SUPREME COURT OF NOVA SCOTIA
Citation: Webster v. Goncalves, 2012 NSSC 197

Date: 20120517
Docket: 1201-060606
Registry: Halifax

Between:

Rachel Marie (Goncalves) Webster

Applicant

and

Ernesto Serralheiro Goncalves

Respondent

Judge:	Justice Carole A. Beaton
Date of Hearing:	March 5, 2012
Date of Written Decision:	May 17, 2012
Counsel:	Rachel Webster, Self Represented Ernesto Goncalves, Self Represented

By the Court:

Introduction

[1] Mrs. Webster ("the Applicant") and Mr. Goncalves ("the Respondent") share joint custody of two children with the Applicant acting as the primary parent. The payor Respondent currently contributes $500.00 per month in child support, and makes no contribution to section 7 *Federal Child Support Guidelines,* SOR/97-175 expenses.

[2] The Applicant filed a Variation Application with the Court on March 16, 2011 seeking an Order requiring the Respondent to:

> (a) adjust his child support payment to reflect the *Guidelines (supra)* Table amount of child support on both a retroactive (to January 1, 2010) and prospective basis;
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> (b) contribute on both a retroactive (to January 1, 2010) and prospective basis to child care costs incurred by the Applicant;
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> (c) increase his contribution to the children's extra curricular activities.

[3] Following the parties participation in the conciliation process and several court appearances, the Application was heard on March 5, 2012. As the hearing commenced, the parties advised they were in agreement the Respondent's obligation to contribute to extra curricular activities should continue as set out in the Corollary Relief Judgment of September 17, 2008, without variation. Specifically, paragraph 43 of the Minutes of Settlement (the "Minutes") incorporated in the Corollary Relief Judgment provided:

> The wife will fund from her regular monthly child support the children's extra curricular activities to a maximum of $200 per child per year without further contribution from the husband. Any extra curricular activities over and above $200 per child per year are to be discussed between the parties and if both parties agree to the activity, are then to be shared equally.

Therefore, it is not necessary to adjudicate on the third aspect (paragraph [1](c) above) of the Applicant's claim for relief.

[4] In addition, the Applicant advised (as the evidence would eventually establish) the Respondent had become unemployed mere days prior to the hearing. In light of that very recent development, the Applicant was not seeking to have the Court order the Respondent to contribute to current child care costs, but rather wanted the Court to consider only the question of a retroactive contribution to the same. The Applicant asked the Court to suspend any obligation it might find the Respondent to have regarding contribution to child care to a future review date.

[5] The questions remaining for determination are whether the Court should make any adjustment, either on a retroactive and/or prospective basis to the Table amount of child support, and whether the Court should require any retroactive contribution to child care expenses.

Background

[6] When the parties divorced in September 2008, the incorporated Minutes identified payment of child support, a contribution to child care expenses and a review of those provisions, and acknowledged the *Guidelines, (supra*) as follows:

> 36. It is acknowledged that the husband has paid child support to the wife pursuant to the parties Interim Agreement of April 25, 2006.
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> 37 Based on the Nova Scotia Child Support Guidelines Table effective May 2006 and the husband's income of $46, 280.39, the husband would be expected to pay to the wife the sum of $664.00 per month. However, the husband shall pay to the wife the sum of $500.00 per month commencing May 1, 2008 and continuing in installments of $250.00 each on the 15th and 30th days of each month thereafter for the two children of the marriage. The parties acknowledge that this amount is less than the Child Support Guidelines table amount based on the husband's income as defined herein. The wife has agreed to accept this amount based on the parents present belief that this amount of child support is sufficient to reasonably meet the needs of the children.
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> 38 The quantum of child support herein was determined on the basis of the parenting arrangements as set out herein, that is, the wife is the primary care giver of the children and the father's access may, on occasion, result in the children being in the care of the father more than 40% of the time which shall not be a change in circumstance for a variation of the child support during the period from the date of execution of this Agreement to the date of the review provided for in paragraph 45 herein.
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> . . .
>
> 42. The parties acknowledge that in 2007 the wife paid childcare costs for the two children in the amount of $6, 670.00 per annum. She receives a tax deduction for this expense. The parties agree that the husband will not be required to make a contribution to the child care expenses but this will be reviewed in accordance with paragraph 45.
>
> . . .

