

SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION

Citation: *MacPherson v. MacPherson*, 2015 NSSC 294

Date: 2015-10-22

Docket: *SFSND* No. 1206-6528

Registry: Sydney, NS

Between:

Darlene MacPherson

Petitioner

v.

Todd MacPherson

Respondent

Judge: The Honourable Justice Kenneth C. Haley

Heard: January 5, 6, 15 and 16, 2015 and May 13, 2015 in Sydney,
Nova Scotia

Written Release: October 22, 2015

Counsel: Candee McCarthy for the Petitioner
Carolyn MacAulay for the Respondent

By the Court:

[1] The parties were married on October 5, 1996, after living together for a year prior to their marriage. They separated on March 10, 2013, resulting in a 17 year marriage.

[2] There is one child of the marriage, namely, Faith Olivia MacPherson, born May 13, 2001. Faith has Down's Syndrome, and as such has special needs and expenses related to those special needs.

[3] During the marriage the Husband was the primary income earner. Although the Wife did work throughout the marriage, she was primarily responsible for the housekeeping duties, and caring for Faith prior to separation.

[4] In April 2012 the Husband obtained employment in Alberta with the Canadian Union of Public Employees. The parties agreed that the Husband would relocate to Calgary with the Wife and dependent child to follow at a later time. At this time the Wife was working as a cook at Maple Hill Manor.

[5] Once the whole family was together in Alberta, the plan was for the Wife to stay at home with Faith, adjusting Faith to her new environment and being available as a wife and mother.

[6] On November 19, 2012 the Wife was required to leave her employment and went on sick leave for 15 weeks. She applied for long-term disability, but initially did not qualify, and was subsequently approved in December 2014.

[7] While the Husband was in Alberta the Wife suspected the Husband was having an extra-marital affair, which she confirmed through the retention of a private investigator.

[8] The parties separated and the Petition for Divorce was filed in April 2013.

[9] The child, Faith, has remained in the primary care of the Wife since separation. The Wife received the amount of \$3,000.00 per month for support. No Order was ever issued by the Court. Payments have been made on a "without prejudice basis" since December 2013 as agreed by the parties, with no specific breakdown as to how the payment related to child and/or spousal support. The

Husband considered the payment to be child support only. The Wife did not claim this money as income, nor did the Husband claim a tax deduction.

[10] Prior to the \$3,000.00 support payment being agreed upon, the Husband was paying one-half of the mortgage on the matrimonial home. He stopped this payment upon commencing the \$3,000.00 payment in December 2013.

[11] The parties financial situation has since further deteriorated and their joint debts are almost all in collections. Mortgage payments have been missed, and the parties' credit ratings have been adversely affected.

[12] The Husband now resides in Halifax, and holds a similar position to that he held in Alberta.

[13] The trial of his matter was heard on January 14, 15, 16 and May 13, 2015. Written Briefs were submitted by counsel. Counsel for the Wife filed on September 18, 2015, and counsel for the Husband filed on July 7, 2015.

[14] Prior to the commencement of the trial the parties agreed to the following:

- The divorce is conceded on the grounds of marriage breakdown.
- Joint custody of Faith.
- Primary care to the Wife.
- The Husband has reasonable access.
- The Husband has the right to access third party information regarding Faith.
- The Husband now acknowledges his obligation to pay ongoing child support once his annual income is determined by the Court.
- Section 7 Expenses will be shared in proportion to income once the Court has determined the appropriate Section 7 expenses.
- The Husband now acknowledges his obligation to pay spousal support once his annual income is determined by the Court.

[15] The remaining issues for the Court to resolve are:

- 1. What is the Husband's annual income for child support purposes?**
- 2. What is the appropriate amount for spousal support?**
- 3. What is the appropriate disposition of the matrimonial home?**
- 4. How should the matrimonial property, both assets and debts, be divided?**
- 5. What are the appropriate Section 7 Expenses since separation?**
- 6. Should the Court gross up income of the Wife?**
- 7. Should the Wife pay occupational rent?**

[16] The Court received into evidence the following Exhibits, namely:

Exhibit 1 - Petition for Divorce.

Exhibit 2 - Long Form Marriage Certificate.

Exhibit 3 - Petitioner's Exhibit Book.

- Tab 1: Petition for Divorce
- Tab 2: Registration of Marriage
- Tab 3: Tax Returns for 2013, 2012, and 2011.
- Tab 4: Letter from Maple Hill Manor re date of hire.
- Tab 5: E.I. Statement.
- Tab 6: Statement from Department of Community Services.
- Tab 7: Letter from Maple Hill re long term disability coverage.
- Tab 8: Letter from Service Canada re Canada Pension Disability Benefits.
- Tab 9: Statement of Expenses.

- Tab 10: Retroactive extraordinary expenses for Faith.
- Tab 11: Statement of Property.
- Tab 12: Receipts from Antigonish Farmers Mutual.
- Tab 13: Receipts from Home Hardware.
- Tab 14: Receipts from MacLeod's Oil Burner and Plumbing.
- Tab 15: Receipt for Respite Care.
- Tab 16: Mortgage transaction history.

Exhibit 4: Bank transfers from Husband to the Wife.

Exhibit 5: Respondent's Exhibit Book

- Tab 1: Affidavit of Todd MacPherson sworn November 25, 2013.
- Tab 2: Statement of Expenses of Todd MacPherson sworn November 25, 2013.
- Tab 3: Statement of Income sworn on November 25, 2013.
- Tab 4: Statement of Property sworn on December 4, 2013.
- Tab 5: Statement of Income sworn on December 14, 2014.
- Tab 6: Statement of Expenses sworn on December 15, 2014.
- Tab 7: Aeroplan Miles Balance.
- Tab 8: Proof of TD Bank E-transfers to Darlene MacPherson April to November 2013.
- Tab 9: Section 7 expenses – proof of costs 2013.
- Tab 10: Correspondence July 30, 2014 re insurance Antigonish Farmers Mutual.
- Tab 11: Handwritten list of debts.

