

SUPREME COURT OF YUKON

Citation: *E.A.G. v. D.L.G.*, 2010 YKSC 23

Date: 20100609
S.C. No. 09-D4166
Registry: Whitehorse

Between:

E.A.G.

Plaintiff

And

D.L.G.

Defendant

Before: Mr. Justice R.S. Veale

Appearances:

Debbie Hoffman
Carrie Burbidge

Counsel for the Plaintiff
Counsel for the Defendant

REASONS FOR JUDGMENT (Child Support and Spousal Support)

INTRODUCTION

[1] This decision addresses child support, spousal support and daycare expenses for the children. It is a companion judgment to *E.A.G. v. D.L.G.*, 2010 YKSC 21, which granted interim custody to the mother and supervised access to the father.

FATHER'S FINANCIAL BACKGROUND

[2] D.L.G., the father has a construction company incorporated in 1989, ("company A"). He is the sole shareholder of company A, which primarily works May through November. The father has provided Financial Statements for the year ended

December 31, 2008, for the year ended September 30, 2007 and the three months ended December 31, 2007, as well as corporate tax returns from 2005 – 2008. His corporate income from company A before tax, the retained earnings and shareholder's loans are as follows:

Company A Year End	Income before Tax	Retained Earnings	Shareholder's Loan
September 30, 2005	\$328,743	\$539,651	\$269,838
September 30, 2006	\$333,135	\$684,422	\$350,000
September 30, 2007	\$69,610	\$711,693	\$338,542
December 31, 2007 (3 months)	\$100,385	\$766,336	\$341,411
December 31, 2008	\$2,798,029 *	\$3,207,451	\$353,877

* This year was unusually high because of a gain on the sale of tangible assets of \$1,744,222 now held in company B also owned by the father. Subtracting the gain on the sale of tangible assets reduces the income before tax to \$1,053,807.

[3] In three of the four years preceding 2009, company A has had income before tax in excess of \$300,000.

[4] In 2003, company A purchased six placer gold mining claims for a price of \$198,000. The company rents an office and shop on land (the family home) that is owned by the father. The land has an assessed value of \$89,950 (according to the 2007 tax notice) with the building assessed at \$593,510. Company A rents its office and shop from the father for \$1,031 per month according to the December 31, 2007 financial statement for company A. Company A expensed \$26,080 for rent in 2008, but the Notes to Financial Statements do not indicate any payment to the father. The father says that he writes off a portion of the expenses of the family home because the offices of company A are located on the bottom floor of the family home and amount to 2,000

square feet of floor space, plus the shop space which is attached to the family home.

Company A employs at least five people at any point in time.

[5] The father is also the sole shareholder of company B. In 2008, company A sold commercial land and fencing for the sum of \$2,089,000 to company B. The father indicates that the land in question is in the industrial area of Whitehorse and he is developing the infrastructure for commercial property, which he estimates will have a market value of one million dollars. At this time, company B simply owns the land and earns no income.

[6] The father has provided a letter dated March 15, 2010 from his insurance agent, who provides the performance bond and labour and material bonds required to carry on the business of company A. As it provides the basis of submissions for the father, I will quote from it extensively:

Thank you for keeping us updated with respect to your current and anticipated work program for the upcoming construction season. It looks like another busy year in the Yukon and once again [company A] is reasonably positioned to take advantage of the opportunities that are forthcoming.

Given that you are one of only five or six significant civil/road building contractors in your region and that you are targeting upwards of \$30M in projects, we think it's a fair assumption that your annual revenue for this year could exceed \$10M and as such we need to ensure that we are able to secure surety support to meet [company A]'s revenue target.

As you are aware we have struggled most years in supporting a bond facility for [company A] due to the company's minimal working capital position. The results from your 2008 fiscal year finally allowed our office to provide adequate support however we caution you that once the inter-company transactions are discounted that we need to continue to build the balance sheet rather than considering ourselves "there".