> 44 Commencing in 2008 and by May 15th of each year, the parties shall exchange their Income Tax Returns for the previous calendar year, together with all attachments in support of the return. Any Notices of Assessment or Reassessment from Canada Revenue Agency shall also be provided to other party within seven days of receipt.
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> 45 Pursuant to the Agreement, the quantum of child support the father pays is less than the base table amount of child support pursuant to the **Federal Child Support Guidelines** and does not include a contribution to the children's childcare expenses. On or before June 1, 2010, the parties shall review child support. If the parties are unable to reach agreement, either party may apply to a court of competent jurisdiction to review child support. Any variation to child support may be retroactive to January 1, 2010.

[7] These provisions establish the quantum of support payable by the Respondent effective May 1, 2006, the rationale for payment below the Table amount, a mechanism for on-going annual exchange of income tax information, and a mechanism for a mandatory review of both child support and contribution to child care no later than June 2010.

[8] The evidence before the Court established that neither party followed clause 45 of the Minutes - neither engaged in a review of the quantum of child support on or before June 2010. However, a series of emails put before the Court in the Applicant's Affidavit and acknowledged by the Respondent during the hearing clearly documented establish that the Applicant raised with the Respondent the matter of an adjustment to child support in the first week of December 2010. She filed her Application with the Court three months later.

[9] Prior to the hearing the Applicant filed her Affidavit, Statement of Income and a Statement of Special or Extraordinary Expenses. In response the Respondent filed an Affidavit and Statement of Income.

[10] At the hearing each party provided additional *viva voce* evidence to the Court. At that time the Respondent filed the following documents which were marked as Exhibits:

> (a) Exhibit No. 1 - A Record of Employment from G.D. Brokerage Incorporated for the period June 28, 2011 to February 21, 2012.

(b) Exhibit No. 2 - A 2011 T4 Statement from G.D. Brokerage Incorporated.

(c) Exhibit No. 3 - A T4E 2011 Statement showing receipt of Employment Insurance benefits.

(d) Exhibit No. 4 - A 2011 T4 Statement from Frito Lay Canada.

(e) Exhibit No. 5 - 3 pay stubs (dated January 9, 2012, December 30, 2011 and December 23, 2011) from G.D. Brokerage Incorporated.

[11] The Court also had for its consideration a chart prepared by the Applicant - Exhibit No.6 in the hearing - which identified: the Respondent's income for the period from 2006 (when the Minutes came into effect) through 2011, the *Guidelines (supra*) yearly Table amount of child support dictated by that income, and a calculation of child care costs for the same period. In his evidence the Respondent concurred the information contained therein was accurate. A copy of that Exhibit is reproduced as Schedule "A" attached to this decision. (As the Applicant seeks relief retroactive to January 1, 2010 it is not necessary for the Court to consider the information contained in the chart which predates that time.)

Has there been a change in circumstances?

[12] The Respondent has consistently paid $500.00 per month in child support since the Minutes came into effect in 2006, despite ensuing changes in his income, as established in the evidence of both parties and chronicled in Schedule "A", and regardless of the failure of the parties to adhere to the requirements of paragraphs 44 (supplying income information annually) and paragraph 45 (mandatory review) of the Minutes.

[13] Section 17 of the *Divorce Act*, R.S.C. 1985, c.3 contemplates the variation of a child support order. The provisions relevant to this Application are:

> **Order for variation, rescission or suspension**
>
> 17. (1) A court of competent jurisdiction may make an order varying, rescinding or suspending, prospectively or retroactively,

> (a) a support order or any provision thereof on application by either or both former spouses; or
>
> (b) a custody order or any provision thereof on application by either or both former spouses or by any other person.

Terms and conditions

(3) The court may include in a variation order any provision that under this Act could have been included in the order in respect of which the variation order is sought.

Factors for child support order

(4) Before the court makes a variation order in respect of a child support order, the court shall satisfy itself that a change of circumstances as provided for in the applicable guidelines has occurred since the making of the child support order or the last variation order made in respect of that order.

Guidelines apply

(6.1) A court making a variation order in respect of a child support order shall do so in accordance with the applicable guidelines.

