IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *Dhillon* v. *Dhillon*, 2003 YKSC 22

Date: May 22, 2003
Docket No.: S.C. No. 01-D3375
Registry: Whitehorse

Between:

Ravinder Dhillon

Petitioner

And:

Upkar Singh Dhillon

Respondent

Appearances:

Mr. Malcolm Campbell — Counsel for the Petitioner
Mr. Edward Horembala, Q.C. — Counsel for the Respondent

Before: Mr. Justice R.E. Hudson

REASONS FOR JUDGMENT

[1] This is a divorce action brought by Ravinder Dhillon, as petitioner against her husband Upkar Singh Dhillon.

Background

[2] The parties were born in India and were both raised initially in the Punjab in the Sikh religion. Mr. Dhillon, the respondent, came to Canada in 1984 with his family consisting of his mother, father and two sisters, leaving one sister in India. He was 20 years old at the time. His father was 61 years old at the time and had been a principal in a school. His mother was 52 or 53 years of age and worked also in education.

[3] The family located in Merritt, British Columbia, where the respondent lived with his sister Harinder for five to six years. He worked on a farm; he did not like it and worked later in Abbotsford, British Columbia. He also worked in a sawmill. It is relevant to the evidence in this matter that all of these businesses were owned and operated by people of the Sikh religion. Religious customs therefore had an effect on the conduct of all the parties but no specific reference to religious practices was ever provided except the ceremony regarding the child's good health that took place in India.

[4] Upon the evidence the following interpretations can be made: Harinder is the sister residing in Merritt; Harjinder is otherwise known as Vicky; Pushpinder is otherwise known as Ruby.

[5] The respondent moved to Whitehorse in 1987 and for the next six months lived with a cousin and then with his sisters, Vicky and Ruby, at 80–100 Lewes Blvd., Whitehorse.

[6] The respondent had met the petitioner in India in 1984, at which time they became engaged, but they were not married until 1992 in India. The parties were not together between the time of the engagement and the wedding date, the respondent

having returned to Canada. The engagement and marriage was described as a standard engagement and marriage in India and was arranged by the parents, complete with the payment of dowry. The petitioner first met the respondent on the occasion of the engagement celebration.

[7] The petitioner lived in India after the marriage before being brought under the sponsorship of the respondent to Canada in 1993, approximately two years after the wedding. In that interval, the petitioner's parents supported her as she lived at home.

[8] During the period of two years after the wedding and before she came to Canada, according to the petitioner, the respondent never phoned or wrote letters. The respondent states he wrote at least 15 times and experienced difficulty in arranging the legal entry of his wife into Canada.

[9] In Whitehorse, before the petitioner came, the respondent worked for a furniture store for six months and thereafter, came to work for McDonald's Restaurant as a crew person. Two of his sisters also worked there. The petitioner arrived in Canada on November 10, 1993, where she was met by members of the respondent's family and went to Merritt, British Columbia, where she stayed for a period of two months. She stayed in the home of the respondent's parents. She came to Whitehorse in 1994.

[10] Initially, the parties moved in with the respondent's sister at 201 Alsek Road, in Whitehorse.

[11] The parties lived in Whitehorse at the following addresses at the following times:

- 201 Alsek Road – approximately 2 weeks
- 80–100 Lewes Blvd. – 3 or 4 months

- In a two-bedroom apartment on Teslin Road in Riverdale until September 1994
- In October 1994, they moved to Klondora Apartments in downtown Whitehorse until 1997.
- Moved back to 201 Alsek Road
- In November 1999, the parties moved to a house at 27 Dieppe Drive that was purchased at that time, where they lived in the basement until the parties separated in 2001.

[12] The petitioner became pregnant and suffered a miscarriage in May of 1995. In 1996, the petitioner gave birth to a daughter, Kamalpreet on May 31, 1996. The parties separated when the petitioner left the home on July 4, 2001 and went to a women's shelter known as Kaushee's Place, where she has stayed with her child to this date.

[13] These proceedings were commenced on July 27, 2001, and the petitioner seeks a divorce, sole custody of the child, child support, spousal support, an unequal division of family assets in the petitioner's favour (since altered to equal division), a restraining order and financial disclosure. The respondent seeks custody and an order barring the removal of the child from the Yukon. The parties were divorced on July 31, 2002, with all the other matters in the action reserved to this later hearing.

[14] The matter came on for hearing on March 10, 2003.

[15] The court had ordered a Custody and Access Report and at the trial, with the consent of both parties, the report of Mr. Geoffrey S. Powter with relation to the matter was filed in evidence as Exhibit 13.

[16] As will be seen, the report of Mr. Powter is of considerable value in assessing the evidence and attempting to resolve the problems of credibility presented during the hearing.

