SUPREME COURT OF NOVA SCOTIA
Citation: *McLellan v. McLellan,* 2020 NSSC 161

Date: 20200525
Docket: 1207-003460
Registry: Truro

Between:

Timothy Walter McLellan

Applicant

v.

Ellen Joyce McLellan

Respondent

Decision

Judge:	The Honourable Justice Glen G. McDougall
Heard:	March 12, 2020, in Truro, Nova Scotia
Counsel:	Kristy Hall, for the Applicant Allison Kouzovnilov, for the Respondent

By the Court:

Background

[1] This is an application to vary the child support provisions of a corollary relief judgment.

[2] The parties were married on October 3, 1992. They were divorced by order of this court dated June 2, 2014, accompanied by a consent corollary relief order. There were three children of the marriage, born in 1993 (Caitlyn), 1996 (Andrea), and 2000 (Ryan), respectively. The 2014 order required the applicant to pay child support for the two younger children, calculated on his 2012 income. However, within a few months of the order, Andrea moved in with her father, and he unilaterally reduced the child support payment to the mother, instead giving half the total to Andrea directly. There does not appear to be any dispute that Andrea is no longer a child of the marriage, and that ongoing child support relates only to Ryan.

[3] The applicant, Mr. McLellan, owns McLellan Industrial Supply (Industrial Supply), which sells industrial supplies and gases. He is also shareholder, officer, and director of R.E. McLellan Machine Shop (the Machine Shop), which does

metal fabrication and custom machining. His wife, Sharon McLellan, is employed by the Machine Shop as a bookkeeper and office administrator, with a portion of her work dedicated to Industrial Supply. She is also recognized agent, director, and officer of R.E. McLellan Machine Shop.

[4] Numerous affidavits and documents have been filed, including affidavits and financial disclosure by the parties, as well as affidavits of Sharon McLellan and Andrea McLellan. In addition to cross-examination of the parties, the court heard evidence from Laurence Tuttle regarding the Machine Shop's finances.

Preliminary issue

[5] The respondent initially sought an adjournment in order to obtain an expert's report respecting income to be attributed to the applicant from the two businesses he operates. Counsel for the respondent also requested an order that the applicant bear the costs of the expert's report. While I did not exclude the possibility of this expense being apportioned in a costs decision after the variation application was determined, I was not prepared to order the applicant to pay the up-front costs for the respondent's report. The respondent chose not to proceed with the expert, and the application proceeded on the basis of the financial information already filed.

Issues

[6] The issues are:

- the appropriate quantum of child support going forward;

- whether there should be a retroactive variation ordered; and

- a determination of the status of arrears.

Legal framework

[7] This application is governed by the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.), and the *Federal Child Support Guidelines*, SOR/97-175. Section 17 of the *Divorce Act* provides for variation orders. It states, in part:

> Order for variation, rescission or suspension
>
> 17 (1) A court of competent jurisdiction may make an order varying, rescinding or suspending, prospectively or retroactively,
>
> (a) a support order or any provision thereof on application by either or both former spouses...
>
> ....
>
> Terms and conditions
>
> (3) The court may include in a variation order any provision that under this Act could have been included in the order in respect of which the variation order is sought.
>
> Factors for child support order

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

[8] The first question for the court on a variation application is whether the party seeking a variation has established that there has been a material change in circumstances since the previous support order, as required by s. 17(4) (see *Willick v. Willick*, [1994] 3 SCR 670, [1994] S.C.J. No. 94, at para. 21). In this case the parties agree that there has been a material change in circumstances. The applicant, Mr. McLellan, says this change occurred when Andrea moved into his home, within several months of the 2014 Corollary Relief Order, and he began paying half his child support obligation to her directly, rather than to the respondent. The respondent does not appear to dispute this, and I find that there has been a material change in circumstances.

[9] The determination of the payor's income is governed by section 16 of the *Guidelines*, which states:

> Calculation of annual 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.

[10] If the payor's income as determined under section 16 is found not to fairly reflect the amount available for child support purposes, the court can consider various grounds for attributing or imputing additional income pursuant to ss. 17, 18, and 19 of the *Guidelines*.

