IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Burchill v. Savoie, 2008 NSSC 307

Date: 20081022
Docket: 1201-061267
Registry: Halifax

Between:

David Gordon Burchill

Petitioner

and

Isabelle Savoie

Respondent

Judge: Justice Lawrence I. O'Neil

Heard: March 4, 5 & 6, May 1 & 5 and June 18, 2008 in Halifax, Nova Scotia

Counsel: Kenzie MacKinnon and Mark Dunning, articled clerk for the Petitioner
B. Lynn Reierson Q.C. and Leigh Davis for the Respondent

By the Court:

Introduction

[1] The Petitioner, age 46 and the Respondent, age 43 met when both were living in Vancouver in 1994. The Petitioner holds a degree in Mathematics from Waterloo University. At the time the parties met he was employed in the high technology industry. The Respondent is a 1989 graduate of The University of Montreal Medical School and earned a Masters Degree in Health Administration from the University of British Columbia in 1993. In 1994 she began employment

as a researcher at the University of British Columbia. The parties began cohabiting in late 1995 and married December 1, 1996. They have two children a nine year old daughter born in 1999 and a six year old son born in 2001.

[2] In 2002, the Respondent was advised of the elimination of her employment. After canvassing other employment opportunities in the Vancouver area, she decided to seek admission to a radiology residency. Her applications to the programs at the University of British Columbia, University of Ottawa and University of Toronto were not accepted. She was accepted in the second round by Dalhousie University. She and the Petitioner ultimately relocated to Halifax in June of 2003 so that she could pursue a specialty in nuclear medicine and radiology, hereafter simply referred to as radiology. The Petitioner remained home with the two children. The parties separated in 2005. The Petitioner entered an education program in September 2006 and the Respondent became a part time resident in September 2006. The Petition for Divorce was filed December 5, 2006. The Court has been asked to resolve a number of issues:

Issues

1. Whether the Divorce should be granted, para. 3
2. Whether parenting of the parties' children should be equally shared
   (a) Parenting Arrangement Criteria, para. 7
   (b) Status Quo, Parties' Agreement, para. 7
3. Credibility, Reliability, para. 20
4. Whether Spousal Support Should be Paid to the Petitioner
   (a) Law: Spousal Support, para. 31
   (b) Entitlement to Spousal Support, para. 34
   (c) Self Sufficiency, para.45
   (d) Decision to Become a Part Time Resident, para.47
   (e) Planned Finances for Period of Study, para. 49
   (f) Finances Since Separation, para. 50
   (g) Parties' Positions, para. 53
   (h) Delayed Benefits, para. 54
   (i) Imputed Income, para. 58
   (j) Quantum: Amount and Duration of Spousal Support, para. 69
   (k) Duration, para. 74
   (l) Periodic Spousal Support and Arrears, para. 77
   (m) Lump Sum Spousal Support, para. 83
   (n) Lump Sum Spousal Support on These Facts, para. 121

5. Ongoing Child Support; Special Expenses and Arrears, para. 141
6. Division of the Matrimonial Property, para. 151
7. Costs, para. 153
8. Conclusion, para. 154

1. Divorce

[3] The parties have been resident in Nova Scotia on a continuous basis since June of 2003. They have established the grounds for divorce. I find that they have lived separate and apart since late August 2005. I am taking September 1, 2005 as the date of separation. Until then neither party had decided to end the marriage. The evidence establishes that they lived in the same residence between September 1, 2005 and January 2006. However they were living separate and apart under the same roof. There are no bars to this divorce. The Divorce is therefore granted.

2. Parenting

2 (a) Parenting Arrangement-Criteria

[4] When ruling on the appropriate parenting arrangement for the two children the court is required by s. 16(8) of the *Divorce Act* S.C. 1985, c. 3 (2nd Supp.) to consider only the best interests of the children as determined by reference to the condition, means and other circumstances of the children. By virtue of section 16(10) of the *Divorce Act, supra*. the court is required to provide for as much contact between the children and each parent as is consistent with the best interests of the children and the court is to specifically consider the willingness of each parent to facilitate such contact. Furthermore s. 16(9) of the same *Act* provides that the past conduct of each parent is not to be considered unless it is relevant to the ability of that parent to act as a parent.

[5] Justice Goodfellow in *Foley v. Foley* [1993] N.S.J. 347 enumerated a helpful list of considerations that frequently must be addressed depending on the facts of a particular case. They are the following:

1. Statutory direction Divorce Act 16(8) and 16(9), 17(5) and 17(6);
2. Physical environment:

3. Discipline;

4. Role model;

5. Wishes of the children - if, at the time of the hearing such are ascertainable and, to the extent they are ascertainable, such wishes are but one factor which may carry a great deal of weight in some cases and little, if any, in others. The weight to be attached is to be determined in the context of answering the question with whom would the best interests and welfare of the child be most likely achieved. That question requires the weighing of all the relevant factors and an analysis of the circumstances in which there may have been some indication or, expression by the child of a preference;

6. Religious and spiritual guidance;

7. Assistance of experts, such as social workers, psychologists- psychiatrists- etcetera;

8. Time availability of a parent for a child;

9. The cultural development of a child:

10.The physical and character development of the child by such things as participation in sports:

11. The emotional support to assist in a child developing self esteem and confidence;

12. The financial contribution to the welfare of a child.

13. The support of an extended family, uncles, aunts, grandparents, etcetera;

14. The willingness of a parent to facilitate contact with the other parent. This is a recognition of the child's entitlement to access to parents and each parent's obligation to promote and encourage access to the other parent. The Divorce Act s. 16(10) and s. 17(9);

15. The interim and long range plan for the welfare of the children.

16. The financial consequences of custody. Frequently the financial reality is the child must remain in the home or, perhaps alternate accommodations provided by a member of the extended family. Any other alternative requiring two residence expenses will often adversely and severely impact on the ability to adequately meet the child's reasonable needs; and

17. Any other relevant factors.

[6] I would add “maintaining the status quo” as a consideration for the court in appropriate circumstances. The duty of the court in any custody application is to consider all of the relevant factors to determine what is in the children’s (child’s) best interests.

2(b) Status Quo, Parties’ Agreement

[7] The current arrangement has the Petitioner as the children’s primary care giver. The children are scheduled to spend Thursday and Friday evening with the Respondent and every other week end from Saturday morning to Sunday afternoon/evening with her. In addition there is frequent unscheduled time arranged between the parties. Prior to leaving Vancouver the parties planned for the Petitioner to be the children’s primary caregiver. He has been in that capacity for the past five years. It is the status quo and it is working for the children. Although the parties had contemplated one household at the time they left Vancouver they have had two households since January 2006 and the Petitioner’s role as the primary care giver has continued. In fact it was confirmed by an agreement between the parties reached in December 2005. Although the Respondent went to great lengths to resist the use of the word agreement to characterize the child care plan that followed their December 2005 meetings involving their respective lawyers, I find that an agreement was in fact reached between the parties at that time.

[8] Since the parties physical separation in January of 2006 the children have had frequent and generous amounts of time with both parents. As stated, the Petitioner has been the primary care giver since then and in fact since the couple arrived in Halifax in June of 2003. I have concluded that he should continue to be the children’s primary care giver subject to two changes in the current allocation of parenting time.

[9] The Respondent shall have additional overnight access to occur Tuesday of each week beginning after school and ending with the children’s drop off at school Wednesday morning. Thursday evening access will continue. Friday night access shall be moved to every other week end and be overnight. It shall precede the “Respondent’s” current Saturday and Sunday parenting time with the children,

which shall be every other weekend. The parties shall have joint custody of the children. This is in the children's best interests.

[10] The parties knew that employment opportunities for the Petitioner in Halifax were more limited than in Vancouver and Toronto, for example. The court accepts the description of the arrangement between the parties prior to leaving Vancouver as put forward by the Petitioner. He testified that the Respondent wanted him to commit to staying home for at least two years to ensure that she could meet the anticipated demands of the radiology program and have the comfort of knowing the children were cared for by a parent. The Petitioner says that he agreed on condition that the Respondent and he would reassess how it was going after six months to ensure that he could cope with the change in lifestyle this was to represent for him. This plan was followed and with the support of the Respondent, the Petitioner continued to perform the role of the children's primary care giver while the parties cohabited; beyond the six month period and to the time of the parties separation. The parties further anticipated that the Petitioner would be the primary care giver even if he took employment outside the home after the two year period but prior to the completion of the Respondent's residency. I do not accept the Respondent's characterization of the child care agreement she reached with the Petitioner before leaving Vancouver as a six month arrangement.

[11] The Petitioner is now qualified as a teacher and hopeful that he will have employment as a teacher in the fall of '08. He explained that the time demands upon him as a teacher coincide in large measure with the children's schedules and that he will remain available for them when they are not in school. I find this to be the case. I also find that prior to leaving Vancouver the parties discussed the possibility of the Petitioner being retrained as a teacher when he became available to the workforce. The Respondent conceded that this choice was within the range of employment possibilities the parties discussed as options for the Petitioner upon his reentering the workforce.

