SUPREME COURT OF NOVA SCOTIA
(Family Division)
Citation: Darlington v. Moore, 2014 NSSC 358

Date: 20141001
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: October 15, 16, 17 & 21, 2013; June 10 & 11, 2014 and September 8, 2014

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

By the Court:

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Introduction

[1] The following is the second decision in this proceeding. Earlier, I concluded that Mr. Moore's disability income; is income for the purpose of setting child and spousal support (see *Darlington v. Moore*, 2013 NSSC 103). I also

reviewed the background to the parties' relationship and the history of their family litigation. The parties were never married to each other.

[2] For ease of reference, I reproduce paragraph 1, 2, 3 and 6 of the earlier decision as context:

> [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.
>
> . . . . .
>
> [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.

Issues

[3] Having determined Mr. Moore's income, I must now turn to the following issues:

Re: the children

1. Whether Mr. Moore met past child support obligations.

2. Whether Mr. Moore is meeting his ongoing child support obligations, if any.

3. Whether Mr. Moore fulfilled any obligation to contribute to the children's special expenses; principally post secondary education expenses.

4. Whether Mr. Moore must cooperate to make certain RESP funds available to a child or children.

Re: Ms. Darlington

5. Whether Mr. Moore met his past obligation to pay "spousal/partner" support.

6. Whether Mr. Moore is meeting his ongoing obligation to pay "spousal/partner" support.

[4] Evidence in this phase of the hearing commenced, but was not concluded in October 2013. Mr. Moore was absent from the country after November 1, 2013 until early 2014. As a result, the evidentiary phase of the hearing could not be completed until June 2014.

[5] Property issues, including debt division will be addressed in a separate decision and after hearing any further evidence the parties wish to offer in September 2014.

History of Litigation: Child and Spousal Support

[6] Ms. Darlington provides the history to the parties' current litigation in her affidavit sworn September 28, 2012 (Exhibit 8).

[7] As a result of Ms. Darlington's initial application in 2010, for child and spousal support, Mr. Moore was ordered to pay $1,441 as child support and $900 per month as spousal support. Justice MacDonald based her order on an income of $108,000 for Mr. Moore and $33,639 for Ms. Darlington. Both children were in high school and no order for the payment of special expenses was made.

[8] After what was to be a final hearing in June 2011, the trial Judge determined Mr. Moore's income to be $189,475, reflecting a grossing up of Mr. Moore's DVA pension and his employment income from the RCMP. She set child support at $2,355 per month and ordered Mr. Moore to pay 74% of all special expenses. Spousal support was set at $3,000 per month.

[9] As a result of an appeal, the trial Judge's order was overturned on procedural grounds. This resulted in Justice MacDonald's initial order being reinstated. This order has governed the payment of child and spousal support since that time.

[10] Ms. Darlington is asking that Mr. Moore's income since the parties' separation be reassessed and child and spousal support be recalculated on a retroactive basis. She says Mr. Moore was not forthcoming about his income when the matter was first before the Court in 2010.

[11] Mr. Moore says the effect of the trial Judge's decision was the garnishment of almost all of his pay and extreme financial hardship (Exhibit 9).

[12] At tab 1 of Exhibit 46 is a letter from the RCMP pay and benefit section dated October 18, 2012 which states that since September 2011, the RCMP have forwarded $48,498.77 to the Maintenance Enforcement Office.

[13] It is valuable to review the entire text of the letter to appreciate the income of Mr. Moore at the time:

> Royal Canadian Mounted Police
>
> Atlantic Region Compensation Section
>
> PO Box 2286
>
> Halifax, NS
>
> B3J 3E1
>
> 2012-10-18
>
> Garnishment Order for David Moore AR-4-15166-2676
>
> RCMP Atlantic Region Compensation has received two garnishment orders for the above noted member since September 2011.
>
> The first order was dated September 16, 2011. This order required us to send $5,355 per month plus 25% of the gross salary for arrears. The member's garnishable salary was not large enough to send the $5,355 to Nova Scotia Maintenance Enforcement Program each month so we could not send any money toward the arrears amount of $65,620.60. This left the employee with no income from the RCMP.
>
> The second order was dated August 1, 2012. This order required us to send $2,341.00 per month plus 25% of the gross salary for arrears which were noted to be $78,668.84.
>
> Since September 2011, we have forwarded $48,498.77 to Nova Scotia Maintenance Enforcement Program.

Respectfully submitted

Pat Curtis

Supervisor, RCMP Pay and Benefits

[14] Ms. Darlington was also in dire financial circumstances following the parties' separation and with responsibility to support two teenage children.

[15] Both parties are faced with the difficult task of recovering from the many legal processes and disagreements that have dominated their lives since separation. It is important that this hearing achieve financial predictability for each party.

Child Support Guidelines

[16] The following summary of the law governing the payment of child support and expenses associated with a child's attendance at a post secondary educational institution correctly outlines the principles I must apply when determining the parties' obligations to (a) pay child support; and (b) to contribute to their children's special expenses - principally their education expenses.

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

[18] The text of both the Federal and Provincial Child Support Guidelines is the same as are the rules governing their interpretation and application subject to minor changes such as the use of the word 'spouse' in the Federal Guidelines as contrasted with the word 'parent' in the Provincial Guidelines. Similarly, the Federal Guidelines refer to 'support' and the Provincial Guidelines use the word 'maintenance'. Consequently, the discussion of the law, although often referencing the Federal regulations, is applicable to the Provincial regulations which govern in this case. As stated, the parties are not married. The Provincial regulations are therefore the governing authority on the issue of child support and the payment of special expenses for their children.

[19] Section 3(2) of both the Federal and Provincial Child Support Guidelines permits the court to deviate from the Child Support Tables when a child of the marriage is over the age of majority (19 years) 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) of both the Provincial Child Maintenance/Federal Child Support Guidelines provide:

> Presumptive rule
>
> 3. (1) Unless otherwise provided under these Guidelines, the amount of a child maintenance [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 parent 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 maintenance [support] order relates is the age of majority or over, the amount of the child maintenance [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 and other circumstances of the child and the financial ability of each parent to contribute to the maintenance [support] of the child.

[20] Once a child reaches the age of majority, a greater degree of court scrutiny of the child's need and a parent's ability to contribute is mandated than is provided for, when a child is 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 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.

[21] Nevertheless, jurisprudence requires a balancing of society's interest in ensuring adult children 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.

Education Expenses

[22] The court is also asked to determine what contribution each parent must make to the cost of their son's and their daughter's university education. This requires the court to determine the children's financial need.

[23] Ms. Darlington testified that her mother gave $2,929.50 as a loan to assist in the payment of the older child's [Siobhan's] educational/living expenses and Ms. Darlington wants her mother reimbursed. The supporting documentation of this loan is shown at tab 3B of Exhibit 17 and confirmation of payment of this amount to Dalhousie is shown on the following page. (Note the document, in error, reads $2,2929.50).

[24] Section 7(1)(e) of the Provincial Child Maintenance Guidelines 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 and, where the parents cohabited after the birth of the child, to the family's pattern of spending prior to the separation:

> . . . . .
>
> (e) expenses for post-secondary education; and
>
> . . . . .

[25] Sections 7(2) and (3) of the Provincial Child Maintenance Guidelines and the Federal Child Support Guidelines presumptively requires that the s.7 expense, when ordered to be paid, 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 spouses 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.

To calculate the parties' obligations to pay child support and special expenses, their incomes and the income and resources of their children must be determined for the relevant periods.

Incomes

- Mr. Moore's Income

[26] I have determined Mr. Moore's income includes both his salary as an RCMP officer and his disability income (*Darlington v. Moore*, 2013 NSSC 103 at paragraph 73).

[27] In a letter to Mr. Moore dated October 2, 2013, the quantum of VAC benefit he receives is explained (Exhibit 15, tab 6). Mr. Moore receives:

90% disability pension	$2,333.99/month
spousal benefit	$ 583.50/month
on behalf of Cameron	$ 303.42/month
on behalf of Siobhan	$ 221.73/month
total pension benefits	$3,442.64/month

[28] Exhibit 30A contains the disability rate tables used to determine Mr. Moore's degree of disability. Increases in the VAC income shown on the bank statements generally reflect an increase in Mr. Moore's level of disability assessment.

