SUPREME COURT OF NOVA SCOTIA
(Family Division)
Citation: Darlington v. Moore, 2013 NSSC 103

Date: 20130315
Docket: SFHMCA 068167
Registry: Halifax

Between:

Michelle Darlington

Applicant

and

David Paul Moore

Respondent

Judge: Associate Chief Justice Lawrence I. O'Neil

Date of Hearing: November 13 and 16, 2012

Counsel: Peter D. Crowther, counsel for Ms. Darlington
Richard A. Bureau, counsel for Mr. Moore

By the Court:

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Introduction

[1] The parties began cohabitation in June 1990 while residents of Prince Edward Island. Mr. Moore was and continues to be a member of the RCMP and Ms. Darlington was then employed as a nurse. They have never married.

[2] In March 1991 they relocated to Halifax. They separated in late 2009.

[3] They have two children, a daughter born in January 1992 and a son born in April 1993. Ms. Darlington had one child with her from a previous relationship when the parties began living together. That child is now independent.

[4] In 1995, Mr. Moore incorporated a company named Sand, Surf & Sea Limited "SSS Ltd.". The company's business activities including losses, indebtedness and the intermingling of the personal and corporate finances of "SSS Ltd." until the present are the subject of significant disagreements between the parties.

[5] The Court has been told that the corporation began as an operator of a restaurant in the Peggy's Cove area; that the restaurant burned in May 2003 and that the insurance proceeds resulting from the fire were expended in various ways. The Court is also told that Mr. Moore bought and sold cars as a business and was involved in home construction over the years. All of the foregoing overlapped with his employment in Halifax with the RCMP.

[6] Prior to separation in 2009, Mr. Moore qualified for disability income even as he continued to work full time. He did not work for a period ending in August 2011. In August of 2011 he returned to full time work with the RCMP and

remains eligible to receive disability benefits. The benefits are for permanent losses of physical capacity.

[7] A core issue in this hearing is whether Mr. Moore's disability income should be considered for the purpose of determining his spousal and child support obligations, including his obligation to pay certain special expenses for his children. In this decision maintenance for a common law partner will also be referred to as spousal support.

[8] Consequently, when the parties first appeared before me on October 2, 2012 I advised them that the final hearing would proceed in stages with a determination of Mr. Moore's income being phase one. Nevertheless, evidence and argument have resulted in the parties addressing related issues, such as whether income should be imputed to Ms. Darlington.

[9] This evidence will be considered when the Court rules on the remaining issues. The parties will, however, be given the opportunity to offer additional evidence and to make further submissions on these issues. This decision addresses whether Mr. Moore's disability income is income for purposes of child and spousal support calculations.

[10] The Court is told that Mr. Moore initiated what Mr. Crowther, on behalf of Ms. Darlington, calls a parallel proceeding in the General Division of the Supreme Court. The Court is told by Mr. Bureau, on behalf of Mr. Moore, that the other proceeding pertains to business issues not matrimonial ones and the proceeding is properly in that forum. Mr. Crowther advised the Court that he will be seeking to have that proceeding transferred to the Family Division.

[11] The parties may find the discussion of Justice Korpan on the issue of consolidation of proceedings helpful in resolving their disagreement on this later point (*Cunningham v. Cunningham*, 2013 ONSC 282 (CanLII).

History of Litigation

[12] As indicated, the parties discontinued cohabitation in late 2009. Ms. Darlington initiated legal proceedings in early January 2010. She sought *inter alia* child and spousal support, as well as a division of property.

[13] She then filed an Interim Application on March 2, 2012 seeking interim child and spousal support. The interim hearing was to occur April 22, 2010 but most issues were resolved on a consent basis. An interim order issued May 14, 2010.

[14] The interim order was based on an income of $108,000 received by Mr. Moore.

[15] Subsequently, the parties exchanged correspondence on the issue of whether Mr. Moore's financial circumstances were being fully disclosed to Ms. Darlington. Pre-trials were held in preparation for the parties' three day trial scheduled for late March 2011 before Justice Lynch. A pre-trial memorandum dated January 27, 2011 detailed disclosure requirements.

[16] A final hearing in late March 2011 resulted in orders to divide Mr. Moore's pension; to divide other property and required the payment of child and spousal support. A costs decision issued November 25, 2011.

[17] On January 6, 2012, Mr. Moore was found to be in contempt because of his conduct during the March 2011 hearing.

[18] Mr. Moore appealed all orders flowing from the March 2011 trial (except the contempt order). The Court of Appeal ordered a new hearing by decision dated June 21, 2012. The parties agreed that given the outcome of the appeal, the terms of the interim order dated May 14, 2012 should be reinstated.

[19] As stated, Mr. Moore has an action in the General Division of the Supreme Court, which action he maintains deals with business issues.

