SUPREME COURT OF YUKON

Citation: *GJS v NIA,* 2024 YKSC 58

Date: 20241028
S.C. No. 22-D5473
Registry: Whitehorse

BETWEEN:

G.J.S.

PLAINTIFF

AND

N.I.A.

DEFENDANT

Before Chief Justice S.M. Duncan

Counsel for the Plaintiff — André W.L. Roothman

Counsel for the Defendant — Josélynn E.K. Fember

REASONS FOR DECISION

Introduction

[1] The plaintiff, G.J.S., and the defendant, N.I.A., were in a 13-year relationship between October 2008 and December 2021. They were married on July 28, 2012, and have one child together, J.W.S, who is 12 years old. The parties met on a flight between Mexico and California and initially lived together in California, the defendant's former home. They organized their lives so that they spent the summer months in Dawson City, Yukon, engaging in placer mining, and the winter months in California, USA.

[2] The defendant brings an application seeking child support, retroactive from January 1, 2022, to May 31, 2024, and ongoing; spousal support retroactive to

January 1, 2022, for 13 years following the date of separation or an after-tax lump sum; permission to conduct mining operations on the AB[1] mining claims in Dawson City, registered in the name of the plaintiff and which she claims are family and partnership assets. She seeks to have income imputed to the plaintiff because of a shortfall between his tax returns and bank statements, and other discrepancies.

[3] This matter is not procedurally straightforward. A trial is set for two weeks starting June 16, 2025, to litigate all issues raised in the pleadings, if not settled, including division of assets, child support, and spousal support. The parties attended a judicial settlement conference on May 1 and 2, 2024, at which they settled decision-making and parenting time of their child, and the division and value of the assets; however, disagreement remains on certain asset values, to be resolved by the presiding justice at the settlement conference. The defendant brings this application on an urgent basis because of her deteriorating financial circumstances and the short duration of the mining season. The parties say that none of the issues before the Court in this application was decided at the settlement conference. This application was heard on August 1, 2024.

[4] The plaintiff says this application is premature because its outcome depends on additional financial disclosure, and the settlement of asset division and value. He does not dispute the defendant's entitlement to child support and spousal support but argues that the quantum of both child support and spousal support requires an assessment of the defendant's income, the evidence of which is incomplete, as well as a final property division, because of its effect on the relative condition, means and needs of the parties.

[1] The names of the mining claims at issues have been anonymized to protect the identity of the parties.

If any support awards are to be made, the plaintiff seeks to have income imputed to the defendant on the basis of improper expense deductions and deliberate underemployment. He further says that the defendant's delay in providing notice of the claim for spousal and child support until May 2024, contradicting her original position that she would not be claiming financial support, needs to be considered when assessing the retroactivity claim as well as the future claims.

[5] The plaintiff further states that the defendant's request for an interim order permitting her to mine the AB mining claims is similar to a request for an injunction and the criteria are not met.

Brief Conclusion

[6] The presentation of this interim application has made it difficult to determine because of the numerous disagreements in the affidavits of the plaintiff and defendant about both background information and information relevant to the issues to be decided; the procedural complexity as described above, leading to difficulty in discerning the current situation and positions due to inclusion in the application record of or reference by counsel to: the judicial settlement conference draft order; other offers to settle; detailed correspondence between the lawyers about positions before the application, and other background information and outstanding disputes not the subject of this application but likely affecting it, including the division of assets; and the incomplete evidentiary record.

[7] Nevertheless, I will order that the plaintiff pay interim spousal support on a non-compensatory basis based on the 2022 incomes of the plaintiff and the defendant,

calculated on the lowest end of the range; and that the plaintiff pay interim child support in the amount of $1,500 per month, starting June 1, 2024.

[8] There is insufficient information on this interim application to impute income to either party.

[9] No retroactive support payments shall be ordered. No notice of claims for spousal and child support were provided until May 17, 2024. Although child support is a joint financial obligation of both parents, there has been equal shared parenting time since separation, and there is insufficient information about circumstances of the defendant and the child to determine retroactive child support at this time.