[12] It has been argued that the children need additional time with the Respondent because they are in a French School. Their opportunity to be exposed to the French Canadian language and culture as a consequence of spending time with their mother exists. They attend a French language school. They currently have a substantial amount of time with the Respondent and there is no evidence that is persuasive that greater changes to parenting schedule would enhance the children's performance at school. The addition of Tuesday night overnight access

will permit the Respondent's timely involvement in the children's school work. As stated, Thursday evening access will continue.

[13] I also find that the petitioner is more likely than the Respondent to facilitate the Respondent's access with the children than would be the reverse. The Petitioner was careful to be positive about the Respondent and to not diminish the Respondent's commitment to the children nor their affection for her. He did not attempt to characterize himself as a better parent, only a more available parent. The court is confident that the Petitioner will actively seek opportunities for the Respondent to be with the children in addition to that which is scheduled. He has demonstrated his willingness to be flexible and his commitment to ensuring the children have time with their mother. Since the separation he has responsibly and generously accommodated the need for the children to spend time with the Respondent.

[14] The Petitioner remained at home and found after six months that he was coping well with his change in responsibilities and identity. He managed his new responsibilities successfully and the Respondent was able to meet the demands of her new program of study.

[15] The court has concluded that the Respondent knew the demands that her new program would place upon her. Prudently, she planned with the Petitioner to alleviate the household and family obligations she would have. She has a history of depression and was treated for this condition while the parties lived in Vancouver. Her care was transferred to Halifax doctors. This was, she conceded, another reason for her to be concerned about the demands of the radiology program. She was also pressured by the need to refresh her academics given her long absence from this field of study.

[16] The Respondent's initial contract required her to work up to 85 hours per week. Of this number, her shift work could not exceed 60 hours per week, with the remaining time being the maximum on-call obligation. The Respondent's current part time schedule permits her to work fewer hours. In her affidavit at paragraph 41, the Respondent describes her part time obligation as half the full time requirement of sixty hours per week and another one or two days of call per month. This represents a weekly employment obligation of more than thirty hours as a part time resident. In her oral evidence, the Respondent described her weekly employment obligation as 32 hours per week. The Respondent argues that by

virtue of her current part time status she is now more available to parent and that the parenting time should therefore be equally shared. In addition to her scheduled work, the Respondent works as a “locum ”, filling in for full time radiologists and for this she receives additional income.

[17] The Respondent characterized her schedule repeatedly as 8-5 and as currently less onerous. Nevertheless, when asked in re-direct to explain why she was mostly unavailable to exercise Monday and Tuesday access in January and February 2008, she said she was working the 3 p.m.- 8 p.m. shifts at the hospital on a number of these days, away for work for other days and hurt her arm and missed two days. These events are at variance with the availability she has generally described for herself when it comes to spending time with the children.

[18] On May 1, when initially asked why she went part time, the Respondent simply responded that it was the Divorce. Later, she explained that she was exhausted and her residency was in jeopardy. She also stated that she had been working a lot of hours. On March 6, she testified that a scheduling error had resulted in her working many more hours than was required for the January-July period of 2006.

[19] I find that the combination of her onerous work obligations in the period January-July 2006 now known to have resulted from a scheduling error, her vulnerability to depressive episodes, her family obligations, the separation and issues related to it and her concern for her legal position were all factors that caused the Respondent to change her status from a full time to a part time resident. All of these factors did not weigh equally in her decision however.

3. Credibility, Reliability

[20] The credibility of the parties is an issue that the court must confront. The credibility of the Respondent on a number of key issues is a concern for the court. She resisted conceding the obvious. When asked to agree that the Petitioner would suffer a financial loss as a consequence of staying home she was evasive and avoided answering. On May 1 she testified as follows on cross examination:

> Q. So, you're concerned about demands on your work, to the point that you asked your husband to stay at home for two years, but you never clarified what the demands were.

A. Yes.

Q. Ok. So, you know there is conflicting evidence between you and Dave about what the arrangements were for coming to Halifax and for him staying at home, but you do acknowledge that you asked him to stay at home for at least the first two years.

A. No, initial discussions in trying to figure out how we were going to transition to Halifax, I had brought that up yes.

Q. Of him staying home for two years.

A. Yes.

Q. If he had said yes to you, do you acknowledge that you understood that that would have been a financial loss to him to stay at home for two years.

A. I believe that by some of that time the kids actually would have been both in school and that would have made it possible for him to also work during the day.

Q. You're the one who said that you asked him to stay, I asked him to commit to staying at home with the children for two years.

A. Yes.

Q. I'm saying if he had complied with your request, you acknowledge that that would have resulted in him suffering financial loss.

A. I'm not sure I can answer that.

Q. Well, either answer it or don't answer it.

[21] The court does not accept the Respondent's explanation for becoming and remaining a part time resident. This is expanded upon in the context of the law dealing with imputed income, beginning at para. 58.

[22] She went to great lengths to avoid characterizing the agreement the parties reached in December 2005 as an "agreement" out of a concern that such a description of the outcome of the December 2005 meetings would prejudice her legal position. I find that much of her evidence was obviously affected by this consideration.

[23] She repeatedly denied having any knowledge or expectation of the income prospects of a radiologist before leaving Vancouver. The Petitioner was emphatic that they discussed what the eventual financial returns would be once the

Respondent began working and that debt incurred while she studied would be repaid from these earnings. It is not credible to suggest that one would make the decision the parties made without considering the financial implications of doing so. For the respondent to say she had no idea of what her salary as a radiologist would be is not believable.

[24] In cross examination she went to great lengths to avoid telling the court what a radiologist can be expected to make. On her expectations of earnings after graduation, the Respondent's evidence includes the following:

> *March 6, 2008 transcript at p.70, the following exchange is recorded as part of direct examination:
>
> Q. Mr. Burchill said that you told him that the base salary for radiologists in Halifax was $409,000. Did you tell him that?
>
> A. No, I did not.
> Q. Is that the base salary?
>
> A. I don't know.
>
> Q. What if anything do you expect in terms of hours and salary when you finish your program?
>
> A. It depends. I'm not sure what it's going to be like.
>
> Q. Okay, so what does the salary depend on?
>
> A. Depends where you work and it depends whether you're full-time or part-time.
>
> * March 6, 2008 transcript at p.136, the following exchange is recorded as part of cross examination:
>
> Q. So, if indeed during the period of time you were in Halifax, if that's what had happened, you came to understand how much a radiologist earns, which I think was acknowledged earlier was somewhere around 400,000. Was it between 350 and 400 you said earlier?
>
> A. I said that I don't know for sure what the base salary of radiologists here is.
>
> Q. You still have never inquired about that?
>
> A. It's only hearsay. It's second hand from a financial planner told me that he's been told. I know it's a good salary. I don't have an exact figure. I've never been offered a job so I don't really know the details. I know it varies from institutions. I know it varies depending on whether you do more CT or more ultrasound or less ultrasound or more GI so it is quite variable within the profession.
>
> Q. Would you acknowledge to me that the talk you've heard around your department with your fellow residents would lead you to conclude that it's

> reasonable to think that you would expect an income of $400,000 per year on your graduation?
>
> A. What I've heard second hand from financial planners, for example, is about 330.
>
> Q. No - one has told you that you can expect to earn more than that?
>
> A. No.

[25] The Respondent's Feb. 19, 2008 affidavit contains the following at para. 18:

> 18. Dave and I did not plan for the financial potential of my radiology specialty as he alleges (paragraph15). In fact it was not until I started the program and began speaking with other residents that I realized how much money radiologists can make (approximately $350,000.00 to $400,000.00 per year) . . .

[26] The Petitioner's counsel returned to the subject of the Respondent's earning capacity and expectations. He reminded her of her affidavit evidence. At p.144, the following exchange is recorded:

> Q. So in Paragraph 18, you say radiologists can make between 350 and $400,000 per year. Is that your evidence?
>
> A. Excuse me?
>
> Q. At Paragraph 18.
>
> A. Yes, 18, sorry.
>
> Q. So is that your understanding of what a radiologist can earn?
>
> A. That's second hand information that I had, yes.

[27] In the course of her May 1 evidence the Respondent initially suggested that she did not spend as much time with the children as did the Petitioner, since September 2006, when she became part time. She was then reminded of her discovery evidence which was that she had as much time with the children as the Petitioner since that time. She was then asked to explain an aspect of paragraph 33 of her February affidavit. Paragraph 33 reads in part:

> 33. ..... My perception is that Dave Burchill made my life as difficult as possible after separation. He tried to limit my time with the children. .....

[28] The relevant exchanges on May 1, 2008 are as follows:

Q. So lets go on to more contents and paragraph 33 I believe it is. So about a dozen lines down or so in paragraph 33, there is a sentence at the beginning of line 12 or 13 or so, “he tried to limit my time with the children”. Did he succeed ?

A. I guess to some extent he did yes.

Q. But you do acknowledge, at least you claim that you've been spending an equal amount of time with the children since at least September 2006.

A. I'm not sure where are you quoting from the affidavit right now.

Q. No, I'm quoting from your discovery testimony.

A. I'm sorry, what's your question.

Q. My question is, did he succeed in limiting your time with the children.

A. Yes, he did at the beginning, but not since I've been part time.

Q. So your evidence now is that David's efforts to limit your time with the children succeeded before you went part time but didn't after that? When you say in your testimony, in your affidavit of early this year, he tried to limit my time with the children, are you speaking about prior September 2006 ?