[20] On October 2, 2012, the parties first appeared before me for a pre-trial and to schedule the re-hearing. The parties were advised that the first phase of the final hearing would primarily be a determination of Mr. Moore's income. The Court also agreed that it would consider ruling on what contribution Mr. Moore must make to meeting the cost of his daughter's university education. Filing deadlines were set and the hearing was scheduled for October 19, 2012.

[21] Mr. Moore's counsel sought and was granted an adjournment of the hearing scheduled for October 19, 2012 . The matter was heard on November 13 and summation occurred November 16, 2012.

[22] A partial interim consent order dated November 16, 2012 suspended the collection of an outstanding costs award by Ms. Darlington and any overpayment of child support by Mr. Moore pending a conclusion of this litigation.

Issues

> 1. Is it necessary to show a change in circumstances to vary the Interim Order issued May 14, 2010? If it is necessary to show a change of circumstances, has there been a change of circumstances within the meaning of s.37 of the *Maintenance and Custody Act* , R.S.N.S. c.160, i.e. does the Court have jurisdiction to vary the parties' Interim Order issued May 14, 2010?
>
> 2. What is Mr. Moore's income for purposes of his spousal support and child support obligations?
>
> 3. What contribution, if any, is Mr. Moore required to make to the cost of his daughter's post secondary education (undergraduate education)? Must Mr. Moore dedicate funds, held in an 'RESP' he controls, for the benefit of his daughter?

Issue One

- change of circumstances

[23] This is a phase of the re-hearing directed by the Court of Appeal (*Moore v. Darlington*, 2012 NSCA 68). No change of circumstance needs to be established. The Court acknowledges that both parties filed pre-hearing submissions referencing this proceeding as a variation proceeding. This is a final hearing.

[24] However, if I am mistaken in this respect and the subject proceeding is a variation proceeding, I will respond to the question: has there been a change of circumstances permitting the Court to vary the existing order?

[25] The Respondent asserts that there has been no change of circumstances conferring jurisdiction on the Court to vary the order pursuant to the *Maintenance and Custody Act*, R.S.N.S., c.160 hereinafter referred to as the *'MCA'*. I will

answer this question and may include references to jurisprudence addressing a similar issue that arises when an application to vary a *Divorce Act* order is made.

[26] Section 17(1) - (5) of the *Divorce Act*, R.S.C., 1985, c. 3 (2nd Supp.) provides for the variation of child and spousal support orders. Before making a variation order in respect of a child support order, "the Court shall satisfy itself that a change in circumstances as provided for in the applicable guidelines has occurred since the making of the child support order or the last variation order." Similarly, the *'MCA'* requires that a change in circumstance be shown.

[27] Section 37 of the *'MCA'* provides:

> 37 (1) The court, on application, may make an order varying, rescinding or suspending, prospectively or retroactively, a maintenance order or an order respecting custody and access where there has been a change in circumstances since the making of the order or the last variation order.
>
> (2) When making a variation order with respect to child maintenance, the court shall apply Section 10. R.S., c. 160, s. 37; 1997 (2nd Sess.), c. 3, s. 11.

[28] The Supreme Court of Canada in *Willick v. Willick* [1994] S.C.J. No. 94; later in *L.(G.) v. G.(B.)* [1995] 3 S.C.R. 370 and *Gordon v. Goertz* [1996] 2 SCR 27 articulated the test for determining whether there has been a change in circumstances. Justice L'Heureux-Dube in *L.(G.) v. G.(B.)* stated the following at paragraph 49, 50 and 51:

> 49. What sort of change is appropriate? Willick, supra, explained what is meant by "change". Sopinka J. said the following (at p. 688):
>
> > In deciding whether the conditions for variation exist, it is common ground that the change must be a material change of circumstances. This means a change, such that, if known at the time, would likely have resulted in different terms. The corollary to this is that if the matter which is relied on as constituting a change was known at the relevant time it cannot be relied on as the basis for variation.
>
> 50. In that same decision I made the following observations (at pp. 733-34):
>
> > In my view, having regard for the wording of s. 17(4) of the Act, the preliminary threshold test ensures that . . . support orders will not be reassessed by courts anytime a change, however minimal, occurs in the circumstances of the parties or their children. This approach recognizes the value in some degree of certainty and stability between the parties.

> Parties must be encouraged to settle their difficulties without coming before the courts on each and every occasion. Nonetheless, the threshold test cannot be applied properly unless the sufficiency of the change in circumstances is evaluated against the backdrop of the particular facts of the case at hand. It is important to point out that the Act does not qualify "change" but merely states that "the court shall satisfy itself that there has been a change". . . . [Emphasis in original.]