[10] Before division of assets is finalized, the defendant will not have a right to mine the AB mining claims. If she were allowed to mine the AB mining claims before that has been adjudicated or settled, this is in effect a decision that she is entitled to some of those claims.

Background

[11] As noted above, many of the background facts were disputed. The following background is limited to those facts that are agreed upon or can be objectively verified.

[12] The parties were in a relationship for 13 years. They met on a flight from Manzanillo, Mexico, to Los Angeles, USA, in March 2008, and moved in together in October 2008. They married on July 28, 2012. They have one child who is now 12 years old. The parties and their child spent the winter months in California, where the defendant lived before the relationship, and the summer months in Dawson City. They separated in December 2021.

[13] At least two incidents occurred involving the plaintiff and the defendant's daughter from a previous relationship, to whom he admitted he was sexually attracted. The first incident occurred in 2015, the second in 2019. The plaintiff admitted to the misconduct, apologized to all, and took personal corrective measures. The defendant reconciled with him and stayed with him until 2021. Despite this, he acknowledges the incidents were a contributing factor to the breakdown of the relationship between the plaintiff and the defendant.

[14] The plaintiff, now 50 years old, is a qualified geologist, equipment operator, welder, and mechanic.

[15] The defendant, also 50 years old, operated a successful daycare between 1998 and 2007 in California. From 1996-98 she was employed at a "Native hospital" in California. There is no evidence of what her role was there. By 2008, she was involved in several business ventures, including the final stages of planning with a property developer the development of 96 condominiums on a seven-acre parcel of land she owned in Mexico. This project was never completed, and the defendant was indebted to an individual who had loaned her $225,000 USD for the development.

[16] The plaintiff's parents owned and operated a placer mining business in Dawson. In or around 2008, the plaintiff was working as a partner with his parents in the business called JK Mining. Each of the three partners held an interest of 33.3% at the outset, and later the plaintiff became a 50% partner, with his parents each having a 25% interest. The family began mining on their original 80 claims, then staked 30 new claims that were registered in 2008/09, 27 AB mining claims in 2008 and bought the remaining AB mining claims in 2009, for a total of 298 claims.

[17] Before the marriage, the plaintiff acquired the AB mining claims from his parents as his inheritance during their lifetimes, confirmed in their wills dated 2017.

[18] For the first years of the relationship, between 2008 and 2013, the defendant's role in the mining business was limited. She could not stay in the Yukon for more than a month in the summer because of the custody arrangements of her daughter. In or about 2015, when the same custody restrictions no longer existed, the defendant was in the Yukon for longer and assumed a larger role in JK Mining. By that time the plaintiff's parents were no longer involved in the business. The defendant took full responsibility for the financial and administrative aspects of the business. She paid bills, expedited, and cooked. Any additional contributions to the business by the defendant are disputed by the plaintiff.

[19] In 2020, the defendant obtained the plaintiff's signature on documents to register the partnership, with her and the plaintiff as the only partners. The plaintiff says he was unaware of this partnership until after the separation but does not deny he signed the papers. The defendant also took steps to transfer the mining assets to a corporation to be formed with herself as President and the plaintiff as Vice President.

[20] In 2020, the plaintiff bought 153 claims called the YZ claims. In 2021, he transferred them to the defendant before she left the relationship. In 2020, the plaintiff also obtained a lease on EF and LM. The EF and LM claims were re-staked in 2021 by the defendant and her new partner (explained below) and registered in the defendant's daughter's name. There are 316 claims.

[21] After separation, the plaintiff obtained 47 more claims – the ST claims.

[22] In February 2022, the defendant took some of the assets from the mining partnership. She registered a partnership, G&H Mining, with C.L. as her partner, and began mining on her YZ claims. C.L. had been the plaintiff's close friend. The defendant and C.L. began a romantic relationship within a few months of the parties' separation. They are no longer together and the business partnership with C.L. no longer exists, having been dissolved in May 2023, according to the defendant.