A. Well, I guess maybe the best way for me to answer that is by saying that in agreeing to anything else than a 50 percent parenting arrangement, it is a way of limiting my contact with the children and he has been systematically resistant to that since the separation so actually, he has been trying and he has been successful in limiting my access to the kids yes, and it continues to be so.

****

Q. But you do claim, it's your claim and Mr. Burchill denies it, it's your claim that since at least September 2006, you have been spending equal time with the children as Mr. Burchill?

A. I've been able to spend much more time during the days with the kids for sure, but the issue of where they sleep at night and whether they are half a night with me, half a night with Mr. Burchill is still an issue.

Q. So, when you told me at discoveries that you had been spending an equal amount of the time with the kids since 2006, are you say, but I'm not spending an equal, the kids are not spending equal nights with me, is that what you are saying now?

A. I'd like to see, I'm not sure what the actual terminology in the discovery statement were. But we are not, the kids are not sharing an equal amount of nights at his house and my house right now, no.

Q. And is the overall effect that the kids now were spending an equal amount of time with you as with Dave, or is the overall affected or not ?

A. Since he's gone back to school and he's been doing his practicum, I think the daytime distribution is more equal yes.

Q. That wasn't my question. Do you think and we'll focus now at the moment in times in September 2006 when he went back to school and you began working part time. Since then, are the children with you 50 percent of the time as compared to his time? Are you and he equally spending time with the children since September of 2006?

A. I haven't counted the number of hours exactly so I'm not sure I can answer that.

****

Q. So you're asking this court to provide you with more than 50% of the time with the children?

A. If that's what the court deems fit, yes, I will definitely take it.

Q. So when you say in that paragraph 33, he tried to limit my time with the children. Is it because he didn't agree to allow you more than 50% of the time with the children?

A. Ask your question again.

Q. I tried to put together what you just told me and I'm going back to your statement, in paragraph 33, page 9 of your affidavit, "he tried to limit my time with the children". So, in the context of what you just told us, are you saying by that, especially since September 2006, that what you mean is that he has restricted you from having more than 50% of the time with the children?

A. He has resisted, yes, a 50/50 parenting arrangement in terms of the nights yes.

Q. But, you told me in discoveries that you had a 50/50 arrangement. There's a series of questions which began on page 167 and I will read them into the record. ..... What do you mean by it ? That was my question, What do you mean by the shared parenting arrangement ? I think we spend a fairly equal amount of time with the kids. And how long has that been the case ? Since at least September 2006, if not longer. So, my question to you as I recall, was when you complained in your affidavit of a couple of months ago that he tried to limit my time with the children, are you saying that you weren't spending 50% of the time

> with the children or are you saying you deserve more than 50% of the time with the children.
>
> A. I think before September 2006 definitely I was not getting half the time with the children.
>
> Q. But you acknowledge before September 2006 you were working full time and Dave was not at university.
>
> A. Yes.

[29] The Respondent has a keen understanding of the legal issues before the court and the significance of certain potential evidence on how the issues would be resolved. This affected her candour. This was apparent from her demeanour. She hesitated to respond directly and avoided answering questions directly when she perceived that the unavoidable answer would not assist her case.

[30] The Petitioner impressed the court as straight forward. He was clearly incorrect in some of his evidence such as the amount of his borrowing from his father, and the number of hours the Respondent worked while they were together. I also believe he was prone to generalities and less precise. The court has considered this feature of his evidence when giving weight to it. The concern is one of reliability, not credibility when the evidence of the Petitioner is evaluated.

4. Spousal Support

4(a) Law: Spousal Support

[31] Section 15.2 (4) (a)- (c), (5) & (6) (a)- (d) of the *Divorce Act, supra*, requires the court to consider the condition, means and circumstances of each spouse and provides that a spousal support order should address four statutory objectives:

> 15.2(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
>
> (4) Factors - In making and 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
>
> ...
>
> (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 an obligation for the support of any child of the marriage;
>
> (c) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and
>
> (d) in so far as practicable, promote the economic self sufficiency of each spouse within a reasonable period of time.

[32] The words of Justice McLaughlin in *Bracklow* [1999] S.C.J. No. 14 at paras. 30-31 are on point:

> (30) The mutual obligation theory of marriage and divorce, by contrast, posits marriage as a union that creates interdependencies that cannot be easily unravelled. These interdependencies in turn create expectations and obligations that the law recognizes and enforces ...
>
> (31) The mutual obligation view of marriage also serves certain policy ends and social values. First, it recognizes the reality that when people cohabit over a period of time in a family relationship, their affairs may become intermingled and impossible to disentangle neatly. When this happens, it is not unfair to ask the partners to continue to support each other (although perhaps not indefinitely). Second, it recognizes the artificiality of assuming that all separating couples can move cleanly from the mutual support status of marriage to the absolute independence status of single life, indicating the potential necessity to continue support, even after the marital "break". Finally, it places the primary burden of support for a needy partner who cannot attain post-marital self-sufficiency on the partners to the relationship, rather than on the state, recognizing the potential injustice of foisting a helpless former partner onto the public assistance rolls.

[33] Justice L'Heureux Dube in *Moge v. Moge* [1992] 3 S.C.R. 813, [1992] S.C.J. No. 107 directed that spousal support must strive to achieve some equitable sharing upon the dissolution of the marriage. At paragraph 73, she stated:

> The doctrine of equitable sharing of the economic consequences of marriage or marriage breakdown upon its dissolution which, in my view, the *Act* promotes, seeks to recognize and account for both the economic disadvantages incurred by the spouse who makes such sacrifices and the economic advantages conferred upon the other spouse .

Nevertheless, in the words of Justice MacLachlin in *Bracklow*, 1999 CarswellBC 532 :

> 21. When a marriage breaks down, however, the situation changes. The presumption of mutual support that existed during the marriage no longer applies . Such a presumption would be incompatible with the diverse post-marital scenarios that may arise in modern society and the liberty many claim to start their lives anew after marriage breakdown. This is reflected in the *Divorce Act* and the provincial support statutes, which require the court to determine issues of support by reference to a variety of objectives and factors.

4(b) Entitlement to Spousal Support

[34] The parties agree that neither wanted to leave Vancouver. At the time, the Petitioner's professional circumstances were acceptable, if not perfect and he would have been content to remain in his employment and in Vancouver. The move to Halifax was made to facilitate the Respondent's professional ambitions and the parties ultimately decided that over the long run they and their family would benefit.

[35] I am satisfied the parties discussed the role that each would have once they arrived in Halifax. They agreed that the primary responsibility for the household would rest with the Petitioner and that he too would have primary responsibility for the children. It was expected that the Respondent would have onerous demands on her time by virtue of her professional program. In addition it was accepted that given her long absence from medical studies that she would need time for academic refreshing. In addition to the time required to be on the job, the Respondent anticipated a need for a significant amount of after hours study. I am also satisfied that the Respondent sought a commitment from the Petitioner that he would not seek employment outside the home for at least two years after arriving in Halifax. I find that the Petitioner agreed to stay at home <u>at least</u> two years, but insisted upon a review after 6 months so he could reevaluate whether he was making the necessary adjustment. The so called review was for him to reassess his

ability to cope. It was for his comfort and no one else. I do not accept that the Respondent urged the Petitioner to return to work prior to the parties separation.

[36] The parties also accepted that there were limited employment opportunities in the high technology sector in Halifax and that the Petitioner's employment in this sector while the Respondent was studying would be counterproductive to the objective of ensuring one parent was at home with the children. The Petitioner testified that prior to moving to Halifax he did a job search for Halifax and was satisfied that there were few jobs in Halifax that matched his skill set and qualifications. Through cross examination it was clear that the Petitioner was in fact a highly qualified high tech professional at the time he left Vancouver. He had become very specialized.

[37] Both parties wanted one parent at home with the children and given the anticipated long hours of the Respondent, the Petitioner was the one that could fulfill that role. They also reasoned that the financial cost of the Petitioner remaining out of the workforce would ultimately be made up from the earnings it was anticipated the Respondent would make as a fully qualified radiologist. Finally, the willingness of the Petitioner to accept a change in careers, including a possible change to teaching was part of what the parties contemplated as a consequence of the decision to leave Vancouver.

[38] The parties accepted a mutual obligation to each other and developed a relationship of interdependency. Their mutual obligations did not terminate abruptly with the parties' separation. At the time of the parties separation on September 1, 2005, the Respondent owed a duty to the Petitioner and the children to provide financial support to both him and the children and the duty continues.

[39] The obligations the parties had to each other herein did not accrue inadvertently. The short term advantages and disadvantages for each party flowing from the move to Halifax were obvious to both. The parties turned their minds to this issue and they agreed on a plan of action. They sought a fair and equitable outcome for each other . I find this to be the case. These parties articulated their expectations and commitment on the issue of mutual support. This is what Justice McLaughlin described as rights arising by agreement and contract.