We are in receipt of your December 31, 2009 internally prepared year end statement and at this point offer only the following comment: With no allowance for depreciation or for deferred revenue we feel that the working capital equity and profitability as presented on your statement will dramatically decrease upon the review of your external accountant. This is why we are unable to determine the level of surety support we can obtain until final version, Review Engagement financial statement is prepared by your Chartered Accountant.

[7] However, the letter also confirms that the 2009 working capital requirement was \$250,000 and this year, 2010, will require working capital of about \$500,000. His agent cautions:

We can confirm at this point that based on your desired revenue that we would need an adjusted (bonding companies discount certain current assets ie. prepaid expenses and inventory) working capital position of about \$500,000 (last year we were at \$250,000). As in the past, should you fail to reach this threshold, we could look at the possibility of injecting and subordinating additional shareholder loans.

Again, as you are aware we have moved your bonding account to different surety companies numerous times since we started doing business in 2001 due to the financial position of [company A].

As we are on the cusp of meeting our financial obligations I would strongly recommend that the working capital position of [company A] is fortified. Any depletion may result in our inability to secure bonds for your desired work program.

[8] I note that the insurance agent had the benefit of receiving the “internally prepared” year end statement for December 31, 2009, which has not been disclosed.

[9] The wife has produced photographs of a classic car collection of 16 cars that she claims have a total value exceeding \$1.2 million. She claims they are owned by the

company A which has an asset category for “automotive” at a cost of \$402,236.

Company A lists its assets for the year ended December 31, 2008, as follows:

Tangible Capital Assets:	\$1,016,908
Equipment under Capital Lease	\$185,575
Resource Properties	\$198,000
Promissory Notes Receivable	\$312,000
Receivable from Related Company	\$56,094
Preferred Share Investment	<u>\$1,777,000</u>
Total	\$3,545,577

[10] Company A had cash of \$542,538 at the end of 2008 and \$150,372 in 2007. No cash figure has been provided for the 2009 year end. The father also advises that company A spent “substantial” capital on replacement of equipment in 2009, but did not disclose the dollar amount.

[11] The father takes an annual draw from company A of \$87,100 per year. His Notice of Assessment for the 2008 tax year indicates a total income of \$90,450. From this, he claims that he pays the mortgage on the family home of \$515.50 every two weeks, which represents one half the mortgage, with Company A paying the other half. He also pays \$300 per month for child support for his son from a previous relationship and an additional \$150 per month for extraordinary expenses. As well, he receives benefits in the form of payments made by company A for its use of assets that he owns such as property taxes. Some of these benefits are listed in the father’s personal financial statement. The father did not assign a dollar value so what follows are the estimated annual financial benefits the father receives from company A:

One-half of mortgage (1030 x 12)	\$12,360
One-half of property tax	\$3,540
One-half of city utilities charge	\$3,794
Rent received from Company A (one-half of \$26,806 claimed in 2008 Financial Statement of company A)	\$13,403
Property Insurance for house paid by company A (estimated)	\$2,000
Ford F-350 truck lease at \$787 per month (1/2 personal use)	\$4,722
Gas for truck paid by company (estimate 1/2 x 600 month)	\$3,600
Motor vehicle maintenance & service (1/2 of estimate \$5,000)	\$2,500
Motor Vehicle insurance, plates, and registration (1/2 x 500 per month estimate)	\$3,000
Heat and electricity for home (estimate 500 per month)	\$6,000
Travel and Entertainment based on company A claim of \$64,101 (estimate 1/2 benefit)	\$32,050
Total	<hr/> \$86,969

[12] I also note that the father personally earned \$318,069 in the 2006 year. He explains that the part of this amount, in excess of \$87,100, was done on tax advice. He received a dividend from company A as his personal tax rate was lower than the corporate tax rate. The money was returned to company A as a shareholder's loan to strengthen the company's position for the purpose of bonding requirements.

[13] I further note that the mother assisted the father in the early years of the relationship by running errands and assisting with internal and outside core audits for which she had training. In the 2008 Financial Statement of company A, Note 15 states that the mother gave a limited guarantee in the amount of \$100,000 to help secure a line of credit.

