

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

**Citation:** *Murphy v. Howes*, 2021 NSSC 354

**Date:** 2021-12-22

**Docket:** SFH No. 1201-062353

**Registry:** Halifax

**Between:**

Kelli Murphy

Applicant

v.

Sean Howes

Respondent

Judge: The Honourable Justice Theresa M. Forgeron

Heard: September 14, 2021, in Halifax, Nova Scotia

Written Release: December 22, 2021

Counsel: Margo Fulmer for the Applicant, Kelli Murphy  
Sean Howes, Respondent, self-represented

**By the Court:**

**Introduction**

[1] Kelli Murphy and Sean Howes are divorced spouses who were involved in a toxic relationship both before and after their divorce. The parties have two children, a daughter who is 14 and a son who is 16.

[2] Ms. Murphy seeks to retroactively increase child support by imputing income to Mr. Howes. Mr. Howes is self-employed in the financial industry. Ms. Murphy argued that many of Mr. Howes' business expenses should be disallowed for the purposes of the child support calculation.

[3] Mr. Howes opposes Ms. Murphy's application. He stated that his deductions are necessary to earn an income. He also noted that his deductions are reasonable and represent an appropriate percentage of his gross earnings.

[4] In addition, Mr. Howes requested that any retroactive obligation be denied for three reasons. First, he stated that he overpaid support for some years when his income decreased. Second, he noted that he paid for childcare expenses during a time when they were not actually incurred. Third, he noted that he paid for some of the children's expenses without contribution from Ms. Murphy.

[5] Further, after the hearing concluded, Mr. Howes sought contribution from Ms. Murphy for certain expenses which he states he makes on the children's behalf.

**Issues**

[6] In this decision, I will decide the following two issues:

- What is the income of Mr. Howes?
- What is the appropriate quantum of child support on a prospective and retroactive basis?

**Background**

[7] The parties married in 2005, separated in 2006, and divorced in 2009.

[8] The last child support order is dated August 2014; it consists of the table amount of \$1,352, along with s.7 expenses for childcare and orthodontics. Support was based on Mr. Howes having an annual income of \$100,248. All child support was paid through the Maintenance Enforcement Program.

[9] In November 2016, Mr. Howes increased his child support payments to \$1,452 per month.

[10] In January 2019, Ms. Murphy applied to vary the parenting provisions of the last court order.

[11] In July 2019, Mr. Howes increased his child support payments to \$1,454 until April 2020 when he made a payment of \$1,038. Thereafter, Mr. Howes paid \$1,410 per month.

[12] In May 2020, Ms. Murphy filed an amended application seeking to vary child support and to address travel related issues. Initially, Ms. Murphy sought to include s. 7 expenses as part of her variation request. During the contested hearing, Ms. Murphy withdrew this request, confirming that she only sought the table amount of support.

[13] The parenting and child support applications were bifurcated. The contested parenting issues were determined during a previous proceeding.

[14] Child support issues were litigated during a hearing held on September 14, 2021. Both parties testified. No other witnesses were called. Oral submissions were supplemented by written briefs filed before and after the hearing. The last written submissions were received on September 21, 2021.

### **Analysis**

#### **[15] What is the income of Mr. Howes?**

##### *Position of Ms. Murphy*

[16] Ms. Murphy wants the court to impute income to Mr. Howes. She states that Mr. Howes did not prove that many of the claimed business expenses should be deducted when determining his net income for two reasons. First, Ms. Murphy said that Mr. Howes did not disclose all the required financial materials, and that the materials that were supplied were so disorganized, and at times, illegible, that they could not be reviewed and assessed. Second, Ms. Murphy disputed many of the expenses as appropriate business expenses for child support purposes even though they may be acceptable to Canada Revenue Agency.

[17] Ms. Murphy offered an extensive list of concerns respecting Mr. Howes' business expense claims, noting that he:

- Provided limited confirmation of the claimed expenses.
- Provided limited explanations as to what the expenses represented or how they related to his business.
- Provided credit card statements that did not distinguish between personal and business expenses.

- Provided no employer verification of his expenses.
- Failed to maintain a motor vehicle log as required by CRA.