- Tab 12: Greenshield benefits 2014 re Speech Therapy.
- Tab 13: Correspondence CUPE dated December 18, 2014 re Expenses.
- Tab 14: Mortgage Payments history 2013.
- Tab 15: EAP reimbursement to Todd MacPherson December 2014.
- Tab 16: CUPE Collective Agreement.
- Tab 17: Email communication between parties October 2014.
- Tab 18: Email communication between parties October to December 2013.
- Tab 19: Email communication between parties June 2014.
- Tab 20: Divorcemate calculations.

Exhibit 6: Binding Machine Receipt.

Exhibit 7: Husband's breakdown of business expenses.

Exhibit 8: Husband's payments for Faith's Section 7 Expenses.

Exhibit 9: Matrimonial Home Appraisal.

Exhibit 10: Husband's Statement of Earnings.

Exhibit 11: Spousal Support Calculations.

PETITIONER'S POSITION/SUBMISSIONS

[17] As a result of an extra-marital affair by the Husband, the parties formally separated on March 10, 2013. The Wife retained a private investigator to confirm the affair, and submits this cost is a matrimonial debt which should be shared by the parties.

[18] The Wife submits that Faith is a special needs child, and requires extraordinary expenses approximately \$1,200.00 per month.

[19] That in December 2013 the parties entered into a “without prejudice” consent arrangement for the Husband to pay \$3,000.00 per month in support, and payment to date is acknowledged. No Court Order was issued in this regard. The Wife submits the \$3,000.00 payment was for child support only, as the Husband refused to pay spousal support.

[20] Upon commencement of the support payment the Husband stopped making any contribution toward the mortgage payment as of November 2013.

[21] Regarding some of the claimed Section 7 Expenses, the Husband received reimbursements from his insurance company, and his Employee Assistance Program. None of the reimbursements were shared with the Wife.

[22] The Wife has been maintaining a portion of the joint debt since separation; but was unable to pay all the parties' liabilities. The parties outstanding debts are almost all in collections. Their current values exceed that of the date of separation after interest and penalties.

[23] The Husband holds three pensions, one with CUPE which the Wife seeks equal division at source; the second being RRSP's which the Wife seeks to be divided at source via a spousal rollover; and a third small pension which the Wife seeks to be included in the equalization calculation.

[24] The Wife submits the Husband received the following Section 7 Expenses through his Employee Assistance Program, and medical insurance plan (Greenshield):

(a) Dr. Cynthia Jordan	....	1,440.00
(b) Speech	....	160.00
(c) Audio link services	....	791.16
(d) Speech and Reading	....	1,820.00
(e) Occupational Therapy	....	190.00
(f) Greenshield (2014)	....	400.00
Total Received	....	\$4,801.16

[25] The Wife submits the appraised value of the home (\$165,000.00), less estimated disposition costs (\$12,885.00), should set the home valuation at \$152,115.00.

[26] There remains an \$80,512.00 mortgage as of the date of trial.

[27] The Wife submits that prior to separation her great-uncle “gifted” approximately \$40,000.00 to her and Faith for the maintenance and upkeep of the home, and to make the home suitable for Faith’s needs.

[28] The Wife submits this money from her great-uncle was not intended to increase the equity to the Husband’s benefit, and thus seeks an unequal division of the home. The Wife does acknowledge that the Husband did share in the benefit of this alleged gift.

[29] The Wife submits the matrimonial debt be divided equally, and set at \$101,563.00, as per Exhibit 3, Tab 11.

[30] The Wife submits the following alternative equalization charts for the Court’s consideration, in terms of division of matrimonial assets and debts.

	Husband	Wife
Asset		
House less \$40,000.00 gift		\$112,115.00
Investments		
RBC	\$27,000.00	
LRI	\$ 1,100.00	
Debt		
Equally shared joint unsecured debt	(\$50,781.50)	(\$50,781.50)
Mortgage		(\$80,512.00)
Total	(\$22,681.50)	(\$19,178.50)
Equalization	\$1,751.50	(\$1,751.50)
	(\$20,930.00)	(\$20,930.00)

In the alternative, if the wife's uncle's gift is not given any consideration.

	Husband	Wife
Asset		
House		\$152,115.00
Investments		
RBC	\$ 27,000.00	
LRI	\$ 1,100.00	
Debt		
Equally shared joint unsecured debt	(\$ 50,781.50)	(\$ 50,781.50)
Mortgage		(\$ 80,512.00)
Total	(\$ 22,681.50)	\$ 20,821.50
Equalization	\$ 21,751.50	(\$ 21,751.50)
	(\$930.00)	(\$930.00)

[31] The Wife submits she was solely responsible to pay the house insurance.

[32] Neither party maintained the payments on the line of credit or the Visa since separation.

[33] The Wife maintained some of the smaller debts such as the Central Supplies and Home Hardware bills.

[34] The Wife submits the Husband's claim for occupational rent should be denied.

[35] The Wife submits her income for the last three years is as follows:

2013	-	\$12,495.00
2014	-	\$13,366.62
2015	-	\$13,366.62

[36] The Wife submits the Husband's income for the last three years should be imputed as follows:

	Claimed	Imputed	Gross up/Adjust
2013	\$102,498.00	\$102,840.00	\$145,972.00
2014	\$ 99,755.13	\$109,923.00	\$117,750.00
2015	\$102,498.00	\$126,840.00	\$145,992.00

[37] The Wife submits child support should be paid as follows:

Monthly Child Support

	Claimed	Imputed
2013	\$857.18	\$1,190.00
2014	\$834.89	\$ 976.00
2015	\$857.18	\$1,190.00

[38] The Wife seeks a retroactive adjustment to child support, if applicable.

[39] The Wife submits that Faith's Section 7 Expenses to date are outlined in Exhibit 3 at Tab 10, totalling \$25,144.83.

[40] The Wife submits Faith's ongoing Section 7 Expenses are \$12,669.00 per year (not inclusive of travel costs to the IWK Hospital).

[41] The Wife acknowledges she did receive \$10,325.00 in bank e-transfers prior to December 2013 when the \$3,000.00 monthly support payment took effect.

[42] The Wife seeks that the Section 7 Expenses be proportional both prospectively and retroactively according to the respective incomes of the parties, once determined by the Court.

[43] The Wife submits a sharing of travel costs for Faith's medical appointments is appropriate.

[44] The Wife seeks an Order that the Husband either provide for the care of Faith in order for the Wife to have knee surgery, or alternatively share the cost of Respite Care during the Wife's recovery time.

