, the defendant began working as a cultural practitioner at [redacted]. There is no evidence of his salary in that position. In 2021, he established his own consulting business doing contract work for various First Nations throughout the Yukon. In 2023, his gross earnings were \$212,388.34, in 2024, his gross earnings were \$124,778.54, with net earnings of \$61,451.77.

[9] In 2014, the plaintiff [began working for the Yukon government] a position she continues to hold. Her annual salary was \$94,165 in 2024, although she received \$69,165.43 in 2024 and the proportional equivalent to date in 2025 due to her disability status since August 2024.

Other Income

[10] The defendant received \$150,000 in December 2023 under the Federal Indian Day School Settlement to compensate him for harms suffered while attending [redacted] Day School in Ontario. He also received \$56,800 on December 18, 2024, as part of [redacted] Treaty litigation settlement payments.

[11] In addition to her salary from the Yukon government, the plaintiff earned some monies from contracts between May 2021 and July 2023, ranging from \$650 to \$3,375.

These contracts were for [redacted] and were associated with the defendant's work as a cultural practitioner, first as a[n] [redacted] employee and then as a consultant, at women's, men's or family camps [redacted]. The plaintiff's work included leading smudging circles, sewing activities, ceremonial teachings, talking circles, and traditional medicines. She also did some contract work. [redacted]. Some of these contracts were obtained through referrals from the defendant.

[12] The plaintiff also assisted the defendant from time to time in preparing for and providing workshops throughout the Yukon, Alberta, and the Northwest Territories. The defendant remunerated her for her efforts in assisting him with his workshops. Between 2003 and 2009 she provided a [redacted] Workshop during some of the defendant's workshops.

[13] Property division has been agreed upon, and the defendant owes the plaintiff an equalization payment of approximately \$40,000 (amount awaiting confirmation through order being prepared by counsel). The defendant will assume the mortgage and other household expenses and will remain in the family home.

Entitlement of Plaintiff to Spousal Support

Legal principles

[14] An overarching principle of the *Divorce Act*, RSC, 1985, c. 3 (2nd Supp.) (the "*Divorce Act*"), is the provision of an equitable distribution of the economic consequences of marriage and its breakdown. The authority to order spousal support comes from the *Divorce Act*. A judge has broad discretion to apply relevant factors to the statutory objectives and strike a balance in order to achieve justice in a case.

[15] Section 15.2(4) of the *Divorce Act* provides that in determining the right to, the amount of, and the duration of spousal support, the court shall take into consideration the condition, means, needs and other circumstances of each spouse, including:

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

[16] This is a factual determination, and the court may have regard to any facts the judge considers relevant, with one exception. The *Divorce Act* specifically states that the court shall not take into account any misconduct of a spouse in relation to the marriage (s. 15.2(5)).

[17] Section 15.2(6) of the *Divorce Act* sets out the objectives of spousal support as follows:

- (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.

[18] The first two objectives- (a) and (b)- relate primarily to compensatory claims, that is, where the claimant sustained an economic loss or disadvantage due to the roles assumed during the marriage, or provided an economic benefit to the proposed payor

without adequate compensation. Examples of factors forming a basis for a compensatory claim include being at home with children full-time or part-time, being a secondary earner, moving for the payor's career, supporting the payor's education or training.

[19] The third and fourth objectives- (c) and (d)- relate primarily to non-compensatory claims, that is, where the claimant experiences a significant decline in their standard of living from the standard they enjoyed during the marital relationship. This type of claim is based on need, and it reflects the economic interdependency created by a shared life. Examples of factors forming a basis for a non-compensatory claim include the length of the relationship, the decrease in the standard of living of the claimant after separation, and economic hardship experienced by the claimant.

[20] The nature and basis of non-compensatory support has been explored in cases decided after *Bracklow v Bracklow*, [1999] 1 SCR 420 ("*Bracklow*"). The expectations of the parties of moral and financial support during difficult times in the marriage are relevant on marriage breakdown. A disability, injury, or illness of a former spouse that did not arise during the marriage and is not caused by the marriage or its breakdown may still give rise to an obligation to provide support. The link between the disability and the provision of support is the joint endeavour and interdependency aspect of a marriage, especially a longer term one, combined with the expectations of the parties. Courts have recognized that the Supreme Court of Canada in *Bracklow* and *Moge v Moge*, [1992] 3 SCR 813 ("*Moge*"), established the principle that a non-compensatory support award "may in some cases be based solely on the social obligation to provide for the former spouse's needs" [translation] (*ML c RT*, [2000] RJQ 2538 (QCCA) ("*ML*")

para. 18) and “recognizing this fundamental social obligation means that the mere state of need of a spouse suffering from an illness or injury can be the basis of a support application under the *Divorce Act*” [translation] (para. 20).