[18] Ms. Murphy submitted that many of Mr. Howes' claimed expenses be disallowed, including those related to donations, his motor vehicle, meals, entertainment, CCA, office supplies, insurance, utilities, salaries, and advertising.

[19] Further, Ms. Murphy disputed Mr. Howes' attempt to remove capital gains as income for child support purposes. Ms. Murphy stated that all capital gains must be considered as income in the year they were reported.

[20] In summary, Ms. Murphy asked that Mr. Howes' income be found as follows:

***2017 Income for Child Support Purposes***

Commission Income	\$125,876.35
Other Income	\$1,311.67
Capital Gains	\$16,021.63
Less Business Expenses	(\$6,840.24)
<i>Total Income</i>	<i>\$136,369.41</i>

***2018 Income for Child Support Purposes***

Commission Income	\$138,576.98
Other Income	\$5.59
Capital Gains	\$415.00
Less Business Expenses	(\$11,888.12)
<i>Total Income</i>	<i>\$127,109.45</i>

***2019 Income for Child Support Purposes***

Commission Income	\$118,827.35
Other Income	\$0
Capital Gains	\$554.81
Less Business Expenses	(\$7,426.68)
<i>Total Income</i>	<i>\$111,955.48</i>

***2020 Income for Child Support Purposes***

Commission Income	\$108,174.00
Other Income	\$2,000.00

Capital Gains	\$0
Less Business Expenses	(\$10,205.93)
<i>Total Income</i>	<i>\$99,968.07</i>

[21] Ms. Murphy relied on the following cases to support her position: *Staples v. Callender*, 2010 NSCA 49; *Lavergne v. Lavergne*, 2007 ABCA 169; *Wilcox v. Snow*, 1999 NSCA 163; *Gossen v. Gossen*, 2003 NSSF 7; *M.C. v. A.P.S.*, 2007 NSFC 10; *Haras v. Camp*, 2018 ONSC 3456; *Dickey v Morrell*, 2011 ONCJ 707; *Meade v. Meade*, 2002 OJ No 3155; and *MacLean v. MacLean*, 2002 NSSC 5.

*Position of Mr. Howes*

[22] Mr. Howes states that as a self-employed individual, he incurs legitimate expenses associated with running a business, from provincial licensing fees, association fees, advertising, labour, and other costs associated with maintaining a business. He notes that his occupation is highly competitive, and that he maintains his client base by visiting clients who live outside HRM and by paying for the coffee or meals of clients from time to time.

[23] Mr. Howes notes that Ms. Murphy’s attempt to reduce his legitimate business expenses contravenes two of the objectives stated in s. 1(a) and (b) of the CSG which discuss establishing a fair standard of support and reducing conflict and tension between spouses when calculating support.

[24] Mr. Howes argued that the capital gains should not be included as income because they are not recurring.

[25] Mr. Howes relied on *Gorgichuk v. Gorgichuk*, [1997] SJ No 211 (QB); *Levesque v. Levesque* (1994), 4 RFL (4<sup>th</sup>) 375; *Mascarhenas v. Mascarhenas*, [1999] OJ No 37 (Gen Div); *Bell v. Bell*, 2011 BCSC 212; *McNeil v. McNeil*, 2013 NBCA 65; and *Andersen v. Andersen*, [1997] BCJ No 2496 (SC).

*Law*

[26] Section 19 (1)(g) of the CSG provides the court with the jurisdiction to impute income where a parent “unreasonably deducts expenses from income”. Section 19(2) confirms that “the reasonableness of an expense deduction is not solely governed by whether the deduction is permitted under the *Income Tax Act*.”

[27] In *Child Support Guidelines in Canada, 2020*, authors Julien and Marilyn Payne provide an excellent summary of the law at pages 203 and 204:

In order to impute claimed business expenses back into a parent's income pursuant to section 19 (1)(g) of the Guidelines, it is not necessary to establish that

the party who has claimed the deductions has acted improperly or outside the norm for claiming expenses in the income tax context. Rather, the issue is whether the full deduction of the expense results in a fair representation of the actual disposable income that is available to the party for personal expenses. In determining whether business expenses claimed by a party are unreasonable, the court must balance the business necessity of the expense against the alternative of using those monies for the purposes of child support. A party who seeks to deduct business expenses from their income for child support purposes has an obligation to explain the reasons for the expenses and how they were calculated, and must provide documentary proof of the expenses in an organized manner so that the court can make a proper determination as to the reasonableness of the expense from the standpoint of the child support calculation. The onus rests upon the parent seeking to deduct expenses from income to provide meaningful supporting documentation in respect of those deductions failing which an adverse inference may be drawn.