[45] The Wife seeks spousal support on a non-compensatory or social obligation model referred to in **Bracklow v. Bracklow**[1999] S.C.J. No. 14.

[46] The Wife submits her primary responsibility for the last 13 years has been caring for Faith, and her employment opportunities were limited due to that primary responsibility.

[47] The Wife submits she is permanently disabled, which the Husband concedes until more is known about the prospects of employment for the Wife post-knee surgery.

[48] Considering the length of the marriage, the condition, means and other circumstances of each spouse, and specifically the relative financial positions of the parties, the Wife's age, need, health, and inability to work, it is submitted the Wife should be entitled to spousal support for an indefinite period of time in the amount of \$1,750.00 per month.

[49] The Wife seeks a retroactive adjustment to spousal support, if applicable.

[50] According to the Wife's Divorcemate calculations, the Husband would pay, the following monthly payments, based upon an imputed income of \$120,000.00.

Child Support.....	\$ 994.00
Section 7 Expenses.....	\$ 773.00
Mid-range Spousal Support.....	\$1,750.00
Total per month payment to Wife.....	\$3,517.00

RESPONDENT’S POSITION/SUBMISSIONS

[51] The Husband agrees the divorce proceed on an uncontested basis.

[52] The Husband acknowledges that all issues of custody and access have been agreed upon to the mutual satisfaction of the parties.

[53] The Husband agrees to pay child support in accordance with his line 150 income, which according to his 2014 Tax Return Summary is \$99,755.13.

[54] The above-noted income of \$99,755.13 yields a child support payment of \$866.00 per month.

[55] The Husband submits that it is not appropriate to impute income for travel expenses for employment as they were largely reimbursements.

[56] The Husband’s line 150 income for the relevant years is as follows:

2013.....	\$102,498.00
2014.....	\$ 99,755.13
2015.....	\$ 99,755.13

[57] The Husband submits all payments made to the Wife, not considered to be child support, should be “grossed up”, as the Wife was not taxed on this income, nor did the Husband receive a tax deduction.

[58] The Wife submits the following calculations are relevant in this regard. Using Justice Campbell’s tax gross-up formula, the Husband asks income to be set for the Wife as per the following chart:

(1) Year	(2) Reported Income already subject to tax	(3) Unreported income and 3 rd party payments (money in her hands)	(4) Child support Portion (non- taxable)	(5) Amount to be grossed up
2013	\$12,495.84	\$15,230.00	\$8892.80	\$6,337.20
2014	\$13,366.62	\$36,000.00	\$10,391.40	\$25,608.60
2014	\$13,366.62	\$18,000.00	\$5,195.00	\$12,804.30

[59] It is submitted column 3 is the amount of money the Wife received in her pocket with no tax liability. Column 5 represents the amount that should be grossed up. The child support portion is excluded from the amount to be grossed up.

[60] The formula is as follows:

$$\begin{aligned} & \text{Tax free income amount} && \$X \\ & \text{Divide by reciprocal of the marginal tax rate } / (A)\% \\ & 100\% - (X) = A \dots\dots\% = \text{GROSSED UP INCOME} \\ & \text{2013} \\ & \text{Tax free income amount } \$6,337.20 / 70.75\% = \$8,987.17 \\ & 100\% - 29.25\% = 70.75\% \\ & \$8,987.17 \times 29.25\% = \$2,619.97 \\ & \$8,987.17 - \$2,619.97 = \$6,337.20 \\ & \text{2014} \\ & \text{Tax free income amount } \$25,608.60 / 66.40\% = \$38,509.17 \\ & 100\% - 33.50\% = 66.50\% \\ & \$38,509.17 \times 33.50\% = \$12,900.57 \\ & \$38,509.17 - \$12,900.57 = \$25,608.60 \\ & \text{2015} \\ & \text{Tax free income amount of } \$12,804.30 / 66.50\% = \$19,254.59 \\ & 100\% - 33.50\% = 66.50\% \\ & \$19,254.59 \times 33.50\% = \$6,450.29 \\ & \$19,254.59 - \$6,450.29 = \$12,804.30 \end{aligned}$$

[61] It is submitted that where the Husband did not claim a deduction for spousal support, he ought to get a credit for the grossed up amount of support paid to the Wife, which was substantial and not subject to tax.

[62] The Wife's income is submitted to be as follows:

Year	Line 150 income	Child Support	Grossed up amount	Total income
2013	\$12,495.84	\$ 8,982.80	\$ 8,957.17	\$30,345.81
2014	\$13,366.62	\$10,391.40	\$38,509.17	\$62,267.19
2015	\$13,366.62	\$ 5,195.70	\$19,254.59	\$37,816.91

[63] Justice Campbell's memo is referenced as Family Practice Tips, Issue 11, dated January 5, 2015.

[64] It is submitted the Husband has paid the following support since March 10, 2013.

Date	Support Paid	Type of support	Note	Paid to Whom
March 10 – Dec. 30, 2013	\$10,325.00	E-transfers	Amount agreed	Darlene MacPherson
March 10 – Nov. 30, 2013	\$ 4,905.00	Mortgage payments (\$545 biweekly x 9 months/2)	3 rd party payment	BMO
2014	\$36,000.00	Agreed amount	\$3,000.00 per month	Darlene MacPherson
2015	\$18,000.00	Agreed amount	\$3,000.00 per month	Darlene MacPherson
2015	\$ 3,000.00	Mortgage arrears – 3 rd party payment	January 29, 2015	BMO
			Total Paid	\$72,230.00

[65] Pursuant to his income, the following is a comparison of what is submitted the Husband ought to have paid compared to what he paid.

Year	Income	Child support	Amount owing	Amount paid
2013	\$102,498.00	\$889.28 x 10 months	\$ 8,892.80	\$15,230.00
2014	\$ 99,755.13	\$865.95 x 12 months	\$10,391.40	\$36,000.00
2015	\$99,755.13	\$865.95 x 6 months	\$ 5,195.70	\$18,000.00
2015	N/A	\$3,000.00 x 1	Mortgage payment	\$ 3,000.00
		Total:	\$24,479.90	\$72,230.00
			Overage:	\$47,750.10

[66] Of the \$72,230.00 the Husband has paid to the Wife, his child support obligation was \$24,479.90 since separation, it is submitted there remains a need to account and properly allocate the \$47,750.10.

