SUPREME COURT OF NOVA SCOTIA
(Family Division)
Citation: Darlington v. Moore, 2015 NSSC 124

Date: 20150420
Docket: SFHMCA 068167
Registry: Halifax

Between:

Michelle Darlington

Applicant

and

David Paul Moore

Respondent

and

2012 Hfx. No. 407388

Between

David Moore and Sand, Surf & Sea Limited, a body corporate

Plaintiffs

and

Michelle Darlington

Defendant

Revised Decision: The text of the original decision has been corrected according to the attached erratum dated May 7, 2015.

Judge: Associate Chief Justice Lawrence I. O'Neil

Date of Hearing: October 15, 16, 17 & 21, 2013; June 10 & 11, 2014 and September 8, 9, 10 & 11, 2014

Written Submissions: October 27, 2014

Counsel: Peter D. Crowther, counsel for Ms. Darlington
David P. Moore, Self Represented

By the Court:

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Introduction

[1] The subject litigation was returned to this court for a rehearing (*Moore v. Darlington,* 2012 NSCA 68). This is my third written decision emanating from that rehearing.

[2] In my first ruling, I determined the income of Mr. Moore for the purpose of calculating his support obligation (*Darlington v. Moore* 2013 NSSC 103) and in a second ruling (*Darlington v. Moore* 2014 NSSC 358), I determined his ongoing and retroactive obligation to pay child support, including a contribution to the payment of special expenses, as well as his past and future obligation to pay spousal support. A determination of the quantum of spousal support was deferred so that a complete picture of the parties' condition, means and circumstances could be gained. This has now been possible because of additional evidence offered by the parties in September 2014 and subsequent written and oral arguments in October 2014. This later evidence focussed principally, but not exclusively on the parties' asset and debt positions throughout and on the business pursuits of each of them.

[3] The Court must also rule on issues arising from the lawsuit initiated by Sand, Surf & Sea Ltd. ('SSS Ltd.') and David Moore against Ms. Darlington in 2012. By order of Justice Pickup on July 9, 2013, this litigation was transferred from the General Division of the Supreme Court to the Family Division of the Supreme Court so that it could be consolidated with the ongoing matrimonial litigation in this Court. A transcript of the proceeding before Justice Pickup is marked as exhibit 58 herein.

[4] A central determination for the Court pertains to each party's responsibility for the liabilities and benefits that flowed from the operation of a restaurant in Queensland, Nova Scotia by 'SSS Ltd.'. The extent to which Ms. Darlington should be liable for debts and have an interest in the company or the assets related directly or indirectly to this enterprise is a core remaining issue to be resolved.

[5] The parties began a common law relationship in 1990 and separated in late 2009. The law of unjust enrichment is being relied upon in part to support Ms. Darlington's claim to a share of the property in Mr. Moore's name or held jointly with Ms. Darlington. The lawsuit filed by David Moore and Sand Surf & Sea Limited is also based, in part on the law of unjust enrichment, as is Mr. Moore's personal claim herein. His response to Ms. Darlington's application identifies unjust enrichment as relief he seeks (tab 27, volume 2, exhibit 19). To assess these claims, a clear understanding of the chronology of the parties' relationship and their activities over the course of their relationship is necessary. It is also necessary to gain an appreciation of Mr. Moore's interest in being an entrepreneur, his litigious personality and the parties' respective roles in the family.

[6] Both Mr. Moore and Ms. Darlington referenced Mr. Moore's health issues. Mr. Moore said he suffered from PTSD (exhibit 30A at tab 5) and suffers other disabilities for which he receives compensation. Ms. Darlington also described Mr. Moore as growing increasingly agitated at the time of their separation (exhibit 7).

[7] The court is satisfied Mr. Moore's personality may explain the often belligerent attitude displayed through this proceeding. However, his understanding of the proceedings was not in doubt. I had no concerns as to his ability to advance his case and to meet the case of Ms. Darlington.

[8] Nevertheless, assessing Mr. Moore's case and defence has been challenging. As is true with many self represented persons involved in disputes about money the court has been left with a task more appropriately assigned to a forensic accountant. In many of his exhibits Mr. Moore presented financial tallies but not the primary documents upon which these are based. For example, in exhibit 29 at paragraph 14 he lists expenditures made by or on behalf of Ms. Darlington from the line of credit. Similarly he lists the changes in value of his RRSPs beginning in 1990 (exhibit 29 tab U).

Issues

[9] This Court must determine Ms. Darlington's and Mr. Moore's interest in or responsibility for the following family and business assets and debts *inter alia*:

- Assets

1. Mr. Moore's RCMP pension.
2. Mr. Moore's employment benefits, principally his severance.
3. RRSP accounts.
4. CPP benefits.
5. "Matrimonial home", Lakeshore Drive, Tantallon

- Debts

1. Line of credit.

-Lawsuit

1. Sand Surf & Sea Limited and David Moore, Plaintiffs and Michelle Darlington, Defendant

- SSS Ltd.

1. Ownership of SSS Ltd. and liability for its debts

[10] To assist the reader and to more fully explain the court's reasons frequent references to exhibits are made.

Overview of the Parties' History

[11] Mr. Moore and Ms. Darlington lived on the Summerside military base for approximately six months prior to relocating to the Halifax area in 1991. The PEI home Mr. Moore occupied had been sold by this time. Prior to moving to Halifax, Mr. Moore identified and agreed to purchase a home in Lower Sackville, Halifax County.

[12] Mr. Moore explained that he moved to Halifax so he could attend law school. He did not do this. However, he says he did take a few night courses for one or two years at Dalhousie. He continued his employment in the RCMP and Ms. Darlington worked as a nurse, once in Halifax.

[13] In 1994 Ms. Darlington left her employment as a nurse to care for the parties' child, Siobhan, who had been diagnosed with cancer. At this time the parties had two biological children, Siobhan, born in 1992 and Cameron, born in 1993 and a third child Tonya born to Ms. Darlington before she met Mr. Moore. Tonya was four and one half years of age when the parties met. With respect to why she left nursing, Ms. Darlington stated on direct that it was to pursue business opportunities with Mr. Moore. However, in cross examination she said it was because of her daughter's illness. The later is consistent with her affidavit evidence (exhibit 19, volume 2, tab 21, paragraph 10).

[14] A knowledge of Mr. Moore's real estate investments directly or through 'SSS Ltd.' or Moore Investments including the dates of investments; manner of financing and the disposition of proceeds upon sale is necessary to resolve the issues before the court. Mr. Moore's/ SSS Ltd. investments included the following:

Summerside, PEI

(a) bungalow - Blueshank Road, acquired in the mid 1980s

(b) triplex - McEwen Road, acquired in the mid 1980s

Halifax County, Nova Scotia

(c) Lower Sackville home on Sawyer Street acquired in 1990

(d) Queensland Restaurant site acquired in 1995

(e) 139 Tantallon Crescent, a lot purchased in 1994

(f) home from Birchill Homes in 2005

(f) lot in Porter's Lake in 2004

(f) Legacy Homes 2000, agreement to buy three lots

(g) in 2000 Mr. Moore constructed a matrimonial home on one of the lots "purchased" in 2000

Other

(h) Florida Investment(s)

(i) vehicles

-Summerside, PEI

(a) bungalow - Blueshank Road , acquired in the mid 1980s (exhibit 106A-C)
(b) triplex - McEwen Road, acquired in the mid 1980s (exhibit 107A-E)

[15] When the parties began cohabitation, Mr. Moore was 25 and Ms. Darlington was 22. Ms. Darlington was completing the nursing program in PEI where they both lived. Mr. Moore was completing his fourth year as a member of the RCMP stationed in Prince Edward Island (exhibit 29 at paragraph 5).

[16] Mr. Moore says when the parties met he "owned" two properties. One was a triplex on McEwen Road (exhibit 107), Summerside and the second was the home he lived in on Blueshank Road (exhibit 106), also in Summerside. Ms. Darlington was renting accommodation and raising her daughter as a single parent. Mr. Moore says he sold the Blueshank property in the spring of 1990 for $91,000 having purchased it in 1986 for $63,000. He says he purchased the triplex for $77,500 in 1986 and sold it in 2003 for $82,500 (exhibit 29 at paragraph 6).

-Lower Sackville home on Sawyer Street acquired in 1990 (exhibit 92A-G inclusive)

[17] Mr. Moore says he purchased the Lower Sackville home in 1990 and sold it for $129,900 in 2000 (exhibit 29 tab O). The closing statement for the sale does

not show the payout of any encumbrances on this property (exhibit 29, tab O). This is consistent with other evidence that this property was mortgage free when sold in October 2000. Mr. Moore says a small mortgage was taken back by him when the Sawyer Street property was sold because the buyers did not have a down payment as equity; a requirement of commercial lenders. Conveyancing and financing documents related to this property are marked as exhibit 92A-G.

[18] Prior to 1990, Mr. Moore initiated litigation against the RCMP. He testified that Edward Greenspan represented him. He says he was successful and in 1997 he received approximately $140,000 as compensation after the costs of his litigation were paid. The debt on the Lower Sackville home was retired in 1997 as a consequence of Mr. Moore applying the proceeds of his lawsuit against it. In 2000 the Lower Sackville home was sold. Mr. Moore testified that the resulting proceeds in the amount of $129,763.54 flowed into the Lakeshore Drive home, referred to herein also as the 'matrimonial home'.

[19] The deed effecting the sale of the Lower Sackville home was signed by Ms. Darlington as Michelle Moore and as releaser and the affidavit of status declared the parties to be spouses.

[20] In his affidavit sworn in September 2013 (exhibit 29 at paragraph 6), Mr. Moore states the purchase of the Sawyer Street home was initially fully financed but soon thereafter, the $104,000 mortgage was retired with the proceeds from his lawsuit.

- 139 Tantallon Crescent, a lot purchased in 1994 (exhibit 109A-B)

[21] In 1994 'SSS Ltd.' purchased a property described as 139 Tantallon Crescent (exhibit 109A and B). The 2010 assessment notice for this property appears at tab 26 of volume 2 of exhibit 19. The documents pertaining to the purchase of this property appear at exhibit 19, tab 21, paragraph 18, as part of Ms. Darlington's affidavit and as exhibit 109B. The property was valued at $25,000.

[22] Although the deed is dated October 29, 1994 and has 'SSS Ltd.' as the grantee this corporate entity was not incorporated until December 6, 1995 (at exhibit 52, tab A appears the certificate of incorporation).

- Queensland Restaurant site acquired in 1995 (exhibit 108A-B)

[23] Mr. Moore used various business names prior to and after incorporating 'SSS Ltd.'. For example, at exhibit 29 tab K appears a 1996 Revenue Canada T4 referring to the restaurant business as Moore's Landing and the Business Development Bank of Canada 1995 offer of financial assistance identifies the offeree as Beach Buddies & Moore Limited (tbi). I infer 'tbi' means to be incorporated.

[24] Mr. Moore stated that his company purchased the restaurant in 1994 for $195,000 (exhibit 19, volume 2 at tab 21T). Elsewhere he said the company was incorporated in December 1995. The deed itself is dated December 18,1995 (exhibit 108 A-B).

- purchase of home from Birchill Homes in 2005 (exhibit 111B-C)
- purchase of lot in Porter's Lake in 2004 (exhibit 111D-F)

[25] In 2005, coincidental with Mr. Moore's efforts to develop real estate and as part of that effort, Mr. Moore entered a contract on behalf of 'SSS Ltd.' to buy a pre-fabricated home from Birchill's Home Sales Limited and to locate it on a lot in Porter's Lake (exhibit 111A-C). Documents confirming the purchase, mortgage and sale of the Meldrum Lane property in Porter's Lake are identified as exhibit 111D-F. Note again that the deed is dated December 21, 2004, almost a full year before the 'SSS Ltd.' was incorporated.

[26] This agreement ended unhappily from Mr. Moore's perspective.

[27] In 2007 'SSS Ltd.' sold a property in Porter's Lake (exhibit 111E). Exhibit 111D is a collateral mortgage on the Porter's lake property. It confirms a mortgage on this property, dated September 20, 2006 for $180,000.

- Legacy Homes 1995, agreement to buy three lots (exhibit 52, tab E&F)

[28] In 2000, 'SSS Ltd.' entered an agreement with Legacy Homes Ltd. to develop three lots in Tantallon, Halifax County. For a variety of reasons, Mr. Moore (through the company) was unable to realize his goal. In the face of a potential beach of contract action by Legacy Homes Ltd., Mr. Moore agreed to settle the dispute by retaining one of the lots for himself and re-deeding the other

two to Legacy Homes Ltd. The 'matrimonial home' was then constructed by Legacy Homes in 2000 on the lot Mr. Moore retained (exhibit 52F).

- in 2000 Mr. Moore and Ms. Darlington built a home on Lakeshore Drive

[29] The former matrimonial home is located on Lakeshore Drive, Tantallon, Halifax County, Nova Scotia. The Court must decide how the equity in the parties' former matrimonial home is to be determined and how it is to be shared. Ms. Darlington seeks to have the equity divided equally, pursuant to the *Partition Act*, R.S.N.S., c. 333, s.8 and the doctrine of unjust enrichment if additional authority is necessary. Mr. Moore says she does not have an interest in the property.

[30] The "matrimonial home" on Lakeshore Drive is held jointly by the parties, the lot having been conveyed to both parties in October, 2000 by Legacy Homes Limited. Mr. Moore says proceeds from the predecessor "matrimonial home" in Lower Sackville being $129,763.54 were used to assist with meeting the cost of purchasing/building the Lakeshore Drive home.

[31] The Lower Sackville home had been held solely in Mr. Moore's name since 1991 when the parties moved to Nova Scotia.

