

**SUPREME COURT OF NOVA SCOTIA**  
**(FAMILY DIVISION)**

**Citation:** *C.M. v. P.M.*, 2019 NSSC 250

**Date:** 2019-08-26

**Docket:** 1201-061669

**Registry:** HFX

**Between:**

C.M.

APPLICANT

v.

P.M.

RESPONDENT

---

**LIBRARY HEADING**

---

**Judge:** The Honourable Justice Cindy Cormier  
**Heard:** January 28, 29, 30 in Halifax, Nova Scotia  
**Submissions:** January 30, 2019, and February 25, 2019  
**Written Decision:** August 26, 2019  
**Subject:** Prospective and retroactive table amount of child support.  
Prospective and retroactive special or extraordinary expenses.  
Determination of income.

**Summary:** **1. Introduction**  
The mother, Ms. M filed a Notice of Variation Application on September 17, 2015, pursuant to section 17 of the *Divorce Act*, R.S.C. 1985 (2<sup>nd</sup> Supp.), c. 3, and applicable *Guidelines*, SOR 97/175. Ms. M sought an increase in prospective child support paid for the children from the date of Application in September 2015.  
Ms. M sought a retroactive increase in the table amount of child support paid to her by the father for their children, J and M dating back to June 1, 2011. Ms. M also sought an increase in prospective child support paid for the children from the date of Application in September 2015.  
Ms. M engaged the services of an expert to complete a Guideline Income Report to establish the payor father's, Mr. M's income for the years between 2011 – 2017. Ms. M asked

the Court to consider the three different scenarios illustrated in the Guideline Income Report. The expert also commented about Mr. M's approximate income for 2018.

The parties two children, J and M lived primarily with their mother, Ms. M. M continues to live with Ms. M, J started University locally and he lived in residence throughout the 2018 /2019 school year. J spent considerable time at Ms. M's home throughout the school year. Their father, Mr. M has had regular parenting time with J and M over the years. The parties agree both children remain dependent.

Mr. M indicated J had signed a rental agreement for an apartment starting May 1, 2019.

On May 2, 2017 Ms. M filed an Amended Notice of Variation Application, pursuant to section 17 of the *Divorce Act*, R.S.C. 1985 (2<sup>nd</sup> Supp.), c. 3, and applicable *Guidelines*, SOR 97/175. In addition to her claims under section 3 of the *Guidelines*, Ms. M sought prospective and retroactive child support for special or extraordinary expenses pursuant section 7 of the *Guidelines*, between June 1, 2011 to the date of trial. Ms. M. sought to have Mr. M pay his proportionate share of expenses incurred for special expenses such as psychological services, and dental services. In addition, she sought to share proportionately the cost of certain extracurricular activities or special expenses which were extraordinary. The other expenses to be addressed included post-secondary expenses for J.

Ms. M mended her pleadings to clarify she was seeking costs

**Issues:**

I must first consider Ms. M's claim for an increase in prospective child support under section 3 of the *Guidelines*, beginning September 17, 2015. I must then consider Ms. M's claim for prospective child support under section 7, of the *Guidelines*, certain special or extraordinary expenses from May 2, 2017 onward.

Once I have dealt with Ms. M's prospective claims, I must consider Ms. M's claims for a retroactive increase in child support under section 3, of the *Guidelines* from June 2011 to September 16, 2015.

Finally, I must consider Ms. M's claim for retroactive child support under section 7, of the *Guidelines*, certain special or

extraordinary expenses for the period between June 2011 through to May 1, 2017.

I must determine Mr. M's income in each year between June 2011 - 2019.

The Nova Scotia Court of Appeal recently commented in *Reid v. Faubert*, 2019 NSCA 42, at paragraph 24 about the starting point for an income analysis under s. 16.

The Court was reminded that in *Johnston v. Barker*, 2017 NSCA 53, Justice Hamilton found that "failing to start with a consideration of the payor's line 150 income as directed by s. 16 may open a trial judge's income determination to appellate review. This is especially so where the reasons do not illustrate the judge's rationale.

Ms. M has asked the Court to consider if Mr. M has used his corporation to artificially reduce his income per section 16, and to determine if Mr. M has proven why pre-tax corporate income should not be included, or if it is to be included, why it should be done at a lesser percentage than proposed.

**Result:**

I order Mr. M to pay to Ms. M forthwith:

1. Prospective child support pursuant to section 3 of the *Guidelines*: October 2015 to December 2015 \$928.83, 2016 \$7518.60, 2017 \$2743.32, January to August 2018 \$20,520.00, September 2018 to February 2019 \$12,333.00 for a total of **\$44,043.75**:
2. Prospective child support pursuant to section 7 of the *Guidelines*. For 2017 \$234.51 and for 2018 \$211.11 for a total of **\$545.62**. In addition, the parties will have to account for J's post secondary expenses for 2018 / 2019, as detailed herein.
3. Retroactive child support pursuant to section 3 of the *Guidelines*: For 2011 \$2801.76, 2012 \$8,983.20, 2013 \$8707.68, 2014 \$6942.72, January to September 2015 \$2786.49 for a total of: **\$30,221.85**
4. Retroactive child support pursuant to section 7 of the *Guidelines*. The following amounts in special or extraordinary expenses between 2011

and 2016. \$64.50, \$139.96, \$88.35, \$148.80, \$158.10, \$27.90, \$86.49, \$117.65, \$74.40, \$245.88, \$79.05, \$1325.25, \$478.95, \$611.80, \$186.00, \$256.58, \$198.54, \$186.00, \$256.58, \$472.34, \$174.00, \$234.89, \$240.02, \$40.01, \$184.00, \$92.00, 253.82, \$67.68, \$248.30, \$144.88, and \$589.93 for a total of **\$7,472.65.**

***THIS INFORMATION SHEET DOES NOT FORM PART OF THE COURT'S DECISION.  
QUOTES MUST BE FROM THE DECISION, NOT THIS LIBRARY SHEE***

**SUPREME COURT OF NOVA SCOTIA**  
**FAMILY DIVISION**

**Citation:** *C.M. v. P.M.*, 2019 NSSC 250

**Date:** 2019-08-26

**Docket:** 1201-061669

**Registry:** HFX

**Between:**

C.M.

APPLICANT

v.

P.M.

RESPONDENT

Judge: The Honourable Justice Cindy G. Cormier

Heard: January 28, 29 and 30, 2019 in Halifax, Nova Scotia

Written Release: August 26, 2019

Counsel: Michelle Axworthy for the Applicant  
William Leahey for the Respondent

**By the Court:**

[2] Ms. M applied to vary child support prospectively and retroactively. Her claims are under Sections 3 and 7 of the *Federal Child Support Guidelines*.

[3] I must consider prospective changes to child support before retroactive ones: *Staples v. Callendar*, 2009 NSCA 49, at paragraph 41.

[4] Mr. M argued that the parties had an agreement regarding how his annual income for child support would be determined and that the agreement should apply.

[5] Ms. M stated she had difficulty obtaining and understanding additional financial disclosure from Mr. M in order to establish his annual income for child support and for spousal support at the time of separation. Ms. M also stated that the “back and forth” asking for additional information was “costing her”, and she could not afford it at that time.

**Orders****Minutes of Settlement Entered Into In 2004**

[6] In 2004 the parties agreed to set Mr. M's annual income for child and spousal support at \$150,000.00. As of October 1, 2004 Mr. M was ordered to pay child support of \$1794.00 per month.

[7] Mr. M was also ordered to pay Ms. M spousal support in the amount of \$3,100.00 monthly, net of tax income, and to pay annually to Ms. M lump sum maintenance to compensate her for any income tax implications of spousal support.

[8] In addition, Ms. M was found to be entitled to receive approximately \$400.00 as a Child Tax Benefit, resulting in \$3,500.00 per month being available to Ms. M. Mr. M was ordered to top up the monthly payment to Ms. M to ensure she received \$3,500.00 net of tax.

[9] In 2004, Ms. M agreed to seek employment upon the parties' youngest child, M commencing school in September 2007.

[10] The Minutes of Settlement entered into by the parties in October 2004 contemplated a review of spousal support in October 2007; specifying that:

the spousal support may be reviewed but not necessarily varied at that time. Neither party can predict what the result of the review will be at this time. Any variation of spousal support after October 2017 shall be made in accordance with s. 17 of the *Divorce Act*. No one factor of s. 17 of the *Divorce Act* will take any precedence over any other factors in s. 17.

[11] Clauses 34 through 38 of the Minutes of Settlement entered into in 2004 specified:

34. Child support payments will be varied from time to time to reflect changes in the income of the Husband and the status of any special or extraordinary expenses for the children. The Husband shall be responsible for J's current dental treatment.

35. To facilitate the calculation of varied child support payments, the Husband will, on or before May 15 of every year, provide the Wife at her written request with the financial information referred to in the *Federal Child Support Guidelines*, Section 21, and the **Wife will provide the Husband with current information about the status of any expenses referred to in the *Guidelines*, Section 7. If Section 7 expenses are being paid, the Wife shall also provide her income information to the Husband.** (my emphasis)

36. It will be the responsibility of each party to file his or her income tax returns in time to permit a May 15 compliance with this Agreement.

37. **Each spouse's annual income will be determined as provided in the *Federal Child Support Guidelines*, Section 16.** (my emphasis) Child Support payable pursuant to this Agreement shall be adjusted at least annually in any given year to reflect the parties' annual income after income tax information has been exchanged in a given year.

[12] Despite the court order which was in place at the time Mr. M stopped paying spousal support in 2007. Ms. M stated that Mr. M took the position that she should be back at work, but she was unable to return to work at that time.

### **Corollary Relief Order**

[13] In June of 2009 a Corollary Relief Order was granted based on settlement discussions which took place in April and May 2009.



[14] Ms. M stated that prior to their divorce being finalized in July 2009, Mr. M failed to provide all financial disclosure she requested. Ms. M indicated she was concerned about whether the expenses Mr. M was claiming for his business were “true expenses”.

[15] The parties agreed Mr. M’s annual income for child support for 2007 would be set at \$175,966.00, for a monthly child support payment of \$1,041.84. Mr. M agreed to pay Ms. M all outstanding child support arrears owing for 2007 by May 31, 2009.

[16] The parties also agreed Mr. M’s annual income for child support purposes in 2008 would be set at \$181,373.00, for a monthly child support payment under section 3 of the *Guidelines* of \$2,264.38 effective May 1, 2009, through May 31, 2010. Ms. M indicated that any other child related expenses were “not that significant”.

[17] Mr. M was ordered to pay spousal support in the amount of \$1125.00 per month for the period from January 1, 2008 through April 1, 2009 for a total of \$18,000.00, and ongoing spousal support of \$1,500.00 per month effective May 1, 2009, through November 1, 2010, at which point spousal support would “terminate absolutely”.

[18] I have considered that when:

as a result of giving priority to child support, a spousal support order was not made, or the amount of a spousal support order is less than it otherwise would have been, any subsequent reduction or termination of that child support constitutes a change of circumstances for the purposes of applying for a spousal support order, or a variation order in respect of the spousal support order, as the case may be.

Spousal support was terminated absolutely in November 2010. Section 15.3(3) (of the *Divorce Act*, R.S.C. 1985 (2<sup>nd</sup> Supp.), c. 3, is presumed to have been applied properly at the time the Corollary Relief Judgment was granted.

[19] Mr. M has argued that when negotiating the Corollary Relief Judgment the parties agreed to a specific formula for calculating Mr. M's income. He pointed to paragraph 11 of the Corollary Relief Judgement granted June 10, 2009, wherein the parties specified that effective June 1, 2010:

child support shall be based upon the Petitioner's Line 150 of his income tax returns, which includes the grossed up dividends received by the Petitioner, as well as dividends dispersed to any parties not at arms length to [Mr. M.]. Any adjustments to child support shall be made on June 1<sup>st</sup> each year.

[20] Paragraph 14 of the Corollary Relief Judgement dated June 10, 2009 specifies that clauses 34 through 38 of the Minutes of Settlement entered into in 2004 continue to be applicable (reproduced in paragraph 10 of this decision). I

find the *Federal Child Support Guidelines* sections 15 – 25 apply when establishing Mr. M's annual income for child support.

[21] The *Divorce Act* R.S.C. 1985 (2<sup>nd</sup> Supp.), c. 3, specifies at section 16:

16. Subject to sections 17 – 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.

...

17. (6.1) A court making a variation order in respect of a child support order shall do so in accordance with the applicable guidelines.

### **Settlement Order February 2011**

[22] Ms. M filed an Application to Vary the Corollary Relief Judgement in Bridgewater Nova Scotia in August 2010. Once again Ms. M took the position that Mr. M was not disclosing all the income information necessary for her to determine his annual income for child support based on all the income available to Mr. M.

[23] In 2010 Ms. M requested child support paid by Mr. M be increased from \$2,264.00.38 to \$4,085.00. Ms. M sought to have Mr. M's gross corporate receipts used to calculate the amount of child support payable each year.

[24] A settlement conference was held in November 2010, Ms. M stated that she could not properly explain or understand the arguments to be made to assist in obtaining further financial disclosure to argue and then fairly determine Mr. M's annual income for child support. Ms. M also argued she did not have the money to pay a lawyer to do the work. She explained that she would have had to hire an accountant and a lawyer and she did not have the money to do so, and she could not afford to take the matter to trial.

[25] The Court's running file reflects that in August 2010 Ms. M filed her Application as a self represented litigant, and she appeared as a self represented litigant at the settlement conference held in November 2010, at which time the parties reached some agreements. Ms. M had not applied to vary any special or extraordinary expenses, however Mr. M did agree **to cover the cost of day camps or other special summer activities the children would engage in while in his care.** (my emphasis) Mr. M agreed not to seek a contribution toward the cost of those activities from Ms. M.

[26] Ms. M appeared with her new counsel for the continuation of the settlement conference in January 2011. The agreement reached by the parties at that time was confirmed by Ms. M's legal counsel, and the Settlement Order was signed by Ms. M's lawyer.

[27] Ms. M explained that although the order was signed, she felt she had no choice but to agree that Mr. M's income for child support for the period June 1, 2010 through May 31, 2011 was \$187,331.08. Mr. M was ordered to increase child support payments paid to the mother to \$2331.00 per month. Mr. M was also ordered to fund a testamentary trust for a minimum of \$500,000.00 by maintaining a life insurance policy with the mother designated as a trustee.

[28] The Settlement Order issued in February 2011 dealt with both parenting issues and child support and it states in part: "in all respects the terms and conditions of the Corollary Relief Judgment, as amended by this Order, shall remain in full force and effect."

[29] Clauses 34-38 of the Minutes of Settlement entered into in 2004 continued to apply to the Corollary Relief Order dated June 2009, and I further find clauses 34-38 of the Minutes of Settlement entered into in 2004 (reproduced at paragraph 10 of this decision) continued to apply to the Settlement Order entered into in February 2011, and that the *Federal Child Support Guidelines* apply.

### **Ongoing questions about Mr. M's income**

[30] Ms. M indicated that she approached several accountants in an ongoing effort to educate herself about how to interpret the financial disclosure she was

being provided by Mr. M. Ms. M stated that she was advised to pay attention to expense items such as continuing education, to be alert to the money being received by Mr. M's corporation from the partnership, and to be alert to any additional family trusts, or to accelerated payments of long term debt during "child support years".

## **Analysis**

### **Determination of Mr. M's income**

[31] At paragraphs 20 – 25, in *Reid v. Faubert*, 2019 NSCA 42, the Honourable Justice Bourgeois stated:

[20] The Guidelines set out a comprehensive scheme for determining the appropriate quantum of child support to be paid in a given situation. The objectives of the Guidelines are stated as follows:

#### **Objectives**

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

[21] For children under the age of majority, the Guidelines presume that the quantum of child support will be determined by the applicable table, and based on the paying parent's income (s. 3(1)(a)).

[22] Section 3(3) requires that child support be paid based on the table for the province in which the parent against whom support is sought, resides. Here, the parties agree the Ontario tables are applicable.

[23] One way in which the Guidelines strive to meet the above objectives is to provide a method for the determination of a parent's annual income. Sections 15 through 20 set out a mechanism for determining income; however, only 16 through 18 are relevant to the issues before us. They provide:

Calculation of annual income

16 Subject to Sections 17 to 20, a parent's annual income is determined using the sources of income set out under the heading "(Total Income)" in the T1 General form issued by the Canada Revenue Agency and is adjusted in accordance with Schedule III. Section 16 replaced: O.I.C. 2000-554, N.S. Reg. 187/2000; amended: O.I.C. 2007-321, N.S. Reg. 294/2007.

Pattern of income

17(1) If the court is of the opinion that the determination of a parent's annual income under Section 16 would not be the fairest determination of that income, the court may have regard to the parent's income over the last 3 years and determine an amount that is fair and reasonable in light of any pattern of income, fluctuation in income or receipt of a nonrecurring amount during those years. Subsection 17(1) replaced: O.I.C. 2000-554, N.S. Reg. 187/2000.

Non-recurring losses

(2) Where a parent has incurred a non-recurring capital or business investment loss, the court may, if it is of the opinion that the determination of the parent's annual income under Section 16 would not provide the fairest determination of the annual income, choose not to apply Sections 6 and 7 of Schedule III, Adjustments to Income, as adopted herein, and adjust the amount of the loss, including related expenses and carrying charges and interest expenses, to arrive at such amount as the court considers appropriate.

Shareholder, director or officer

18(1) Where a parent is a shareholder, director or officer of a corporation and the court is of the opinion that the amount of the parent's annual income as determined under Section 16 does not fairly reflect all the money available to the parent for the payment of child support, the court may consider the situations described in Section 17 and determine the parent's annual income to include

(a) all or part of the pre-tax income of the corporation, and of any corporation that is related to that corporation, for the most recent taxation year; or

(b) an amount commensurate with the services that the parent provides to the corporation, provided that the amount does not exceed the corporation's pre-tax income.

Adjustment to corporation's pre-tax income

(2) In determining the pre-tax income of a corporation for the purposes of subsection (1), all amounts paid by the corporation as salaries, wages or management fees, or other payments or benefits, to or on behalf of persons with whom the corporation does not deal at arm's length must be added to the pre-tax income, unless the parent establishes that the payments were reasonable in the circumstances.

[24] The starting point for an income analysis is s. 16, often referenced as a determination of “line 150” income. In *Johnson v. Barker*, 2017 NSCA 53, Justice Hamilton said:

[23] Section 16 of the *Child Support Guidelines* provides the starting point for determining the appellant's income:

16 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.

Schedule III provides for adjustments, including those to neutralize the favourable tax rates for dividends and capital gains, as compared to other income, and to take into account non-cash expenses such as capital cost allowance.

[24] Section 17 provides that if the court is of the opinion that s. 16 does not provide the fairest determination of the appellant's income, the court can determine an amount based on the spouse's pattern of income over the last three years.

See also *M.C. v. J.O.*, 2017 NBCA 15, at para. 14; *Gosse v. Sorensen-Gosse*, 2011 NLCA 58, at paras. 90-91; and *Bembridge v. Bembridge*, 2009 NSSC 158, at para. 9.

[25] Failing to start with a consideration of a payor's line 150 income as directed by s. 16 may open a trial judge's income determination to appellate review. This is especially so where the reasons do not illustrate the judge's rationale.

[32] The parties both retained financial experts.