[17] The issues of credibility play a major role in the fact-finding process of this hearing and the report of Mr. Powter clearly indicates that the difficulties of language played a big part in making more difficult the task that he undertook. Significantly, he said in his report:

> 1. English is the second language of both members of the marital couple and this hindered a clear comprehension of some of the details of the situation. Although I make every effort I could to determine where inconsistencies in this and other records might be a matter of misunderstandings, I remain concerned that some details of this report might reflect the language problem. This concern is partially founded on Mr. Dhillon's insistence that some of the prior court documents have not accurately recorded his statements, but also on my direct experience of Mr. Dhillon's disputing my understanding of the history he was attempting to relate.
> 2. That said, it also needs to be pointed out that there were simply some broad inconsistencies between the parties in their telling of the family history, and some inconsistencies within Mr. Dhillon's story itself. (This was less the case with Ms. Dhillon; her story was presented more coherently and without apparent contradiction.) Mr. Dhillon attempted to explain the inconsistencies by suggesting that he has a problem remembering dates, and told me from the outset that I "should ask [his] wife; she knows better than me" if I wanted to know when things occurred in the course of the marriage. He insisted, however, that when it came to the allegations of spousal abuse, Ms. Dhillon's memory should be considered equally suspect.

[18] In the court's experience with the testimony of both parties, the conclusion to be reached as to credibility appears to be slightly different than was Mr. Powter's, but the

difficulties were as described by him. I found that the petitioner's testimony was equally as suspect as that of the respondent.

[19] Both parties were difficult to understand and the court had to frequently inquire if the answer perceived was the correct answer. Opposing counsel had the same problem and sometimes the examining counsel. There had been an order that an interpreter be appointed, but this order was vacated by consent.

[20] It is my comment on the evidence as a whole that there were many allegations of the petitioner denied by the respondent and favourable to the petitioner which were not objectively supported by other evidence.

[21] This could not as frequently be said of the respondent's evidence where it contradicted that of the petitioner as there were several instances in which photographs were provided and other witnesses attended, all to objectively support the respondent's position of denial.

[22] Some examples are:

a) The petitioner asserted that at the time of the miscarriage, the sisters Ruby and Vicky assaulted her. She said she called the respondent at his work and he came, consulted with his sisters, then assaulted her himself and took her to the hospital.

   The respondent denied this, saying the petitioner called him at work to say she was in difficulty. He came and took her to the hospital.

The respondent then called his then employer, Mr. Karp, who testified that he had a clear recollection of this occasion, as the respondent had become a close friend. He said the respondent was distraught and came to him in tears. He also confirmed the respondent's evidence that the sister Vicky was in Vancouver at this time, on business, at a training session. She could not have been present or assaulted the petitioner at the time of the miscarriage. The petitioner's evidence in this occurrence was obviously untrue.

b) The petitioner testified that the child, Kamalpreet, did not like Vicky's son, Micky, and never played with him. Vicky said they frequently played. The respondent confirmed this, and Mr. Karp also confirmed that they played together. In addition, photographs were produced that showed the two children together apparently playing. I completely accept Mr. Karp's testimony and the effect of the picture. Again, the petitioner's evidence is untrue.

c) The petitioner stated she never went out and was never at Mr. Karp's house. This evidence is contradicted again by photographs and the evidence of Mr. Karp. The evidence of the petitioner on this point is untrue.

d) The petitioner swore she never knew a Ms. Annette Steele and that she certainly never assisted her in learning English. Ms. Steele was called and described her dealings with the petitioner. I accept the evidence of Ms. Steele. This is another clear instance of untrue evidence, either deliberate or inadvertent. I find it damages the petitioner's credibility.

e) The petitioner describes another occasion when, in an altercation, she suffered a broken nose at the hands of the respondent. Medical records

> confirm the injury and, as a result of a charge laid, which was not proceeded with, the respondent entered a recognizance to keep the peace. Therefore, this evidence by the petitioner of assault is confirmed, and the respondent's is not. The respondent says he noticed it but was told it resulted from an accident. A doubt remains as to the real facts of this incident.

[23] This is not to say, however, that the occasion in which I might not accept the evidence of the petitioner necessarily impelled me to make decisions relating to fact that were relevant contrary to the interest of the petitioner. In some instances, the inconsistencies or contradictions were on matters unnecessary to the factual decision in question. For instance, some allegations by the petitioner of abuse at the hands of the respondent ought not be believed, but could be characterized as hyperbole and not decisive of an issue, such as access.

[24] The same would apply to the respondent's evidence, although there were more often instances where objective confirmation or support led to a finding of fact which supported the respondent. Nonetheless, in deciding a question of fact involving such testimony, I did not find it necessary to follow that evidence and make findings totally in support of the respondent's position. For the most part, the findings of fact to be made to resolve the questions presented by this litigation were made on a global basis; that is to say, determining if issues had been proven on a balance of probabilities giving appropriate weight to evidence as I saw fit from time to time. This would be so notwithstanding that some evidence was rejected by me as lacking credibility. Significant evidence in which contradictions took place were: instances of physical and mental

abuse, both spousal and child, including specific assaults, financial matters, property acquisition and the respondent's role in the family before separation.