[40] Eligibility for spousal support is therefore based on non compensatory and compensatory foundations and on their agreement. Here, as stated, the parties

expressly agreed that the Petitioner would be supported during the period that the Respondent was in the residency program and thereafter if necessary. The parties agree that his re-employment was contemplated. The period of support was to include time during which the Petitioner retrained. The Respondent would not have pursued the radiology residency without the support and involvement of the Petitioner. This is clear from the testimony of both parties and implicit in the agreement they reached to ensure that she could pursue the residency program.

[41] The ultimate personal; professional and financial rewards for the Respondent will be very significant. Had they not been, it is doubtful that the Respondent would have pursued the speciality at this point in her career and life. The financial benefits to be reaped by the Respondent can be quantified and are relevant to assessing the value of the Petitioner's contribution to the career of the Respondent.

[42] Similarly, the costs to the Petitioner are known by both parties.

[43] The Petitioner may begin teaching in September 2008 at the earliest and earn a salary in the range of $43,000. This is approximately one half of what he earned in British Columbia. The Petitioner is partially responsible for the income prospects of the Respondent. One must be mindful that the Respondent possessed a medical degree before the parties even met; that her ultimate success in the radiology program will flow from her innate ability and ongoing effort. The Petitioner has assisted the Respondent to realize her objective and he has been disadvantaged as a consequence. He, however is not responsible for the fact that she will some day be a qualified radiologist.

[44] The parties had a short to medium term relationship of ten years. Nevertheless the Petitioner's sacrifices have substantially enhanced the Petitioner's earning capacity. He left an established high technology career with a salary in the $85,000 range. In the language of s. 15.2 (6) (a) of the *Divorce Act, supra*, the Respondent has realized a significant economic advantage from the marriage and the Petitioner has suffered a significant economic disadvantage as a consequence of the marriage. The fact that the Petitioner will not be part of a marriage with the Respondent to share the full benefit flowing from her ultimate high earning capacity is a lost benefit. He has also been required to start over in a

new career. This is a significant disadvantage for him flowing from the marriage breakdown.

4(c) Need to Become Self Sufficient

[45] I am satisfied that the parties followed the plan they developed until the separation on September 1, 2005. Faced with the separation, the Petitioner quickly pursued his eligibility for a Bachelor of Education program so that he could teach. He ruled out returning to Vancouver or a more proximate city such as Toronto, where employment would probably be available for him, in large measure because that would have involved moving the children away from their mother. He visited Mount Saint Vincent University and accepted the advice he was given to strengthen his application for acceptance in the first available education program beginning in September 2006. He took an English class and volunteered at a Halifax School. He was admitted to the program and began it in September 2006. For the year September 2005- September 2006 he continued to be the children's primary care giver. He has remained in that role to this day.

[46] I find that the Petitioner's actions to get retrained were reasonable and pursued with dispatch given his family responsibilities. The parties had already agreed, before leaving Vancouver, that the Petitioner's reentering the high technology sector in Halifax was incompatible with the family obligations the parties were managing. Prior to leaving Vancouver teaching had been discussed as an acceptable option for the Petitioner. While a B.Ed. student in 2006-2008, the Petitioner continued as the children's primary care giver.

4(d) Decision to Become a Part Time Resident

[47] Coincidental with the Petitioner's initiative in seeking admission into a B.Ed. program, the Respondent chose to become a part time resident beginning September 2006. This decision was made in July or August of 2006. The Respondent testified that she did not have this intention in June of 2006.

[48] In August of 2006 the Respondent applied to become a part time resident and in September 2006 she became a part time resident. Her formal application for part time status was based on "personal reasons". No mention of medical reasons

appears on the application. When given the opportunity to explain why she did not detail health or medical concerns as the basis for the application the Respondent did not offer any. The Petitioner testified that the Respondent told him that she would go part time to improve her case against paying support and for shared parenting. I am satisfied that the most important factor leading to her decision to reduce her work schedule was a perceived need to strengthen her application for shared parenting and to weaken the Petitioner's claim for primary care of the children, child and spousal support. This conclusion will be expanded upon in later paragraphs 58-68.

4(e) Planned Financing of Studies

[49] The Petitioner testified that the parties discussed how they would finance the move and cover their expenses during their stay in Halifax. They were to cash in RRSPs; rely on the proceeds from the sale of their Vancouver home; draw on savings; rely upon the Respondent's UBC salary which was to continue to late in 2003; and borrow up to $200,000 over the 6 year term of study in Halifax. He said the plan did not require any earnings from him given that his returning to the work force was subject to the availability of employment and the needs of the family. He was to be the stay at home parent for at least two years. I accept his evidence.

4(f) Finances Since Separation

[50] The Respondent continued to contribute funds to cover some of the household expenses even after she left the home in January of 2006. In December 2005 the parties came to an agreement that resulted in the Respondent paying $2,600 per month to the Petitioner as combined child and spousal support. This payment continued until June 2006 when it was reduced to $1,400 . In September 2006 the spousal support component was eliminated. The Respondent has continued to pay only child support in the amount of $455. Given that her gross income from the part time residency program is one half $53-$54,000; and also that she earned $30,000 from locums in 2007 and expects to earn locum income of $20,000 in 2008 her current child support payments are less than the table amount. The $455 child support payment reflects a total income of $30,000. In fact, her income for 2007 and 2008 has been much higher.

[51] The Petitioner gave evidence that he borrowed extensively from his father since the parties separated and that the accumulated indebtedness is now $140,000. The Petitioner's father confirmed this figure when he testified. The tabulation is shown in Exhibit 4 . I accept that the Petitioner has borrowed these amounts of money from his father since the parties separation. It is not clear how all these funds were expended.

[52] The Respondent testified that she has borrowed in excess of $165,000 and has been authorized to borrow up to $200,000 under the terms of the student line of credit program at the Bank of Nova Scotia.

4(g) Parties' Positions

[53] The Respondent's position is that the Petitioner is not entitled to any support from her. She explains that the support she did give in 2006 was to avoid conflict not based on any recognized entitlement on his part or obligation on her part. She argues further that she currently lacks the means to pay spousal support. The Petitioner's pre-trial brief concludes with a claim for $5,000 per month in ongoing spousal support to compensate him for his future losses and $5,000 per month for the accumulation of losses he has suffered between leaving Vancouver and starting work in Halifax. The later amount would be payable upon the Respondent's completion of her training program.

4(h) Delayed Benefits

[54] The facts of this case are unusual because the realization of the Respondent's financial benefits due, in part, to the sacrifices of the Petitioner are postponed until she is certified as a radiologist. Does this effectively eliminate the compensation otherwise due to the Petitioner?

[55] An inequity will result if that is the case. In addition such a scenario would be an incentive for separating spouses to avoid compensating the other for advantages not yet realized but contributed to by the spouse , simply by delaying the time when the known and quantifiable benefits of the former partner's sacrifices would be realized. Such a result would be unfair. I do not believe the court is so constrained.

[56] In the Annual Review of Family Law 2007 (McLeod & Mamo, Thomson/Carswell at p.332) when discussing compensatory support the authors comment:

> Although some judges have held that a spouse is not entitled to support if he/she is able to meet his/her reasonable needs, such comments should be approached with caution. A spouse who has suffered specific compensable economic loss from the marital relationship or conferred an identifiable economic advantage on his/her partner should be entitled to compensatory support to redress the specific loss incurred or benefit conferred even if he or she is self-sufficient, so long as the loss/benefit has not been fully compensated by the property division or other benefits received during marriage . . .

And further at p. 333:

> A spouse suffers economic disadvantage arising out of the roles adopted in a relationship if he or she withdraws from the workforce for family reasons, delays entry into the work force for family reasons, or otherwise defers pursuing a career or economic independence for family reasons . . . *Rondeau v. Kirby*, [2003] N.S.J. No. 436 affirmed 2004 NSCA 54; . . . *Gailbraith v. Lavoie*, 2006 NSSC 202 . . . *Mason v. Mason*, 2006 NSSC 171 . . .

[57] Consistent with the foregoing, the authors state compensatory support may be awarded to address unjust enrichment of a spouse. At p.388 they write:

> A court may award support to compensate a spouse for an economic advantage he or she conferred on his or her partner, even if he or she is self-sufficient and

> suffered no apparent economic disadvantage arising from the roles adopted in the relationship . . .
>
> A claim for "compensatory support" to address unjust enrichment arises when one spouse confers a career enhancement opportunity on the other and the recipient would be unjustly enriched if he or she was allowed to retain the benefit of the opportunity without further accounting. Since jobs and careers are not "property" subject to division under provincial matrimonial property statutes, the only way to redress the unjust enrichment is through an award of support . . .

3(I) Imputed Income

[58] The Petitioner has not been forthright in explaining her decision to become a part time resident.

[59] The burden of proof is upon Mr. Burchill to establish on a balance of probabilities that income should be imputed to Ms. Savoie (*Codiac v. Codiac* (2005), 237 N.S.R. (2d) 362 (SC) and *McCarthy v. Workers' Compensation Appeals Tribunal (N.S.)* et al (2001), 193 N.S.R. (2d) 301 (C.A.) at para 574).