**Guideline Income Report, prepared by Ms. M's expert**



[33] Nikki Robar, CPA, CA, CBV, (hereafter Ms. R) was engaged by Ms. M and was qualified as an expert to give opinion evidence in relation to Mr. M's annual income for child support and spousal support, specifically she was qualified as an expert:

experienced in financial analysis including business evaluations of tangible and intangible assets **and quantification of guideline income in family law matters for the purposes of child or spousal support, capable of giving opinion evidence on the subject of guideline income for support purposes (my emphasis).**

No objections were raised about the admissibility of her expert opinion evidence. I found Ms. R's evidence to be of assistance to the Court, and have relied on her evidence. *WBLI v. Abbott and Haliburton*.

[34] When Mr. R was asked about the type of report she had prepared. she responded as follows:

I am a chartered ... a CPA, a chartered accountant by ... by trade but I haven't prepared financial statements in a long time. My roll (sic) now is to prepare evaluation reports or a financial analysis for expert reports so it falls under the standards of, for our work, it falls under the standards of the Chartered Institute of Business Valuators, Canadian Institute, sorry, of Chartered Business Valuators. And so this report falls under the expert report, the standard 310 which is expert reports under the standards of the CICBV. So it is not an audit, it is not a review, it's not a preparation of financial statements. Within our standards we have different levels of work that we would do, very similar to what you would do in the accounting world but this is sort of a stand-alone different type of report. As an expert report, we rely on the information provided to us. If there is a reason not to rely on it or if we're given sufficient information to do extra, more robust

analysis, we would do that analysis but typically we rely on the information provided as accurate and that's one of the key assumptions in our report.

[35] Ms. R completed a Guideline Income Report, December 11, 2018 of Mr. M's annual income for child support for the years 2011, 2012, 2013, 2014, 2015, 2016, and 2017. After reviewing additional disclosure received from Mr. M after the report was completed Ms. R also gave her opinion with regard to an estimate of Mr. M's income for 2018.

[36] Ms. R explained that in her Guideline Income Report she had outlined three different scenarios. In her direct examination Ms. R explained what the findings in the various schedules indicate:

schedule one is the calculation of guideline income and it follows the ... basically the guidance prescribed by the federal child support guidelines. The starting place, in accordance with the guidelines, is line 150 income.

...

It then follows through schedule three adjustments and those schedule three adjustments, in this situation, are annual dues and the dividends. So the annual union professional ... excuse me, professional or like dues come directly again from the individual's tax return and those are prescribed schedule three adjustments to line 150 income.

...

I'm applying Sections 15 through 20. My process is typically to follow the guidelines as they go through so the layout of schedule one would literally follow through the guidelines in terms of **starting with line 150. We then make the 18(1)(a) adjustment, again acknowledging that at the end of the day it's the discretion of the Court to make any adjustments from that, it's not the discretion of the expert. We then take into consideration schedule 19 and we do that by ... in a couple of different ways. One is we take into consideration past experience and past case law, things that have come to our attention**

**over the time of preparing multiple, multiple guideline income reports, again acknowledging that Section 19 is completely at the discretion of the Court (my emphasis).**

...

So the source of that information again is the individual's tax return, personal tax return. Then the dividends from taxable Canadian corporations, schedule three suggests that you reverse out the taxable capital ... excuse me, the taxable dividends and replace with the actual dividends. So **when dividends appear on an individual's personal tax return they've been grossed-up for tax purposes and then later in the tax return there's a ... there's a dividend tax credit. They're taxed differently from normal income. So that's why schedule three prescribes that adjustment so that is the adjustment you see at rows seven and eight where we're taking ... we're deducting taxable which is the exact amount that would be in the person's tax return so that's the row three amount. We're deducting that off of income and we're replacing it with the actual amount of dividends paid by the company.** (my emphasis)

...

**We do an adjustment later.** (my emphasis) So based on case law and our experience, when an individual is able to have the discretion to pay dividends rather than salary from a company and thereby enjoy the benefits of a better tax rate typically on the dividends, the guidance is that the **benefit of that gross-up or the tax credit that appears later in the tax return should be added to the individual's ... the individual's income and that's again an adjustment in accordance with Section 17 of the guidelines where they get a preferred tax rate on those dividends.** (my emphasis)

....

**So the gross-up again is removed and added back, that occurs at line ten and is explained in the report.** (my emphasis) Lines 11 and 12 are the disability payments received and if you look through, under the notes column, you'll see that there's reference to a note four. Note four will then explain the sources of the disability payments received by [Mr. M.] and this ... the sources of these information are various letters, information provided in the disclosure, etc. where we obtained the actual amount of payments that were received for disability by [Mr. M.]. These are not reported on the individual's tax return so these are sources of income but are not taxed. They've come from various letters that are referenced in our scope of work but not from any one place.

...

**So in the preparation of guideline income, the objective that I always consider is we're trying to equate the cash, the pretax cash that the individual has with an employed person** (my emphasis). So if you've got a tax-free amount, that tax-free amount needs to be grossed-up to go into the guideline

income to account for the fact that they don't then pay tax on it and by doing that, you would equate it to a person who's paying tax on their source of income. There are different ways to do it. You can take the effective tax rates and just gross it up using an effective tax rate. Given our marginal rate system that we have both in the province and in the country that's, you know, a bit more rounding than we like so we actually mock up the tax return. In other words, we enter all the information into our tax preparation program and essentially calculate what would this person need to make as pretax income in order to have the same amount of cash at the end of the day as this individual had with their non-taxable income. So when we say we mocked up the tax return, that's what we literally recreated the tax return, and input that number until we got to the after-tax quantum that [Mr. M.] would have had had he received a taxable amount.

...

**At the preparation of this report, 2018 had not yet been completed so we wouldn't have had full 2018 information and we have not arrived at a conclusion, we've simply gathered the information that was available to us with regard to 2018 and included it herein.** (my emphasis) In the preparation of the other years in the disclosure provided is understanding that [Mr. M.] would received \$4,000 a month from Desjardins as long-term disability benefits so \$4,000 a month times the 12 months in 2018 would get you to \$48,000. The RBC insurance premiums are a little bit different. They're about 7,000, I believe, plus another 1,000 for the first seven months of the year and that increases slightly for the remaining five months of the year. So that would be a calculation of the ... of a year's worth of the disability benefits based on the letter that we observed from RBC.

## **Commentary Report provided by Mr. M's expert**

[37] Mr. M's expert, Stuart Maclean CPA, CA, (hereafter Mr. SM) was qualified to give an opinion with respect to the preparation of financial documents, specifically:

**...the preparation and interpretation of corporate financial documents** (my emphasis) with respect to generally accepted Canadian accounting practices or standards for private enterprises.

and Mr. SM prepared a Commentary Report on the PWC Report on Guideline

Income of [Mr. M.], and a Retained Earnings Report for [Mr. M.]

Dentistry Inc.

[38] I accept Ms. R's opinion evidence with regard to the various methods used to determine Mr. M' annual guideline income for child support, by "trying to equate the cash, the pre-tax cash that Mr. M has with an employed person".

[39] When asked about Mr. M's income in 2017 Ms. R stated in part:

Yes, that was referenced in I believe it's the 2017 reconciliation of income that was prepared by Levy Casey Carter MacLean. They referenced that in 2017 the corporate income of [Mr. M.], that's the company, [Mr. M.] ... [Mr. M's business] was reduced by a dividend ... excuse me, a bonus that was declared in 2017. So that reduces the corporate income in 2017 and essentially pushes that bonus to 2018 for the individual. So when you declare a bonus in one year and it pushes into the next year, you get the benefit of the corporate deduction in the year it's declared but you don't pay tax on it until the year that it's received because individuals pay tax on a cash basis and companies pay tax on an accrual basis.

...

So we follow the guidelines as outlined in the report. We follow the federal child support guidelines and the guidelines indicate, at Section 18 and it's in appendix C, that where a spouse, shareholder, director or officer of a corporation ... sorry, I'm looking at 18(1), it's 19 we should be looking at. Imputing income, so the Court may impute income to a spouse as it considers appropriate in the circumstances including attribution of income. I'm going to scratch that for one second, I'm supposed to be looking at 18(1)(a). Attribution of income first and then imputing income. **So 18(1)(a), which is on page 16 of the report and appendix C: Where a spouse is a shareholder, director or officer of a corporation and the Court is of the opinion that the amount of the spouse's annual income is determined under 16, Section 16 does not fairly reflect all the money available to the spouse for the payment of child support, the Court may consider the situations described in Section 17 and determine the spouse's annual income to include subsection (a) all or part of the pretax**

**income of the corporation and of any corporation that is related to that corporation for the most recent tax year.** (my emphasis) So our starting point again for guideline income following through the guidelines is line 150 income. We then go make the schedule three adjustments to the line 150 income. For purposes of corporation attribution, we will then consider the nature of the company but for a professional services corporation that doesn't have sort of a capital intensive nature, **we would add back then all of the pretax corporate income. It's ultimately the Court's discretion but that's the number we would add to income to arrive at guideline income including a corporate attribution figure.** (my emphasis)

...

So a professional services corporation is essentially a flow-through. **It's a mechanism in place for professionals like myself, like lawyers, like dentists, to be able to shelter, defer, otherwise have some ... the access to some tax deductions that an employed person might not.** (my emphasis) So in a professional services practice you don't need a lot of equipment so the equipment used by the dentists and the accountants and the lawyers tends to be owned at the overall business level. In this situation, the equipment is owned at the Atlantic Dental level. The professional services corporation doesn't then have to buy that equipment. It doesn't have to carry the receivables of the dental operations, much like a partner in any firm that has made the decision to incorporate. You then have the ability to manage your income a little bit better. **You have access to certain tax deductions that again wouldn't be available to other individuals but there's not really ... there's not really an investment that that business has to make other than in its partnership interest in this situation.** (my emphasis)

[40] Ms. R. was asked if she made an adjustment to account for the dividend paid when attributing the pre-tax corporate income to Mr. M, and she replied as follows:

Yes, we have. So that's the issue with pretax corporate income. Pretax corporate income is then taxed and the accumulation of the after-tax amount is the number that dividends are paid from. So it retain and accumulates into retained earnings, retained earnings then have dividends come out of those. **So if you include 100 percent of the pretax income and the dividends that are in line 150, you've effectively double counted that level of income. So we would always remove the dividends from the income so as not to double count what the company has been able to generate.** (my emphasis)

## Schedule 1

[41] Ms. R was then asked if in Schedule one, she had attributed any deductions from pre-tax corporate income, or expenses of the corporation. Ms. R responded:

**It actually attributes all of the expenses.** (my emphasis) So this, by including pretax corporate income, we are **effectively accepting that all of the expenses reported by the company are bona fide business expenses. So none of them are personal in nature,** (my emphasis) everything that has been deducted as an expense in the company, is then not available for corporate attribution. That's the assumption made on schedule one.

[42] Mr. R was asked if she had taken any steps to review specific receipts of the company or whether "Schedule 1" was assumed that the financial statements all reflect reasonable expenses for federal child support guideline purposes. Ms. R responded as follows:

This assumes that it's all reasonable for federal child support purposes. We always will ask for details around any kind of discretionary or personal expenses that go through the company. So it's certainly a disadvantage of working for the non-business owning spouse and not having the opportunity to speak to the business owning spouse. We did have the benefit of some receipts in this situation but again to look at a receipt for Moxie's and be able to understand what was the business purpose, who joined you for that dinner, was there a personal or discretionary element to that meal, you know, it's impossible for us to be able to do that analysis without access to speak to and obtain all of the documents and records. **So we've not made any adjustments for any personal or discretionary element of the expenses that were reported by the business for any of the years ...** (my emphasis)

So often when personal expenses are very intermingled with business expenses so, for example, if you did find out that Moxie's receipt was for taking the kids out for dinner and it was a \$100 receipt or that's actually an expense that is discretionary in nature, **notwithstanding the fact that CRA will allow that, under 19(2) of the federal child support guidelines, they're explicit in saying this is not a judgement of what CRA will allow or disallow, it's an assessment**

**of the reasonableness of the expenses for purposes of the child support guidelines.** (my emphasis) So that's the context that I would give. **To the extent that that meal is ... is a personal meal, that should be added back to guideline income.** (my emphasis)

...

**So our conclusion, our opinion, is ... is based on scenario one in the absence again of the information to be able to do a more thorough analysis of the nature of the expenses of the business.**

## Scenario B

[43] Ms. R then went on to discuss the scenarios where certain expenses were added back, including a discussion about the issue of amortization. She stated in part as follows:

So on page three of six of the schedules, again it's outlined at the top that this was an analysis that we were asked to prepared on the premise that certain of the expenses were personal in nature. And so we went through the expenses that are reported by the company and sorry, **not necessarily personal in nature but not ... not a function of actual cash expenses so amortization's a good example,** (my emphasis) it's not really ... it's not a cash event that happens each year so we added back amortization and we added back to the pretax corporate income certain expenses that were reported in the fiscal years that may have a personal component to them. **And again, keeping in mind as a professional corporation, trying to distinguish between what are the expenses of Atlantic Dental versus what are the expenses of a corporation that's been set up as a conduit to manage the income of the individual partners.** (my emphasis)

[44] Ms. R then highlighted areas she would usually spend more time on when completing a guidelines income report, she stated in part:

...



**So there are certain areas when we're doing guideline income reports that were the areas that we would certainly want to focus a little bit more time on. Travel and continuing education are one of them.** (my emphasis) If you decided to do a course in Vegas, could you have done the course at Dalhousie Dental School? So it's trying to understand is there a personal component. If you've got travel expenses, did you take your spouse with you on that trip? Was there a personal component to the travel? So trying to dig into those numbers a little bit, those are two keys areas that we would pick. **So in continuing education, you would accept that it is normal to have a certain level of continuing education undertaken each year so we selected what is the lowest reported number in those years which is about \$800.00.** (my emphasis)

...

We've assumed that that amount, if that amount was good enough for one year, that amount should have been suitable for all years would be the ... would be the assumption under this analysis. And so we've adjusted the continuing education number by the \$800 as a base level amount and that's adjusted at line nine. So continuing education was at line three on this page and at line nine we said you'd expect it to be \$800 at least or on average. **We've done the same thing, if I can skip down, to professional fees and professional fees were one area again, you know, this has been an ongoing matter, \$9,000 in professional fees for a professional corporation that, you know, gets its income from a pretty predictable source. You get the information from Atlantic Dental, to then pay that much to get your accounting and taxes done would be kind of unusual and we didn't have further details on, you know, why you have gone from \$2,000 for example in 2012 to \$9,300 in 2017.** (my emphasis) So again we've said \$2,000, if that was the expenditure in 2012, that seems like a reasonable amount for the expenditure to be each year so at row ten we've ... sorry, at row six we've added back all of the professional fees but at row ten we've said \$2,000 a year would seem to be a standard amount for a company like this to have their annual work done. **The other ones we added back, so continuing education and professional fees are the only two that we said, you know, a reasonable level of those might be an appropriate adjustment but there would be something, just not all of it.** The other ... other areas in this analysis we've added back all of the amortization. We've added back all of the interest and bank charges. Again, a professional corporation is a flow-through so it's really, you know, an extension of the individual if I can call it that so to the extent that you're paying your bank charges and your overdraft interest and you're able to get the deduction for them, an employed person would not necessarily have the benefit of that. **The office expenses which would include telephone and such, that has been added back.** (my emphasis) Again, the business of Atlantic Dental is operated separately from the business of [Mr. M.'s business] **so to incur that much in office expenses again for a professional services corporation seemed high. And, you know, without the details of what was in there, what the nature of them was, and some**

**distinction between a personal discretionary amount and the ... a required amount to run again a professional services corporation, we've added that back. Travel and entertainment has been added back and we added the vehicle back.** (my emphasis)

...

So this is ... effectively schedules two and three are a summary of the financial statements of [Mr. M.'s business]. And the figures from those are derived directly from the financial statements and then feed into the analysis on the guideline income.

...

Interest and bank charges, line eight, I have added that back. Line ten from schedule two I have not added back and line ten is the interest ... sorry, excuse me, interest on long-term debt. **So that's the debt, I believe, from the original acquisition of the partnership interest and there's only interest on long-term debt in 2011, 12 and 13 but I did not adjust that out.** (my emphasis).

....

Because it was specifically for the acquisition of the investment so it wasn't ... it was for business purposes.

## Scenario C

[45] Ms. R goes on to explain that in scenario C, all of the expenses of the corporation are disallowed. As though there was “a true flow-through of the revenue of Atlantic Dental Center into the hands of [Mr. M.]”. Ms. R states:

This scenario begins with revenue so this third scenario effectively assumes that the professional corporation is an extension of the individual and that all of the expenses have been added back effectively under this scenario. And again, **scenarios two and three are ones that we prepared for, I would say, illustrative purposes because we did not have the information specifically to do ... to do the adjustments that would be well thought out in terms of making a judgement or assessment around specific expenses so it's kind of a spectrum of adjustments. The first scenario we've included all of the pretax corporate income. The second scenario we've made specific adjustments to accounts, again without the details behind those numbers but specific adjustments to accounts. And the third scenario is essentially every ... it's**

**essentially treating the professional corporation as a flow-through where had ... had [Mr. M.] not been incorporated, he wouldn't have had the deductions** (my emphasis).

...

...the most granular information we have would be the financial statements for [Mr. M.'s business]. There are, attached to a corporate tax return which we have for [Mr. M.'s business], you can sometimes find a little bit more detail around certain expenses but for all intents and purposes, **the financial statements are the most granular level of information we have to support the numbers that ... that we've used in schedule one. So this income statement is drawn directly from the financial statements.** (my emphasis)

...

So again when we're calculating guideline income, you have to consider the type of business you're looking at. If you're looking at a service-based business which is driven more by, you know, hours or some kind of flow-through but not heavy capital investment, then typically you would see a balance sheet not unlike this one where you've got maybe a small amount of capital equipment, small amount of working capital but essentially you're building up your retained earnings. In this situation there's the investment in the partnership which again is not unusual so there's nothing really terribly unusual about this balance sheet in terms of a dental corporation. **There are some investments that have happened along time that have been ... have taken place within the business, that's a personal preference, and I'm referencing specifically the long-term investments when I speak of those.** (my emphasis) No receivables, so again when you set up a professional corporation, you have the ability to defer your taxes on certain income so you can borrow money from the corporation on a tax-free basis so the notes receivable would ... would reflect that there's been money borrowed. The ... we know that there's been a bonus accrued, for example, in 2017 so, you know, all of those things for an accountant are readily visible from this but there's nothing really unusual in this. **The retained earnings in ... over time has ... has been confused as value by a Court, it's been confused as sort of available. I ... I wouldn't ... I wouldn't support that assumption or expectation. Retained earnings is simply a residual amount of the difference between the assets and the liabilities.** (my emphasis) So a balance sheet is not a reflection of value, it's not a reflection of worth, it's simply something that has ... that reflects a difference in ... in cash balances and working capital over a period of time and investments. So in looking at ... in this situation and looking at this balance sheet and I would compare it to a manufacturing environment, for example. If you've got a business that has ... that's carrying on all of its business or even, for example, if we were looking at the balance sheet of Atlantic Dental, you've got a very different looking balance sheet. You've got all of your receivables from your patients or your insurance companies. You've got all of your payables, potentially payroll accruals. You've got all of the equipment that the practice owns. So

you've got all of those things that you need to continue to reinvest in and so there's a different measure of looking at a balance sheet of a capital-intensive business than there would be of a non-capital intensive business. In a capital-intensive business, you have to be thoughtful about the cash requirements and cash needs so you're going to do a different evaluation of how much realistically can this business take out, how much is available to the business owner. **It's a different exercise than looking at a professional corporation where, and when I say available I don't mean sitting in a chequing account, I mean it's essentially a flow-through of the income.** (my emphasis) A manufacturing corporation it's not quite that easy. You do have to take into consideration a constant reinvestment in the business in order to make money in the future. So it's ... it's a different exercise.