[23] In June 2023, the defendant sold a wash/sluice plant for $265,900 and has been using the proceeds to support herself and pay for household and living expenses for her and her child.

[24] The plaintiff has continued to mine the AB (and other) claims and has retained the proceeds. His income for 2022 was $182,296 and in 2023 was stated by the defendant to be $249,147, although there is no objective evidence of this amount provided in this application.

[25] The defendant's 2022 income according to her income tax return was zero, although she conceded that with the capital cost allowance deduction removed, it was $6,625. There is no evidence of her income in 2023, other than monies from the sale of the wash plant.

[26] There is no evidence of any income earned by either party outside of mining over the last several years. There is no evidence of any income earned by the defendant in California or of her attempts; if any, to find other employment. The defendant says she is a miner and intends to continue to earn income from mining. The plaintiff disputes her ability to do so.

[27] The child spends half the year in California and half the year in Dawson City. The parents have been sharing parenting one week and on one week off since separation. The defendant claimed through her lawyer spousal support and child support on May 17, 2024. This application was brought on June 19, 2024.

Issues

a. Is the defendant entitled to interim spousal support on a compensatory or non-compensatory basis? If so, what is the quantum?

b. Is the defendant entitled to retroactive spousal support?

c. Is the defendant entitled to interim child support? If so, what is the quantum?

d. Is the defendant entitled to retroactive child support?

e. What if anything prevents the defendant from mining on the AB claims?

Law and Analysis

Spousal support – legal principles

[28] The objectives for both compensatory and non-compensatory spousal support are set out in s. 15.2 (6) of the *Divorce Act*, RSC, 1985, c 3 (2nd Supp.) ("*Divorce Act*"):

> 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.

[29] Compensatory support relates to the first two objectives that address economic advantage of one spouse over the other arising from the marriage. Non-compensatory support relates to the last two objectives, as its purpose is to address the financial gap between spouses after a marriage breakdown. The Court of Appeal for British Columbia in *Healey v Healey*, 2024 BCCA 68 ("*Healey*"), described in more detail compensatory and non-compensatory spousal support as follows:

> [60] Compensatory support is intended to provide redress to the recipient spouse for economic disadvantage arising from the marriage, such as diminished earning capacity or sacrificed career opportunities resulting from the assumption of childcare and household responsibilities. It also recognizes the conferral of economic advantage on the other spouse, who is free to pursue career opportunities free of such responsibilities: *Chutter v. Chutter*, 2008 BCCA 507 at paras. 50–51. The main goal of compensatory spousal support is to provide for an equitable sharing of the economic consequences of the marriage: *Zacharias v. Zacharias*, 2015 BCCA 376 at para. 26.
>
> [61] Non-compensatory (needs-based) support focuses on the needs and means of the spouses, and the nature and duration of the marital relationship. It is based on the concept that spouses have an ongoing responsibility to care for one another: *Zacharias* at para. 27. "Need" in this context refers to something more than the basic necessities of life. The concept of need may vary depending on the circumstances of the parties. In longer marriages, courts may measure need against the marital standard of living: *Chutter* at para. 90.
>
> [62] Once entitlement to spousal support is established, the issues are the quantum and duration of support. These issues require a determination of the parties' incomes. The

> approach to determining income is generally the same for spousal support as for child support. The starting point is ss. 16–20 of the *Guidelines*.

[30] The Court of Appeal for British Columbia in *Healey* noted the general practice in British Columbia is to determine first the division of property before ordering spousal support. This is because of the connection between property division and spousal support. A court must consider the condition, means, needs, and other circumstances of each spouse in making a spousal support order (s. 15.2(4) of the *Divorce Act*). Property division can affect the relative condition, means, needs of the parties, especially as it may generate further income for a spouse (*Healey* at para. 64). The Court of Appeal further noted that this order of determining the issues is a practice and not a legal rule. As a result, while it is not an error of law not to follow this sequence, there is a risk if a court does not do so that it may err by, for example, not considering the relative condition, means, or needs of the parties before making a support order.