[67] The Husband suggests this be credited toward any retroactive claim by the Wife for spousal support and/or retroactive support.

[68] The foregoing amount does not include items he has paid for on behalf of Faith by way of the following:

- (a) E-transfers to Laura Dunlop for Speech Therapy.
- (b) Credit card payments for hotel stays for Ms. MacPherson and Faith at the Travel Lodge in Dartmouth.
- (c) Insurance payments for the house from March 2013 until November 2013 which were paid directly by him.

[69] It is submitted all Section 7 Expenses claimed by the Wife are not reasonable and necessary expenses (see Exhibit 3 at Tab 10). These expenses total \$25,944.83.

[70] In particular the Husband submits:

- Alarm System (\$165.60) is not a reasonable or necessary expense. No medical evidence was provided to support the need for same. The Wife acknowledged there are other cheaper options to alert her if Faith left the home, and that there was no need for an alarm system.
- Parenting Course is not a reasonable or necessary expense. This was an optional (\$38.00) course for the Wife to complete. All issues of custody and access were agreed to by the parties.
- Reading Machine cost was paid for by the Husband's Employee Assistance Program. The shipping cost of \$79.00 was paid for by the wife, but should not be included as a Section 7 Expense.
- 2013 YMCA (\$227.07). Swimming course for Faith. The Husband objects to paying a share of the expense when the net cost is unknown, and the tax benefits go to the Wife.
- 2014 Respite (\$300.00). Cost was incurred by the Wife without consulting the Husband. She attended a wedding in Ottawa. Other options were available to the Wife such as family or the Department of Community Services. This expense was not receipted, and the service was provided by a friend of the Wife.
- Restoralax (\$560.00) is an over-the-counter drug recommended to the Wife by her doctor to assist with Faith's digestive issues. The Husband submits without receipts there is no proof the Wife incurred any cost or whether or not the cost may be covered by the Husband's drug plan.
- Adjustable bed (\$3,892.67) was purchased to assist Faith to sit up to alleviate choking. It was doctor recommended. The Husband was of the view it was unaffordable. The Wife's boyfriend assisted with the purchase. The Husband takes the position it was a gift from the boyfriend, and therefore he should not be required to share in the cost.
- Reading tutor (\$2,160.00). The Husband's Employee Assistance Program reimbursed \$1,200.00 of this cost. The Wife may be able to defer some or all of this cost while not working.

- Speech therapy is paid by both the Husband's Employee Assistance Program and his medical plan to the extent of \$400.00 per year. The actual cost is \$480.00 per month, although there is no clear picture as to the amounts incurred to date (\$5,760.00 annually).
- Soccer Assist (\$720.00) was money paid to a student to assist Faith on the soccer field. The Husband submits this is not an extraordinary expense.
- Piano (\$45.00) is not a reasonable or necessary expense with parents of these means.
- Boost. Cost (\$267.00) is disputed as an extraordinary expense. The Wife acknowledged Faith no longer uses same.
- Halifax travel (\$9,624.49) are expenses, it is submitted, that have been covered by the Husband by paying for hotels on his credit card and paying \$3,000.00 per month for support. The Husband submits the Wife can mitigate her costs when travelling to Halifax by staying with family or using hospital accommodations offered to parents at a reduced nightly rate. The Husband submits it would be inappropriate to issue a retroactive Order in this regard.

[71] The Husband submits that he has paid \$47,750.10 over and above child support since separation. Some portion of what he has already paid should be credited to the Husband bringing this matter to a fair and equitable conclusion.

[72] It is submitted the Court must prioritize Section 7 Expenses for Faith, because the parties' resources are limited. Priority must be given to what Faith needs to function and develop in a healthy manner.

[73] It is submitted an important aspect of establishing a claim for retroactive expenses is appropriate documentation. Hand written notes are not sufficient proof of past expenses.

[74] With respect to spousal support the Husband concedes the Wife is entitled, as a result of her now receiving disability benefits. The Husband, nonetheless, submits that should the Wife have successful knee surgery and return to work, that would constitute a material change of circumstances for which spousal support would be reviewable.

[75] The Husband submits the following spousal support calculations as being fair and reasonable:

	Income	Mid-range per month
2013	\$102,498.00	\$1,789.00
2014	\$ 99,755.03	\$1,668.02
2015	\$99,755.03	\$1,668.02

[76] Based upon the above, the Husband submits he has overpaid spousal support since March 2013 by \$8,795.93.

[77] The Husband submits, based upon the above calculations, his total spousal support obligation since the date of separation was \$57,992.00. His actual spousal support payments to date equal \$44,749.60.

[78] The Husband submits by grossing up his actual payments to date, the payment becomes \$66,720.93, which yields an overall overpayment of \$8,795.93 for spousal support. This, thus, eliminates the need for a retroactive adjustment.

[79] The Husband seeks an equal division of matrimonial assets and debts. He requests the home be sold, and that the proceeds be applied to the debts outstanding.

[80] The Husband submits that the \$15,000.00 the Wife paid to retain a lawyer and private investigator, and also for some living expenses should be the sole debt of the Wife, and seeks an adjustment in this regard.

Law and Analysis

[81] I am satisfied that all jurisdictional requirements of the *Divorce Act* have been met, and there is no possibility of reconciliation. I am further satisfied there has been a permanent breakdown of this marriage by reason of the parties having lived, and continued to live separate and apart for a period in excess of one year from the commencement of this divorce proceeding. The divorce is hereby granted.

[82] I have scrutinized the evidence with care, and considered all of the evidence presented in this case, including the Exhibits, and submissions of counsel. The Court has made its finding of proof on a balance of probabilities by the production of clear, convincing and cogent evidence. **C.R. v. McDougall**, 2008 S.C.C. 53 (SCC).

Issue One

What is the Husband's annual income for child support purposes?

[83] The Wife seeks to impute the Husband's annual income on the basis that he receives bonuses and non-taxable benefits, including a company vehicle, gas card, meal allowance, and per diem pay for out of town meetings he may be required to attend for work purposes.