[29] Exhibit 9 at tab J contains additional background information on Mr. Moore's disabilities, including rulings by disability adjudicators in response to appeals by Mr. Moore, beginning in 2002.

[30] The history of disability payments to Mr. Moore is shown in part as deposits on the following bank statements:

> Exhibit 8 at tab E - Mr. Moore's Scotiabank account summary - June 2008 to March 2011.
>
> Exhibit 4 - Mr. Moore's Scotiabank account summary - March 2011 to October 2012
>
> Exhibits 42 and 112 (at tab 1) - Mr. Moore's Scotiabank account summary - November 9, 2012 - August 9, 2014

- 2008 - 2010 Income

[31] On September 29, 2008 deposits from Veterans Affairs Canada (VAC) begin to appear. On September 29, 2008, $668.33 was deposited to Mr. Moore's power chequing account. Later deposits included the following from VAC:

October 10, 2008	$2,361.34
October 27, 2008	$1,180.76
October 30, 2008	$ 668.33
November 27, 2008	$1,169.57
December 23, 2008	$1,169.57
January 29, 2009	$1,198.81

[32] In the same months as many of these payments were made, Mr. Moore received approximately $4,000 as salary income - presumably after deductions. These entries/deposits are shown as well. For example, in January 2009 he received $1,947.99 on January 14 and $1,882.16 on January 28.

[33] The pattern of salary income and VAC income is shown in these bank statements through to February 2010 (Exhibit 8, tab E):

$2,048.73	Payroll February 9, 2010 (see page 1373)
$1,982.91	Payroll February 23, 2010 (see page 1374)
$3,289.65	VAC February 25, 2010 (see page 1374)

A higher monthly VAC payment appeared February 25, 2010. However, a retroactive payment of $32,562.34 is shown as deposited on February 3, 2010 - see page 1349.

[34] Exhibit 4 is a copy of Mr. Moore's personal bank account with Scotiabank for the period March 2011 to October 2012. These records show a deposit from VAC in the amount of $3,381.76 by October 2012. Exhibits 42 and 112 (at tab 1) cover the period after November 2012 and record deposits.

[35] Exhibit 42 is Mr. Moore's Scotiabank account information for the period January 10, 2013 to June 8, 2013. The VAC income is shown as $3,442.64/month.

[36] In her affidavit filed August 29, 2013, being Exhibit 18, Ms. Darlington at tab M calculates Mr. Moore's income for the period 2010-2013 inclusive as follows:

2010	
Grossed up DVA (ongoing plus retroactive) RCMP Salary	$ 62,196.22 (ongoing) + $29,000 (lump sum retroactive amount paid in 2010) = $116,352.00 (grossed up income) $ 84,181.00 $200,533.00
2011	
Grossed up DVA Income RCMP Salary	$ 57,844.00 ($32,473.80 + grossing) $ 86,595.64 $144,439.64

2012	
Grossed up DVA Income RCMP Salary	$ 61,113.00 ($33,579.12 + grossing) $ 88,637.00 $149,750.00
2013	
Grossed up DVA Income RCMP Salary	$ 61,113.00 ($33,579.12 + grossing) $ 80,498.00 $141,611.00

[37] I have come to a different conclusion as to Mr. Moore's income in the year 2010. The lump sum payment shown as income in 2010 was money due to him for previous years.

[38] Exhibit 46 contains copies of Mr. Moore's tax returns for 2010, 2011 and 2012. These documents declare line 150 income in 2012 as $88,636.64; $86,595 in 2011 (see Notice of Assessment); $84,181 in 2010 and $82,245 in 2009.

[39] I am satisfied that Mr. Moore's disability income for 2010 should not be grossed up to include $32,562.34 paid to him as retroactive disability income for 2009 and earlier (see paragraph 55 of Exhibit 9 - Mr. Moore's affidavit dated October 2012). I have concluded none of this retroactive pay pertains to January or February 2010. I set his 2010 income as the average of his grossed up income in 2011, 2012 and 2013. I view the lump sum payment as non recurring, in as much as it was retroactive pay, and is properly not considered as income in 2010 for child support purposes (s.17 Child Support Guidelines).

[40] I am satisfied that the calculations and conclusions presented by Mr. Crowther, however, are generally correct for 2011, 2012 and 2013. Mr. Moore's average income for these years was $145,266.88. The table amounts changed January 1, 2011 and the calculation must reflect that change. The foregoing conclusion is subject to the questions I pose and further directions given in the concluding paragraphs of this decision.

[41] I therefore determine Mr. Moore's income in 2010 as approximately $145,266.88. Again, this conclusion is subject to my invitation for the parties to offer revised calculations and to answer the questions posed in the concluding paragraphs of this decision.

[42] When he testified in October 2013 and again in June 2014, Mr. Moore said the quantum of his disability income had been reduced. This conclusion flows from a letter he received in October 2013 from DVA (Exhibit 44).

[43] He believes he may also be required to repay a possible over payment of that income. The over payment issue appears to have arisen because he was receiving an additional amount on the basis of administrators of the disability benefit plan believing he was still in a common law relationship with Ms. Darlington. That status would have entitled him to an incremental amount of disability income (see Tab 6 of Exhibit 15).

[44] Mr. Moore did reference documents or e-mails to support what he was telling the Court. However, there is a lack of clarity as to the quantum of the potential reduction, if any, in his income or the consistency of that reduction in Mr. Moore's income over the past several years and over the past year in particular as a consequence. In addition, Mr. Moore is in a common law relationship and has been for a period not known to the Court. This later reality may offset consequences flowing from the fact he is no longer in a common law relationship with Ms. Darlington.

[45] Mr. Moore was under an obligation to establish claimed reductions in his income level. He did not do an adequate job in this respect. I do not accept his explanations as to why he could not. He has extensive experience in managing paperwork, including financial records and has a long and involved history with the personnel office of his employer and with benefit administrators, including the Veteran's Affairs officials. I am therefore not prepared to conclude his disability income was/is less than shown above. The absence of clear answers and disclosure as to his income over the course of this proceeding has been an ongoing concern.

[46] Section 24(c) of the Guidelines permits the Court to make adverse inferences in certain circumstances when the obligation to disclose and to explain one's income is not discharged.

- Ms. Darlington's Income

[47] Ms. Darlington's income tax information to 2012 appears at tab C of Exhibit 18 and her notices of assessment for 2009-2012 inclusive are attached to

her statement of income (Exhibit 21) filed July 30, 2013. Her 2013 Notice of Assessment is at page 47 of Exhibit 81. These documents show the following as Ms. Darlington's line 150 income:

2009	$15,989
2010	$37,409
2011	$42,072
2012	$29,972
2013	$13,939

[48] Mr. Crowther calculates Ms. Darlington's income to be her line 150 income in each of these years, less the $900/month she was receiving from Mr. Moore as spousal support. He then concludes her income in the years 2010 - 2013 to be as follows:

2010	$29,309
2011	$30,441
2012	$19,164
2013	0.00

Payments Made: Current Order

[49] Mr. Moore is subject to a 2010 order to pay combined child and spousal support totalling $2,341, of which $900 is spousal support. As stated, a subsequent order in 2012 requiring a higher payment was overturned and a new trial was ordered. This proceeding is that new trial.

[50] At Tab L of Exhibit 18, the affidavit of Ms. Darlington filed on August 29, 2013, the record of payments (of both child and spousal support) created by the Maintenance Enforcement ('MEP') office appears.

[51] That record for the period June 1, 2010 - August 7, 2013 shows a regular due amount of $105,476.16 and a received amount of $107.817.16. The opening balance was $6,123. However, the arrears as of August 26, 2013 were $1,441. In addition, the record shows a regular due amount of $14,177.18 for September 2, 2012.

[52] The record also shows a payment by Mr. Moore of $14,046 on February 27, 2013 (as a result of garnishment I believe).

- child support 2010-2014

[53] As stated, the 'MEP' record to August 7, 2013 shows an amount owing of $105,476.16 and $107,817.16 as having been paid.