...

**So I want to be careful in using the term value so in my mind, I would distinguish things that I'm looking at in the financial statements between income and worth.** (my emphasis) So income is the revenue that you have, the expenses that you spend for the business in order to earn that revenue specifically, and then there's worth. **The partnership interest is a function of worth so when you're continuing to reinvest in that ownership of the partnership, that is a function of, you know, no different than investing in a life insurance ... a whole life insurance policy or what have you.** (my emphasis) So it hasn't come into consideration other than the fact that by being a partner in the partnership, [Mr. M.] has access to income from that partnership. **But when he sells his interest in the partnership, this ... this line item, this partnership interest, cannot be confused with the proceeds that he would receive on the sale. So to the extent he continues to invest, he will receive the returns upon sale of that partnership interest. Those aren't things that I would take into consideration in guideline income unless he had already sold it and I would be tasked then with looking at how do the proceeds on sale impact the income of the individual in the future.** (my emphasis) So I have not considered partnership interest in terms of calculating guideline income under the guidelines...

....

So again, in a professional services corporation, other than observing the balance sheet to ensure that it's not a capital-intensive type of business, I wouldn't give a lot of consideration to balance sheets, however, **I did look at the long-term investment. There are two components. Again, that investment is a function of worth, that's value that cash has been used to invest in a long-term investment, it has created worth not necessarily income. With the caveat that this long-term investment has created income, the income is reported in the company, it is part of the pretax earnings of the business and therefore it's part of corporate attribution.** (my emphasis)

...

**However, that investment, so my understanding of this investment in particular is that in February of 2015, [Mr. M.] began to set money aside.** (my emphasis) My understanding from disclosure is that was for the education of his children so he saved \$1,000 a month and then in January of 2018, that investment was cashed out. **So again it's a use of cash but it's not ... it's not something to take into consideration in guideline income other than the investment income that it generates.** (emphasis)

...

This is what the cash, so generating cash and generating income are again two different things. So when the company's making money, presume ... presumably it's generating cash which it uses for various purposes. Part of the cash was used to make an investment.

...

No different than if you look at row four, part of the cash was used as a loan. So the cash flow statement and the financial statement shows how cash is used but cash is used to invest ... cash is used ... generated from income and used for expenses so to that extent, it's part of the income calculation. **That piece of cash goes into guideline income but cash is also used to generate worth or value and in terms of investments, in terms of the partnership interest, that's a function of worth not ... not income so that is not taken into consideration in the guidelines.** (emphasis)

[46] Ms. R was then asked a question about bank indebtedness and she stated in part:

Well again, we're talking about the sources and uses of cash. So our sources and uses of cash again are it's generated from revenue and it's spent on expenses, that's one stream. And then cash is used, for example, to make investments, to continue to invest in the partnership interest.

...

Cash is ... was used in this situation, there's a \$26,000 note receivable so cash was loaned out. So all of those things use up the cash of the corporation and may have led to bank indebtedness.

...

I believe the financial statements indicated that it was advanced to directors of the company during the fiscal year ended December 31, 2017.

...

And that's not an uncommon thing to see. **Again it's, you know, when you have the benefit of a corporation established, you have the added benefit of being able to manage your taxable income over a period of time and borrowing, CRA allows you to borrow money from a corporation for a discreet period of time on a tax-free basis so not uncommon to see that.** (my emphasis).

[47] Specifically in relation to long term debt, Ms. R stated:

So current portion of long-term debt and long-term debt, so when we're looking at that it would be rows 15 and 17 and that, you would only see those figures in 2011 and 2012. By the end of 2013 those had been repaid. So at row 15 we've got the current portion and at row 17 we've got the long-term portion. Together those would be long-term debt. **The distinction of the current portion is that generally accepted accounting principles require that the amount due within the next 12 months be taken into consideration as a current liability.** (emphasis) So if you were looking at a loan statement or a loan balance, you would add together these two figures to get to the actual long-term debt amount due.

...

**The guidelines do not include any reference to adjusting for payment of debt. Again, it's a function of worth. You make an investment, you borrow to pay for that investment, so you realize your return on that investment when you sell your investment. So long-term debt is not something we take into consideration in the guidelines with the exception of the interest portion which is an operating cost of holding a debt. That interest portion is a deduction under scenarios one and two of our guideline income so it's incorporated in the pretax corporate income that's been added to [Mr. M.'s] guideline income.** (my emphasis)

[48] Ms. R goes on to talk about retained earnings, she states in part:

So again, retained earnings is a residual, it's a mathematical difference between your assets and your liabilities. It's not a function of worth, it's not a function of value, not a function of cash available. It ... again, not unusually in a professional services corporation, it very much looks like the investment that you hold in the partnership. So if you look at the partnership interest in 2017, for example, you've got partnership interest at a book value I'll call it of \$324,646 so that's how much you've actually invested. Again, it's not what the value is if you were to sell it but it's how much you've invested in your partnership interest. And the retained

earnings is 347,834 again in 2017. So any ... if you look at each year, those numbers are very similar and again not uncommon in a professional services corporation where the main asset you hold, the purpose for having a corporation, is to hold your partnership interest. The other things that happen around it are really ancillary ... ancillary items within a balance sheet.

...

[49] When Ms. R was asked if she had reviewed the comments made about retained earnings in the commentary report completed by Mr. M's expert, Mr. SM Ms. R responded that she had, and she stated in part:

I would first like to distinguish it so it's corporate money. So again this is referencing cash flow, this isn't referencing income, this is referencing cash flow so this is not ... not the typical process you'd go through under the guidelines. The typical process under the guidelines again is going back to Section 18. It's your ... your pretax corporate income, bearing in mind that there would be adjustments for that for the normal operations of a business. Again if this were a heavily capital-intensive business that had significant operations, had employees, had you know a premises where it paid rent and built machinery, you'd see much broader swings and required investment to stay in the business. **So there's a different measure of the reasonableness of that pretax corporate income being attributed to the spouse. So that's kind of the process we go through. It's not ... and on those questions of what cash might be there for distribution, that's got some nuances as well.** (my emphasis) For example, if you've got a company that's traditionally paid for personal expenses, it's used its cash for different things. **So the fact that it has no cash isn't necessarily a measure of whether it can manage the corporate attribution that's been included in the business owner's income.** (my emphasis) So there are a lot of different considerations to that corporate attribution figure that aren't necessarily on paper.

...

If we go back to this section so this section specifically says corporate money so again it's measuring what cash is in the company to pay it out. **Well, let's keep in mind this company's already used a lot of its cash to pay expenses. It's used its cash to give a shareholder loan or a director loan. It's used its cash to make investments in student loans. So it's used cash in a lot of different ways. That's not necessarily aligned to the process that you take when you're calculating corporate attribution.** (my emphasis) If we go to this section, that first line ... that first line is the increase and the decrease in the partnership investment. So again the partnership makes money, the Atlantic Dental makes money. The dentists take withdrawals from the amount attributed to them. The

dentists have to leave money in their investment so that the dental practice can continue to operate. That amount's not dollar-for-dollar. If Atlantic Dental makes \$100,000 a year and requires that you leave \$10,000 in the business doesn't mean that, you know, that there's exactly \$110,000 withdrawn. There's always going to be differences in the amount taken out and the amount left in and we can see across the top here, I have no dispute with the figures. We have ... with the math behind the figures I should say. **We see the change in the amount left in that investment and again that's a function of timing, a function of the difference between the income of Atlantic Dental and how [Mr. M.] takes his draws.** (my emphasis)

[50] Ms. R was asked again about Mr. M paying tax on a withdrawal and she replied in part:

except that because he's in an incorporated business, you can declare a bonus to offset that. So looking at this as a discreet item without looking at all of the ways that you can manage your taxable income as a professional corporate owner, it's the reason you would incorporate a professional practice, right, is to manage that income and manage your tax liabilities. So ... or tax obligations. So, yes, essentially he left an extra \$12,000 in the business. Because partnerships aren't taxed on their own, he would have paid tax on that \$12,175 but for the fact that he declared a bonus, which then reduced the tax liability on the \$20,000.

...

[51] In response to questions about money taken out by Mr. M in 2015 and in 2016 Ms. R responded as follows:

That means he withdrew more than the partnership made. So in those years, he would have drawn out more cash than he left in. And these aren't big numbers really, in the overall scheme of things. The bigger numbers happen in, you know, the earlier years, 12, 13. In 2012 in particular, [Mr. M.] bought out the interest of another dentist so ... so that's why you see some more left in the partnership.

...

I believe it was approximately a percentage but yes. **So, you know, on an overall basis why you look at the fluctuations, if they were really large fluctuations that were going to heavily impact income, you might take those into consideration. If this is a longer term investment going into the future, I**



**would take ... you know, be more likely to take that into consideration. Why I ... and I certainly wouldn't in terms of buying additional partnership interest. Again these are functions of worth, these are not functions of ... of income necessarily.** (my emphasis) So the other thing to consider is that my understanding is [Mr. M.'s] aspiring to sell his partnership interest so in the event that you're taking all of these fluctuations into consideration, at some point in time that's going to come to an end.

[52] Ms. R was asked about the Assante investment and she responded in part as follows:

I would consider that to be a discretionary use of funds, a discretionary use of the cash of the business. He happened to have it inside the corporation. Had he carried that investment outside of the corporation, it wouldn't be an issue for discussion.

[53] With regard to the repayment of debt Ms. R had the following to say:

[Mr. M.] paid 27,000, in 2012 [Mr. M.] paid 31,000 and in 2011 [Mr. M.] paid 22,000 against his long-term bank debt? I would just like to confirm that that's only the principal portion, just give me one second. Yes, I'm not sure if that's the principal and the interest, long-term debt, but that would be a repayment of long-term debt. It would certainly include the principal payment so again, not an adjustment you'd make in accordance with the guidelines. It's a function of worth. When he bought the partnership interest, he would have borrowed money in order to acquire his partnership interest. He would have repaid that money and by doing that, his net proceeds on the sale of his partnership interest would be maximized because he doesn't have debt to repay. So again it's, you know...

...

So in 2012 ... in 2012 we see from the balance sheet that there was a current portion of long-term debt of \$12,443 and there was a long-term portion of \$14,981. What you would expect to see in the subsequent year is that the long-term portion, either some or all, would become a short-term portion so it would be repaid over years. The total of the current plus the long-term portion of debt in 2012 was \$27,424 and I get to that by adding the 12,443, a current portion of long-term debt to the \$14,981 of long-term debt.

[54] Ms. R was asked, “is it that he was required to pay 11,564 in 2011 but he, in fact, did pay 22,868? And in 2012 he was required to pay 12,443 but he did pay 31,035? So in 2013 he would have been required to pay the current portion of 12,443. But he actually paid the full amount of 27,424?

[55] Ms. R responded in part:

Going backward. And so that ... that adjustment on Mr. MacLean's schedule one, that is just the principal repayment of long-term debt and again the guidelines don't contemplate any adjustment for debt repayment. It's a function of worth not a function of income with the exception of the interest portion which we've left into ... in our ... in our calculations.

[56] Ms. R was asked to consider the following:

Where both spouses agree in writing on the annual income of the spouse, the Court may consider that amount to be the spouse's income for the purpose of these guidelines, if the Court thinks that the amount is reasonable having regard to the income information provided under Section 21.

...

[57] Ms. R was then asked if she had reviewed the Corollary Relief Judgement issued in June of 2009 in the preparation of her report? And whether she considered the terms when applying Section 18(1) of the *Federal Child Support Guidelines*:

Okay. So 18(1) states that: Where a spouse is a shareholder, director, or officer of a corporation and the Court is of the opinion that the amount of the spouse's annual income as determined under Section 16 does not fairly reflect all the

money available to the spouse for the payment of child support, the Court may then consider the situations described in Section 17 and determine the spouse's annual income to include and it goes on to list two situations.

...

[58] Ms. R was asked to consider section 18(1):

Where a Court is of the opinion that the amount of the spouse's annual income, as determined under Section 16, does not fairly reflect all of the money available to the spouse for the payment of child support.

[59] Ms. R was asked to indicate if she interpreted section 18(1) “as meaning that if [Mr. M.] is required to make debt payments through his company, that he's contractually obliged to make, that that money that goes to pay the debt is therefore not available for the payment of child support or do you take a different approach to that notion?”

[60] Ms. R responded as follows:

The calculation of the 18(1) for me, it's pretax income. So there is no ... there is no specific reference to the repayment of debt within again if I were looking at a capital intensive where you have to borrow to have a building or you have to borrow to do certain investments that are required of the business, then I might take into consideration the amount of working capital or the amount of cash that has to be retained in the business to manage the ongoing operations of the business. That is separate and apart from discretionary choices or discretionary willingness to either pay for expenses or pay for debt, etc. So if I were to look into this line item, I would also have to take into consideration a deeper dive into what expenses were paid in the corporation for personal benefit that were cash use for the shareholder and I haven't been able to do that either. So there is potentially a broader look **but for me, with this company, it's an evaluation looking at the fact that as a professional corporation, it's a flow-through corporation that had [Mr. M.] been owning it as an individual, he would have had different ability to make deductions and if I'm trying to create**

**parity between the professional corporation income and employed ... employed person with the same level of income, if I'm trying to create parity between the guideline incomes of those two individuals, then debt would not be part of that calculation.** (my emphasis).

[61] Ms. R was asked if she would acknowledge the income was already used in the corporation for the purpose of repayment of certain debts. Ms. R responded as follows:

Expenses and debts but not necessarily expenses and debts as they had to be paid. So, for example, if we go back to the debt repayment, the debt repayment took place at a pace that was different from what it was required to take place at. So when you're looking at the discretionary use of cash in a business, it's ... it would be difficult to suggest that that debt either couldn't be refinanced to create cash or couldn't be paid out at a different rate. So again, it's not like you're investing in a building where you're out the million dollars for the building and you've got cash of \$800,000 to help pay for that and you have to take that debt repayment over an amortization of 20 years into consideration. **First, the guidelines don't account for that, for that principal repayment, only the interest would hit guideline income. And second, you would be doing a much deeper evaluation of the retained earnings and the assets and liabilities of the company.** (my emphasis)

...

There's no direction for me as an expert to take into consideration, there's no guidance within the guidelines, for me as an expert to take into consideration repayment of debt.

...

Again, in a different structured company, it might be more relevant. **This is not a company that has a heavy capital burden and therefore you wouldn't expect it to have a heavy debt burden so it's not something I would have considered in this business.** (my emphasis) It's not an analysis I prepared but if the Court chooses to make an adjustment for that, it's at the discretion of the Court, not at the discretion of the expert in my view.

...

**This issue has come up in prior matters that I've testified in. There's no reference to repayment of long-term debt because again it's a worth ... it's a worth consideration, not an income consideration. It is a use of cash but it's also potentially a source of cash so considering one without considering the**

**possibility of the other is imbalanced in my view in terms of calculating guideline income.** (my emphasis) Again it's no different if you were to look at the individual and you buy a house and you decide to pay cash for the house or you decide to finance the house. Paying those mortgage payments, if you paid it all in one year and then had no obligation to pay principal for the next 20 years or for however long we hold our mortgages for, is it equitable to look at that in direct comparison to a person who's decided to pay cash for their house.

In these particular circumstances there was no evidence of any need to consider the capital cost allowance anomaly referenced in Section 18(2), and Schedule III, paragraph 11.

[62] Ms. R was then asked, “if [Mr. M.] was required to make a contribution to the partnership each month, was the money he contributed considered available to him for child support purposes?”

[63] The question was clarified further “In other words, if the partnership decided to use Mr. M’s contributions in the partnership to pay expenses such as staff salaries, such as the purchase of dental chairs, such as the purchase of dental inventory, such as the purchase of leasehold improvements, was that money Ms. R would consider is available to Mr. R for the payment of child support?”

[64] Ms. R responded as follows:

Again, that is a number that would be calculated within the change in partnership interest that we talked about earlier. Had the swings of that been much broader and more significant, then it might have been something we took into

consideration but two things influenced our decision not to adjust for that. **One is that the swings are positive and negative in fairly small amounts, year-over-year basis, and the second point is that we are aware or certainly it's available in disclosure that [Mr. M.] is going to be selling his partnership interest.** (my emphasis) At that point in time any of those swings would be crystalized.

[65] In his commentary report, Mr. M's expert, Mr. SM states: "That while I agree with the mathematical calculation of pretax corporate income adjusted, ...I do not agree with the added description that it is available for distribution to [Mr. M.]" Ms. R was asked if that is what she was saying.

[66] Ms. R responded in part as follows:

My calculation is under 18(1)(a) where it says: All or part of the pretax income of the corporation, and of any corporation as related to that corporation, for the most recent tax year be added to the guideline income. So **I did not have sufficient information regarding the actual expenses of the corporation to make an assessment as to the reasonableness and I would define reasonableness as it is defined under Section 19, not reasonableness in terms of ... of would CRA allow it but reasonableness in terms of was there a discretionary component to that that was necessary to the business.** (my emphasis) So I didn't have the opportunity to do that analysis on a fulsome basis which would have been a very different analysis from simply adding back pretax corporate income. And at the same time, that would have generated a different cash balance than essentially the company had because the cash wouldn't have been spent on said discretionary expenses in the event that they were there. **Again without being able to do that analysis, it's impossible to say what would have been available in a professional services corporation if you had the ability to do a full analysis of the expenses that were paid.** (my emphasis)

[67] It is important to remember, as noted in *Kowalewich v. Kowalewich*, 2001

BCCA 450, "the use of pre-tax corporate income as a basis for the determination of

child support **does not strip a spouse of his available money** (my emphasis). It is to use available money as a measuring rod for the purpose of fixing annual income and thus the amount of child support”.

[68] Ms. R was then questioned further about the information she had available to her when she completed her report.

[69] Ms. R was specifically asked whether Mr. M had disclosed financial information including his personal returns with attachments, his corporate returns with whatever attachments came with them for the period from 2011 to 2017, the family trust returns for each of the two family trusts, and corporate financial statements prepared for the partnership by Levy Casey Carter MacLean.

[70] Ms. R was then asked to confirm whether she was of the opinion that the income, the mathematical calculation of pre-tax corporate income adjusted for pre-tax value of dividends, was income available for distribution to Mr. M.

[71] Ms. R responded in part as follows:

No, the assumption would be that that's income to be included in [Mr. M.'s] guideline income for purposes of calculating ... **for purposes of the Court's consideration of calculation of his income.** (emphasis) No, I'm saying that money should be taken into consideration in the calculation of [Mr. M.'s] guideline income for purposes of establishing support. **In any guideline income calculation, it's, you know, this misnomer of every penny that goes into guideline income needs to be extracted from the business in order to pay support is exactly that, it's a misnomer.** (my emphasis)

...

So again, it's there are two pieces of this that one would consider. One is what expenses were incurred by the business on a personal discretionary basis. We have no ability to calculate what those were. Regardless of the financial statement disclosure and, in fact, we saw copies of receipts. It doesn't tell me, if you see \$100 receipt from Moxie's, who went, what was the business purpose. CRA would require all those as well by the way in terms of allowing the deductibility, but it doesn't tell me what the expenses that the company has actually expended could potentially have had a discretionary or personal use for purposes of calculating guideline income. **So in fact, I would consider scenario one is somewhat of a conservative calculation because I'm accepting effectively that all of the expenses that ran through the corporation were for business purposes,** (my emphasis) And again, that inclusion of the amount of pretax corporate income, without positive or negative adjustment, is not an assumption that the company's writing a cheque for that. It's the ... the expectation that because it's a professional services corporation, that effectively flows through to the guideline income for purposes of the Court's consideration for spousal support and child support.