[84] In 2012 the Husband received \$25,948.95 in expense reimbursements. In 2013 the expense paid was \$24,342.00, and up to April 2014 they were \$10,168.04.

[85] Section 19 of the Federal Child Support Guidelines grants the Court the jurisdiction to "impute such amount of income to a spouse as it considers appropriate in the circumstances".

[86] The Husband opposes any imputation of income on the basis that the expense payments he received were largely reimbursements.

[87] The Husband submits that line 150 of his tax return should determine his income for child support purposes.

[88] Counsel for the Wife provided a number of cases supporting the imputation of per diem income to the payor; however I find the reasoning of Justice Coady of

the Nova Scotia Supreme Court who decided otherwise in **Brown v. Brown** [2006] N.S.J. 492 to be more persuasive. Justice Coady stated at paragraph 20-21:

I am not prepared to include Mr. Brown's food per diem in his income for child support purposes: Given the amount of travel and the nature of his employment, I conclude that it would be unreasonable to force him to take his meals in a bag. I find these funds are for a purpose related to the performance of his duties.

I am not prepared to include Mr. Brown's income tax refunds in his income. There is no authority in the guidelines and to do so would be capturing income twice.

[89] Counsel for the Wife agrees that actual out of pocket expenses such as "hotel fees etc." should not be imputed, but the additional non-taxable income he receives should be treated as income, and should also be grossed up to account for the fact the benefit is non-taxable. I disagree with the submission and find that these benefits are related to the performance of his duties, and amount to a reimbursement of expenses. I do agree any bonuses the Husband receives should be included as income.

[90] I, therefore, find the Husband's income for support based purposes shall be his line 150 income for the years 2013, 2014, and 2015. The following reflects the total amount of child support that should have been paid since separation.

	Income	Monthly Payment	Total
March to December 2013	\$102,498.00	\$889.28	\$ 8,892.80
2014	\$ 99,755.13	\$865.95	\$10,391.40
January 1, to September, 2015	\$ 99,755.13	\$865.95	\$ 7,793.55

Issue Two

What is the appropriate amount for spousal support payable?

[91] The Wife seeks an Order for spousal support for an indefinite period pursuant to s. 15.2(1) of the *Divorce Act*.

[92] Section 15.2 of the *Divorce Act* grants jurisdiction to make spousal support orders:

- (1) Spousal support order – A court of competent jurisdiction may, on application by either or both spouses, make an order requiring a spouse to secure or pay, or to secure and pay, such lump sum or periodic sums, or such lump sum and periodic sums, as the court thinks reasonable for the support of the other spouse.

...

- (3) Terms and conditions – The court may make an order under subsection (1) or an interim order under subsection (2) for a definite or indefinite period or until a specified event occurs, and may impose terms, conditions or restrictions in connection with the order as it thinks fit and just.

...

- (4) Factors – in making an order under subsection (1) or an interim order under subsection (2), the court shall take into consideration the condition, means, needs and other circumstances of each spouse, including:

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

- (5) Spousal misconduct – In making an order made under subsection (1) or an interim order under subsection (2), the court shall not take into consideration any misconduct of a spouse in relation to the marriage.

- (6) Objectives of spousal support order – An order made under subsection (1) or an interim order under subsection (2) that provides for the support of a spouse should

- (a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;
- (b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;

(c) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and

(d) insofar as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.

[93] The parties were married 17 years. They have a special needs daughter for whom the Wife has been primarily responsible. The Wife continues to have the primary role in parenting the parties' 13 year old daughter. The parties have agreed upon all issues of custody and access.

[94] The two leading cases on entitlement to spousal support are **Moge v. Moge** [1992] 3 S.C.R. 813 and **Bracklow v. Bracklow** [1999]S.C.J.No. 14. The decision by the Supreme Court of Canada in **Moge**, supra, established the compensatory model for spousal support where the **Bracklow** decision establishes the model for the non-compensatory model for spousal support.

[95] The introductory comments in **Bracklow**, supra, made by Justice McLachlin, are relevant to the case at bar:

(1) What duty does a healthy spouse owe a sick one when the marriage collapses? It is now well-settled law that spouses must compensate each other for foregone careers and missed opportunities during the marriage upon the breakdown of their union. But what happens when a divorce – through no consequence of sacrifices, but simply through economic hardship – leaves one former spouse self-sufficient and the other, perhaps due to the onset of a debilitating illness, incapable of self-support? Must the healthy spouse continue to support the sick spouse? Or can he or she move on, free of obligation? That is the question posed by this appeal. It is a difficult issue. It is also an important issue, given the trend in our society toward shorter marriages and successive relationships.

[96] In paragraph 32 of her decision, Justice McLachlin, answers the question of whether a spouse should be held to pay spousal support for a sick spouse by stating that the Courts must look at the needs of the parties:

(32) Both the mutual obligation model and the independent, clean-break model represent important realities and address significant policy concerns and social values. The federal and provincial legislatures, through their respective statutes, have acknowledged both models. Neither theory alone is capable of achieving a just law of spousal support. The importance of the policy objectives served by both models is beyond dispute. It is critical to recognize and encourage the self-

sufficiency and independence of each spouse. It is equally vital to recognize that divorced people may move on to other relationships and acquire new obligations which they may not be able to meet if they are obliged to maintain full financial burdens from previous relationships. On the other hand, it is also important to recognize that sometimes the goals of actual independence are impeded by patterns of marital dependence, that too often self-sufficiency at the time of marriage termination is an impossible aspiration, and that marriage is an economic partnership that is built upon a premise (albeit rebuttable) of mutual support. The real question in such cases is whether the state should automatically bear the costs of these realities, or whether the family, including former spouses, should be asked to contribute to the need, means permitting. Some suggest it would be better if the state automatically picked up the costs of such cases: Rogerson, “Judicial Interpretation of the Spousal and Child Support Provisions of the Divorce Act, 1985 (Part 1)”, *supra*, at p. 234, n. 172. However, as will be seen, Parliament and the legislatures have decreed otherwise by requiring courts to consider not only compensatory factors, but the “needs” and “means” of the parties. It is not a question of either one model or the other. It is rather a matter of applying the relevant factors and striking the balance that best achieves justice in the particular case before the court.