[21] The Supreme Court of Canada in *Bracklow* at para. 35 stated, “[n]o single objective is paramount; all must be borne in mind. The objectives reflect the diverse dynamics of the many unique marital relationships” and, at para. 36: “[i]n cases where the extent of the economic loss can be determined, compensatory factors may be paramount. On the other hand, ‘in cases where it is not possible to determine the extent of the economic loss of a disadvantaged spouse ... the court will consider need and standard of living as the primary criteria together with the ability to pay of the other party’ ... 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.”

[22] Entitlement on a compensatory or non-compensatory basis to spousal support must be proved first on a balance of probabilities, before determining appropriate amounts.

The plaintiff does not have a strong compensatory claim

[23] In this case, the plaintiff does not have a strong compensatory claim for the following reasons. Other than 2023 when the defendant had an exceptional year of earnings, there has not been a large disparity in incomes between the plaintiff, who was a secondary earner, and the defendant. The plaintiff did take care of the defendant’s son and her own daughter while the defendant was away providing workshops; however, this was occasional. The defendant provided the same care for the children

when the plaintiff was away from time to time for work reasons. She did not have to give up her own career to support his career aspirations. She supported the defendant by assisting with his workshop preparation and at his workshops from time to time; for the most part, she was paid by him for her efforts. She also supported his dream to establish his own business, but because he did not need any education or training to do so, this did not require financial or other sacrifices by her. Further, he became financially successful very quickly. At no time was she required to move to support the defendant's career. The plaintiff generously admitted she learned valuable cultural teachings from the defendant over the years, as well as new skills enabling her to participate in and instruct others about cultural activities. He was a support to her in the work she did with First Nations.

[24] While the plaintiff was primarily responsible for maintaining the house, preparing meals, and doing the laundry and dishes, this on its own is an insufficient basis for a compensatory claim as it does amount to an economic disadvantage.

[25] I find that the plaintiff did not suffer an economic disadvantage, nor did the defendant obtain an economic advantage during the marriage, due to the roles they assumed.

The plaintiff has a non-compensatory claim

[26] The plaintiff meets the test of need that entitles her to non-compensatory support payments. Her entitlement arises from the expectations of moral and financial support created by the joint endeavour of a long-term marriage, the decrease in her standard of living as a result of the marriage breakdown, and her disability status since August 2024.

[27] The defendant remains in the three-bedroom family home in an established subdivision close to town, having assumed the mortgage debt and other expenses. The plaintiff lives in a rental property approximately 20 minutes outside of town. She pays \$1,000 per month plus heat, phone line, and hydro, in addition to \$115 per month for storage of her belongings. Her landlord has given her notice that she must leave by July 1, 2025. It is not disputed that the current rental housing market in Whitehorse is challenging – there is low vacancy, high demand, and as a result high monthly rental charges. The plaintiff is having difficulty finding living accommodation she can afford, equivalent to the home and standard of living she enjoyed with the defendant.

[28] The plaintiff had no savings at the date of separation and a small amount of cash in a bank account. She advised during the marriage she became accustomed to obtaining money for household expenses and other spending from the defendant without accountability to him. While this situation eventually became a source of resentment by the defendant, because he perceived he was assuming an unfair proportion of the household finances, to the plaintiff's advantage, this was the reality of their partnership. She now has little discretionary spending in her budget. This absence of funds as a result of the marriage breakdown has detrimentally affected her standard of living.

[29] The plaintiff is currently on long-term disability, receiving 80% of her salary. Her disability arose from a significant respiratory illness she suffered in August 2024, requiring her to be admitted to the Vancouver General Hospital intensive care unit on ventilation support. At one point, the physicians believed she would require a lung transplant. She was in a coma while hospitalized. A GoFundMe campaign started by

her family and friends raised \$7,820 to pay for travel, accommodation, groceries, and supports. Fortunately, she did not require a lung transplant, she came out of the coma and was released from the hospital. The plaintiff returned to the Yukon in November 2024, and became sick again with pneumonia in February 2025, requiring hospitalization and subsequent leave from work for three months, to be reviewed in June 2025.