Court may take agreement, etc., into account

(6.2) Notwithstanding subsection (6.1), in making a variation order in respect of a child support order, a court may award an amount that is different from the amount that would be determined in accordance with the applicable guidelines if the court is satisfied

> (a) that special provisions in an order, a judgment or a written agreement respecting the financial obligations of the spouses, or the division or transfer of their property, directly or indirectly benefit a child, or that special provisions have otherwise been made for the benefit of a child; and
>
> (b) that the application of the applicable guidelines would result in an amount of child support that is inequitable given those special provisions.

[14] Furthermore, section 17(4) must be read in conjunction with section 14(b) of the *Guidelines, (supra)* which states:

> Circumstances for variation
>
> 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:
>
> > (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...

[15] The Court must be persuaded there has been a change in circumstances before any change to the child support provisions of the Minutes might be made going forward. I am satisfied on the whole of the evidence there has been a change in the Respondent's circumstances since the making of the last order. That change is found in: (a) the Respondent's not insignificant increase in annual employment income in 2010 over what it had been in 2006 when the Minutes came into effect and (b) the Respondent's two periods of unemployment, in 2011 and 2012, with a concurrent reduction in his income.

[16] Further, it is to be remembered that paragraph 45 of the Minutes specifically contemplated an automatic review of the quantum of child support on or before June 1, 2010. As I am satisfied there has been a change in circumstances pursuant to s.17 of the *Divorce Act, (supra)* it is not necessary to consider the impact of the mandated review found in the Minutes although that factor will impact on the question of retroactivity.

The Applicant's evidence

(a) Child support

[17] I am satisfied until the Applicant filed her Application in March 2011 there had been no exchange of Income Tax returns as contemplated in the Minutes because, as the Applicant explained, she never had any reason to believe there had been any increase in the Respondent's annual income from the figure reflected in the Minutes. She could recall on occasion the Respondent had identified to her it was "difficult to make ends meet" and she understood that he had suffered some "set backs" in terms of income. I am satisfied that any disclosure of financial information consisted only of verbal comments by the Respondent to the Applicant

which portrayed his financial circumstances in a negative light; disclosure did not extend to an exchange of supporting documentation and specifically, income tax returns. It was only when her Application triggered a mandatory exchange of financial information that the Applicant learned the Respondent had experienced an increase in income (over 2006) in 2010.

[18] On cross- examination the Applicant was pressed by the Respondent that *neither* party had carried out the review of respective incomes or the 2010 review of child support referenced in the Minutes. While she acknowledged the same, the Applicant emphasized the failure to do so was in part because the parties have always been able to communicate about and show flexibility regarding their respective time with the children, however they do not have the same level of cooperation when it comes to "money matters" pertaining to the children.

[19] The Respondent suggested that historically the parties were getting along well and the children's needs were being met, until that point in time when he said he would not be able to contribute to the children's extra curricular activities. The Applicant countered that the parties were not before the Court on an earlier date because she had no financial disclosure to prompt her that a return to Court was needed. I accept the evidence of the Applicant on that point, underscored by the Respondent's later evidence that theirs was essentially a "don't ask - don't tell" policy. It makes more sense that, as the Applicant described it, there was simply nothing for her to seek to review in 2010 because she had been led by the Respondent to believe he had no income changes, or at least certainly no positive ones, after 2006.

(b) Child care

[20] The Minutes provided the Respondent would not make any contribution to child care and that matter would also be reviewed in 2010 (see clause 42 of the Minutes, in paragraph 5 above). The Applicant testified that between 2006 and 2010 she paid over $22,000.00 in child care and her real costs were increasing over time, as per the calculation contained in Exhibit 6 (Schedule "A"). The Applicant commented if she had known at the time the Minutes were signed her child care costs would exceed $20,000.00 from the period 2006 through 2011 she might not have been so quick to agree. The Applicant clarified she was not necessarily seeking an equal splitting of the retroactive child care expenses but a proportional share based on any formula the Court might deem appropriate.

[21] The Applicant testified the parties' Minutes suitably reflected the needs of the parties and their children when executed, but she could not agree with the suggestion repeatedly put to her on cross-examination that as of the date of the hearing all of the needs of the children were continuing to be met. By way of one example she reported the cost of child care had increased in the 2010-2011 period to reflect the fact that she now worked four days per week as opposed to three days per week.