[97] In **Fisher v. Fisher** [2001] N.S.J. No. 32, the Nova Scotia Court of Appeal considered the fundamental principles in spousal support cases. Cromwell, J.A. stated at paragraph 82:

The fundamental principals in spousal support cases are balance and fairness. All of the statutory objectives and factors must be considered. The goal is an order that is equitable having regard to all of the relevant considerations. As was stated in Bracklow, *supra*, at paragraph 36:

...there is no hard and fast rule. The judge must look at all the factors in the light of the stipulated objective as support and exercise his or her discretion in a manner that equitably alleviated the adverse consequence of marriage breakdown.

[98] In this instance the evidence is clear, convincing and cogent that the Wife is entitled to spousal support. She has supported her Husband throughout a long-term marriage, and took on the primary responsibility of raising her daughter, Faith, who has special needs.

[99] The Wife is now herself disabled, and unable to work. With the added responsibility of being the sole caregiver for Faith, the prospects of the Wife returning to the work force are uncertain.

[100] I acknowledge there is no specific medical evidence in this regard, and circumstances may change; but at this moment in time, it is clear that the Wife should receive spousal support for an indefinite period, which will afford her the opportunity to, hopefully, get well; while at the same time allow her to focus on Faith's day to day needs. To the Husband's credit he now acknowledges this need as well.

[101] The parties have provided the Court with their respective calculations with regard to the quantum of spousal support. The Wife submits the appropriate amount is \$1,750.00 per month, however this is premised on an imputed income to the Husband of \$120,000.00. The Husband submits a fair and equitable amount for spousal support is \$1,668.00 per month. In consideration of all of the factors the Court must weigh in this instance, I find \$1,668.00 per month does justice between the parties. This amount shall now be included as income to the Wife on a go forward basis, and be a tax deduction for the Husband.

Issue Three

What is the appropriate disposition of the matrimonial home?

[102] The Wife owned a home she inherited from her mother prior to the marriage. She sold the home and used the funds to pay off debt belonging to the Husband, and to put a down payment on the matrimonial home.

[103] The Wife's great uncle arranged a \$20,000.00 mortgage payment on the current matrimonial home. In addition, another \$20,000.00 was provided by the great-uncle to renovate the basement. It is submitted this money was a gift to the Wife and Faith. The Wife seeks an unequal division arguing that it would be unfair or unconscionable for the Husband to realize this windfall, when the equity in the home is realized on the division.

[104] With respect I do not agree. The evidence is clear, convincing and cogent that the money paid by the great uncle was to the benefit of the Wife and Husband as a married couple for their matrimonial home where they resided with their child.

[105] There is no documented agreement between the great uncle and the Wife to suggest otherwise. The Wife requested financial assistance from the great uncle. The great uncle kindly responded by arranging a \$20,000.00 mortgage, and providing funds for home renovations. The great uncle knew this was the matrimonial home of his niece and her husband. It would be unfair and

unconscionable to deprive the Husband of sharing in this equity. There will, thus, be an equal division of the matrimonial home which is appraised at \$165,000.00, less the outstanding mortgage balance which the Court finds was \$80,512.00 as of date of trial. (An updated mortgage payout should be obtained in advance of the home closing).

[106] The net equity, if any, shall then be divided between the parties; but before this division can occur, all the assets and debts must be calculated and divided equally between the parties.

[107] The Wife would like to remain in the home with her daughter, Faith. The Court would encourage this to occur if indeed the Wife can arrange sufficient financing to buy out the Husband's one-half interest. This number cannot be determined until the issue of retroactivity is addressed. Once determined, the Wife will have the first option to buy the home. If she cannot afford to do so, the home will be sold, with proceeds to be used to pay off the outstanding matrimonial debt.

Issue Four

How should the matrimonial assets and debts to be divided?

[108] Both parties acknowledge the matrimonial debt of \$102,235.02 outlined in Exhibit 3, Tab 11, namely:

Category	Institution	Particulars	Amount owing as of March 10, 2013
Joint Mortgage	Scotiabank		\$ 67,728.69
Credit Union O/D	Coady CU	05226-10-4	\$ 1,504.00
Joint Line of Credit	Scotiabank	4538 165 897 898	\$ 70,388.43
Joint Gold Visa	Scotiabank	4538 016 827 748 020	\$ 13,810.37
Overdraft	Scotiabank	202029248	\$ 1,004.00
Joint Rewards Visa	Royal Bank	4512 2386 1725 5566/74	\$ 6,218.45
Home Hardware		5054-4320-0023- 0101	\$ 924.71
Schwartz			\$ 2,343.00
Central		F0000963	\$ 1,175.03
Family Windows			\$ 2,300.00
Water account (current)			\$ 698.03
MacLeod's Fuels			\$ 1,200.00
Insurance			\$ 670.00

[109] The Husband submits that post-separation debt incurred by the Wife on the joint line of credit to pay for her lawyer, private investigator is not a matrimonial debt and should be the Wife's sole responsibility. I agree and find the Husband should be credited for the \$15,000.00 expense incurred by the Wife. The remaining matrimonial debt, will otherwise be divided equally.

[110] The outstanding mortgage at date of separation was \$67,728.69. The Husband stopped paying the mortgage in November 2013, upon commencement of paying the monthly \$3,000.00 support payment. The mortgage balance has since increased to \$80,512.00, and perhaps beyond, which must be accounted for in the equalization calculation.

[111] I find the matrimonial assets and debts shall be divided as follows:

Asset/Debt	Husband	Wife
(Asset) House - \$165,000.00 minus disposition fees		\$152,115.00
(Asset) RBC	\$ 27,000.00	
(Asset) LRI	\$ 1,100.00	
(Debt) Shared Unsecured debt	(\$ 51,116.50)	(\$ 51,116.50)
Mortgage		(\$ 80,512.00)
Total	(\$23,016.50)	\$ 20,486.50
Equalization	(\$21,751.50)	\$ 21,751.50

Note: This calculation is dependent upon estimated disposition fees of \$12,885.00, and that the home is sold at the appraised value.

This results in an equalization payment of \$21,751.50 owed by the Wife to the Husband.

Issue Five

What are the appropriate Section 7 Expenses since separation?