[60] The court is persuaded that the principal reason the Respondent altered her work schedule is strategic. Her strategic considerations pertained to the legal issues the court is now being asked to resolve. The court accepts the testimony of the Petitioner that the Respondent told him directly in the summer of 2006 that she would go part time to strengthen her application for shared custody. The court acknowledges that altering one's work schedule to accommodate child care responsibilities in and of itself is laudable. The Respondent offers health reasons as the basis of her "having gone part time". She offers no supporting opinions that it was necessary for her to do so or that it remains necessary for her to continue to be a part time resident. When asked on May 1, if her psychiatrist recommended that she go to part time status she replied that she did not recall. In contrast, her pre-trial brief and affidavit at paragraph 34, states her psychiatrist prescribed a leave of absence from the program but she requested a reduction in her workload instead. One would expect a medical professional such as the Respondent to have a better recollection of the advice of her treating psychiatrist.

[61] Earlier in her cross examination she testified that she had no plans to go part time in June of 2006. The Respondent justifies her decision to seek part time status on the basis that she could not cope with the burdens and responsibilities of her

family; professional and personal life. Asking the court to now increase her family responsibilities is not consistent with her self described vulnerability to fatigue. In fact, given the ages of the parties and the significant lost income and accruing debt that every year out of the work force represents to the Respondent her decision to continue to delay completion of the radiology program requires a more thorough explanation than that which has been offered. The financial, personal and professional challenges she faces can be addressed more effectively by her moving to complete her studies.

[62] The Respondent offered that living with the Petitioner became stressful yet resists the suggestion that her leaving the matrimonial home made matters better for her. She offers the fact of litigation as a reason she is under stress. This is undoubtedly so, yet she knows that this stage of the litigation is coming to an end. The onerous work schedule she followed in the January-June 2006 period is now known to have been a result of a scheduling error. These changes should make the respondent more capable of resuming full time studies. In addition, when she testified on May1, 2008 she agreed that she was now functioning well at work and in her personal life. The case for her to remain a part time resident is clearly not present. Even the rationale for her decision to go part time in 2006 is not currently being offered to justify her decision to remain part time.

[63] The Respondent is currently scheduled to end her part time status in December 2008. She explained that she must reapply for part time status for the next phase of her studies in the nuclear medicine component of the residency. She further explained that she is confident that her application for continuing part time status will be accepted.

[64] A payor's income may be intentionally reduced for a number of reasons. The *Child Support Guidelines*, S.O.R./97-175, s.19(1)(a) provide that a parent may reduce income because of the needs of the children, or that parent's reasonable educational or health needs. The Nova Scotia Court of Appeal in *Montgomery v. Montgomery* [2000] N.S.J. No. 1 (2000) 3 R.F.L. (5th) 126 reviewed s.19(1)(a) of the Child Support Guidelines and held that an intention to deprive the other spouse of child support income need not be present before a court may impute income. (S*ee also the Ontari*o Court of Appeal, M.M.A. v. A.J. No. 3731 and the New Brunswick Court of Appeal decision in M.(J.A.) v. M.(D.L.) 2008 CarswellNB 24 and Forgeron, J. in *Crane v. Crane* [2008] N.S.J. No. 47.)

[65] The Respondent did advise the court that as a full time resident her annual salary is $53-54,000 with the prospect of doing a one week locum (filling in for a radiologist on one's spare time). She could earn an additional $9-12,000 for a week of locum work. For a one week locum in Antigonish in February, 2008 she earned $9000. She earned $3-$4,000 for a week end locum in Truro in April, 2008. In 2007 she earned a total of $29,700 as income from locums. She expects to earn $20,000 from locums in 2008.

[66] Her decision to remain a part time resident is not reasonable. I am imputing a current income of $65,000 to the Respondent . This is arrived at by adding $12,000 locum income to her annual salary as a full time resident ($53,000). I will therefore determine her support obligations on the basis of her having an imputed income of $65,000. I am not prepared to impute an income that would require future borrowing by the Respondent. Had the matter come before me prior to the parties borrowing large amounts I would have considered an award that assumed borrowing given the parties agreement. A higher spousal support award may have been the result. However, the parties will have a significantly reduced lifestyle until the Respondent graduates or the Petitioner gains employment. This is not what was agreed to. The economic return for this disadvantage should be reflected in part, in spousal support payments by the Respondent when she commences full time employment.

[67] The Petitioner currently does not have an income although he expressed optimism that he would achieve a teaching position by September 1, 2008. Such a position would pay approximately $43,000 per year. The parties circumstances are fluid. Significant financial changes in both parties' income positions are anticipated to occur within 2-3 years.

[68] It is impossible for the parties' actual budgets to be known since changes must be made by both. They need to manage substantial debts pending the Respondent's completion of her training and the Petitioner's employment.

4(j) Quantum - Amount and Duration of Spousal Support

[69] In *Bracklow, supra,* MacLachlin J. defined the concept of quantum in reference to spousal support to include both the amount and duration of the support. She stated further that the factors relevant to entitlement also have an impact on quantum. At para. 53, when addressing the significance of any agreement the parties had, she states:

> ". . . Finally, subject to judicial discretion, the parties by contract or conduct may enhance, diminish or negate the obligation of mutual support . . . "

[70] Having decided that the Respondent owes a duty to the Petitioner to provide spousal support I must decide the amount of support that is currently payable; when that obligation arose; what form it should take; what arrears if any are payable and when the obligation terminates.

[71] As earlier noted *The Divorce Act* s. 15.2 (4) & (6), *supra,* requires the court to consider a number of factors and objectives when determining the quantum of spousal support:

> Spousal Support Orders
>
> 15.2(4) In making an order under subsection (1) or an interim order under subsection (2), the court shall take into consideration the condition, means, needs and other circumstances of each spouse, including
>
> (a) the length of time the spouses cohabited;
>
> (b) the functions performed by each spouse during cohabitation; and
>
> (c) any order, agreement or arrangement relating to support of either spouse.
>
> (6) An order made under subsection (1) or an interim order under subsection (2) that provides for the support of a spouse should :
>
> (a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;
>
> (b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;
>
> (c) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and

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

[72] The Respondent resisted suggestions that she had an expectation to earn a very high income following graduation. I find that she was not forthright when responding to questions on this issue.

[73] I am satisfied that the Respondent will earn in the range of $400,000 each year as a qualified radiologist. If she continues as a part time resident she will complete her programming in 2011. If she resumes her status as a full time resident she will complete the program in 2010. She was scheduled to finish in 2009, had she remained a full time resident.

4(k) Duration

[74] The parties express agreement on the subject of support enhances the right of the Petitioner on these facts. The Spousal Support Advisory Guidelines suggest a maximum duration for spousal support of one year for each year of marriage when parties do not have children. When children are involved, the guidelines suggest an indeterminate order. The parties cohabited for one year before marriage and 9 years afterwards.

[75] I order that support be payable for an indeterminate period commencing October 30, 2008.

[76] Each party is (1) to notify the other of any change in their income within fourteen days. I further order that (2) each year the parties shall confirm income for the preceding 6 months on July 1 and January 1 as well as (3) provide a copy of each other's notice of assessment and income tax returns on or before June 1 of each year. A change in the income of either party shall represent a change in circumstances entitling either party to seek a review of the quantum of spousal support payable.

4(l) Periodic Spousal Support and Arrears

[77] The Respondent contributed $2600 per month for the period January 2006 - June 2006 and $1,400 per month for July and August 2006 as combined spousal and child support. Thereafter, she did not pay any spousal support. The Respondent should have assisted the Petitioner after September 1, 2006. Nevertheless, a retroactive award to September 1, 2006 is not ordered. Such an award would be harsh. The law on when retroactive support should be ordered is discussed infra. at paragraphs 128-136 in the context of child support arrears.

[78] The Respondent is not currently in a position to pay retroactive spousal support. Her failure to pay this support after September 1, 2006 was a factor in the decision to award lump sum spousal support.

[79] Attributing an income of $65,000 to the Respondent and no income to the Petitioner, the Spousal Support Advisory Guidelines (SSAG) suggest a spousal support payment of $980 per month. The Respondent's net disposal income is $65,000 less child support of $10,680, taxes and deductions or approximately $30,000. The Petitioner has no notional child support, taxes or deductions. He receives only the child tax credit and child care allowance, valued at $300 per month or $3,600 per year.

[80] The parties total net disposable income is $33,600 of which 40-46% should be left with the Petitioner, i.e. $14-15,000. He is in receipt of $3,600 per year and should therefore receive $11,000 as spousal support each year. This represents $980 per month spousal support. The Respondent is ordered to pay this amount on or before the first of every month commencing October 1, 2008.

[81] Should the Petitioner be employed as a teacher, for example, earning $43,000, the calculation will be different.

[82] In that case, the spousal support payable to the Petitioner will be $100 per month. This is a nominal amount.

4(m) Lump Sum Spousal Support

[83] Section 15.2 (1) of the *Divorce Act* provides that a spousal support order may include a lump sum combined with a periodic sum.

[84] Monthly spousal support payments can not adequately compensate the Petitioner for the disadvantages he has suffered due to the break down of the parties marriage and the career change he has made. The Petitioner is now heavily in debt and starting over in a lower paying professional career. The court can not ignore the express agreement of the parties, that the Petitioner would be compensated as a consequence of his sacrifices.

[85] The Petitioner is entitled to be compensated for his sacrifices and his contribution to the Respondent's career. However, it is inaccurate to say that he is as entitled as she to the benefits of her achievement.