[54] These amounts include $900/month payable as spousal support pursuant to the 2010 order. This amount forms part of the regular due amount in the records of 'MEP' and is part of the amount paid.

[55] Mr. Crowther, on behalf of Ms. Darlington, says Mr. Moore paid $1,441 per month as child support as ordered for the period April 2010 to August 2013. He says that the monthly amount should have been much higher given Mr. Moore's grossed up income, after his disability income is included.

[56] The result is a claim by Ms. Darlington for retroactive child support to August 2013 in the amount of $28,491.00.

[57] Using Mr. Moore's income figures outlined by her and reproduced herein at paragraph 36 *supra*, Ms. Darlington calculates the table amount of Mr. Moore's child support obligation over this period was as follows:

2010	
January - February (1 child) March - December	owed $1,307/month, paid 0.0/month owed $2,479/month, paid $1,441/month
2011	
January - December	owed $1,851/month, paid $1,441/month
2012	
January - December	owed $1,931/month, paid $1,441/month
2013	
January - August	owed $1,848/month, paid $1,441
Difference $28,491.00	

[58] As stated, I have determined Mr. Moore's income for 2010 to be $145,266.88 by averaging his income (*supra* paragraph 40). For a payor parent earning this amount, the table amount of monthly child support for one child is

$1,171; for two children the table amount of monthly child support is $1,861. The child support tables changed on December 31, 2011.

[59] Assuming Mr. Moore's obligation to pay some child support continued to August 31, 2014, Mr. Moore's maximum potential table amount of child support payable over this period was as follows:

2010 Income	$145,266.88
January - February	$1,171/month - for one child = $2,342
March - December	$1,861/month - for two children = $18,610
2011 Income	$144,439.64
January - December	$1,851/month - for two children = $22,212
2012 Income	$149,750.00
January - December	$1,931/month = $23,172
2013 Income	$141,611
January - August	$1,848/month = $14,784
Total to August 31, 2013	$81,120

An additional amount would be payable for the period to May 31, 2014. For that nine (9) month period, the obligation was 9 x $1,848 = $16,632.00 less 9 x $1,441 paid = $3,663.00. For reasons that follow, since June 1, 2014, the maximum potential obligation is for one child, i.e. $1,157 using an income of $141,611 for Mr. Moore. The obligation to pay this amount for the younger child terminated August 31, 2014 for the reasons that follow. This is an additional potential total obligation of $3,471.00.

Child Support - September 1, 2013 - September 1, 2014

August 31, 2013 - May 31, 2014	9 x $1,848 = $16,632
paid 9 x $1,441 = $12,969	
June 1, 2014 - August 31, 2014	3 x $1,157 = $3,471
paid 3 x $1,441 = $4,323	
Total obligation	$20,103
Less total paid	$17,292
	$ 2,811

- ages and status of the children

[60] The Court must now explain how it determined when the support obligation ended for each of these children.

[61] Until they turned 19 years of age, these children were dependent as defined by s.2(c) of the *Maintenance and Custody Act*, R.S.N.S. 1989 c.160:

> Interpretation
>
> 2 In this Act,
>
> (c) "dependent child" means a child who is under the age of majority or, although over the age of majority, is unable, by reason of illness, disability or other cause, to withdraw from the charge of the parents or obtain the necessaries of life;

[62] As discussed, after the children reached 19 years of age, a wider range of factors must be considered when determining whether a child support obligation existed, particularly as is the case here, when contributions to education expenses are also sought and provided.

[63] Section 9 of the *Maintenance and Custody Act* provides:

> Maintenance order
>
> 9. Upon application, a court may make an order, including an interim order, requiring a parent or guardian to pay maintenance for a dependent child. 1997 (2nd Sess.), c. 3, s. 4.

Attendance at university is accepted as continuing a child's state of dependency into adulthood. The governing principle for determining child support is provided for in s.3 of the Guidelines as noted supra in paragraph 19.

[64] Exhibits 17 and 81 provide some income information for the two children.

- the son

[65] The son Cameron was born in April 1993. He was 16 when the parties separated in late 2009. He remained with his father for several months and moved in with his mother in March 2010.

[66] He graduated from high school in June 2011. He attended Dalhousie University for the academic years 2011-2012; 2012-2013 and 2013-2014. He continues to be enrolled. Throughout he has lived with his mother but for periods when he was away and employed on a work term.

[67] He reached the age of 19 in April of 2012 after completing his first year of university. After completing his first year of studies (2011-2012), Cameron switched from environmental studies to the co-op business program. To date he has carried a balanced course load most years, i.e. four (4) courses (see Exhibit 17 and 38). The business program he is following is four (4) years but provides for a student to have work terms.

[68] A confirmation of Cameron's enrolment in university over the summer of 2014 (May 5, 2014 - August 26, 2014) was filed. The summer tuition cost in 2014 was $747.60. It is not clear if this reflects participation in a work term or more traditional studies. Cameron studied one course over the summer of 2012-2013.

[69] In filings received in June 2014 on behalf of Ms. Darlington, additional detail concerning Cameron's education expenses and earnings over the course of his university studies was provided (Exhibit 81). In an earlier filing, her affidavit sworn August 29, 2013, Ms. Darlington provided details of Cameron's earnings in 2013.

[70] At Tab 1 of Exhibit 17 Cameron's earnings for the period May 6 - July 15, 2013 are revealed as $1,129l.01. T4s for 2012 show earnings of $1,334.99 and $1,200.65. I do not have evidence of his earnings over the summer of 2011, the period following graduation from high school.

[71] Cameron completed a work term over the summer of 2013 (see Exhibit 17). He has work terms scheduled for the fall of 2014 and the summer of 2015. His anticipated graduation date is May 2016. His planned program has him completing four (4) courses over the winter of 2015; four (4) over the fall of 2015 and three (3) over the winter of 2016. During his work term in 2013, Cameron earned $7,987.50 (see Exhibit 18, tab F). His 2013 tax return shows a line 150 income of $12,831.31 (Exhibit 81). His income in earlier years is detailed in Exhibit 17. In 2014, his earned income is anticipated to reach the $17,000-$20,000 range.

- older child, a daughter

[72] The parties' daughter Siobhan was 17 when the parties separated in late 2009. She moved from the family home with her mother. She began university in September 2010. She reached the age of 19 in January of 2011. She attended Dalhousie University for the academic years 2010-2011; 2011-2012; 2012-2013; and 2013-2014.

[73] In June 2014 filings provided on behalf of Ms. Darlington, the Court received documents relative to the children's education (Exhibit 81). These form part of the evidence to be considered as a result of an agreement between the parties (Exhibit 81). In her affidavit dated August 29, 2013 (Exhibit 18), Ms. Darlington offered additional details concerning Siobhan's finances, including her income and university expenses.

[74] In a letter Siobhan advised the Court that she completed her science degree and graduated from Dalhousie in May 2014. She has no plans to attend post secondary education in the fall of 2014. She lived in New Brunswick following graduation but plans to return to Nova Scotia in the fall of 2014. Her student debt is $15,000. Of this amount, $8,140 was advanced during her final year of studies (2013-2014) by the government student assistance program. The Court is told Siobhan will be required to pay $300 per month on her student loan(s).

[75] In the same filings, notices of assessment for Siobhan reveal her line 150 income to have been $9,611 in 2013. Her notices of assessment of the taxation years 2010, 2011 and 2012 appear at tab 2(c), (d) and (e) of Exhibit 17. Her income in 2010 was $4,968, of which $3,098.79 was from an education plan. In 2011 her employment income was $8,799 and in 2012 her employment income was $6,986.

[76] Siobhan's earnings are shown at Tab 2 of this same exhibit were:

> 2013 - earnings to July 22 - $5,258.25 (Exhibit 81 at page 14 contains a Notice of Assessment recording an income of $9,611 for 2013)
>
> 2012 - Notice of Assessment (line 150) - $6,986.00
>
> 2011 - Notice of Assessment (line 150) - $8,799.00
>
> 2010 - RESP education assistance - $3,098.79

2010 - Notice of Assessment (line 150) - $4,966.42

[77] At tab 2(f) of Exhibit 17, confirmation of Siobhan's student assistance from the Government of Nova Scotia appears. It reveals a grant of $2,000 and a loan of $7,140 for the academic year 2013 - 2014. Similar correspondence shows a grant of $800 and a loan of $7,132 for the 2012-2013 academic year. This explains the claim that Siobhan has student loans totalling $15,000.