[25] I will canvass each of these as they relate to the claims for relief found in the petition and at this time will proceed to canvass these claims for relief and the evidence in support.

Custody

[26] All parties, including the respondent, agree that the petitioner is a success as a mother. The child's teacher gave the child very high marks and also commented on the dedication of the petitioner to the child's best interests. The respondent told Mr. Powter that the petitioner was a good mother to Kamalpreet, and I find as a fact that a strong case has been made for the petitioner to have custody. I also find that because of communication difficulties and the potential for interference of the respondent's extended family that joint custody would not be appropriate. On the face of the evidence and since the matter is not in serious dispute, there will be an Order for permanent custody of the child to the petitioner.

Access

[27] The matter of the access to be permitted to the non-custodial parent is one of considerable difficulty because of the firmness of the positions taken.

[28] The position of the petitioner is that there should be no access or, if any, it should be totally supervised by others not members of the respondent's family.

[29] The respondent's position is that he should have reasonable unsupervised access.

[30] At this time I will discuss the evidence of spousal abuse and child abuse since it relates to the access and may relate as well to other claims of relief. Generally, it is the petitioner's evidence that there was abuse on the part of the respondent from the very beginning of the residence in Whitehorse. The petitioner describes the respondent as a person habitually drunk and that the abuse was rained on her both from the respondent and his sisters. The petitioner describes an incident in 1995 when she was pregnant with a male child that the sisters began pushing her, telling her that it was their function to look after the respondent, not hers.

[31] This is totally denied by the respondent, except that he recalls receiving a phone call from his wife telling him that her water had broken, would he hurry home and assist her, which he did, and accompanied her either to the doctor's office or the hospital where, after discussion, it was decided that the foetus should be taken. This did take place, of course, to the distress of the petitioner. The respondent's witnesses positively established that the sister, Vicky, was not in Whitehorse that day and the other sister testified she was not here. As earlier stated, I reject this evidence of the petitioner.

[32] The petitioner describes the circumstances in which the respondent was frequently drunk and abused her both physically and mentally. She describes that he did not provide any money or food in the home for long periods of time. This is denied by the respondent, but he admitted to much alcohol consumption until the birth of the child.

[33] The petitioner testifies that after becoming noticeably pregnant with her daughter, physical mistreatment by the respondent and his sisters occurred again.

[34] The petitioner said that, in the presence of the child, the respondent threw her against the wall and she became extremely afraid of him. There was an occasion, she

said, when he had been drinking, he threw the child against the wall. There was an occasion when he did not come home for two months.

[35] There was a time when the child went to pre-school and the respondent declined or refused to drive her there and she was forced to rely on neighbours to do that.

[36] In October 1997, the petitioner describes an incident in which the respondent struck her and broke her nose. The fact of the injury is supported by independent medical reports. The petitioner asserted that on that occasion she was massaging the daughter's hair when the respondent said that he was going to his sister's house and told the petitioner to clean the back yard and the front yard. The petitioner said that she would need help, to which the respondent replied that she would have to do what he said. The petitioner said that he pushed her against the wall and her nose started to bleed and it was painful. She said there was hard tape placed on her nose for two days. She said that at the same time, her daughter was suffering from soreness from her chest area. As to this occasion, the testimony of the respondent is that a day following the medical treatment for the broken nose, he asked her what happened and was told that the child hit her on the nose or that she broke her nose hitting it against the wall.

[37] The petitioner describes another occasion when she left the child very briefly with her husband and when she returned shortly thereafter and asked if she had eaten, he told her she had taken something to drink. At that time, the respondent described that he had bad feelings that the child made him angry and he thought he would stab her in the tummy. This is denied by the respondent. The petitioner said thereafter that she never left the child alone with the respondent. The respondent replied by introducing credible

testimony of many occasions when the respondent and the child were together in the absence of the petitioner.

[38] With respect to many of these instances, she did not report them to the police but when her nose was broken she did.

[39] Proceedings were commenced in court for assault and the petitioner agreed that she had signed a note dated February 17, 1998, as follows:

> Subject regarding to my husband, Upkar Dhillon
> The statement I gave to the R.C.M.P. was not right because I was upset that time. I made that story because things not going right in the house. I am not going to testify against my husband. If possible can you drop the charges?
> Ravinder Dhillon, police file # 97-7214.

[40] The only evidence with respect to this is that the petitioner said that the respondent forced her to do this and forced her to deliver it to his defence counsel's office. The respondent disagreed and said that the petitioner voluntarily prepared the letter and it was either delivered or faxed to the lawyer's office. Nonetheless, without production of the court record, it appears that the respondent was placed on a recognizance to keep the peace and the matter was dropped for that reason.