[32] At paragraph 24 of his affidavit sworn April 22nd, 2010, Mr. Moore described the financing of the Lakeshore Drive home as follows (exhibit 19, volume 3, tab 31):

> 24. In 2000, the Company built the home in which we resided as a family. I sold my home in Lower Sackville and used $140,000.00 from the proceeds of the mortgage free home and $60,000.00 from an inheritance from my mother, $67,000 from the sale of my Apt building in Summerside to purchase the land and build the home. In addition, I opened a line of credit, in my name alone, secured against the home, to complete the building of the home, which had a balance of $235,000.00 by 2003.
>
> 25. The company received $285,000.00 in insurance proceeds for the fire in 2003 and I borrowed this from the company and paid off the line of credit for the house. The first payment was $235,000.00 and second was for $50,000.00. This loan has not been repaid yet.

[33] I note the foregoing affidavit says the sale proceeds resulting from the sale of the Lower Sackville home were $140,000 but elsewhere the sale proceeds are stated to be $129,763.54.

[34] Justice Jollimore in *Soubliere v. MacDonald*, 2011 NSSC 98 reviewed the presumption of equal sharing arising when joint tenancy exists and it arises by virtue of title being in both parties' names. The presumption is rebuttable.

[35] The parties do not agree on the cost of the Lakeshore Drive home.

[36] They disagree on the source of the funds needed for the lot purchase, the construction of the home and the cost of subsequent improvements to the time of separation and after separation. Related to this issue is what indebtedness on the line of credit is attributable to the home construction and improvements. Conclusions on these issues are relevant to a determination of "the equity" in the home at the time of separation and today. Mr. Moore says the land cost was $120,000 and the cost of the home was $300,000 in 2000. He says the housing market is currently down and the value of their home is down as well.

[37] The home was appraised in 2010 as having a value of $570,000. Mr. Moore says improvements of $59,000 in value were made after that. An appraisal dated September 2010 states it has a market value of $570,000 (exhibit 19, volume 3, tab 43A). An appraisal dated August 2014 arrives at the same value (exhibit 82).

[38] Mr. Moore testified that he renovated the basement of the family home in 2010; and did additional work on the property following separation including landscaping work which included the placement of boulders on the property and all of which cost in excess of $50,000. Mr. Moore says these funds were drawn on the line of credit and therefore should be returned to the line of credit when the house is sold. At paragraph 34 of his affidavit (exhibit 52) Mr. Moore says $54,300 was borrowed from 'SSS Ltd.' (through use of the line of credit) to convert the basement of the property to a rental unit (see also exhibit 30A at tab 8).

- business activities of 'SSS Ltd.'

[39] As stated, in late December 1995, Mr. Moore incorporated 'SSS Ltd.'. He was and remains its sole shareholder, officer and director. This business

undertaking would directly or indirectly dominate the financial lives of the parties for the next decade and is at the centre of issues before me. The corporate entity purchased, renovated and then opened a seasonal restaurant in Queensland, a community near Halifax (exhibit 108A and B). The acquisition of the restaurant was financed by a loan from FBDB (BDC) and proceeds from the sale of Mr. Moore's property or borrowing against his real estate.

[40] In 2003 the restaurant burned. Later that year, Mr. Moore received the payout on an insurance policy in the approximate amount of $285,000. The evidence as to the quantum of the insurance proceeds is inconsistent and the proceeds are stated to be $247, 391.08 on occasion and $286,000 elsewhere. I am satisfied the quantum is approximately $285,000 and consisted of two amounts; one for the restaurant and another related to losses associated with the apartment above the restaurant. When she testified in September 2014 Ms. Darlington confirmed there were two components to the payment. She was unsure of the precise amounts but offered $230,000 and $50,000 as the two payments.

[41] Mr. Moore applied these proceeds to the parties' line of credit identified as the TD Canada Trust Line of Credit. The TD Canada Trust Line of Credit shows *inter alia* large deposits in 2003. He says the effect of these payments was to leave a positive balance of $60,000 on the line of credit in 2004 (exhibit 60 and exhibit 52 tab L). It appears from Mr. Moore's testimony that he viewed the insurance proceeds as still in the company, notwithstanding the funds were used to pay down the family's personal line of credit. He explained the use of the insurance proceeds in this way was a loan to him and Ms. Darlington. This line of credit was used to finance both family and business activities of 'SSS Ltd.'.

[42] At the time of the fire, the corporate records for 'SSS Ltd.' showed a shareholder's loan of more than $245,305 owed to Mr. Moore (exhibit 114A-E). Rather than simply repaying the shareholder's loan, I am satisfied that Mr. Moore subsequently used these insurance funds.

[43] It is relevant to discuss why the restaurant was not reopened. Mr. Moore described conflict that developed with the Nova Scotia Department of Transportation because of that Department's opposition to the restaurant being reopened (exhibit 19 volume 2 at tab 21T). Mr. Moore was denied the necessary approvals to rebuild. This resulted in litigation, *Sand, Surf and Sea Ltd. v. Nova Scotia (Minister of Transportation and Public Works* (2005), 236 NSR (2d) 201.

In addition, retired Nova Scotia Supreme Court Judge, David Gruchy was asked to do a report for the government. His 2008 report forms part of exhibit 98 and also appears in exhibit 52 at tab J. The Honourable David Gruchy's report contains a detailed history of the challenges faced by Mr. Moore in reestablishing the restaurant following the fire and in particular, his conflict with the Department of Transportation and related litigation. The report recommended that the government acquire the property and compensate Mr. Moore (his company) in the amount of $300,000. Mr. Moore has not yet received any compensation from the Province of Nova Scotia as a result of that report.

[44] The effect of the conflict with the Nova Scotia Department of Transportation was to drain many thousands of dollars from Mr. Moore and or 'SSS Ltd.' to pay for legal services. In his affidavit appearing in exhibit 19, volume 3 at tab 31 he states:

> 27. Since the restaurant fire, the company has been involved in a very costly litigation with the government over a property dispute regarding the land upon which the restaurant was situate. The cost has been $400,000 in legal fees, including an award of $100,000 in costs against the company and me personally, as the directing mind of the company. To date, $179,000.00 in fees and court costs are outstanding and unpaid.

[45] Coincidental with the foregoing, 'SSS Ltd.' was in conflict with the Canada Revenue Agency. The company was audited by the Canada Revenue Agency 'CRA' in 2000. A tax bill for non payment of HST resulted. The apartment above the restaurant, which the parties occupied during the tourism season when the restaurant was operating, was classified a personal asset, not a corporate asset and certain input tax credits claimed by the company became unavailable to the company. Mr. Moore challenged the ruling. In 2008 Justice Webb, then a trial Judge with the Tax Court of Canada ruled partially in 'SSS Ltd.'s' favour (see exhibit 61).

[46] The 2000 audit by 'CRA' and subsequent Court processes are cited by Mr. Moore as alerting him to the need to keep the insurance proceeds "moving", i.e. to be actively investing them. In his mind, this would safeguard against the funds being treated as his personal income paid to him by 'SSS Ltd.'. Presumably, the active investing was to be on behalf of 'SSS Ltd.' although the ongoing need for there to be a line between acting in his personal capacity and that of the corporation did not seem to be appreciated by Mr. Moore.

[47] It is within this context that Mr. Moore incurred hundreds of thousands of dollars in legal fees and pursued other business ventures including the purchase of cars; their resale and the purchase of property in Florida.

[48] Ms. Darlington estimated the line of credit as being at $80,000 in December 2009; the month she says she left. Mr. Moore says the current debt to be shared by the parties is in excess of $600,000 of which $200,000 is the liability attributable to the line of credit and $454,000 is the amount loaned to the couple by the business 'SSS Ltd.'. In 2012, Mr. Moore's initiated litigation against Ms. Darlington claiming she is indebted to 'SSS Ltd.' because of the use of 'SSS Ltd.' funds. As stated, I must resolve that litigation as well. In his letter dated October 29, 2010 to Mr. Crowther, counsel for Ms. Darlington, Mr. Moore says the account receivable due to him is valued at $450,000 plus interest (exhibit 19, volume 1, tab 6H).

[49] Also listed as liabilities of 'SSS Ltd.', are a $230,000 rolling line of credit for vehicles; court judgments and penalties with Revenue Canada. It is of interest that on October 29, 2010 the line of credit had a total liability of $86,866.30 (exhibit 60). The line of credit limit was $225,000 at the time.

- loan from 'SSS Ltd.' to parties

[50] Mr. Moore described the following loans from 'SSS Ltd.' as existing in 2000 (exhibit 9, paragraph 22):

> $111,500 lot purchase price (matrimonial home)
>
> $225,000 line of credit

[51] On May 1, 2001 he says a further $40,456.31 was borrowed from 'SSS Ltd.' (on the line of credit) to pay for the construction of a garage next to the matrimonial home.

[52] Mr. Moore says the insurance proceeds of $247,391.08 following the fire which destroyed the restaurant, were used to reduce the foregoing line of credit (exhibit 9, paragraph 29).

[53] Mr. Moore says a further $54,300 was borrowed to construct a basement apartment in the matrimonial home in 2010, following the parties separation (exhibit 9, paragraph 34).

[54] Mr. Moore says part of the indebtedness on the line of credit reflects funds expended for the direct personal benefit of Ms. Darlington and invested in the home she now claims a half interest in. In his affidavit sworn October 17, 2012 Mr. Moore (exhibit 9 paragraph 51) identified the following expenditures in particular:

> - the purchase of a Honda Civic Ms. Darlington currently drives and 'owns', an expenditure in excess of $30,000 (exhibit 29 tab w, xyz); in his affidavit he says the cost was $33,000;
>
> - cosmetic surgery $20,000
>
> - improvements to the matrimonial home Mr. Moore estimates as valued at $54,000, partial receipts for which are shown at tab 8 of exhibit 30A; in his affidavit he says the renovations to finish the apartment cost $40,000
>
> - retirement of a portion of the line of credit that was attributable to the construction of the parties' home; $235,000
>
> -$15,000 car for Tonya
>
> -$20,000 for a family cruise
>
> -$30,000 for a real estate course for Ms. Darlington 1999-2000
>
> total $168,000 + $235,000

[55] As stated, Mr. Moore says the line of credit was used to pay for Ms. Darlington's Honda hybrid in the fall of 2009 at a cost of $33,000 (exhibit 60 and exhibit 29 tab W, XYZ). I am satisfied the car was financed from the line of credit.

[56] Mr. Moore says the total amount loaned to him and Ms. Darlington to build and to renovate the home was $453,697.39 (exhibit 9, paragraph 35).

[57] In his statement of property, sworn February 3, 2010, he stated $235,000 of the insurance proceeds were applied to pay off the debt on the parties' home and this had risen to $310,500 because of interest costs.

[58] Exhibit 3 is the CIBC business operating account statement for 'SSS Ltd.' for June 2012. It shows a balance of $5,512.

[59] Unfortunately there are no clearly identifiable corporate records, financial or otherwise recording borrowing or lending transactions on behalf of 'SSS Ltd.' after 2003. Even for the period before then the records are scattered or non existent. Exhibit 62 and exhibits 114A-E contain the records that exist to that point. Similarly, no tax returns for the period after 2003 exist nor did they ever exist.

[60] Exhibit 62 is a copy of the 2002 T2 Corporation Income Tax Return for Sand, Surf & Sea Limited. A number of financial statements for the company form part of Exhibit 62. They are (1) a balance sheet to December 31, 2002; (2) notes to the financial statements to December 31, 2002; and (3) changes in financial positions.

[61] Advances from shareholders are valued at $245,305. The FBDB (also referred to as the Business Development Corporation-BDC) mortgage is shown as $156,822 secured by a "chattel" mortgage on land and building.

[62] The documents presented as promissory notes evidencing loans by 'SSS Ltd.' to the parties were clearly created after the fact to evidence loans to the parties from 'SSS Ltd.' as opposed to the payment of income by 'SSS Ltd.' to Mr. Moore. If the funds were found to be income for Mr. Moore the funds were potentially taxable in his hands. In his statement of property dated February 2010, Mr. Moore declares as a liability, a loan from 'SSS Ltd.' in the amount of $235,000 with an amount owing of $310,500 (exhibit 19, volume 2, tab 26). The promissory notes purport to be signed by or on behalf of Ms. Darlington as well as Mr. Moore.

[63] I am satisfied Ms. Darlington was unaware of the creation of 'the promissory notes' and did not sign them. Mr. Moore signed on her behalf. Mr. Moore called his accountant, Mr. Wilde, from the period leading to 2003 to testify and to presumably *inter alia* authenticate the promissory notes. He testified that he saw the loan documents for the first time in 2014.

[64] In his affidavit sworn October 17, 2012 (exhibit 9 at paragraph 33) Mr. Moore referenced a promissory note signed by him in favour of 'SSS Ltd.'. He

did not say in his affidavit that Ms. Darlington signed the promissory notes but he does attribute the debt to Ms. Darlington as well. Four promissory notes appear at tab E of exhibit 9. These are dated:

> May 3, 2001 ($40,456.31); August 29, 2003 ($247,391.08)
>
> February 9, 2000 ($111,550) and December 5, 2010 ($54,300)

[65] Ms. Darlington was involved in some of the activities of the business.

[66] Ms. Darlington was employed at the restaurant, a seasonal business, for parts of the following years: 1996, 1997, 1998, 2000, 2001 and 2002. In 2003 she discontinued working there because of the fire. She says she was paid a salary for the first three years and worked afterwards without pay and this was her contribution to the business (exhibit 19, volume 2, tab 21 at paragraph 13). She says she took four days off in six seasons. For some of these years she received employment insurance income (exhibit 19 volume 2 at tab 21) during the off season.