[31] This concern was expressed in the decision of *NEGB v TAS*, 2024 BCSC 647, where the court noted at para. 64, that the material facts allowing for a proper consideration of the conditions, means, needs and other circumstances of each spouse were not sufficiently developed, so the court decided there would be no order for spousal support until after the trial.

[32] Interim orders for spousal support may be granted to provide relief before trial. At trial, the court should have sufficient information to make a decision on the merits. The legal test to determine interim support is different from the test in reaching a final order. As stated in *Maxim v Maxim*, 2024 BCSC 641 (“*Maxim*”) at para 12:

> … orders for interim spousal support are stop gap orders which require a cautionary approach because the evidentiary

> record may not be well developed, but the court should not be "so overly cautious as to be timid". On an interim application, the court does not go into an in-depth analysis, but rather takes a rough justice approach: S.L.N. at para. 21. … [emphasis in original]

[33] An in-depth analysis is better left for trial. On an interim application, the needs of the applicant and the potential payor's ability to pay assume greater importance and are the focus of the approach (*Maxim* at para. 12).

[34] The *Spousal Support Advisory Guidelines* are the tool used to determine the amount of interim support, unless there are exceptional circumstances (*Maxim* at para. 13; *Ladd v Ladd*, 2006 BCSC 1280; and *Robles v Kuhn*, 2009 BCSC 1163 at para. 12).

[35] Chapter 9 of the *Spousal Support Advisory Guidelines* sets out the factors for consideration in determining the range under which spousal support may fall. They include:

> Section 9.1: The strength of the compensatory claim. A spouse who has suffered significant economic disadvantage as a result of the marital roles and whose claims are based on both compensatory and non-compensatory grounds may have a stronger support claim under the without child support formula than a spouse whose economic circumstances are not the result of marital roles and who can only claim non-compensatory support based upon loss of the marital standard of living.
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> Section 9.2: Recipient's needs. In a case where the recipient has limited income and/or earning capacity, because of age or other circumstances, the recipient's needs may push an award to the higher end of the ranges for amount and duration.
>
> Section 9.4: Needs and ability to pay of payor. The needs and limited ability to pay on the part of the payor spouse may push an award to the lower ends of the ranges. [*Maxim* at para. 87]

[36] The court in *Maxim* declined to order spousal support on a compensatory basis because there was insufficient evidence about the claimant's work history or career trajectory before the marriage and birth of the children, that could be compared with her situation during the marriage, especially after the children arrived. The court also found the "fluid situation" due to her ongoing recovery from cancer surgery, weighed against finding a strong compensatory claim. Yet, the court in *Maxim* did make an interim award of spousal support based on her needs and ability to pay and her spouse's means. The court had enough income information from both spouses to be able to establish her entitlement on an interim basis.

[37] In the case of *Jadavji v Khadjieva*, 2021 BCSC 2267 ("*Jadavji*") at para. 134, the court made an interim award of spousal support at the lowest end of the range because of the payor's valid concern that the payee had not disclosed fully information about her means and needs, including her new partner's income and contribution to her expenses.

Application of interim spousal support legal principles to this case

[38] The plaintiff does not dispute the defendant's entitlement to spousal support. The objection of the plaintiff is that the determination of quantum is premature because the evidence is not sufficiently developed or complete, and the division of assets may affect the quantum of support. If quantum is to be determined, then the plaintiff says income should be imputed to the defendant due to her inappropriate deduction of expenses in 2022.

[39] In this case, as of July 31, 2024, the defendant had disclosed her income tax returns from 2021, 2022, and 2023, and notice of assessment for 2022. It is not clear

whether the notices of assessment for 2021 and 2023 were disclosed. In 2022, the defendant reported an income of $226,472.41 and claimed business expenses of $245,563.94. The business expense deductions relate to the business conducted by G&H Mining, the partnership of the defendant and C.L.