[41] The petitioner repeatedly testified that she feared the respondent both for herself and for her child's safety. She agreed that his drinking abated and virtually discontinued in the later years of their marriage. She testified that he refused her the right to communicate with her family in India, that he resisted her in getting further education at Yukon College, that he never took her anywhere and in particular, never went visiting in the home of his employer, Mr. Karp, or any other people.

[42] The respondent aggressively denies these allegations. He produced photographs to show the petitioner at a dance or other party and at a family gathering where on both occasions she was elegantly dressed. A photo of a family get-together shows the child had her arm on the shoulders of her cousin, whereas the petitioner says the child was never with the cousin, as she did not like him. About that she was adamant. Evidence was called describing other visits in other people's homes. The petitioner denied that a person named Annette Steele had helped her with her work at Yukon College with respect to English and the witness Steele indicated clearly that she had done so notwithstanding that the petitioner swore that she did not even know this person. There was an issue with respect to the use of the telephone and the petitioner being deprived of such usage, but the respondent claims that he removed the services of the telephone in a rather unlikely way because she was complaining about calls coming in from his family which she did not want to receive.

[43] The question therefore is whether or not on the evidence before me I can conclude that it is not in the child's interest that she has visits or contact with her father.

[44] The report of Mr. Powter is of some assistance. On page 2, paragraph 6, he quotes:

> The young girl stated that she was sufficiently afraid of her father that she did not want to see him at all, even in the safety of the Family and Children's Services office, even with me always present. It seemed unfair to push her to do so, but I acknowledge that not seeing the father and daughter together limited the breadth of my view of the family.

[45] Mr. Powter deals with an incident in which Mr. Dhillon had been drinking, threatening violence to the petitioner and her daughter. The police were called and took Mr. Dhillon's firearms away and the petitioner temporarily resided in a transition home. Mr. Dhillon indicates that it was this incident which caused him to stop drinking.

[46] Mr. Powter refers to Family and Children Services records showing that Mr. Dhillon was urged to attend counselling, but that he refused to do so.

[47] It is not contradicted that at a later time, the petitioner became pregnant and the sex of the foetus was determined to be female and the child was aborted. The petitioner says that the respondent ordered her to do this but the respondent says that it was the petitioner's idea because she would have to have a further delivery by Caesarian section, which she did not want. The procedure took place in India and there are some unanswered questions surrounding this incident, but the fact of the abortion procedure having taken place is not in issue. Mr. Dhillon indicates that the purpose of the trip was to carry out a ceremony to foster good health for the child, Kamalpreet.

[48] The petitioner recites a lengthy practice of the respondent to fail to provide for food, transportation and other financial support for the petitioner and her daughter. This is denied by Mr. Dhillon.

[49] Mr. Powter refers to an interview with the child from which he brings out certain things:

- She said that she saw her parents argue, but she had never seen any hitting.

- When asked if she had ever seen her mother afraid of her father, she said that she did not know.
- When asked what kind of relationship she wanted with her father, she said that she did not want to see him again.
- When asked what she would like to do if her father was right outside the door and had presents for her, she said again: “I don’t want to see him.”
- When asked to do a drawing and include everyone in her family, she did not include the respondent and blocked any attempts to have him added, saying: “No, just me and my Mom.” Mr. Powter further reports in interviewing the kindergarten teacher that Kamalpreet had drawn a picture of Mr. Dhillon, adding a caption which read: “My Pop is the best, I love him very much.” And the drawing was produced to Mr. Powter. It obviously refers to a time well before the separation.

[50] The respondent produced photographs of family outings and family gatherings showing the respondent with the child, Kamalpreet, arguing that it was an indication of the closeness of the father-daughter relationship.

[51] In considering visitation rights or access, I consider the fact that the respondent has been prevented by court order for over a year to have any contact with the petitioner.

[52] There is a great deal of evidence dealing with the relationship between the respondent’s family and the petitioner. I have no hesitation in concluding that the attitude of the respondent’s family, including the respondent, tends to show an attitude of

exclusion of the petitioner from family activities and interests, except insofar as the respondent and his family feel inclined to include her.

[53] This is borne out by the employment in a family business, the allegations (some of which I accept) of moderate physical and psychological abuse directed at the petitioner by the sisters of the respondent, and by my interpretation of one or two of the photographs. If a picture is worth a thousand words, my interpretation of the photographs is that it shows some exclusion because the petitioner is shown in the back row by herself, staring unsmilingly into the camera while the rest of the people are lined up in front of her in bright coloured clothes with great smiles.

[54] Another photo shows her at a gathering staring straight ahead while the other people depicted are dancing, singing and laughing. The problem of credibility is borne out here because it is the clear evidence of the petitioner that such gatherings never took place, which evidence is clearly contradicted. However, I am persuaded on the evidence that there was a concentrated negative attitude towards the petitioner which did not consider her well-being or happiness.