[67] In 2000 Ms. Darlington secured her licence to sell real estate. Mr. Moore said this was part of Mr. Moore's and her entry into land development and real estate sales. He complains that Ms. Darlington did not seriously pursue becoming a real estate sales person. Ms. Darlington responds with the observation that Mr. Moore did not build any homes to sell and secondly, that she was too busy working at the restaurant to do so.

Lawsuit: David Moore and Sand, Surf & Sea Limited, Plaintiffs and Michelle Darlington, Defendant

[68] Succinctly summarizing Mr. Moore's and Sand, Surf & Sea Ltd.'s claim against Ms. Darlington based on the evidence has been challenging. I am satisfied that the subject statement of claim beginning at paragraph 6 captures Mr. Moore's case against Ms. Darlington and captures Sand, Surf & Sea Ltd.'s case against her:

> 5. Darlington and Moore were engaged to be married in 1995.
>
> 6. In 1996 SS&SL purchased, fixed up and began operating a restaurant called "Moore's Landing" located at 9564 St. Margarets Bay Road, Queensland Beach, Queensland, Nova Scotia (hereinafter referred to as the "restaurant").

7. Darlington was employed as a manager of the restaurant.

8. Darlington became increasing disgruntled as a manager of the restaurant and decided to change careers.

9. Moore and Darlington agreed that SS&SL would pay for Darlington to acquire a real estate license and begin selling real estate as a new profession and career.

10. In 2000, SS&SL acquired several lots under contract to build homes for resale.

11. Darlington was to be hired as the listing agent to sell the completed homes.

12. On the 9th of February, 2000, SS&SL entered into an agreement to purchase Lot 407 situate at 141 Lakeshore Drive, Hammonds Plains, Nova Scotia from United Golf Incorporated for the amount of $111,550.00.

13. SS&SL entered into a contract with Legacy Home Builders to construct a house on Lot 407 situate at 141 Lakeshore Drive, Hammonds Plains, Nova Scotia as well as two other properties.

14. In the summer of 2000, Darlington decided she no longer wanted to be a real estate agent placing the agreements for construction of homes as aforementioned at risk.

15. In October of 2000, Darlington and Moore decided the home being built on behalf of SS&SL on Lot 407 situate at 141 Lakeshore Drive, Hammonds Plains, Nova Scotia would become the principal residence of Moore and Darlington so as not to breach the building contract with Legacy Home Builders (hereinafter referred to as the "principal residence").

16. The principal residence is owned by Moore and Ms. Darlington as joint tenants.

17. In order to purchase and build the principal residence, Darlington and Moore borrowed funds encumbering the principal residence on or about the 30th day of August, 2000 with a mortgage/line of credit in the amount of $225,000.00.

18. On or about May 1, 2001, Forty Thousand Four Hundred Fifty Six Dollars and Thirty-One Cents ($40,456.31) was borrowed via a Promissory Note from SS&SL to pay for some of the construction costs of the principal residence.

19. On or about May 23, 2003, before opening for the season, the restaurant was extensively damaged by fire.

20. SS&SL entered into negotiations with the insurance provider to reimburse SS&SL for all of the losses resulting from the fire.

21. SS&SL immediately after the fire began making arrangements to rebuild the restaurant, but ran into numerous difficulties resulting in significant delays in rebuilding the restaurant.

22. On or about August 29, 2003, SS&SL received the sum of Two Hundred and Forty Seven Thousand Three Hundred and Ninety One dollars and Eight cents ($247,391.08) from the Insurance company as reimbursement for losses suffered when the restaurant was extensively damaged by fire.

23. On or about August 29, 2003, by agreement Darlington and Moore jointly and severally agreed with SS&SL that the proceeds from the insurance company referred to in paragraph 22 of this Statement of Claim were to be borrowed by Darlington and Moore jointly and severally and used to pay off the mortgage/line of credit, and complete construction of the principal residence in order to save Darlington and Moore the cost of borrowing from the existing mortgage/line of Credit until such time as the money was required by SS&SL.

24. Darlington and Moore further agreed that within thirty (30) days from demand for repayment the monies advanced from SS&SL would be repaid.

25. The terms of repayment were set out in a promissory note which was signed by Moore and which confirmed the terms and conditions of the loan from SS&SL to Darlington and Moore.

26. The total amount of monies paid to Darlington and Moore by SS&SL was Four Hundred and Fifty Three Thousand Six Hundred and Ninety-seven dollars and Thirty-nine cents ($453,697.39).

27. On October 29, 2009, Darlington and Moore broke up.

28. On the 27th day of February, 2012 SS&SL demanded payment of Four Hundred and Fifty Three Thousand Six Hundred and Ninety-seven dollars and Thirty-nine cents ($453,697.39) from Darlington.

29. To date, no monies have been paid back to SS&SL.

30. In the alternative, SS&SL claims that Darlington has been unjustly enriched in the amount of Four Hundred and Fifty Three Thousand Six Hundred and Ninety-seven dollars and Thirty-nine cents ($453,697.39).

31. Moore and SS&SL jointly and severally claim against Darlington:

    a. Payment of the total outstanding, together with interest at the rate set out in the promissory note, being the sum of Four Hundred and Fifty Three Thousand Six Hundred and Ninety-seven dollars and Thirty-

nine cents ($453,697.39) from February, 2000 until the date of judgment.

b. Interest on the amounts of any arrears from the date the payment or payments are due until the date of judgment.

c. In the alternative an order transferring Darlington's interest in the property to Moore to allow Moore to refinance the property to pay back the loan from SS&SL.

d. Reimbursement of any interest and penalties charged by Canada Revenue Agency against SS&SL or Moore due to Moore's inability to repay the monies to SS&SL.

e. Costs and such other relief as this Honourable Court may order.

Mr. Moore's other business activities

[69] The pressure Mr. Moore felt to reinvest the insurance proceeds helps explain many of his business decisions subsequent to the 2003 fire. He was, perhaps correctly of the view that once the funds were in his hands as opposed to in the corporate account for 'SSS Ltd.', he was at risk of having the money declared as personal income, unless the funds were being used to further the business interests of 'SSS Ltd.'. He decided against applying the funds to the repayment of a shareholder's loan to him or the loan from FBDB, a fairly straight forward and obvious option in the circumstances. The result was that in 2003, the company showed a shareholder's loan of $245,305 in favour of Mr. Moore and had approximately $280,000 as insurance proceeds.

[70] Mr. Moore explained that money was invested in antique or vintage cars; in Florida real estate and to reduce the line of credit attributable to the parties' home. Mr . Moore argued strenuously that these business funds benefited the family because they were used to eliminate the loan against the matrimonial home. In the words of Mr. Moore, he had to keep the money moving to avoid tax consequences that would accrue if he did not. He did not explain why he did not simply leave the funds in the account of "SSS Ltd".

Line of Credit (Limit $225,000); Insurance Proceeds and Promissory Notes

[71] The history and recent status of the TD Canada Trust line of credit is reflected in exhibit 60 for the period January 3, 2002 to August 2012. Exhibit 60 is

documentary evidence of a line of credit having a limit of $225,000, as confirmed by exhibit 63. It is secured against the Lakeshore Drive home. The security was put in place coincidental with the conveyance of the matrimonial home to the parties in October 2000. It is observed that Mr. Moore declared he was married to Michelle "Moore" when he swore the affidavit of status associated with the line of credit.

[72] In his statement of property sworn September 7, 2012 Mr. Moore declared his obligation and that of Michelle Darlington to 'SSS Ltd.' for the deposit of the insurance proceeds on the line of credit as $235,000.

[73] Exhibit 60 shows the indebtedness on the line of credit being reduced from $187,417.16 on August 15, 2003 to a positive balance of $60,292.82 on August 29, 2003 as a result of two large deposits on August 29, 2003. These were in the amounts of $186,417.16 and $60,973.92.

[74] These deposits are consistent with the deposit of the insurance proceeds resulting from the fire at the restaurant and the sale of the Summerside triplex. I am satisfied that these deposits relate to these sources.

[75] Later transactions involving the line of credit of particular interest include a cheque in the amount of $55,000 negotiated on November 28, 2003 and a second cheque for $2,177.52 which reduced the positive balance of the line of credit to zero.

[76] On January 20, 2006 a cheque drawn on the line of credit increased the liability from zero to $133,483.37. By May 31, 2007 the line of credit liability had increased to $179,719.18. On November 9, 2007 the then liability was reduced to $31,263.30 as a result of a deposit of $181,364.52. The Porter's Lake property was sold in 2007 (exhibit 111E). Mr. Moore said the profit realized was $45,881 and this was paid on the line of credit.

[77] On July 31, 2009 the liability grew to $51,724.04.

[78] Over the following years the liability varied as reflected in the following:

December 31, 2009	$86,393.37
January 4, 2010	$85,393.37
January 8, 2010 (wire to customer $5,074.30)	$90,467.67
January 21, 2010 (deposit $10,000)	$83,026.42
January 27, 2010 (wire to customer $24,495.00)	$107,521.42
February 8, 2010 (deposit $32,000)	$74,773.91
. . . . .	
January 20, 2011 (USD draft $100,530.00)	$187,754.34

[79] The outstanding balance on August 31, 2012 was $165,422.32. A deposit of $55,922.62 was made on September 11, 2012 and the liability was reduced to $108,499.70 (see bank statements forming part of exhibit 43).

[80] In the same record three withdrawals are listed for January 2013 and the liability reached $208,336.60. On January 11, 2013 and January 14, 2013 withdrawals in the form of wire transfers of $25,045 and $24,997.50 respectively are shown. A GC transfer out in the amount of $59,828.99 is shown on January 15, 2013.

[81] Mr. Moore says the sale of the Porter's lake property by 'SSS Ltd.' resulted in a profit of $45,881.15 which was paid on the line of credit (exhibit 111 d-f). He references the line of credit record for September 11, 2007 (exhibit 60). He argues this deposit of $47,881.15 and the resulting $60,292.82 credit balance resulting from the deposit of the fire insurance proceeds on August 29, 2003 are evidence of indebtedness to 'SSS Ltd.'.

[82] At the time of the hearing the parties disagreed as to their separation date. This is potentially significant. The line of credit had a balance of $49,006.77 on October 30, 2009 when Mr. Moore says they separated and $86,393.37 on December 21, 2009, the day Ms. Darlington says they separated (exhibit 19 volume 1 at tab 10). In his affidavit sworn April 22, 2010 , Mr. Moore says the parties separated October 30, 2009 (exhibit 19, volume 3, tab 31 at paragraph 3) but he also says this was the day Ms. Darlington moved out.

[83] Liabilities for pre and post separation draws against the line of credit must be examined and assessed. When she testified in November 2012 Ms. Darlington placed the line of credit liability at approximately $80,000 at the time of separation (transcript, exhibit 22 at page 98). Note Mr. Moore argues Ms. Darlington's liability is more than half the value of the line of credit at the time of separation because he says the family borrowed significant funds from the corporation and these were used to keep the line of credit level lower than it would otherwise be. He offers promissory notes as evidence of this indebtedness (exhibit 9, tab E).

[84] I am satisfied that the parties' separation date was December 21, 2009. This is the day Ms. Darlington moved out. The parties had a troubled relationship for a lengthy period before this date. However, her decision to move was definitive and the relationship ended.

[85] The balance of the line of credit when the parties separated is a joint debt of the parties. The line of credit was accessed by both parties and understood by both to be for their joint benefit and to be their joint liability. The parties agree that this is the case.

[86] It is impossible to know from the documents filed what the activities, expenses and income of 'SSS Ltd.' were after the restaurant was destroyed in 2003. The court has Mr. Moore's evidence. However it does suffer from unreliability and makes conclusions difficult.

[87] Having reviewed the parties history and activities I must turn to a review of the legal principles governing a determination of the parties' property entitlement and liability for debts, both personal and corporate.

Unjust Enrichment, Resulting Trust

[88] Given that the parties were never married and they did not register as a domestic partnership as permitted by Part II of the *Vital Statistics Act*, R.S.N.S. 1989, c.494, the *Matrimonial Property Act*, R.S.N.S. 1989 c.275 is not relevant to an analysis of the parties' property and debt position.

[89] The Court must apply the principles governing the application of the law of unjust enrichment and resulting trust to the evidence presented. The Court's

jurisdiction to do so is explicitly defined in s.32A(1)(w) of the *Judicature Act*, R.S.N.S. 1989 c.240. The leading case on both issues is *Kerr v. Baranow*, 2011 SCC 10. The case summary is a concise and clear outline of the relevant law. It appears at the forefront of the case report:

> For unmarried persons in domestic relationships in most common law provinces, judge-made law is the only option for addressing the property consequences of the breakdown of those relationships. The main legal mechanisms available have been the resulting trust and the action in unjust enrichment. Resulting trusts arise from gratuitous transfers in two types of situations: the transfer of property from one partner to the other without consideration, and the joint contribution by two partners to the acquisition of property, title to which is in the name of only one of them. The underlying legal principle is that contributions to the acquisition of a property, which were not reflected in the legal title, might nonetheless give rise to a property interest. In Canada, added to this underlying notion was the idea that a resulting trust could arise based solely on the "common intention" of the parties that the non-owner partner was intended to have an interest. This theory is doctrinally unsound, however, and should have no continuing role in the resolution of domestic property disputes. While traditional resulting trust principles may well have a role to play in the resolution of property disputes between unmarried domestic partners, parties have increasingly turned to the law of unjust enrichment and the remedial constructive trust. Since the decision in Pettkus v. Becker, the law of unjust enrichment has provided a much less artificial, more comprehensive and more principled basis to address claims for the distribution of assets on the breakdown of domestic relationships. It permits recovery whenever the plaintiff can establish three elements: an enrichment of the defendant by the plaintiff, a corresponding deprivation of the plaintiff, and the absence of a juristic reason for the enrichment. This Court has taken a straightforward economic approach to the elements of enrichment and corresponding deprivation. The plaintiff must show that he or she has given a tangible benefit to the defendant that the defendant received and retained. Further, the enrichment must correspond to a deprivation that the plaintiff has suffered. Importantly, provision of domestic services may support a claim for unjust enrichment. The absence of a juristic reason for the enrichment means that there is no reason in law or justice for the defendant's retention of the benefit conferred by the plaintiff. This third element also provides for due consideration of the autonomy of the parties, their legitimate expectations and the right to order their affairs by contract.