[40] The plaintiff objects to the expenses deducted by the defendant in 2022 because: she was only able to deduct 50% of them because they were expenses of the shared partnership with C.L.; many of them appeared to be personal expenses such as meals for two, groceries, legal costs related to the transfer of her property in a subdivision, fuel for her home in the subdivision; and she improperly claimed a capital cost allowance deduction on behalf of G&H Mining, on a piece of equipment that she received from her partnership with the plaintiff, not her partnership with C.L.

[41] There remain outstanding matters related to the asset division. Current valuations of the defendant's homes in California and Dawson City have not been done; there have been no recent appraisals. The order arising from the judicial settlement conference in which asset division and valuation were discussed has not been agreed to or finalized at the time of writing.

[42] The plaintiff's income in 2022 according to line 150 of his income tax return was $182,295.75. The defendant's income in 2022 was zero after deduction of business expenses. The plaintiff's income for 2023 was stated by the defendant to be $249,147; however, there is no objective evidence or verification of this provided in the application record. There is no evidence of the defendant's income for 2023, other than the monies from the sale of the wash plant.

[43] Applying the legal principles for interim spousal support, I find there is insufficient evidence of the economic disadvantage and sacrifice alleged to have been suffered by the defendant as a result of the marriage, and a corresponding economic advantage to the plaintiff as a result of her contributions to the business, to ground an entitlement to a compensatory spousal support claim at this time. When the relationship began, she no longer operated the daycare and there is no evidence of her earnings from that business in any event. The evidence is undisputed that in 2008 she was living off of a loan for a condominium project that ultimately failed. She was also indebted to her former husband. The plaintiff assisted in paying off her debts, although the amount of his contribution is in dispute. While the defendant says she gave up a career in California to relocate to the Yukon and assist the plaintiff with mining, there is no evidence of what that career was, what her earnings may have been, and what her future prospects were, in order to compare it with what she did and earned while mining. She also spent the majority of her time in California during the first few years of the relationship and there is no evidence of earnings there, if any, during those or subsequent years of the relationship. Finally, there is a dispute between the parties about the extent of her contributions to the mining partnership with the plaintiff, and the reasons for the increasing financial success of the plaintiff.

[44] As a result of this lack of evidence, I am unable to award spousal support on a compensatory basis, even applying the rough justice approach. This does not preclude a claim on this basis from being made at trial or on another interim application if new evidence is provided.

[45] An interim spousal support award generally focuses on the means and needs of both spouses, as noted above, that is, the non-compensatory basis of a claim. In this case, there is still much outstanding information required from both parties. The defendant's income for 2023 has not been provided and the plaintiff's 2023 income has not been verified. No notice of assessment has been provided in the record by either party. The defendant has not provided any details of her efforts since the breakup of the partnership with C.L. and their failed mining attempts to find alternate employment or to otherwise mitigate her losses. Her daily living expenses were also not itemized, and her standard of living not described.

[46] Currently the defendant's means appear to be greater than the plaintiff's. The plaintiff has stated that the defendant does not know how to mine; whether or not this is true, the defendant appears to have had less success thus far with her mining claims than the plaintiff has had and continues to have with his. Mining is where she has appeared to have put most of her time and effort in 2022 and possibly in 2023. While she has some money from the sale of the wash plant and will have additional resources once the asset division is agreed to and completed, this has not yet occurred. The relationship was 13 years, including a nine year marriage, and much of her life at least in the final six years of the marriage was spent mining in the Yukon. She is now 50 years old. These factors are sufficient to base the defendant's entitlement on an interim basis to non-compensatory spousal support.