[112] The Section 7 Expenses are detailed in Exhibit 3 at Tab 10. The Wife submits that retroactive extraordinary expenses total \$25,144.83.

[113] Upon review of the evidence the Court concludes the following past expenses are not reasonable and necessary, and are therefore not extraordinary expenses, namely:

Alarm System	\$ 165.60
Parenting Course	\$ 38.00
2014 Respite	\$ 300.00
Soccer Assist	\$ 720.00
Piano	\$ 45.00
Boost	\$ 267.00
TOTAL	\$ 1,535.60

[114] Given the specific needs of Faith, I find the remaining expenses itemized in Exhibit 3 at Tab 10 are reasonable and necessary. The adjusted balance for retroactive Section 7 Expenses is, thus, \$23,609.83. The foregoing amount is inclusive of \$9,624.49 claimed as travel expenses by the Wife for Faith's trips to the IWK in Halifax. It is unclear to the Court whether or not the Wife's claim includes direct payments made by the Husband to the benefit of the Wife for hotels. It is clear that the Husband did make some direct payments to secure accommodations for the Wife when travelling with Faith. The Husband also incurred his own travel expenses in this regard.

[115] I find it is appropriate and just to give the Husband some credit for the direct payments he made, and as a result I find the \$9,624.49 for past travel expenses shall be shared between the parties on a 50/50 basis. The remaining balance of \$13,985.34 shall be divided by the parties in proportion to their respective incomes at the relevant time.

[116] The Wife's income for 2013 and 2014 was \$12,495.00 and \$13,366.62 respectively. The Husband's income for the same time period was \$102,498.00 and \$99,755.13. The average income for the Wife thus equals \$12,930.81 and for the Husband \$101,126.57. This results in a 13% / 87% split between the parties. The parties shall be responsible for the retroactive expenses as follows:

	Expenses for Faith’s care and education	Car and Travel expenses	Total
Adjusted s. 7 expenses	\$13,985.34		
Car and travel expenses		\$ 9,624.49	
Husband’s share	\$12,167.24 (87%)	\$ 4,812.25 (50%)	\$16,979.49
Wife’s share	\$ 1, 818.09 (13%)	\$ 4,812.25 (50%)	\$ 6,630.34

[117] The Husband is thus responsible for \$16,979.49 of retroactive Section 7 Expenses. This will be considered when determining the equalization payment owed by the Wife to the Husband.

[118] The known or projected ongoing Section 7 Expenses are Restoralax; reading; tutor; speech; occupational therapist; which totals \$10,116.00 per year, plus yet to be determined travel costs to the IWK and possible Respite.

[119] The parties must be prepared to share in any further “unknown” Section 7 Expenses which may become necessary for Faith as she grows and matures, so this calculation made by the Court may vary, depending upon Faith’s future needs. By way of example the bed was a one-time purchase, but a necessary one.

[120] The parties will share current Section 7 Expenses, including travel, in proportion to their 2015 projected income as follows:

Husband	\$99,755.13	(66.5%)
Wife (including spousal support)	\$33,382.62	(33.5%)

[121] The Wife must document and receipt all Section 7 Expenses. Upon provision of same to the Husband, he will be required to reimburse the Wife 66.5% of these expenses within 30 days of receiving documentation in support.

[122] To this end the Husband will reimburse the Wife one-third of any insurance reimbursement he may receive through his medical or employee assistance plan.

[123] The Wife may have to have surgery on her knee, which will likely result in the need for Respite assistance for both her and Faith.

[124] The Court disallowed the retroactive Respite claim, because it was not properly documented, and the Wife did not investigate other service agencies such as Community Services or the Husband's medical/employee assistance plan for alternative funding.

[125] In the event Respite is required in the future, I order the Husband pay 50% of the receipted expense, but this shall be paid only after it is confirmed in writing that no other option to engage this service is available to the Wife. The Respite must be established to be reasonable and necessary.

Issue Six

Should there be a retroactive award with regard to child or spousal support and/or Section 7 Expenses?

[126] Using the earlier calculations I find the Husband should be responsible for child support as follows:

	Income	Child Support	Total
March to December 31, 2013	\$102,498.00	\$889.28 x 10	\$ 8,892.80
2014	\$ 99,755.13	\$865.95 x 12	\$10,391.40
January 1 to September 2015	\$ 99,755.13	\$865.95 x 9	\$ 7,793.55
Total obligation to date			\$27,077.75

And similarly for spousal support I find as follows:

	Spousal Support	Total
March to December 31, 2013	\$ 789.00 x 10	\$17,890.00
2014	\$1,668.00 x 12	\$20,016.00
January 1 to September 2015	\$1,668.00 x 9	\$15,012.00
Total obligation to date		\$52,918.00

[127] Thus the Husband's total child and spousal support obligation is \$79,995.75 since the date of separation up to September 30, 2015.

[128] The Husband has paid to date the following since separation:

Date	Support Paid	Type of Support
March 10 to Dec. 30/13	\$10,325.00	E-transfers
March 10 to Nov. 30/13	\$ 4,905.00	Mortgage payments
2014	\$36,000.00	Agreed \$3,000.00 per month
January 1 to September 2015	\$27,000.00	Agreed amount at \$3,000.00 per month
2015	\$ 3,000.00	Mortgage arrears
Total to date	\$81,230.00	(Note adjustment below)

[129] I accept the evidence that the Husband received past reimbursement from his Employee Assistance Program and Greenshield Medical Plan totalling \$4,801.16. This was not shared with the Wife, so the Court will deduct one-half of this amount (\$2,400.58) from the amount paid calculated above, yielding an adjusted total amount paid by the Husband of \$78,829.42. The retroactive amount owed to the Wife is thus calculated as follows:

• Child Support Obligation	-	\$ 27,077.75
• Spousal Support Obligation	-	\$ 52,918.00
• Retroactive Section 7 Expenses	-	\$ 16,979.49
• Estimated 2015 Section 7 Expenses to September 2015	-	\$ 5,045.40
• Total Support Obligation from separation to Sept. 2015	-	\$102,020.64
• Less Amount Paid	-	(\$ 78,829.42)
• Subtotal	-	\$ 23,191.22
• Less post-separation debt adjustment in favour of Husband	-	<u>(\$ 15,000.00)</u>
• Adjusted post-separation amount owed by Husband	-	\$ 8,191.22

[130] The amount of \$8,191.22 is therefore credited towards the equalization of payment of \$21,751.50, which results in \$13,560.28, remaining to be owed by the Wife to the Husband to equalize the property division.

