SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION
Citation: *Boylan v. MacLean*, 2018 NSSC 15

Date: 2018-03-05
Docket: SFHMCA-032826
Registry: Halifax

Between:

Michelle Boylan

Applicant

v.

Lauchlin MacLean

Respondent

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Judge: The Honourable Justice R. Lester Jesudason

Heard: April 25, 26 and July 18, 2017

Final Submission: January 31, 2018

Summary: Mother sought, amongst other things, to retroactive increase the father's child support going back over ten years. While the father should have annually provided his financial disclosure as required under a 2005 Consent Order, the retroactive claim was largely dismissed because of the mother's delay, the child's past and present circumstances not favouring a retroactive increase, and the hardship which would be caused.

Key words: Family, Parenting, Custody, Shared parenting, Child support, Table amount, Special or extraordinary expenses, RESPs, Cell phone, Orthodontic work, Life insurance, Non-recurring income, Retroactive child support, Unreasonable delay, Blameworthy conduct, Child's circumstances, Hardship

Legislation: *Maintenance and Custody Act*, R.S.N.S. 1989, c. 160

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Counsel:	Julia E. Cornish, Q.C., and Gillian R. Lush, for Michelle Boylan Lauchlin MacLean, self-represented.

By the Court:

1.0 Introduction

[1] The child at the heart of this proceeding is S. Her parents are Michelle Boylan (the "Mother") and Lauchlin MacLean (the "Father"). S is fourteen and, by all accounts, is a delightful and gifted child. She's in Grade 9 and excels academically. She was publicly recognized for being a youth volunteer of the year. She is described as having a good circle of friends, a healthy social life and being a well-balanced teenager. The Mother says S is "perfect".

[2] While S is thriving, unfortunately, she has also been the focus of bitter litigation between her parents for many years beginning when she was less than a year old. They have clashed over parenting and child support issues in this court, and also in criminal proceedings.

[3] Plainly, the years of conflict have taken a financial toll. The Mother indicates that, due to significant legal fees she incurred retaining family and criminal counsel, she had to declare bankruptcy in 2005. The Father says he could not afford a lawyer to assist him in this proceeding because he still owes fees to his previous lawyer.

[4] Their latest foray into litigation asks me to go back in time over ten years, when S was only three. Specifically, in addition to asking me to determine some current parenting and child support issues, the Mother asks me to retroactively increase the Father's child support obligation going back to September 1, 2006. The total retroactive award she seeks is approximately $72,000.

2.0 Family and Litigation History

[5] S was born in 2003. In 2004, litigation ensued over parenting and child support issues. The parties attended a settlement conference with counsel in June 2005. They entered into a Consent Order where they agreed, amongst other things:

- They would have joint custody of S. In non-emergency situations, neither parent would make major developmental decisions regarding S without the consent or acquiescence of the other parent. If they were unable to reach an agreement, the Mother would make the decision, pending further agreement or court order;

- The Father would have regular parenting time with S every second weekend from Friday at 5:00 p.m. until Sunday at 7:00 p.m., and every Tuesday from 5:00 p.m. until Thursday morning;

- In even-numbered years, S would spend Christmas Eve at noon to Boxing Day at noon with the Mother, and then spend Boxing Day at noon until December 28th at noon with the Father. The reverse would happen in odd-numbered years;

- The Father's income was $60,700 for the purpose of determining his Table amount of child support;

- The Father would pay the Mother monthly Table amount of child support of $500 beginning on July 1, 2005. He would also pay specified amounts or percentage contributions to child care, medical expenses, agreed upon extracurricular activities, and a Registered Education Savings Plan; and

- The Father would annually provide the Mother with his personal and corporate income tax returns and notices of assessment on or before July 31st of each year.

[6] At a subsequent contested hearing held before Justice Lynch on September 21, 2005, the Father's regular parenting time was increased so that in addition to his weekly parenting time from Tuesday to Thursday, his time every second weekend was extended from Friday at 5:00 p.m. until Monday morning. Thus, the Father had S in his care for seven out of fourteen nights every two weeks. The parties agree that this increase in the Father's parenting time resulted in a shared parenting arrangement as defined under s. 9 of the *Child Maintenance Guidelines* (the "*Guidelines*").

[7] The shared parenting arrangement continued for many years. However, as S got older, the Mother began requesting that S remain in her care during the week claiming that this would be less disruptive for S. The Father eventually agreed in February 2013 so that the shared parenting arrangement ended in favour of one where S remained in the Mother's primary care during the week, and the Father's care every other weekend from Friday after school until Monday morning.

[8] In December 2013, the parties agreed that the Father would return S to the Mother's care on Sunday at 5:00 p.m. unless Monday was a holiday. This parenting schedule remains the current parenting schedule.

[9] On February 12, 2013, a few days after the shared parenting arrangement ended, the Mother filed a variation application seeking financial disclosure from the Father so she could assess a possible retroactive child support claim from September 1, 2006, onwards. The Father filed a response to variation application on May 9, 2013, seeking to vary his child support obligations on a prospective basis.