The Respondent's evidence

[22] The Respondent agreed he had never disclosed to the Applicant when he earned income higher than that recorded in the Minutes, nor had he ever offered to make any contribution to child care. He justified the same by saying he thought the Applicant was "ok with it" based on the contribution he was making to child support. When confronted in cross examination with the contents of paragraph 45 of the Minutes which identified a payment of $500 child in support only with no contribution to child care, the Respondent agreed that he was not making any contribution specifically to child care but that the child support payment he was making *could* be used in any way, with any portion of it being applied to either child care and/or child support as the Applicant might choose.

[23] The Respondent repeatedly emphasized the parties had spent a great deal of time, money and energy in reaching the Minutes, which was a document intended to look after the needs of the children and enable each party to care for, love, support and nurture them. He was adamant that the Applicant knows the children will always be looked after and cared for by him as they are more important than money. He noted the parties share "almost equally" their parenting time with the children. While that maybe, nonetheless, there is a complete absence of evidence to establish the parenting arrangement set out in the Minutes has changed to the extent it might alter the Respondent's child support obligation.

[24] The Respondent was firm the Minutes, intended to set out what would work for the parties, had worked very well - so well the parties did not need a review in June 2010 or surely the Applicant would have raised the matter with him at that time. This approach would suggest the onus was solely on the Applicant to trigger a review pursuant to clause 45 of the Minutes. In my view, a careful read of that

clause cannot support the obligation belonged only to the Applicant; the Respondent was equally responsible to trigger a review.

[25] The Respondent's justifications and rationale for the history that has unfolded regarding a lack of adherence to the review provisions of the Minutes are without merit. The contents of clause 45 of the Minutes address the very principle articulated in *Staples v. Callendar*, 2010 NSCA 49, wherein Bateman, J. on behalf of the Court stated at paragraph 9:

> The *Child Maintenance Guidelines* govern the amount of child support under the **Maintenance and Custody Act**. The custodial parent's income is irrelevant to the Table amount of child support which is based upon the income of the non-custodial parent ("the payor"). Consequently, the Table amount is not based upon the child's need for support, but is fixed in accordance with the non-custodial parent's ability to pay. Adequate financial disclosure, particularly by the payor parent is key to determining the proper amount of support. (emphasis added**)**

Obviously, the matter before the Court in *Staples (supra)* involved provincial child support Guidelines, however the same need for adequate disclosure exists when employing the federal *Guidelines.*

[26] The Respondent's position fails to recognize that while calculation of the appropriate child support quantum is predicated on a requirement of accurate disclosure of the payor's income, ultimately the support goes to the benefit of the children.

[27] It is difficult to understand how the Respondent could maintain Minutes crafted in 2006 might not need adjustment as the years passed. The very fact that it would be unrealistic to expect the Minutes to govern in such a fashion as to permit the parties and their respective circumstances to remain static was obviously contemplated in the clause 45 stipulation of a calendar-driven review in June 2010.

Child Support

[28] The Respondent's position as articulated throughout his evidence misses entirely the point that the Court cannot be concerned with the ease or comfort of financial arrangements between the parties to the detriment of the best interests of children and the right of children to be supported financially by their parents.

[29] The Respondent suggested to the Court he would be prepared to make a contribution to child care expenses incurred by the Applicant based upon a proportional or an equal sharing of her annual after tax child care costs. In the alternative, the Respondent proposed paying $100 per week for the children which would be "capped" as a universal payment toward both child support and child care. A third alternative he offered was to pay $100 per week child support, also "capped" and then the parties could "look at child care costs and come up with something suitable".

[30] None of the above proposals are reasonable or appropriate in the circumstances. The role of the Court is not to negotiate a solution with the Respondent in order to serve his obvious goal of budgeting only a particular amount of money to be paid to the Applicant each month. Any decision about what is appropriately done in this or any case has its genesis in the application of the *Guidelines (supra)* unless there is sound reason to deviate from them or unless the parties agree to something outside the *Guidelines, (supra)* and can then persuade the Court it is appropriate to endorse the same (as was the case with the Minutes of these parties, which allowed for an amount of child support lower than the Table amount). Here the former scenario cannot be permitted as there is no sound evidentiary basis upon which to do so, and the latter scenario does not exist as there is no such agreement between the parties.