51. As to what change is sufficient, I went on to say (at p. 734):

> To begin with, "sufficiency" of the "change" must be defined in terms of the parties' overall financial situation. Moreover, the fact that a change was objectively foreseeable does not necessarily mean that it was contemplated by the parties. Finally, although any change which is not contemplated may be considered by a judge to be sufficient, it is obvious that not every change will justify variation. Most importantly, however, and notwithstanding the above observations, while the onus of proving the sufficiency of the change in condition, means, needs or other circumstances rests upon the applicant . . ., the diversity of possible scenarios in family law dictates that courts maintain a flexible standard of judicial discretion which does not artificially limit the adaptability of the Divorce Act provisions. [Emphasis in original.]

[29] The Provincial 'CSG' at s.14 provide:

> 14. For the purposes of subsection 17(4) of the Act, any one of the following constitutes a change of circumstances that gives rise to the making of a variation order in respect of a child support order:
>
> (a) in the case where the amount of child support includes a determination made in accordance with the applicable table, any change in circumstances that would result in a different child support order or any provision thereof;
>
> (b) in the case where the amount of child support does not include a determination made in accordance with a table, any change in the condition, means, needs or other circumstances of either spouse or of any child who is entitled to support; and
>
> (c) in the case of an order made before May 1, 1997, the coming into force of section 15.1 of the Act, enacted by section 2 of chapter 1 of the Statutes of Canada, (1997).

[30] The jurisprudence on what constitutes a 'change in circumstances' for purposes of the *Divorce Act* has application to defining the same under the *'MCA'*.

[31] Our Court of Appeal in *Read v. Read*, 2000 NSCA 33 considered whether a change in circumstances existed. The Court ruled that if the change would have resulted in a different order, then it is a material change.

[32] Finally, as stated, this hearing is a ruling on one aspect of the final hearing, i.e. the determination of Mr. Moore's income for the purpose of determining his child and spousal support obligation, if any.

[33] Justice Jollimore comments on recent Supreme Court of Canada decisions on the meaning of 'material change' as it relates to spousal support variation applications in a recent article have been helpful. (Canadian Family Law Matters, CCH, February 2012, Number 334)

[34] I am satisfied that a change of circumstances arose following the consent Interim Order the parties agreed to and which subsequently issued on May 14, 2010.

[35] At the time of that order, neither child was in university and both were under the age of majority. In addition, Mr. Moore's monthly benefit from the Veterans Affairs office, as reported by him, was significantly less than it is now known to have been and currently is.

[36] A broad range of circumstances can and do represent a change of circumstances.

- child support

[37] Section 10(1) of the *'MCA'* requires the Court to consider the Provincial Child Maintenance Guidelines, N.S. Reg. 53/98:

> 10 (1) When determining the amount of maintenance to be paid for a dependent child, or a child of unmarried parents pursuant to Section 11, the court shall do so in accordance with the Guidelines.

[38] Herein, the Federal Child Support Guidelines, P.C., 1997-469 and the Provincial Child Maintenance Guidelines, N.S. Reg. 53/98 are both referred to as the Child Support Guidelines or 'CSG'. The 'CSG' establish child support tables and these are referred to as "the tables" or some obvious modification of this

description. The Provincial 'CSG' are the applicable guidelines. However, the text of both the Federal and Provincial Guidelines, the accompanying child support tables and jurisprudence surrounding the Guidelines is the same or almost so for both the Federal and Provincial 'CSG'.

[39] The ongoing disclosure requirement of both the Federal and Provincial 'CSG' recognize the obligation on payor parents to adjust their payments to reflect increases in income. (For a thorough discussion of the related principles, see Justice Bastarache's commentary in *D.B.S. v. S.R.G.* 2006 SCC 37 at paragraph 38-48 inclusive).

- 'spousal' support/maintenance

[40] Section 4 and 5 of the *'MCA'* outline the factors for the Court to consider when determining the amount of any maintenance to be paid to a spouse or common-law partner:

> 4. In determining whether to order a person to pay maintenance to that person's spouse or common-law partner and the amount of any maintenance to be paid, the court shall consider
>
> (a) the division of function in their relationship;
>
> (b) the express or tacit agreement of the spouses or common-law partners that one will maintain the other;
>
> (c) the terms of a marriage contract or separation agreement between the spouses or common-law partners;
>
> (d) custodial arrangements made with respect to the children of the relationship;
>
> (e) the obligations of each spouse or common-law partner towards any children;
>
> (f) the physical or mental disability of either spouse or common-law partner;
>
> (g) the inability of a spouse or common-law partner to obtain gainful employment;
>
> (h) the contribution of a spouse or common-law partner to the education or career potential of the other;
>
> (i) the reasonable needs of the spouse or common-law partner with a right to maintenance;
>
> (j) the reasonable needs of the spouse or common-law partner obliged to pay maintenance;
>
> (k) the separate property of each spouse or common-law partner;