[10] On May 15, 2015, the Mother filed an amended variation application seeking a contribution from the Father for special or extraordinary expenses.

[11] At the parties' request, there were four judicial settlement conferences between February 17, 2016 and March 2, 2017. They resulted in a new Consent Variation Order – Parenting which, amongst other things, confirmed that the Mother would continue to have primary care of S.

[12] The remaining issues went to a hearing before me conducted over three days.

3.0 Agreements

3.1 Agreed Terms of Order

[13] The parties agreed these terms will form part of an order:

- The Father's 2016 Line 150 income of $62,400 would be used for determining his ongoing Table amount of child support so he would pay monthly Table amount of child support of $527.52 beginning on May 1, 2017. Also, given that the *Child Support Guidelines* were revised effective November 22, 2017, the monthly amount would be increased to $533 from December 1, 2017, onwards.

- The Father will provide four months of post-dated cheques to the Maintenance Enforcement Program every four months;

- The Mother's 2016 income of $50,000 would be used for the purpose of determining her contribution towards ongoing special or extraordinary expenses;

- The parties will split the cost of S's school trips, up to $1000 per year, in proportion to their incomes;

- The Father will annually provide his personal income tax returns and financial statements for his corporations, as well as notices of assessment or reassessments, to the Mother on or before July 31st each year.

- If eligible, the support order would be enrolled in the Administrative Recalculation Program.

[14] These terms shall be incorporated into the order arising from my decision, rounding the Father's monthly Table amount of child support beginning May 1, 2017, to $528.

3.2 Evidentiary Agreements

[15] The parties also agreed to the following evidentiary points:

- Subject to some minor points dealt with on the record, neither party objected to the contents of their respective Exhibit Books being admitted as evidence, subject to each party reserving the right to argue what weight, if any, should be given to same.

- The Mother claimed S as a dependent for tax purposes and received benefits such as the Canada Child Tax Benefit and Universal Child Care Benefit from 2005 to February 2013.

- The Father paid all or almost all of the costs of S's extracurricular activities from 2005 to 2012.

- The Mother was not seeking to impute income to the Father greater than the income shown on his personal income tax returns.

4.0 Issues to be Determined

[16] The parties' agreements leave me to determine the following eight issues:

1. How final decisions will be made for S;

2. Christmas Holiday parenting arrangements;

3. Whether the Father must pay for the Mother to have his annual financial disclosure reviewed;

4. Whether the Father must secure future child support payments with life insurance;

5. Whether the Father must continue to contribute at least $1000 annually towards a RESP for S;

6. If, and how, the parties should share the costs of S's special or extraordinary expenses;

7. Whether the Father should pay retroactive child support going back to September 1, 2006, and, if so, how much; and

8. Whether either parent should be required to make a contribution to retroactive special or extraordinary expenses.

[17] Much of the hearing focussed on the Mother's request for a retroactive increase to the Father's Table amount of child support going back to September 1, 2006. While this retroactive claim was clearly the most contentious and time-consuming issue, I will deal with it after I deal with the prospective claims because a payor's prospective support obligations may have implications on the payor's ability to pay retroactive support: *Staples v. Callender*, 2010 NSCA 49.

5.0 Relevant Legislation

[18] This proceeding was commenced under the *Maintenance and Custody Act* (now called the *Parenting and Support Act*) before legislative amendments came into effect last year. I will therefore use the language of the *MCA* except I have used the word "support" instead of "maintenance". Substantively, in its pre- and post-amendment forms, the *Act* requires that there must be a "change in circumstances" before I may vary an order relating to custody and access or child support: *MCA*, s. 37(1). If I decide to vary child support, I must apply s. 10 of the *Act*.

6.0 Parenting Variation (Issues 1 and 2)

[19] The 2005 Consent Order gave the Mother the power to make decisions if the parties were unable to agree, pending further order of the court. The Father wants to change this so that he has final decision-making authority.

[20] The 2005 Consent Order provided that S would annually alternate spending Christmas Eve from noon to Boxing Day at noon with one parent, and then Boxing Day at noon to December 28th at noon with the other parent. The Mother wants S to spend every Christmas Eve and Christmas Day with her. The Father wants to vary the Christmas arrangements so S is with one parent from noon on the last day of school until Boxing Day, and then with the other parent from Boxing Day until the first day of school. Alternatively, he asks to keep the Christmas parenting arrangements unchanged.

[21] The person seeking to change a court order must prove that there has been a change of circumstances since the order was granted. Parenting orders are based on a child's best interests. A change means the existing order is no longer in the child's best interests and a new order must be crafted to recognize the child's current circumstances: *Gordon v. Goertz*, [1996] 2 S.C.R. 27.

[22] Here, neither parent has persuaded me that their circumstances, or S's, have changed such that these aspects of the 2005 Consent Order are no longer in S's best interests and should be changed. I therefore dismiss the parenting variations.