[11] Mr. McLellan says his total income for support purposes should be set at $42,499. His line 150 income for 2018 was as follows:

Employment income:	$10,598.38
RRSP income:	$668.00
Self-employment income:	$27,351.44
Total:	$38,617,82

[12] Mr. McLellan agrees that his business pays cell phone expenses of $281 per month for himself and the two younger children. He also has use of a company vehicle, which he values at $98.14 per month, based on 20 percent personal use. I agree that Mr. McLellan's income for child support purposes should be calculated on this basis.

[13] The respondent submits that the applicant's income should be adjusted in view of the non-arm's length relationship between himself, his wife Sharon

McLellan, and his businesses. Section 9 of Schedule III and s. 18(2) of the *Guidelines* provide, respectively:

> Net self-employment income
>
> 9 Where the spouse's net self-employment income is determined by deducting an amount for salaries, benefits, wages or management fees, or other payments, paid to or on behalf of persons with whom the spouse does not deal at arm's length, include that amount, unless the spouse establishes that the payments were necessary to earn the self-employment income and were reasonable in the circumstances.
>
> ....
>
> 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 spouse establishes that the payments were reasonable in the circumstances.

[14] Mr. McLellan agrees that his wife is not at "arm's length" and that that he must establish that payments to her were reasonable and necessary in the circumstances. As noted earlier, Sharon McLellan is employed full-time by the Machine Shop as a bookkeeper and office administrator, as well as being the company's recognized agent, director, and officer. The applicant maintains that her work is "integral to the financial and operational health of the company", as she deals with bookkeeping, banking, and accounts receivable; deals with the company's accountant; oversees remittances; manages bill payments; and monitors

the company's credit accounts. She is also responsible for office administration and reception, as well as other errands and duties that may arise. She is the only office employee of the two businesses. Her gross annual income from the Machine Shop is $31,200. This amount is attributed partly to Industrial Supply due to her duties being divided between the two companies.

[15] While counsel for the respondent suggested that Sharon McLellan's salary was not reasonable in view of the evidence about the financial state of the two businesses, I do not accept this view. I am satisfied that payments to Sharon McLellan are a reasonable and necessary expense of the businesses, and that if the Machine Shop were not paying her, it would be obliged to employ someone else at the same or higher salary.

[16] Additionally, I am not convinced that it is "not reasonable" (as suggested by respondent's counsel) that in some tax years Sharon McLellan has declared higher line 150 income from the Machine Shop than Mr. McLellan has declared. In other words, I am not prepared to find that the couple are income splitting simply on the basis of the variations in Mr. McLellan's income, where Sharon McLellan's income is reasonable in view of the evidence and has remained unchanged for several years.

Capitalization

[17] Section 12 of Schedule III of the *Federal Child Support Guidelines* provides that "[w]here the spouse earns income through a partnership or sole proprietorship," it is permissible to "deduct any amount included in income that is properly required by the partnership or sole proprietorship for purposes of capitalization." This provision was considered in *Ghosn v. Ghosn*, 2006 NSSC 2, where Coady J. said:

> [24] ... Capitalization refers to the cash needed to operate on a day to day basis. Mr. Ghosn's capitalization costs primarily reflect the mortgage payments on his rental properties. In these situations the court must be satisfied that such income is properly required for purposes of capitalization.
>
> [25] This point was addressed in *Gossen v. Gossen*, [2003] 213 N.S.R. (2d) 217 (N.S.S.C.). Smith, J. stated at paragraph 98:
>
> > Section II must be read in conjunction with Section 12 of Schedule III which indicates that where the spouse earns income through a partnership or sole proprietorship the court shall deduct from any amount included in income that which is properly required by the partnership or sole proprietorship for the purposes of capitalization.