Although there may be good reason to look behind the income tax return of a self-employed spouse to determine whether business expenses should be allowed in the context of the Guidelines, a court is fully entitled to find that the expenses are reasonable and should not be added back into the spouse's income for the purposes of determining the child support to be paid. The adoption of the "reasonableness" criterion in section 19 of the Guidelines underlines the fact that the provisions of the *Income Tax Act* are designed for different purposes than *the Federal Child Support Guidelines*. ...

[28] And further at page 210, the authors note:

Special care must be taken when scrutinizing the expenses of self-employed spouses. The court should focus on expenses that were necessarily incurred to earn income. Discretionary expenses, such as entertainment or promotional expenses, even if deductible from taxable income, may be more readily reduced or disallowed, as may also capital cost depreciation for use of an office in the home or automobile expenses. ...

[29] In *Wilcox v. Snow*, *supra*, the Nova Scotia Court of Appeal affirmed that analysing business expenses involved a different exercise when calculating child support than when calculating income tax for CRA:

[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.

[23] In the recent case of **Vermeulen v. Vermeulen**, [1999] N.S.J. No. 193 (Q.L.), this Court upheld the decision of a trial judge who went beyond the self-employed spouse's income, as declared in his tax return. Chief Justice Glube, writing for the Court, said the following:

In my opinion, the decision of Justice Hall to impute the sum of \$30,000.00 as income is quite reasonable. It is one thing to deal with your income tax to provide the most favourable conclusion, but it is another matter if that affects the person's ability to make support payments.

[30] Further, the Court of Appeal affirmed that the legal burden was on the business owner to prove that the claimed business expenses were appropriate for child support purposes:

[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.

[31] **Wilcox v. Snow**, however, must be placed in context. Two points are worthy of note. First, the case involved a father who asked to vary a child support order that had issued only five months earlier. Second, the father's sole reason for seeking the reduction was that he claimed business expenses, that represented 88.23 % of his gross earnings, to reduce his annual income to \$7,736. The Court of Appeal observations are stated at para 3:

[3] In May, 1999, five months after Justice Boudreau's Order, the respondent made application to vary his child support obligation. The sole basis of the respondent's application was the fact that his 1998 income tax return, prepared by his accountant in April, 1999, disclosed that he had net business income for the year 1998 of \$7,736.00. The gross earnings of the respondent's business were \$65,726.27.

[32] On the issue of capital gains, authors, Julian and Marilyn Payne, in *Child Support in Canada, 2020*, note at pages 126 and 127:

In determining income, section 6 of Schedule III of the *Federal Child Support Guidelines* stipulates that taxable capital gains must be converted to the actual amount of capital gains realized in excess of actual capital losses. Regular capital

gains are included in income pursuant to section 6 of Schedule III of the Guidelines where they are annual recurring amounts. A non-recurring capital gain may be excluded from an obliger's annual income pursuant to section 17(1) of the Guidelines, or may be included where the simple use of employment income would be unfair in light of the attendant circumstances. There are numerous factors that should be taken into account in assessing whether the inclusion of a non-recurring capital gain should be included as a fair determination of income.

...

[33] In *Dunnett v. Dunnett*, 2018 BCCA 262, the British Columbia Court of Appeal reviewed factors to consider when determining whether capital gains should be included as a fair determination of income:

[23] There are many cases where the objective that children benefit from the financial means of their parents (s. 1(a)) is of primary importance. It was recognized in *Mariangeli v. Mariangeli* (2003), 2003 CanLII 27673 (ON CA), 66 O.R. (3d) 40, where Mr. Justice Weiler stated:

[30] While the courts have differed in their approach when dealing with non-recurring income, the recurring theme is that the child of the marriage should benefit from a sudden increase in lifestyle and money available to the family.