[78] Siobhan received an entrance scholarship in the amount of $1,000 for the 2010-2011 academic year. She received an additional $1,000 for the 2011-2012 academic year and $750 for the 2013-2014 academic year.

Child Support, Education Expenses

[79] Mr. Moore's and Ms. Darlington's obligation to contribute to their son's and daughter's special expenses, i.e. university expenses for the period of their undergraduate studies must be determined. As already observed, the pursuit of higher education is recognized as activity that may continue a child's dependent state.

[80] The estimated cost of a year of university at Dalhousie, excluding accommodation, is provided at tab S of Exhibit 17 (and Exhibit 81):

2013 Fall - $2,665.70 (tuition, books, fees)
2014 Winter - $3,769.45 (tuition, books, fees)
Total - $6,435.15

[81] Mr. Moore, by virtue of his child support payments, has made pursuit of a university education possible for his son and daughter. Ms. Darlington continued to provide a home for them. Both parents have therefore made a substantial contribution to their children's education - an obligation founded on their status as dependents. They have made it possible for these children to attend university and to complete a degree relatively debt free.

[82] The son and daughter also 'received' financial support from Mr. Moore in addition to child support while they attended university. Mr. Moore has identified transfers of funds to his son and daughter that amount to thousands of dollars. Ms. Darlington also provided significant financial support directly to each child while they attended university.

(a) Mr. Moore's record of payments to his children

[83] Exhibit 34 contains Mr. Moore's handwritten summary of records he says detail payments made to his son and daughter directly; paid as child support or on their behalf to their universities. Mr. Moore cross references his entries to cheque numbers. Interpreting Mr. Moore's records has been challenging.

[84] His summary contains the following details:

> Direct Contributions (not child support)
>
> Siobhan
>
> Claimed direct contribution to Siobhan: $11,777
>
> 2010 (September 9) $3,638 - $3,500 cheque drawn on the line of credit
>
> . . . . .
>
> 2011 (January 5) $2,094 - direct deposit
>
> (February 10) $2,000 - cheque drawn on the line of credit
>
> (September - October) $4,045 comprised of two cheques - $2,006.25 and $2,039.62
>
> These amounts total $11,777
>
> . . . . .
>
> Mr. Moore testified that after October 2011, he discontinued his contribution to his daughter's education costs because of her alleged misconduct victimizing him.
>
> . . . . .

[85] Exhibit 17 is a bound set of documents titled Children's Financial Disclosure. At tab R of Exhibit 17 is a summary of contributions to the post education costs of Siobhan which summary is submitted by Ms. Darlington. It does not show contributions by Mr. Moore:

> 2010 (Fall) - RESP - $2,980.50
>
> (Tab M of Exhibit 17 shows this transaction)
> 2011 (Winter) - RESP - $2,094.50
> (Tab K of Exhibit 17 shows this transaction)
> 2011 (Fall) - RESP - $2,006.25
> (Tab J of Exhibit 17 shows this transaction)

Cameron

Claimed direct contribution to Cameron $16,267.25

2011 (September $3,756.10 - the entries identified as payment methods for this period total $4,045 which is the amount of support shown for the older child)
2012 (January) $3,758.50
(September) $4,287.65
2013 (January) $4,465.00
These amounts total $16,267.25

[86] At tab (I) of Exhibit 17 is a summary of tuition payments paid on behalf of Cameron . This summary of payments is offered by Ms. Darlington:

Fall 2011 - David Moore by personal cheque - $2,039.62

RESP - $1,332.31 (Tab J of Exhibit 17 shows this transaction)

Winter 2012 - David Moore by personal cheque - $3,181.95

Fall 2012 - David Moore by personal cheque - $4,352.29

These payments total $13,440.36.

[87] Mr. Moore calculates (Exhibit 34) he provided the following funds to each child to assist them with their education, which amounts he says include the payment of child support:

Money paid to son - $56,009.22
- his university education began in September 2011
- November 12, 2009 to May 9, 2011 - $13,097.00
- June 1, 2011 to September 20, 2012 - $15,384.03
- September 30, 2012 to September 18, 2013 - $13,398.19
- October 2011 - September 2012 (garnished funds $14,130) ($1,177.50 for 12 months)

Money paid to daughter - $45,075.75
- her university education began in September 2010
- September 2010 - $3,638.00
- January 2011 - $4,094.50
- September 2011 - $4,045.87
- January 2012 - no payments made as a result of Mr. Moore having concluded she had victimized him

[88] Mr. Moore calculates his payments to his children from after tax income total $101,084.97 for the period beginning in November 1, 2009 and ending July 31, 2013.

[89] Exhibit 4 is a record of Mr. Moore's day to day banking offered to corroborate the foregoing payments listed by Mr. Moore on page 2 of Exhibit 34.

[90] I am satisfied that Mr. Moore advanced substantial sums of money to meet the costs of his two children attending university. The form of the assistance was child support which represents a contribution to the living costs of these children while they studied. He paid child support or has been assessed that obligation for twelve months for each of the university years, including periods his son lived in Alberta. He transferred additional dollars to support their education more directly. The money was derived from an RESP to which he contributed over the years; from his line of credit and from other personal funds. It is impossible to quantify the totals. However, I am satisfied the contribution was meaningful.

[91] Mr. Moore agrees that he did not provide education support for Siobhan, after 2012. To that point in time, he did provide both child support and some financial support for education expenses. Thereafter his contribution was in the form of child support.

[92] The children had an obligation to contribute to the costs of their post secondary education and did so. Student loans were a source of funds for Siobhan.

[93] When determining whether Mr. Moore should now be directed to make an additional contribution to meeting the costs of the children's education, I must consider Mr. Moore's ability to do so; what he has contributed and the ability of these children to assume the remaining costs.

[94] I am satisfied that Mr. Moore has an obligation to pay the table amount of child support to Ms. Darlington for his son while the son is an undergraduate student until completion of four (4) years of study. Cameron has earned a significant salary to date in 2014 by virtue of his work term. The Court learned in September 2014 that his earnings in 2014 will approach $20,000. Mr. Moore has already made substantial payments as child support for Cameron to date in 2014. In the words of the guidelines, ordering him to continue to pay child support for his son would be inappropriate as that language is used in s.3(2) of the Child Maintenance Guidelines. Cameron continues to live with his mother when in Nova Scotia.

[95] Ms. Darlington initially asked that child support for the older child be reviewed in August 2014 because the daughter was expected to be leaving for post graduate studies in British Columbia. That is no longer the case. She asks that Mr. Moore pay $3,500 towards her son's tuition for the 2013-2014 academic year. She also wants Mr. Moore to retire the daughter's student loans totalling $15,000 by providing the remaining RESP funds to her.

[96] In all of the circumstances, I am satisfied that Mr. Moore's obligation to pay child support for Siobhan ended in May 2014 and for Cameron on August 31, 2014. As of these dates, Siobhan had completed her studies and was no longer dependent and Cameron was commencing a work term that would result in his 2014 income approaching $20,000. When the child support paid by Mr. Moore to August 31, 2014 is added to these resources, it is clear Cameron is without a need for support. The payment of special university expenses after that date is not before the Court for Siobhan. Subject to my ruling on the disposition of the RESP fund remaining to be distributed, no further contribution to Siobhan's or Cameron's education costs is ordered at this time whether in the form of child support or a special expense.

(b) tax credit/deductions for university expenses

[97] Mr. Moore has consistently sought the necessary consent of both children to have their university "tax credits or deductions" transferred to him to the extent this is possible. He has asked that these children complete forms he identifies as T2222a; T22220 for 2009 - present (see Exhibit 40, his letter to Mr. Crowther dated May 26, 2013). They have agreed to do so.

[98] Exhibit 46 at tab 3 contains a letter form the Canada Revenue Agency to Mr. Moore dated May 10, 2013 in which the transfer forms from the children are requested.