CHILD SUPPORT

[14] The issue in this case is whether the annual income of \$87,100 declared by the father fairly reflects all the money available to pay child support.

[15] The mother separated from the father in September 2009. She did not receive any formal child support during the period of October 2009 to March 2010. During the attempted reconciliation she had the use of the company apartment free of charge. The father provided her with a car with all expenses paid and \$2,000 per month for groceries and expenses. The father initially paid her \$5,000 in October for expenses which included money to assist with her condominium payments. The father agreed that she could have the use of all her business income.

[16] The father indicated that when they were together, the wife paid for her own personal items and daycare and he put \$4,000 a month into an account for all other household expenses. In addition, company A paid the expenses for the family home where company A operates from, such as property taxes, property insurance, water, sewer and garbage, heat and electricity and gas and oil.

[17] On February 25, 2010, when the father had filed no financial information and was retaining new counsel, I ordered that he pay interim interim child support to the mother in the amount of \$1,500 per month, commencing January 1, 2010, based upon his verbal statement that he made approximately \$80,000 per year and that he was prepared to pay \$1,500 per month child support. The mother advises that the father did not pay the \$4,500 ordered until March 16, 2010 and had not paid his April 1 support payment as of April 14, 2010.

[18] The applicable sections of the Federal *Child Support Guidelines* for the calculation of child support are:

16. Subject to sections 17 to 20, a spouse's annual income is determined using the sources of income set out under the heading "Total income" in the T1 General form issued by the Canada Revenue Agency and is adjusted in accordance with Schedule III.

17. (1) If the court is of the opinion that the determination of a spouse's annual income under section 16 would not be the fairest determination of that income, the court may have regard to the spouse's income over the last three years and determine an amount that is fair and reasonable in light of any pattern of income, fluctuation in income or receipt of a non-recurring amount during those years.

(2) Where a spouse has incurred a non-recurring capital or business investment loss, the court may, if it is of the opinion that the determination of the spouse's annual income under section 16 would not provide the fairest determination of the annual income, choose not to apply sections 6 and 7 of Schedule III, and adjust the amount of the loss, including related expenses and carrying charges and interest expenses, to arrive at such amount as the court considers appropriate.

18. (1) Where a spouse is a shareholder, director or officer of a corporation and the court is of the opinion that the amount of the spouse's annual income as determined under section 16 does not fairly reflect all the money available to the spouse for the payment of child support, the court may consider the situations described in section 17 and determine the spouse's annual income to include

(a) all or part of the pre-tax income of the corporation, and of any corporation that is related to that corporation, for the most recent taxation year; or

(b) an amount commensurate with the services that the spouse provides to the corporation, provided that the amount does not exceed the corporation's pre-tax income.

(2) In determining the pre-tax income of a corporation for the purposes of subsection (1), all amounts paid by the corporation as salaries, wages or management fees, or other payments or benefits, to or on behalf of persons with whom the corporation does not deal at arm's length must be added to the pre-tax income, unless the spouse establishes that the payments were reasonable in the circumstances.

[19] The decision of the British Columbia Court of Appeal in *Kowalewich v.*

Kowalewich, 2001 BCCA 450 is instructive for cases where the husband owns and operates an incorporated business, because the reasons for judgment of Huddart J. confirm the fact that the T1 General Form "Total Income" may not bear any relationship to the money available to the husband for child support (para. 28). The court does not need to look for bad faith or undisclosed personal benefits to trigger an adjustment under s. 17 or s. 18 of the *Child Support Guidelines*. As Huddart J. points out at para. 41:

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

And later, at para. 43, she quotes approvingly the statement of Martinson J. in *Baum v.*

Baum (1999), 182 D.L.R. (4th) 715:

Valid corporate objectives may differ from valid child support objectives. The purpose of s. 18 is to allow the court to "lift the corporate veil" to ensure that the money received as income by the paying parent fairly reflects all of the money available for the payment of child support. This is particularly important in the case of a sole shareholder as that shareholder has the ability to control the income of the corporation.