[47] Each party seeks imputation of income to the other party. The authority lies in s. 19(1) of the *Federal Child Support Guidelines,* SOR/97-175 ("*Guidelines*"), which the *Spousal Support Advisory Guidelines* state provides a starting point for imputing income

in spousal support cases. The defendant seeks imputation of income to the plaintiff based on s.19(1)(d), where “it appears that income has been diverted which would affect the level of child support to be determined under these Guidelines”. Her support for this comes from information she gained from accessing their child’s iPad and through it, the plaintiff’s emails, which evidence has been excluded from consideration in this application. As well she bases it on an unsubstantiated reference to his earnings in text messages exchanged about the litigation. The defendant further alleges the plaintiff has not disclosed all of his income in his tax returns because the amounts in his bank statements are greater than what was provided on his income tax return. The plaintiff has no solid explanation for the discrepancy, only speculation, but says it is necessary to obtain further information from his bookkeeper.

[48] The plaintiff seeks to impute income to the defendant on the basis of s.19(1)(g) “the spouse unreasonably deducts expenses from income”. He seeks the remedy of adding her claimed business expenses into her income, as permitted by s. 18 or s. 19 of the *Guidelines* in order to assess the defendant’s actual income, because they were improperly deducted as noted above. The plaintiff also says there is no evidence she has made any efforts to mitigate her losses by seeking other employment, which fits under s. 19(1)(a) as a basis for imputation of income because of alleged intentional under-employment.

[49] The defendant had a partial explanation for her business expenses, saying that her accountant advised she could claim expenses attributable to workers living in her log cabin and travel trailer as well as house bills. She appears to have acknowledged the inappropriateness of the capital cost allowance claim as she has added it in to her

income, for the purpose of this application, bringing her 2022 income from a deficit of $19,000 to a positive income amount of $6,625. She further says in response to the allegation of under-employment that she attempted to mitigate her losses by mining with C.L., and it is not reasonable for the plaintiff to require her to find different employment.

[50] Imputing income is generally considered inappropriate on an interim application, especially where the evidence is conflicting. This is particularly the case where the imputation of income is based upon an assessment of the earning capacity of a spouse, one of the arguments of the plaintiff in this case. The difficulty in this case is that the allegations about imputation of income by both parties require evidence of detailed itemization of expenses and explanations, detailed analyses of bank statements which are not in evidence, and an understanding of accounting principles and tax laws, possibly requiring expert evidence. “Any party who asks the court to impute income must establish an evidentiary basis: *Marquez v Zapiola*, 2013 BCCA 433 at para. 36” (*Maxim* para. 42). For example, while the underlying evidence of the expenses was provided through invoices, the propriety of these deductions from income as business expenses was not set out, and legitimate questions have been raised by the plaintiff. In sum, sufficient evidence has not been provided in this application for a determination of how much income should be imputed, and as a result I will not impute income at this time to either party. This ruling is without prejudice to the right of both parties to make these arguments at trial.

[51] Due to an absence of reliable evidence about the 2023 incomes of both parties, I will only assess interim spousal support on the 2022 income tax return stated income of the plaintiff of $182,296 and the defendant’s admitted 2022 income of $6,625. As the

court found in *Jadavji,* I will award interim spousal support on a non-compensatory basis at the lowest end of the range, given the evidentiary gaps related to the defendant's situation.

[52] In doing this, I am aware of the prematurity concern expressed by the plaintiff, especially as it relates to the inter-relationship between the asset division and amount of spousal support. The defendant herself has noted that the income disparity will be substantially reduced once asset division occurs, assuming it occurs according to her expectations. However, the plaintiff's agreement that she is entitled to spousal support and the defendant's current financial circumstances to the extent they have been described in the evidence have persuaded me that this is the appropriate approach at this time. It is a stop-gap measure, using a rough justice approach. As this litigation and settlement discussions progress, adjustments may be likely. This award does not preclude further interim applications on the basis of new information.

Retroactive spousal support

[53] No order for retroactive spousal support will be made. In this case, the defendant did not provide any notice of a claim for spousal support until her lawyer's letter of May 17, 2024. While the absence of earlier notice is not necessarily determinative of the validity of a retroactive claim, it is a factor for consideration. In this case, the evidentiary gaps noted above, the anticipated effect of the finalized asset division on the income disparity, and the fact that a trial date has been set at which time the court will have a full evidentiary record, make it inappropriate to award retroactive spousal support on an interim basis.