[24] This statement of the law has been referred to with approval in this court, in *Brown*, and the Alberta Court of Appeal in *Schick v. Schick*, 2008 ABCA 196. However, there are numerous factors that should be taken into account in assessing whether the inclusion of a non-recurring capital gain should be included as a fair determination of income. In *Ewing v. Ewing*, 2009 ABCA 227, the court observed as follows:

[32] ...

[33] Thus, the nature of the sale of a capital asset, or other extraordinary gain or fluctuation in income, should always be considered when determining fair income. Frequently the fairest method of income may be to exclude the gain. On the other hand, where a non-recurring gain is in the nature of an employment bonus, in the sense that it is truly income for work done, its inclusion in section 16 income may not make that method of calculation unfair. The sale of stock options as part of annual compensation may be such an example.

[34] In addition to considering the nature of the non-recurring gain, or fluctuation of income, it is also important to consider the purpose of support orders when deciding whether a section 16 calculation of income is fair. Support orders are directed at ensuring that, to the extent possible, that children enjoy the same standard of living they would have experienced if the marriage had not broken down. Thus, when determining a fair and reasonable income, the day-to-day standard of living the family



would have enjoyed, had it remained intact, is relevant. A court might want to consider whether a specific non-recurring gain would have resulted in a change in lifestyle of a particular family, had it remained intact.

[25] The court then set out a list of matters that a court might consider in assessing a fair determination of income at para. 35:

Is the non-recurring gain or fluctuation actually in the nature of a bonus or other incentive payment akin to income for work done for that year?

Is the non-recurring gain a sale of assets that formed the basis of the payor's income?

Will the capital generated from a sale provide a source of income for the future?

Are the non-recurring gains received at an age when they constitute the payor's retirement fund, or partial retirement fund, such that it may not be fair to consider the whole amount, or any of it, as income for child support purposes?

Is the payor in the business of buying and selling capital assets year after year such that those amounts, while the sale of capital, are in actuality more in the nature of income?

Is inclusion of the amount necessary to provide proper child support in all the circumstances?

Is the increase in income due to the sale of assets which have already been divided between the spouses, so that including them as income might be akin to redistributing what has already been shared?

Did the non-recurring gain even generate cash, or was it merely the result of a restructuring of capital for tax or other legitimate business reasons?

Does the inclusion of the amount result in wealth distribution as opposed to proper support for the children?

### *Decision*

[34] I will now determine Mr. Howes' income for each of the contested years based on the evidence, law, and submissions. Before doing so, I will discuss the nature of Mr. Howes' profession to provide context.

[35] Mr. Howes works as a financial planner who earns income based on commissions. About 20% of his commissions are derived from the sale of insurance; 80% from the sale of investments. His gross earnings can thus fluctuate.

[36] Mr. Howes works in a regulated and competitive industry. He is self-employed and incurs legitimate business expenses to earn a living. His reasonable

business expenses include advertising and licensing fees as well as benefits paid to the office administrator. Mr. Howes must also pay for his own office supplies, including computer and software programs. He needs a phone and internet both at work and at home.

[37] Further, Mr. Howes must meet with clients. He purchases coffee and on occasion meals for them because he needs to retain his client base in a competitive environment. He also must travel to meet with clients. He thus incurs motor vehicle expenses. Mr. Howes owns a Honda Pilot.

[38] The difficulty, however, is that Mr. Howes was not always the best record-keeper. He did not produce copies of his 2017 business expenses, and although volumes were produced for 2018, 2019, and 2020, they were not as organized as they could have been. Further, Mr. Howes did not keep the motor vehicle log in a form stipulated by CRA.

[39] In reaching my factual findings and in making my decision, I have taken these lapses into account. I have drawn negative inferences where appropriate. I recognize, however, that Mr. Howes is not like the respondent in *Wilcox v. Snow*, *supra*. Mr. Howes did not attempt to write off more than 88% of his income as business expenses. Mr. Howes did not file an application to vary five months after the initial order was issued. I also find that Mr. Howes did not attempt to provide false or misleading information to CRA.

[40] In reaching my factual findings, I also adjusted some of the listed business expenses, which although properly claimed for CRA purposes, have a personal component. Adjustments relate to expenses associated with meals, utilities, and motor vehicle. Further, I did not allow the deductions for health care premiums, insurance, or political donations.