[31] When the Respondent was queried in cross examination as to what he thought was the purpose of the *Guidelines (supra)* he responded they applied to fathers who did not spend much time with their children or take them on outings or only saw their children every few weekends or not at all. The Respondent was of the view that based on the amount of time he spends with his children the *Guidelines (supra)* "don't really apply to a father like me".

[32] Clearly the Court takes a different view of the applicability of the *Guidelines (supra)* to all payors, including the Respondent. While his position could be characterized as defensive, rather it is more likely borne out of a misconception that the quality or frequency of parenting correlates inversely to the dollar amount of child support paid by that parent. At the risk of understating it, such is simply not ever the case.

[33] The purpose of the *Guidelines (supra)* is found in Section 1:

> The objectives of these Guidelines are
>
> (a) to establish a fair standard of support for children that ensures that they continue to benefit from the financial support of both spouses after separation;
>
> (b) to reduce conflict and tension between spouses by making the calculation of child support orders more objective;
>
> (c) to improve the efficiency of the legal process by giving courts and spouses guidance in setting the levels of child support orders and encouraging settlement; and
>
> (d) to ensure consistent treatment of spouses and children who are in similar circumstances.

Nothing about those four objectives relates to the amount or kind of time any children spend with any payor parent.

[34] There is nothing in the evidence which is persuasive of any conclusion other than the Respondent must be required to pay child support going forward pursuant to the *Guideline* Table amount that corresponds to his income. Section 16 of the *Guidelines (supra)* provides:

> Subject to sections 17 to 20, a spouse'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.

The Respondent's income can be established by reference to line 150 of his prior year's income tax return or in the alternative, as frequently occurs to allow for adjustments to the Table amount of support, by reference to up-to-date financial information that establishes his current rate of income.

[35] The Respondent was laid off on February 21, 2012 and has again applied for Employment Insurance. At the date of hearing he did not have any confirmation as to whether his claim would be accepted or, if it is to be accepted, what the amount of his benefits might be. He testified he is looking for work through the internet but he has limited education and has only ever worked in sales from a vehicle. His evidence was that when he collected Employment Insurance benefits in 2011 he earned $800.00 every two weeks. This would calculate to an annualized income of $20, 800.00, which it is appropriate to impute as the Respondent's income going

forward, based his evidence as to what he earned through the same source when he found himself similarly unemployed less than a year ago. That figure attracts a Table amount of child support of $295.00 per month effective February 15, 2012 and going forward in two monthly installments on the 15th and 30th of each month (which payment schedule mirrors that found in the Minutes).

Retroactivity - analysis

[36] There is nothing in the evidence to support that it would be inappropriate or unjustified to consider a retroactive award in this case, both as a matter of law and based upon the Minutes.

[37] As noted by Williams, J in *Anderson v. Anderson*, 2011 NSSC 504 at paragraphs 14-15:

> The issue of retroactive child support is dealt with in *D.B.S. v. S. R. G.*,2006 SCC 37 (Supreme Court of Canada), a case of the Supreme Court of Canada. Retroactive Orders are not exceptional. The Court should not be saying "well, it is only in exceptional circumstances that a retroactive Order should be made". That is not the case at all. Retroactive Orders can and are often made by the Court.
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> The Supreme Court of Canada did, however, say it is not always appropriate for a retroactive award to be ordered.
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> > Retroactive awards will not always resonate with the purposes behind the child support regime. This will be so where the child would get no discernible benefit from the award. Retroactive awards may also cause hardship to a payor parent in ways that a prospective award would not. In short, while a freestanding obligation to support one's children must be recognized, it will not always be appropriate for a Court to enforce this obligation once the relevant time period has passed.

[38] In this case the evidence is clear that neither party lived up to the Minutes by failing to exchange annual income tax information. Beyond that, the Respondent payor withheld from the Applicant a material change in his income consisting of an income increase in 2010, which, ironically, was the same year in which a mandatory review of both quantum of child support and contribution to child care by the Respondent were to occur, per the same Minutes the Respondent now argues were designed to lead the parties forward. While neither party pressed the

matter of a review in 2010, the evidence satisfies me that Respondent was disingenuous in his own reasons for not doing so.