7.0 Whether the Father must pay for the Mother to have his annual financial disclosure reviewed (Issue 3)

[23] The Father is President and CEO of Glenora Distillers (1994) Limited. He is paid a salary. He has a minority shareholding interest in the company as well as an associated company, Glenora Distillers International Ltd. It also appears he has controlling interests in other companies associated with Glenora Distillers (1994) Limited.

[24] The 2005 Consent Order required the Father to annually provide the Mother with his personal tax returns and notices of assessment and reassessment, as well as this same information for any corporations over which he had control.

[25] The Mother asks me to order that she be entitled to annually select a professional, at the Father's cost, to review his personal and corporate tax returns to determine his income.

[26] The Mother provided no authority to support her request and made minimal argument on the request at the hearing. It's not clear what sort of professional she is seeking, what limit, if any, she is proposing be put on the cost to be borne by the Father, whether she would consult with the Father when selecting the professional, or whether she needs additional professional assistance to determine the Father's income. Furthermore, I note that the 2005 Consent Order, negotiated with the assistance of counsel, did not require the Father to pay for any such cost but simply required him to disclose his personal and corporate tax information. Considering these circumstances, I decline the Mother's request.

8.0 Request that the Father secure future child support payments with life insurance (Issue 4)

[27] The Mother asks me to order that the Father be required to secure future child support payments with life insurance.

[28] Again, there was little focus by the Mother on this request during the hearing. She presented no evidence about the amount of coverage needed or what the cost would be to obtain and maintain it. She didn't suggest that there was a pressing need for life insurance to secure future child support given the Father's health and relatively young age. I decline the Mother's request.

9.0 Whether the Father must continue to contribute at least $1000 annually towards an RESP for S (Issue 5)

[29] The 2005 Consent Order required that the Father maintain S's existing RESP and annually contribute not less than $1000 to it. The Father seeks to be relieved of this obligation. The Mother wants it to continue and that the Father be required to contribute more than $1000 should his income increase.

[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).

[33] I am satisfied that the Father's financial circumstances have changed since 2005, and that neither parent should be obliged to contribute to an RESP although, as stated in *Van der Linden*, either parent's willingness to do so on a voluntary basis is laudable. I will elaborate more on the change in the Father's financial circumstances when I address the Mother's retroactive claim later in my decision.

10.0 Prospective Sharing of Special or Extraordinary Expenses (Issue 6)

[34] Under the 2005 Consent Order, the parties agreed:

- The Father's income was $60,700 for determining his Table amount of child support;
- He would pay 100% of S's child care costs to a maximum of $550 per month;
- He would pay 100% of S's medical expenses up to a maximum of $1000 per year and two-thirds of any medical expenses above $1000 per year, and
- He would pay two-thirds of the costs of extracurricular activities for S that were agreed to prior to being incurred.

[35] At the time, the Father's Line 150 incomes listed in his 2004 and 2005 tax returns were $91,383 and $96,879, respectively, not the figure of $60,700 agreed to in the 2005 Consent Order as his income for his Table amount of child support. The Mother's income was not listed in the 2005 Consent Order but the Line 150 income shown in her 2005 income tax return was $3,461. She has subsequently indicated that this was her "pre-bankruptcy return" as her T4 revealed an income of approximately $30,000 (Exhibit 1, Tab 4, Paragraph 57).

[36] The Mother seeks prospective contributions from the Father for a number of expenses she claims are special or extraordinary expenses.

[37] The parties have agreed that when determining their prospective contributions for current special or extraordinary expenses, I should use their 2016 incomes of $62,400 and $50,000 respectively. This was agreed despite the Mother's counsel advising, when the parties returned for oral argument on July 18, 2017, that the Mother had recently lost her job and received a severance package. The Mother's counsel confirmed that the Mother was not seeking to introduce new evidence about the loss of her employment or the details of her severance package and agreed that her income should still be fixed at $50,000 for the purpose of any prospective relief sought in this proceeding. The Father agreed to proceed on that basis.

10.1 General approach to section 7 expenses

[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.*

10.2 Additional premium costs attributable to covering S under the Mother's medical plan from June 2015 onwards

[40] Neither party had a medical plan when they entered into the 2005 Consent Order. The Mother later obtained one and sought a contribution from the Father when she filed her Amended Notice of Variation Application and Statement of Special or Extraordinary Expenses on May 15, 2015.

[41] On March 13, 2017, the Mother filed an Updated Statement of Special or Extraordinary Expenses claiming a contribution from the Father for the additional costs of covering S under her medical plan from June 2015 to March 2017. She described this as a "retroactive special expense" [Exhibit 1, Tab 8, Pages 184-185].