[18] The applicant also cites *Boniface v. Boniface*, 2007 BCSC 1543, where the court quoted Justice Coady's statement in *Ghosn* (at para. 24) that capitalization "refers to the cash needed to operate on a day to day basis", and said:

> [15] What Mr. Justice Coady says in *Ghosn* makes perfect sense because, obviously, in order to earn income one necessarily has certain expenses such as staff, office rental, leases or purchases of furniture or equipment, and so on. In my respectful view, however, the *Guidelines* do not intend that deductions from income should be made for the acquisition of an asset, such as an interest in a partnership or the shares of a corporation, that is then used, in turn, to earn income. In other words, capitalization in the sense used by the *Guidelines* is money necessarily paid out of pocket for day to day expenses necessary to generate the gross income of the proprietor or the partner...

[19] The proprietorship in question in this case is Industrial Supply. The applicant has detailed expenses that include inventory costs; management fees (relating to Sharon McLellan's salary); repairs and maintenance; property taxes and utilities; and motor vehicle expenses. Details of these business expenses are reviewed in Mr. McLellan's Supplementary Affidavit, filed 14 February 2020. Counsel for the respondent agreed in the hearing that the evidence does not provide any basis to make adverse findings respecting capitalization and amortization, particularly in light of the lack of expert evidence. I accept Mr. McLellan's evidence that the expenses he sets out in his Supplementary Affidavit are properly required for the day-to-day operations of the business.

Imputing income under s. 18 of the *Guidelines*

[20] The respondent seeks to impute income to the applicant pursuant to section 18 of the *Child Support Guidelines*. Section 17 and subsection 18(1) provide:

Pattern of income

17 (1) If the court is of the opinion that the determination of a spouse's annual income under section 16 would not be the fairest determination of that income, the court may have regard to the spouse's income over the last three years and determine an amount that is fair and reasonable in light of any pattern of income, fluctuation in income or receipt of a non-recurring amount during those years.

Non-recurring losses

(2) Where a spouse has incurred a non-recurring capital or business investment loss, the court may, if it is of the opinion that the determination of the spouse'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, 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 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 consider the situations described in section 17 and determine the spouse'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 spouse provides to the corporation, provided that the amount does not exceed the corporation's pre-tax income.

[21] The onus under section 18 "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": *Reid v. Faubert*, 2019 NSCA 42, at para. 29. In *Bembridge v. Bembridge*, 2009 NSSC 158, the payor father received income from

two restaurant businesses. The recipient mother claimed that he was artificially reducing his income by using the corporate structure of the businesses, doing work for cash, receiving the benefit of company vehicles, and not adding back capital cost allowance for rental properties. She also claimed that retained earnings showed that the father could have declared larger corporate dividends. Justice Beryl MacDonald rejected these claims, finding them unsupported by the evidence (see paras. 23-29). On the question of capital cost allowance, she said:

> [29] Section 18 does not direct a court to add back to personal income corporate income amounts that have been deducted from corporate income for capital cost allowance whether on buildings, equipment, or renovations. This direction appears in Schedule III as required by section 16 and is an adjustment to Line 150 income of a person - not a corporation. The Schedule III adjustments apply to persons who receive income from sources other than as a shareholder. Schedule III adjustments do not apply to income received from a corporation. Capital cost allowance within the corporation must be taken into account when examining the corporate pre-tax income or lack thereof. If a capital cost allowance is merely a book entry and does not serve a real business purpose this may suggest there is or should be money available to pay more income to the shareholder. The best place to look for this money in the corporate financial records is in the Statement of Cash Flows because it adds back any non-cash amortization. What is evident in the statements for Company 1 is it does not have significant cash at the end of each reporting year and it often has a bank overdraft. Company 2, even with the add back for "items not involving cash amortization", has a negative cash flow.

[22] The applicant says the "modest" capital cost allowance declared by the Machine Shop relates to depreciable assets, "including building and components, such as electrical wiring, lighting, plumbing, heating and ventilation systems,

sprinklers, etc." This, he says, "is not merely a book entry, but rather it accurately reflects the loss in value of these assets over time."