[55] I consider this relevant to the question of access rights.

[56] I also have a concern that the respondent’s family could act to the detriment of the relationship between the child and the petitioner if access were granted, and therefore full unsupervised access might not be in the best interests of the child. Although these considerations are, in my view, valid on the basis of the evidence before me, I would make the following Order with respect to visitation with the child by the respondent.

[57] For a six-month period, commencing forthwith, the respondent shall have a visit with the child, once a week, for a period of six hours, to be supervised in the presence of one person agreed to by the parties or failing that in the presence of two persons, one selected by the petitioner, and one selected by the respondent. I would hope that Mr. Karp's willing assistance would be availed of in the circumstances. I would also hope that both parties would agree that Mr. Karp is an appropriate person to supervise. At the conclusion of the six months, these visits may be doubled to twice a week, six hours on a Saturday or Sunday and two hours on a Tuesday, Wednesday or Thursday.

[58] On the anniversary date of this ruling, the matter of visitation will be subject to an application by either party with the question to be answered being whether unsupervised access should be permitted and whether, during the following year, overnight visits will be permitted.

[59] All of this is based on the evidence before me, particularly that of Mr. Powter, but is always subject to the hope that in the child's interest an access program not involving supervision may in time be agreed to.

[60] Any costs of the access is to be paid for by the respondent. This order contemplates the continued residence of the petitioner in Whitehorse and is subject to my later directions as to the place of residence of the petitioner and her child.

[61] There was an interim order restraining the respondent from contacting the wife. This relief was sought in the Petition. This order is continued except for the purposes of arranging access. It is also my order that both parties shall refrain from any action vocal or otherwise calculated to demean the other.

Removal of the child from the Yukon

[62] The residence of the petitioner in Yukon constitutes a problem to the petitioner, as she says she is in great fear of the respondent. On balance, I am satisfied that this fear is real and not imaginary and that in the history of the parties there is justification for it. I so find notwithstanding that some of the allegations of abuse are either false or constitute exaggeration.

[63] I also consider that the respondent, who claims to be presently unemployed, has shown a considerable ability and willingness to take up residence in either Alberta or British Columbia.

[64] There was no evidence given as to any concrete plans of the petitioner to move. There was only a vague reference to a desire to go to southern Ontario, but no reason was given. It is the court's expectation that upon the conclusion of these proceedings, the petitioner may, in the best interests of the child, see fit to remain in the Yukon, where the child is succeeding so markedly in her education.

[65] Considering all those matters, it is the court's order that the petitioner shall be permitted to remove the child from this jurisdiction, but only after the end of the school term in the summer of 2004. It is my intention that the access provision above referred to will continue.

Child Support:

[66] The petitioner calls for an imputation of the respondent's income at $54,000. The respondent argues that he is unemployed and rental income and expected income in new employment of $17,000 justifies an imputation of no more than $24,000.

[67] The respondent is in receipt of rental income from property at 403 Hanson St. and a portion from 31 and 27 Dieppe. This results in a gross income of $4,650 per month.

[68] The respondent earned approximately $36,000 per year with McDonald's before he left that employment resulting from a change of ownership. His income tax returns show that he has declared income as follows:

Year	Total Earnings	Net Rental Income	Total Income
1991	$23,553	$ 4,293	$27,846
1992	29,357	5,807	35,164
1993	29,165	Nil	29,165
1994	32,567	Nil	32,567
1995	34,492	5,077	39,569
1996	36,890	Nil	36,890
1997	35,625	2,607	38,232
1998	37,860	1,076	38,936
1999	38,067	Nil	38,067

[69] Two later income tax statements were provided. Since he left McDonald's, he has had sporadic employment in businesses operated by his extended family members and has otherwise received support from his very close-knit family. He has filed a sworn financial statement showing an annual income of $88,896.96, but it includes gross rental

income and the related expenses are not broken out. They show taxes of $13,000 per year, which I find unreasonable, and deduct the whole mortgage payment instead of just the interest portion. The resultant indication of a negative balance for the month is therefore unreliable in the extreme.

[70] The respondent claims to be planning to become employed by a family member at $10.00 per hour and an annual income of $17,000, barely above the poverty level.

[71] It is my finding that the respondent is either working for family members for no compensation, or is simply intentionally being under-employed and relies on his family to meet his financial needs. On the basis of the evidence, I impute to him an income of $32,000 pursuant to the family support guidelines and set child support at $281 payable monthly from June 1st, 2003.

Spousal Support

[72] There is a claim by the petitioner for spousal support. The resolution of this claim is complicated by the circumstances of the marriage, an arranged marriage at a time the husband was a Canadian resident. Also, there are the religious, ethnic and other cultural differences between the wife's country of origin and where she resided when giving her marriage vows, India, and the jurisdiction in which resolution is sought, Canada.