[30] To be balanced against these factors are the condition, means, needs, and other circumstances of the defendant (s.15.2(4)). In particular, the defendant says he is unable to pay because he is self-employed without income-generating assets, he has significant debt to the Canada Revenue Agency, he agreed to an equal property division and assumed some family debts, and he has recently been unable to obtain as many work contracts with First Nations because of damage to his reputation caused by the plaintiff's communicating to many people in the community her allegations of his mistreatment of her since the marriage breakdown. He further states that the payments obtained to compensate him for serious harms he suffered at the day school, as well as the amount he received for the breach of the Robinson-Huron Treaty were not invested and did not generate income. There is no dispute that these compensation payments are his personal income and not a family asset. The plaintiff says, however, that these payments allowed him to maintain a certain standard of living, which included several holiday travel trips to the United States and Europe with a new partner after the separation, while she was sick or recovering and trying to make ends meet. The defendant does not deny that the additional \$200,000 increased his financial status, but says it was a temporary benefit.

[31] The defendant also notes he has paid the plaintiff \$15,000 to assist with her expenses post-separation (taken into account in the property division), and he paid the expenses for her daughter and her partner to visit her while she was in the Vancouver hospital.

[32] Finally, the defendant says he still supports his adult son, who cannot work at this time due to addiction issues and he provides some financial assistance to the plaintiff's daughter.

[33] I recognize the significant debts the defendant has incurred and family debts he has assumed and must now manage, as well as his lower income in 2024, and possibly in 2025, than in previous years, and his support of his son. I also recognize one of the objectives of the *Divorce Act* is for each spouse to attain economic self-sufficiency within a reasonable period of time, as far as is practicable.

[34] At this time, given the plaintiff's disability status, her difficulties in finding a suitable place to live on her own, and the absence of the discretionary spending she enjoyed and had come to expect during the marriage, outweighs the defendant's ability to pay and his other circumstances. The courts have been clear that the longer the marriage endures, the greater the presumptive claim to equal standards of living on its dissolution (*Moge*). While the defendant blames the absence of his work contracts on the allegations the plaintiff was making about him, there was insufficient evidence provided that any negative comments she made resulted in First Nations refusing to contract with the defendant. Indeed, one of the people who the defendant said had advocated to terminate his contract was from a First Nation with which he continues to have a contract. There could be numerous other reasons for the reduction in his

contracts for this year. Having said this, I caution the plaintiff not to disparage the defendant to those with whom he has or is seeking to contract, as it could have financial consequences that could not only affect him but her as well.

[35] The entitlement of the plaintiff to non-compensatory support payments is established.

Amount and Duration of Spousal Support

[36] To determine amount and duration, the condition, means, needs, and other circumstances of both spouses are to be considered.

[37] Condition includes a consideration of age, health, needs, obligations, dependents, and station in life. Means is the ability of the payor to pay. Needs and the achievement of economic self-sufficiency may be determined in part by reference to the lifestyle enjoyed by both spouses during their relationship (see Julien D. Payne and Marilyn A Payne, *Canadian Family Law*, 10th ed. (Irwin Law, 2024) at 215). Many courts have held that subject to the financial practicalities of divorce, a long-term spouse may be entitled to support to maintain a lifestyle similar to that enjoyed during the marriage (see *Fisher v Fisher*, 2008 ONCA 11 at paras. 53, 56).

[38] The defendant is in his early 60s and, although he has suffered several heart attacks, is now fit and capable of working. As a self-employed person, his income will fluctuate from year to year, as the last four years have demonstrated. The defendant is responsible for his adult son, who lives with him and is not currently employed.

[39] The plaintiff is in her late 50s and will know soon whether she remains disabled from work due to her respiratory condition. At the present time, she remains an employee of the Yukon government and receives 80% of her salary.

[40] The *Spousal Support Advisory Guidelines* (the “*Guidelines*”) have been prepared by the federal government to assist lawyers, mediators, and individuals involved in divorce proceedings with practical guidance to resolve spousal support disputes. They are informal, voluntary, advisory, and not legally binding. The *Guidelines* contain formulas for calculations of spousal support, designed to assist judges in making decisions by providing some structure to the exercise of discretion. They are based on income and income-earning capacity of the spouses.