[23] As to retained earnings, B. MacDonald J. said, in *Bembridge*:

> [33] Retained earnings are not cash. They may represent some cash in the bank or a capacity to raise cash but they do not, as with net income, merely by their existence, represent money sitting in an bank account awaiting withdrawal. Retained earnings represent the difference between assets and liabilities; the accumulation of net income less dividends since the inception of the company; they represent the equity in the company, loosely similar to a homeowners equity in a residence. There are hazards in attributing retained earnings as cash available to a shareholder to be taken as income. There are problems relating to corporate after-tax income versus pre-tax income; the time period since incorporation versus a specific year or years; there may be no cash in the corporation, nor borrowing capacity to actually "take out one's equity in the business". A corporation must have retained earnings to be solvent. Corporations cannot receive financing from a Bank without a certain level of retained earnings. Nevertheless many courts have placed burden of proof upon a shareowner/director to justify the existence of the retained earnings.
>
> ...
>
> [35] The unfortunate fact is that retained earnings do not necessarily represent money that "the shareholders can take out as income" and this very important reality has often been overlooked. I do not require "expert evidence" before me to state that retained earnings and corporate pre-tax income are not, in and of themselves, cash available to the shareholder as income. This is a "fact" that "would be accepted by reasonable people who have taken the trouble to inform themselves on the topic as not being the subject of reasonable dispute for the particular purpose for which it is to be used". (*R v. Spence*, [2005] 3 S.C.R. 458) Chartered Accountants, Chartered Business Valuators and Investigative and Forensic Specialists, have tried to bring this message to our courts and those judges "who have taken the trouble to inform themselves on the topic" must incorporate this information into decision making...

[24] The Court of Appeal cited *Bembridge* in *Reid v. Faubert*:

[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):
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> - 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...

[25] The court must be satisfied that additional money is actually available to the payor, without endangering the financial viability of the company, before applying section 18.

[26] The applicant cites *Koester v. Koester* (2003), 50 R.F.L. (5th) 78, 2003 CarswellOnt 5372 (Ont. Sup. Ct. J.), where the court dismissed the recipient mother's claim for inclusion of 50 percent of the retained earnings in the father's business in income for child support purposes. The court said:

> 44 In my view the financial statements of H.K. Sheet Metal do not disclose an historical manipulation of either retained earnings or salary. In other words, it is not a situation wherein the records disclose that the respondent began to depress or diminish his salary or dividend income subsequent to the imposition of child support obligations; and it is not a situation wherein the corporation began to dramatically increase its retained earnings following the onset of child support obligations. There is, in my view, no evidence that the money taken by the respondent and his partner by way of salary, was in any way, out of proportion with general industry standards, or in any way inconsistent with their position as co-owners of a young business operating in the construction sector.
>
> 45 In my view, in dealing with the retained earnings of the company, I decline to exercise my discretion pursuant to s. 18 and the above reasons to import any portion of the retained earnings into the income of the respondent.

[27] The applicant maintains that the Machine Shop does not have significant liquid assets, i.e. cash. Rather, most of its assets consist of accounts receivable, inventory, and amounts due from a related party, that is, Industrial Supply. The amount owing from Office Supply is attributable to the portion of Sharon McLellan's wages that should be paid by the proprietorship. The applicant says the Machine Shop's retained earnings are insufficient to fund operations and bolster the balance sheet. He says the retained earnings are not available to him as income,

but are required to maintain operations, withstand market fluctuations, and prepare for future capital investments.

[28] It has been held to be an error to rely on retained earnings to impute income, rather than the entire financial situation of the company: *Johnson v. Barker*, 2017 NSCA 53, at para. 45. In that case, the court said:

> [40] While earlier in her decision the judge correctly referred to s. 18(1) as authorizing her to consider the company's pre-tax income for its most recent taxation year when determining the appellant's income for support purposes, she did not take the company's pre-tax income into account in her s. 18(1) analysis. In fact, the financial statements of the company indicate it had no pre-tax income for its 2015 taxation year, just a pre-tax loss of $26,401.
>
> [41] Rather, in imputing $16,666 per year to the appellant, the only factor the judge considered was the company's retained earnings, which she stated included the company's cash on hand of $85,957, disclosed in its June 30, 2015 balance sheet.
>
> [42] The judge's statement that cash is included in retained earnings was contrary to the evidence of the company's accountant...
>
> [43] The thrust of recent case law on s. 18(1)(a) suggests that merely looking at the retained earnings of a company is of limited assistance in applying s. 18 of the *Guidelines*.