[72] Ms. R was then questioned about the \$81,327 in repayment of long-term debt from 2011 through 2013.

[73] Mr. M argued that whether he was paying the principal or the interest on the loan, that "if he's contractually obliged to make that payment, to use an analogy, if he has to make the mortgage payment on the house, it doesn't really matter what part of it's principal and what part of it's interest, he doesn't have that money to pay child support."

[74] Ms. R responded as follows:

That cash would have been used to repay long-term debt. However, the complexity of debt is that what's prohibiting him from then going and refinancing his partnership interest the next year and at, you know, 50 percent value you can



bring \$150,000 in. By the same logic, would one include that \$150,000 in his income available to pay debt? It's not income.

...

It's an investment. It's a function of worth. If we were valuing this practice, if you were dividing the asset of the business, that is a piece of that calculation that one would take into consideration.

...

We're calculating ... we're calculating income. The repayment of debt is not taken into consideration in the income. It's not in the income statement of one's tax return. It is not taken into ... excuse me, taken into consideration in 18(1)(a).

[75] Mr. M then argued that "Actually it says in 18(1)(a) you're to look at what income is available to the taxpayer for the payment of child support". Mr. M argued that it appeared Ms. R was suggesting she knew better than Mr. M about how to manage his business and she was suggesting that he should go out and refinance at every opportunity in order to generate more cash flow.

[76] Ms. R responded as follows:

That's not my suggestion at all. The point I am raising is that if one were to start taking repayment of interest ... excuse me, repayment of principal of long-term debt into consideration, one then also needs to consider the access to cash. If we're only looking at cash flow, cash flow's available in all kinds of different ways. Repayment of long-term debt, borrowing long-term debt, if we were to start building availability of debt into our guideline income calculations, we would have so many scenarios that we'd all be cross-eyed.

[77] Mr. M argued that he purchased his partnership interest in ADC in 1998 and he borrowed money to do it at the time. He objected to the argument by Ms. M,

that his purchase was “discretionary in the sense that he didn’t have to borrow the money”. Ms. R was asked if she agreed with Ms. M’s position.

[78] Ms. R responded as follows:

I have not done a full cash-flow analysis of [Mr. M.’s] income, cash flow, availability to cash, back to 1998 so I cannot come to that conclusion.

....

I’m not questioning the fact that the money would have to be repaid but I think it’s clear from the balance sheets that it was repaid in a different way than the debt would have been structured. So again, if you look at what the current portion of long-term debt would have been in 2012, the choice in 2013 was to repay the current and the long-term portion so there is some discretion as to how that debt was repaid so it’s not like a, you know, like a mortgage where you’re paying the minimum payment for, you know, five years until you refinance it. There is some discretion on the pace at which that debt can be repaid but again, that is what creates the complexity of debt repayment as an adjustment to guideline income. There is discretion in debt.

...

If he were contractually obliged to make those payments, at the end of 2012 the entire amount would have been reported as a short-term debt. The fact that it was divided between a short-term and long-term portion would suggest that whatever agreement on the debt that was in place at the end of ... unless the financial statements are wrong, it would suggest that whatever debt agreement was in place at the end of 2012 that led the accountants to divide that debt between short-term and long-term, that debt ... that debt agreement enabled him to pay it over a longer period of time than he chose to make it. That would suggest to me that he, at his discretion, he accelerated the payments.

...

I’m pointing out the many difficult pieces of taking into consideration principal repayment on debt when calculating guideline income. It’s not as simple as ... as just saying here’s what was paid and then therefore that wasn’t available. You have the ability through repayment of debt on a discretionary basis to be able to influence income if you start taking into consideration, again no different than if I were to assume that he could refinance that partnership interest at whatever proportion he originally borrowed. He acquired partnership interest in 2012, he didn’t borrow or pay for that so that

was paid out of cash flow. So, you know, there are different ways to finance the operations of a business. If he needed access to cash, that is a financeable asset. Would I suggest he go finance it? Not unless he was desperate, not unless he needed it but ...

...

**... If you're assuming that the repayment of principal on debt is a guideline income adjustment downward then you have to take into consideration the potential access to future debt would be a possible guideline income increase.** (my emphasis) If you're talking simply about access to cash, you have a financeable asset that no longer has debt on it. **If you're talking about access to cash, then the entire proceeds of the sale of the business in whatever year he sells, in my view, would be on the table. We're talking a worth discussion as opposed to an income discussion.** (my emphasis)

...

I'm suggesting that the repay ... the principal portion of that repayment of long-term debt isn't a guideline income adjustment that I can make as the expert. If the Court wishes to consider that as a use of cash, there are a lot of pieces of that to take into consideration beyond what would belong in an expert report, in my view.

...

I haven't added the principal portions of debt to his income.

...

If you look at my schedule one, there is no reference to adding back repayment of the principal portion of the long-term debt. In fact, if anything, we've taken into consideration the deduction on the interest portion of it. There's no ...

...

However, my read of his report, he seems to be trying to reconcile that 182,000 and to identify all of the different places that the cash was spent.

...

**What he doesn't take into consideration is the fact that the corporation had a number of expenses that are reported expenses that we have accepted where cash was spent potentially on discretionary expenses. So it's a very ... it's a very lopsided attempt at reconciling ...**(my emphasis)

...

So his schedule one is a mish-mash of all the places money was spent including corporate taxes, which don't take into consideration that guideline income is a pretax amount, including advances to the directors which is

essentially access to free money, including changes in the partnership agreement, but also accrual of the bonus which gives the benefit of deferring tax. So in my view, it's a very lopsided approach to trying to lay claim to how the money of the business was spent. **Again, if the Court wishes to consider that the way money was spent is an appropriate adjustment under the guidelines, that's at the Court's discretion. I followed the guidelines which advise me to add that pretax corporate income.** (my emphasis)

...

**It would also suggest that to the extent that there were personal discretionary expenses under Section 19, those would be upward adjustments of income.** (my emphasis) I don't have the ability to make those upward adjustments of income. **So on balance, there were funds used, you know, there was cash in the business used for other purposes than expenses that are in pretax corporate income but there was also cash used in the business potentially for personal or discretionary expenses or the benefit of [Mr. M.] personally.** (my emphasis)

[79] Mr. M pointed out that in his expert's report, it states that \$69,754 is an increase in the investment in Atlantic Dental Center. He says this would consist "primarily of partnership income allocated to the corporation on paper that was retained by the partnership for its own purposes to purchase equipment or repay debt and were therefore not paid to the corporation and not ... and thus not money available to Mr. M during the 2011-2017 period".

[80] Ms. R was asked if she disagreed with the figure of 69,754.

[81] Mr. M argued that except for three years 2014, 2015 and 2016, he had to increase the amount of his investment in Atlantic Dental Center so it could perform its normal everyday function of paying its expenses.

[82] Ms. R responded as follows:

Well, I would bifurcate that line item to as 2012 also includes the acquisition of additional partnership interest and again if we go back, I hate to revisit it, but we go back to the discussion on debt, the original acquisition of partnership interest was a financeable transaction. So again, you've got a financeable transaction that he chose not to finance, paid from cash flow, so again these are discretionary investments. If you wanted to go to the bank and finance the partnership interest or refinance the partnership interest, that gives you access to cash if that's your ... if that's your aspiration. He had the ability to pay for this through cash flow. He chose to pay for this through cash flow. Again, to include an investment like this or to include repayment or obtaining long-term debt, these are not, in my mind, guidelines income adjustments that would be appropriate in this situation.

...

He acquired a financeable asset, it's a function of worth. When he sells that asset he will realize the returns on his investment.

...

It is in the future ... but the obtaining of debt is in the past and we're taking that into consideration so again, if ... if you had a heavily capital-intensive business, these are all analysis you would have to perform. This is not a heavily capital-intensive business.

[83] Mr. M then argued that the "personal body corporate and the partnership of which that body corporate is a member, you can't really separate it from each other because one can't function without the other".

[84] Mr. M asked Ms. R if when considering the "heavy integration" that she referred to, whether she took "into account in determining what additions to [Mr. M.'s] income could be made from money that was used to pay, for example, \$69,754 in the ... into the partnership"?

[85] Ms. Robar stated that it would be “taken into consideration by default if the income flows through to [Mr. M.’s business] in his proportionate interest”.

[86] It was then suggested that Ms. R agreed with Mr. M, “that if he had to pay according to the majority of the partnership, \$69,754, that the money was no longer available to be used as income for the payment of child support”.

[87] Ms. R responded as follows:

That is a use of cash that [Mr. M.] experienced over the seven-year period both to make an increased investment in the dental practice. Again, that gave him access to more cash, will give him access to greater proceeds on the sale of the business, but again if you were to prepare a scenario analysis on how he could have otherwise obtained that cash, that’s what we’d be looking at, I think. We’d be looking at the possibility that he didn’t have to pay that out of cash. He could have accessed the cash in different ways similar to how he did when he bought his original partnership interest. It is how he chose to use cash, no different than how he chose to use cash to pay the expenses of the business over time.

[88] Ms. R was asked to assume that Mr. M, after purchasing his original interest in the partnership for \$200,000 as is noted in his expert’s report, paid another \$10,000 for just over another one percent in the partnership.

I would take ... so that 69,754 includes the new investment in the percentage of the practice so he would have had discretion over buying new shares but the decision over how much the dental practice retained would have been a joint decision. So again, I would bifurcate that into two pieces.

...

One, he bought an increased interest and two, additional funds from Atlantic Dental were retained for the ongoing operations of the business.

...

it's included in the balance sheet item of partnership interest and the calculations at Mr. MacLean's schedule one are simply the difference between those net book values of the balance sheet interest year over year. In 2012 the 30,000 and change, that is the difference between the book value that it was in 2011 and the book value it is in 2012 that also include his acquisition, regardless of who he acquired it from, would include the acquisition of that partnership interest from the other dentist.

...

So if we're getting to that line item being 69,754, part of that is what was retained over that seven-year period for the reinvestment of the dental practice, Atlantic Dental, again which is a measure of worth that increases his investment in that business. The second piece, which also increases his investment, would have been a discretionary choice to buy, without financing, an additional one percent of, and I'm rounding at one percent, approximately one percent of the dental practice.

...

**It's not ... it's not an adjustment to income per se, it's not an adjustment to pretax income/after-tax income, it's a function of worth. Again, for me to take that into consideration, you need to take into consideration what access to cash do you have by ... by the fact that you own this investment.** (my emphasis)

...

So if the dental center makes \$100,000 in the run of a year and [Mr. M.'s] share of that, I'm going to round up to 25 percent because I can do better math, [Mr. M.'s] share of that is \$25,000, 25 percent, then that's his income. If he only draws of that \$20,000, then the \$20,000 is what he gets as cash so there may be that additional net of \$5,000 left in the dental practice. So essentially what Atlantic Dental Center earns is not necessarily what Atlantic Dental Center pays out and the difference would be his investment. Is that the question?

...

So the staffing piece, you need to be careful. So, yes, it would be for paying for capital, paying for new equipment, paying for, you know, to invest in the business, maybe cover off working capital if there are large receivables outstanding. Paying for staff, that's an expense so that's already netted against the income amount that gets split. So again we're talking income versus worth.

...

The partnership is holding on ... the partnership is holding onto some of that cash in order to make investments.

...

But the income, it can't hold onto income because it's not taxable in and of itself so ... so that's the whole growth in the investment is that the partnership is retaining some of the cash to pay its expenses which would then be realized by the partners upon disposition of their interest and again that part fluctuates each year a little bit. You'd have your main investment in your partnership which I believe [Mr. M.] did in 1998, so you have your main investment then and from then, there's going to be fluctuations simply because it's not perfect math every year and every year there might be different requirements of the business from a cash perspective.

[89] Ms. R then referenced Mr. M's expert report:

**Yes, I think he's getting to a cash amount of what, once you've paid all the expenses and paid all the, you know, the liabilities, what cash could you extract which is not the objective of the calculation. So ... and it fails to consider the piece that I would have thought Mr. MacLean would have the best access to which is what cash does the company already spend that maybe needs to be considered as an adjustment, an upside adjustment, to guideline income because they are discretionary or personal in nature (my emphasis).**

[90] Ms. R was asked her opinion about whether Mr. M should have been expected to keep a record of discretionary adjustments of a more personal nature. Specifically, whether the Canada Revenue Agency required a business owner to retain receipts for a certain period of time?

[91] Ms. R responded by stating "Yes, I believe it's seven years".



[92] Mr. M's expert report cited Mr. M's investment in mutual funds as another example of non-discretionary use of funds, and questioned whether Ms. R had identified the funds being used for this investment as being available for income for [Mr. M.]. Mr. M was identified as having a \$32,850 increase in long-term investments.

[93] There was acknowledgment that the amount represented funds that the corporation invested in mutual funds with Assante. Mr. M argued that the Assante investment was to be used towards the education expenses of his children, and that the amount was therefore arguably not money available to Mr. M during the 2011-2017.

[94] I do not agree with Mr. M. At paragraph 30 – 32, in *Boylan v. MacLean*, 2018 NSSC 15, the Honourable Justice Lester Jesudason stated:

[30] Child support, whether Table amount (s. 3 of the *Guidelines*), or as a contribution to a special or extraordinary expense (s. 7 of the *Guidelines*), is to primarily finance a child's current costs. RESP contributions are not current costs but a form of saving to pay future educational expenses. They are generally not ordered.

[31] Julien D. Payne and Marilyn A. Payne, in *Child Support Guidelines in Canada, 2015* (Toronto: Irwin Law Inc., 2015) make this point as follows:

Registered Education Savings Plans are not section 7 expenses, nor are they part of the table amount of child support. Child support is intended to provide for the current needs of the children. A child support order should not address anticipated needs in the distant future. A court may refuse to order a parent to make future payments into a scholarship savings plan or

a Registered Education Savings Plan (RESP) to meet future need of the children (p. 446).

[32] Similarly, in *Van der Linden v. Rhynold*, 2007 NSCA 72, our Court of Appeal set aside the provision of a trial judge's order which required the payor to contribute to an RESP fund although leaving open the possibility that, in unusual or exceptional circumstances, a payor may be required to set aside money for future educational costs. The court stated:

Generally, post-secondary education expenses are addressed through a continuing obligation to provide child support rather than a prospective award...It is unnecessary for us to determine whether circumstances may arise where a payor of child support can be ordered to set aside an amount for future educational or other expenses...Here the judge did not find that there were unusual or exceptional circumstances that would warrant such an order. While his motivation in establishing the education fund is laudable, it is my respectful view that in doing so, the judge erred (para. 14).

[95] Ms. R was asked to assume Mr. M used the \$32,850, for the purchase of a car for one of his sons who needed it for transport back and forth to work, the payment of insurance for that car year over year, for a cell phone for the same son, for repairs to the automobile and for the purpose of paying the son's tuition in his first year at Dalhousie, over and above, what he was paying for regular child support under the guidelines as he declared his income during this time frame.

[96] In *Boylan v. MacLean*, 2018 NSSC 15, at paragraph 38, Jesudason J., stated:

[38] In determining the Mother's request for a contribution from the Father in relation to each of her claimed expenses, I should:

- determine whether the contribution was covered by the 2005 Consent Order and, if so, whether I should vary that Order;
- determine whether the expense falls within one of the enumerated categories of s. 7 of the *Guidelines*;

- determine whether the expense is necessary in relation to S's best interests;
- consider the reasonableness of the expense in relation to the parents' and S's means and to the family's pattern of spending prior to separation; and
- if the expense falls under subsection 7(1)(f) of the *Guidelines* (expenses for extracurricular activities), determine whether it is "extraordinary" after determining the above considerations. (*L.K.S. v. D.M.C.T.*, 2008 NSCA 61 (CanLII), at paragraph 27; Leave to appeal to the Supreme Court of Canada denied at *D.M.C.T. v. L.K.S.*, 2009 CanLII 1998 (SCC))

[39] If I determine that the expenses are proper section 7 expenses, I have the discretion to require that the Father pay all or any portion of same. I can consider any subsidies, benefits, income tax deductions or credits when I determine the amount of an expense which can be estimated: subsection 7(3) of the *Guidelines*. The guiding principle is that the expense should be shared in proportion to the parties' incomes given that S did not contribute to any of the expenses: subsection 7(2) of the *Guidelines*.

[97] Any payments by Mr. M for a car or cellular telephone for J was at Mr. M's discretion. Mr. M has not satisfied me that the cost of a car and a cellular telephone for J are proper section 7 expenses as provided for under s. 7(1) of the *Guidelines*.

[98] Ms. R was asked if, assuming Mr. M spent the money as outlined above in paragraph 91, "if he spent all that money on the benefit of his son", did Ms. R still believe the funds were still available to determine Mr. M's income. The Court interjected and specified that the question of what a proper section 7 expense is, is for the Court to answer and not Ms. R.

[99] Ms. R was asked if it was her opinion that the \$67,963 that was paid into corporate taxes for the body corporate, should be added back to [Mr. M.'s] income.

Ms. R responded as follows:

So again, you're using the terminology of added back. I've not added back any of these things. These are cash flow uses of cash of the corporation. There are many uses of cash of the corporation. The calculation of guideline income, in my experience, is a completely pretax calculation, again with the objective of putting the incorporated individual or the business owner on a parity scale with the employed person in order to establish a fair amount ... **for the Court to establish a fair amount of income that would be comparable to the employed individual.** (my emphasis) So these are pretax calculations, everybody pays tax. If I were doing this calculation for an employed person who had a T4 slip and who ... who then had to pay tax later, I don't care what tax they pay either. **The idea is to get the line 150 or guideline income to a comparable number so the existence of tax obligations are there for everyone.** (my emphasis) The fact that through a corporate structure you have the ability to manage that tax obligation in terms of timing, you have, depending ... depending on where the legislation is at any point in time, often a preferred tax rate to a slight amount as compared to the individual. Those are ... those are different considerations but the fact that there's a tax payable or there's a cash flow amount in the company that goes to paying tax, that's a ... that's a non-issue in terms of calculating guideline income which is solely pretax.

[100] Ms. R was then asked if she was “assuming under her approach that Mr. M should be looked upon as an employee and not as the owner of a company who pays his child support based upon his line 150 as generated by the company's revenue”. Ms. R was asked if she was assigning Mr. M the status of an employee.

[101] Ms. R responded by stating “The goal of guideline income calculations for a business owner is to try and understand, if he were an employee, what his income would be on a comparable level.”

[102] As recognized in *Kowalewich, supra*, and *Gosse v. Sorensen-Gosse*, 2011 NLCA 58, use of section 18 of the *Guidelines* “**does not strip the corporation of any income; it is a measuring rod for the purpose of fixing the income of a parent.** (my emphasis) The corporation is not a party to the action. The corporation does not need to make any adjustments in its books, nor does it have to pay out any money. The corporation does not transfer any money out of its accounts when corporate income is attributed to a payor.”

### **Scenario B**

[103] Ms. R was asked about the comments Mr. M’s expert made with respect to scenario B which was included in the Guideline Income Report.