[90] Constructive trusts must be clearly understood as a possible remedial outcome when an unjust enrichment is found. The summary continues:

> Where the unjust enrichment is best characterized as an unjust retention of a disproportionate share of assets accumulated during the course of a "joint family venture" to which both partners have contributed, the monetary remedy should be calculated according to the share of the accumulated wealth proportionate to the claimant's contributions. Where the spouses are domestic and financial partners, there is no need for "duelling *quantum meruits*". The law of unjust enrichment,

> including the remedial constructive trust, is the preferable method of responding to the inequities brought about by the breakdown of a common law relationship, since the remedies for unjust enrichment "are tailored to the parties' specific situation and grievances". To be entitled to a monetary remedy on a value-survived basis, the claimant must show both that there was a joint family venture and a link between his or her contributions and the accumulation of wealth.

[91] The Court must determine whether the parties have been engaged in a joint family venture. Again, the case summary describes the task:

> To determine whether the parties have, in fact, been engaged in a joint family venture, the particular circumstances of each particular relationship must be taken into account. This is a question of fact and must be assessed by having regard to all of the relevant circumstances, including factors relating to mutual effort, economic integration, actual intent and priority of the family. The pooling of effort and team work, the decision to have and raise children together, and the length of the relationship may all point towards the extent to which the parties have formed a true partnership and jointly worked towards important mutual goals. The use of parties' funds entirely for family purposes or where one spouse takes on all, or a greater proportion, of the domestic labour, freeing the other spouse from those responsibilities and enabling him or her to pursue activities in the paid workforce, may also indicate a pooling of resources. The more extensive the integration of the couple's finances, economic interests and economic well-being, the more likely it is that they have engaged in a joint family venture. The actual intentions of the parties, either express or inferred from their conduct, must be given considerable weight. Their conduct may show that they intended the domestic and professional spheres of their lives to be part of a larger, common venture, but may also conversely negate the existence of a joint family venture, or support the conclusion that particular assets were to be held independently. Another consideration is whether and to what extent the parties have given priority to the family in their decision making, and whether there has been detrimental reliance on the relationship, by one or both of the parties, for the sake of the family. This may occur where one party leaves the workforce for a period of time to raise children; relocates for the benefit of the other party's career; foregoes career or educational advancement for the benefit of the family or relationship; or accepts underemployment in order to balance the financial and domestic needs of the family unit.

[92] Furthermore, the family property approach is clearly rejected by Justice Cromwell speaking for the Court in *Kerr v. Baranow*, 2011 SCC 10 at paragraph 194:

> (c) The "Family Property Approach"
>
> [194] I turn finally to Ms. Kerr's more general point that her claim should be assessed using a "family property approach". As set out earlier in my reasons, for Ms. Kerr to show an entitlement to a proportionate share of the wealth

> accumulated during the relationship, she must establish that Mr. Baranow has been unjustly enriched at her expense, that their relationship constituted a joint family venture, and that her contributions are linked to the generation of wealth during the relationship. She would then have to show what proportion of the jointly accumulated wealth reflects her contributions. Of course, this clarified template was not available to the trial judge or to the Court of Appeal. However, these requirements are quite different than those advanced by the appellant and accordingly her "family property approach" must be rejected.

[93] To fully appreciate the meaning and effect of Justice Cromwell's rejection of the "family property approach" a clear understanding of this approach must be achieved. It is important to know the distinction between this approach and an analysis predicated on a finding of a joint family venture.

[94] The "family property approach" is premised on each party being presumptively entitled to a proportionate share of the wealth accumulated during the relationship.

[95] In *Kerr v. Baranow*, 2011 SCC 10, the Court also discussed the concept of a resulting trust and its application in domestic cases. At paragraph 24, Justice Cromwell declared that the common intention resulting trust has "no further role in the resolution of domestic cases". However, he was clear that his conclusion was limited only to the common intention resulting trust:

> [29] I would hold that the resulting trust arising solely from the common intention of the parties, as described by the Court in Murdoch and Rathwell, no longer has a useful role to play in resolving property and financial disputes in domestic cases. I emphasize that I am speaking here only of the common intention resulting trust. I am not addressing other aspects of the law relating to resulting trusts, nor am I suggesting that a resulting trust that would otherwise validly arise is defeated by the existence in fact of common intention.

[96] The Court must be mindful to resist interpreting the law in a manner that blurs the distinction between married and unmarried couples when property division issues arise at separation. In *Walsh v. Bona*, 2002 SCJ 325 and *Quebec (Attorney General) v. A.*, 2013 SCC 5 the Supreme Court upheld the distinction. These cases are hereinafter referred to as *Walsh* and 'A' respectively.

[97] The objective of an unjust enrichment analysis is not to achieve a property regime at common law for unmarried couples similar to that which many legislatures have established for married persons. That would be improper given

the role of the legislatures under our constitution and earlier rulings of the Supreme Court. I observe also that such an approach forces the question what legislative regime is preferred. Not all Provinces have the same legislative regime governing property division between married couples upon separation. Consequently, to the extent that Court initiative seeks to eliminate the distinction between statutory regimes and common law regimes governing the division of property upon separation, on the basis of fairness and consistency what Provincial regime will be favoured?

[98] As observed in '*A* ' at paragraph 279-280:

> [279] This type of legislative intervention has in fact occurred in certain provinces. Provincial legislatures have chosen to regulate the private relationships of common law spouses on the basis of their own provinces' legislative objectives. Today, each province defines the effects of de facto unions or common law relationships differently, which is a mark of Canadian legal pluralism.
>
> [280] For example, in all provinces except Quebec, and in the territories, cohabitation for a certain number of years gives rise to an obligation of support between common law spouses: see, inter alia, Family Law Act, R.S.O. 1990, c. F.3; Family Services Act, S.N.B. 1980, c. F-2.2; The Family Maintenance Act, R.S.M. 1987, c. F20; Maintenance and Custody Act, R.S.N.S. 1989, c. 160; Family Relations Act, R.S.B.C. 1996, c. 128; Family Law Act, R.S.N.L. 1990, c. F-2; The Family Maintenance Act, 1997, S.S. 1997, c. F-6.2; Family Law Act, R.S.P.E.I. 1988, c. F-2.1; Family Law Act, S.N.W.T. 1997, c. 18; Domestic Relations Act, R.S.A. 2000, c. D-14. Some provinces, such as Ontario, have imposed this policy to alleviate the burden on the public purse: see, inter alia, W. Holland, "Intimate Relationships in the New Millennium: The Assimilation of Marriage and Cohabitation?" (2000), 17 Can. J. Fam. L. 114, at p. 128. In British Columbia, in addition to the obligation of support, certain measures to protect the family residence apply to common law spouses: Family Relations Act. In Saskatchewan and Manitoba, common law relationships are, in addition to being subject to a support obligation and measures related to the family residence, subject to the division of family property: The Miscellaneous Statutes (Domestic Relations) Amendment Act, 2001 (No. 2), S.S. 2001, c. 51; Common Law Partners' Property and Related Amendments Act, S.M. 2002, c. 48. As we saw above, Nova Scotia's legislation provides that common law partners can choose to register their partnerships and thus be governed by the legal framework applicable to marriage with respect to matrimonial property: Law Reform 2000 Act, S.N.S. 2000, c. 29.

[99] The legal reality for married couples is that the law in all the Provinces is not the same when property division must be effected upon divorce. The *Matrimonial Property Act of Nova Scotia* excludes business assets from the definition of

matrimonial assets. Matrimonial assets are presumptively equally divisible and that presumption governs pre marital assets. That is not the case in all Provinces.

[100] Some jurists, after finding the existence of a joint family venture, in a presumptive way move to distribute the assets of both parties as if the parties were married i.e. equally. This is an attractive resolution, for its simplicity, but ignores the fact that the parties are not married and a more in depth analysis is required. (see 34 C.F.L.Q. 35, December 2014, Carswell)

[101] The first trial court in *Kerr v. Baranow* awarded Ms. Kerr an undivided one third interest, by way of resulting trust, in real property owned by Mr. Baranow (2009 BCCA 111). Following the decision of the Supreme Court of Canada the matter was returned to the Supreme Court of British Columbia. After the rehearing (2012 BCSC 1222) a monetary award of $240,000 was made to Ms. Kerr i.e. 25 %, an amount less than she was awarded after the first trial.

[102] Justice Gerow in the rehearing of *Kerr v. Baranow* 2012 BCSC 1222 commented on the challenge faced by a court when a monetary award must be determined and the mutual conferral of benefits must be valued. At paragraph 63-65 she quoted Justice Cromwell at length:

> [63] As stated by Cromwell J. at paras. 46 and 47, remedies for unjust enrichment are restitutionary in nature, and the claimant may be entitled to either a monetary or proprietary remedy. The first remedy to consider is the monetary award; however, the calculation of the appropriate award has presented difficulties in the past because of the mutual conferral of benefits that takes place in many relationships. As noted in paras. 48 and 49 of the decision, problems have arisen because it is difficult to retroactively create some sort of notional ledger to record and value the services performed by each partner for the other, and because it was considered that monetary awards must always be calculated on a "fee for service" or "value received" approach. Cromwell J. disagreed that monetary awards should always be calculated on this basis, stating at para. 58:
>
> > In my view, restricting the money remedy to a fee-for-services calculation is inappropriate for four reasons. First, it fails to reflect the reality of the lives of many domestic partners. Second, it is inconsistent with the inherent flexibility of unjust enrichment. Third, it ignores the historical basis of quantum meruit claims. Finally, it is not mandated by the Court's judgment in Peter. For those reasons, this remedial dichotomy should be rejected.

and further at paragraph 83 Justice Gerow stated:

[83] It is clear from Kerr at para. 111 that when the respondent has pleaded a counterclaim or set-off, the mutual benefit issue must be resolved in the course of considering that defence or claim. Cromwell J. rejected the argument that the mutual benefit issue should be taken into consideration at the detriment/benefit stage of the inquiry, but that it may be considered at the juristic reasons stage, stating at para. 116:

> I conclude that mutual benefits may be considered at the juristic reason stage, but only to the extent that they provide evidence relevant to the parties' reasonable expectations. Otherwise, mutual benefit conferrals are to be considered at the defence and/or remedy stage. I will have more to say in the next section about how mutual benefit conferral and the parties' reasonable expectations may come into play in the juristic reason analysis.

[103] Finally Justice Gerow concluded at paragraphs 106-110:

[106] In my view, the facts demonstrate that both parties conferred benefits on the other, and both have established that they made contributions to the other to their own detriment. The evidence establishes that the parties entered into a joint family venture where they accumulated assets, namely the new home on the Wall Street property and their personal savings. At the same time, they kept their finances separate and any resolution should demonstrate that.

[107] The claimant has established a link between the claimant's contributions and the construction of the new house on the Wall Street property. In my view, it would be unjust for the respondent to retain that entire asset given the claimant's contributions.

[108] However, the respondent's very significant contributions to the claimant's welfare and care, particularly after the stroke, must also be taken into account and go to reduce the amount the claimant would otherwise be entitled to.

[109] As Cromwell J. stated at para. 102:

> ... While determining the proportionate contributions of the parties is not an exact science, it generally does not call for a minute examination of the give and take of daily life. It calls, rather, for the reasoned exercise of judgment in light of all of the evidence.

[110] Having considered all of the circumstances, and both the claims of the claimant and the respondent, I have concluded that the claimant is entitled to a monetary award to offset her contribution to the Wall Street property equivalent to 25% of its appraised value of $960,000, which was done prior to the 2007 trial. Accordingly, the claimant is entitled to $240,000. As well, I have concluded that both parties should retain the savings in their name.

[104] I recommend the analysis of the Supreme Court's decision in *Kerr v. Baranow*, as articulated by Professor McInnes in his text, The Canadian Law of Unjust Enrichment and Restitution, LexisNexis Canada 2014 at page 1202-1203:

> (iii) Sufficient Connection
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> As Cromwell J. explained, not every joint family venture carries a right to relief calculated on a "value surviving", rather than a value received, basis. And even if the "value surviving" model is applicable, it does not invariably entail equal shares. The plaintiff is entitled to relief only to the extent that her contributions to the couple's collaborative effort were connected to the defendant's enhanced wealth.
>
> The burden of proof regarding the causal issue varies with the claim. "[T]here must be a link between the contribution and the accumulation of wealth, or ... between the 'value received' and the 'value surviving' whether the plaintiff seeks beneficial interest under a constructive trust or a judgment debt measured as a proportionate share of the accumulated assets. The proprietary response, however, requires a "sufficiently substantial and direct" nexus, a "clear proprietary relationship", to a specific asset. The personal response, in contrast, is justified as long as "the joint effort ... led to an accumulation of assets generally". Consequently, "[w]here that link exists, and a proprietary remedy is either inappropriate or unnecessary, the monetary award should be fashioned to reflect the true nature of the enrichment and the corresponding deprivation".

[105] In short, these are the principles that will guide the Court's analysis of the parties asset and debt positions.

[106] For Ms. Darlington to succeed with her unjust enrichment claim against Mr. Moore and to show an entitlement to a proportionate share of "the wealth" accumulated by Mr. Moore during the relationship, Ms. Darlington must establish the following (*Kerr v. Baranow* 2011 SCC 10 at paragraph 36-53):

1. That Mr. Moore has been (a) unjustly enriched at (b) her expense which assumes © the absence of a juristic reason for the enrichment.