[39] In *D.B.S* v. *S.R.G; L.J.W v T.A.R*; *Henry v. Henry; Hiemstra v. Hiemstra*, 2006 SCC 37 Bastarache, J. stated at paragraphs 124 - 125:

> The date when increased child support should have been paid, however, will sometimes be an more appropriate date from which the retroactive order should start. The situation can most notably arise where the payor parent engages in blameworthy conduct. Once the payor parent engages in such conduct, there can be no claim that (s)he reasonably believed his/her child's support entitlement was being met. This will not only be the case where the payor parent intimidates and lies to the recipient parent, but also where (s)he withholds information. Not disclosing a material change in circumstances - including an increase in income that one would expect to alter the amount of child support payable - is itself blameworthy conduct. The presence of such blameworthy conduct will move the presumptive date of retroactivity back to the time when circumstances changed materially. A payor parent cannot use his/her informational advantage to justify his/her deficient child support payments.
>
> The proper approach can therefore be summarized in the following way: payor parents will have their interest in certainty protected only up to the point when that interest becomes unreasonable. In the majority of circumstances, that interest will be reasonable up to the point when the recipient parent broaches the subject, up to three years in the past. However, in order to avoid having the presumptive date of retroactivity set prior to the date of effective notice, the payor parent must act responsibly: (s)he must disclose the material change in circumstances to the recipient parent. When the payor parent does not do so, and thus engages in blameworthy behaviour, I see no reason to continue to protect his/her interest in certainty beyond the date when circumstances changed materially. A payor parent should not be permitted to profit from his/her wrongdoing. [emphasis added]

[40] The Respondent would or should have known a review would likely mean a higher quantum of child support payable by him plus the possibility of a contribution to child care given his increased income. He experienced a change in income in 2010 and furthermore the Minutes dictated a mandatory review in the same year. Both events justify a retroactive award in this case.

[41] In *Conrad v. Skerry*, 2012 NSSC 77, Justice Jollimore considered the question of retroactivity and the guiding principles:

> In deciding whether to make a retroactive award, the competing principles of certainty and flexibility are to be balanced, and the core principles of child maintenance respected. The core principles of child maintenance were identified by the Supreme Court of Canada in *Richardson*, 1987 CanLII 58 (SCC), 1987 CanLII 58 (S.C.C.) and *Willick*, 1994 CanLII 28 (SCC), 1994 CanLII 28 (S.C.C.) and were endorsed in *D.B.S. v. S.R.G.*; *L.J.W. v. T.A.R.*; *Henry v. Henry*; *Hiemstra v. Hiemstra*, 2006 SCC 37 (CanLII), 2006 SCC 37 at paragraph 38: child maintenance is the child's right; the child's right to maintenance survives the breakdown of the parents' relationship; child maintenance should, as much as possible, perpetuate the standard of living the child experienced before the parents' relationship ended; and the amount of child maintenance varies, based upon the parent's income.
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> [90] *D.B.S. v. S.R.G.*; *L.J.W. v. T.A.R.*; *Henry v. Henry*; *Hiemstra v. Hiemstra*, 2006 SCC 37 (CanLII), 2006 SCC 37, instructs me to consider: the reason for Ms. Conrad's delay in claiming maintenance; Mr. Skerry's conduct; Breana's past and present circumstances; and whether a retroactive award would result in hardship in deciding if a retroactive award is appropriate. All of these factors must be considered and no one factor on its own determines whether a retroactive award is appropriate, according to Justice Bastarache, who wrote for the majority...[emphasis added].

[42] I am satisfied in the instant case, the Applicant's delay in seeking an adjustment to child support was because she was never provided with any disclosure that there had been changes to the Respondent's income other than his verbal reports of reductions in income, and even then, the Respondent himself did not pursue a downward variation in the Table amount. There is nothing before me to suggest the circumstances of the children from 2010 to date would not justify a retroactive award. Cross-examination of the Applicant made that apparent. The evidence does not establish there might be hardship to this Respondent in making the necessary retroactive adjustments to his child support obligation, over and above the presumed challenge that faces any payor found to owe monies retroactively. Indeed the calculations contained in paragraph 35 herein reveal a benefit to the Respondent to the extent that his very recent financial circumstances have had the effect of reducing his monthly child support obligation from the $500.00 found in the Minutes.