### ***2017 Income for Child Support Purposes***

[41] For the 2017 tax year, I must determine two issues – capital gains and business expenses. First, I find that the capital gain of \$16,021.63 is a non-recurring amount that in the factual circumstances of this case should be excluded from the calculation of child support for the following reasons:

- A substantial portion of the gain was acquired by Mr. Howes liquidating shares he owned in Investco Canada. The adjusted cost base for the shares was \$98,126 while the proceeds of disposition were \$114,013. This disposition produced a gain of \$15,877, which when added to the other gain of \$134.63, yielded a total gain of \$16,021.63, half of which was taxable.

- The capital gain was not connected with Mr. Howes' employment. The gain was not in the nature of a bonus or other employment incentive akin to income for the work Mr. Howes performed during the year.
- Rather, the capital gain was paid when Mr. Howes cashed in his own savings so that he could buy a home. He wanted a place for the children to live when they were in his care.
- The capital generated from the sale of his shares will not provide Mr. Howes with a source of income in the future.
- Mr. Howes' primary source of income is from commissions. The sale of his personal investments is not an income stream.
- The inclusion of the capital gain is unnecessary to provide proper child support in all the circumstances. Mr. Howes' income is in the \$100,000 range. Child support paid was not minimal. The children's standard of living remained constant. Further, Mr. Howes' father paid for the daughter's tuition at the private school she attended.

[42] Second, I find that Mr. Howes proved that the following business expenses are reasonable and result in a fair representation of the actual disposable income available to Mr. Howes for child support purposes. In so doing, I balanced the need of the claimed business expenses against the alternative of using those monies for the purposes of child support:

Advertising	\$2,531.90	
Meals and entertainment	440.31	[50% of claimed amount]
Insurance	609.35	
Business taxes, licence etc.	881.9	
Office expenses	5,155.33	
Salary, wages, benefits	4,000.00	
Utilities	1,755.19	[50% of claimed amount]
Deliveries	763.39	
Motor Vehicle Expenses	2,665.37	[50% of claimed amount]
CCA for business-use-of-home	1,003.43	[50% of claimed amount]
<i>Total</i>	<i>\$19,806.17</i>	

[43] I thus find Mr. Howes' income to be **\$107, 381.85** for 2017:

Commission Income	\$125,876.35
Other Income	\$1,311.67
Less Business Expenses	(\$19,806.17)
<i>Total Income</i>	<i>\$107,381.85</i>

***2018 Income for Child Support Purposes***

[44] In 2018, the contested issues concerned a much smaller capital gain of \$415.00 and the amount of business expenses. The 2018 capital gain arose from Mr. Howes' decision to sell shares which resulted in a gain of \$415.00, half of which was taxable. For the reasons previously stated, I find the gain is a non-recurring amount that is not to be included as income for child support purposes.

[45] Second, I find the following business expenses are reasonable and result in a fair representation of the actual disposable income available to Mr. Howes for child support purposes. In so doing, I balanced the need of the claimed business expenses against the alternative of using those monies for the purposes of child support:

Advertising	\$813.42	
Meals and entertainment	564.59	[50% of claimed amount]
Insurance	594.32	
Business taxes, licence etc.	1,341.50	
Office expenses	7,884.57	
Salary, wages, benefits	3,600.00	
Utilities	1,659.86	[50% of claimed amount]
Deliveries	265.79	
Motor Vehicle Expenses	2,806.42	[50% of claimed amount]
CCA for business-use-of-home	799.25	[50% of claimed amount]
<i>Total</i>	<i>\$20,329.72</i>	

[46] I thus find Mr. Howes' income to be **\$118,252.85** for 2018:

Commission Income	\$138,576.98
Other Income	\$5.59
Less Business Expenses	(\$20,329.72)
<i>Total Income</i>	<i>\$118,252.85</i>

### ***2019 Income for Child Support Purposes***

[47] In 2019, the contested issues concerned a small capital gain of \$554.82 and the amount of business expenses. For the reasons previously stated, I find the gain is a non-recurring amount that is not to be included as income for child support purposes.