[29] In *Gossen v. Gossen*, 2003 NSSF 7, 2003 CarswellNS 121, D.K. Smith J. (as she then was), summarized the court's approach under section 18:

> 84 The ability of the Court to impute income pursuant to s.18 is discretionary. The fact that an individual may not draw an income from a corporation or may draw a lesser amount of income than could possibly be taken is not necessarily determinative of the matter (if it were, s.18 would be mandatory in nature rather than discretionary). The question that the Court has to consider is whether it is reasonable for a corporation to retain

part of its earnings rather than pay them out to the spouse in question (see for example: *Lyttle v. Bourget* (1999), 178 N.S.R. (2d) 1 (N.S. S.C.) where the Court declined to include in a spouse's income the pre-tax income of a professional corporation despite the fact that the company held retained earnings of $218,119.00).

85 What then should the Court take into account in determining what is reasonable in this regard?

86 As a preliminary matter, the Court should review the tax returns of the individual in question as well as the financial statements and tax returns of the companies involved. Of interest would be whether, prior to separation, the paying spouse took income or benefits from the company which he/she is no longer taking now that the parties have separated without some justifiable business reason. In other words, is the spouse intentionally leaving money in the company in order to reduce his/her income for child support purposes?

87 Intentional under-drawing of income, however, is not the only matter for the Court to consider. An individual may have no intention whatsoever of reducing his/her income for child support purposes but, nevertheless, may be unreasonably leaving income in a company which should be available for child support purposes. In order to determine this, the Court must consider the pre-tax income of the corporation, the services that the individual provides to the corporation (is this an individual who works full-time for the company but without reasonable justification draws out a non-commensurate income?) as well as the needs of the business itself in order to function properly. The goal is not to strip the company of capital reasonably required in order to function. Nor is the goal to deny the company the ability to grow and to become more competitive and to be able to fund capital needs as they arise. The goal is to balance reasonable child support objectives with reasonable company objectives.

88 In a situation where the Court is satisfied that a corporation should and can pay out additional income to a spouse without undermining the financial health of the company, the Court may include in the spouse's annual income all or part of the pre-tax income of that corporation (see for example: Jess v. Strong (1998), 169 N.S.R. (2d) 271 (N.S. S.C.)). [Emphasis added.]

[30] The applicant says that, similar to the situation in *Johnson*, the Machine Shop had a net loss (of $25,267) in 2018. He does not receive dividends from the Machine Shop, and received no income from it between 2014 and 2016, then

received taxable employment income of $20,000 in 2017 and $10,598.38 in 2018. He says the 2017 amount was not an actual transfer of cash or income, but only "an accounting entry that was credited to his shareholder's account" relating to a receivable due from Industrial Supply. He says he is not income splitting with his wife, who is full-time salaried employee performing necessary duties. His evidence was that the Machine Shop has "persistent cash flow problems and few liquid assets", dealing with slow accounts receivable, late payment of expenses, penalties and interest owing to CRA, and an unpaid debt to Mr. McLellan's sister.

[31] I am not satisfied that there is any basis to attribute income of the company to the applicant for child support purposes under s. 18(1) of the *Guidelines*. The evidence does not reveal any pattern of income or benefits that would support the conclusion that Mr. McLellan is leaving money in the company in order to reduce his own income. As in Bembridge, there is no actual evidence of inappropriate conduct. Mr. McLellan acknowledges receiving a personal benefit from the use of a company vehicle. I have no basis to conclude other than that the Capital Cost Allowance serves a real business purpose, in light of the company's depreciable assets. As to retained earnings, I am mindful that these are not automatically cash available to the shareholder as income. I accept Mr. McLellan's evidence respecting the limited liquid assets of the company. I conclude that this is not a

situation where it would be appropriate to exercise the court's discretion by imputing income under s. 18(1).