[20] Section 18(1)(a) permits a court to use all or part of the pre-tax income of the corporation to determine the spouse's annual income and s. 18(1)(b) permits the use of

an amount “commensurate with the services that the spouse provides to the corporation”, so long as it does not exceed the corporation’s pre-tax corporate income.

[21] However, Huddart J. also makes it clear that “monies needed to maintain the value of the business as a viable going concern will not be available for support purposes” and should not be included in determining annual income (para 58).

[22] I am also mindful of the constraints arising on interim applications as set out in *L.G.B. v. M.A.C.M.*, 2005 BCSC 1786.

Determination of the Father’s Annual Income

[23] The case at bar is one of a sole shareholder who has the ability to control both his income and the income of the corporation.

[24] It is unfortunate that the father did not file the December 31, 2009 internally prepared year end financial statement to make the opinion of his insurance agent somewhat clearer. Nevertheless, I note that the opinion of the insurance agent that a working capital position of \$500,000, as opposed to \$250,000, is based upon a target annual revenue of \$10 million. That is considerably greater than the annual revenue of company A at December 31, 2008, in the amount of \$4,877,587 or in the previous years. It appears that the working capital concern expressed by the insurance agent is somewhat speculative and based upon a doubling of corporate revenue. I note that there did not appear to be any difficulty in 2006 to inject in excess of \$200,000 into the company.

[25] Counsel for the father submits that child support must be based on \$87,100, because any increase in that amount for the purpose of calculating child support may affect the working capital available to retain the bonding of company A to bid on jobs. I

have difficulty accepting this submission because the insurance agent makes reference to increasing working capital in a situation where the annual revenue doubles from approximately \$5 million to \$10 million. The submission that no additional funds can be drawn from company A as income beyond \$87,100 ignores the fact that the father drew the same amount when the company earned pre-tax income in the \$300,000 plus range in the years ending September 30, 2005 and 2006. It is difficult to accept that when the income before tax triples to \$1,053,807 at the year ending December 31, 2008, that the father's income draw can only be \$87,100.

[26] I note that the income before taxes of company A has varied from a low of approximately \$177,000 in 2007 and in excess of \$300,000 in each of 2005, 2006 and 2008.

[27] I also note that the father's income of \$87,100 on average in the last few years is considerably higher when benefits paid by company A are calculated in. A conservative calculation of the actual income of the father including benefits paid by company A is closer to \$150,000.

[28] Counsel for the father submits that the court should be cautious in making a finding that the capital of company A should be treated as income. Firstly, the capital is not being treated as income. Rather, the income before tax is being used, as s. 18(1)(a) permits, to establish a fairer determination of annual income for the purpose of establishing child support. Secondly, as the insurance agent indicates, the capital requirements were adequate in 2008. The possibility that there will be increased capital requirements in 2010 based upon a doubling of corporate revenue should not trump a fair determination of the father's annual income.

[29] I am satisfied that the father's annual income of \$87,100 does not accurately reflect the money available to him for the payment of child support. I am not persuaded that all his income and benefits should be added to the pre-tax income available to him, but I am satisfied that, pursuant to s. 18(1)(a), his income should be determined to be \$300,000 for the purpose of calculating interim child support. In my view, the calculation of child support on this amount does not impair the working capital requirement for bonding particularly in the year ended December 31, 2008, being the latest year end the father has disclosed.

[30] Accordingly, I order that the father pay the mother child support based upon an annual income of \$300,000, commencing January 1, 2010 and then on the first day of each and every month thereafter until a final order for child support is agreed upon or ordered. Payments made under the interim interim child support order will be credited to these amounts, which I will address below.

[31] In the order dated March 25, 2010, I ordered that each parent pay 50% of the daycare expense which is \$1,100 per month. Given my determination of the father's income, it would be more appropriate to have the father pay the daycare expense in full as he did voluntarily during and after the attempted reconciliation.

Calculation of Child Support for Incomes Over \$150,000

[32] There are different considerations to be taken into account when child support is calculated on an income in excess of \$150,000.