[99] Exhibits 29 and 81 contain copies of forms Mr. Moore believes must be executed as a pre condition to his obtaining a tax refund as a result of a transfer of the education tax credits/deductions from the children to Mr. Moore.

(c) misconduct by a child

[100] In his affidavit filed in October 2012, being Exhibit 9, Mr. Moore details the alleged misconduct of both children, beginning at paragraph 70.

[101] Mr. Moore says his daughter disentitled herself to his assistance in meeting her university expenses. There are cases when such a result may be warranted. However, this is not one of them.

[102] In his oral and affidavit evidence, Mr. Moore detailed misconduct by each of his children which misconduct he says is relevant to a determination of his child support obligation and his obligation to assist in meeting their special expenses. Exhibit 9 - Mr. Moore's affidavit dated October 17, 2012 beginning at paragraph 75, details damage done to Mr. Moore's property, allegedly by his son. The damage included breaking windows in his home; $70,000 damage to a vintage car and other damage to Mr. Moore's SUV.

[103] Beginning at paragraph 88 of the same exhibit, he describes alleged misconduct by his daughter which also victimized Mr. Moore. He says she publicly slandered him and smashed into the side of his SUV. Mr. Moore is of the view that he is consequently within his right to not assist her in meeting the cost of her university education.

[104] The older child is described as a straight A student by Ms. Darlington. She says the child borrowed to pay for her education (see Exhibit 18, the affidavit of Ms. Darlington dated August 29, 2013 beginning at paragraph 35).

[105] In her affidavit dated August 29, 2013, beginning at paragraph 59 (Exhibit 18), Ms. Darlington says Mr. Moore himself must accept much of the responsibility for the poor relationship with the children. She believes Mr. Moore is misrepresenting and/or fabricating the alleged misconduct of the children.

[106] The children have been victims of this high conflict breakdown in the relationship between the parties. Whether they did or did not damage Mr. Moore's property is moot given that I am not ordering additional payments on Siobhan's past education expenses (subject to my ruling relative to the RESP). I would not

be influenced by the accusation against the children, even if proven. They are victims of a high conflict separation between their parents.

(d) retroactive child support March 2010 - August 2013

[107] Subject to the questions and directions in the concluding paragraphs of this decision, I am satisfied that for the months (March 2010 - August 2013) Mr. Moore's maximum potential obligation was $81,120 as child support. He paid $1,441/month for 42 months ($60,522) pursuant to the May 2010 interim order herein. The difference is $20,598. This is the maximum level of the retroactive award of child support for the period and reflects the amount payable on the basis of his grossed up income. Additional amounts were due and payable to August 31, 2014 as explained.

[108] I have considered whether this is a case where the total amount of recalculated child support should be ordered to be paid by the payor. I have considered the guidance offered by the Supreme Court of Canada in *D.B.S.*, 2006 S.C.C. 37.

[109] Weighing in favour of ordering a lesser amount is the poor financial circumstances of Mr. Moore; the fact the children are approaching independence and there is some question as to whether the funds will benefit them. Weighing in favour of ordering the amount calculated as a retroactive obligation are the fact that Mr. Moore's disclosure throughout has been deficient and the fact that his VAC income identified a component of that income, as being provided to him, because he had a responsibility to 'support' two children. In some respects, his child support was partially paid for him by VAC.

[110] I am satisfied Mr. Moore's retroactive child support obligation should not be forgiven.

(e) RESP accounts and RRSP accounts

[111] Ms. Darlington argues an RESP account established by Mr. Moore should be available to fund the children's post secondary education. From other documents it is identified as Plan ID 5005205. She says that although the parties' son expects to finish his undergraduate program without debt, the parties' daughter has debt and wishes to continue in university.

[112] Exhibit 2 is a financial statement dated January 6, 2009 offered by Ms. Darlington as evidence of the existence of RESP(s) for the benefit of the children but subject to Mr. Moore's control.

[113] Exhibit 19, book 1 at tab 4 contains Ms. Darlington's statement of property prepared in January 2010 which also lists two (2) RRSPs with the Investment Planning Counsel. One is in Ms. Darlington's name, i.e. account 5005470 and one in Mr. Moore's name, i.e. account 5003626. Three RESPs are also listed in her statement of property. They are account 27364587 (Renaissance Investments) valued at $6,261.87; account 5005205 (Investment Planning Counsel) valued at $33,378.64 and account 2766547 (Franklin Templeton Investment) valued at $8,381.12. Documents confirming these amounts accompany Ms. Darlington's Statement of Property.

[114] Ms. Darlington identifies two other accounts managed by the Investment Planning Counsel but she does not provide account numbers or descriptions. She stated one account had a value of $1,664.45 as of September 30, 2009 and the second one in her name had a value of $11,231.22 as of September 30, 2009. The enclosed supporting documents show the account for Ms. Darlington as an RRSP bearing Plan ID number 5005470 and Mr. Moore's account number as 907917. Mr. Moore's plan is described as open (individual).

[115] Exhibit 20, being the affidavit of Michelle Darlington, filed March 30, 2011 in support of a preservation order, identifies the following accounts with Investment Planning Counsel:

1. Plan ID 5005205 (RESP)
2. Plan ID 907917 (RESP) [Ms. Darlington's Statement of Property doesn't describe this plan as an RESP account. See the fourth paragraph following this.]
3. Plan ID 5003626 (RRSP)

The second plan number does not correspond to documents on file.

[116] In his affidavit filed in October 2012 (Exhibit 9), Mr. Moore provides his perspective as to the history and purposes of RESPs held by him now or in the past. Exhibit 39 provides additional detail. The RESP account in dispute had a balance of $30,699.74 on May 30, 2013. Beginning at paragraph 80, Mr. Moore

says the bulk of the RESP funds in question are in fact funds set aside for him. He testified that he wants to return to university and to become a lawyer.

[117] He says a separate RESP account was opened for the children (paragraph 84) but the funds were disbursed for the older child's benefit. Mr. Moore says he contributed $465/month to this plan (paragraph 43 of Exhibit 13).

[118] He says he also borrowed against his own RESP, the A250 program, and contributed $5,000 from this plan to his son's university education. He says he must repay the plan. Corroboration of his plans to use the A250 program for his education is offered at tab O of Exhibit 9. These are RCMP forms dated 1990 or earlier.

[119] Paragraphs 80, 81, 84, 85 and 86 of Mr. Moore's affidavit (Exhibit 9) filed October 17, 2012 state:

> 80. In 1988, prior to the birth of the children, Cameron and Siobhan, I took out an RESP Self-directed investment plan with Scotia MacLeod for myself. At the time I was enrolled in University of PEI with the intention of attending law school as a mature student. In 1991 and 1992 I attended Dalhousie University in Halifax. Funds were set aside and matched by the RCMP under the A250 Education Program. Under the A250 program, combined with LWOP (leave without pay), three years of leave could be granted in pursuit of a Law Degree. This is a Federal Government incentive program to assist Federal Government employees in achieving higher learning. At this time, an RESP was not set up for the children. Attached hereto and marked as Exhibit "O" is a copy of my A250 program acceptance for 1989 and copies of my UPEI transcript and receipts. This plan was put in place before I met Ms. Darlington.
>
> 81. Prior to the birth of the children, Cameron and Siobhan, I took out an RESP investment plan for myself. At the time I was enrolled in University in PEI with the intention of attending law school as a mature student. Funds were set aside and matched by the investment program to assist Federal Government employees in achieving higher learning. This RESP was not set up for the children, and cannot be used for anyone other than the designated A250 sponsor, who is me.
>
> 84. Several years after the children were born, an RESP fund was opened up for Siobhan and Cameron. Tonya was not eligible, as she is not my child. Attached hereto and marked as Exhibit "" is a copy of a 2004 Portfolio Balance Form showing the two separate RESP's:
>
> a. One for the A250 Program; and
>
> b. One for Siobhan and Cameron.
>
> 85. Since Siobhan began university, those funds have been used up. Ms. Darlington is fully aware of this, as she went to the investment planner and was

given direct information by staff. Ms. Darlington has always known the other RESP is for me to attend Law School.