Imputing income under s. 19

[32] The respondent does not appear to be relying on the general power to impute income under section 19 of the *Guidelines*. On the evidence before the court, I would have likewise found no basis to impute income under that section. Section 19 states, in part:

> Imputing income
>
> 19 (1) The court may impute such amount of income to a spouse as it considers appropriate in the circumstances, which circumstances include the following:
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> ...
>
> (d) it appears that income has been diverted which would affect the level of child support to be determined under these Guidelines;
>
> (e) the spouse's property is not reasonably utilized to generate income;
>
> (f) the spouse has failed to provide income information when under a legal obligation to do so;
>
> (g) the spouse unreasonably deducts expenses from income;
>
> (h) the spouse derives a significant portion of income from dividends, capital gains or other sources that are taxed at a lower rate than employment or business income or that are exempt from tax...
>
> Reasonableness of expenses
>
> (2) For the purpose of paragraph (1)(g), the reasonableness of an expense deduction is not solely governed by whether the deduction is permitted under the *Income Tax Act*.

[33] The respondent made no specific argument on these provisions, but her general submissions on imputing income under other headings are relevant to section 19 as well. The principles governing imputation of income under section 19 were discussed in *Coadic v. Coadic*, 2005 NSSC 291, where Forgeron J. discussed the need to exercise such discretion judicially (para. 10), and said:

> [11] The court cannot impute income on an arbitrary basis, rather there must be a rational and a solid evidentiary foundation in order to do so. Imputation of income must be governed by principles of reasonableness and fairness in keeping with the case law which has developed.
>
> [12] The burden of proof lies with Ms. Coadic as she is the party who is seeking to have income imputed. The standard is proof on a balance of probabilities.

[34] As for what constitutes a reasonable expense under s. 19(2), the Court of Appeal said, in *Snow v. Wilcox*, 1999 NSCA 163, [1999] N.S.J. No. 453:

> 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.

[35] As I have already discussed, I am satisfied that the business expenses Mr. McLellan claims are reasonable and necessary ones. He has provided explanations which go beyond merely asserting that the expenses are necessary. Moreover, I have no expert evidence respecting accounting or business operations that would point to the conclusion that Mr. McLellan's evidence should be rejected, in whole or in part. Imputing income under section 19 cannot be done arbitrarily, but rests on principles of reasonableness and fairness, and the burden is on the party seeking to have income imputed. I am not convinced that that burden has been met here.

Prospective child support

[36] I have concluded that prospective child support should be calculated on the basis of a total annual income of $42,498. This produces a table amount of $362 per month. In addition, Mr. McLellan would continue to pay Ryan's cell phone expense of $108 per month.

[37] Section 7 of the *Guidelines* provides for payment of additional support for special or extraordinary expenses, including education:

> 7 (1) In a child support order the court may, on either spouse's request, provide for an amount to cover all or any portion of the following expenses, which expenses may be estimated, taking into account the necessity of the expense in relation to the child's best interests and the reasonableness of the expense in relation to the means of the spouses and those of the child and to the family's spending pattern prior to the separation:

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

[38] In respect of post-secondary education expenses under section 7(1)(e), there is virtually no evidence about Ryan's educational or financial circumstances. The law indicates that children are expected to contribute to their own educations: *MacEachern v. MacLeod*, 2014 NSSC 238, at para. 31. It appears that the applicant's position is that there should be no further amount ordered under section 7. He notes that the table amount is meant to contribute to food and housing, in any event. I am satisfied that there is no basis on which a section 7 order can be made at this time.

Retroactive support and arrears

[39] The respondent seeks retroactive support dating back to the 2014 order.

[40] Justice Bastarache discussed retroactive orders, speaking for the majority in *D.B.S. v. S.R.G.*, 2006 SCC 37:

> 68 The concern associated with retroactivity is that, from the perspective of the person on whom a retroactive obligation is imposed, the order is arbitrary and unfair... Yet a retroactive child support order, as considered in the present appeals, does not involve imposing an obligation on a payor parent that did not exist at the time for which support is being claimed... As I concluded above, a payor parent always has the obligation to pay — and the dependent child always has the right to receive — child support in an amount that is commensurate to his/her income. This obligation is independent of any court order that may have been previously awarded. Accordingly, even where the payor parent has made payments consistent with an existing court order, (s)he would not have

> been fulfilling his/her obligation to his/her children if those payments did not increase when they should have, according to the applicable law at the time. Thus, the support obligation of a payor parent, while *presumed* to be the amount ordered by a court, will not necessarily be *frozen* to the amount ordered by a court. It is the responsibility of both parents to ensure that the payor parent fulfills his/her actual obligation, tailored to the circumstances at the relevant time. Where they fail in this obligation, a court may order an award that recognizes and corrects this failure. Such an award is in no way arbitrary for the payor parent. To the contrary, it serves to enforce an obligation that should have been fulfilled already. [Italics in original.]