[48] Second, I find the following business expenses are reasonable and result in a fair representation of the actual disposable income available to Mr. Howes for child support purposes. In so doing, I balanced the need of the claimed business expenses against the alternative of using those monies for the purposes of child support:

Advertising	\$911.98	
Meals and entertainment	581.34	[50% of claimed amount]
Insurance	579.22	
Business taxes, licence etc.	942.85	
Office expenses	3,201.13	
Salary, wages, benefits	0.00	[None claimed]
Utilities	986.65	[50% of claimed amount]
Deliveries	210.52	
Motor Vehicle Expenses	1,531.15	[50% of claimed amount]
CCA for business-use-of-home	530.42	[50% of claimed amount]
<i>Total</i>	<i>\$9,475.26</i>	

[49] I thus find Mr. Howes' income to be **\$109, 352.09**:

Commission Income	\$118,827.35
Other Income	\$0.00
Less Business Expenses	(\$9,475.26)
<i>Total Income</i>	<i>\$109,352.09</i>

### ***2020 Income for Child Support Purposes***

[50] In 2020, Mr. Howes' gross commission earnings, not unexpectedly, reduced because of the impact of COVID. He had no reported capital gains. The only contested issue involved what constituted business expenses.

[51] I find the following business expenses are reasonable and result in a fair representation of the actual disposable income available to Mr. Howes for child

support purposes. In so doing, I balanced the need of the claimed business expenses against the alternative of using those monies for the purposes of child support:

Advertising	\$7,948.56	
Meals and entertainment	156.17	[50% of claimed amount]
Insurance	578	
Business taxes, licence etc.	965.85	
Office expenses	4,676.94	
Salary, wages, benefits	0.00	[None claimed]
Utilities	1,268.64	[50% of claimed amount]
Deliveries	204.34	
Motor Vehicle Expenses	1,304.56	[50% of claimed amount]
CCA for business-use-of-home	300.97	[50% of claimed amount]
<i>Total</i>	<i>\$17,404.03</i>	

[52] I thus find Mr. Howes' income to be **\$92,770.55** for 2020:

Commission Income	\$108,174.58
Other Income	\$2,000.00
Less Business Expenses	(\$17,404.03)
<i>Total Income</i>	<i>\$92,770.55</i>

### ***Summary***

[53] Under the 2014 court order, child support was based on Mr. Howes earning an annual income of \$100,248. In 2017, Mr. Howes earned \$107,381.85; in 2018, he earned \$118,252.85; in 2019, he earned \$109,352.09; and in 2020, he earned \$92,770.55.

[54] I must also set Mr. Howes' income for 2021. Commission earnings until September 3, 2021 total \$76,789.24. There is no evidence about business expenses. Although 2021 was another COVID year, it appears that Mr. Howes is earning more than he did in 2019. In the circumstances, for 2021, I find that Mr. Howes will earn, net of expenses, about \$100,000.00.

**[55] What is the appropriate quantum of child support on a prospective and retroactive basis?**

*Position of the Parties*

[56] For the period between January 2017 and July 2021, Ms. Murphy seeks \$10,277.13 to retroactively adjust child support, based on the income she submits should be imputed to Mr. Howes. Ms. Murphy also concedes that she did not incur childcare expenses after June 2017. She acknowledges a credit for any overpayment for childcare made after June 2017. Further, Ms. Murphy disputes any other credit being provided to Mr. Howes.

[57] Mr. Howes objects to a retroactive adjustment. He states that not only did he overpay child support through his continuing payment of childcare, but he also overpaid child support because his income was reduced after the 2014 court order issued. Mr. Howes states that Ms. Murphy should not be permitted to “cherry pick” years to garner best results. Finally, Mr. Howes states that, in addition to child support, he paid for various expenses on behalf of the children which more than offset any underpayment of support for the years in which his income increased.

*Decision*

[58] The following calculations confirm that retroactive child support, if awarded, would total **\$916**, subject to any further adjustments recorded by MEP, and without credit to Mr. Howes for other expenses which he incurred. The \$916 is determined as follows:

- In November and December 2016, Mr. Howes overpaid child support. He entered 2017 with a **(\$200)** credit.
- In 2017, Mr. Howes earned \$107,381.85. Monthly child support of \$1,439<sup>i</sup> was due for the table amount plus s. 7 childcare of \$58 for six months. The total due is thus \$17,268 + \$348 = **\$17,616**. MEP records confirm that Mr. Howes paid **\$17,424**. Mr. Howes underpaid child support by **\$192**.
- In 2018, Mr. Howes earned \$118,252.85. Monthly child support of \$1,606 or **\$19,272** for the year was due. MEP records confirm that Mr. Howes paid **\$17,424**. Mr. Howes underpaid child support by **\$1,848**.
- In 2019, Mr. Howes earned \$109,352.09. Monthly child support of \$1,497 or **\$17,964** for the year was due. MEP records confirm that Mr. Howes paid **\$17,436**. Mr. Howes underpaid child support by **\$528**.
- In 2020, Mr. Howes earned \$92,770.55. Monthly child support of \$1,296 or **\$15,552** for the year was due. MEP records confirm that Mr. Howes paid **\$16,680**. Mr. Howes overpaid child support by **(\$1,128)**.

- In 2021, I find Mr. Howes will have an income of about \$100,000. Monthly child support of \$1,383 or \$16,596 for the year was due. Evidence confirms that Mr. Howes paid \$16,920.<sup>ii</sup> Mr. Howes overpaid child support by **(\$324)**.

[59] Should I award \$916, or \$183.20 per year, in retroactive child support? The law on retroactive child support was recently revisited by the Supreme Court of Canada in *Michel v Graydon*, 2020 SCC 24 and *Colucci v Colucci*, 2021 SCC 24. I apply the law as stated and make the following findings:

- Ms. Murphy provided understandable social factor reasons for the delay in bringing her application. The parties' toxic relationship and consequent numerous court applications focused on parenting issues. The resolution of the parenting issues assumed priority over outstanding child support.
- Mr. Howes was paying support in keeping with the current order. He also increased the amount of his payments.
- Mr. Howes paid for a number of expenses which he believed directly benefitted the children, including \$3,295 per year for health and life insurance premiums; \$207 per year for the children's Dalplex membership; and the occasional provision of additional money for the children's activities when Ms. Murphy requested. As an aside, Mr. Howes may wish to revisit the continuation of the specialized insurance plans given their cost and any impact on his ability to pay the table amount of child support. I also note that Mr. Howes is not being asked to contribute to the cost of Ms. Murphy's health plan that covers the children's health expenses.
- At first glance, it appears that Mr. Howes may have overpaid child support in the years between 2014 and 2017. The cumulative income tax record would lead to that conclusion. Unfortunately, Mr. Howes neither produced his actual income tax returns for these years, nor did he produce details of his business expenses. Therefore, I am unable to determine whether Mr. Howes overpaid child support between 2014 and 2017.
- Mr. Howes' father paid about \$13,000 each year for the daughter's private school tuition, which is no longer incurred because the daughter recently decided that she wanted to attend a public school. A gift from the paternal grandfather does not reduce Mr. Howes' obligation. Mr. Howes stated that he occasionally reimbursed his father for a very small portion of the tuition expense, but his evidence was unclear on exact amounts, although I am satisfied that he likely did pay minor amounts.



- There are no significant benefits or hardship factors to consider in the circumstances of this case.

[60] Given my findings, I conclude that there is no retroactive amount owing. Mr. Howes proved that a retroactive award is not justified, despite Ms. Murphy having an understandable social factor reason for the delay, given the payments made by Mr. Howes and the other expenses which he assumed over the past five years, and in the circumstances as described.

### **Conclusion**

[61] The income of Mr. Howes is calculated from 2017 to date. No retroactive child support is awarded, provided MEP records confirm that Mr. Howes made the payments noted until the end of December 2021.

[62] Further, ongoing child support of \$1,383 per month is due. Once Mr. Howes' income stabilizes after the impact of the pandemic is over, child support should once again be revisited.

[63] Mr. Howes must also provide a copy of his complete income tax return and assessments to Ms. Murphy on an annual basis, and no later than July 15th of each year, commencing July 15, 2022. The failure to do so will result in a cost award.

[64] Absent agreement, costs submissions should be filed by January 20, 2022.

[65] Ms. Murphy's counsel shall draft the variation order.

Forgeron, J.

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<sup>i</sup> Because the 2017 Tables did not come into effect until November 22, 2017, I used the 2011 Tables for the entire 2017 calendar year.

<sup>ii</sup> The calculation is based on the assumption that Mr. Howes continued to pay maintenance at a rate of \$1,410 per month.