[104] Ms. R was reminded that Mr. M’s expert, Mr. SM stated:

The scenario ... this scenario in the PWC report starts with the income calculated under scenario A based on the assumptions used in that scenario and adds to it certain corporate expenses that are assumed to be discretionary and therefore not deductible under Section 19(1). Is he correct so far?

[105] Ms. R was asked if at page three of six of the schedules in the PWC report, scenario B adjusts for potential discretionary expenses. Specifically, Ms. R was asked if she had assumed that most of the corporate expenses claimed on the financial statements of the corporation were discretionary and unreasonable.

## Disclosure

[106] Ms. R responded as follows:

No, I would not make any assessment as to the unreasonableness of expenses and again I would point the Court to **Section 19(2) which specifically states that the definition of reasonableness of the expenses is not CRA's definition of reasonable.** (my emphasis)

...

**I'm assuming that the financial information that's been provided in the corporate tax returns and personal tax returns are accurate and that they would be acceptable by CRA. I'd see nothing in the file to suggest otherwise. However, again that's not the definition that we look at, particularly around a professional services corporation. It gives the owner the leeway to be able to take expenses that would have been paid, again if we're trying to equate the employed person with the business owner, it takes expenses that would be paid from an after-tax net income amount of an employed person and it enables the business owner to build those in as a deduction in a corporation and enjoy the benefits of the reduced taxes accordingly.** (my emphasis) So CRA wouldn't have an issue with it, this is not a question of what is allowable or what is permissible and I would ... I would not ... you know, I would not use the term unreasonable loosely to say I believe it's unreasonable but **the question becomes are they necessary for purposes of earning income. And again, in the absence of being able to look at actual invoices and have discussions with [Mr. M.] and/or Mr. MacLean, I can't ... I can't make that assessment on a line-by-line basis so we chose broad categories under scenario two, which I would add is an illustrative scenario, not our opinion, our opinion is scenario one.** (emphasis) We chose broad categories in the absence of having specific ability to make adjustments on potential discretionary expenses.

[107] Ms. R confirmed she had added scenarios B and C at the request of Ms. M.

[108] Ms. R was asked what expenses listed in the financial statements were “at least partially valid deductions”. Ms. R responded in part as follows:

The ones that we agree should be valid deductions, two of them are addressed on this page. **So continuing education at the annual expense of \$800 and professional fees at the annual expense of \$2,000 we have agreed would be appropriate and then it's essentially whichever expenses do not appear here.** (my emphasis) So these ones we're adding these back under the premise that these would be or include discretionary amounts. That's correct, in the absence of information to be able to understand the exact expenses incurred.

...

Yes, well this would benefit Ms. M's position because it increases the corporate ... the corporate attribution. However again, I think the big part that's missed here is under **scenario A, which is our conclusion, in the absence of information we're not able to actually analyze these expenses to the degree we would like to understand them to be able to approach this in a way that looks at the actual expenses of the corporation, makes an assumption or an assessment based on those expenses, and simply add back those amounts that we can assume or observe have a personal or discretionary element.** (my emphasis)

[109] Ms. R was then asked if Mr. M would need to supply Ms. R with every receipt for all of his expenses over the entire seven-year time frame, and if he would need to allow her to examine every single receipt, and if he would then need to sit down with her and to explain each receipt.

[110] Ms. R responded as follows:

So in my experience there's not a lot of cost benefit to that. Our typical approach, and we would take this approach when we're working for the business owner, **our typical approach would be to look at anomalies and I would point to professional fees, for example. Professional fees that go ... that range from 2,000 to \$9,300 over the seven-year period.** (my emphasis) So clearly something's going on that's requiring you to pay your lawyers, your accountants, your advisors an unusual amount of money so we would ask specific questions around that. We might observe those invoices. In those invoices you might see that there were legal fees paid to set up a family trust or you might see that there were extra

accounting fees paid, for example, for Mr. MacLean to prepare the reports. **So there's all kinds of things again that you're able to deduct from a corporation that CRA will accept but they're not necessarily appropriate in terms of comparing the employed individual to the business-owning individual.** (my emphasis) So they would be things we would ... would take into consideration. So some we might look at invoices, insurance, professional fees, you know, you're probably only looking at two or three invoices a year. However, when you're talking meals and entertainment, when you're talking travel, that's a very different calculation, when you're talking about office expenses. Even amortization, for example, it's a much broader possibility so again, let's go back to the \$100 Moxie's receipt. Showing me a \$100 Moxie's receipt and telling me that I deducted \$100 ... sorry, \$100 as an expense in my financial statements for dinner at Moxie's, it doesn't tell me whether there was a business purpose or a personal purpose. CRA is probably never going to ask. So again, and you know, bearing in mind I am also a partner, I am aware of the advantages that are available in that ... in that environment, my question would be more around the concept of if you spent \$2,000 on meals and entertainment during the run of a year, what proportion of that is personal, what proportion of it is business. And if I were working for the business owner, we would again, from a cost benefit perspective, we would tend to accept, within reason, what was said. We would look then at anomalies. Is it \$2,000 every year except for 2014? In 2014 it was \$6,000, well why, let's talk about that and let's see whether we need to do a deeper dive into that year. **So in the family law world, we would never go into a forensic investigation of expenses of a company this small. There would be no possibility of that being advantageous. But we acknowledge that when we're working for the business owner, it is the responsibility of the business owner to be able to justify the expenses that are made within the company. I think it's very reasonable to acknowledge that in ... in a wholly owned company, especially a professional services firm, there are going to be expenses that are discretionary. There are going to be expenses that you're able to deduct and phone or vehicle would be other ones. You're going to deduct 100 percent of your phone but it might not be 100 percent for your personal use.** (my emphasis) Those are discussion points that again if we're working for a business owner, we're able to tweak out without having to look at invoices that may or may not provide full information

[111] Mr. M once again inquired about what he would have had to supply to Ms. R in order for her to be able to comment on the reasonableness of the deductions that



were shown under her scenario B. Mr. M asked whether he would have to show her the actual deductions by producing every single receipt for travel and entertainment, every single receipt for restaurant, every single receipt for interest and bank charges over a seven-year time frame?

[112] Ms. R responded as follows:

Well, you know, again my experience in guideline income is it's I would seldom be asking for receipts. **I would ask for the general ledger detail of an account to see where the expenditures were made and then it's really asking questions around it. (my emphasis).** So it would be a very similar process, I would think, to what Mr. MacLean would go through in preparing the year-end financial statements. At a review level you're looking for the plausibility of expenses, you're asking questions around anomalies. It's the same ... it's the same process. **The only time I would do a deeper dive would be if there was, you know, concern or mistrust with regard to those expenses. But I would point the whole reason that scenario two and three are called supplementary analysis at the request of counsel is because we don't have the ability to make specific conclusions or to draw ... sorry, make specific calculations or to draw conclusions from the information provided (my emphasis).** Therefore, we have no choice but to go with scenario one because the only information we have available to us pretax corporate income and thereby accepting that essentially under scenario one, every expense of the company is a bona fide necessary expense of the company and that there's nothing that's discretionary which I'm not sure is right either given the nature of the company, **but in the absence of that ability to discuss, in the absence of Mr. MacLean providing that information who would have access to it, I can't come to a different conclusion (my emphasis).**

[113] Mr. M suggested the only request made to him to provide additional information, was a request for him to meet in person with Ms. R, and not with his accountant.

[114] Ms. R responded by stating:

I can't recall, I'd have to check back in my e-mails but I would have ... I would have asked through e-mail and I can't recall whether it was [Mr. M.] or Mr. MacLean but it was with the view of understanding some of the expenses and some of the adjustments that we made.

...

We always ask to speak with the ... the business owner because we would like to have the ability to discuss some of the adjustments that we're making.

[115] Mr. M then asked Ms. R about a request, through his counsel in writing, suggesting that a list of questions be created and submitted from Ms. R.

[116] Ms. R responded as follows:

Yes, but **the questions we had were similar to the questions that had been asked over the period of time of this matter so again, in the interest of time and cost benefit, for me to recreate the same questions that had been asked didn't seem beneficial.** (my emphasis) And again, a lot of the analysis isn't through, you know, through query, written query, it's through looking at and discussing and asking, you know, Mr. MacLean or [Mr. M.] to look at the general ledger and let me know, you know, if there's something unusual in here that I should be made aware of.

...

In the disclosure there are several questions asked around the nature of certain expenses of the business.

[117] Ms. R was asked why she could not have restated, or why further questions she felt were relevant could not have been asked after answers were given to the initial questions.

[118] Ms. R responded by stating:

**So the answers I observed were consistent with Mr. MacLean's approach that all of the expenses of the business are reasonable and diverting the analysis to a cash flow discussion as opposed to an understanding nature of the expenses discussion.** (my emphasis) So again, in the ... it would be a fairly lengthy discussion and it would be fairly detailed and it's not one easily addressed through written questions and answers.

[119] Mr. M then asked Ms. R to comment about amortization of equipment that gets old. He took the position that every piece of equipment that either the partnership or Mr. M's company owned, would get old and would need to be replaced.

[120] Ms. R responded in part as follows:

Amortization is an accounting adjustment so what happens is if a business acquires an asset and I'll use a very simple, a vehicle. A business acquires an asset of \$1,000 and that asset has a useful life of ten years, instead of having a big hit to your income statement in the year you acquire it, you amortize it over a period of time. So in that case, on a single ... on a, sorry, a straight-line basis, you would have \$100 a year as an amortization expense and by the end of the ten years, it's ... you've accounted for the useful life of the asset in a more balanced way.

...

I can't speak to the equipment that [Mr. M.'s business] owns other than it's largely computer equipment and again, looking at a professional services corporation, it would have been one of the questions that ... that I would want further information on. Buying computers would tend to have a personal nature and personal use. There are quite a few computers purchased over time, digital camera, things like that. I wasn't clear on whether they were for business or personal use so we've allowed the amortization expense under scenario one to remain.

...

So again I would draw your attention to Section 19(2) of the federal child support guidelines and the concept of reasonableness. CRA would not have an issue with this adjustment. They would have no problem with bank charges on a monthly basis being run through the company, overdraft charges, you know, interest and penalties by CRA. An employed individual does not have the benefit of those deductions in operating their own similar banking. So the adjustment ... Mr. MacLean's critique is on these adjustments as reasonable in a normal operating business would CRA allow it. That seems to be the perspective he's applied to this. That is not the perspective, that is not the approach we've taken in calculating guideline income. (my emphasis) That's not the purposes of us making those adjustments. The purposes of us making those adjustments is to try to distinguish what of those expenses would a similar employed individual have the benefit of deducting. They would not have the benefit of deducting interest and bank charges.

[121] Mr. M then asked Ms. R to consider the terms of the Corollary Relief Judgment, and to provide an opinion about whether the formula outlined therein “that [Mr. M.’s] income for child support purpose would be calculated based upon his line 150 on his personal tax return, adjusted for dividends that he's received(sic) grossed-up under the **Income Tax Act** and any non-arms length payments made to third parties”, should be thrown out and the court should “begin looking at [Mr. M.’s] income from the point of view of the gross receipts of his company as if he were an employee?”

[122] Ms. R responded as follows:

The approach of our report, and I'm not familiar with the corollary relief judgement nor any agreement in the past, the mandate and the approach that I've taken to the report is to calculate guideline income in accordance

with the guidelines for [Mr. M.]. **By your explanation, the long-term disability and the gross-ups which Mr. MacLean has accepted are reasonable and rational, would also be excluded.** (my emphasis) So I'm not here to measure income or certainly it wasn't my mandate, I shouldn't say I'm not here, it wasn't my mandate to measure income in accordance with a past agreement, it was my mandate to measure income in accordance with the guidelines. What the Court decides to do with that is the discretion of the Court.

[123] I found Ms. R's expert opinion regarding the Guidelines Income Report to be relevant, necessary and reliable based on the information made available to her by Mr. M.

[124] I agree it was Mr. M's obligation to disclose all necessary information to Ms. M and to explain that information to her as Ms. R's expert. Mr. M needed to explain what level of personal benefit he derived from his corporation, and he provided very little information Ms. R could work with. In the absence of evidence, the court presumes availability of income to be considered for child support, *Richards v. Richards*, 2016 NSCA 7, confirmed in *Reid v. Faubert*, 2019 NSCA 42, at paragraph 29. *Civil Procedure Rules* 59.19 through 59.28 as well as sections 21 – 25 of the *Guidelines* provide guidance with respect to disclosure requirements.

[125] At paragraph 28 in *Reid v. Faubert*, 2019 NSCA 42, the Honourable Justice Bourgeois stated:

[28] In *Goett v. Goett*, 2013 ABCA 216, the Alberta Court of Appeal summarized the principles relating to the application of s. 18:

[11] In developing the guidelines, the legislators recognized that determination of income (and disclosure of income) by reliance on s 16 alone may be insufficient or unreasonable in fixing a fair amount of income for the purpose of child support. Specifically, the true income of someone who is self employed or operating a business is not necessarily reflected in their personal tax returns for the purpose of determining child support obligations. Section 18 provides that where a spouse is a shareholder, director or officer of a corporation and the court is of the opinion that the amount of the spouse's annual income as determined under s 16 does not fairly reflect all the money available to the spouse for the payment of child support, the court may consider, among other things, all or part of the pre-tax income of the corporation for its most recent taxation year or an amount commensurate with the services that the spouse provides to the corporation provided the amount does not exceed the pre-tax income of the corporation. In determining the pre-tax income of a corporation for this purpose, all amounts paid by the corporation as salaries, wages or management fees, or other payments to or on behalf of persons with whom the corporation does not deal at arms length must be added, unless the shareholding spouse establishes that the payments were reasonable in the circumstances: *Nesbitt v. Nesbitt*, 2001 MBCA 113 (CanLII), [2001] M.J. No. 291; *Kowalewich v. Kowalewich*, 2001 BCCA 450 (CanLII), [2001] B.C.J. No. 1406.

[29] **Numerous courts have concluded that in applying s. 18, the onus rests on the payor to adduce clear evidence demonstrating that some or all of the pre-tax corporate income is unavailable for the payment of child support.** (my emphasis) See *Richards v. Richards*, 2012 NSCA 7 (CanLII) at para. 44; *Hausmann v. Klukas*, 2009 BCCA 32 (CanLII) at paras. 51-61, leave to appeal to S.C.C. refused [2009] S.C.C.A. No. 135; *Cunningham v. Seveny*, 2017 ABCA 4 (CanLII) at para. 28; and *Potzus v. Potzus*, 2017 SKCA 15 (CanLII) at para. 13.

[30] How does a court determine how much of a payor's pre-tax corporate income is available for the payment of child support? Courts have identified a number of factors that are relevant to a s. 18 analysis. In *Bembridge, supra*, Justice MacDonald pointed out there are multiple factors that courts should consider, and focusing solely on retained earnings can lead to problematic results. She wrote:

[36] Other courts examining this issue have commented that decisions made pursuant to section 18 require a court to understand (for example):

- the historical practice of the corporation for retaining earnings;

- the restrictions on the corporation[’s] business including the amount and cost of capital equipment required;
- the type of industry is involved and the environment in which it operates;
- the potential for business growth or contraction;
- the level of debt;
- how the corporation obtains its financing and whether there are banking or financing restrictions;
- the control exercised by the parent over the corporation.

[37] This list is not exhaustive. Failure to understand exactly where the additional money can be found to increase the parent’s income can lead to an incorrect result and ultimately, if the parent cannot find the expected additional money, may undermine the operation of the corporation and eventually “kill the goose that lays the golden egg”.

[31] A proper s. 18 analysis requires a broad contextual approach. In *Child Support Guidelines in Canada, 2017* (Toronto: Irwin Law Inc., 2017), Julien D. Payne and Marilyn A. Payne write at page 165:

**It is pre-tax net corporate earnings and not retained earnings that should be used in applying section 18 of the Guidelines.** [Miller v. Joynt, 2007 ABCA 214 (CanLII); Johnson v. Barker, 2017 NSCA 53 (CanLII); Mayer v. Mayer, 2013 ONSC 7099 (CanLII)] In *Nykiforuk v. Richmond* [2007 SKQB 433; Johnson v. Barker, 2017 NSCA 53], Ryan-Froslic J. (as she then was) of the Saskatchewan Court of Queen’s Bench (Family Division) observed that, in determining whether to exercise its discretion pursuant to section 18 of the Guidelines, the court must be satisfied that additional money is actually available and that it can be paid to the shareholder without endangering the financial viability of the company. **Merely looking at the retained earnings of the corporation is of limited assistance. Retained earnings are a shareholder’s equity in the corporation (its assets less its liabilities). They do not represent cash available for distribution, nor do they reflect the pre-tax income of the corporation.** In making a determination pursuant to section 18 of

the Guidelines, a wide range of factors must be considered, including:

- 1) The pre-tax income of the corporation;
- 2) The nature of the business involved (Is it capital intensive or service-oriented? Is it subject to seasonal fluctuations or economic cycles?);
- 3) The corporate share structure, including any obligation imposed by shareholders' agreements;
- 4) The financial position and general operations of the company (What are the company's operating requirements, its inventory, accounts receivable and accounts payable? Are there bank covenants which may affect payment out of funds? Is there a necessity to upgrade equipment, etc.?); and
- 5) Is the company a well-established one or merely in its start-up phase?

[126] In *Wilcox v. Snow*, 1999 NSCA 163, the Honourable Justice Flynn stated:

[22] In the case of a self-employed businessman, like the respondent, there is very good reason why the Court must look beyond the bare tax return to determine the self-employed businessman's income for the purposes of the **Guidelines**. The net business income, for income tax purposes, of a self-employed businessman, is not necessarily a true reflection of his income, for the purpose of determining his ability to pay child support. The tax department may permit the self-employed businessman to make certain deductions from the gross income of the business in the calculation of his net business income for income tax purposes. However, in the determination of the income of that same self-employed businessman, for the purpose of assessing his ability to pay child support, those same deductions may not be reasonable.

...

[26] Where, as here, the respondent is applying to vary an existing child support order, he bears the onus of proof. As a self-employed businessman he cannot, simply, file with the court a copy of his most recent income tax return, and expect that his net business income for tax purposes will be equated with his income for child support purposes. That is what the respondent did in this case. It



is not enough. **The businessman must demonstrate, among other things, that the deductions which were made from the gross income of the business, in the calculation of his net business income, should, reasonably, be taken into account in the determination of his income for the purpose of calculating his obligation to pay child support.** (my emphasis)

[27] In fact, s. 21(1) of the **Guidelines**, specifically requires the respondent to file certain documentation to enable the Court to make a proper determination of his income. Relevant to this matter are the provisions of s. 21(1)(a) and (d) of the **Guidelines** which provide as follows:

21(1) A spouse who is applying for a child support order and whose income information is necessary to determine the amount of the order must include the following with the application:

- (a) a copy of every personal income tax return filed by the spouse for each of the three most recent taxation years;
- (b) a copy of every notice of assessment or reassessment issued to the spouse for each of the three most recent taxation years; .....
- (d) where the spouse is self-employed, for the three most recent taxation years
  - (i) the financial statements of the spouse's business or professional practice, other than a partnership, and
  - (ii) a statement showing a breakdown of all salaries, wages, management fees or other payments or benefits paid to, or on behalf of, persons or corporations with whom the spouse does not deal at arm's length.

...

[29] Section 21(1)(e) deals with the situation where the spouse is a partner in a partnership and provides as follows:

21(1) A spouse who is applying for a child support order and whose income information is necessary to determine the amount of the order must include the following with the application:

.....