Child Support

Legal basis

[54] The *Guidelines* regulate the jurisdiction of the courts to order child support in divorce proceedings. Section 26.1(2) of the *Divorce Act* provides: “the guidelines shall be based on the principle that spouses have a joint financial obligation to maintain the children of the marriage in accordance with their relative abilities to contribute to the performance of that obligation.”

[55] Section 9 of the *Guidelines* provides that where each spouse exercises no less than 40% of parenting time with the child over a year, the amount of child support order must be determined by taking into account the amounts in the tables for each of the spouses, the increased costs of shared parenting time arrangements, and the conditions, means, needs and other circumstances of each spouse and of any child for whom support is sought.

Application of child support legal principles to this case

[56] The plaintiff does not dispute his obligation to pay child support, but again states the application is premature as it relates to the determination of quantum. As well, the plaintiff says the application is poorly supported, according to the *Guideline* requirements.

[57] The problem of determining quantum according to the plaintiff is the same as is described above in the determination of spousal support. The wrongful deduction of business expenses according to the plaintiff means that her income is higher than reported. There is no evidence of her attempt to secure employment other than engaging in mining.

[58] The plaintiff explains that the application is not properly supported because it does not contain the notice of assessment for 2023 as required by s. 21(1)(b) of the *Guidelines*. This is necessary because of the equal shared parenting time of the plaintiff and defendant. Notice of assessment of the defendant's tax return for 2022 was provided. It is not clear whether a notice of assessment was provided for 2021. The plaintiff relies on s. 22(1) of the *Guidelines* which permits the responding party to apply for the matter to be set down for a hearing, and the ability to move for judgment, and for an adverse inference to be drawn if the required information from the applicant is not provided; or the ability of the responding party to request an order for production of the missing documents.

[59] The defendant says at the time of submitting the documents for her application she could not find an accountant to assist her and had not received her T1 Generals. These were later provided to the plaintiff. There was no explanation for the absence of notices of assessment for 2023 or 2021.

[60] The defendant did provide her notice of assessment for 2022, and it is not clear whether the notices of assessment for 2021 and 2023 have now been provided. If they have not, they must be provided before trial. It appears the plaintiff has not provided his notices of assessment either. The quantum of the defendant's income remains uncertain because of the lack of evidence, expert and otherwise, needed to determine whether the business expenses were properly deducted or not.

[61] Neither counsel provided any case law in support of their respective positions on this point.

[62] I find the failure to provide notices of assessment of 2023 and possibly 2021 is not sufficient to deny the application for child support or draw an adverse inference, especially since the plaintiff has also not provided his notices of assessment. While I agree that the determination of the defendant's actual income is uncertain without further disclosure and possibly expert accounting and tax evidence, for the purposes of an interim application, taking the rough justice approach, I will order interim child support. Given the statutory obligation of both parents to support the child of the marriage, and applying three factors of s. 9, in particular the third one relating to the circumstances of each party and the child, I find that on an interim basis, the condition, means, needs and circumstances of the defendant require additional support from the plaintiff for the child to be assured of the same standard of living and opportunities when with each parent. On an interim basis, the plaintiff shall pay child support commencing June 1, 2024, based on his 2022 income of $182,296 and her 2022 income of $6,625. The table amount is $1,624 per month, but in the context of the equal shared parenting time and applying s. 9 which is intended to be flexible, I will reduce this to $1,500 per month.

Retroactive child support

[63] The defendant seeks retroactive child support, beginning January 2022. She explains she did not make the application sooner because she did not have sufficient financial disclosure, in particular the plaintiff's income tax returns for 2022 and 2023, until May 31, 2024. She says she could not have commenced an application without disclosure of financial information.

[64] However, the defendant at no time gave notice to the plaintiff that she would be seeking child support, until the lawyer's letter of May 17, 2024. Notice of intention to seek child support is different from bringing an application and such notice can be used to determine the commencement date for child support.