Retroactivity - child support

[43] As stated earlier, the Respondent adopted the information contained in Schedule "A" and amplified it by explaining that in 2010 he had earned $60,000.00 and an additional $17,000.00 realized when he cashed an RRSP. He stated he used the RRSP funds to pay $2,000.00 debt, purchase a $14,000.00 vehicle (upon which he still owes $5,000.00) and pay the tax liability attracted by withdrawing the RRSP funds.

[44] The Respondent argued the $17,150.40 of RRSP income shown at line 129 of his 2010 return should not enter into the calculation of the Table amount of support for 2010 even though he acknowledged he had to claim it as income on his return. Should all of the income available to the Respondent in 2010 be used to calculate his support obligation? The answer lies in line 150 of his 2010 Income Tax return, which records "total income" of $77, 869.28, as section 16 of the *Guidelines (supra)* instructs that figure be used.

[45] Therefore, the Respondent's 2010 income for the purpose of calculating child support is, by virtue of section 16, $77,869.28. That figure attracts a Table amount of child support for two children at the rate of $1081.00 per month or $12, 972.00 per year for 2010. The Respondent paid $500.00 per month or $6000.00 per year for 2010, therefore the arrears for 2010 are calculated as $6972.00.

[46] The Respondent's 2011 total income of $41,305.78 came from three sources: employment with Frito Lay; employment with G.D. Brokerage and employment insurance benefits. That figure attracts a Table amount of child support for two children at the rate of $596.00 per month or $7152.50 per year for 2011. The Respondent paid $500.00 per month or $6000.00 per year for 2011, therefore the arrears for 2011 are calculated as $1152.00.

[47] The *Guideline (supra)* Table amounts were revised in December 2011; based upon the Respondent's 2011 total income of $41, 305.78 his child support obligation for the month of January 2012 was $587.00. He paid $500.00, and is therefore $87.00 in arrears for January 2012.

[48] The total arrears owing are fixed at $8211.00. The Respondent is required to have that amount paid in full on or before June 1, 2014. Arrears shall be collected through the Maintenance Enforcement Program.

Retroactivity - child care

[49] Section 7(1)(a) of the *Guidelines (supra)* contemplates child care costs as a special or extraordinary expense:

> 7.(1) Special or extraordinary expenses - In a child support order the court may on either spouses'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 spouses and those of the child and to the family's spending patter prior to the separation:
>
> > (a) child care expenses incurred as a result of the custodial parent's employment, illness, disability or education or training for employment:

There is evidence before the Court in the Applicant's Statement of Income as to her income in 2010 ($46, 024.78) and 2011 ($49, 256.40) and the costs of child care incurred by her in each of those years (Exhibit 6). It is not difficult to contemplate that in exercising its discretion to make a section 7 award a Court might often be persuaded the child care expense is legitimate and in the children's best interests. The Applicant, as primary parent, and indeed the Respondent as a joint custodial parent, are no different than many parents who need to ensure the children are being cared for when both are required to attend at their respective places of employment.

[50] Sections 7(2),(3) and (4) of the *Guidelines (supra)* instruct the court on the considerations in determining an expense:

> (2) Sharing of expense - 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 is shared by the spouses in proportion to their respective incomes after deducting from the expense, the contribution, if any, from the child.
>
> (3) Subsidies, tax deductions, etc. - 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 deduction or credits relating to the

> expense, and any eligibility to claim a subsidy, benefit or income tax deduction or credit relating to that expense.
>
> (4) Universal child care benefit - In determining the amount of an expense referred to in subsection (1), the court shall not take into account any universal child care benefit or any eligibility to claim that benefit.

Here, the parties agreed on the impact for the Applicant of the income tax deduction relating to the expense, as also set out in Exhibit 6.

[51] The only budget information from the Respondent, not challenged during the hearing, was that contained in his Statement of Expenses dated August 2011, showing a monthly surplus of $90.00. Inexplicably, the Statement does not reflect the payment of $500.00 per month child support which both parties agreed has occurred, which would have the effect of turning the Respondent's monthly surplus into a monthly deficit of $410.00.