> (l) the ability to pay of the spouse or common-law partner who is obliged to pay maintenance having regard to that spouse's or common-law partner's obligation to pay child maintenance in accordance with the Guidelines;
>
> (m) the ability of the spouse or common-law partner with the right to maintenance to contribute to his own maintenance. R.S., c. 160, s. 4; 1997 (2nd Sess.), c. 3, s. 3; 2000, c. 29, ss. 5, 8.
>
> Obligation of maintained spouse or partner
>
> 5 A maintained spouse or common-law partner has an obligation to assume responsibility for his own maintenance unless, considering the ages of the spouses or common-law partners, the duration of the relationship, the nature of the needs of the maintained spouse or common-law partner and the origin of those needs, it would be unreasonable to require the maintained spouse or common-law partner to assume responsibility for his maintenance, and it would be reasonable to require the other spouse or common-law partner to continue to bear this responsibility. R.S., c. 160, s. 5; 2000, c. 29, s. 8.

Issue Two: Income

- disclosure

[41] A payor is subject to important disclosure obligations when served with an application for a child support order. Section 21(2) of both the Federal and Provincial 'CSG' incorporates the filing requirements of s.21(1).

[42] The Court may draw an adverse inference against a spouse who does not disclose income information as required. (s.23 of the Guidelines).

- VAC disability pension

[43] Mr. Moore is a member of the RCMP. He is working full time and earns $86,595.64 (line 150 income) per year. In addition, he receives $3,183.12 as tax free income per month in the form of a disability pension (Exhibit #9, Tab J; letter dated January 29, 2010). Veterans Affairs Canada administers this disability program for the RCMP. Consequently, this revenue is referred to as the VAC pension.

[44] Mr. Moore argues that his so called VAC "income" is not income for purposes of determining his child support obligation (including his contribution to

special expenses); nor is it income for spousal support purposes. He relies upon (1) the rationale recently articulated by the Federal Court in *Manuge v. The Queen*, 2012 FC 499; and (2) claims that much of this revenue is needed to meet his ongoing medical expenses and therefore is not income as contemplated by the caselaw.

[45] Ms. Darlington argues that Mr. Moore is not incurring the medical expenses he claims to incur and secondly, there are numerous situations where a financial benefit received by a parent/partner/former partner although not taxable as income under the *Income Tax Act*, RSC 1985, c.1 (5th Supp.) is nevertheless income for purposes of child and spousal support calculations. She argues that the disability income should be grossed up to yield an income of $71,659 for child and spousal support purposes. She argues Mr. Moore's total income for child and spousal support purposes is therefore $158,255.

- medical needs

[46] Paragraph 47 of Exhibit 9, being the October 17, 2012 affidavit of Mr. Moore reads as follows:

> 47. The funds provide payment for various medical expenses including, but not limited to, hearing aids, chiropractic services and ongoing mental health treatment to manage psychotic episodes. The monthly breakdown of expenses is shown as follows:
>
> a. Hearing Aids - $500.00 per month
> b. Chiropractic Services - $1,200.00 per month
> c. Psychological Services - $2,200.00 per month
> d. Hot Tub Operating Expenses - $200.00 per month
> e. Orthopedic Mattress/Bedding - $81.00 per month (Orthopedic bedding cost $1,944.14 - replaced every two years)
> f. Orthopedic Shoes/Obus Back Support/Orthopedic Chair for the Office - $50.00 per month. Total - $4,231.00 per month. This total does not include the cost of a Hoyer Lift which is required by me to be installed in the home at a cost of approximately $15,000.00.

[47] No corroborating evidence of these expenditures was offered. None is required as a matter of law. The Court may simply accept the representation.

[48] Mr. Moore said that his monthly VAC benefit is reduced to reflect the expenditures on health services, which health service providers bill directly to the

Government of Canada. He did not identify on the bank statements in evidence any example of when this happened.

[49] On cross-examination he conceded that the services in fact were not being regularly provided to him. He explained he needed the disability income to meet debt obligations and therefore, was not prepared to accept the medical services identified.

[50] Obviously, his direct evidence on this important point was seriously lacking and misleading in terms of his obtaining the medical services identified on the schedule provided.

[51] I must observe that requiring a recipient of VAC benefits to choose between accepting needed medical services or taking cash in lieu or requiring that the services be paid from disability income is surprising. No documents defining the policy were introduced into evidence.

[52] I am satisfied that Mr. Moore's VAC income is not being expended on needed medical services. I am not satisfied that he would "lose" the income if he did access the services.