[42] In my view, given that the Mother claimed the additional cost associated with covering S under her medical plan when she filed her original Statement of Expenses on May 15, 2015, any amounts claimed from June 2015 onwards are not truly "retroactive special expenses" because the Father has had formal notice of same since May 15, 2015. Thus, I will deal with the Mother's claim from June 2015 onward as a prospective one, rather than a retroactive one.

a) Mother's Position

[43] The Mother asks me to order the Father to pay two-thirds of the additional premium costs attributable to covering S under her medical plan from June 2015 to March 2017.

b) Father's Position

[44] The Father accepts that the ongoing additional premium costs of adding S under the Mother's medical insurance plan are a proper s. 7 expense. He says, however, that his contribution should be in proportion to the parties' incomes: 55% of the costs based on the parties agreed incomes of $62,400 and $50,000, respectively.

c) Decision on the Father's contribution to additional premium costs attributable to covering S under the Mother's medical plan from June 2015 onwards

[45] I conclude that from June 2015 onwards, the parties should proportionately share the additional premium costs attributable to covering S under the Mother's medical plan. The Mother has not persuaded me that there is any reason to depart from the guiding principle that the parties should share this expense in proportion to their incomes. As an aside, given that I was advised on July 18, 2017, that the Mother had recently lost her job, I am unsure if she still has a medical plan.

[46] Little time was spent by the parties on this issue. Neither party calculated a proportionate sharing of this expense going back to June 2015. It also appears that the extra cost of having S covered under the Mother's medical plan has not remained constant perhaps because the Mother worked for different employers during this period. For example, in her Statement of Special or

Extraordinary Expenses filed on May 15, 2015, the additional "net" cost was listed as $126.50 per month with the monthly contribution sought from the Father being $84.33 (Exhibit 1, Tab 7A, Page 125). However, in her Updated Statement of Special or Extraordinary Expenses filed on March 13, 2017, the difference in coverage was indicated to be $80.89 with the monthly contribution sought from the Father being $53.92 (Exhibit 1, Tab 8, Page 184).

[47] If the parties can't agree on the appropriate calculation for the Father's proportionate sharing of the cost from June 2015 onwards, I reserve the right to deal with this limited issue.

10.3 Health related expenses that exceed insurance reimbursement

[48] In the 2005 Consent Order, the parties agreed that the Father would pay 100% of S's medical expenses up to a maximum of $1000 per year, and two-thirds of any medical expenses above $1000 per year. They also agreed that this clause was reviewable if either party obtained a health insurance plan.

[49] Despite the Mother obtaining a health insurance plan several years later, this was never reviewed.

a) The Mother's Position

[50] The Mother says that the Father should continue to be bound by the provisions of the 2005 Consent Order.

b) The Father's Position

[51] The Father says that the parties should share the uninsured medical expenses proportionately. He didn't challenge any of the specific expenses claimed by the Mother as being proper section 7 expenses except for the costs associated with S's orthodontic work.

c) Decision on health expenses that exceed insurance reimbursement

[52] I conclude that there has been a change of circumstances since the 2005 Consent Order and that, consistent with the guiding principle set out in s. 7(2) of the *Guidelines*, the parties should share S's reasonable and necessary health related expenses from June 2015 to March 2017 that exceed insurance reimbursement by at least $100 annually in proportion to their respective incomes.

[53] In coming to this conclusion, I note that the parties' Line 150 incomes in 2005 were $96,879 and $3,461 respectively. Again, the Mother indicates this was her "pre-bankruptcy return" and that her T4 for that year showed income of approximately $30,000. Nevertheless, the large disparity between their incomes was considerably narrowed in 2016 when their incomes were $62,400 and $50,000, respectively. Thus, in exercising my discretion, I find that it is currently more appropriate that they share reasonable and necessary uninsured health expenses

proportionately. Again, if the parties can't agree on the appropriate calculation, I reserve the jurisdiction to deal with that limited issue.

10.4 Orthodontic Expenses

[54] The Mother arranged for S to get braces in May 2015. The Mother and S met with S's orthodontist earlier in April. The orthodontist wrote a letter that day advising that she saw S for an orthodontic consultation and, based on the identified issues, recommended that, "to establish an ideal occlusion, treatment with comprehensive orthodontics is indicated". She quoted $6,100 for the braces.

[55] The Mother sent emails to the Father about the expense on April 9 and 27, 2015. In her email of April 27, 2015, she said that she'd like to start the treatment right away and that if she didn't receive an email back from him objecting, and outlining his reasons for objecting, she would take his silence as agreement (Exhibit 1, Tab 4, Exhibit "Q", Pages 83-84).

[56] The Father did not initially respond and S got the braces on her birthday in May. The original orthodontist was on maternity leave so the procedure was performed by a second orthodontist. The Mother claims that the timing of the braces being put on S on her birthday was entirely coincidental.

[57] On May 8, 2015, the Mother emailed the Father again advising that she would be submitting the expense to Maintenance Enforcement. The Father responded that same day indicating that he had not responded earlier because he was waiting for S's orthodontist to return from maternity leave. He advised that he did not agree to contributing to the expense. He also referred to a prior request he made that the Mother attend with him at a conciliation session in court to deal with these types of issues but that she refused. He further indicated that if she provided some dates to attend conciliation, he would share expenditures agreed to at that conciliation session as the parties' current agreement did not cover "this extreme type of health expenditure" (Exhibit 1, Tab 4, Exhibit "Q", Page 83).