[33] The *Child Support Guidelines* provide:

4. Where the income of the spouse against whom a child support order is sought is over \$150,000, the amount of a child support order is

- (a) the amount determined under section 3; or
- (b) if the court considers that amount to be inappropriate,
 - (i) in respect of the first \$150,000 of the spouse's income, the amount set out in the applicable table for the number of children under the age of majority to whom the order relates;
 - (ii) in respect of the balance of the spouse's income, the amount that the court considers appropriate, having regard to the condition, means, needs and other circumstances of the children who are entitled to support and the financial ability of each spouse to contribute to the support of the children; and
 - (iii) the amount, if any, determined under section 7.

[34] In *Francis v. Baker*, [1999] 3 S.C.R. 250, Bastarache J. said that the word “inappropriate” must be interpreted broadly to mean “unsuitable” so that the court has the discretion to both increase or reduce the amount of child support where the paying parent has an annual income exceeding \$150,000 (para. 40). He further acknowledged that courts should not be too quick to find that the *Guidelines* will produce an indirect benefit to the custodial parent, as all child support inherently involves some form of wealth transfer. However, he concluded that “courts must therefore have the discretion to remedy situations where table amounts are so in excess of the children’s reasonable needs so as no longer to qualify as child support” (para. 41). He also found that in all cases Parliament intended that there be a presumption in favour of the table amounts (para. 42), and that there must be clear and compelling evidence to depart from the *Guidelines* figure (para. 43).

[35] The table amount using my income determination of \$300,000 for the father requires child support of \$3,944 per month for the two children.

[36] Having regard to the condition, means, needs and other circumstances of the children, I do not find this amount to be inappropriate. It is a reasonable amount based upon the mother's modest monthly budget of \$6,236.68. The children do not have the benefit of the family home and have changed residences several times. The mother will need every penny of this child support to support the children as they settle in a new home and prepare for going to school for the first time. Their lifestyle should not be compromised during an adult dispute and separation.

[37] I am also satisfied that the father is quite able on the financial information he has provided to pay the child support without difficulty.

[38] There is no onus on the custodial parent to justify the table amount of child support and I find no basis under s. 4 to reduce the table amount of child support in the amount of \$3,944 per month.

SPOUSAL SUPPORT

Mother's Financial Background

[39] There is a great dispute over the mother's income. The mother initially ran her health and rehabilitative business on a part-time basis from outside the home for about four hours a week. She stopped working at her business for four months after the twins were born in 2005.

[40] The mother then moved her business to the father's building at the family home and paid rent to the father of \$550 per month plus utilities and telephone. The father raised her rent to \$1,250 per month in January 2009, which she says she could not afford in addition to paying for the children's clothing and daycare expenses. The father

raised the rent again to \$1,936 per month in September 2009, which contributed to the separation, particularly when he threatened eviction for non-payment of arrears.

[41] The mother says her net income for 2007 was \$28,131, for 2008 it was \$23,918.88 and for 2009 she estimates it was approximately \$23,000. The mother claims that her business was more a psychological outlet to escape an emotionally abusive spouse and to have some financial independence.

[42] The father, on the other hand, sees the wife's business as a lucrative operation that can produce a revenue stream of \$10,000 per month, assuming she works at it full time.

[43] The mother also owns a one-bedroom condominium in Los Angeles, with a mortgage of \$1,316.68, which she rents for \$950 per month. She refinanced the mortgage to pay for her purchase of equipment for her business. She states that she has been receiving no rent in recent months because of repairs that have been credited to the tenant. However, rent will commence again in May 2010. She says the condominium has a market value of \$250,000 and a mortgage of \$204,000.

[44] In her financial statement, the mother estimates that her monthly expenses after May 16, 2010 will be \$6,236.68. She has a monthly food budget of \$1,000, the same as claimed by the father. She made no claims for health expenses, clothing expenses, school expenses, meals outside the home, vacation or savings. She estimates that she is in debt in the amount of \$30,000 for legal fees and living expenses since her separation in September 2009.