[52] The real challenge in this case rests in the phrase "the reasonableness of the expense in relation to the means of the spouses" found in section 7(1). The means of the spouses is not only difficult to assess at present and in the near future due to the Respondent's unemployment, but more to the point, difficult to assess retroactively as well. There are receipts attached to the Applicant's filings that confirm past child care costs and the Respondent does not challenge the math found in Exhibit 6, but the court does not know how the work schedule of either parent and the parenting schedule may have impacted the need for child care at specific times in either the 2010 or 2011 year. Further, how might the period of unemployment experienced by the Respondent in 2011 and again at present have impacted on the need for child care, if at all?

[53] There is an additional challenge being that in 2010 the Respondent was paying less than half of the Table amount of child support. In light of my determination that there are arrears of child support outstanding in both 2010 and 2011, how does the amount of child support that should have been paid relate to the reasonableness of the child care expense as it pertains to the means of the Applicant to meet that expense? If the Applicant had been in receipt of the *appropriate* amount of child support in 2010 or 2011, what, if any, effect would that have had on her means to pay child care?

[54] As noted by Roscoe, J. A. in *T. (D.M.C.) v. S.(L.K.)*, 2008 NSCA 61 at paragraph 25 (in part):

> It must be emphasized that a section 7 order is discretionary. The starting point is that it is assumed that the table amount will ordinarily be sufficient to provide for the needs of the child.

[55] I am not comfortable engaging in speculation on the questions raised above. Given the evidence which would assist me in responding to a claim for a retroactive contribution to child care costs is lacking, I decline to exercise my jurisdiction to make such an award. This is consistent with the approach taken in *Cooke v. Cooke* 2012, NSSC 73 (paragraph 91). The Respondent now has a sizeable obligation to meet in repaying the retroactive child support, which had it been paid in 2010 or 2011 may well have better positioned the Applicant in relation to child-related expenses such as child care. It would be unwise to potentially compromise the capacity of the Respondent to pay arrears of child support by permitting an additional retroactive discretionary award. This is not to suggest that a contribution to child care by the Respondent would necessarily be inappropriate at some future point, particularly given clauses 42 and 43 of the Minutes remain in effect and do not discount the potential for a future contribution to child care and/or extracurricular activities.

Conclusion

[56] For the time being, as requested by the Applicant, the Respondent's obligation to fund child care is suspended until further order or agreement. The Respondent's monthly child support obligation and arrears of child support are as set out in paragraphs 35 and 48 herein.

[57] As the Respondent's financial situation was tenuous at the time of the hearing, the parties should return to Court for a review if they are unable to make the appropriate prospective adjustments to either the quantum of child support and/or contribution to child care. It was very clear during the hearing that the parties have a facility for applying the *Guidelines (supra)* and the Tables. A one hour review is tentatively scheduled for August 1, 2012 from 11:30 a.m until 12:30 p.m. If the time is not needed, the parties should each notify the Supreme Court, Family Division Scheduling Office as soon as possible. To facilitate the review hearing, the Respondent must file with the Court and the Applicant ten days prior

any and all documentation confirming his sources of income since February 21, 2012.

[58] An order shall issue forthwith giving effect to this decision.

J.

SCHEDULE "A" (Exhibit No. 6)

Table Amounts and Income

Year	Income	Table Amount	Amount Paid	Difference Per Month	Total Difference per year
2006	46 280.39	664.00	500.00	164.00	2788.00
2007	49 105.07	702.00	500.00	202.00	3434.00
2008	51 705.83	738.00	500.00	238.00	4046.00
2009	51 722.25	738.00	500.00	238.00	4046.00
2010	77 869.28	1080.00	500.00	580.00	6960.00
2011	41 305.78	587.73	500.00	87.73	1052.76

Total Difference up until time of time of review (January 2010) = $11 553.88
Retroactive amount = $9860.00 - 17 months Jan 2010 - June 2011

Child Care Costs

Year	Child Care Total	Tax Deduction	Net of Tax Cost
2006	5350.00		
2007	6670.00		
2008	6438.00		
2009	3780.00		
2010	3840.00	1318.00	2522.00
2011	4800.00	1440.00	3360.00

Total Child care costs up until time of review (January 2010) = $22 238.00
Total costs after time of review (January 2010-January 2012)=$ 8640.00
Net of Tax for child care January 2010-January 2012 = $5882.00