[53] He clearly was not forthright on this point when he swore his affidavit of October 17, 2012 or when he testified on direct examination. I can not rely upon his representations as to pre-conditions associated with access to medical services. He has the onus of establishing that the VAC income is not available to him to meet living costs. He has not done so.

- determining income

[54] The 'CSG' at s.15-20 outline the principles to be applied to determine a payor's income. Typically parties rely upon a payor's "line 150 income" as shown on a payor's annual tax return. However, there are a range of circumstances where a spouse's annual income can not be determined in that way.

[55] Section 16 of the Guidelines provides:

Calculation of annual income

16. Subject to sections 17 to 20, a parent's annual income is determined using the sources of income set out under the heading "(Total income)" in the T1 General form issued by the Canada Revenue Agency and is adjusted in accordance with Schedule III.

[56] Section 16 directs that a spouse's income is determined by using the sources of income set out under the heading "Total Income" in the T1 General Form and as adjusted in accordance with Schedule III. The T1 General Form identifies the sources which make up total income as:

(a) employment income;
(b) other employment income;
(c) old age security pension;
(d) Canada or Quebec Pension Plan benefits;
(e) disability benefits;
(f) other pensions or superannuation;
(g) unemployment insurance benefits;
(h) dividends*;*
(i) interest and other investment income;
(j) partnership income;
(k) rental income;
(l) capital gains;
(m) registered retirement savings plan income;
(n) other income;
(o) business income;
(p) professional income;
(q) commission income;
(r) farming income;
(s) fishing income;
(t) workers' compensation payments; (*emphasis added)*
(u) social assistance payments; and
(v) net federal supplements

Source: Income Tax Act, R.S.C. 1985, c.1 (5th Supp.) as amended: Part 1-Income Tax: Division B - Computation of Income

[57] Schedule III at s.3.1, 5 and s. 13 provides as follows:

3.1 **Special or extraordinary expenses** - To calculate income for the purpose of determining an amount under section 7 of these Guidelines, deduct the spousal

> support paid to the other spouse and, as applicable, make the following adjustments in respect of universal child care benefits:
>
> > (a) deduct benefits that are included to determine the spouse's total income in the T1 General Form issued by the Canada Revenue Agency and that are for a child for whom special or extraordinary expenses are not being requested; or
> >
> > (b) include benefits that are not included to determine the spouse's total income in the T1 General form issued by the Canada Revenue Agency and that are received by the spouse for a child for whom special or extraordinary expenses are being requested.

[58] Once a spouse's annual income is determined under s.16, it may be determined that the method:

> "would not be the fairest determination of that income and the court may have regard to the spouse's income over the last three years and determine an amount that is fair and reasonable in light of any pattern of income, fluctuation of income or receipt of a non-recurring amount during those years". (s.17(1) of the Guidelines)

[59] Herein, counsel for Ms. Darlington is arguing that Mr. Moore's income far exceeds that shown on line 150 of his most recent tax returns. She asks that income be imputed to Mr. Moore as provided by s.19 of the 'CSG'. She is relying upon s.19(1)(b) and (h). The provisions provide:

> 19. (1) The court may impute such amount of income to a spouse as it considers appropriate in the circumstances, which circumstances include the following:
>
> > (b) the spouse is exempt from paying federal or provincial income tax;
> >
> > . . . . .
> >
> > (h) the spouse derives a significant portion of income from dividends, capital gains or other sources that are taxed at a lower rate than employment or business income or that are exempt from tax;

[60] The burden of proof is upon Ms. Darlington to establish on a balance of probabilities that income should be imputed to Mr. Moore (*Codiac v. Codiac* 2005 NSSC 291 (CanLII) and *McCarthy v. Workers' Compensation Appeals Tribunal (N.S.) et al* 2001 NSCA 79 (CanLII). I am satisfied that she has met that burden.

[61] There is a long list of cases that stand for the proposition that a payor's disability income or income analogous to it should be considered when the quantum of spousal and child support are being determined.

[62] Justice Gass and Justice Dellapinna of this Court have both ruled that the payor's DVA income should be grossed up to reflect a value comparable to earned income (see *Bridger v. Bridger*, 2008 NSSC 150 and *Cramm v Mason-Cramm*, 2009 NSSC 339).

[63] Justice Ferguson did the same in *Snelgrove v. Snelgrove*, 2011 NSSC 77.

[64] In the more recent case, *Kelly v. Strickland*, 2012 NSSC 207, Justice Legere Sers varied the parties' Corollary Relief Order and increased the payor's child support payment retroactively to reflect the payor's failure to disclose his tax-free DVA income.

[65] Mr. Moore argues that the foregoing caselaw must be read with the more recent decision of the Federal Court in *Manuge v. The Queen*, 2012 F.C. 499.