[45] Spousal support orders may be made on an interim basis under s. 15.2 of the *Divorce Act*, R.S. 1985, c. 3 (2nd Supp). Section 15.2 states as follows:

(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.

(2) Where an application is made under subsection (1), the court may, on application by either or both spouses, make an interim 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, pending the determination of the application under subsection (1).
Terms and conditions

(3) The court may make an order under subsection (1) or an interim order under subsection (2) for a definite or indefinite 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.

(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 spouses cohabited;

(b) the functions performed by each spouse during cohabitation; and

(c) any order, agreement or arrangement relating to support of either spouse.

(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.

(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.

[46] Martinson J. provides a good summary of the difference between interim spousal support and final spousal support orders in *D.R.M. v. R.B.M.*, 2006 BCSC 1921, in para. 7 – 21, which I summarize below:

1. Interim orders are intended to be short term to bridge the gap between the starting of the action and a decision on the merits;
2. Interim proceedings are summary in nature and provide rough justice at best;
3. The *Spousal Support Advisory Guidelines* (“SSAG”) are designed to apply to interim spousal support as they provide a quick, easily calculated amount, and may be given substantial weight although they are not binding on the court;
4. While it is an error to consider only the means and needs to the exclusion of other factors, the means and needs will often be the most important factor.

[47] This last principle comes from *Johnson v. Johnson*, [1993] B.C.J. No. 2140, which recognized that while all factors under s. 15.2(4) and (6) must be considered, the

needs and means may be the most important factors from a practical point of view until the property settlement is determined (para. 16).

[48] Counsel for the father submits that the mother failed to provide the court with adequate information to determine her current revenue. In fact, the mother provided a great deal of information to support her estimate of income. Counsel for the father says it is inadequate and her gross income should be imputed to be \$93,600 with a net income between \$80,000 to \$83,000, which would not require any payment of spousal support. I am not prepared to make such an imputation of the mother's income. Given her historical earnings averaging between \$20,000 - \$30,000 and the disruption to the mother and children since September 2009, I find that it is appropriate to impute a net income of \$40,000 per annum to the mother.

Spousal Support and the Priority of Child Support

[49] I have found that the father should pay \$3,944 per month for the two children plus \$1,100 a month for daycare.

[50] Under the title "Priority", s. 15.3 of the *Divorce Act* states:

15.3 (1) Where a court is considering an application for a child support order and an application for a spousal support order, the court shall give priority to child support in determining the applications.

(2) Where, as a result of giving priority to child support, the court is unable to make a spousal support order or the court makes a spousal support order in an amount that is less than it otherwise would have been, the court shall record its reasons for having done so.

(3) Where, as a result of giving priority to child support, a spousal support order was not made, or the amount of a spousal support order is less than it otherwise would have been, any subsequent reduction or termination of that child support constitutes a change of circumstances for the

purposes of applying for a spousal support order, or a variation order in respect of the spousal support order, as the case may be.

[51] Section 15.3 of the *Divorce Act* permits the court to give priority to child support and reduce spousal support, or make no spousal support order at this time or at all.

[52] An example of a case where the father was ordered to pay child support and reduced spousal support is *Harraway v. Harraway*, 2010 BCSC 679. In that case, an income of \$75,000 was imputed to the husband and he was ordered to pay child support on that amount. The family assets of \$175,100 were to be divided equally. However, at trial, the father was not employed and not earning the imputed income. The trial judge gave priority to the child support and concluded that, at that time, he was unable to make a spousal support order.

[53] Counsel provided calculations for my consideration, using the *Spousal Support Advisory Guidelines*. In the first one, provided by the father, assuming employment income of \$87,100 and corporate pre-tax income of \$213,000 and a \$40,000 income for the mother, the spousal support ranges from (low) \$4,318 to (mid) \$5,079 to (high) \$5,859. In the second calculation provided by the mother based on a \$300,000 corporate pre-tax income for the father and \$40,000 for the mother, the range was from (low) \$4,903, to (mid) \$5,550 to (high) \$6,199. Thus, the range of spousal support could be from \$4,300 to \$6,200 per month. Counsel for the mother provided a third calculation, which increased the ranges by several hundred dollars, based on the fact that the father receives a considerable benefit by having company A pay many expenses. That may be a more appropriate calculation for the trial, where I expect there

will be expert testimony. At this interim stage, I am going to use the ranges in the first two calculations.