- (e) where the spouse is a partner in a partnership, confirmation of the spouse's income and draw from, and capital in, the partnership for its three most recent taxation years;

[127] I find Ms. R considered all of the disclosure provided by Mr. M when preparing the Guideline Income Report, and that she considered as many factors as she was able to given the disclosure provided by Mr. M. I find that with respect to any expenses, it was Mr. M's burden to explain himself fully and he did not.

[128] The burden was on Mr. M to supply meaningful disclosure to support any expenses, failing which an adverse inference can be drawn. *Wilson v. Wilson*, 2011 ONCJ 103.

[129] As noted in *Monahan-Joudrey v. Joudrey*, 2012 ONSC 5984, paras 33 – 34 “a payor who seeks to deduct a disputed business expense must provide reasons for the expense, and must provide documentary proof in an organized fashion to enable the court to make a proper determination.

## **Analysis**

### **Core principles and objectives of child support**

[130] The core child-focussed principles in all child support cases are:

1. child support is the right of children:
2. the children's right to support survives the breakdown of the relationship between the children's parents;
3. child support should, as much as possible, perpetuate the standard of living the children experienced before the parents' relationship broke down; and

4. the amount of child support varies, based upon the parent's income

[*D.B.S. v. S.R.G., L.J.W. v. T.A.R., Henry v. Henry, Hiemstra v.*

*Hiemstra*, 2006 SCC 37 (CanLII), at para. 38].

[131] The four objectives of the *Guidelines* are:

(a) to establish a fair standard of maintenance for children that ensures that they benefit from the financial means of both parents;

(b) to reduce conflict and tension between parents by making the calculation of child maintenance order more objective;

(c) to improve the efficiency of the legal process by giving courts and parents guidance in setting the levels of child maintenance and encouraging settlement; and

(d) to ensure consistent treatment of parents and children who are in similar circumstances: Section 1 of the *Guidelines*.

### **Material change in circumstances**

[132] The parties do not dispute there have been changes, or that the Court should consider child support from the date of application in September 2015.

**Income determination for prospective child support from September 17, 2015**

[133] After full consideration of all the evidence, the case law, and after considering the application of sections 16 – 25 of the *Guidelines*, I find scenario B as outlined in the Guideline Income Report offers a fair representation of how to assess Mr. M's income. I find that after the Settlement Order was agreed to in February 2011, Mr. M made several decisions which had the effect of making it appear as though there was less income available for him to pay child support, and therefore I am using my discretion to vary child support between June 1, 2011 and the February 2019

**Prospective Child Support September 17, 2015 onward**

**2015**

[134] The parties agree Mr. M's line 150 income for 2015 was \$207,308, adjusted for disability tax gross up.

[135] Ms. M's line 150 income was \$22,142.33 in 2015 (gross business income of \$15,380.47 or net business of \$13,400.47, RRSP's of \$5000, and child support of \$34,645.52 as reported by Ms. M on her Income Tax and Benefit return, Mr. M references \$30,484.80 according to Schedule 1, presumably in the Guideline

Income Report). ). Using the chart provided by Ms. M would suggest he paid \$2540.39 per month in 2015 which would be \$30,487.08.

[136] After considering all of the evidence, case law, legislation and specifically making reference to *sections 16 – 25* of the *Guidelines*, I find Mr. M's annual income for child support for **2015** is **\$229,400.00 for a table amount of \$2850.00 per month for two children**. Mr. M paid \$2540.39 per month and owes Ms. M \$309.61 x 3 months (October, November and December 2015) = **\$928.83 in total in prospective child support under section 3 for 2015**.

## **2016**

[137] The parties agree Mr. M's line 150 income for 2016 was \$151,747.00 when adjusted for disability gross up.

[138] Ms. M's line 150 income was \$22,900.00 in 2016 (gross business income of \$15,000.00 or net of \$11,815.00, \$5000.00 in RRSP's, and \$32,060.93 in child as reported in Ms. M's Income Tax and Benefit Return, \$30,550.00 as referenced by Mr. M, Schedule 1). Using the chart provided by Ms. M, Mr. M would have paid \$2007.45 per month in 2016 for an annual amount of \$24,089.40.

[139] After considering all of the evidence, case law, legislation and making reference to *sections 16 – 25* of the *Guidelines* I find Mr. M's annual income for child support for **2016** to be **\$210,400.00 for a table amount of \$2634 per month for two children**. Mr. M paid \$2007.45 per month. Mr. M owes Ms. M \$626.55 x 12 months = **\$7,518.60 in prospective child support under section 3 for 2016.**

## **2017**

[140] The parties agree Mr. M's line 150 income for 2017 was \$138,490.00 when adjusted for disability gross up.

[141] In July 2017 Ms. M began full time work with the RCMP. Ms. M's line 150 income in 2017 was \$38,377.27 (employment income of \$25,096.27, gross business income of \$14,620, and net business income of \$13,281.00). Ms. M received approximately \$26,799.00 in child support as reported in Schedule 1 of the Guideline Income Report, referenced by Mr. M. According to Ms. M's chart Mr. M paid \$2,540.39 per month for a total of \$30,484.68 in child support in 2017.

[142] After considering all of the evidence, case law, legislation and making reference to *sections 16 – 25* of the *Guidelines* I find Mr. M's annual income for child support for **2017** to be **\$215,100.00 for a table amount of \$2769.00 per month for two children**. Mr. M paid \$2540.39 per month. Mr. M owes Ms. M

\$228.61 x 12 months = **\$2,743.32 in prospective child support under section 3 for 2017.**

## **2018**

[143] Ms. M's income in 2018 was \$48,912.00 working for the RCMP and then with the Department of Fisheries starting in August 2018. Mr. M paid child support in the amount of \$2,085 per month for an annual amount of

[144] The parties acknowledged Mr. M's annual income for child support for **2018** was approximately **\$371,833.00 for a possible table amount of \$4650.00 per month for two children while M and J continued to reside primarily with Ms. M.**

1. Mr. M paid a table amount of \$2085.00 per month. Mr. M owes Ms. M \$2,565.00 x 8 months (January, February, March, April, May, June, July and August 2018 = **\$20,520.00 in prospective child support under section 3 between January and August 2018.**

## **September 2018 – February 2019**

2. For the period when the parties' youngest child, M continued to reside primarily with Ms. M and their eldest child, J was living in residence

while at University but also spending additional time and most holidays with Ms. M, (September, October, November, December 2018, and for January, February 2019), the monthly child support amount would be different. The difference accounts for J being out of the home a large portion of the time, but Ms. M maintaining a home for J to come home to.

3. Mr. M's approximate income of \$371,833.00 for 2018 attracts a table amount of \$3,766.50 per month using the average of one child and two children amount. Mr. M paid \$1711 per month. I find Mr. M owes  $\$2,055.50 \times 6 =$  **\$12,333.00 in prospective child support under section 3 for the period between September 2018 and February 2019.**

### **Section 7 expenses**

[145] Ms. M has indicated Mr. M would sometimes agree to cover what Ms. M considered to be section 7 expenses but Mr. M would sometimes argue that an expense was covered by child support he was paying to Mr. M pursuant to section 3. The applicable Orders did not provide a list of agreed upon special or extraordinary expenses.



[146] Ms. M is seeking to have the court review retroactive child support for special or extraordinary expenses arising between June 2011 and February 2019. She filed her Statement of Special or Extraordinary Expenses in 2017.

[147] At paragraph 20 in *L.K.S. v. D.M.C.T.*, 2008 NSCA 61, the Honourable Justice Roscoe of the Nova Scotia Court of Appeal stated:

[20] The Guidelines provide that a court may order a parent to pay an additional amount toward the extraordinary expense of a child, 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** (my emphasis) and, where the parents cohabited after the birth of the child, to the family's pattern of spending 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;
- (b) that portion of the medical and dental insurance premiums attributable to the child;
- (c) health related expenses that exceed insurance reimbursement by at least \$100 annually, including orthodontic treatment, professional counselling provided by a psychologist, social worker, psychiatrist or any other person, physiotherapy, occupational

therapy, speech therapy and prescription drugs, hearing aids, glasses and contact lenses;

(d) extraordinary expenses for primary or secondary school education or for any other educational programs that meet the child's particular needs;

(e) expenses for post-secondary education; and

(f) extraordinary expenses for extracurricular activities.

**(1A)** For the purposes of clauses (1)(d) and (f), “extraordinary expenses” means

(a) expenses that exceed those that the spouse requesting an amount for the extraordinary expenses can reasonably cover, taking into account that spouse’s income and the amount that the spouse would receive under the applicable table or, if the court has determined that the table amount is inappropriate, the amount that the court has otherwise determined is appropriate (my emphasis); or

(b) if clause (a) is not applicable, expenses that the court considers are extraordinary, taking into account all of the following:

(i) the amount of the expense in relation to the income of the spouse requesting the amount, including the amount that the spouse would receive under the applicable table or, if the court has determined that the table amount is inappropriate, the amount that the court has otherwise determined is appropriate,

(ii) the nature and number of the educational programs and extracurricular activities,

(iii) any special needs and talents of the child or children,

(iv) the overall cost of the programs and activities,

(v) any other similar factor that the court considers relevant.

### **Sharing of expense**

(2) The guiding principle in determining the amount of an expense referred to in subsection (1) is that the expense is shared by the parents in proportion to their respective incomes after deducting from the expense, the contribution, if any, from the child.

[21] It should be noted that s.7(1A) was added to the Guidelines in 2006, so earlier cases dealing with extraordinary expenses may not be applicable.

[22] Ms. T. sought an order that Mr. S. pay, in addition to the table amount, for the private school tuition and additional school related costs, the cost of items purchased by the mother for the child such as a drum kit, a snowboard, and a computer, a contribution to her monthly travel expenses related to transporting the child to and from school, the cost of new snow tires for her car, her relocation expenses incurred in the move from Yarmouth to Wolfville, the costs of maintaining two residences and the cost of an annual vacation to Louisbourg with the child. The total claim was approximately \$35,000.

[23] The trial judge found that the private school tuition was a legitimate s. 7 expense and ordered that the parties equally share the tuition and that the mother pay any additional school fees. He recognized that she would be paying her share from the table amount of child support since she had no other income other than the GST rebate and the child tax credit. He did not mention any of the other s. 7 expenses claimed by the mother, presumably finding either that they did not qualify as s. 7 expenses, or that given the level of regular child support the mother should pay for them. Since he did not provide an explanation, it is necessary to assess the mother's claim.

[24] Ms. T. submits that the trial judge erred in refusing to order payment of the full claim for s. 7 expenses, all of which she argues are for the benefit of the child and other than the Louisbourg trip are all related to the fact that the child attends Kings Edgehill School. No case law is cited in support of the submissions that the items claimed are the type of expense courts have considered as legitimate s. 7 expenses.

[25] It must be emphasized that a s. 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.** (my emphasis). The expenses claimed here would fall under s.7(1)(d) and (f), being for educational and extracurricular activity costs. Therefore the definition in 7(1A) applies. This new definition of “extraordinary expenses” is explained by Professor Rollie Thompson in *The Chemistry of Support: The Interaction of Child and Spousal Support* 2006 25 C.F.L.Q. 251:

The May 2006 amendments to the Federal Child Support Guidelines added one more wrinkle to the section 7 analysis, in deciding the initial eligibility of section 7 expenses. **The amendments include a new definition of "extraordinary" for the purposes of expenses under s. 7(1)(d) and (f). The primary "ability-to-pay" test in paragraph (1.1)(a) looks at the resources available to the requesting parent, rather than the joint incomes of both parents under the McLaughlin approach** (my emphasis):

expenses that exceed those that the spouse requesting an amount for the extraordinary expenses can reasonably cover, taking into account that spouse's income and the amount that the spouse would receive under the applicable table or, where the court has determined that the table amount is inappropriate, the amount that the court has otherwise determined is appropriate.

The secondary test in para. (b) applies where ability to pay is not an issue, listing off various additional factors other than parental resources. [footnotes omitted]

[26] The amendment to the Nova Scotia Guidelines is the same as that made to the federal Guidelines. In Manitoba the Guidelines have provided the same definition for extraordinary expenses since 1998. The courts in Manitoba have dealt with the s. 7 analysis as described by Justice Allen in *Correia v. Correia* 2002 MBQB 172 (CanLII):

7 In beginning an analysis of a claim for extraordinary expenses for extracurricular activities, s. 7(1.1)

requires the court to determine whether the expenses exceed those which the parent can reasonably cover, taking into account the parent's own income and the child support received by that parent. This first step does not involve a consideration of the merits of the proposed extracurricular activity but only an examination of the financial issues. (my emphasis) While the section directs the court to take into account income and child support, in my view the parent's budget may also have to be examined in order to determine whether the expense could reasonably be covered by the parent requesting an amount for extraordinary expenses.

...

10 ... Here, it is necessary to examine the mother's budget to ascertain whether these expenses exceed what she could reasonably cover. In my view, it is important to remember that the mother is responsible for two children. The daughter has many activities of her own that the mother pays for from her income and the child support received. **The mother's budget, once the child support is factored in, basically balances without the snowmobile expense.** (my emphasis) The budget does not appear to be exaggerated or excessive and, short of asking the mother to give up vacations and savings for the future, I see no room where she could cut, in order to pay for the child's activity alone. In these circumstances, I do not think it reasonable to deny the mother an allotment for savings or vacation in order to fund the child's activity. Accordingly, I find that the mother cannot reasonably cover the ongoing expenses and therefore that they are extraordinary.

11 Having determined that the expenses are extraordinary, the rest of s. 7 must be considered. Here, the court must examine the necessity of the expense in relation to the child's best interests, the reasonableness of the expense in relation to the means of the parents and those of the child, and to the family's spending patterns prior to the separation. (my emphasis)

12                    The first question is whether this  
snowmobile racing expense is necessary in the child's  
best interests. ...

See also *Chambers v. Chambers* 2004 MBQB 239 (CanLII) and *Fong v. Charbonneau* 2005 MBQB 92 (CanLII). Outside of Manitoba, although there are numerous cases dealing with s.7 generally, few actually tackle the significance of the 2006 amendment. In *Simpson v. Trowsdale* 2007 PESCTD 3 (CanLII), Justice MacDonald analysed the issues raised in a manner similar to the Manitoba cases and opined that Guidelines still leave many unanswered questions.

[27] In my view, in this case, which is somewhat out of the ordinary, it is preferable to deal first with s.7(1) to determine whether the expenses are necessary in relation to the child's best interests and reasonable in relation to the means of the parents before dealing with the definition of extraordinary expenses in s. 7(1A). (my emphasis) If an expense is not necessary in the child's best interests it seems illogical to include it when assessing whether the total cost of items claimed are affordable, especially if a large amount is involved.

[28] The trial judge has determined that the cost of the child attending private school is in the child's best interests and neither parent questions that at this point. What then are the necessary expenses relating to that educational program? The school tuition and other charges by the school are approximately \$13,300 per year. The father was ordered to pay half of the tuition, so I will not include that portion in this analysis. The evidence establishes that the following expenses are necessary or incidental to the attendance at the private school which is several hundred kilometres away from where the mother and child previously lived:

- |   |                             |          |
|---|-----------------------------|----------|
| - | tuition and school charges: | \$6,850. |
| - | drum kit:                   | 1,842.   |
| - | snowboard:                  | 359.     |
| - | computer:                   | 2,000.   |

- travel expenses (for 9 months per year): 3,600.
- relocation expenses: 3,585.
- snow tires: 1,158.

Total: \$19,394. (\$1,616 per month)

[29] The other expenses, the costs of maintaining the home in Yarmouth for 11 months (\$11,000) and the annual Louisbourg trip (\$2,000) cannot be said to be necessary for the attendance at the school or otherwise necessary in the child's best interests and therefore should not be included.

[30] The first part of the s. 7(1A) test requires an assessment of whether or not these expenses exceed those which the mother can reasonably cover given her total income. In this case the mother's only income is the tax free child support of \$8,125 per month and approximately \$400 a month child tax credit and GST rebate. She did not file a budget. However, she testified about some of her expenses, indicating that her rent and utilities cost \$1,090 per month and that she spends approximately \$500 per month on food for the two of them and about \$200 per month for clothes for the child which would leave approximately \$6,700 per month to apply towards the \$1,600 for the necessary s. 7 expenses. If Ms. T. were to pay for all of those items, it would leave her with approximately \$5100 a month for other expenses she failed to mention. It appears therefore that on the first part of the test, the expenses claimed are not extraordinary because they do not exceed an amount the mother can reasonably cover.

[31] **Since the expenses do not exceed the amount the mother can reasonably cover, the alternative test in s. 7(1A)(b) should be applied to determine if they are extraordinary under that part of the definition.** (my emphasis) Thus it is necessary to determine whether the **expenses are extraordinary taking into account the amount of the expense in relation to the mother's income, the nature and number of the programs and activities, the special needs or talents of the child, the overall cost of the programs and any other similar factor the court considers relevant.**

[32] **While in the first part of the test the issue was whether the mother could afford the expenses, the alternative test states the first factor as whether the expense is extraordinary taking her income into account.** (my emphasis) I think this invites a proportionality inquiry. If the expenses require 25% of a parent's income, they might be seen as extraordinary, but if an expenditure of 5% of the income was required, it might not be seen as quite so extraordinary. For example, for a parent earning \$2,000 a month, \$500 per month for sports related expenses might be extraordinary, but for a parent with a monthly income of \$10,000 it may not be so extraordinary. Of course, each case depends on its own particular facts and it is not suggested that expenses over 25% of a parent's income will always be considered as extraordinary. In this case the total of all the necessary expenses claimed pursuant to s. 7 represents about 19% of Ms. T's monthly income, so I would find them to be approaching the extraordinary mark in that sense. However, given that \$8,125 is intended for the child's needs only, and the other expenses for his necessities add up to \$1,000 per month, paying for expenses such as a snowboard or travelling to school from the balance of more than \$7,000 does not seem to be out of the ordinary.

[33] As for the remaining factors in s. 7(1A)(b), of the expenses claimed that are directly related to educational programs and extracurricular activities for the child, the nature and number do not appear to be unusual, there are no special needs or talents of the child and the overall cost of the specific programs and activities, for private school, snowboarding and band seem to be reasonable.

[34] Overall, considering the relevant factors, the expenses do not in my view satisfy the definition of extraordinary. While it would have been helpful for the trial judge to have analysed the issue in more detail, it cannot be said that he erred in the determination of the appropriate amount to be paid by Mr. S. pursuant to s. 7 of the **Child Maintenance Guidelines** and I would dismiss this ground of appeal.

**Prospective child support pursuant to section 7, special or extraordinary**



[148] When considering an expense I must first determine if the expense is covered in any of the applicable Orders and if so, whether the Order(s) should be varied. The Order contemplated there would be section 7 expenses but the specific expenses claimed by Ms. M were not listed in the applicable Order.

[149] I must also consider whether the expense falls within one of the enumerated categories of section 7 of the Guidelines (child care expenses, medical or dental premium attributable to the child(ren), health related expenses exceeding \$100 per year, **extraordinary** (my emphasis) expenses for primary or secondary school, post secondary expenses, or **extraordinary** (my emphasis) expenses for extracurricular activities).

[150] Then I must consider whether the expense was necessary in relation to the children's best interests, whether it was reasonable in relation to the family's pattern of spending prior to separation, and "if the expense is for an extracurricular activity, then whether it is "extraordinary."

[151] I must deal with special or extraordinary expenses on a prospective basis first.