[66] In *Manuge supra* , Federal Court Justice Barnes ruled that long term disability benefits payable to disabled Canadian Forces members under the Canadian Forces income security insurance plan could not be reduced by the monthly amounts payable to the affected members under the *Pension Act*. The Court concluded that the offset was not contractually justified.

[67] The decision to exclude the disability benefits from the definition of income in *Manuge supra* was based on an interpretation of the governing contract of insurance. At paragraph 43, the Court identified its challenge and answered it as follows:

> [43] It is, therefore, left to the Court to determine what was intended by the phrase "the total monthly income benefits payable to the member under the Pension Act (including dependant benefits and retroactive payments . . .)". The task is not to interpret any particular word or phrase in isolation but, rather, in the context of the complete agreement and the surrounding circumstances. The search for meaning is performed by looking objectively for a common intention and one that achieves a fair and sensible commercial outcome for the parties.
>
> . . . . .

[62] Viewed contextually and with the reasonable expectations of the parties in mind, what was the common intent behind the use of the word “income” to qualify the word “benefit”? Would anyone examining the SISIP Policy reasonably expect that a Pension Act disability benefit that bears no relationship to lost future income would, in the event of a disabling injury, be deducted from a CF member’s SISIP income replacement benefit? Of perhaps greater significance is whether a CF member who suffers a catastrophic combat injury at a level approaching 100% disability would expect to effectively receive nothing more than 75% of his CF income and to be treated the same as a CF member with a disability of lesser functional significance arising outside of his military service.

[63] It seems to me that to ask these questions is to answer them. Giving effect to the SISIP offset of Pension Act disability benefits wholly deprives disabled veterans of an important financial award intended to compensate for disabling injuries suffered in the service of Canadians. The SISIP offset effectively defeats the Parliamentary intent that is inherent in the Pension Act which is to provide modest financial solace to disabled CF members for their non-financial losses. The approach adopted by the Defendant does not lead to a fair or sensible commercial result and defeats the reasonable expectation of CF members. CF members looking at the SISIP Policy and, in particular Article 24, would expect that they were obtaining a meaningful and not illusory LTD benefit payable over and above their Pension Act disability entitlement for the loss of personal amenities. This view is enhanced by the fact that disabled CF members who continue with their active service are entitled to be paid and to keep their Pension Act disability benefits and by the fact that they lose their right of action against the Crown to pursue claims to damages (including income losses) if a Pension Act benefit is payable: see Crown Liability and Proceedings Act, RSC 1985, C-50, s 9. The practical consequence of the claimed offset is to substantially reduce or to extinguish the LTD coverage promised to members of the Class by the SISIP Policy with particularly harsh effect on the most seriously disabled CF members who have been released from active service. That is an outcome that could not reasonably have been intended and I reject it unreservedly.

[64] Even if I am wrong in the interpretation I have placed on Article 24(a)(iv), the issue must be resolved against the Defendant on the basis of the principle of contra proferentem. Where a policy of insurance contains exceptions and limitations to coverage, it is incumbent on the drafter to use language that clearly expresses the extent and scope of those limiting provisions: see Indemnity Insurance Co of North America v Excel Cleaning Service, [1954] SCR 169 at para 35, 1954 CarswellOnt 132 (WL Can). Here, the offset Canada has applied represents a substantial limitation to a CF member’s LTD coverage: a limitation that effectively deprives the most seriously disabled CF members from recovering much, if anything, for their income losses. Because the CDS did not make it “perfectly clear” that he could deduct a member’s Pension Act disability pension from the SISIP LTD benefit, any ambiguity stands to be resolved in favour of the Plaintiff and the other members of the Class: see Canada Life v Donohue, above, at para 14.

[68] The *Manuge* decision is distinguishable on this basis.

[69] The calculation of child support and spousal support requires the Court to interpret statutory instruments that address broad policy objectives.

[70] When determining the quantum of spousal support, the Court has wider latitude to consider disability income received by a payor. For example, s.15.2(4) of the *Divorce Act* directs that spousal support, if any, will reflect the "condition, means, needs or other circumstances" of either spouse. The *MCA* at s.4(l) directs the Court to consider the payor's ability to pay when considering the amount of "spousal" maintenance to be ordered.

[71] In my view, this broad language requires the Court to consider the fact a payor has disability income when called upon to determine a quantum of spousal/partner maintenance.

[72] The case for considering a payor's disability income is made more obvious when one asks whether disability income in the hands of a prospective recipient of "spousal" support should be considered when determining the quantum of "spousal" support to award. It should.

[73] In conclusion, I am satisfied that both the *Divorce Act* and '*MCA*' direct that income for child support and spousal/partner maintenance purposes includes tax free disability income. The disability income should be grossed up.