[86] The Respondent had a medical degree and a level of experience and intelligence that made her admission to the radiology program possible. She has expended substantial effort since the parties separation to advance her career and will continue to do so. In other words, the Respondent is principally responsible for the increased earning capacity that she will achieve following the completion of the radiology program.

[87] A significant challenge for the court is to determine a mechanism to compensate the Petitioner for his disadvantage flowing from the breakdown of the parties relationship and the advantage their relationship conferred upon the Respondent. The Petitioner gave up a professional career so that the Respondent's career could progress. His income prospects are approximately one half of his prior earnings. The Respondent's income will be 4-5 times her previous earnings. The Petitioner has a pressing and immediate need for assistance.

[88] The decision of McLachlin J. In *Bracklow, supra*, is cited as encouraging courts to be creative in making orders that reflect the parties' circumstances and is cited as approval of orders combining lump sum and periodic support orders in the appropriate circumstances. (Annual Review of Family Law 2007, McLeod & Mamo, Thomson/Carswell at p. 340)

[89] In *Snyder v. Pictou* [2008] N.S.J. No. 77 (N.S.C.A.), Justice Fichaud, at para. 24 wrote:

> 24. In *Moge v. Moge*, [1992] 3 S.C.R. 813, and *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420, the Court approved a flexible approach to spousal support with the governing principle that the Court should fairly address the economic consequences of matrimonial breakdown.

[90] I believe a lump sum payable over time should be paid to the Petitioner by the Respondent. I do not equate the determination of spousal support pursuant to the authority of the *Divorce Act* as analogous to the computation of damages in tort or contract law. The marital relationship is far more complex and intangible in nature. It is, by definition, based in large measure on emotional considerations and even in the present day context , a belief that the marital state will continue. The considerations for the court when determining spousal support are found in the *Divorce Act,* as interpreted by higher courts.

[91] Numerous courts have awarded lump sum support when asked to fashion an order designed to achieve compensatory support.

[92] In *Morris v. Morris* [1988] N.S.J. No. 235, Glube, then C.J.T.D. ordered both lump sum and periodic spousal support to a spouse who was together with her husband when he returned to school in the course of the marriage to become an anaesthetist. The parties had a ten year period of cohabitation separating in 1987. At the time of separation, the husband was earning $25,000 U.S. At the time of trial, the husband was earning $10,000 per month and was working in Halifax. He was ordered to make a lump sum payment to cover education and other costs for his wife. He was also ordered to pay monthly support of approximately $1,800 for two years, with the second year of payments being contingent upon his wife being a student at that time.

[93] Mrs. Morris was the beneficiary of unequal division of matrimonial assets and an agreement by her husband to assume repayment of all matrimonial debt. She was also qualified for employment as a staff nurse, earning $30,000 but she rejected that option because she disliked that type of work. Instead, she wanted to obtain her Masters in nursing and be an instructor.

[94] The parties did not have children.

[95] This decision pre-dated the Supreme Court's decisions in *Moge* and *Bracklow*.

[96] A year later, in *Cole v. Cole* [1989] N.S.J. No. 27 Glube, C.J.T.D. considered the spousal support obligation of a dentist to his wife who had worked while he trained. The marriage lasted four years and at the time of trial the husband was earning $30,000 per year. The court acknowledged that professions are not valued as property under the *Matrimonial Property Act* of Nova Scotia, S.N. S., 1980, c.9. After reviewing a number of authorities, Glube J. ordered a lump sum payment to Mrs. Cole in an amount not to exceed $12,000. She considered the future earning capacity of Mr. Cole, describing it as "future earning power available".

[97] She summarized the husband's circumstances as follows, at p. 5:

> Dr. Cole is also in good health and working at his profession. His present income may be considered modest, however his future is in his own hands. Whether he decides to change his position to one of equity or ownership is entirely up to him. He has his potential future earning power available. He too has a car which is financed, but in addition, he has the other debts as previously outlined.

[98] The parties did not have children.

[99] The court in *Cole, supra*, was focussing on the issue of self sufficiency to determine the husband's obligation to his former wife. As in *Morris, supra*, a lump sum payment contingent in part on Mrs. Cole being in an education program was ordered.

[100] In *Monks v. Monks* [1993] M.J. No. 85, the parties were married 19 years. The court considered the then recent decision of the Supreme Court in *Moge v. Moge* [1992] S.C.J No. 107 in the context of her counsel's request for a lump sum payment to compensate her.

[101] At p.3, the court wrote:

> . . . Marriage did not anyway hinder the career of the husband, but it diminished, somewhat, the career advancement opportunities of the wife. The wife is now living on an income less than the joint income when she was married, and she is economically disadvantaged. The exact amount that she has been disadvantaged is very difficult to ascertain as there has been no evidence called to show what

> opportunities she may have had. Her counsel suggested a lump sum payment would be appropriate to compensate the wife.

[102] Glowacki J. then ordered the husband, an associate professor, earning $63,000 to pay lump sum support of $8,000 to his former wife who was earning $39,000 as an airline employee. Each party had primary care of one of their two children.

[103] In *Ormerod v. Ormerod* [1990] O.J. No. 1035, Van Duzer U.F.C.J. considered a report from an economist and an actuarial report prior to ordering lump sum and periodic spousal support. The wife received $103, 000 for career interruption.

[104] This amount was determined to be the difference between Ms. Ormerod's projected future earnings and what her earnings would have been had she not interrupted her career. This was her future pecuniary loss.

[105] In *Babij*, [1999] O.J. No. 822 (O.C.A.) , the wife argued that the trial Judge had erred in not making an award for loss of economic opportunity. At the time of the appeal, her counsel agreed that the wife did not presently need support given that she was earning $57,000 replacing a supply teacher. On appeal, she was awarded $39,000 as an award for loss of economic opportunity to be paid by her former husband who was earning $250,000.

[106] The Ontario Court of Appeal, at paragraph 15 and 16 wrote:

> 15. We agree with the trial judge that the evidence in support of the claim for loss of economic opportunity was not presented in the manner it should have been. There was no evidence, however, that if the wife had applied for the position in Espanola she would have been successful. Nor do we think that in the circumstances of this case that she should have been obliged to do so.
>
> 16. In our opinion, the reasons given by the trial judge do not provide an adequate foundation for his conclusions that the wife was not making satisfactory efforts to support herself. There was evidence on which a finding of loss of economic opportunity should have been made. The difficulty was calculating the amount. There is a paucity of evidence on which to base an award for loss of economic opportunity. In addition, the contingency that the wife will require support in the future is also a factor to be considered in making a lump sum award of support. A consideration in favour of the husband is that he is providing financial support to the children, who are in his care, and he is not claiming support on their behalf from the wife.

[107] In *Prince*, [1997] N.S.J. No. 433 (N.S.C.A.) Justice Bateman, on behalf of the court upheld a lump sum payment of $8,000 as spousal support. At paragraph 26 when upholding an award of lump sum spousal support she stated:

> . . . The wife was not expected to encroach upon capital for her own needs . . .

[108] Justice Tidman in *Ross v. Ross,* 27 R.F.L. (4th) 31, 1996 CarswellNS 432, at paragraph 16 stated, " It is clear under the *Divorce Act* that the court has jurisdiction to make a present award payable in the future...". Mr. Ross's full child support obligation was delayed pending the cessation of other obligations he was subject to and which were to terminate at a fixed date.

[109] In *Kearst v. Kearst* , (1986) 1 R.F.L. (3d) 401, 1986 CarswellOnt 257, the court was addressing the spousal support obligation of a Doctor who had separated while studying. While the parties were married and the husband was working as a teacher; the couple developed a plan for the husband to become a Doctor. Prior to his completing his program, they separated. The court ordered spousal support that reflected the husband's post separation income as a doctor. The husband was ordered to pay his former wife $600 per month for her lifetime and in recognition of her contribution to his career, he was ordered to pay $1,000 per month continuing for ten years thereafter ($120,000 over ten years).

[110] The circumstances for the wife were extreme. At the time of separation, she was ill, unable to work and in receipt of public assistance. Periodic assistance was awarded to reflect these circumstances.

[111] Significantly, she was also awarded support that recognized her contribution to her husband's career under the provision of the *Family Law Act*, S.O. 1986 c.4. The monthly quasi-restitutionary or compensatory sum for contributions to her husband's medical career potential was ordered to commence several years later in 1990. The judgment was rendered in 1986.

[112] In *Fletcher v. Fletcher*, 2003 ABQB 890, 2003 CarswellAlta 1534, Veit J. stated the following when deciding the appropriate level of interim spousal support:

> " ...I have concluded that Mr. Fletcher's income for the years 1997 through 2000 represents the fruition of his development as a business manager during the course of his marriage... Ms. Fletcher is entitled to share equally in the fruits of that phase of Mr. Fletcher's career that represents the contribution made to his career through his marriage."

The husband's income increased in the post separation period, in part. because of an M.B.A. he achieved while married.