**2017**

[152] Ms. M's claim for special or extraordinary expenses in 2017 included the following: ski passes for M and J \$275.89, a driver's license for J \$68.55, and school supplies for M and J \$36.73. For a stated total of \$381.17.

[153] Mr. M has argued that he paid a sufficient amount of child support pursuant to section 3 in 2017 (approximately \$30,484.68). In addition to asking the Court to consider the child support he has already paid, Mr. M asks the Court to consider that he purchased a car for J in 2017, and that he paid for J's car insurance and maintenance for the car while he was also paying child support for both J and M pursuant to section 3.

[154] Ms. M does not agree the car and related expenses for the car should be taken into consideration when determining what if any additional child support Mr. M might pay under sections 3 or 7 of the *Guidelines*. Ms. M stated that she had already arranged for J to have use of a car. She stated that the car Mr. M purchased was not necessary, that it was kept at Mr. M's home, and that the car also benefitted Mr. M as he was unable to drive for a period.

[155] There is insufficient evidence to suggest how the purchase of a car, care insurance, or maintenance of the car for J would fit into the enumerated expenses in 7(1) or should be added to the list. In addition, the evidence does not support a

finding that the purchase of the car was reasonable or necessary when considering J's or M's best interests. I do not consider Mr. M's purchase of a car \$13,126.00, payment of yearly insurance for the car \$3,108.00, or payment of yearly maintenance for the car \$1,255.00, to be reasonable or necessary for J or M, and the expenses will not be considered a contribution pursuant to section 7 of the *Guidelines*.

[156] With respect to the expenses claimed by Ms. M for 2017 I find as follows;

1. The ski passes for M and J \$275.89 are extracurricular in nature, and I find:
  - a. The expense does not exceed the amount Ms. M could reasonably cover;
  - b. considering the alternative test in s. 7(1A)(b), I find the expenses are "extraordinary" taking into account the amount of the expense in relation to the mother's income, the nature and number of the programs and activities, the special needs or talents of the child, the overall cost of the programs, and that Mr. M participated in the program with the children.

c. In making this determination I have considered the parties previous agreement (referenced at paragraph 24) and the evidence that not only was this expense in the best interests of the children in a personal way, it also benefited Mr. M and the children's relationship with Mr. M as he sometimes accompanied the children during this activity.

d. The expense should be shared proportionately, her income as \$38,377.27 (15%) (acknowledging Ms. M also received some income from the South Shore Regional School Board and HHELLPS), and his income \$215,100.00 (85%) for an amount **of \$234.51** owed by Mr. M.

2. The driver's license for J \$68.55 does not fit any of the criteria under section 7.

3. In addition, I find:

a. Ms. M (and J) could afford to pay for the expense; and

b. the expense was not extraordinary taking into account the mother's income (the child's income), the nature and number of the programs and activities, the special needs or talents of the

child, the overall cost of the programs the amount of the expense in relation to the above noted factors.

4. The school supplies for M and J in the amount of \$36.73 would come under “extraordinary” expenses for primary or secondary school.
  - a. Ms. M could afford to pay for the expense; and
  - b. the expense was not extraordinary taking into account the amount of the expense in relation to the factors not above.

## **2018**

[157] Ms. M’s income in 2018 was approximately \$48,912.00. She had been working with the RCMP since the summer of 2017 and then she began work with the Department of Fisheries in August 2018. Ms. M indicated that after 2017 she would not be working for the South Shore Regional School Board and she would not be employed with HHELLPS.

[158] Mr. M earned approximately \$371,833.00 in 2018.

[159] Ms. M sought a proportionate sharing of the extracurricular activities in 2018:

1. J's ski pass \$239.90, her income \$48,912.00 (12%) his approximate income \$371,833.00 (88%) for a cost of **\$211.11**;
2. M's school supplies \$144.28, claim dismissed;
3. M and J's fee to attend Neptune with their class \$40.00 each, claim dismissed; and
4. J's graduation related fees of \$170.00, claim dismissed.
5. I find Ms. M could pay the above noted expenses. However, after taking into account the amount of the expense in relation to the mother's income (and J's income in 2018), the nature and number of the programs and activities, the special needs or talents of the children, the overall cost of the programs, and that Mr. M participated in skiing with J, I grant Ms. M's claim to share the expense of the ski pass. As noted, I dismiss Ms. M's claims for school supplies, the trips to Neptune. I do so taking into account Mr. M's evidence he paid for J's grad yearbook and for his calculator \$385.00.

[160] Also in 2018, Ms. M advised that she had difficulty accessing Mr. M's insurance program in order to pay for medication for Jake at a cost of \$26.97 on three occasions. I am not prepared to have Mr. M reimburse Ms. M personally for

J's medication. Mr. M has indicated Ms. M or J, could have accessed Mr. M's insurance plan and I find she should have done so at that time. The matter was before the Court and any problems with Ms. M's or J's use of Mr. M's insurance could and should have been raised and resolved. Mr. M must ensure the children have access to his medical and drug plans.

### **University expenses for J for 2018 / 2019**

[161] The parties agree J continues to be a dependent while attending University. I find J's reasonable post secondary expenses to be special expenses that should be shared proportionally between the parties after accounting for J's reasonable contribution, unless the parties make a separate agreement.

[162] Ms. M paid for J's application to attend Dalhousie University and his application for residence \$270 for September 2018. Ms. M also paid the deposit for J's residence \$500.00 although she was later reimbursed \$390.00.

[163] Ms. M contributed to the purchase of J's books in the amount of \$241.31, while Mr. M paid \$130.00, and J paid \$130.00 for additional books.

[164] Ms. M estimated J's books would cost him \$500.00 in his second term, January – April 2019.

[165] J paid his “frat fee” of either \$500.00 or \$590.00, and J spent approximately \$1,400.00 on personal items or socializing up to January 2019.

[166] In August of 2018 Mr. M proposed he pay certain of J’s expenses including J’s tuition, and his residence fees for the 2018/2019 academic year, less a contribution from J (initially stated \$4000, assuming this includes any bursaries, scholarships, grants, and J’s income), and with the understanding he would not pay any child support to Ms. M for J pursuant to section 3.

[167] More specifically, in October 2018 Mr. M suggested he would assist J with his post secondary expenses throughout J’s post secondary education. Mr. M estimated a budget of approximately \$30,689.00 per year. Ms. M thought the budget was low.

[168] Mr. M indicated he was allowing for tuition costs of \$16,081.00, accommodations for 8 months (at \$675.00 per month) \$5,400.00 September - April, food \$4,800.00 September - April, and he was also accounting for J’s annual car insurance \$3,108.00, and car repairs \$1,300.00. Mr. M also suggested he would pay for J’s cellular telephone costs.



[169] As noted earlier, any payment Mr. M makes toward J's car, would not be considered payment of child support pursuant to section 7 and would be purely discretionary on Mr. M's part. I find the same for the cellular telephone expense.

[170] Mr. M suggested he would assist J with the understanding that J would pay his own expenses over the summer months, May – August (accommodation in an apartment / food / other).

[171] If the parties choose to proceed in that manner, they may agree to do so.

**J's resources for 2018 / 2019**

[172] For the 2018 / 2019 school year J received bursaries in the amount of approximately \$2000.00 (PSAC, Science, NS Student), scholarships in the amount of approximately \$2000.00 (Dal entrance). Mr. M stated J earned \$4,283.00 at his part time job. However, Ms. M indicated J earned \$7,762.82 in 2018. Ms. M also stated that J paid for his own gas to travel back and forth to Mr. M's home, his own clothing, and for his meals out with friends.

[173] If Ms. M does not agree with Mr. M's proposal then I order a proportionate sharing of J's expenses based on Ms. M's income of \$48,912, Mr. M's estimated income of \$371,833.

**2018 / 2019 school year**

[174] Mr. M is expected to pay child support for both J and M until May 1, 2019

[175] J's contribution of at least \$8000.00 in 2018 should be taken into account when determining a proportionate (12% and 88%) sharing for the 2018 / 2019 school year only.

[176] In calculating any proportionate sharing of expenses, for 2018 / 2019 or on a go forward basis, the parties must account for all post-secondary special expenses such as application fees, tuition, accommodations, food and toiletries (while in residence or an apartment), books, computer, school supplies such as pens and paper.

[177] Conservatively speaking I find J should have been able to contribute \$8000.00 to his post-secondary expenses for the 2018/2019 school year.

**2019 / 2010 school year**

[178] Mr. M testified that J asked to move into his own apartment for the upcoming school year. It is unclear whether J intended to sublet the apartment for the summer or if he intended to live in the apartment for the summer. Mr. M stated

that he approved J's move and that J leased an apartment starting May 1, 2019.

Ms. M did not appear to have been involved in the decision making process.

[179] Mr. M indicated he was prepared to support J during the coming school years (the court has assumed this means any application fees, tuition, accommodations, food / toiletries, books and supplies), and that Mr. M intends to continue to help J with other expenses such as expenses for his car and his cellular telephone.

[180] I note that Mr. M said he would pay the above noted expenses for J with the understanding that J would pay for his own apartment May through August each year and J would pay for all his other expenses throughout the school break, food, toiletries (May, June, July and August). In addition, J would be expected to make a \$5000.00 contribution to his school expenses September through April, and would pay any incidentals during the school year. It is unclear what Mr. M intended by incidentals (gas?, haircuts?). In consideration for his contributions Mr. M suggested he would not pay any table amount of child support to Ms. M for J.

[181] Assuming Mr. M is accurate about costs: tuition cost of \$16,081.00, accommodations for 8 months (at \$675.00 per month) \$5,400.00, and food

\$4,800.00. Adding in the cost for books of approximately \$1000.00, and deleting the expenses for the car, the total would be approximately \$27,281.00 with an expectation that J would contribute \$5000.00 (and support himself in the summer). So it appears Mr. M's section 7 contribution would be about \$22,281.00, after I added the books.

[182] Ms. M indicated she expected J would be working near her home during the summer of 2019. Ms. M was quite certain J would visit her home regularly and J would be seeking to have her assist him financially with certain expenses as she has in the past.

[183] If starting May 1, 2019 onward J pays for his own accommodations \$2,700.00, and cost of food of \$2,408.00, (May - August), then J would have spent \$5,108.00 of his own money in the summer on accommodations and food alone.

[184] There is no guarantee J will be awarded bursaries or other money. J earned \$7,762.82 in total in 2018, and there is no guarantee he will earn the same amount in 2019.

[185] I find that based on the evidence I have before me, with J living in his own apartment it is unlikely J will be in position to save \$5000.00 for the 2019 / 2020 school year?

[186] I find J will not likely be in the same financial position to be able to pay for incidentals as he was during the 2018/ 2019 school year. He will not be able to afford any “frat fee”, or to purchase clothing as he did before, or to eat out with friends as he had while he was working and living with his mother during the summer leading up to his first year of university starting in September 2018, and living in residence September 2018 – April 2019.

[187] If the parties agree to Mr. M’s terms, with Mr. M paying for J’s application fees, tuition, food, accommodations and books, and arguably computer, school supplies, they may proceed in that manner. If not, then all expenses including any application fees, tuition, food, accommodations, books, and incidentals (personal hygiene items), computer, school supplies, will be shared proportionately between the parties after considering a contribution from J (70% of anything he has earned if he is living with a parent only).

**Retroactive Child Support under section 3, June 1, 2011 to September 2017**

[188] Mr. M argues it would be unfair for the Court to grant an increase in child support under section 3 retroactive to June 2011. Mr. M is not arguing that the Court does not have the authority to do so, but that the Court should not use her discretion due to Ms. M’s delay.

## Establishing the date of retroactivity

[189] At paragraph 38 of *L.K.S. v. D.M.C.T.*, 2008 NSCA 61, the Honourable Justice Roscoe states the following:

The effective date of the order:

[35] The trial judge dealt with the request for the increase in child support to be retroactive as follows:

75 The leading case on retroactivity of child maintenance is indexed as *S.(D.B.) v. G.(S.R.)*, (2006), 31 R.F.L. (6<sup>th</sup>) 1 (S.C.C.). While there are various considerations and principles identified in that case for the court to consider I do not feel the need to repeat them or to explicitly deal with them in this decision although I have considered them. Following the *S.(D.B.)* decision and the evidence in this case I can see no reason to depart from the "general rule" to order payments retroactive to the date of "effective notice",

....

[36] Ms. T. submits through her counsel that the order should have been retroactive to January 2005 not August 2005 because Mr. S. resisted disclosure of his financial records which amounted to blameworthy conduct as discussed in *S.D.B.*, *supra*.

[37] In *S.(D.B.)* Justice Bastarache identified four factors that should be considered when determining whether to order a retroactive award:

- (1) unreasonable delay by the recipient parent in applying for the support;
- (2) conduct of the payor spouse;
- (3) circumstances of the child; and

(4) hardship occasioned by the retroactive award.

[38] Justice Bastarache discussed the relationship between blameworthy conduct and the effective date of a retroactive award in the following passage:

123 Once the recipient parent raises the issue of child support, his/her responsibility is not automatically fulfilled. Discussions should move forward. If they do not, legal action should be contemplated. While the date of effective notice will usually signal an effort on the part of the recipient parent to alter the child support situation, a prolonged period of inactivity after effective notice may indicate that the payor parent's reasonable interest in certainty has returned. **Thus, even if effective notice has already been given, it will usually be inappropriate to delve too far into the past. The federal regime appears to have contemplated this issue by limiting a recipient parent's request for historical income information to a three-year period** (my emphasis): see s. 25(1)(a) of the **Guidelines**. In general, I believe the same rough guideline can be followed for retroactive awards: **it will usually be inappropriate to make a support award retroactive to a date more than three years before formal notice was given to the payor parent.** (my emphasis)

124 **The date when increased support should have been paid, however, will sometimes be a more appropriate date from which the retroactive order should start. This situation can most notably arise where the payor parent engages in blameworthy conduct.** (my emphasis) 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.** (my emphasis) 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.

125 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. Where 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.

[190] Mr. M points out that he and Ms. M were engaged in litigation between 2012 and 2015. Mr. M notes that the parties dealt with parenting issues only and Ms. M did not raise the issue of child support throughout the litigation. He argues it was Ms. M's choice not to pursue any variation of child support.

[191] In addition, Mr. M asks the Court to consider that Ms. M did not apply for prospective or retroactive section 7 special or extraordinary expenses when she filed her Notice of Application in September 2015. Ms. M amended her application in May 2017 to request the court consider section 7 expenses and consider costs.

[192] Mr. M points out that at various points Ms. M was represented by counsel. He argues he has been prejudiced by her delay in making an Application to the Court.



[193] Mr. M asks the Court to consider his interest in certainty when considering retroactive child support before September 2015. Mr. M characterizes his conduct as blameless, arguing that he reported his income as he thought he was obligated to do, that he adjusted child support yearly based on his understanding of his obligation. Mr. M argues that any failure on his part to disclose information, such as his insurance income in 2014, was a mistake. I do not accept Mr. M's characterization that his conduct was blameless.

[194] The parties' have a past history of struggling to co-parent and struggling to agree on expectations with respect to spousal support and child support. I am satisfied that Ms. M has clearly expressed her concerns and made inquiries about how to resolved the issue but has been unable to do so to her satisfaction.

[195] Ms. M's expressed concerns about and there is evidence of her repeated efforts to try to establish what annual income was available to Mr. M for child support. Ms. M noted her frustration in attempting to obtain disclosure and establishing Mr. M's income in 2004, eventually agreeing to \$150,000. Ms. M raised a further concern and there is evidence of a further agreement reached that Mr. M's income for 2007 would be adjusted to \$175,966, and for 2008 it would be adjusted to \$181,373.00 through to May 31, 2010, and then again \$187, 331.08 through May 31, 2011.

[196] I find that after the parties' agreement in February 2011 Mr. M's choices of how to manage his finances within his corporation continued to be of concern to Ms. M. Given Mr. M's lack of clear communication about his finances with Ms. M, I find her delay in bringing the matter forward is understandable and I find her request for the court to review Mr. M's annual income for child support to June 1, 2011 within reason.

[197] I find Mr. M should have known or should have inquired about his responsibility to disclose his disability income, his decision to pay off long term debt in an accelerated manner, his decision to increase personal investments in RRSP's, or his investments within the corporation, and he should have informed himself about how deductions (expenses) are considered when establishing an annual income for child support.

[198] I do not have to find that Mr. M made financial decisions in order to avoid child support, but I do find Mr. M made financial decisions which he believed / or he thought he could argue allowed him less income for payment of child support. Proof that Mr. M deliberately sought to evade his child support obligation is not required. *Montgomery v. Montgomery*, [2000] N.S.J.1 (CA) and *Smith v. Helppi*, 2011 NSCA 65.

[199] For instance, Mr. M argues that he made a mistake when he told Ms. M that his disability income could not be used to calculate his annual amount of income for child support, or that it should not be grossed up. I find Ms. M continued to struggle to establish a more fair assessment of Mr. M's income, that she was unable to afford to take the matter to trial or hire an expert in 2004 or in 2010, and that she was afraid Mr. M may stop paying child support (as Mr. M had stopped paying spousal support in 2007 despite a Court order being in place). I also find Ms. M was afraid Mr. M might seek more parenting time with J and M, despite concerns she had about Mr. M's mental and emotional health between 2012 - 2015.

[200] As noted above, the test for a retroactive award is set out by Supreme Court of Canada. *S. (D.B) v. G (S.R.)*, 2006 SCC 37 (S.C.C).

[201] The case also stands for the following principles:

1. Child support is the right of the child and such right survives the breakdown of the relationship of the child's parents.
2. The child loses when one parent fails to pay the correct amount of child support.

3. Parents have an obligation to support their child according to their income and this obligation exists independent of any statute or court order.
4. The payment of a retroactive award is not an exceptional remedy.
5. A retroactive maintenance award should be payable from the date the custodial parent gave effective notice to the non-custodial parent.
6. It is generally inappropriate to make a retroactive award more than three years prior to the date when formal notice was provided to the non-custodial parent.
7. The quantum of a retroactive award must be tailored to fit the circumstances of the case.
8. The court must examine and balance four factors when determining the issue of retroactivity.

[202] According to *D.B.S.*, the *Guidelines* seek to instill efficiency and consistency in child support matters and adopt a “children first” perspective: *D.B.S.*, at para.

43.

[203] As noted above, the first factor concerns the reasonableness of the custodial parents' excuse for failing to make a timely application in the face of the nonpayment of child support, or in the face of an insufficient payment of child support.

[204] The second factor relates to the conduct of the noncustodial parent. If the noncustodial parent engages in blameworthy conduct, then the issuance of a retroactive award is usually appropriate. The determination of blameworthy conduct is a subjective one based on the objective indicators and the court should take an expansive view as to what constitutes blameworthy conduct in the face of nonpayment or insufficient payment of child support.

[205] The third factor to be balanced focuses on the circumstances, past and present of the child, and not of the parent, and include an examination of the child's standard of living.

[206] The fourth factor requires the court to examine the hardship which may accrue to the noncustodial parent as a result of the noncustodial parent's current financial circumstances and financial obligations, although hardship factors are less significant if the noncustodial parent engaged in blameworthy conduct.

## **Delay**

[207] Ms. M has argued that in 2004 and in 2010-2011 she did not know how to obtain the disclosure she needed and that she did not have the money to pay a lawyer to do the work. She explained that she would have had to hire an accountant and a lawyer and she did not have the money to do so, and she could not afford to take the matter to trial.

[208] The parties acknowledge they engaged in settlement discussions surrounding the issues of parenting in 2012 through mid 2015. Ms. M acknowledges she did not formally pursue the issue of child support during that period.