[65] The case of *DBS v SRG*, 2006 SCC 37, provides that the court should take a holistic view of the circumstances of a case in determining whether to make a retroactive award. The Court should consider the reason for the delay, the conduct of the payor, the past and present circumstances of the child, and whether the retroactive award may entail hardship.

[66] In *Colucci v Colucci*, 2021 SCC 24, the court held that retroactive orders for child support are not truly retroactive; instead, they enforce the pre-existing obligation of parent to pay an amount of child support commensurate with their income.

[67] The difference in this case is that s. 9 is applicable, given the equal shared parenting time that has always existed. There is no evidence about the circumstances of the child from the defendant. While she maintains she is currently struggling financially because she has not been mining in 2024 and is living off the $265,900 sale of the wash plant, there is no evidence as to how her financial situation may affect the child, their comparative standard of living while with their mother, and when the situation changed. Under s. 9, set off between the two incomes occurs, and the difference remains payable by the spouse with the higher income. Without more certain, complete and accurate evidence of the defendant's income, expenses, and standard of living, since January 2022, it is impossible to determine the relative payment obligations of each spouse in past years.

[68] I accept that the defendant's means at the moment, at least until division of assets is completed, are less than those of the plaintiff and may have been since the application was brought in June 2024. However, I do not have sufficient information about the impact of her circumstances on the child, and the timing of such impacts, if any. The child's living arrangements have not changed as she has the same house in California and Dawson, the child is home schooled, and there is no evidence of material deficiencies.

[69] As a result, I will not make a retroactive order for child support on an interim basis at this time. This does not preclude the request for and granting of such an order at trial, on the basis of additional evidence. Nor does it preclude the bringing of a further interim application if new information is acquired.

Permission to defendant to work on AB mining claims

[70] The defendant requests a court order on an interim basis allowing her to mine on the AB mining claims. They are registered in the plaintiff's name. She maintains these are family assets because they were mined during the partnership, and she contributed to the profits obtained from them. They became family assets as a result, even if they were inherited by the plaintiff from his parents. She states their partnership still exists as none of the circumstances that would result in termination has occurred.

[71] The plaintiff says first he was unaware until after separation he had signed a document in 2020 that confirmed a partnership with the defendant. In any event, he says the partnership was terminated through her conduct of taking items and equipment that belonged to the partnership; and by competing with the partnership by entering into

another partnership to mine with C.L. (see ss. 22(1), 32, and 37 of the *Partnership and Business Names Act*, RSY 2002, c 166).

[72] The plaintiff further notes that originally the defendant wanted the division of assets to reflect her exclusive ownership and use of the YZ, EF and LM mining claims, leaving the AB mining claims exclusively for the plaintiff. However, at the judicial settlement conference she changed her position to say that AB mining claims were a family or partnership asset.

[73] I find that the seeking of an order for permission to mine the AB mining claims is premature. Whether or not the AB mining claims belong to both parties, or to the plaintiff alone is in dispute. Granting this order would in effect be an interim decision that the AB mining claims are a family or shared asset. It is not possible nor appropriate to decide this asset issue on this interim application. It needs to be made at a full trial on all the evidence, or after successful settlement discussions.

Conclusion

[74] To conclude, I order as follows:

a. interim spousal support calculated at the lowest end of the range based on plaintiff income of $182,296 and defendant income of $6,625, payable by the plaintiff to the defendant monthly, starting June 1, 2024;

b. interim child support of $1,500 per month, payable by the plaintiff to the defendant monthly, starting June 1, 2024;

c. both parties shall complete any outstanding financial disclosure before trial;

d. the parties shall exchange income information on or before June 1 of each year; and

e. paragraph 5 of the defendant's application is dismissed.

[75] The plaintiff advised during the hearing of this application that he has provided his permission to the defendant to sell the 153 mining claims registered in her name located in YZ mining claims in Dawson City, Yukon, so there is no need for an order for paragraph 6 of the defendant's application.

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DUNCAN C.J.