[113] Justice Goodfellow in *Stefanyk v. Stefanyk*, (1996) 156 N.S.R. (2d) 161, 1996 CarswellNS 509 ordered spousal support to a father who had moved to Halifax from Alberta to accommodate his spouse's career. In Alberta he had been employed as a fireman. He was at home with the children in Halifax. He and his wife separated. He could not find work and needed to get reestablished. He returned to Alberta and was struggling to make a living at the time of the trial. Given the husband's economic disadvantage as a consequence of his move to Nova Scotia, he was awarded $1,500 per month spousal support.

[114] In an earlier decision, (1994) 128 N.S.R. (2d) 335, he had been awarded $1,500 per month as interim support. His spouse was earning $102,000 annually.

[115] The British Columbia Court of Appeal in *DeBeeld v. DeBeeld* [1999] B.C.J. No. 2157 confirmed an award of $40,000 lump sum compensatory support for the wife's contribution to the husband's chartered accountant's qualifications. The decision of the trial Judge to award $300 per month periodic spousal support was also upheld. At the time of trial, the husband was earning $56,000 a year and the wife was receiving $39,000 under the provisions of a long term disability insurance policy.

[116] Huddart, J.A. on behalf of the court stated the following at paragraphs 17 and 18:

> 17. In my opinion, the trial judge's conclusions were reasonable. The appellant received an advantage, not only in that he was able to embark on a financially remunerative career without the disadvantages of student loans, but he was also able to enjoy a relatively comfortable standard of living while a student. The advancement of his career, at the expense of savings and a higher standard of living, was a joint goal of the parties. It is a reasonable inference that the parties chose that joint goal as a means to a future higher standard of living, and future savings to make comfortable their retirement. I can see no error in principle, no

> injustice, in the trial judge's conclusion that the equitable distribution of the resources of this marriage required a lump sum to be paid over a period of years when the primary investment by the parties during their marriage was in the earning capacity of one of them. Nor can I see any material error in principle or injustice in the trial judge's conclusion that the economic allocation of the adverse consequences of the marriage breakdown required a continuing support payment of $300 per month to provide Mrs. De Beeld with some of the benefit of the increased income Mr. De Beeld would continue to enjoy in significant part because of her contribution during the marriage.
>
> 18. If it was not clear before the decision of the Supreme Court in *Moge v. Moge*, [1992] 3 S.C.R. 813, it is certainly now clear after that court's recent decision in *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420 that the duty of a court called upon to exercise a discretion under s. 15.2(1) of the *Divorce Act* is to have regard to all the factors in s.15.2(4) in order to achieve the objectives set out in s.15.2(6). While the trial judge appears to have followed the argument of counsel in her reasons, and to have segregated her consideration of what she called compensatory support under s.15.2(6) and periodic support under s.15.2(4), when read as a whole the trial judge's reasons do not offend the provision of the *Divorce Act*.

[117] The Ontario Court of Appeal in *Greenberg v. Daniels* [2005] O.J. No. 87 affirmed an award of $400,000 as lump sum compensatory support. The parties had lived together for nine years. At the time of trial, the husband had a salary in excess of $500,000. The court at paragraph 9 stated:

> 9. The appellant garnered a significant economic advantage by having the respondent take on the bulk of domestic and financial responsibilities, as well as providing him with emotional support, thereby enabling him to rehabilitate himself and eventually establish himself in the position he occupies today (assets in excess of $6.5 million dollars, salary in excess of $500,000 annually). The respondent, on the other hand, suffered an economic detriment and also became physically depleted. The appellant's upward progress cannot be separated from the contributions made by the respondent as the appellant suggests. Detriment aside, given the magnitude of the appellant's success, the respondent's contributions to that success, in themselves justified a significant award of compensatory spousal support.

[118] In response to the argument that lump sum spousal support was inappropriate, the court stated the following at paragraph 11:

> 11. The appellant submits that any award of support should have been periodic and that a lump sum award was inappropriate. In support of this position the appellant relies on *Elliott v. Elliott* (1993), 15 O.R. (3d) 265 (Ont. C.A.). In our opinion, *Elliott* is readily distinguishable. The court's conclusion in that case was based on the cumulative effect of several considerations that are not present here. The appellant in that case did not enjoy the economic advantage that the appellant

> enjoys here. Moreover, unlike in *Elliott*, a lump sum award here would not result in significant hardship to the appellant. Nor is there difficulty in identifying the economic advantages and disadvantages arising from the relationship with sufficient accuracy to award a lump sum, a factor which militated against a lump sum award in *Elliott*.

[119] In *Vynnk v. Baisa* [2007] O.J. No. 274 Klowak, J. ordered a husband, age 39, to pay his wife, age 33, lump sum spousal support of $75,000 and monthly spousal support of $2,000 for five years. The husband was found to have an income of $87,000 and the wife an income of $39,000. The wife's plans were to return to school. This would result in a decrease in her income.

[120] Most of these cases involved situations where the actual financial benefits for the payor spouse had been realized and could be clearly ascertained post separation and at the time of trial. Herein that is not possible.

4(n) Lump Sum Spousal Support on These Facts

[121] I wish to repeat the following factors which must weigh significantly in the fashioning of the appropriate spousal support order. These are to be considered with my previous comments.

[122] The Respondent has a substantial and immediate need for support . He has incurred debt of more than $100,000 to cover his living expenses.

[123] The Petitioner was clearly disadvantaged by the career move to Halifax. The move conferred a significant benefit on the Respondent. The Respondent can anticipate a salary of $400,000 and upwards for the remainder of her working life, once certified. The Petitioner's initial salary will be in the range of $43,000. He is currently not employed.

[124] Although there was no evidence as to his anticipated income progression once employed as a teacher, it will be significantly less than that of the Respondent, perhaps never exceeding 25% of her income once both are fully employed.

[125] Over the five year period following the Respondent's certification, assuming the anticipated income levels remain static, the parties disparity in income could amount to $1.5-$2.0 million.

[126] The Petitioner has also foregone an income of $85,000 per year (plus benefits) for the past five years ($425,000). Over the next five years, assuming a static income as a teacher and also that his income as a computer consultant would be constant at $85,000, the income loss will be an additional $200,000. (These projections assume the Petitioner will be employed as a teacher. That was not the case at the time of the parties summation on June 18).

[127] The parties had an agreement to support each other when the Respondent was studying to become a radiologist. This is not happening.

[128] The Respondent discontinued support of the Petitioner in August of 2006 and has made no further spousal support payments.

[129] For a period of eight months following her departure from the matrimonial home, the Respondent did continue to make combined spousal and child support payments to the Petitioner. These amounted to $2,600 for six months and $1,400 for two months in the period January - August 2006.

[130] Notwithstanding that the Respondent had access to and spent tens of thousands of borrowed dollars after August of 2006; she did not advance any of these funds to the Petitioner while he was a student in the B.Ed. program. She has also been earning $40-$60,000 per year as a part time resident and from doing locums.

[131] The parties must accept that their income levels impose a lower standard of living on each of them and this will be the case until one or both parties are employed full time.

[132] The parties are both carrying substantial debts. The Petitioner placed his indebtedness to his father, incurred since the parties separation, at $140,000. The Respondent's line of credit is currently approved to $200,000 and drawn to more than $167,000.

[133] The parties anticipated that they would reap the bulk of the financial rewards following the Petitioner's certification. Prior to leaving Vancouver and for a period of time after arriving in Halifax, they wanted to have a life style better than that of "students". The separation has rendered that impossible. The spousal support

award must recognize the parties' income limitations at this time. The Petitioner's budget dated November 2007 shows expenses of $3,912.92 per month . The Respondent's budget, also dated November 2007, shows expenses of $6,175.00 per month. This level of spending can not be sustained.

[134] As a general comment on the decisions of the parties with respect to their spending following their separation, I conclude that they did not move to reduce their financial obligations to reflect the fact that they were now required to finance two households. They must bear responsibility for some of the financial consequences of those decisions. The Respondent was entitled to keep herself in appropriate accommodation and maintain a standard of living that reflected the benefits of her employment and borrowing. She can not be faulted with not dedicating her entire earnings to the support of the Petitioner and the children. The Petitioner can not reasonably expect the Respondent to maintain him in his anticipated lifestyle regardless of her ability to do so.

[135] The parties anticipated that the debt incurred while she studied would be paid from the Respondent's earnings. The Petitioner has now been retrained and a lump sum spousal support order must include a contribution to the costs incurred by the Petitioner in his retraining. I accept that he has incurred substantial debt to date, as a consequence of the breakdown of the parties marriage and to meet his needs. If his unemployment continues the debt level will continue to increase.

[136] The parties agreed that the Respondent would contribute to the Petitioner's retraining and she has not. The Petitioner has borne those costs solely.

[137] I have concluded that the Respondent is currently capable of full time employment and her decision to remain a part time resident is not reasonable. It was initially based on strategic considerations and that continues to be the core basis of the decision.

[138] These factors must be considered in a manner consistent with s.15.2(4) and (6) of the *Divorce Act, supra*. I have considered the length of the parties relationship; their respective functions throughout their relationship; and their agreement to support one another. The order I direct is designed to recognize the parties economic advantages and disadvantages; to apportion the financial consequences of child care; relieve economic hardship arising from the breakdown

of the marriage and to promote the economic self sufficiency of each spouse within a reasonable time.