[131] The Wife submits she needs a newer vehicle to ensure Faith's safety when driving, in particular when travelling to Halifax for medical appointments. I agree.

[132] The amount of \$13,560.28 is thus awarded to the Wife as a lump sum payment to assist her with the purchase of a new vehicle. The Husband drives a new vehicle for business and personal use. This lump sum thus allows the Wife to also drive a new and safer vehicle, which is fair and just in the circumstances.

[133] As a result, neither party owes the other. The equalization will balance at zero, once the house transfer or sale is finalized, and all debts have been satisfied. They can share in any surplus if same is realized.

[134] The Court will retain jurisdiction to assist counsel, if required, to adjust any mathematical variation which may result upon transfer or sale of the home.

CONCLUSION

[135] It is time for the parties to move on with their respective lives, and not be encumbered by the financial chaos which existed during the marriage, and after separation.

[136] This is a fair and equitable result for all concerned, and strikes a balance of fairness. The retroactive complications of the past are now resolved. The parties will have a fresh start, and can focus on their futures.

[137] As stated by Justice Saunders in **Koval v. Brinton** [2010] NSCA 78, at paragraph 58:

Thus, it was entirely within the discretion of the Nova Scotia Court to confirm, vary or refuse confirmation of the provisional order of the New Brunswick court. In my view, Campbell, J. did not err in his consideration of the evidence or in the approach he took to craft an order which would provide a fair and practical resolution to these parents' litigation on a go forward basis. (emphasis added)

[138] To this end I reject the Husband's request to gross up the Wife's income. This request is unreasonable, and only served to fuel hostility during separation and the litigation process.

[139] The Husband agreed to pay \$3,000.00 as an "all in" support rather than pay it as guideline support. He was firm in his evidence that the \$3,000.00 was not spousal support. The Wife did not declare it as income, nor did the Husband claim it as a deduction. In the circumstances there is no clear, convincing, or cogent evidence for the Court to conclude the \$3,000.00 payment was anything other than a "without prejudice" agreement between the parties. No order was filed with the Court for issuance. The intent of the parties is vague and ambiguous in terms of how the \$3,000.00 payment was to be classified for income tax purposes. It may be a matter for Canada Revenue Agency to investigate with a view to amendment, but not for this Court to resolve through the gross-up process.

[140] Similarly I reject the Husband's claim for occupational rent. The Husband left the home with his disabled Wife and special needs daughter to fend for themselves. The Wife testified she was in "dire straits" during this period of time. It would be unconscionable to make such an award.

[141] In conclusion, the Court orders the following which is fair and practicable:

- The divorce is granted.
- The parties are awarded joint custody of Faith. Primary care shall be with the Wife. The Husband will have reasonable access at reasonable times upon reasonable notice.
- The Wife shall keep the Husband informed of all issues regarding Faith's health, education, and overall needs regarding her welfare and wellbeing. The Wife will consult with the Husband before finalizing any major decision in this regard. In the event of disagreement, the Wife shall have final decision making authority.
- Child support payable by the Husband in the amount of \$865.95 on the first of each and every month, commencing on January 1, 2015. Such payment will be subject to annual recalculation by Maintenance Enforcement authorities.
- Spousal support payable by the Husband in the amount of \$1,668.00 on the first of each and every month commencing January 1, 2015. This will thus be income to the Wife, and a deductible expense to the Husband, for the full 2015 taxation year and ongoing years.
- Section 7 Expenses, exclusive of travel costs, are estimated to be \$10,116.00 per year. The Husband is responsible for two-thirds of the cost. The Wife will be responsible for the remaining one-third. The Wife shall provide the Husband with documented receipts for these expenses. The Husband will have 30 days to pay the same.
- Section 7 Expenses relating to travel expenses for medical appointments in Halifax will be divided on a two-third, one-third basis. The Husband will pay his two-third share within thirty days upon provision of receipts by the Wife.
- The Husband will pay the Wife one-third of any medical reimbursement he may receive through his medical plan or Employee Assistance Program. Such payment will be made within 30 days of receipt by the Husband.
- By virtue of this Order the Husband is up-to-date with his respective support obligations, up to and including September 30, 2015. His next payments are

due October 1, 2015, and will continue each and every month thereafter until otherwise ordered by a Court of competent jurisdiction.

- The Husband may defer future Section 7 payments until receipts are provided, but must pay any properly documented expenses within 30 days of receipt.
- The Wife shall have 60 days to make financial arrangements to purchase the home. Failure to do so will result in the home being listed for sale and sold on the public market as soon as practically possible.
- Upon transfer or sale of the home, all matrimonial debts are to be paid and satisfied, including the outstanding mortgage on the property. It is possible the Court's calculations may vary once all the real numbers are known, but the intent of the Court is clear in terms of liquidating debt, and eliminating any retroactive or equalization payments between the parties. The Court will retain jurisdiction to address any issues in this regard.
- The parties shall share equally in any surplus from the sale, if realized.
- The estimated equalization valuation results in the Wife owing the Husband \$13,560.28. This is ordered to be a lump sum award payable to the Wife to assist with the purchase of a new vehicle. As a result no payment is required to be made by the Wife to the Husband in terms of equalization which is satisfied by this lump sum award.
- The Husband will arrange for the Wife to share equally in any and all pensions to which he may be entitled to in the future.
- The Husband will ensure medical coverage is maintained through his employer for his daughter, Faith.
- The parties shall provide to each other copies of their previous year's income tax returned, whether filed or not and with all attachments, not later than June 1st of each year, commencing in 2016, and continuing on an annual basis thereafter.

[142] The Husband's go forward monthly support obligations are thus:

Child Support	\$ 865.95
Spousal Support	\$1,668.00
Plus proportionate share of documented Section 7 Expenses	66.50%
Plus documented travel expenses for Faith's medical trips to Halifax	66.50%

[143] Given the mixed success of the parties in this proceeding, each party will bear their own costs.

Order Accordingly,

Justice Kenneth C. Haley