2. That her relationship with Mr. Moore was a joint family venture.

3. That her contributions are linked to the generation of wealth during the relationship.

4. And, what proportion of the jointly accumulated wealth reflects her contributions.

[107] Once an unjust enrichment claim is made out, the remedy is restitutionary in nature, that is, "it may attract either a 'personal restitutionary award' or a 'restitutionary proprietary award'." (*Kerr v. Baranow* 2011 SCC 10 at para. 46)

[108] Cromwell, J., beginning at paragraph 30 in *Kerr v. Baranow* explained that the resulting trust as an option for addressing property division issues that arise when common law couples separate must be abandoned in favour of the flexible approach and more doctrinally sound option available in the area of unjust enrichment law. He observes at paragraph 62 that "the law of unjust enrichment does not mandate a presumption of equal sharing"; unlike much matrimonial property legislation. However, the law of unjust enrichment can and should respond to the social reality identified by the legislature that many domestic relationships are more realistically viewed as a joint venture to which the parties jointly contribute.

[109] Earlier at paragraph 53 he wrote:

> The extent of the constructive trust interest should be proportionate to the claimant's contributions. Where the contributions are unequal, the shares will be unequal . . . As Dickson J. put it in Rathwell, "The court will assess the contributions made by each spouse and make a fair, equitable distribution having regard to the respective contributions".

[110] In the view of Cromwell, J. (at para 78):

> . . . What is essential, in my view, is that, in either type of case, there must be a link between the contribution and the accumulation of wealth, or to use the words of McLachlin J. in Peter, between the "value received" and the "value surviving". Where that link exists, and a proprietary remedy is either inappropriate or unnecessary, the monetary award should be fashioned to reflect the true nature of the enrichment and the corresponding deprivation.

Joint Family Venture

[111] As stated, unjust enrichment claims made by a party following the breakdown of a common law relationship and which are based on the claimed existence of that relationship require the Court to analyse circumstances to determine whether the parties were in fact in a 'joint family venture'. In the words of Cromwell, J. at para. 87 in *Baranow, supra*:

> My view is that when the parties have been engaged in a joint family venture, and the claimant's contributions to it are linked to the generation of wealth, a monetary award for unjust enrichment should be calculated according to the share of the accumulated wealth proportionate to the claimant's contributions. In order to apply this approach, it is first necessary to identify whether the parties have, in fact, been engaged in a joint family venture . . .

[112] The existence of a joint family venture will be determined after considering evidence relevant to four criteria, i.e. (a) the existence of mutual effort; (b) the degree of economic integration; (c) actual intent of the parties, and (d) the extent to which the parties gave priority to the family.

- mutual effect

[113] Ms. Darlington and Mr. Moore were clearly working together towards common goals. They moved to Nova Scotia, started a restaurant, raised the children and supported each other with a view to creating a more comfortable and financially secure life for themselves and their children. Their incomes were accessible to the other as required and the household expenses were not segregated.

- economic integration

[114] I have already commented on the fact that the parties had almost total economic integration in their personal lives. It is acknowledged that Mr. Moore managed business interests and activities and Ms. Darlington's involvement in the businesses was limited. More will be said about that elsewhere in this decision.

- actual intent

[115] The parties talked of marriage and fully intended their personal financial affairs to be intertwined. In reality, Mr. Moore was the main breadwinner. They frequently referred to each other as husband and wife and Ms. Darlington referred to herself from time to time as Mrs. Moore. Holding title to the 'matrimonial home' on Lakeshore Drive in both their names is also evidence of their intention to engage in a joint family venture.

- priority of the family

[116] The parties did place a high priority on meeting the needs of their two biological children and Ms. Darlington's child. When one of the children developed cancer, the couple met the resulting challenges together. Mr. Moore supported Ms. Darlington's career pursuits.

[117] As stated, it is not correct to conclude that having found a joint family venture a presumption of equal division of assets, owned by each, arises.

[118] In the *Vanasse* appeal considered by the Supreme Court with the *Kerr v. Baranow* appeal, the contribution claimed was in the form of domestic and childcare services (paragraph 134). The trial Judge found that a link existed between wealth accumulated during a middle period of the parties' relationship when Ms. Vanasse was almost solely responsible for the home and children. The trial Judge also found a linkage to Mr. Sequin's business success (para 138 of Justice Cromwell's decision):

> [138] The trial judge found as a fact that Ms. Vanasse's efforts during this second period were directly linked to Mr. Seguin's business success. She stated, at para. 91, that
>
> > Mr. Seguin was enriched by Ms. Vanasse's running of the household, providing child care for two young children and looking after all the necessary appointments and needs of the children. Mr. Seguin could not have made the efforts he did to build up the company but for Ms. Vanasse's assumption of these responsibilities. Mr. Seguin reaped the benefits of Ms. Vanasse's efforts by being able to focus his time, energy and efforts on Fastlane. [Emphasis added.]
>
> Again at para. 137, the trial judge found that
>
> > Mr. Seguin was unjustly enriched and Ms. Vanasse deprived for three and one-half years of their relationship, during which time Mr. Seguin often worked day and night and traveled frequently while in Halifax. Mr. Seguin could not have succeeded, as he did, and built up the company, as he did, without Ms. Vanasse assuming the vast majority of childcare and household responsibilities. Mr. Seguin could not have devoted his time to Fastlane but for Ms. Vanasse's assumption of those responsibilities. . . . Mr. Seguin reaped the benefit of Ms. Vanasse's efforts by being able to focus all of his considerable energies and talents on making Fastlane a success.

[119] It is worth noting that Ms. Vanasse had left a promising job with CSIS to support the family and Mr. Sequin's business interests. She moved to Halifax, took a leave from her employment, then returned to Ottawa and left her job altogether and remained home with the children.

Conclusion: RESP

[120] Ms. Darlington and her counsel appeared before me on February 27, 2015. Mr. Moore participated by telephone from Florida.

[121] The parties agreed that the funds in an RESP account valued at approximately $33,000 (referenced in my earlier decision 2014 NSSC 358 at paragraph 128) have now been accessed by Mr. Moore. It is agreed that the student indebtedness of Siobhan has been reduced by $15,000 by Mr. Moore as a consequence but the remaining funds were paid on the line of credit. Mr. Moore explained that funds he already advanced to Cameron from the line of credit to help Cameron with the costs of his education have simply been returned to the line of credit from the RESP account.

[122] The court direction was that the RESP funds be made available to the children directly if that was possible. We now know the funds were accessible and could have all been made available to the children to assist in meeting their education costs. The court considered Mr. Moore's evidence as to his use of the line of credit to help the children prior to giving the earlier direction with respect to this RESP.

[123] Mr. Moore is directed to pay his son Cameron the funds derived from the liquidation of the subject RESP and not applied to Siobhan's debts. The court believes the amount to be $17,000; however tax implications of collapsing the RESP may cause the money received to be significantly less. The distribution is to be of the net funds received by Mr. Moore after tax consequences and related costs are considered.

[124] Mr. Moore is directed to provide Ms. Darlington with documents confirming the actual payout from this RESP. This direction is also the concluding paragraph of my last decision (2014 NSSC 358).

Spousal Support

[125] The court explained in its earlier decision that a more complete picture of the parties past and current financial and other circumstances was necessary before the court could establish a quantum of spousal support payable by Mr. Moore (2014 NSSC 358 at paragraph 163 - 174).

[126] Ms. Darlington has received $900 per month as spousal support since April 2010 as directed by Justice MacDonald (exhibit 19 volume 2 at tab 21K). The 2010 order was based on Mr. Moore having an assumed income of $108,000 and Ms. Darlington having an income of $33,639 and there being two minor children. In light of my decision that disability income is to be considered when the income of parties is calculated, Mr. Moore's income is now determined to be significantly higher (2013 NSSC 103 at paragraph 73).

[127] Mr. Moore was classified as having certain disabilities as a consequence of his work as an RCMP officer and was on paid stress leave in February 2010. The Court is not clear when this leave started and when it ended. Mr. Moore was back at work and also receiving disability income at the time of this trial. At exhibit 9, tab J appear letters as early as 2003 confirming Mr. Moore's eligibility for some disability benefits.

[128] Ms. Darlington's work history was relatively steady with the exception of the two years she stayed home to look after Siobhan (1994-1996). Between 1992-1994 she worked as a nurse; between 1996-2002 she worked at the family restaurant from May - October; from August 2006 to December 2008 she worked at the Bish restaurant; in January 2009 with Electrolux and after July 2009 she worked with Worldwide Furniture (exhibit 7).

[129] Mr. Moore disagrees with Ms. Darlington's description of her role at the 'SSS Ltd.' restaurant in later years. He says by 2000 she had become disgruntled in her employment. He says he therefore supported her becoming trained as a real estate salesperson (exhibit 9).

[130] . Ms. Darlington's tax information for the period 2003-2012 appears at tab C of exhibit 18 and reveals the following total income inclusive of spousal support:

2003 ($5,672; 2004 ($27,509); 2005 ($33,151);

2006 ($10,493); 2007 ($33,018); 2008 ($39,282);

2009 ($15,989); 2010 ($37,409); 2011 ($42,072); 2012 ($29,972)

[131] As explained in my earlier decision, for the purpose of this analysis I set Mr. Moore's grossed up total income as $145,266.88 for 2010 and ongoing to the present (paragraph 40, 2014 NSSC 358). In earlier years Mr. Moore's employment income was significantly less as shown below:

2006	$74,408.78 (exhibit 11)
2007	$76,144.54 (exhibit 11)
2008	$83,192.09 (exhibit 11)
2009	$82,245.82 (exhibit 19 at tab 29)

[132] Ms. Darlington initially calculated Mr. Moore underpaid his spousal 'support' obligation by $88,306 to December 31, 2013 (2014 NSSC 358 at paragraph 161-162) if one applies the mid range of spousal support determined as payable based on the guidelines. The obligation she attributes to Mr. Moore ranges from $3,534/month in 2010; to $2,201 per month in 2011; $2,654 per month in 2012 and $3,169 per month in 2013. She attributes the following earned income to herself over these periods:

2010	$29,309
2011	$30,441
2012	$19,164 (to August 31)
2012	August 31 - December 31 $0
2013	$0
2014	$0 until August 31, 2014
	$40,000 September 1, 2014 forward

[133] As stated, Ms. Darlington relies upon the federal spousal support guidelines in reaching her conclusion as to the quantum of Mr. Moore's spousal support obligation. The guidelines are advisory and not binding and of course this proceeding is under the Nova Scotia *Maintenance and Custody Act* not the *Divorce Act*.

[134] A factor that often results in an order of support at the low end of the guidelines is a high level of indebtedness assumed by one or both parties. I have concluded the following with respect to Mr. Moore *inter alia*:

> 1. Mr. Moore has an outstanding child support obligation requiring him to pay arrears; to August 2013 this was $20,598 in after tax income, subject to the adjustments/credits for any subsequent overpayments (see paragraphs 59 & 130, 2014 NSSC 358).
>
> 2. Mr. Moore is personally responsible for what remains on the parties' line of credit with the exception of $86,393.37; this being the balance on the line of credit at separation (infra. at paragraph 82);
>
> 3. Mr. Moore remains liable to 'SSS Ltd.' for any liability to 'SSS Ltd.' flowing from this family having spent 'SSS Ltd.' funds, principally the insurance proceeds.
>
> 4. Mr. Moore remains potentially liable to the Canada Revenue Agency for the use of corporate funds for personal purposes.

[135] I am alive to the argument that Ms. Darlington should not be penalized with a lower spousal support obligation because Mr. Moore underpaid his child support. However, Mr. Moore finds himself responsible for a very high level of indebtedness attributable to this family's lifestyle and he has been managing this obligation since the parties' separation.

[136] I am satisfied for example, that almost all of the insurance proceeds owned by 'SSS Ltd.' in the amount of $235,000 were applied to the debt against the parties' home as Mr. Moore testified to. 'SSS Ltd.' has not filed a tax return in more than twelve years, nor has it prepared comprehensive business records from which its income, expense, asset and debt position could be known.

[137] Regardless, it is clear that a substantial financial obligation awaits Mr. Moore and or 'SSS Ltd.' when these filings are made. Those records will need to be prepared and tax filings will need to be completed. Mr. Moore will need to declare this money as personal income or repay it to the company and/or demonstrate where it was invested on behalf of the company.

[138] It is difficult to see an outcome that will not be very costly for Mr. Moore personally. His evidence of buying and selling cars on behalf of 'SSS Ltd.' satisfies me that he has lost substantial sums. The description of the investment in a vehicle which is now in Australia being a case in point.

[139] As stated, Mr. Moore and Ms. Darlington did not repay 'SSS Ltd.' the subject insurance monies. I have ruled that Ms. Darlington does not have

responsibility for this debt, associated interest or penalties. She has benefited but was not involved in the financial decisions associated with the use of monies advanced to this family by 'SSS Ltd.' As stated I have come to this conclusion because I am satisfied Mr. Moore made the decisions affecting the management of these funds and Ms. Darlington was not part of the decision making process, notwithstanding I am also satisfied she benefited from those decisions.

[140] Mr. Moore borrowed funds from the line of credit to purchase Ms. Darlington a car; to purchase her daughter a car; to pay for a family cruise and for cosmetic surgery for Ms. Darlington. I am satisfied he borrowed thousands more to build a garage on the matrimonial property lot and to complete a basement apartment. Holding both parties responsible for the balance on the line of credit at separation is, in part, a recognition of this history.

[141] This couple had a very good lifestyle funded in large measure because of Mr. Moore's salary; funds 'borrowed' from 'SSS Ltd.'; their use of the funds available on the line of credit and because of Mr. Moore had access to additional thousands of dollars when his lawsuit settled in 1997 and his properties sold.