[54] Counsel for the father advocates a cautious approach. She submits that because of the potential capital requirements of bonding, the court should leave the determination of spousal support to the trial judge when there will be expert evidence available. In other words, do not award any spousal support, or award it at a reduced level, on an interim basis. Counsel also points out that, in the spousal support range proposed, the mother would have a higher portion of the net disposable income, assuming the income of \$300,000 for the father.

[55] It is clear that the mother and father cohabited for almost nine years. It appears that while the mother was the primary caregiver, the father contributed to a lesser extent. The mother supported and contributed to the father's business, but there is no doubt that the father was and is the financial breadwinner for the family. While the mother was the primary caregiver for the children, she was also able to earn a modest income from her business.

[56] It is also fair to say that the mother and children have been at a severe economic disadvantage since the separation, having had to leave the family home and move from a women's shelter, to a company apartment, to friends, and finally to their own residence. The mother has necessarily incurred significant debt to stay afloat, not to mention legal fees. She estimates her debt for legal fees and living expenses to be \$30,000. At the same time, the mother's business has been disrupted for several months with the instability that has followed the separation.

[57] However, it must also be recognized that she has established a basis to pursue self-sufficiency prior to separation so that she does not appear to be in a position to require retraining. I expect that her income from her business will improve from the modest levels in the past.

[58] But my task is to ensure 'rough justice' between the mother and father pending the trial of this matter. The mother has clearly suffered the greatest disruption and economic hardship from the separation. She has no access to the assets of company A or to the family home, while the father receives considerable benefits from both.

[59] I note that during the attempted reconciliation, the mother received approximately \$5,000 monthly for expenses, plus what she could earn from her business. In my view, she will need interim assistance to get back on her feet during this legal battle until her property claim is either settled or litigated.

[60] Counsel for the father submits that company A cannot support both child and spousal support. In my view this is not supported by the evidence:

1. Company A is doing very well, as evidenced by the increased retained earnings every year. I recognize that this is not synonymous with cash, but it does indicate an improving and more stable corporate financial situation.
2. By the same token, the shareholder's loan position of the company has increased each year. Again, I recognize that this is not necessarily cash, but it indicates the constantly improving working capital position of company A.
3. The cash position of company A at the end of 2008 was \$542,538. The glowing report of the insurance agent based on "another busy year" and

reviewing the undisclosed December 31, 2009, internally prepared year end statement, all suggest that 2009 financial statement, when it is produced, will not result in a deterioration of the financial capacity of company A.

4. Company A has significant assets of at least a value of \$3.5 million.
5. The father benefits considerably from the use of the family home and the use and control of company A to pay many expenses that would otherwise be paid on taxed income. This permits the father to purport to live on an income of \$87,100 which is in reality closer to \$150,000.

[61] I also note that the mother's Financial Statement is modest and her expenses are very reasonable.

[62] Finally, my determination above that the father's income is \$300,000 for child support purposes (para. 29) is cautious leaving considerable corporate pre-tax income for the business.

[63] I conclude that the father has the ability to pay, and the mother has a demonstrated need for, spousal support of \$4,300 per month.

CONCLUSION

[64] Top summarize, the court makes the following interim order:

1. the father's income for calculation of child support is \$300,000;
2. the father shall pay the mother \$3,944 in child support for the two children commencing January 1, 2010, with credit for interim interim child support paid;
3. the father shall pay the daycare expense of \$1,100 per month; and

4. the father shall pay spousal support to the mother in the amount of \$4,300 commencing January 1, 2010.

[65] Counsel may speak to costs, if necessary.

VEALE J.