86. Since Siobhan began university, the funds in her and Cameron's RESP have been used up. Ms. Darlington is aware of these facts and has always known the other RESP is for me.

2008

[120] Exhibit 2 at page 2 provides Mr. Moore's RESP and RRSP portfolio balance as of December 31, 2008:

RESP Fam (Joint)Plan ID 5008176
Registered in name of client (Dave Moore)
Beneficiary: Cameron Moore (other)
Siobhan Moore (other)
Renaissance ATL-1880-273
Total for RESP Fam (Joint) Plan: $5,497.22

RESP FamPlan ID 5005205
Registered in name of client (Dave Moore)
Beneficiary: Cameron Moore (other)
Siobhan Moore (other)
TML-205-2766547$ 6,962.90
TML-700-2766547$15,473.29
$22,436.19
Total for RESP Fam Plan$22,436.19

RRSP account$58,888.13

2009

[121] Finally, Mr. Moore offers a summary of his plans with the Investment Planning counsel as of October 29, 2009; proximate to the end of the parties' relationship (Exhibit 66 at page 43). The total value of all plans was $126,546.93, of which the components were as follows:

Plan ID 907917	OPEN (Individual)	$ 1,671.32
Plan ID 5003626	RRSP (Individual)	$91,413.92
Plan ID 5005205	RESP Fam (Individual)	$33,461.69

2010

[122] Mr. Moore says that the subject RESP Plan ID 5005205 account is in fact one he has always planned to access for his own education, i.e. training to become a lawyer. This claim must be reconciled with paragraph 43 of Exhibit 13 (unsworn) being Mr. Moore's "affidavit" filed April 21, 2010 which reads as follows:

> 43. Four hundred dollars per month continues to be withdrawn from my account for an RESP for the children and I have paid $550.00 for Cameron's soccer and deposited $131.99 in his account last week for things he said he needed for soccer.

2013

[123] Mr. Tim Ross of the Investment Planning Counsel provided a copy of his records (Exhibit 39).

[124] The value of the RESP account, Plan 5005205 to May 30, 2013 was $30,699.74 (Exhibit 39). Exhibit 34 contains a statement(s) from the Investment Planning Counsel showing Mr. Moore as the plan holder for a number of accounts as follows:

> RESP Plan ID 5005205
> Plan holder: Dave Moore
> Beneficiary: Siobhan Moore, Cameron Moore
> Account value on June 30, 2013 = $30,013.60
>
> RRSP Account Plan ID 5003626
> Plan holder: Dave Moore
> Account value on June 30, 2013 = $134,725.33

Page one of the report provides an account summary, being the total value of all accounts, in the amount of $164,738.93.

[125] In his covering letter dated June 11, 2013, Mr. Ross explained the following:

> - the RESP accounts were opened in 2000 and 2003
>
> - account TML-2766547 account opened in 2000 has Dave Moore as the subscriber and Siobhan and Cameron as beneficiaries - (this account has a balance of $30,000 but withdrawals of $20,181.95)

> - account ATL-27364587 had Dave Moore and Michelle Darlington as subscribers and Siobhan and Cameron as beneficiaries but it has been completely used for schooling.

Both of these accounts are included in Plan ID 5005205 (Exhibit 2, page 2). This RESP was established after the parties were living in Halifax. Mr. Moore was not attending UPEI at that time, which is when he said the RESP was set up for his own benefit.

[126] At page 7 of 9 of the documents provided by Mr. Ross, the following payments are shown:

> September 30, 2011 - Education assistance - $2,000
>
> January 11, 2012 - Education assistance - $3,181.95
>
> February 4, 2013 - Post secondary education - $10,000

Further, at page 8 of 9, a beneficiary summary for this plan is shown to May 30, 2013:

Siobhan Moore	$14,800.00 Contributed
	$ 2,560.00 CES grant received
Cameron Moore	$14,800.00 Contributed
	$ 2,840.00 CES grant received
	$ 1,976.74 CES grant received

[127] A footnote to the summary references Human Resources Development Canada's (HRDC) role in the CES Grant program. The note further indicates HRDC refused one or more of the education savings incentives applied for ‘last' year.

[128] Given all of the foregoing, including the oral and sworn evidence of both Mr. Moore and Ms. Darlington, I am satisfied, on a balance of probabilities, the plan now valued at approximately $33,000 and identified as an RESP account Plan ID 5005205 was established for and dedicated to the education of the parties' two children.

[129] These funds are being held for the children's education and must be dedicated, to the extent possible, to their post secondary education expenses. Only

after that option is exhausted will the funds be available to Mr. Moore or Ms. Darlington or to both.

Conclusion: Child Support, Education Expenses

- child support

[130] I have determined that an application of the child maintenance tables would result in a calculated underpayment of child support by Mr. Moore for two children in the amount of $20,598 to August 2013. The underpayment for the period to May 31, 2014 is an additional amount. The obligation after May 31, 2014 to August 31, 2014 was for one child. Obviously, Mr. Moore will be credited for payments he has made.

- education assistance/RESP

[131] Subject to my ruling on the RESP fund, I am satisfied that additional financial support from Mr. Moore for the children's educational pursuits whether past, present or future is not warranted.

[132] I have come to this conclusion for a number of reasons.

[133] Mr. Moore is in poor financial circumstances. I have determined that he must pay Ms. Darlington arrears of child support amounting to $20,598 to August 2013 and an additional amount for the period to the present. This will be paid with after tax dollars. In addition, a substantial spousal support obligation to be met by Mr. Moore will flow from this decision.

[134] Although Mr. Moore will presumably receive some tax benefit as a result of claiming the children's education expenses, he will remain significantly indebted and restrained nevertheless by this obligation.

[135] Both children are well placed to meet financial obligations that remain as a result of attending university. An order to pay special expenses must reflect the ability of a parent to meet the obligation and the resources of the children. There is a reasonable prospect that the RESP fund will be utilized by one or both children. If it can not be, it may be available to one or both parents in whole or in part to distribute to the children as that parent feels appropriate. Cameron has

earned a substantial income to date in 2014; benefited from child support paid by Mr. Moore in 2014 and will earn an income over the fall of 2014.

[136] In my view, Mr. Moore has done his part and provided substantial financial support to (or for) his children as a contribution to special expenses while they are/were at university. Cameron has sufficient resources to meet his needs including contributing to his room and board in 2014. Siobhan is no longer eligible for child support.

[137] I have addressed the status of the outstanding RESP under a separate heading.

Spousal Support

[138] Mr. Moore has paid $900 per month as spousal support since April 2010 pursuant to Justice MacDonald's order. This order remains in effect.

[139] The law governing entitlement to spousal support is summarized and forms part of my first decision beginning at paragraph 40 (*Darlington v. Moore*, 2013 NSSC 103):

> - '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.

(a) entitlement

[140] Ms. Darlington's entitlement to spousal support has not been challenged by Mr. Moore. He has focussed his attention on the quantum and the duration of spousal support in as much as he has suggested the Court should impute income to her.

[141] Sections 3A and 4 of the *Maintenance and Custody Act* provide as follows:

> Priority
>
> 3A (1) Where the court is considering an application for a child maintenance order and an application for a spousal or common-law partner maintenance order, the court shall give priority to child maintenance in determining the applications.
>
> (2) Where the amount of a spousal or common-law partner maintenance order is less than it otherwise would have been as a result of giving priority to child maintenance, any subsequent reduction or termination of that child maintenance

constitutes a change of circumstances for the purposes of an application for a variation order in respect of the spousal or common-law partner maintenance order.

Factors considered

4 In determining whether to order a person to pay maintenance to that person's spouse or common-law partner and the amount of any maintenance to be paid, the court shall consider

(a) the division of function in their relationship;

(b) the express or tacit agreement of the spouses or common-law partners that one will maintain the other;

(c) the terms of a marriage contract or separation agreement between the spouses or common-law partners;

(d) custodial arrangements made with respect to the children of the relationship;

(e) the obligations of each spouse or common-law partner towards any children;

(f) the physical or mental disability of either spouse or common-law partner;

(g) the inability of a spouse or common-law partner to obtain gainful employment;

(h) the contribution of a spouse or common-law partner to the education or career potential of the other;

(i) the reasonable needs of the spouse or common-law partner with a right to maintenance;

[142] I will nevertheless review the law governing entitlement to spousal support herein and acknowledge that I will apply the principles governing spousal support as discussed by me in *Strecko v. Strecko*, 2013 NSSC 49 beginning at paragraph 91:

> [91] The general principles governing spousal support were outlined in Burchill v. Savoie, 2008 NSSC 307 (CanLII), 2008 NSSC 307 beginning at paragraph 31:
>
> > [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.