[58] The Mother made an initial payment of $528.00 toward the cost of the braces and was thereafter required to pay a monthly amount of $199.00 for twenty-eight months, from June 2015 until October 2017.

[59] The Mother put the expense through Maintenance Enforcement which originally enforced the Mother's claimed contribution from the Father of $132.65 per month, but stopped doing so in July 2016 after the Father disputed the expense.

a) Mother's Position

[60] The Mother argues that the braces were medically necessary and the Father should be required to contribute to the cost in accordance with the 2005 Consent Order. She says he owes her a contribution of $1,362.50 for the ten months from July 2016 to the date of the hearing after Maintenance Enforcement stopped enforcing the Father's contribution. She also says that the

Father should contribute to the remaining amount owing to October 2017 of approximately $1,194.

b) Father's Position

[61] The Father says that he should not be required to contribute to the cost for the braces because:

- he did not agree to the expense;
- the braces were cosmetic as opposed to being medically necessary;
- the cost did not have to be incurred in such a quick manner which denied him the opportunity to discuss the procedure with the orthodontist who originally recommended it prior to going on maternity leave; and
- the braces were presented by the Mother as a "gift" to S for her birthday as part of an "egregious act'' by the Mother seeking to take advantage of the 2005 Consent Order to his financial detriment.

[62] The Father therefore argues that he should not be required to contribute anything more than what has already been collected by Maintenance Enforcement.

c) Decision on Orthodontic Expenses

[63] In *McInnes v. Hamilton*, 2013 NWTSC 58, a mother sought a contribution from a father towards a $6600 orthodontic treatment cost incurred for their child. In denying the claim, Justice Charbonneau stated:

> The party who seeks an order regarding special expenses bears the burden of establishing that the expense fits within the parameters set out in the *Guidelines* which includes establishing that the expense is both necessary and reasonable… (para. 16)
>
> ...Orthodontic treatment can be contemplated in a wide range of circumstances. At one end of the spectrum, it may be absolutely required for medical reasons. At the other end of the spectrum, it may be desirable, but purely for cosmetic reasons. (para. 21)
>
> To assess whether the proposed treatment constitutes a special expense within the meaning of the *Guidelines*, and to assess its necessity and its reasonableness, the Court needs evidence about why the treatment is being contemplated and the consequences should the child not receive it. The evidence here is simply insufficient to enable the Court to make that determination… (para. 22)

[64] Similarly, here, the Mother has not persuaded me that the orthodontic treatment she arranged for S is a proper section 7 expense which was necessary and reasonable such that I should exercise my discretion to order that the Father contribute to same. I rely on the following:

- Neither the original orthodontist who recommended the procedure, nor the orthodontist who actually performed it, gave evidence as to the necessity and reasonableness of the $6100 expense. Furthermore, the original orthodontist's letter contains opinion evidence to which I give lesser weight as part of my overall gatekeeping role given that the orthodontist was not present for cross-examination;

- Even if I accept the original orthodontist's opinion, she indicated that the treatment was to establish an "ideal occlusion" as opposed to suggesting that the procedure was medically necessary. She gave no clear indication of the consequences to S if the treatment wasn't done;

- The Mother has failed to establish why the procedure needed to be done in a very short timeframe, coinciding with S's birthday, without obtaining the Father's express agreement to contribute to the cost. This, in my view, supports the Father's suggestion that the braces were presented to S as a birthday gift as opposed to being an urgently required medical procedure. If the Mother presented the braces to S as a gift, it seems unfair that the Mother could present it that way to S, and now demand that the Father bear the lion's share of the cost;

- Even if I had accepted that the cost for S's braces was a proper s. 7 expense, given that the Mother has failed to provide me with sufficient evidence to assess the reasonableness of the expense, I would exercise my discretion to not require the Father to contribute anything beyond what he has already contributed to the expense through the collection procedures taken by Maintenance Enforcement.

10.5 Child Care Costs

[65] The 2005 Consent Order required the Father to pay the cost of S's child care up to a maximum of $550 per month directly to the child care provider. Since at least July 2015, S has not required any after school child care. Prior to this, the parties appear to agree that the Father paid 100% of S's child care costs from 2006 to 2013, and two-thirds to 100% of S's Excel costs incurred from 2013 to 2015.

a) Mother's Position

[66] The Mother requests that the Father contribute up to $550 per month for summer and March Break camps for S. She attached information from the Canada Revenue Agency to her pre-hearing brief which indicates that child care expenses include day camps and day sports schools where the primary purpose is to care for children.

b) Father's Position

[67] The Father says that S has not required child care since she was in Grade 5. He says that he should not be required to contribute to summer and March Break camps as they are not child care but should be considered extracurricular activities. He further says that, on an ongoing basis, each parent should be responsible for S's child care when in his or her care especially given that S is in his care for four weeks during the summer. Finally, he suggests each parent should be responsible for future camp costs in which he or she enrolls S unless otherwise agreed.

c) Decision on Child Care Costs

[68] I decline ordering any contribution from either parent to summer or March Break camps for the following reasons:

- S is fourteen. By both parents' accounts, she is a mature and well-rounded teenager. I have no evidence that she requires any child care let alone the type of child care which was contemplated by the 2005 Consent Order when she was only two;

- Irrespective of how the Canada Revenue Agency may treat day camps for tax purposes, in order for them to be considered proper s. 7 child care expenses, they must be required as a result of the Mother's employment, illness, disability or education or training for employment: s. 7(1) of the *Guidelines.* The Mother has failed to establish that the proposed summer and March Break camps come within these parameters. Indeed, the Mother lost her employment shortly before the hearing and I have no evidence that she has any illness, disability or educational or employment training requirement which makes child care for S necessary;

- I have limited to no evidence as to the reasonableness of the proposed costs of future summer and March Break camps; and

- Even if I had been persuaded that the proposed summer camps could constitute proper s. 7 expenses, given that the March 2017 Consent Variation Order provides that S will spend close to equal time with each of her parents during her summer vacation, I would decline to order that either parent be required to contribute to the costs of summer camps when S is in the other's care.

10.6 Extracurricular Activities

[69] The 2005 Consent Order provided that the Father was to pay two-thirds of the costs of any agreed upon extracurricular activities for S, prior to the expense being incurred.

[70] The parties agree that from 2005 to 2012, the Father paid close to 100% of the cost of all of S's extracurricular activities even though he was not required to do this under the 2005 Consent Order.

[71] The Mother says that since 2012, the Father has largely ignored her emails seeking his agreement to enroll S in various activities. She also says that he has put S in activities without consulting her or asking her for a contribution.

a) Mother's Position

[72] The Mother asks that, on a go forward basis, the Father pay a fixed amount of $300 per month towards the cost of S's extracurricular activities and says that she will bear any costs above this amount to a maximum of $150 per month. She says this will help avoid the parties' difficulties with communication.

b) Father's Position

[73] The Father is willing to pay $275 towards the first $500 of the cost of S's extracurricular activities (i.e. 55% of $500). He proposes than any expenses above $500 would have to be expressly agreed to and shared on a 55/45 per cent basis. If there is no agreement, then the expense should be the sole responsibility of the parent who incurred it. The Father also suggests that the parties meet annually sometime between August 15th and September 15th to try to reach agreement on what upcoming costs for extracurricular activities they will share.

c) Decision on Extracurricular Activities

[74] Neither party provided me with any significant evidence in relation to specific contemplated future costs for extracurricular activities. I have also been given little to no basis on which to assess whether such expenses are necessary in relation to S's best interests, or to consider their reasonableness. I also have not been given sufficient evidence to assess whether any proposed extracurricular activities are extraordinary. In these circumstances, rather than engage in speculation, I decline to order that either party be required to make a specific contribution to ongoing costs for extracurricular activities by varying the 2005 Consent Order except that, as agreed by the Father, he will annually make a flat contribution of $275 towards the first $500 cost of S's extracurricular activities. I direct he make this contribution by no later than December 15th of each year for the following calendar year. Thus, he owes this amount for 2018 given that his first payment would have been due on December 15, 2017. I direct it be paid to the Mother within 90 days.

[75] I also suggest that the Father's idea that the parties meet annually sometime between August 15th to September 15th to try to reach agreement on sharing upcoming costs for S's extracurricular activities is worth exploring. I encourage the parties to consider doing so but will not order this given the parties' history of conflict.

10.7 School Trips

[76] The Mother indicated that S had a Spring Band Trip planned in May 2017 which would cost roughly $550. She says that S also expressed an interest in attending a Rendez-Vous

Program trip organized by the United Church in Montreal this past August which had an estimated overall cost of $550.

[77] The parties agree to split the cost of school trips up to an amount of $1000 each year in proportion to their 2016 incomes. They agree that the cost of the Spring Band Trip would be shared on this basis. They disagree whether the Father should contribute to the cost of the United Church trip.

a) Mother's Position

[78] The Mother says the United Church trip is held only once every few years for students in Grade 9 and higher. She says that given S's participation in the United Church and French immersion, the trip would benefit S.

b) Father's Position

[79] The Father is Roman Catholic and is not agreeable to sharing in the cost of the United Church trip. He says that the Mother can register S for the United Church Trip on her own vacation time and he will provide his written consent for the trip, if required.

c) Decision on School Trips

[80] In 2004/2005, the parties disagreed over S being baptized. The Father says that the Mother went ahead and baptized S over his objection. In 2011, the parties were in court litigating whether S should receive the sacrament of First Communion in the Father's church. The Father's request for same was denied by Justice Jollimore: 2011 NSSC 314.

[81] Clearly, both parties have strong religious beliefs. To their credit, it appears that they have decided to expose S to their respective faiths and let her make her own decision as to what faith, if any, she follows.

[82] The Mother has not satisfied me that the United Church trip is a proper section 7 expense on the basis that it is necessary to S's best interests or that it is a reasonable expense under the *Guidelines*. Furthermore, even if she had, I would exercise my discretion to not require either parent to contribute to a trip organized by the other parent's church. Rather, given each's strong religious beliefs, I conclude it more appropriate that the parent wishing to enroll S in any such church trip cover the cost associated with same.