[139] I set the lump sum payment owed by the Respondent to the Petitioner at $300,000. This is partly payable to the husband at the time the parties matrimonial home is sold and is secured against the wife's share, to be distributed upon closing of the sale. It is open for the wife to release her equity in the home and to have her share credited to the payment of the lump sum support obligation payable. The remainder is to be paid in sixty monthly and equal instalments beginning September 2010.

[140] This amount reflects an assigned monetary value of $100,000 for each of the following group of considerations:

> (1) spousal support otherwise payable to the Petitioner since August 2006 to September 2008;
> (2) the cost of the Petitioner's retraining;
> (3) the lost income of the Petitioner since he relocated to Halifax;
>
> . . .
>
> (4) the long term reduction in the Petitioner's earning capacity;
> (5) the lost opportunity to share in the anticipated high income of the Respondent, particularly after the expiry of the term of periodic spousal support obligation;
> (6) the fact of the parties express agreement to support each other and to share the benefits of the Respondent's higher earnings;
>
> . . .
>
> (7) the level of indebtedness of the Petitioner and the parties agreement that the debt associated with the move to Halifax would be repaid from the Respondent's earnings;
> (8) the limited ability of the Respondent to make significant periodic spousal support payments until her certification; and
> (9) the Petitioner's contribution to the Respondent's career.

The court acknowledges that the process leading to a determination of what the appropriate lump sum payment should be is imperfect. That observation applies to much of what must be decided in the context of matrimonial litigation. Another court might well focus on other factors and assign different values of support. The governing principle must be the pursuit of a solution that fairly addresses the

economic consequences of matrimonial breakdown by reference to identifiable considerations.

5. Ongoing Child Support, Special Expenses and Arrears

[141] The ongoing child support obligation of the Respondent is to be calculated on the basis of her imputed income of $65,000. The table amount of child support payable by a person earning $65,000 for two children is $917.00 per month. I order that she pay child support of $917.00 per month effective October 29, 2008.

[142] I remind myself of the directions of the Supreme Court of Canada when considering the issue of retroactivity of a child support order: *D.B.S. v. S.R.G.* [2006] S.C.J. No. 37.

[143] The burden of proof upon Ms. Savoie is to satisfy me on a balance of probabilities that the award of child support should not be made retroactive and why her child support obligation should not be reassessed based on her actual imputed income since September 2006. (*Coadic v. Coadic,* [2005] N.S.J. No. 415 (SC); and *McCarthy v. Workers' Compensation Appeals Tribunal (N.S.)* et al (2001), 193 N.S.R. (2d) 301 (C.A.) at para. 574).

[144] The Supreme Court in *D.B.S. v. S.R.G.* [2006] S.C.J. No. 37 addressed the issue of whether a court can make an order for retroactive child support and in what circumstances it is appropriate to do so. Three situations were described; awarding retroactive support where there has already been a court order for child support to be paid; awarding retroactive support where there has been a previous agreement between the parents and awarding retroactive support where there has not already been a court order for child support to be paid.

[145] Justice Bastarache then reviewed factors that could curtail the power of judges to make retroactive awards in specific circumstances. These are:

1. Status of the child. (para. 86)

2. Federal jurisdiction for original orders. (para. 91)

3. Reasonable excuse for why support was not sought earlier. (para. 100)

4. Conduct of the payor parent. (para. 105)

5. Circumstances of the child. (para. 110)

6. Hardship occasioned by a retroactive award. (para. 114)

[146] He then commented on how the court is to determine:

the amount of a retroactive child support award, (para. 117);

the date of retroactivity (para. 118), and the

quantum of the retroactive award (para. 126).

[147] Justice Bastarache summarized the governing principles as follows:

> 131. Child support has long been recognized as a crucial obligation that parents owe to their children. Based on this strong foundation, contemporary statutory schemes and jurisprudence have confirmed the legal responsibility of parents to support their children in a way that is commensurate to their income. Combined with an evolving child support paradigm that moves away from a need-based approach, a child's right to increased support payments given a parental rise in income can be deduced.
>
> 132. In the context of retroactive support, this means that a parent will not have fulfilled his/her obligation to his/her children if (s)he does not increase child support payments when his/her income increases significantly. Thus, previous enunciations of the payor parent's obligations may cease to apply as the circumstances that underlay them continue to change. Once parents are in front of a court with jurisdiction over their dispute, that court will generally have the power to order a retroactive award that enforces the unfulfilled obligations that have accrued over time.
>
> 133. In determining whether to make a retroactive award, a court will need to look at all the relevant [page 288] circumstances of the case in front of it. The payor parent's interest in certainty must be balanced with the need for fairness and for flexibility. In doing so, a court should consider whether the recipient parent has supplied a reasonable excuse for his/her delay, the conduct of the payor parent, the circumstances of the child, and the hardship the retroactive award might entail.
>
> 134. Once a court decides to make a retroactive award, it should generally make the award retroactive to the date when effective notice was given to the payor parent. But where the payor parent engaged in blameworthy conduct, the date when circumstances changed materially will be the presumptive start date of the award. It will then remain for the court to determine the quantum of the retroactive award consistent with the statutory scheme under which it is operating.

> 135. The question of retroactive child support awards is a challenging one because it only arises when at least one parent has paid insufficient attention to the payments his/her child was owed. Courts must strive to resolve such situations in the fairest way possible, with utmost sensitivity to the situation at hand. But there is unfortunately little that can be done to remedy the fact that the child in question did not receive the support payments (s)he was due at the time when (s)he was entitled to them. Thus, while retroactive child support awards should be available to help correct these situations when they occur, the true responsibility of parents is to ensure that the situation never reaches a point when a retroactive award is needed.

[148] The award of a retroactive maintenance award is a discretionary remedy. (Roscoe, J.A. in *Conrad v. Rafuse* (2002), 205 N.S.R. (2d) 468, para. 17-20). Judicial discretion was described by Justice Bateman in *MacIsaac v. MacIsaac*, [1996] N.S.J. No. 185 (N.S.C.A.) at para. 19 and 20. Discretionary decision making within the judicial context confers an authority to decide "according to the rules of reason and justice, not according to private opinion".

[149] The Respondent was aware of her obligation, had negotiated a payment schedule and subsequently, changed her payments to reflect her part time income (salary exclusive of her locum income). I have found that her decision to do so was not justified. The Petitioner sought a timely remedy. His Petition for Divorce was filed December 5, 2006. The Respondent will have the resources to meet a retroactive award of child support.

[150] She is ordered to pay retroactive child support since September 1, 2006 on the basis of the imputed income of $65,000. This represents an additional $462 ($917-$455) per month for each of the twenty-four months ($917 - $455). The retroactive amount of $11,088 shall be payable in equal installments over the coming forty-eight months. I exercise my discretion to not award a contribution to special or extraordinary expenses on a retroactive or ongoing basis.

6. Division of Matrimonial Property

[151] I am not prepared to order an unequal division of matrimonial property and debts. I considered exempting the value of the Petitioner's RRSP account and savings depleted after the Respondent left. I acknowledge that the rate of the depletion of his matrimonial property whether RRSPs or savings, was accelerated by the Respondent's decision to not pay spousal support.

[152] The parties' legal arguments focussed on two principal issues: (a) the parenting arrangement and (b) spousal support. I have ruled on these issues. My belief is that other than the matter of unequal division, the division of property was not contentious. Should the parties want me to rule further on the division of property, I reserve jurisdiction to do so subject to more detailed submissions and hearing more evidence.

7. Costs

[153] Should the parties want to make submissions on costs, I ask that I be so advised by the end of the business day on October 31st, 2008. If I do not hear from either party on this issue, each party will bear their own costs. I observe that the success of the parties has been divided.

8. Conclusion

[154] The Court orders:

(1) That the parties' Divorce be Granted.

(2) That the parties have joint custody of their children with primary care to remain with the Petitioner.

(3) That the Respondent shall have parenting time with the children as follows:

(a) every Tuesday after school until the commencement of school the next day;

(b) every Thursday evening as currently scheduled;

(c) every other week-end from Friday after school to Sunday at 4:30 p.m.;

(d) for block periods at Christmas, March Break, Easter and over the summer; and

(e) at such other times as agreed to between the parties.

(4) That the Respondent shall pay ongoing child support based on the Nova Scotia tables to reflect an income of $65,000, inclusive of her locum income. This is $917.00 per month.

(5) That the Respondent shall pay child support arrears of $11,088 in equal installments over the coming forty-eight months commencing November, 2008.

(6) There is no award of retroactive spousal support.

(7) That the Respondent shall pay ongoing spousal support of $980 per month effective October 30, 2008. In the event the Petitioner has an income of $43,000, that amount shall be $100 per month.

(8) Each party is (1) to notify the other of any change in their income within fourteen days. I further order that (2) each year the parties shall confirm income for the preceding 6 months on July 1 and January 1 as well as (3) provide a copy of each other's notice of assessment and income tax returns on or before June 1 of each year. A change in the income of either party shall represent a change in circumstances entitling either party to seek a review of the quantum of spousal support payable.

(9) That the Respondent pay lump sum spousal support of $300,000 to the Petitioner. This shall be paid in part when the parties matrimonial house is sold or otherwise disposed of. The remainder is to be paid in sixty monthly and equal installments beginning September 2010.

J.