[41] The majority went on to identify relevant considerations in deciding whether to order retroactive child support, including whether there is a reasonable excuse for the delay; the conduct of the payor parent; the circumstances of the child; and the hardship that might arise from a retroactive order (paras. 100-116). The majority also discussed the recipient parent's obligation to give effective notice:

> 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: 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.

[42] The applicant says he had no effective notice that Ms. McLellan wanted to adjust the child support order prior to her response to this application in the spring of 2019. The evidence and submissions before the court indicate that the respondent made no formal objection to the applicant's unilateral decision to begin paying half of his monthly support amount to their daughter Andrea when she moved in with her father in November 2014. This situation continued until Andrea moved out in October 2017, after graduating from the Nova Scotia Community College and beginning full-time work. Mr. McLellan continued to make payments for Ryan through the Maintenance Enforcement Program. He indicated in his Supplementary Affidavit that he had been paying $330.27 since November 2018 (and $276 prior to that). In her affidavit, Ms. McLellan confirmed that this is the amount she currently receives.

[43] Ms. McLellan's evidence was that she was relying on Maintenance Enforcement to collect child support on her behalf. She alleged in her affidavit that "[r]epeated actions by MEP ... were ignored" between November 2014 and March 2019. She also says the amount owing was reduced in March 2018, when she informed MEP that Andrea had moved out in 2014. I note that Mr. McLellan states in his affidavit filed May 31, 2019, that he advised MEP of the change in Andrea's situation at the time it occurred, and again when MEP contacted him in 2015, and

he understood that this was all he needed to do. He stated that the situation was brought back to his attention when MEP contacted him again in October 2018. He stated that the MEP staff member he spoke to suggested that he file a variation application.

[44] Mr. McLellan admits that he did not notify Ms. McLellan of his income annually as required by the 2014 order, but argues that in these circumstances that should not be regarded as blameworthy conduct. He says there was no wilful or malicious non-disclosure, he did not prioritize his own interests over the children's right to support, and he reasonably believed he was complying with the 2014 order.

[45] As to the circumstances of the child, the applicant says there is no evidence that his financial needs were not adequately met when he lived with Ms. McLellan. He adds that he was unaware of until this matter was before the court that Ryan had left school or had experienced any health issues. He says there is still no evidence of Ryan's employment or financial circumstances, but his understanding was that Ryan had returned to university in September 2019. Additionally, because Ryan is over the age of majority, he is no longer presumptively a child of the marriage. The Court of Appeal commented on this point in *MacLennan v. MacLennan*, 2003 NSCA 9, where Cromwell J.A. (as he then was) said, for the court:

> [39] I agree with the appellant that a child at or over the age of majority is not automatically a child of the marriage for the purposes of support simply by virtue of being a full time undergraduate university student, although I would add that most such students will qualify as such. As required by the provisions of the *Divorce Act* to which I have referred, it must be shown that the child is unable to withdraw himself or herself from parental charge. The party claiming support has the burden of establishing entitlement.

[46] The applicant says he would suffer financial hardship from a retroactive award, and that such an award would hinder his ability to pay support in the future. He says it would be a windfall to the respondent, but little benefit to Ryan himself, since he no longer lives with his mother.

[47] The evidence does not indicate that Mr. McLellan deliberately attempted to avoid his obligations under the 2014 Corollary Relief Order. However, he contravened his obligations in two ways: by unilaterally changing the payment arrangement in respect of Andrea, and by failing to disclose his income annually to Ms. McLellan. Admittedly, the evidence indicates that she made no requests for income updates. Nevertheless, despite Mr. McLellan's efforts, no reasonable explanation was offered for not doing so.