10.8 Tutoring Costs

[83] In September 2016, the Mother emailed the Father about possibly hiring an outside tutoring service to help S in French Immersion Math. The anticipated cost was $480 for twelve hours of assistance. The Mother asked that the Father contribute to the cost.

[84] The Father said he did not have money to assist with the cost of an outside tutor but indicated that he would help S with her French Immersion Math.

[85] The Mother later found a Grade 12 student to tutor S for free.

a) Mother's Position

[86] The Mother asks me to order that the Father pay two-thirds of the cost of any recommended future tutoring for S.

b) Father's Position

[87] The Father says he should not have to contribute to any future tutoring costs unless both parties agree.

c) Decision on Tutoring

[88] I decline to order now that either party be required to contribute to any future tutoring costs for the following reasons:

- Neither parent is currently incurring any tutoring costs for S. I therefore see no need to issue on order requiring sharing of future tutoring expenses which, at this juncture, are purely speculative. This does not mean, however, that should S require tutoring in the future, this issue cannot be revisited.

- The Mother has failed to demonstrate that any tutoring costs are necessary in S's best interests. The most recent marks I was given from S's Term 2 of her 2016/2017 Academic Year, show her lowest mark is 90 in French Immersion Math, and her highest mark is 99 in French Immersion Sciences. S is clearly an exemplary student. I commend the Mother for finding the Grade 12 student who has helped S with math for free. I also accept that the Mother believes that extra tutoring may be beneficial to S in the future. However, I am not persuaded that S currently has any learning or academic needs that make additional future tutoring costs a necessary expense.

10.9 Cell Phone Costs

a) Mother's Position

[89] The Mother says that she understands that S is required to ask the Father's permission to use the phone at his home. She therefore requests that the Father be required to pay for a cell phone for S that has emailing and texting ability so that S's ability to contact the Mother is not limited when staying with the Father.

b) Father's Position

[90] The Father says that, since 2006, he has made available a phone for S to use as long as she uses it before 8:00 p.m. He says he can't afford an extra phone for S and doesn't believe that she needs one. He also says that S has not suffered from an inability to communicate: she's active on the internet, Instagram, Snapchat and Facetime. S also has access to his laptop computer.

c) Decision on Cell Phone Costs

[91] I decline the Mother's request that the Father pay for a cell phone for S for the following reasons:

- The Mother has not satisfied me that the cost for a cell phone for S is a proper section 7 expense as provided for under s. 7(1) of the *Guidelines;*

- Even if the cost of the cell phone could be considered a section 7 expense, the Mother has failed to demonstrate to me that the expense is necessary in S's best interests. Indeed, the Mother didn't provide a single example of being unable to communicate with S when S was at the Father's home. To the contrary, S has use of the Father's phone until 8:00 p.m., as well as multiple other ways to communicate with the Mother; and

- I have no evidence about the proposed cost for the cell phone so am unable to consider the reasonableness of the expense as required under the *Guidelines.*

11.0 Retroactive Table Amount of Child Support from September 1, 2006, to April 30, 2017 (Issue 7)

11.1 Parties' Positions

[92] The Mother seeks a retroactive increase of $72,014 to the Father's Table amount of child support for the period from September 1, 2006, to April 30, 2017.

[93] The Father opposes any retroactive increase.

[94] Both parties provided calculations as to what amount of child support would be owed by the Father if one went back in time and calculated his Table amount of child support based on his actual income. I asked them to tell me if they challenged the other's calculations. Neither has. It therefore appears the parties differ not in the other's math, but with the other's methodologies and assumptions.

11.2 The Father's Income

[95] The first area where the parties' assumptions differ is in relation to what figure should be used for the Father's income to determine child support.

a) Mother's Position

[96] The Mother provided a table outlining what she says should be the Father's income for 2005 to 2016 for the purpose of determining his child support obligation from September 1, 2006, to April 30, 2017. She used figures from the Father's income tax returns and did not limit his income simply to what was shown in Line 150, but totalled all income earned by the Father including the full amount of capital gains realized each year. I reproduce that information in Table 1 below and also include the information for the 2004 year using the Mother's methodology.