[41] The *Guidelines* are a useful tool as the formula provides ranges of spousal support – high, medium, and low – based on the respective incomes of the spouses. They must be applied along with the specific factors and objectives set out in the *Divorce Act* (ss. 15.2(4) and (6)). A comprehensive analysis of how to decide among the ranges was provided by the court in the case of *James v James*, 2020 MBQB 6 paras. 113-117 (“*James*”). A review of the factors reviewed in *James* supports an award at the lower end of the range in this case:

[116] Common factors that may support an award in the lower end of the range include:

- a) the recipient has a weak or no compensatory claim;
- b) the payor has a limited income or earning capacity;
- c) the recipient does not have significant need;
- d) the recipient is younger than the payor;
- e) there has been an unequal division of property in favor of the recipient;
- f) the debts of the parties exceed the assets, and the payor is carrying those debts; and
- g) the recipient has remarried or re-partnered.

[42] In this case, applying the above factors, those supporting a lower range payment are the lack of a justifiable compensatory claim by the plaintiff, the absence of significant need by the plaintiff, and the plaintiff's age, which is five years' younger than the defendant. Further, although there was not an unequal division of property, the plaintiff will receive a payout from the negotiated settlement with the defendant, and the defendant assumed significant debts from the relationship, in addition to his own tax debts, which affect his ability to pay.

[43] The defendant's net income was \$90,428 in 2021, \$90,224 in 2022, and \$61,451.77 in 2024. His 2023 gross earnings of \$212,388.34 (net amount not provided) were an anomaly, although showed that the defendant had the capacity to earn that amount. Similarly, his 2024 earnings seem to be an anomaly, given his previous years' earnings. Given the many variables associated with self-employment, as evidenced by the variation in his income levels, it is appropriate to assess his income at \$100,000. The plaintiff's income should be calculated at the disability amount she has been receiving - \$60,929. At the low end of the range, this provides a monthly payment of \$1,000 from the defendant to the plaintiff.

Review Order

[44] While the plaintiff has need, for the reasons set out above, that need is likely to be time limited. Not all the facts are yet known to determine the extent of her current and ongoing need. This is because the assessment to determine her ongoing disability payments is scheduled for this month, and she will have to find new housing in July.

[45] As a result of these uncertainties, this is an appropriate case for a review order. These do not require either party to show a material change in circumstances. They are

used in circumstances where a spouse lacks the ability to cope with economic disadvantages arising from the marriage breakdown, but those economic circumstances are reasonably expected to improve in future (*VK v TS*, 2011 ONSC 4305 at para. 289). In other words, where there are genuine, material, and specific uncertainties about a party's circumstances at the time of a spousal support order that are likely to become certain in an identifiable time frame, a review order is justified (*Leskun v Leskun*, 2006 SCC 25). The existence of a disability or illness at the time of an order for spousal support does not mean the receipt of never-ending support payments.

[46] Thus, the spousal support payments shall be reviewed in October 2025, specifically to address the two issues of whether the plaintiff's disability status is ongoing and where she is living and at what cost, as well as any other relevant circumstances of either party. The support payments in the meantime will assist her with some of her basic living expenses.

Retroactive support payments

[47] Retroactive orders for spousal support are discretionary. The relevant factors for the court's consideration are the financial circumstances of the claimant, the conduct of the payor, the reason for the delay in seeking the support, and any hardship a retroactive award will cause the payor (see *McKenzie v Perestrelo*, 2014 BCCA 161 at paras. 105-06). The court may also consider the effect a retroactive support order may have on matrimonial property division.

[48] In this case, the plaintiff initiated an application for interim spousal support at the time of filing the Statement of Claim, in April 2024. That application was never heard because the parties decided to resolve their differences through a binding judicial

settlement conference. Thus, there was no intentional or blameworthy delay; the reason was justifiable.

[49] A retroactive support order, which is generally payable in a lump sum, will cause significant hardship to the defendant. With the significant debts and obligations he currently has, a lump sum support payment of the kind the plaintiff seeks, would detrimentally affect his financial position.

[50] For these reasons, the monthly spousal support payments will start as of July 1, 2025, and continue until the review in October 2025. Counsel shall request a date for that review from the Trial Coordinator.

Conclusion

[51] The plaintiff is entitled to monthly spousal support payments of \$1000, which is the low end of the range set out by the *Guidelines*, based on the defendant's annual income of \$100,000 and the plaintiff's disability income of \$61,000. The payments will start on July 1, 2025, and continue until October 1, 2025. During October 2025 there will be a review by the Court.

DUNCAN C.J.