[48] Ms. McLellan was seeking enforcement of arrears that would have been due on Andrea's account until March 2018; she stated in her affidavit that "Mr. McLellan now claims that he paid support directly to Andrea but I have no

evidence that he ever did, or if so, for how long" (para. 13). It is clear from the affidavits of both Andrea and Mr. McLellan that he in fact paid Andrea directly. There is no dispute that there was a change of circumstances when Andrea moved in with her father. This had a significant and long-lasting impact on the viability of the 2014 Order as it related to Andrea's support. I am satisfied that a variation would have resulted at that time if Mr. McLellan had applied for one. In the circumstances – where Andrea was above the age of majority for most of the relevant time period, was receiving direct support from her father, and was not residing with her mother but with her father – I am not satisfied that any arrears should be enforceable in respect of Andrea's support amounts, nor should there be any retroactive reassessment of the support amounts due.

[49] However, this is not the case with respect to Ryan. The amount of child support due is governed by the court order. Nothing about the change in circumstances that resulted from Andrea's move had any effect on Mr. McLellan's obligations under the *Guidelines* and the Corollary Relief Order to pay support for Ryan. The Corollary Relief Order required Mr. McLellan to deliver his tax return annually (this was not a reciprocal exchange), and required that the amount of child support due be adjusted as of April 1 each year in accordance with the *Guidelines*. I am satisfied that this should have been done starting April 1, 2015.

[50] The calculation of Mr. McLellan's income is based on the line 150 income reported in Mr. McLellan's tax returns, with adjustments. I have included the amount he receives from his businesses for personal cell phones ($281 per month) and vehicle use ($98.14 per month). It appears from Mr. McLellan's Supplementary Affidavit that the vehicle was purchased in April 2015 (paras. 22-23 and Exhibit H). I accept his evidence that he did not in fact receive the RRSP income of $668 shown on his 2018 tax return (Supplementary affidavit, para. 14). However, I am not satisfied that there is a sufficient explanation for his statement that he did not receive the taxable employment income of $20,000 from the Machine Shop reported in 2017. He indicates that this is based on information received from Mr. Tuttle (Supplementary Affidavit, para. 16), but this point was not put to Mr. Tuttle in his evidence. I have included that amount in his income for support purposes. Accordingly, I find that his income for support purposes under the existing order was as follows:

2014	$65,091.93
2015	$45,909.08
2016	$30,068.78
2017	$35,169.15
2018	$42,499.50

[51] I emphasize that this is not a retroactive variation of child support, but only a confirmation that the actual terms of the agreement were not observed. It will be for Maintenance Enforcement to calculate the actual payments made and to determine whether there has been an underpayment or overpayment of the *Guidelines* amounts due. If it is determined that an underpayment exists, MEP can take the necessary steps to enforce payment over a reasonable time period going forward. Such amount, if any, shall be paid to Ms. McLellan. Conversely, should there be an overpayment, Mr. McLellan's monthly payments to his son, Ryan, will need to be adjusted to account for that scenario.

Other issues

[52] The respondent has additionally requested that I order that the applicant comply with provisions of the 2014 order in addition to child support, namely, provisions respecting Mr. McLellan's obligation to contribute to or provide health coverage for the children, and to execute documents to divide an RRSP. I conclude that these matters are not properly before me on this application, which is limited to a determination of the applicant's child support obligations.

Direct payment

[53] The applicant seeks to pay child support directly to Ryan, who is apparently a student and a dependent. (There was no current evidence to this effect, but Mr. McLellan did not appear to seriously dispute Ryan's status as a dependent.) The respondent took no issue with this request. It is, therefore, ordered that all future payments of support be directed to Maintenance Enforcement for distribution to the payor's defendant child, Ryan. When he ceases to be a dependent child, it will be up to Mr. McLellan to seek a further variation to terminate his support obligations.

Costs

[54] I will leave it to the parties to try to reach agreement on costs failing which they will each have 45 days from the date of release of this decision to file their written submissions.

Glen G. McDougall, J.