[142] Finally, it is relevant that Mr. Moore's much higher DVA income became a reality around the time of the parties' separation. This income is not in any way attributable to the relationship with Ms. Darlington. I have ruled that it is income to be considered for purposes of child and spousal support determinations, however, this income is in the nature of an increase in post separation income. It is to considered but it is not on these facts to be viewed the same way as his employment income when the quantum of spousal support is to be determined. However, it was used to determine the table amount of child support over the post separation period.

[143] The issue of post separation income and its relevance when determining the quantum of spousal support was discussed in *Thompson v. Thompson* 2013 ONSC 5500 by Justice Chappell at paragraph 100-103:

> [100] The Respondent's position respecting spousal support is premised on the assumption that he should be permitted to benefit from alleged increases in the Applicant's income since the parties' separation in June 2009. This position raises difficult questions regarding the relevant timing for income determination in spousal support cases, and the circumstances in which a recipient spouse should be permitted to reap the benefits of the payor's post- separation income increases.
>
> [101] In addressing this issue, it is helpful to compare the approaches which the Ontario Court of Appeal adopted in two cases. In the 2003 decision of Marinangeli v. Marinangeli,[103] where the facts indicate that the Respondent wife

had a compensatory spousal support claim, the court made the following comments respecting need and ability to pay:

> "In determining need, the court is to be guided by the principle that the spouse receiving support is entitled to receive the support that would allow her to maintain the standard of living to which she was accustomed at the time cohabitation ceased. In addition, there is jurisprudence to the effect that a spouse is entitled to an increase in the standard of living such as would have occurred in normal course of cohabitation. See MacDougall v. MacDougall (1973), 11 R.F.L. 266, 1973 CarswellOnt 130 (Ont. S.C.) per Henry, J. See also Linton v. Linton (1990) 1 O.R. 3d 1 (Ont. C.A.). At the same time the court must guard against redistributing the payor's capital in the guise of support."[104]

[102] By contrast, in Fisher v. Fisher,[105] where the Court of Appeal was dealing with a non-compensatory support claim, Lang, J.A. did not consider the payor spouse's post-separation income in determining the spousal support claim. Rather, she averaged out the spouses' respective incomes during the three years prior to separation and in the year of separation. These two cases provide a backdrop against which to analyse the issue of post-separation increases in a payor's income, and they suggest that a fundamental consideration in determining how to treat such increases is whether the spousal support claim is based on compensatory or non-compensatory grounds.

[103] The authors of the SSAG and the cases decided since the guidelines were introduced have established that the treatment of post-separation increases in a payor's earnings in spousal support cases is ultimately a matter of discretion for the court, to be undertaken having regard for the unique circumstances of each case and the general factors and objectives underlying spousal support. Upon considering these factors and objectives and the relevant case-law, I conclude that the following general principles should guide and inform the court's exercise of discretion on this issue:

> a) A spouse is not automatically entitled to increased spousal support when a spouse's post–separation income increases.[106]
>
> b) The right to share in post-separation income increases does not typically arise in cases involving non-compensatory claims, since the primary focus of such claims is the standard of living enjoyed during the relationship.[107]
>
> c) Compensatory support claims may provide a foundation for entitlement to share in post-separation income increases in certain circumstances. The strength of the compensatory claim and the nature of the recipient's contributions appear to be the major factors which may tip the balance either for or against an entitlement to share in the increased income.[108]
>
> d) The recipient spouse may be permitted to share in post-separation increases in earnings if they can demonstrate that they made contributions that can be directly linked to the payor's post-separation success. The nature of the contributions does not have to be explicit, such as contribution to the payor's education or training. The question of whether the

contributions made by the recipient specifically influenced the payor's post-separation success will depend on the unique facts of every case.[109]

e) A spousal support award is more likely to take into account post-separation income increases where the relationship was long-term, the parties' personal and financial affairs became completely integrated during the course of the marriage and the recipient's sacrifices and contributions for the sake of the family and resulting benefits to the payor have been longstanding and significant.[110] When this type of long history of contribution and sacrifice by a recipient spouse exists, the court will be more likely to find a connection between the recipient spouse's role in the relationship and the payor's ability to achieve higher earnings following the separation.

f) In determining whether the contributions of the recipient were sufficient, the court should consider such factors as whether the parties divided their family responsibilities in a manner that indicated they were making a joint investment in one career, and whether there was a temporal link between the marriage and the income increase with no intervening change in the payor's career.[111]

g) If the skills and credentials that led to the post-separation income increase were obtained and developed during the relationship while the recipient spouse was subordinating their career for the sake of the family, there is a greater likelihood of the recipient deriving the benefit of post-separation income increases.[112]

h) By contrast, the likelihood of sharing in such increases lessens if the evidence indicates that the payor spouse acquired and developed the skills and credentials that led to the increase in income during the post-separation period, or if the income increase is related to an event that occurred during the post separation period.[113]

i) Assuming primary responsibility for child care and household duties, without any evidence of having sacrificed personal educational or career plans, will likely not be sufficient to ground an entitlement to benefit from post-separation income increases.[114]

j) Evidence that the post-separation income increase has evolved as a result of a different type of job acquired post-separation, a reorganization of the payor's employment arrangement with new responsibilities, or that the increase is a result of significant lifestyle changes which the payor has made since the separation may militate against a finding that the recipient should share in the increase.[115]

k) Where the payor's post-separation advancement is related primarily to luck or connections which they made on his own, rather than on contributions from the recipient, the claim for a share in post-separation income increases will be more difficult.[116]

l) The court may also consider the amount of time that has elapsed since separation as an indicator of whether the recipient's contributions during the marriage are causally related to the post–separation income increases.[117]

> m) Evidence that the payor also made contributions to the recipient's career advancement, or that the recipient has not made reasonable steps towards achieving self-sufficiency are also factors that may preclude an award that takes into account post separation income increases.[118]

[144] The Spousal Support Advisory Guidelines: A New and Improved User's Guide to the Final Version, Justice Canada 2010 described the issue as follows at page 51:

> Under the current law, a post-separation income increase on the part of the payor raises another distinct issue for spousal support analysis, an entitlement issue, namely whether **all, some or none of the increase** should be taken into account in calculating the formula range.
>
> As we said in the Final Version: "Some rough notion of causation is applied to post separation income increases for the payor, in determining both whether the income increase should be reflected in increased spousal support and, if it should, by how much. It all depends on the length of the marriage, the roles adopted during the marriage, the time elapsed between the date of separation and the subsequent income increase, and the reason for the income increase (new job vs. promotion with same employer, or career continuation vs. new venture)."

[145] A revised user's guide is expected to be released in the spring of 2015.

[146] In her post hearing submission filed October 28, 2014 Ms. Darlington used the following respective incomes to calculate Mr. Moore's spousal support obligation as determined in my earlier ruling 2014 NSSC 358 at paragraph 160:

2010	$145,267	$30,000
2011	$145,267	$30,000
2012	$145,267	$30,000 (until August 31, 2012)
	$145,267	$0 (September - December 2012)
2013	$145,267	$0
2014	$145,267	$0 (until August 31, 2014)
		$40,000 (September 1, 2014 forward)
2015	$145,267	$40,000

[147] Ms. Darlington revised the range of the claimed underpayment of spousal support to reflect the court's earlier ruling that Mr. Moore's income over the

relevant period was $145,267. She calculates the monthly low, mid and high range of spousal support payable beginning in 2010 as follows:

2010	January - March	$1,983 - $ 2,337 - $2,690
	April - December	$2,232 - $2,617 - $3,002
2011	January - December	$2,232 - $2,617 - $3,002
2012	January - August	$2,211 - $2,595 - $2,979
	September -December	$3,250 - $3,574 - $3,899
2013	January -December	$3, 250 - $3,574 - $3,899
2014	January -May	$3,250 - $ 3,574 - $3,899
	June - August	$3,702 - $4,070 - $4,438 (child support now payable for one child not two)
	September -October	$2,434 - $2,840 - $3,246 (no child support payable and Ms. Darlington earning $40,000)

[148] After deducting the monthly payment of $900 currently ordered Ms. Darlington calculated the underpayment of spousal support as ranging from a low of $105,233 to a mid range level of $126,202 and a high of $147,112 to October 31, 2014. In her post hearing submission Ms. Darlington asks for arrears of spousal support in the amount of $105,000. The foregoing calculations, of course, assume a straight application of the spousal support guidelines.

[149] A significant part of Mr. Moore's income is analogous to "post separation" income. This is a very relevant consideration when considering the Spousal Support Advisory Guidelines. I am satisfied Mr. Moore's spousal support obligation should be set below the low end of the Spousal Support Advisory Guidelines as a consequence.

January 2010 - August 2012

[150] I am satisfied the spousal support obligation for 2010, 2011 and until September 2012 should be set at $1,500 per month (inclusive of the already ordered $900 per month).

[151] The increased child support payments resulting from Mr. Moore's successful appeals of various rulings as to eligibility for disability benefits has resulted in a significant increase in the child support obligation for him and this has benefited the children. The increased child support obligation flowed from Mr. Moore

becoming eligible for a significantly higher disability income in 2010. The court must exercise its discretion when determining its impact on the level of spousal support payable:

(a) March 2010-August 2012: $1,500 per month in spousal support is ordered inclusive of the $900 currently ordered; child support for this period ranged between $1,861 and $1,931 (paragraph 59, 2014 NSSC 358)

September 2012 - August 2014

[152] During the period September 2012 - August 2014 Ms. Darlington was in an educational program and without earned income but she was receiving spousal support of $900 and child support each month. Until June 1, 2014 she had two dependent children and after that, one child until August 31, 2014. Thereafter, there was no child support obligation. The spousal support obligation is set as follows:

(a) September 2012 - December 2012: $2,200 in spousal support is ordered on a monthly basis inclusive of the $900 currently ordered; child support for this period was $1,931 (paragraph 59, 2014 NSSC 358);

(b) January 2013 - December 2013: $2,200 in monthly spousal support is ordered inclusive of the $900 currently ordered; child support for this period was $1,848 (paragraph 59, 2014 NSSC 358);

(c) January 2014 - June 1, 2014: $2,200 in monthly spousal support is ordered inclusive of the $900 currently ordered; child support for this period was $1,848 (paragraph 59, 2014 NSSC 358); and

(d) June 1, 2014 - August 31, 2014: $2,600 in monthly spousal support is ordered inclusive of the $900 currently ordered.; child support for this period was $1,157 (paragraph 59, 2014 NSSC 358).

August 31, 2014 - currently

[153] Ms. Darlington is earning $40,000 per year and Mr. Moore is receiving $145,267 (grossed up income). Spousal support in the amount of $1,700 per month is ordered, inclusive of the $900 currently ordered:

(a) September 1, 2014 - May 1, 2015: $1,700 in spousal support is ordered on a monthly basis inclusive of the $900 currently ordered; no child support was payable for this period (paragraph 59, 2014 NSSC 358)

Conclusion: Spousal Support

[154] The foregoing yields the following retroactive amounts of spousal support to be paid by Mr. Moore:

2010, 2011, until September 2012

30 months x $1,500	=	$45,000
less 30 months x $900	=	$27,000
		$18,000

2012 (September - December)

4 months x $2,200	=	$ 8,800
less 4 months x $900	=	$ 3,600
		$ 7,900

2013

12 months x $2,200	=	$26,400
less 12 months x $900	=	$10,800
		$15,600

2014 (January - June 1, 2014)

5 months x $2,200	=	$11,000
less 5 months x $900	=	$ 4,500
		$ 6,500

2014 (June 1, 2014 - August 31, 2014)

3 months x $2,600	=	$ 7,800
less 3 months x $900	=	$ 2,700
		$ 5,100

Subtotal - Amount Owing: $53,100 to August 31, 2014

2014 (August 31 forward)	$1,700 per month to May 1, 2015 = 8 x $1,700
	$13,600
less	$ 7,200
	$ 6,400

Total $59,500 in retroactive spousal support payable to May 1, 2015

[155] The quantum selected is not based on a straight application of the spousal support guidelines. The parties are invited to suggest a structuring of the payment of this retroactive obligation to maximize the prospect of Mr. Moore being able to realize a tax benefit as a result of paying spousal support. This is contemplated by the spousal support guidelines.

[156] A Canada Revenue Agency bulletin to take into account a ruling of the tax court (*James v. Government of Canada*, 2013 TCC 164) as it relates to retroactive obligations may be of assistance.

[157] Evidence discloses that the income of both parties is subject to change as is their circumstances. Changes in income are to be communicated by each party to the other within one week of the change occurring.

[158] Should Ms. Darlington commence cohabitation with another, she shall notify Mr. Moore. As contemplated by the *Maintenance and Custody Act*, this is a factor relevant to the issue of spousal maintenance.

Lawsuit/Property Division

[159] As stated earlier, by action filed on September 27, 2012, Sand, Surf and Sea Limited and Mr. Moore are seeking the repayment of funds from Ms. Darlington. This action was consolidated with the "matrimonial" litigation between the parties and will therefore be ruled upon as part of the same proceeding. The details of the claim are reproduced infra. at paragraph 66.

[160] In addition, the court must conclude what principles apply and will achieve a fair resolution of property ownership issues when common law couples separate, that is common law couples who choose not to register as a domestic partnership. The Supreme Court has clearly recognized the flexibility of parties to select their legal status as a couple with the accompanying rights and liabilities. At paragraph 273 in '*A*' Justice LeBel for the majority reminds us that a decision not to marry can not be assumed to be uninformed:

> [273] Nor can I take judicial notice of the fact that the choice of type of conjugality is not a deliberate and genuine choice that should have patrimonial consequences but necessarily results from the spouses' ignorance of the consequences of their status. Such a fact is clearly controversial and not beyond reasonable dispute: Find, at paras. 48 and 60-61.