Issue Three

- child support and university education funding

[74] Section 3(2) of the CSG permits the Court to deviate from the Child Support Tables when a child of the marriage is over the age of 19 and the court considers the application of the tables to be inappropriate "having regard to the condition, means, needs and other circumstances of the child and the financial ability of each spouse to contribute to the support of the child". A child support order for a child over 19 may not require any child support in certain circumstances. This might be

the case when a child is at university and contributions are being made in the form of education assistance. Sub sections 3(1) and (2) provide:

> Presumptive rule
>
> 3.(1) Unless otherwise provided under these Guidelines, the amount of a child support order for children under the age of majority is
>
> (a)the amount set out in the applicable table, according to the number of children under the age of majority to whom the order relates and the income of the spouse against whom the order is sought; and
>
> (b) the amount, if any, determined under section 7.
>
> Child the age of majority or over
>
> (2) Unless otherwise provided under these Guidelines, where a child to whom a child support order relates is the age of majority or over, the amount of the child support order is
>
> (a) the amount determined by applying these Guidelines as if the child were under the age of majority; or
>
> (b) if the court considers that approach to be inappropriate, the amount that it considers appropriate, having regard to the condition, means, needs 2010 NSSC 221 (CanLII) and other circumstances of the child and the financial ability of each spouse to contribute to the support of the child.

[75] Clearly, once a child reaches the age of majority, a greater degree of Court scrutiny of the child's need is mandated than for a child under the age of majority. Such a change in approach is understandable given the desirability of holding young adults accountable; demanding financial responsibility from them and demanding that these young adults contribute to meeting their needs. Coincidental with a parent's desire to demand more independence of their children, young adults are often clear in demonstrating independence from their parents.

[76] Nevertheless, jurisprudence requires a balancing of society's interest in ensuring young adults maximize their educational opportunities; that young adults demonstrate responsibility and that parents be afforded some discretion to limit their financial obligations to adult children. There are legitimate non financial reasons a parent may want to limit assistance to an adult child. Provided the explanation is reasonable, a Court should show some deference to a parents' point of view. An adult child who remains "dependent" need not typically be viewed as without resources to help himself. That is particularly true of young adult children

attending university, persons who by virtue of their status as university eligible students have achieved a level of success and presumably possess personal resources to assist them in meeting their financial needs.

[77] The parties have asked the Court to determine what contribution each parent must make to the cost of their daughter's university education. This requires the Court to determine her financial need. Support for the parties' son is not an issue because his education is now complete.

[78] Section 7(1)(e) of the 'CSG' provides as follows:

> Special or extraordinary expenses
>
> 7. (1) In a child maintenance order the court may, on a parent's request, provide for an amount to cover all or any portion of the following expenses, which expenses may be estimated, taking into account the necessity of the expense in relation to the child's best interests and the reasonableness of the expense in relation to the means of the parents and those of the child, where the parents cohabited after the birth of the child to the family's spending pattern prior to the separation:
>
> . . . . .
>
> (e) expenses for post-secondary education;
>
> . . . . .

[79] Sections 7(2) and (3) of the CSG "suggests" that the s.7 expense be shared proportionately between parents and that the amount of the expense be determined after considering subsidies and tax benefits, etc. Section 7(2) also requires the court to deduct, "from the expense, the contribution if any, from the child":

> Sharing of expense
>
> (2) The guiding principle in determining the amount of an expense referred to in subsection (1) is that the expense is shared by the parents in proportion to their respective incomes after deducting from the expense, the contribution, if any, from the child.
>
> Subsidies, tax deductions, etc.
>
> (3) Subject to subsection (4), in determining the amount of an expense referred to in subsection (1), the court must take into account any subsidies, benefits or

> income tax deductions or credits relating to the expense, and any eligibility to claim a subsidy, benefit or income tax deduction or credit relating to the expense.

[80] Mr. Moore has provided financial assistance to the parties' son to meet the cost of his university education. That is not an issue. However, he does not wish to continue to assist his daughter.

[81] He helped his daughter meet the cost of her first year at Dalhousie but not the cost for the academic year 2012-2013. The daughter contributed $1,000; borrowed from her grandmother and qualified for $2,000 of student assistance from the student loan program. (It appears her student loan assistance assumes there will be no help from her father through a registered education savings plan 'RESP').

[82] Ms. Darlington argues that an "RESP" exists for the benefit of the daughter, that Mr. Moore controls the plan and refuses to release the funds.

[83] Mr. Moore responds that the plan, in fact, is for his benefit and he proposes to use it when he returns to university. He wants to become a lawyer. He provided the Court with documents that pre dated the parties' relationship and the birth of the children which he says confirms this. Exhibit #9, tab O a document dated October 19, 1989 does reference Mr. Moore's then stated interest in law school. The parties moved to Halifax in the early 90s and Mr. Moore testified that he took university night courses at that time. There is no evidence of his having done so since.