[92] 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. While historically rooted in a concept of marriage that saw one spouse as powerful and the other as dependent, in its modern version the mutual obligation theory of marriage acknowledges the theoretical and legal independence of each spouse, but equally the interdependence of two co-equals. It postulates each of the parties to the marriage agreeing, as independent individuals, to marriage and all that it entails -- including the potential obligation of mutual support. The resultant loss of individual autonomy does not violate the premise of equality, because the autonomy is voluntarily ceded. At the same time, the mutual obligation model recognizes that actual independence may be a different thing from theoretical independence, and that a mutual obligation of support may arise and continue absent contractual or compensatory indicators.
>
> [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.

[93] Justice L'Heureux Dube in Moge v. Moge 1992 CanLII 25 (SCC), 1992 CanLII 25 (SCC), [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:

> [73] 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.

[94] Nevertheless, in the words of Justice MacLachlin in Bracklow supra, 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.
>
> . . . . .

[95] 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 . . . "

[143] As a result of applying these principles, I have concluded that Ms. Darlington is entitled to "spousal/partner" support. Mr. Moore and Ms. Darlington developed a relationship of inter dependency and clearly had an expectation that each would support the other. For most of the duration of their relationship they did.

(b) quantum

- imputed income

[144] As noted, Section 5 (*supra* para 139) of the *Maintenance and Custody Act* imposes an obligation on maintained spouses or common-law partners to assume responsibility for their own maintenance. The statute also provides for a reduction or forfeiture of partner maintenance in some circumstances:

> Reduction or forfeiture of maintenance
>
> 6.(1) Maintenance to which a spouse or common-law partner would otherwise be entitled may be reduced where the spouse or common-law partner entitled to maintenance engages in conduct that arbitrarily or unreasonably prolongs the needs upon which maintenance is based or that arbitrarily or unreasonably prolongs the period of time required by the person maintained to prepare himself to assume responsibility for his own maintenance.
>
> (2) Maintenance to which a spouse or common-law partner would otherwise be entitled may be reduced or eliminated where the spouse or common-law partner entitled to maintenance
>
> (a) persistently engages in a course of conduct that constitutes a repudiation of that spouse's marriage relationship;
>
> (b) persistently engages in a course of conduct which, if the common-law partners were married and living together, would constitute a repudiation of their marriage relationship;
>
> (c) marries;
>
> (d) remarries;
>
> (e) cohabits with another person in a conjugal relationship.
>
> (3) repealed 2000, c. 29, s. 6.

[145] Mr. Moore argues that Ms. Darlington should have retrained as a nurse, a profession that would have resulted in her earning an income in the $70,000 range. Ms. Darlington responded to this suggestion and said she could not do the work given the anticipated need to stand for long periods.

[146] Ms. Darlington was in her mid forties when the parties separated. She committed two years of study to a program that will yield a much lower income - if employment is found - as contrasted with re-employment as a nurse - if employment is found. She enrolled in the community college and is completing training as a health records professional.

[147] In the course of his evidence and his cross examination of Ms. Darlington, Mr. Moore pointed to other job experiences of Ms. Darlington and by implication, identified skill sets she possesses which made her employable and therefore, made her returning to the community college unreasonable.

[148] Ms. Darlington had been absent from nursing for a long time when the parties separated. I accept her evidence that much had changed in the profession and that her requalifying as a nurse would have been challenging. The work as a nurse, once attained, would also have been physically demanding.

[149] I am not satisfied, however, that her employment as a nurse was an unattainable or an unreasonable goal.

[150] Many individuals faced with a family crisis and the need to re-establish oneself following divorce, separation or the loss of a partner must take on tasks that are challenging. Some decide to not do that. Such is a person's prerogative.

[151] However, when the financial consequences of that choice are to borne in whole or in part by someone else, one must be prepared to justify one's choice. The Court must assess the choice Ms. Darlington has made.

[152] In her affidavit sworn September 28, 2012 (Exhibit 8) Ms. Darlington explained why she enrolled in the Nova Scotia Community College and in the two-year diploma program in Health Information Management. For the 2012-2013 year, program fees were $13,952.

[153] Ms. Darlington finished her first year classes in April 2013 and then completed a six-week practicum. She sought employment over the summer of 2013 but was unsuccessful until mid August of 2013 (Exhibit 18). Ms. Darlington completed the program in the spring of 2014 and then completed a seven week practicum.

[154] To finance her education, Ms. Darlington borrowed from her line of credit; from family members; the student loan program and accessed education grants. She estimates her student loan obligation as $12,141. She testified that she will earn approximately $40,000 if she gains employment in the insurance field.

[155] The considerations I must make when asked to impute income to a payor or payee were also discussed in *Strecko v. Strecko*, 2013 NSSC 49 beginning at paragraph 105:

> [105] The Court's authority to impute income is codified in the 'CSG'. Similar considerations govern when the Court is asked to impute income for purposes of determining spousal support and contributions to special expenses for children.
>
> [106] The Court is mindful of the distinction that can be made when the Court is determining income for purposes of child as contrasted with spousal support (see Richards v. Richards, 2012 NSCA 7 (CanLII), 2012 NSCA 7).
>
> [107] Justice Forgeron in Marshall v. Marshall, 2008 NSSC 11 (CanLII), 2008 NSSC 11 (CanLII), 2008 NSSC 11 (CanLII), 2008 NSSC 11 provides a helpful summary of the state of the law on this issue. At paragraph 17-18, she wrote:
>
> > 17. The discretionary authority found in section 19 of the Guidelines must be exercised judicially in accordance with the rules of reason and justice - not arbitrarily. There must be a rational and solid evidentiary foundation in order to impute income in keeping with the case law which has developed. The burden of proof is upon Ms. Marshall and it is proof on the balance of probabilities: Coadic v. Coadic 2005 NSSC 291 (CanLII), 2005 NSSC 291 (CanLII), (2005), 237 N.S.R. (2d) 362 (SC).
> >
> > 18. In reviewing the factors to be considered when a party has requested imputation, the court stated at paras. 14 to 16 of Coadic:
> >
> > > [14] In making my determination as to the amount of income to be attributed to Mr. Coadic, I am not restricted to the actual income which he earned or earns, rather I am permitted to review Mr. Coadic's income earning capacity having regard to his age, health, education, skills and employment history.
> > >
> > > [15] In Saunders-Robert v. Robert, [2002] N.W.T.J. No. 9, 2002 CarswellNWT 10 (S.C.), Richard, J., stated at para. 25:
> > >
> > > > [25] When imputing income, it is an individual's earning capacity which must be considered, taking into account the individual's age, state of health, education, skills and employment history. In the circumstances of the respondent, in my view it would not be unreasonable to impute, at a minimum, one-half of the income that the respondent earned in 1995 and 1996, say $50,000. I note that the respondent's present income, according to his own evidence, is approximately $42,500.00."
> > >
> > > [16] In R.C. v. A.I., [2001] O.J. No. 1053, 2001 CarswellOnt 1143 (Sup. Ct.), Blishen, J., reviewed the principle that income is based upon the amount of income which a parent could earn if working to

his/her capacity and further adopted the factors to be applied when imputing income as proposed by Martinson, J., in Hanson v. Hanson, [1999] B.C.J. No. 2532 (S.C.). Blishen, J., stated at paras. 79 to 80:

> [79] By imputing income, the court is able to give effect to the legal obligation on all parents to earn what they have the capacity to earn in order to meet their ongoing legal obligation to support their children. Therefore, it is important to consider not only the actual amount of income earned by a parent, but the amount of income they could earn if working to capacity (Van Gool v. Van Gool 1998 CanLII 5650 (BC CA), 1998 CanLII 5650 (BC CA), (1998), 166 D.L.R. (4th) 528).
>
> [80] In Hanson v. Hanson, [1999] B.C.J. No. 2532, Madam Justice Martinson of the British Columbia Supreme Court, outlined the principles which should be considered when determining capacity to earn an income as follows:
>
> > 1. There is a duty to seek employment in a case where a parent is healthy and there is no reason why the parent cannot work. It is "no answer for a person liable to support a child to say he is unemployed and does not intend to seek work or that his potential to earn income is an irrelevant factor." (Van Gool at para. 30).
> >
> > 2. When imputing income on the basis of intentional under-employment, a court must consider what is reasonable under the circumstances. The age, education, experience, skills and health of the parent are factors to be considered in addition to such matters as availability to work, freedom to relocate and other obligations.
> >
> > 3. A parent's limited work experience and job skills do not justify a failure to pursue employment that does not require significant skills, or employment in which the necessary skills can be learned on the job. While this may mean that job availability will be at a lower end of the wage scale, courts have never sanctioned the refusal of a parent to take reasonable steps to support his or her children simply because the parent cannot obtain interesting or highly paid employment.
> >
> > 4. Persistence in unremunerative employment may entitle the court to impute income.

> 5. A parent cannot be excused from his or her child support obligations in furtherance of unrealistic or unproductive career aspirations.
>
> 6. As a general rule, a parent cannot avoid child support obligations by a self- induced reduction of income.

[156] I am satisfied Ms. Darlington's decision was reasonable. I accept the reasons she offers for making her decision as valid and made in good faith. I am not prepared to impute income to her on the basis of an alleged decision to be under employed. In addition, even if she had sought re-qualification as a nurse, two (2) years of retraining was required.

[157] Ms. Darlington had essentially lost her career as a nurse. In late 2009 she found herself in a high conflict divorce proceeding with responsibility for two adult children of university age. She offered reasons for not wanting to be re-trained as a nurse. These included the difficulty involved in doing so and the difficulty she would face should she be successful. The work would be particularly demanding physically and more than she could endure. I accept her conclusion to be reasonable. She had discontinued nursing while Mr. Moore and she were a couple. He accepted the decision then.

[158] I am not satisfied that a nurse's income should be imputed to Ms. Darlington as argued by Mr. Moore for the period 2009 to the present. Ms. Darlington did seek and gain employment as she testified to. She was capable of earning $30,000 per year as income following her separation and I impute this level of income to her for the years she was not in full time attendance at school.

[159] She has now completed her program and her income level effective September 1, 2014 will be imputed to be $40,000 on an annualized basis.

- calculation of spousal support/spousal support guidelines

[160] Using an income of $140-$150,000 for Mr. Moore over the period 2010-2013 and an income for Ms. Darlington of 0.0 in 2013; $19,164 in 2012; $30,441 in 2011 and $29,309 in 2010, Mr. Crowther calculated Mr. Moore's spousal support arrears to August 2013 as $88,306 after crediting Mr. Moore with the payment of $900 per month. He applies the spousal support guidelines to reach this conclusion.

[161] As stated, Mr. Crowther, on behalf of Ms. Darlington, calculates the spousal support under payment in the following manner, after applying the *Spousal Support Guidelines*:

2010	
January - February March - December	owed $3,127/month, paid 0.0/month owed $3,534/month, paid $900/month
2011	
January - December	owed $2,201/month, paid $900/month
2012	
January - December	owed $2,654/month, paid $900/month
2013	
January - December	owed $3,169/month, paid $900
Claimed Underpayment $88,306 to December 2013	

[162] Ms. Darlington is asking the Court to order ongoing spousal support of $3,863 each month, an amount she says is on the low range of the spousal support advisory guidelines. She also calculates that after Mr. Moore's actual income since separation is considered, she has a claim of $107,904 for retroactive spousal support to August 2013 (see Exhibit 18, Ms. Darlington's affidavit dated August 29, 2013 beginning at paragraph 88). The Court will seek clarification of this amount given it is different than the amount referenced in the preceding paragraph.

[163] These parties were never married to each other. Even if they were, the Spousal Support Guidelines would not be binding. The guidelines are an important reference to assist Courts to arrive at a fair level of support consistent with the principles that form the basis of spousal support orders and the objectives to be achieved, whether the partner/spousal support is pursuant to the '*MCA*' or the *Divorce Act*.

[164] In many cases, a payor's financial position will reflect the investment of a couple over the years. This is not a pre-condition to determining the quantum of

spousal support commensurate with a payor's income/means and circumstances. However, when one partner is realizing financial gain from a joint investment in that person's earning capacity, that is a factor for the Court to consider and weighs in favour of an award on the higher end of the scale.

[165] Herein Mr. Moore receives a significant payment as disability income. The fact he receives this payment is relevant to an assessment of his means. However, Ms. Darlington can not be credited with any part in his eligibility to receive disability income, nor can the fact of their relationship. When they were together, the VAC payment was significantly lower. While this couple was together, Mr. Moore did not receive the current level of disability income. Consequently, the lifestyle they enjoyed as a couple did not reflect Mr. Moore's current level of income.

[166] In the October 2, 2013 letter (Exhibit 44) Mr. Moore is advised that he has been in receipt of an additional benefit because he was understood to be in a common law relationship with Ms. Darlington. Given that he is no longer in that relationship, he is to be reassessed. He is concerned that he will be assessed on over payment and directed to repay that amount. He is unsure of what interest charges or penalties, if any, will also be assessed as a consequence of the over payment.

[167] Subject to further submissions as requested in the concluding paragraphs of this decision, I have decided to set Mr. Moore's average income as $145,266.88 for spousal support purposes. This is the figure I will use when doing calculations with the Spousal Support Guidelines. To May 31, 2014, Mr. Moore had a child support obligation for two children; after that and to August 31, 2014, the obligation was for one child. Ms. Darlington's income is set at $30,000 for 2010 and 2011; $30,000 to August 31, 2012; 0 for the period September 1, 2013 to September 1, 2014. Thereafter, her income is set at $40,000.

[168] I have determined the parties' relationship to have been 18.5 years in duration.

(d) duration

[169] Mr. Moore paid $900/month beginning in April 2010. To the end of August 2014, this amounts to 53 months x $900 = $47,700.

[170] The Court will hear the parties and accept written submissions on the calculations including duration. However, the Court may not apply the spousal support guidelines.

Conclusion: Spousal Support

[171] I have considered the prospect of Mr. Moore's VAC income being effectively reduced on a retroactive basis should he be assessed an overpayment because Ms. Darlington and he ceased cohabitation in the fall of 2009.

[172] The potential consequential reduction of his income being $583.50 per month may impact the quantum of spousal support I feel is appropriate in the circumstances. It may also be impacted by Mr. Moore being obliged to repay any amounts to VAC as a consequence of an overpayment. Given the evidence before me, both of these outcomes seem likely and I will factor this circumstance of Mr. Moore into my determination as to the level of future and past spousal support.

[173] However, I have also concluded that the quantum of spousal support should not be set until the Court has heard evidence pertinent to the division of property and debts flowing from the parties' relationship or forming part of their lives together and ruled on the issues arising from that phase of the hearing.

[174] A full picture of the condition, means and circumstances of Mr. Moore and Ms. Darlington are not yet determined and it would therefore be premature to determine the quantum of spousal support.

Further Calculations

[175] The parties are directed to submit updated child and spousal support calculations that show:

> - how the quantum of Mr. Moore's grossed up income is arrived at and why the calculation should be accepted for the period since separation including the % used to determine the grossed up amount;
>
> - given the Court's conclusions, the net amount of child support now outstanding and how that amount is arrived at;

- spousal support guideline calculations that reflect Ms. Darlington having an income of $30,000 over the post separation period with the exception of the period September 1, 2012 to September 1, 2014 when it is set at zero. After September 1, 2014, her income should be set at $40,000; and

- commentary on the calculations shown herein.

[176] The parties are also directed to advise the Court if the subject RESP account proceeds can be made available to one or both children or to either party.

ACJ