[73] Additionally, there is the circumstance that whatever income earning experience the petitioner has had in Canada, it was all in businesses operated by her husband's extended family and the circumstance that, to some degree, the petitioner was impeded from finding her way, both socially and economically, in her new country.

[74] Her evidence discloses she was employed as a housekeeper or chambermaid in the hotel run by her husband's uncle or in-laws. She stated that for a time, her husband received the pay she had earned, but this changed, for an unstated reason, and she began to receive her pay and to have a bank account. Undoubtedly, at the direction of her husband, she worked during the busy months of June, July and August and received employment insurance for the balance of the year, to the extent allowed by the regulations.

[75] She made some attempts at educating herself, which appear to have been partly successful. I accept that, in some measure, she was hindered, and at other times encouraged, by her husband. I believe that Ms. Annette Steele did help her with her English studies.

[76] No doubt her volunteer efforts at her daughter's school have assisted her and may have contributed somewhat to start her on the route to self-sufficiency.

[77] Her demeanour in court, subject to concerns about credibility, to which I have referred, displayed, in my opinion, a fertile basis for the development of work skills of some material value to any employer. In fact there was evidence that while employed as a housekeeper, she was able to amass $12,000 in a bank account.

[78] The law is to be found in the *Divorce Act*, RSC, c. 3 (2nd Supp.), s. 15.2(1):

> **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 and pay, such lump sum or periodic sums, as the court thinks reasonable for the support of the other spouse.
>
> …

Factors

(4) In making an order under subsection (1) or an interim order under subsection (2), the court shall take into consideration the conditions, 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.

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;
(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.

[79] The case of *Bracklow* v. *Bracklow*, [1999] 1 S.C.R. 420 deals extensively with the application of those provisions in deciding entitlement to, and quantum of, spousal support. The judgment in that case provides that:

> 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 and strikes the balance that achieves justice in the particular case.

[80] Dealing first with entitlement, McLachlin, C.J.S.C. states in *Bracklow* v. *Bracklow*, *supra*, at para. 37:

> Turning to the specific provisions, the factors judges must consider in resolving support issues reveal the three different conceptual bases for spousal support obligations – contractual, compensatory and non-compensatory. The judge must consider them all, and any or all of them

> may figure in the ultimate order, as may be appropriate in the circumstances of the case.

[81] The court also indicates that there may be an order for spousal support in certain cases based on the fact of the marriage alone (see also L'Heureux-Dubé in *Moge* v. *Move,* [1992] 3 S.C.R. 813 at p.845). I also find the provisions of C.J. Rogerson "Spousal Support After Moge" (1996 – 97), 14 C.F.L.Q. 281 at p. 378 to be highly applicable:

> One is simply not allowed to abandon a spouse to destitution at the end of a marriage if one has financial resources which might assist in relieving the other spouse's financial circumstances.

[82] Entitlement is established in my view. The respondent's position appears to be that entitlement is negated by the respondent's inability to pay. However, the strong doubts I have as to his real income potential, and the fact that he has assets, and the fact of the substantial support of his extended family (which in the particular circumstances of this case I consider to be a substitute for income) must be considered.

[83] I am satisfied that applying the principles of the *Divorce Act* and the interpretation of those provisions by the Supreme Court of Canada in *Bracklow* v. *Bracklow*, *supra,* entitlement is clearly established.

[84] As to quantum, there are several factors in the evidence to consider:

a) The circumstances whereby the petitioner married in India by arrangement, was brought to Canada and to Yukon and the difficulties presented thereby;

b) The employment difficulties and the educational difficulties, some of which were provided by the respondent.

c) The ability of the petitioner to support herself during the marriage (she even saved.)

d) The immediate need to upgrade her education as an imperative to achieve self-sufficiency.

e) The difficulties of maintaining employment as a single mother.

f) The likely need to ultimately move from Yukon due to her fear of the respondent and the dysfunctional relationship with his family in Whitehorse

[85] Considering these and the evidence as a whole, I find that on balance justice is served in the ordering of spousal support as follows:

i. The sum of $3,500 forthwith to assist the petitioner in her education advancement and to do so without draining her capital;

ii. The sum of $750 per month for 24 months, commencing May 1, 2003. It is my view that the petitioner can secure part-time employment forthwith;

iii. The sum of $500 per month for the next successive 24 months following May 2005, at the conclusion of which time the entitlement to spousal support shall cease.

[86] It is also the court’s order, if it is required, that the arrears of support at the time of trial in the amount of $7,494 be paid forthwith.

[87] With respect to this claim, the relevant statute is *Divorce Act*, s. 15.2.

Family Property Division

[88] With respect to this claim, the relevant statute is the *Family Property and Support Act*, RSY 1986, c. 63, specifically ss. 6, 7, 11 and 12.