[84] Mr. Moore says his daughter has vandalized his vehicle, refuses to acknowledge him and has essentially withdrawn from his care. He argues that as a parent he should have the freedom to deny financial assistance to his daughter as a consequence. (Exhibit #9 - affidavit of Mr. Moore at paragraph 77-78).

[85] On cross-examination on this issue, Mr. Moore and Ms. Darlington's counsel concluded their exchanges with the following:

November 13, 2012 - 15:16:29 - 15:18:20 (inclusive) - Cross-Examination by Mr. Crowther

Q. So, we requested that October 5th, that you provide all of the account statements for that RESP account. Were you able to obtain those, Mr. Moore?

A. I do believe there were some that I disclosed here and I have asked Tim Ross didn't come into play until 2004/2005, so I'm not sure if that's what you're asking for because they didn't apply during that time. Understand what I mean by that.

Q. Well you've made contributions to the RESP between 2008 December.

A. Yes.

Q. And October 2009?

A. All that, that Tim Ross has available too (inaudible) up until 2005 he was (inaudible) and prior to that Scotia McLeod, myself (inaudible).

Q. Ok, you've made some allegation against your daughter because of her conduct, she should not be supported by you.

A. I didn't give up my right to be a parent and when I see that someone behaves in the manner that she did and using slanderous comments on Facebook, there's no excuse for that.

Q. So you're alleging that this occurred and that a reason for cutting her off completely.

A. I was present when the damage was done to my truck, I was standing right there and I read it on Facebook and I've got copies of all the Facebook comments and everybody and the monkey's uncle has read Facebook.

Q. So, you're damage to your vehicle was repaired through insurance?

A. No I believe not.

Q. It wasn't?

A. They never paid the bill.

Q. Who didn't pay the bill?

A. The insurance company, they never paid.

Q. Why, did you submit it?

A. Yes, they never paid the bill.

Q. Is there a reason why it was never paid?

A. Interference, I would suggest.

The Court: Are we talking about the Mercedes?

A. The Mercedes was not insured, it's a dead loss, $7,000.

The Court: Yes, but that's the Mercedes you told us earlier was valued at $20,000, is that what you said earlier. I think you said . . .

A. He made reference to a document that had a $20,000 bill on it, that's what I paid for it, that's not what it is worth.

The Court: No, I think he asked you what the Mercedes was worth. You said $20,000 as I recall. No, but one he valued, the higher number was $20,000 and it caught my attention because I had read somewhere that there was $70,000 worth of damage to the Mercedes.

A. For me to repair that car . . .

The Court: But it was $70,000 on a $20,000 car. I'm not trying to trick you.

A. (Inaudible) paint job on the car, it has to go to Stuttgart, Germany to be repaired. In the Canadian (inaudible) system North America they use modern day things now (inaudible) so there's only one place to send it to get the value back up on that car. (Inaudible) you want to do it, the car is still sitting there with the damage (inaudible) marks all over it. I haven't got the money to fix it. That original vehicle had nothing to do with (inaudible).

a) conduct of an adult child

[86] The parties are asked to submit caselaw on the issue of what impact an adult child's conduct may have on the obligation of a parent to provide support for that child's university education. The Court will hear further from the parties on this issue.

b) RESP

[87] The basic questions concerning the 'RESP' plan can be answered when full disclosure of the terms and conditions of the plan occurs. This has not yet happened. I direct that it occur within thirty days of the release of this decision.

[88] I remind the parties that I need not resolve the issue of whether Mr. Moore should assist in meeting his daughter's cost of university education by accessing the subject 'RESP'. I can address the issue by reference to the parties' existing Interim Consent Order issued May 14, 2012 and the 'CSG'.

[89] The Interim Consent Order in its preamble contemplated a proportionate sharing of the section 7 expenses incurred by the children.

[90] The preamble provides in part:

> AND UPON it appearing the parties were agreeable to an Interim Order in respect to the children's primary residence, access with David Moore, table guideline child support, and the proportional sharing of the costs of a medical and dental plan;
>
> AND UPON it appearing David Moore has an annual income of $108,000.00 for the purpose of determining the table amount of child support and for the purpose of the proportional sharing of the section 7 expenses;
>
> AND UPON it appearing the annual income of Michelle Darlington for the proportional paying of section 7 expenses is $33,639.00;

[91] A further pre-trial will be scheduled for the parties to confirm what issues remain to be resolved between the parties and the preferred timing to address them. The parties should be prepared to provide the Court with a status report on related litigation initiated in the General Division of the Supreme Court.

ACJ