[209] Ms. M explained that Mr. M was experiencing significant personal issues between 2012 and 2014. Ms. M cited deaths in the family, an illness, Mr. M's surgery. Ms. M noted that at one point Mr. M indicated he was going to Ottawa for a medical procedure but she later learned he was actually participating in treatment for alcoholism. Ms. M also cited Mr. M's relationship issues with his new wife and his eventual separation from his second wife in the fall of 2014 as stressors in Mr. M's life which made it more difficult to address the issue of child support with him, while also dealing with parenting issues.

[210] As a result of all the personal issues needing to be addressed Ms. M chose to focus on resolving parenting issues rather than attempt to address the issue of child

support again. I accept Ms. M made this decision in an effort to do what was best for the emotional health of all involved at that time, but most importantly she did it to avoid further conflict which would effect the children.

[211] Ms. M indicated she felt powerless in terms of asking for what she felt was a fair amount of child support. She noted that in 2007 she had asked Mr. M questions about how to calculate his income for support purposes and he stopped paying spousal support in 2007 and then refused to share travel points with her. Ms. M noted that discussions about sharing expenses for the children caused conflict, and that the children were struggling and attending counseling during that period.

[212] Ms. M argued that her fear was justifiable and that she lacked the emotional and financial means to bring an application. I accept her evidence.

### **Blameworthy conduct**

[213] The evidence suggests it was in or around 2013 that Ms. M first learned Mr. M had two family trusts.

[214] Ms. M advised that in 2014 Mr. M's income dropped as he was off work for six or seven weeks. Ms. M has indicated that Mr. M failed to disclose non-taxable

income he was receiving through his disability insurers. Ms. M stated that she began to make inquiries about Mr. M's disability income in July 2015.

[215] Mr. M qualified for disability payments in 2014 but told Ms. M they were not taxable and they should not be calculated as part of his annual income for child support. Mr. M should have made inquiries about his obligation, he cannot now claim he made a mistake and this Court should not adjust his income. In addition, it is difficult to blame Ms. M for making an application to see what else Mr. M may not have disclosed since child support was dealt with up to and including May 31, 2011.

[216] It was not until January 2016 that Mr. M filed a Statement of Income with the Court acknowledging disability income needed to be included in his income to determine child support payments 2014 - 2016.

[217] There was some evidence Ms. M requested information from St. Mary's University where Mr. M worked as an adjunct professor. Mr. M initially refused to provide such information. It is unclear why Mr. M would think Ms. M did not have a right to all his income information. Given repeated concerns, and repeated difficulties and delays obtaining disclosure, it is understandable that Ms. M would want the court to thoroughly review Mr. M's income since the last Order.



[218] In February 2015 Mr. M began “putting away” \$1000.00 as an investment within his corporation. He did this for 30 months (to July 2017) and then withdrew \$32,903.98 in January 2018. It was Mr. M’s position that because he was saving the money for the children’s education, that the money was not available to be included in a calculation of Mr. M’s annual income for child support. Mr. M should have informed himself. His argument is not supported by caselaw or legislation. I do not accept Mr. M’s argument.

[219] Given Ms. M’s ongoing concerns about the determination of Mr. M’s income, I find Mr. M’s failure to be helpful to Ms. M, his failure to always be transparent about his income, and his failure to always consider how the use of his income might effect child support has been extremely unhelpful throughout the parties’ protracted period of litigation.

[220] I find Mr. M made a difficult situation all the more difficult for Ms. M. Mr. M could afford to obtain advice and had a responsibility to obtain both legal and financial advice about how to apply the *Guidelines* when assessing his annual income for child support. He had all the necessary support and information at his disposal. It was his burden to explain his finances in a meaningful way.

[221] The burden to provide sufficient evidence to allow Ms. M and the Court to establish what a fair assessment of his income was, and continues to be Mr. M's. I find Mr. M failed to cooperate fully with Ms. M in providing sufficient explanations about his financial circumstances.

[222] Any "mistake" Mr. M made or any oversight(s), or failure to disclose had the effect of alienating Ms. M. I find Mr. M's behaviour led to an unhealthy level of distrust between the parties, effecting the parties' co-parenting relationship and impacting on both J and M.

[223] As Fraser J commented in *Cunha v Cunha*, (1994), 99 B.C.L.R. (2d) 93 (B.C.S.C), at para 9, in the context of property division but I feel it applies to this situation: "Non disclosure of assets (income) is the cancer of matrimonial (child support) litigation. It discourages settlement or promotes settlements which are inadequate. It increases the times and expense of litigation. The prolonged stress of unnecessary battle may lead weary or drained women simply to give up and walk away with only a share of the assets they know about, taking with them the bitter aftertaste of a reasonably-based suspicion that justice was not done."

[224] At points during his argument Mr. M suggested he had paid enough child support or that any adjustment would not be that significant. Perhaps not

significant to him but definitely of some significance to Ms. M from the perspective of a person who had much less money available to her, and was caring for the parties' children primarily.

**Would J and M benefit from a retroactive award of child support under section 3 of the Guidelines**

[225] There is no doubt that J and M will both require continued emotional and financial support from both their parents for years to come.

[226] The reduction in child support being paid to Ms. M due to J moving out of the home (out of residence)k will be an adjustment for Ms. M as she had not planned for J to move into his own apartment. Ms. M had a reasonable expectation that J would continue to reside in residence and would reside with her during his breaks. Ms. M likely expected Mr. M would be paying \$3,766.50 during J's school year and \$4,650.00 in child support to her for both J and M during the summer months.

[227] Ms. M testified about using her savings (RRSP's) and about a number of debts she incurred in an effort to maintain a home while providing extras for the children who were primarily in her care since the parties separated in 2004.

Relatively speaking, Ms. M was earning very little money of her own between

2004 and 2017 and she relied even more heavily on child support from Mr. M after spousal support came to an end in November 2010.

[228] Ms. M has earned and continues to earn significantly less money than Mr. M, and M continues to live with her primarily. I am satisfied M and most likely J will benefit from any retroactive award the court may order.

**Would it cause Mr. M undue hardship**

[229] There is no evidence to suggest a prospective or a retroactive award of child support to Ms. M from Mr. M pursuant to either section 3 or section 7 of the *Guidelines*, would cause Mr. M undue hardship.

[230] There was a significant discrepancy in the money available to Ms. M and the money I find was available to Mr. M. I find the money will be of great assistance with Ms. M's ongoing efforts to provide a home for M and to support J in whatever way she can.

**Retroactive child support pursuant to section 3**

**2011**

[231] Mr. M's line 150 income for 2011 was \$206,144.00

[232] Ms. M's line 150 income was \$17,875.00. (Her gross business income was \$13,885.00 and her net income was \$12,875.00, RRSP's \$5000.00). It appears from Ms. M's chart that Mr. M paid child support in the amount of \$2585.04 in 2011 so a yearly amount of \$31,020.48.

[233] After considering all of the evidence, case law, legislation and making reference to *sections 16 – 25* of the *Guidelines*, I find Mr. M's annual income for child support for 2011 to be \$251,700.00. Mr. M paid \$2,585.04 per month and should have paid \$3,052.00. **Mr. M owes \$2,801.76 in retroactive child support under section 3 for 2011.**

## **2012**

[234] Mr. M's line 150 income in 2012 was \$226,351.00.

[235] Ms. M's line 150 income in 2012 was **\$19,556** (gross business income of \$16,187.50...net business income of \$14,556.50 and \$5000 RRSP's). Ms. M received child support in the amount of approximately **\$33,784.80**.

[236] After considering all of the evidence, case law, legislation and making reference to *sections 16 – 25* of the *Guidelines*, I find Mr. M's annual income for child support for **2012** to be **\$292,000.00 for a monthly table amount**

**of \$3,564.00.** Mr. M paid \$2,815.40 per month. Mr. M owes Ms. M  $\$748.6 \times \underline{12 \text{ months}} = \underline{\$8983.20}$  in retroactive child support under section 3 for 2012.

## **2013**

[237] Mr. M's line 150 income in 2013 was \$237,137.00.

[238] Ms. M's line 150 income in 2013 was **\$17,129** (gross business income of \$14,000 and net of \$12,129.00). Ms. M also received child support payments in the amount of approximately **\$35,260.32**.

[239] After considering all of the evidence, case law, legislation and making reference to *sections 16 – 25* of the *Guidelines*, I find Mr. M's annual income for child support for **2013** to be **\$300,800 for a monthly table amount of \$3,664.00.**

Mr. M paid \$2,938.36 per month. Mr. M owes Ms. M  $\$725.64 \times 12 \text{ months} = \underline{\$8,707.68}$  in retroactive child support under section 3 for 2013.

## **2014**

[240] Mr. M's line 150 income for 2014 was \$203,109.00.

[241] Ms. M's line 150 income in 2014 was \$36,533 (employment income of \$25,153.36, gross business income of \$8300, net of \$6380, and RRSP income of

\$5000.00). Once again, there is no dispute that Mr. M paid child support. He paid Ms. M child support in the amount of approximately \$30,605.28 in 2014.

[242] After considering all of the evidence, case law, legislation and making reference to *sections 16 – 25 of the Guidelines*, I find Mr. M's annual income for child support for **2014** to be **\$253,900 for a monthly table amount of \$3,129.00.**

Mr. M paid \$2,550.44 per month and owes Ms. M  $\$578.56 \times 12 \text{ months} =$   
**\$6942.72 in retroactive child support pursuant to section 3 for 2014.**

**2015 (January, February, March, April, May, June, July, August, September)**

[243] As noted earlier, Mr. M's line 150 income in 2015 was \$207,308 accounting for the disability income tax gross up.

[244] Ms. M's line 150 income was \$22,142.33 in 2015 (gross business income of \$15,380.47 or net business of \$13,400.47, RRSP's of \$5000, and child support of \$34,645.52 as reported by Ms. M on her Income Tax and Benefit return, Mr. M references \$30,484.80 according to Schedule 1, presumably in the Guideline Income Report). Using the chart provided by Ms. M would suggest he paid \$2540.39 per month in 2015 which would be \$30,487.08 in 2015.

[245] After considering all of the evidence, case law, legislation and making reference to *sections 16 – 25* of the *Guidelines*, I find Mr. M's annual income for child support to be **\$229,400 for a monthly table amount of \$2850.00**. Mr. M paid \$2,540.39 per month. Mr. M owes Ms. M  $\$309.61 \times 9 \text{ months} = \underline{\$2786.49}$  **in retroactive child support pursuant to section 3 between January and September 2015.**

#### **Retroactive child support pursuant to section 7**

[246] Mr. M argues that the court should not consider any claim by Ms. M for special or extraordinary expenses between 2011 and 2017. A total claim of \$10,675.00 according to Mr. M's review of Ms. M's application for special or extraordinary expenses which was filed July 21, 2017.

[247] Given the findings I have made regarding the determination of Mr. M's annual income for child support, given the party's relationship difficulties, and given Ms. M's financial circumstances between 2011 and 2017, I am prepared to consider Ms. M's claims for retroactive child support pursuant to section 7 of the *Guidelines*.

[248] Ms. M's retroactive claim for special or extraordinary expenses in 2011 included the following:



## Special expenses in 2011

1. child care for J total amount \$2,150 (Mr. M paid \$1935 and Ms. M paid \$215). Child care is a special expense under section 7 of the *Guidelines*. The parties should have shared the expense proportionately with Mr. M's income being \$292,000 and Ms. M's income being \$19,556.00. Mr. M should have paid 93% of the cost (\$1999.50) and Ms. M 7 % (\$150.50). **Mr. M owes Ms. M \$64.50.**
2. Psychological counseling for M and J of \$150.00, is also a special expense under section 7 of the *Guidelines*. The parties should have arranged to submit the claim through Mr. M's insurer, or they should have shared the expense proportionately. If Mr. M is no longer able to claim the expense through his insurer then he must pay Ms. M the proportionate amount he owes **\$139.96.**
3. Eye exam for M \$95, is a special expense under section 7 of the *Guidelines*. Mr. M must pay his proportionate share of **\$88.35.**

[249] I find the above noted special expenses were necessary in relation to the children's best interests, and I find they were reasonable in relation to the family's pattern of spending prior to separation.

**Extraordinary expenses in 2011**

1. curling registration for M and J \$160, Mr. M must pay **\$148.80**;
2. curling brooms for M and J \$170, Mr. M must pay **\$158.10**;
3. curling mitts for M and J \$30, Mr. M must pay **\$27.90**;
4. curling spiel competition registration for M and J \$100, Mr. M must pay **\$86.49**;
5. curling spiel hotel for M and J \$126.50, Mr. M must pay **\$117.65**;
6. curling spiel transportation drive to Wolfville for two spiels \$80.00, Mr. M must pay **\$74.40**;
7. ski pass for M and J \$264.39, Mr. M must pay **\$245.88**; and
8. ski suits for M and J \$85, Mr. M must pay **\$79.05**;
9. soccer registration for M and J \$120, I dismiss this claim;
10. soccer cleats for M and J \$120, I dismiss this claim; and
11. school supplies for M and J \$330.81 (he paid \$223.35 and she paid \$107.46), I dismiss this claim.

**Are the extracurricular activities, and is the secondary school expense “extraordinary”?**

[250] The above noted extracurricular activities and the supplies for school were necessary in relation to the children's best interests, and I find they were reasonable in relation to the family's pattern of spending prior to separation but were they extraordinary?

[251] The total amount of special or extraordinary expenses claimed in 2011 were \$3,909.94.

[252] As noted above, in *L.K.S. v. D.M.C.T.*, 2008 NSCA 61, the Honourable Justice Roscoe stated in part: "while in the first part of the test the issue was whether the mother could afford the expenses." I find Ms. M could afford to pay for these activities and for the school supplies.

[253] Justice Roscoe found the second part of the test invited "a proportionality inquiry," and he took into account the "amount of the expense in relation to the mother's income, the nature and number of the programs and activities, the special needs or talents of the child, and the overall cost of the programs.

[254] Ms. M did not file Statements of Expenses for each year the court is considering.

[255] Ms. M had a line 150 income of \$17,875.00 (gross business income of \$13,885.00/ net business income of \$12875.00 and \$5000.00 in RRSP's). Mr. M

paid Ms. M \$2,585.04 per month in child support in 2011 for a total of approximately \$31,020.48 in child support pursuant to section 3 of the Guidelines, for a total of \$48,895.48. The expenses would take up approximately 8% of Ms. M's total income. I note that in 2011 Ms. M felt it was necessary to cash in \$5000.00 in RRSP's in order to meet her and the children's reasonable needs.

[256] In considering the nature of the extracurricular programs and activities listed above, I find that Mr. M would often spend his parenting time with the children skiing and perhaps curling. Despite the disparity in the parties' incomes, Ms. M paid for the children's registration for skiing and curling, for their equipment, and for them to attend. This benefited the children and it also benefited Mr. M who did not pay for the children to participate in these activities with him when he chose to take them during his parenting time.

[257] I find skiing and curling to be extracurricular expenses which were extraordinary from the perspective of Ms. M, but reasonable when considering Mr. M's income and resources. I therefore Order Mr. M to pay his proportionate share of all skiing and curling expenses.

[258] Taking into account my decision about skiing and curling, I do not find the cost of soccer to be extraordinary or the payment of a portion of the children's school supplies to be extraordinary.

### **Special expenses claimed in 2012, 2013, 2014**

[259] The parties will share proportionately all special expenses:

1. In 2012 the cost of psychology services in the amount of \$1,425.00 and the cost of teeth extractions of \$515.00; her income \$19,556 6%, his income \$292,000 93%. He owes **\$1,325.25** for the psychological services and he owes **\$478.95** for the extractions.
2. In 2013 the cost of psychological services of \$644.00 (her income \$17,129 5% and his income \$300,800 95%); **\$611.80**

### **Extracurricular activities and school supplies in 2012 – 2017**

[260] I do not find the cost of school supplies to have been extraordinary and I dismiss Ms. M's claims for a proportionate sharing of the cost of school supplies between 2011 and 2015, part of the claim in 2016, and the claim made for 2017.

1. 2011 \$330.8 (receipts were entered twice);
2. 2012 \$426.12 (receipts do not appear to support);

3. 2013 \$227.48, 2014 \$205.07, 2015 \$148.56, 2016 \$339.52 (allowed a portion of school supply claim for computer expense dealt with below in 2016 (my emphasis) found to be in children's best interest, reasonable and extraordinary);
4. 2017 \$36.73.

[261] Mr. M is ordered to pay his proportionate share of the costs for extracurricular activities I have found to be extraordinary: including skiing and curling:

1. In 2012 curling registration for M and J of \$200, ski passes for M and J \$275.89, ski gear for M and J \$213.48. Proportionate sharing of 7% and 93%; **\$186.00, \$256.58, and \$198.54.**
2. In 2013 curling registration for M and J of \$200, ski passes for M and K of \$275.89, ski gear for M and J \$507.89; proportionate sharing of 5% and 95%: **\$186.00, \$256.58, and \$472.34.**
3. In 2014 curling registration for M and J of \$200, curling jacket, shoes and mitts for M of \$269.99, ski passes for M and K of \$275.89, ski gear for J \$45.99. Proportionate sharing of 13% and 87%. Mr. M most pay **\$174.00, \$234.89, \$240.02, \$40.01.**

4. In 2015 curling registration for M and J of \$200, broom for M of \$100.00, ski passes for M and K of \$275.89, ski gear for M and J \$73.57. Proportionate sharing of 8% and 92%. **Mr. M must pay \$184.00, \$92.00, \$253.82, \$67.68.**
5. In 2016 ski passes for M and J of \$275.89, ski gear for M and J of \$160.98, and I find the cost of the computer for the children \$569.98 + tax of \$85.50 was extraordinary given Ms. M's financial circumstances and I Order Mr. M to share the cost with her on a proportionate basis. Proportionate sharing of 10% and 90%. **Mr. M must pay \$248.30, \$144.88, \$589.93.**

## **Disposition**

[262] I order Mr. M to pay to Ms. M forthwith:

1. Prospective child support pursuant to section 3 of the *Guidelines*:  
October 2015 to December 2015 \$928.83, 2016 \$7518.60, 2017 \$2743.32, January to August 2018 \$20,520.00, September 2018 to February 2019 \$12,333.00 for a total of **\$44,043.75**:
2. Prospective child support pursuant to section 7 of the *Guidelines*. For 2017 \$234.51 and for 2018 \$211.11 for a total of **\$545.62**. In addition

the parties will have to account for J's post secondary expenses for 2018 / 2019, as detailed herein.

3. Retroactive child support pursuant to section 3 of the *Guidelines*: For 2011 \$2801.76, 2012 \$8,983.20, 2013 \$8707.68, 2014 \$6942.72, January to September 2015 \$2786.49 for a total of: **\$30,221.85**
4. Retroactive child support pursuant to section 7 of the *Guidelines*. The following amounts in special or extraordinary expenses between 2011 and 2016. \$64.50, \$139.96, \$88.35, \$148.80, \$158.10, \$27.90, \$86.49, \$117.65, \$74.40, \$245.88, \$79.05, \$1325.25, \$478.95, \$611.80, \$186.00, \$256.58, \$198.54, \$186.00, \$256.58, \$472.34, \$174.00, \$234.89, \$240.02, \$40.01, \$184.00, \$92.00, 253.82, \$67.68, \$248.30, \$144.88, and \$589.93 for a total of **\$7,472.65.**

Cindy G. Cormier, J.