[89] At my request, the parties have provided written calculations of their submissions regarding the distribution of matrimonial property. These are appended as end-notes to these reasons.

[90] The petitioner originally claimed that she was entitled to be declared to have an interest in five properties. They are:

a) Property in Merritt, B.C. – This property was acquired in October 1986. The purchase price was $80,000. The purchasers were the respondent and his father. The property consists of four acres and three or four buildings: a house, a small cabin and two sheds. The respondent testified that the reason he was included on title as a tenant in common was to enable his father to obtain a mortgage loan as he was too old to get one himself. In January 2002, following the death of his father, the respondent transferred ½-interest to his mother.

   The respondent had contributed a small amount to the original purchase price and other family members contributed substantial amounts as well. The evidence of the two sisters showed substantial contributions but the respondent contributed nothing following the original purchase.

   For years, the respondent showed rental income for this property as his income for tax purposes. His testimony was that he signed the tax return in blank and sent it to the accountant, and was not aware of the final figures in the returns.

The evidence regarding the acquisition and holding of this property is very uncertain. The interest, if any, was obtained by the respondent five and a half years before the marriage and the increase in value was never shown to have any connection with the marriage in question nor was due to any activity of the petitioner or respondent and I am not satisfied that there is an entitlement established in favour of the petitioner. The burden is on a person shown on record to have an interest in property to show that that recording is merely an accommodation but I am satisfied that that burden has here been established. This portion of the claim is dismissed.

b) Property at 80-100 Lewes Blvd., Whitehorse – This property, recorded in the name of the respondent's sister, was also raised. The evidence falls short of proving entitlement and in any event, the claim was not pleaded. If the petitioner seeks any remedy in connection with this property, it is denied.

c) Property at 27 Dieppe Drive, Whitehorse – This property was purchased by the respondent for $132,000, with a mortgage being fronted by the Bank of Nova Scotia for $99,000. This property was altered to allow for two dwellings, one of which became the family home.

There is little argument that this is not a family asset, and on the evidence I find that it is and that the petitioner is entitled to one-half of the value thereof.

Pursuant to Exhibit 23, the balance owing on the mortgage as at January 1, 2002 was $80,983.85. The petitioner uses this date of December 31, 2002, one and a half years after separation, and the respondent uses December 31, 2001, six months after separation.

I do not understand why neither counsel was able to acquire an exact payment listing on this mortgage to show the balance as at July 4, 2001, but on the balance closest to the separation date of January 1, 2002. I agree that the quantum of the petitioner's interest in this property is $29,503.50, and I so order.

d) Property at 31 Dieppe Drive – This was purchased by the respondent in October 1996 for $126,000, and the respondent obtained a mortgage for $86,938.00. The respondent testified that his sister contributed $37,000 to the purchase, $10,000 of which was spent on improvements to allow for a duplex development.

The respondent testified that the deal was that the sister would eventually receive title, but for a period of time the respondent would collect and keep the rental payments. The respondent was responsible in the first instance for the improvements and later for the maintenance, upkeep, mortgage, tax and insurance payments. However, the title remained in his name, with no record of entitlement of the sister.

In February 2002, the respondent transferred the title to this property to his sister, Harjinder Kaur (Vicky), for $130,000.

The petitioner claims that on the basis of the title documents, she is entitled to one-half of the value of the equity in this property. The respondent presents three alternate arguments as outlined in the end notes. On my view of the evidence, and considering that the respondent has the burden of establishing a contradiction to the record of title, I find that the second submission on this

point is the appropriate one. Therefore, I find that the respondent, at the time of separation, had a one-half, equal interest in the property and held one-half in trust for his sister. I adopt the respondent's calculations and find the petitioner's entitlement to be $19,850.50.

I have accepted the mortgage balance figures as at January 1, 2002 as appropriate in determining the value as at July 4, 2001.

[91] The respondent and his sister purchased a property at 403 Hanson Street in Whitehorse in March 1999 for $128,600, with a mortgage loan of $99,000. Again, I accept the respondent's calculations of the mortgage balance and find an entitlement of $14,028.50.

[92] The respondent has occupied 27 Dieppe Drive and received rentals for his one-half interest in a portion thereof and his one-half interest in the other since the separation date. As compensation for this, I allow pre-judgment interest in the total of the entitlement at the prevailing rate of interest pursuant to the *Judicature Act*, R.S.Y. 1986, c. 96, as amended.

[93] As to the chattels, the evidence is very uncertain. I assess the total value at $5,000 and allow $2,500 as petitioner's entitlement.