[161] The analysis in response to the claim before the court must recognize that the mere fact of one party acquiring more assets than her partner over the course of a common law relationship is not enough to support a successful claim to a share of the assets held by the more affluent partner, even if the parties have a joint family venture. A claim at common law based on unjust enrichment must meet a number of criteria to succeed. Furthermore, even when a claim of unjust enrichment is made out, there is no presumption of equal sharing.

[162] It is important to not confuse contributions to a household that properly give rise to a " spousal" support claim with those that support an unjust enrichment claim. Many such contributions and sacrifices may give rise to both a claim for "spousal" support and to unjust enrichment but this is not necessarily the case. Ms. Darlington has received and will continue to receive considerable "spousal" support in recognition of her role in the family, sacrifices and the like she made.

[163] For ease of reference, I reference Section 4-6 of the *Maintenance and Custody Act* R.S.N.S. 1989 c.160 which provides as follows:

> Factors considered
>
> 4. In determining whether to order a person to pay maintenance to that person's spouse or common-law partner and the amount of any maintenance to be paid, the court shall consider
>
> (a) the division of function in their relationship;
>
> (b) the express or tacit agreement of the spouses or common-law partners that one will maintain the other;
>
> (c) the terms of a marriage contract or separation agreement between the spouses or common-law partners;
>
> (d) custodial arrangements made with respect to the children of the relationship;
>
> (e) the obligations of each spouse or common-law partner towards any children;
>
> (f) the physical or mental disability of either spouse or common-law partner;
>
> (g) the inability of a spouse or common-law partner to obtain gainful employment;
>
> (h) the contribution of a spouse or common-law partner to the education or career potential of the other;
>
> (i) the reasonable needs of the spouse or common-law partner with a right to maintenance;
>
> (j) the reasonable needs of the spouse or common-law partner obliged to pay maintenance;
>
> (k) the separate property of each spouse or common-law partner;
>
> (l) the ability to pay of the spouse or common-law partner who is obliged to pay maintenance having regard to that spouse's or common-law partner's obligation to pay child maintenance in accordance with the Guidelines;
>
> (m) the ability of the spouse or common-law partner with the right to maintenance to contribute to his own maintenance.
>
> Obligation of maintained spouse or partner
>
> 5 A maintained spouse or common-law partner has an obligation to assume responsibility for his own maintenance unless, considering the ages of the spouses or common-law partners, the duration of the relationship, the nature of the needs of the maintained spouse or common-law partner and the origin of those needs, it

> would be unreasonable to require the maintained spouse or common-law partner to assume responsibility for his maintenance, and it would be reasonable to require the other spouse or common-law partner to continue to bear this responsibility.
>
> Reduction or forfeiture of maintenance
>
> 6(1) Maintenance to which a spouse or common-law partner would otherwise be entitled may be reduced where the spouse or common-law partner entitled to maintenance engages in conduct that arbitrarily or unreasonably prolongs the needs upon which maintenance is based or that arbitrarily or unreasonably prolongs the period of time required by the person maintained to prepare himself to assume responsibility for his own maintenance.
>
> (2) Maintenance to which a spouse or common-law partner would otherwise be entitled may be reduced or eliminated where the spouse or common-law partner entitled to maintenance
>
> (a) persistently engages in a course of conduct that constitutes a repudiation of that spouse's marriage relationship;
>
> (b) persistently engages in a course of conduct which, if the common-law partners were married and living together, would constitute a repudiation of their marriage relationship;
>
> (c) marries;
>
> (d) remarries;
>
> (e) cohabits with another person in a conjugal relationship.

[164] The court need not employ the doctrine of unjust enrichment to meet the objectives of spousal support. In the words of Justice Deschamps at paragraph 393 in *'A'* support and patrimony have different purposes:

> [393] There is another reason, a pragmatic one, why a distinction must be drawn between the measures related to property and those related to support. Whereas a plan to live together takes shape gradually and can result in the creation of a relationship of interdependence over which one of the parties has little or no control, property such as the family residence or pension plans can be acquired only as a result of a conscious act. The process that leads to the acquisition of a right of ownership is different from the one that causes a spouse to become economically dependent. In short, I find that the Court of Appeal was correct to distinguish the right to support from the patrimonial rights.

[165] When determining whether a partner has been unjustly enriched the court is directed to take a holistic view of the financial history of the parties. In the course of assessing the evidence to determine whether there has been a benefit; a corresponding deprivation and the absence of a juristic reason the court is mindful of the Supreme Court's guidance articulated in *'A'* at paragraph 119-120 by Lebel J:

> [119] As this Court held in Peter v. Beblow, a de facto spouse can benefit from certain rebuttable presumptions that make it easier to discharge his or her burden of proof. For example, in the case of a long-term de facto union, a court can presume, on the one hand, that there is a correlation between the enrichment of one spouse and the impoverishment of the other and, on the other hand, that there was no reason for the enrichment: Peter v. Beblow, at pp. 1013 and 1018; M.B. v. L.L., at para. 37; Benzina v. Le, 2008 QCCA 803 (CanLII), at para. 7; Barrette v. Falardeau, 2010 QCCA 989 (CanLII), at paras. 26-27. Finally, when these conditions are met, the de facto spouse's action will be allowed in the lesser of the following two amounts: that of the enrichment of his or her spouse and that of his or her own impoverishment (Cie Immobilière Viger, at p. 77).
>
> [120] In a recent decision written by Dalphond J.A. with the concurrence of Côté J.A., the Court of Appeal reiterated the principles of the doctrine of unjust enrichment with respect to de facto spouses and the importance of the presumptions in the plaintiff's favour: C.L. v. J.Le., 2010 QCCA 2370 (CanLII), at paras. 10-15, quoted in full in Droit de la famille — 121120, 2012 QCCA 909 (CanLII), at para. 65. The Court of Appeal correctly noted that a court hearing [translation] "a claim by a de facto spouse for compensation for unjust enrichment [must] undertake a broad, overall analysis of the parties' circumstances, taking into account all contributions made by the spouses during the time they lived together": C.L. v. J.Le., at para. 12 (emphasis added). As well, rather than a simple accounting exercise, [translation] "the analysis of the factual and legal aspects requires a particular flexibility adapted to the nature of relationships between spouses (Lacroix v. Valois, 1990 CanLII 46 (SCC), [1990] 2 S.C.R. 1259, at p. 1279)": C.L. v. J.Le, at para. 13 (emphasis added).

and earlier in *Walsh* at paragraph 165-166 the Court held:

> 165. The Supreme Court has made many strides since Murdoch to recognize the presence of unjust enrichment in situations involving the dissolution of non-marital relationships. The Court has been of great assistance to these litigants by recognizing, for instance, that the provision of domestic chores may constitute the granting of a significant benefit under the first step of unjust enrichment: see Sorochan v. Sorochan, 1986 CanLII 23 (SCC), [1986] 2 S.C.R. 38. The Court has also made it easy for parties who pass the first step (conferral of benefit) to prove that there has been a corresponding deprivation. At page 45 of Sorochan, the Court noted that the devotion of one's free labour typical in most relationships can easily be seen as a deprivation. On the third step, the Court has also reduced the claimant's burden by linking the absence of a juristic reason for the enrichment and deprivation to the absence of any obligation on the part of the contributing spouse to perform the work and services carried out during the relationship: Sorochan, supra, at p. 46. Peter, supra, at p. 1018, even contains the comment that the provision of services by itself creates a presumption that they were provided with the expectation of compensation.
>
> 166. While I fully endorse and applaud this Court's attempts to make the unjust enrichment doctrine more accessible to litigants, I am the first to acknowledge the limitations inherent in seeking out a remedy under this head of obligation. In the first place, the principles relating to the proper remedy to grant are complex and uncertain. For a constructive trust to arise, the claimant must show a direct link between the property and the services rendered: Peter, supra, at p. 997. This concept can lead to fairly uncertain results.

[166] As observed the parties did have a joint family venture. I am satisfied on the balance of probabilities of the following:

1. The parties' decision to relocate to Halifax from Summerside was not to either party's detriment nor to advance either party's career more than the other; although Mr. Moore testified that he wanted to go to law school Ms. Darlington disputed his evidence that this was a plan they were following; neither suggested the move was detrimental to their circumstances or advantageous; it was a decision of two young people moving to a bigger centre for a myriad of reasons.

2. When the parties began to cohabit, Mr. Moore had two properties with some equity in each, it is correct that the equity is unknown but each property did sell and yield proceeds for Mr. Moore that flowed into the family; in the case of the bungalow it sold in 1990 and the proceeds were used to assist in the purchase of the Lower Sackville home and the triplex sold in 2003 and proceeds were deposited on the parties line of credit.

3. Mr. Moore had an RRSP account when the parties met, his evidence is that it was in the range of $65,000 in the early nineties, I am satisfied this is correct.

4. Mr. Moore received a settlement of $140,000 in 1997 flowing from a lawsuit that predated the parties' relationship and he paid of the mortgage on the Lower Sackville home as he testified to.

5. The proceeds from the sale of the Lower Sackville home flowed into the Lakeshore Drive home in 2000 (approximately $129,000).

6. A significant part of the insurance proceeds from the fire at the restaurant were applied against the line of credit secured against the home ; I am satisfied this was $235,000 as Mr. Moore testified to; this resulted in the matrimonial home being debt free (subject to any indebtedness arising from the promissory notes) .

7. The insurance proceeds remain an account payable to 'SSS Ltd' by Mr. Moore; I do not find Ms. Darlington liable for the repayment of any of these funds; I am satisfied however that she has benefited from the fact these funds were not returned to 'SSS Ltd.'; an accounting is impossible because Mr. Moore has not maintained reliable records upon which conclusions can be based;

8. I am satisfied Mr. Moore is facing dire financial circumstances.

Conclusion: Lawsuit against Ms. Darlington

[167] As between Ms. Darlington and Mr. Moore I have concluded Mr. Moore is responsible for the debts and liabilities arising from various business pursuits and litigation. I am satisfied that Ms. Darlington is not liable to 'SSS Ltd.' for any

mingling of the company's insurance proceeds with the parties' personal financial affairs. I am also dismissing any claim she asserts to other personal or real property Mr. Moore has acquired through the company or through use of the company's resources. This includes any claim by her to a Florida property (ies) and vehicles Mr. Moore has acquired. These assets are clearly a product of Mr. Moore's business activities to which Ms. Darlington has disavowed any significant role. Similarly, she does not want any liability for the losses flowing from Mr. Moore's business activities.

[168] Although I say Mr. Moore is responsible for these debts this is only to the exclusion of Ms. Darlington not other persons or corporations and does not preclude his defence on other grounds to claims asserted by third parties.

[169] The claim of 'SSS Ltd.' and David Moore against Ms. Darlington (infra. at para. 68) is therefore dismissed.

[170] I am satisfied that the lead in managing the financial affairs of the family has rested with Mr. Moore and his decisions have had disastrous consequences for which Ms. Darlington should not be responsible.

[171] It is clear from Mr. Moore's evidence and decision making over the years, as described by him, that he has engaged in grandiose thinking and acted upon an inflated sense of his business acumen and means.

[172] His decision to direct some of the insurance proceeds received after the restaurant burned, to the line of credit was imprudent. He embarked upon a process of spending and borrowing from 'Peter to pay Paul' largely in an effort to avoid having the insurance proceeds declared his personal income.

[173] The financial consequences for Mr. Moore have been unfortunate. He began his career as a hard working young man with initiative. He invested in modest real estate while living in PEI and began to build an RRSP portfolio. By the mid nineties, however, he had ambitions beyond his ability. He set in motion a decade of business decision making that appears to have been impulsive and not soundly based. His decision to direct funds to investments in cars; undeveloped lots and other real estate was high risk and costly.

[174] Nevertheless, I am satisfied he did contribute substantial personal assets to the family. Ms Darlington's financial contribution did not equate, it was minimal. She was the source of very little, if any, of the funds invested in the business activities and significantly less in the household as compared to Mr. Moore.

[175] Mr. Moore contributed the proceeds from the sale of the home he formerly occupied in PEI; proceeds from the sale of the triplex in PEI; the proceeds flowing from the settlement of his lawsuit against the RCMP and an inheritance.

[176] His pursuit of litigation was enormously costly. He challenged a decision of the Canada Revenue Agency and a decision of the Nova Scotia Department of Transportation. He says his legal costs have been in the hundreds of thousands of dollars.

[177] I am mindful of Ms. Darlington's contribution to the household, particularly when Siobhan was ill between 1994-1996. Nevertheless she did begin to work many long hours outside the home shortly thereafter when the restaurant opened. Mr. Moore assumed primary responsibility for the children during subsequent years from May to October.

[178] I am satisfied that Ms. Darlington chose not to return to nursing after the 1994-1996 absence from the profession. Circumstances did not prevent her from returning to nursing. I am unable to conclude that she was deprived of her career as a result of placing a priority on meeting her family responsibilities. This was not the case.

Conclusion: Matrimonial Home

[179] I am satisfied that Mr. Moore paid off the Lower Sackville home and Ms. Darlington made little financial contribution to this debt. Mr. Moore acquired the property, held it in his name solely and retired the mortgage in the nineties when he settled his lawsuit and received $140,000.

[180] I am also satisfied the Lakeshore Drive home, built in 2000, did cost several hundreds of thousands of dollars as Mr. Moore testified to. I am also satisfied that over the following years, tens of thousands of dollars were spent constructing a garage on the property and completing an apartment in the home. Ms. Darlington made very little contribution to meeting those costs.

[181] Mr. Moore says he paid for the garage and the apartment with funds borrowed against the line of credit. This is probably so. However, compensation can not be ordered to his benefit because of his poor record keeping. The Court can not be simply asked to figure it out and to pick a number. The task required of this Court has been challenging enough given the poor quality of the evidence offered by Mr. Moore.