[94] In conclusion, as an equal division of family assets, I find the petitioner is entitled to:

a) 27 Dieppe	$29,503.50
b) 31 Dieppe	19,850.50
c) 403 Hanson	14,628.50
	$63,982.50
Chattels	2,500.00
Total distribution of family assets to the petitioner	**$66,482.50**

[95] The court directs that this indebtedness be a charge of all the real property and if the payment is not made within 30 days that the equity in the property at 27 Dieppe be transferred to the petitioner or be sold at the petitioner's option and if sold the proceeds applied to this debt. Thereafter, if the debt has not been satisfied, the properties at 403 Hanson shall likewise be sold and the proceeds distributed. The petitioner shall be at liberty to apply for further enforcement orders under the *Family Property and Support Act*, *supra.*

[96] The petitioner being largely successful shall have her costs on Scale 3.

____

HUDSON J.

End Notes

Submitted by the Petitioner

27 Dieppe Drive
Whitehorse, Yukon

Value of Property (please see Respondent's Financial Statement filed 11 March, 2003)	$ 140,000.00	
Mortgage at 31 December, 2002 (please see Exhibit 23)	$ 74,598.87	
Equity	$ 65,401.13	
Petitioner's Entitlement (1/2 X $65,401.13)		**$ 32,700.57**

31 Dieppe Drive
Whitehorse, Yukon

Value of Property (please see Respondent's Financial Statement filed 27 Sept. 2001)	$ 140,000.00	
Mortgage at 31 December, 2002 (please see Exhibit 21)	$ 52,016.73	
Equity	$ 87,983.27	
Petitioner's Entitlement (1/2 X $87,983.27)		**$ 43,991.64**

403 Hanson Street
Whitehorse, Yukon

Value of Property (please see Respondent's Financial Statement filed 11 March, 2003)	$ 130,000.00	
Mortgage at 31 December, 2002 (please see Exhibit 22)	$ 61,717.03	
Equity	$ 68,2582.97 (sic)	
Share owned by Vicky Toor (1/2 x $68,282.97)	$34,141.48	
Equity belonging to the Parties	$34,141.28	
Petitioner's Entitlement (1/2 X $34,141.28)		**$ 17,070.75**

TOTAL of Petitioner's Entitlement to the Whitehorse properties **$ 93,762.96**

Submitted by the Respondent

Note: The Petitioner and Respondent separated on July 4, 2001. (See Petition for Divorce filed July 27, 2001, paragraph 14)

For purposes of determining the valuation date pursuant to section 6(2)(c) of the *Family Property and Support Act* the outstanding amount of the mortgage nearest to date of separation of July 4, 2001 has been used. (i.e. January 1, 2002)

27 Dieppe Drive
Whitehorse, Yukon

Value of Property (see Financial Statement filed by Respondent March 11, 2003)	$140,000.00	
Mortgage at January 1, 2002 (See Exhibit 23)	$80,983.00	
Equity	$59,017.00	
Petitioner's entitlement: ½ x $59,017.00		$29,503.50

403 Hanson
Whitehorse, Yukon

Value of Property (see Financial Statement filed by Respondent March 11, 2003)	$130,000.00	
Mortgage at January 1, 2002 (See Exhibit 22)	$71,486.00	
Equity	$58,514.00	
Share owned by Vicky Toor ½ x $58,514.00	$29,257.00	
Equity belonging to Petitioner and Respondent	$29,257.00	
Petitioner's entitlement: ½ x $29,257.00		$14,628.50

31 Dieppe Drive
Whitehorse, Yukon

Value of Property (See Financial Statement filed by Respondent March 11,2003)	$140,000.00	
Mortgage at January 1, 2002 (See Exhibit 21)	$60,598.00	
Equity	$79,402.00	

Submission No. 1

Property transferred to Vicky Toor in January of 2002 in consideration for her initial investment of $37,000.00 and receiving no rental income for approximately 5 ½ years.

Respondent has no interest in 31 Dieppe and therefore neither does the Petitioner.

Submission No. 2

Vicky Toor's initial investment of $37,000.00 should first be deducted from the equity of $79,402.00 because she received no rental income for approximately 5 ½ years and some of the rental income from 31 Dieppe was used to purchase 27 Dieppe (the family home) in which the Petitioner now has an entitlement.

Therefore from equity of $79,402.00 deduct $37,000.00 (Vicky Toor's entitlement) leaving an equity of	$42,402.00	
Equity belonging to Petitioner and Respondent: (½ of $42,402.00)	$21,201.00	
Petitioner's entitlement: ½ x $21,201.00		$10,600.00

Submission No. 3

Vicky Toor has a ½ interest in 31 Dieppe as a result of her initial investment of $37,000.00 and foregoing receiving any of the rental income from 31 Dieppe for approximately 5 ½ years and some of the rental income from 31 Dieppe was used to purchase 27 Dieppe (the family home) in which the Petitioner now has an entitlement.

Therefore equity of	$79,402.00	
Share owned by Vicky Toor: ½ x $79,402.00	$39,701.00	
Equity belonging to the Petitioner and Respondent	$39,701.00	
Petitioner's entitlement: ½ x $39,701.00		$19,850.50