[182] In August 2014 the Court ordered the transfer of title in the Lakeshore Drive home to Ms. Darlington to ensure property insurance could be placed on the property. Consequently, the home is currently in Ms. Darlington's name for this purpose. From its date of acquisition it had been in the name of both parties as joint tenants.

[183] I am satisfied the parties should equally share equity in the matrimonial home. Equity will be determined after payment of disposition costs and setting aside $86,393.37 as a contribution to the line of credit indebtedness. This later amount is the balance on the line of credit when the parties separated in late December 2009 (i*nfra.* at paragraph 78).

[184] The foregoing conclusion does not impact security interests that may attach to the property. The court has been told the line of credit is 'secured' against the house (exhibit 63). The court is not aware of other security affecting the property title to the matrimonial home.

Conclusion: Severance

[185] The Court received a letter dated September 25, 2014 from counsel for Ms. Darlington enclosing an e-mail from the RCMP 'pay office' that states Mr. Moore's severance was paid out in 2013. Mr. Moore's severance, once determined, is income. A severance payment is an earned right analogous to Mr. Moore's pension. Ms. Darlington has no entitlement to this benefit or a share of it. It is unclear if the court is being asked to reserve jurisdiction to revisit the spousal support calculation for 2013 as a consequence. It will reserve that jurisdiction and exercise it if asked to do so.

Conclusion: CPP

[186] Ms. Darlington seeks an equal division of the CPP entitlement of Mr. Moore, presumably set off against her earned entitlement. The division of the parties' respective entitlement to Canada Pension Plan entitlement is governed by the *Canada Pension Plan*, R.S.C., 1985, c. C-8. The procedure to accomplish mandatory division is provided for beginning at s.55.1.

Conclusion: RRSP

[187] RRSP records filed include those of Hicks Financial Solutions dated 1998. These show Mr. Moore's total holdings of $72,354.56 on December 16, 1998 and $86,114.46 on July 3, 2001 (exhibit 66).

[188] The Investment Planning Counsel records show total holdings of $126,546.93 on October 29, 2009 and $104,194.11 on April 4, 2008 (exhibit 66).

[189] In his October 27, 2014 submission Mr. Moore says his RRSP was valued at $65,442.47 when the parties began cohabitation; $91,413.92 when they separated which represents a gain of $25,971.45.

[190] Similarly for the same period, he calculates Ms. Darlington's two RRSPs totalled $12,896.

[191] My disposition of the claim for a share of the RRSP of both parties is different than for the RCMP pension; the Canada Pension entitlement and severance earned by Mr. Moore.

[192] In the case of the RRSPs, I am satisfied that each contributed to the realization of this asset. RRSPs are a discretionary investment, retirement vehicles and in this case, were paid for with funds otherwise available to the family, which funds the parties agreed were for their ongoing expenses but were directed to the purchase of RRSPs. The mingling of the household income made this possible and the mingled resources were the source of the funds used to 'purchase' RRSPs. That can not be said about the RCMP pension; the Canada Pension or the severance. The RRSPs have also grown since separation; presumably recovering from the 2008 downturn in the economy.

[193] Clearly, Mr. Moore's earnings were the source of the RRSP funds he invested and he received the corresponding tax benefit. However, the opportunity for him to do so in the form of his access to disposable income for this purpose was contributed to by Ms. Darlington.

[194] To September 25, 2014, Mr. Moore's RRSP holdings were $146,974.38 (exhibit 66, tab 1). Ms. Darlington transferred one half the value of her RRSP account in 2010 following the first trial in this matter. She will be credited with this transaction. Mr. Moore says the RRSP value in October 2009 was $91,413.92, i.e. when the parties' separated and $65,442.47 when the parties began to cohabit in 1990.

[195] The value of the RRSPs to be divided is the value at the time of the September 2014 trial or the value at the time of division whichever is higher; less an adjustment for post separation contributions and growth/losses attributable to these contributions. (I am concerned Mr. Moore may have taken action since the time of trial that has resulted in their having a decreased value.) Mr. Moore's RRSPs were valued at $146,974.38 at the time of trial. Herein, I conclude the appropriate ratio of division of the total value of all RRSPs is 60:40 in favour of Mr. Moore recognizing he began the relationship with a significant RRSP portfolio and contributed significantly more to the growth of the account than would Ms. Darlington.

Conclusion: Mr. Moore's Pension

[196] Ms. Darlington seeks a fifty percent interest in Mr. Moore's pension entitlement, earned over the course of the parties' relationship, reflecting his years of service with the RCMP.

[197] Mr. Moore opposes this request. At one point in the proceeding, Mr. Moore assumed division of his pension at source (exhibit 9, paragraph 52). However, I do not take his position as consenting to that outcome. His position reflected his understanding of an inevitable result of this hearing.

[198] The parties began to cohabit in 1990 and moved from Prince Edward Island to the Halifax area in 1991. This move was not detrimental to Ms. Darlington. Mr. Moore continued his work with the RCMP in Nova Scotia and she worked as a nurse. I am satisfied Ms. Darlington left the nursing profession willingly except for the period 1994-1996. Subsequently, she and Mr. Moore pursued business interests and she was employed.

[199] However, Ms. Darlington's contributions and sacrifices were not linked to the accrual of Mr. Moore's pension entitlement. Mr. Moore was a member of the RCMP when the parties met. His salary and other income flowing from his employment supported Ms. Darlington and the children, including Ms. Darlington's daughter, born before she met Mr. Moore. When their older biological child was diagnosed with cancer in 1994, Ms. Darlington left the work force and was financially supported by Mr. Moore. Clearly she had primary responsibility for care of the child for the period of the child's treatment which lasted two years. This was an important contribution to the family taken into account by me when I settled the ratio of division of the RRSPs. In her post hearing submission, Ms. Darlington requested that the RRSP s be divided as of the date of separation. I settled on a valuation date that may result in a greater award to her.

[200] Beginning in 1996, Ms. Darlington involved herself in the restaurant operated by 'SSS Ltd.'. I am satisfied Ms. Darlington worked full time in the restaurant business between 1996 and 1999 and was paid a salary of $25,000 for the first three years and for some of these years received employment insurance when not working at the restaurant. She worked in a managerial capacity for long hours and every day between May and October as she testified to. Following the

destruction of the restaurant she worked at the 'Bish'; a Halifax restaurant for several years (2003-2006) as described in her letter dated November 13, 2006 (exhibit 30A at tab 2).

[201] During the periods of months of long days of employment for Ms. Darlington I am satisfied Mr. Moore carried most of the responsibility for the household and the family. Ms. Darlington testified that over the six years 1996-2003 she had only six days off; during the May-October period.

[202] Following her employment at the restaurants, Ms. Darlington worked outside the home for furniture stores for a number of years.

[203] I am satisfied that as far as Mr. Moore's pension is concerned Mr. Moore was not unjustly enriched; that the accrual of his pension entitlement was not at Ms. Darlington's expense. Further, her contributions to the relationship were not linked to the pension entitlement of Mr. Moore.

[204] The court is mindful of the guidance of Justice Cromwell in *Kerr v. Baranow* wherein he observes that a holistic view of the parties' relationship and contributions to the family must be made when determining whether a claim for unjust enrichment has been made out. The court is also mindful of the Supreme Court's direction that even a finding of unjust enrichment does not necessarily result in an equal sharing of the value of any or all assets.

[205] However, some assets are clearly separable and can be isolated in a relationship. In my view the pension and severance entitlements of Mr. Moore fall into this category on these facts. The award for Ms. Darlington flowing from this decision is substantial, particularly when her relief from debt obligations is considered. This is a possible outcome because the court took a holistic view. Ordering an equal sharing of all of the assets and leaving Mr. Moore with the debt and failing to recognize his disproportionate contribution of assets and income to this family, even after considering non monetary contributions of Ms. Darlington would be unfair. The result would be an unjust enrichment of Ms. Darlington.

[206] Mr. Moore says when he met Ms. Darlington he owned four vehicles and an RRSP valued at $65,442.97 and investments with the BNS and CIBC. Exhibit 29, tab H contains Mr. Moore's handwritten quarterly reports of the valued of his RRSP account for the period 1983-2012 (although some entries are blank). He

calculates his net worth as $250,000 when the parties met - exclusive of his pension (see his 'summary submission' in a binder received by the Court on October 27, 2014). I am not satisfied this summary is entirely correct. However, I am satisfied he brought substantial assets into this relationship.

[207] Ms. Darlington had a child when the parties met and Mr. Moore accepted financial responsibility for this child and devoted resources to raising this child as his own, including contributing to the cost of her education. I am satisfied this was a substantial cost to Mr. Moore over the course of the parties' relationship.

[208] Nevertheless, I am satisfied that Ms. Darlington should receive a substantial part of the parties' RRSP account; an equal share of the 'equity ' in the matrimonial home and relief from liability to pay other liabilities associated with the line of credit and should be found not liable to 'SSS Ltd.' for the insurance proceeds. In my view this outcome balances the asset and debt distribution as between the parties and reflects a just outcome of their joint family venture.

[209] Finally I am satisfied 'SSS Ltd.' is unlikely to have any value and Mr. Moore cannot be described as benefiting from retaining this entity. Ms. Darlington was careful to not associate herself with this entity or claim any role in it. This was prudent.

Conclusion: Ownership of 'Sand, Surf and Sea Ltd.'

[210] As stated, Ms. Darlington does not claim an interest in the company or any of its assets. Similarly she takes no responsibility for the debts and other liabilities, current or potential, associated with the company or its operations. I am satisfied, in any case, Mr. Moore retains ownership and control of this corporate entity. He has been its sole shareholder, director and officer throughout and maybe personally responsible for its liabilities.

Summary

[211] Mr. Moore's ongoing spousal support obligation is $1,700 per month payable on the first of every month for an indefinite period. Mr. Moore's retroactive spousal support obligation to April 30, 2015 is $59,500. It will be subject to variation should the parties' incomes change or now be different or

should there be other changes in circumstances as that phrase is used in this area of law. Regardless this order shall be subject to review in the fall of 2019.

[212] Mr. Moore is found to owe Ms. Darlington retroactive spousal support to May 1, 2015 in the amount of $59,500. In my earlier ruling I determined the child support arrears to August 2013 to be $20,598 (paragraphs 59 & 130, 2014 NSSC 358) and an additional amount to August 30, 2014 estimated at $2,811 which amount must be confirmed when the records of the maintenance enforcement program are examined.

[213] Ms. Darlington is found to have a claim to one half the value of the matrimonial home after disposition costs and the line of credit debt at separation on December 21, 2009 ($86,393.37) are deducted. In addition insurance fees incurred after the court learned the property was not insured shall be deducted from the proceeds of sale; the home is to be listed for sale on or before the close of business on Friday, May 15, 2015. Ms. Darlington has sole authority to do this and the proceeds from the sale are to be held in trust by her law firm and to be distributed as further directed ; (I repeat the court is concerned that there may be unknown security interests against the house which could make that process difficult.)

[214] The preservation order in place will continue until further order of this court.

[215] Ms. Darlington is entitled to forty percent of the value of the parties' combined RRSPs at the time of division or at trial, whichever value is greater less an adjustment for post separation contributions and growth/losses attributable to these contributions; in the case of Ms. Darlington's RRSP account the proceeds were divided following the first trial; the value of Ms. Darlington's RRSP at the time of distribution will be used to determine the aggregate amount of RRSPs to be divided;

[216] Mr. Moore shall transfer the undisbursed RESP funds to his son Cameron as directed.

[217] Ms. Darlington has no claim to Mr. Moore's employment pension; Canada Pension or severance nor does he have any claim to her Canada Pension entitlement.

[218] Subject to the foregoing, Ms. Darlington is not liable for the balance on the line of credit.

[219] Ms. Darlington is not liable to "SSS Ltd." or to Mr. Moore for money advanced to her directly or indirectly from either.

[220] Ms. Darlington has no claim to 'SSS Ltd.' or assets held by it or other assets held by Mr. Moore personally or through 'SSS Ltd.'; Ms. Darlington shall retain ownership of the Honda;

[221] The court reserves jurisdiction to resolve any mathematical miscalculations the parties identify and to address issues related to implementing the decision should that be necessary.

Costs

[222] The parties are directed to make written submissions on costs on or before Friday, May 22, 2015.

ACJ

SUPREME COURT OF NOVA SCOTIA
(Family Division)
Citation: Darlington v. Moore, 2015 NSSC 124

Date: 20150420
Docket: SFHMCA 068167
Registry: Halifax

Between:

Michelle Darlington

Applicant

and

David Paul Moore

Respondent

and

2012 Hfx. No. 407388

Between

David Moore and Sand, Surf & Sea Limited, a body corporate

Plaintiffs

and

Michelle Darlington

Defendant

Revised Decision:	The text of the original decision has been corrected according to the appended Erratum dated May 7, 2015
Judge:	Associate Chief Justice Lawrence I. O'Neil
Date of Hearing:	October 15, 16, 17 & 21, 2013; June 10 & 11, 2014 and September 8, 9, 10 & 11, 2014
Written Submissions:	October 27, 2014
Counsel:	Peter D. Crowther, counsel for Ms. Darlington David P. Moore, Self Represented

Erratum:

Decision, para [186] and para [187] are deleted and replaced by the following:

Conclusion: CPP

[186] Ms. Darlington seeks an equal division of the CPP entitlement of Mr. Moore, presumably set off against her earned entitlement. The division of the parties' respective entitlement to Canada Pension Plan entitlement is governed by the *Canada Pension Plan*, R.S.C., 1985, c. C-8. The procedure to accomplish mandatory division is provided for beginning at s.55.1.

ACJ