Table 1 – Mother's Suggested Figures for Father's Income for Child Support

Year	Income For Child Support
2004	$132,697 (employment income of $45,500, RRSP income of $4314 and actual capital gains of $82,883)
2005	$115,932 (employment income of $58,499, actual capital gains of $36,158, RRSP income of $6275, and business income of $15,000)
2006	$313,905 (employment income of $51,999 and actual capital gains of $261,906)
2007	$183,460 (employment income of $58,499 and actual capital gains of $94,716)
2008	$145,298 (employment income of $58,499, actual capital gains of $65,374, RRSP income of $75 and other income of $21,350)
2009	$78,371 (employment income of $61,000, interest income of $351.82 and actual capital gains of $16,819.29
2010	$176,717 (employment income of $60,000.03, actual capital gains of $115,475.90, interest income of $44.28 and RRSP income of $1,197)
2011	$153,253 (employment income of $61,850.03 and actual capital gains of $91,403.04)
2012	$75,941 (employment income of $62,400, interest income of $11.41, actual capital gains of $13,540.22, less interest carrying charges of $11.41)
2013	$67,234 (employment income of $62,400, net business income of $5500, less interest/carrying charges of $665.77)
2014	$64,768 (employment income of $62,400, other income of $2618.03, less interest/carrying charges of $250.07)
2015	$62,832 (employment income of $62,400, actual capital gains of $50.00 and other income of $382.00)
2016	$62,400 (employment income)

b) Father's Position

[97] The Father says that his capital gains realized each year should not be included in determining his income for child support as it is "non-recurring" income. In the alternative, he suggests I should simply use his Line 150 income which includes the taxable (50%) portion of the capital gains, as opposed to the full capital gains.

c) Decision on Father's Income

[98] The starting point is that, subject to Sections 17 to 20 of the *Guidelines* and adjusted by Schedule III, the Father's income is determined using the sources of income set out under the heading, "Total Income" in the T1 General form: section 16 of the *Guidelines.*

[99] I should replace the taxable gains realized in a year by the actual amount of capital gains realized by the Father in excess of the Father's actual capital losses in that year (section 6 of Schedule III) unless the capital gain is a non-recurring one in which case I may choose to exercise my discretion not to apply section 6 of Schedule III if I am of the opinion that the determination of the Father's annual income under Section 16 would not provide the fairest estimation of the annual income: subsection 17(2) of the *Guidelines.*

[100] Both parties rely on the Alberta Court of Appeal decision of *Ewing v. Ewing*, 2009 ABCA 227, where Justice Conrad provided a list of questions to consider when determining whether a non-recurring gain should be included in a payor's income. Those questions are outlined in paragraph 35 as follows:

> While the courts have the discretion to determine whether the section 16 income calculation is fair, having regard to non-recurring gains and patterns of income, the following, although not an exhaustive list, outlines some of the matters a court might consider:
>
> > 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?

[101] The Father testified that the capital gains he received over the years were due to gains he received from the sale of shares in junior capital resource companies which rose in value in the mid-2000s due to increases in the resource commodity sector. He considers this "windfall income" which he argues should not be considered in his income for child support purposes on the basis it is "non-recurring" income.

[102] I reject the Father's position for the following two reasons:

- In my view, the capital gains are not properly characterized as "non-recurring" gains. They are not isolated occurrences or fluctuations due to special circumstances. Rather, the Father regularly received these capital gains for many years through the sale of shares he actively traded. To characterize them as "non-recurring" is not appropriate.

- Even had the Father persuaded me that the gains were "non-recurring", he has failed to persuade me that the fairest determination of his income warrants me exercising my discretion to not include them as provided under section 6 of Schedule III of the *Guidelines.* For example, the capital gains were not part of the Father's employment income as a bonus for work done during the year or received at an age when they would constitute a retirement fund. Rather, they appear to be realized as part of an active trading strategy. To the extent that the Father considers them to be a "windfall", it would be unfair to S, from a child first perspective, to simply ignore this "windfall" when determining the Father's child support obligation.

11.3 Core Principles and Objectives of Child Support

[103] Before delving into an analysis of the Mother's retroactive claim, it is helpful to emphasize the core child-focussed principles in all child support cases. They are:

- child support is the right of children;
- the children's right to support survives the breakdown of the relationship between the children's parents;

- child support should, as much as possible, perpetuate the standard of living the children experienced before the parents' relationship broke down; and
- 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, at para. 38].

[104] 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*.

[105] 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.

11.4 General Approach to Retroactive Claims

[106] Retroactive claims for child support are treated differently than prospective ones. They are neither automatic nor exceptional. They are discretionary. In considering whether I should make a retroactive award, I am to take a holistic approach, balancing the competing principles of certainty and flexibility, while respecting the core principles of child support. The principle of certainty reflects the Father's interest. He has paid child support under the 2005 Consent Order, claiming he believed he was meeting his obligation. The principle of flexibility reflects S's interest in receiving support in an amount that reflects the Father's income: *D.B.S.*, at paras. 95-99.

[107] It will not always be appropriate to order a retroactive award as it will not always resonate with the purposes behind child support. Unlike prospective awards, retroactive awards can impair the delicate balance between certainty and flexibility. As situations evolve, fairness demands that obligations change to meet them. On the other hand, when obligations appear to be settled, fairness also demands that they not be gratuitously disrupted. Thus, prospective awards are very different than retroactive awards – prospective awards create a new and predictable *status quo* while retroactive awards serve to supplant it: *D.B.S.*, at paras. 96-97.

[108] In determining whether a retroactive award is appropriate, I am to consider:

- the reason for the Mother's delay in claiming support;
- the Father's conduct;
- S's past and present circumstances; and

- whether a retroactive award would result in hardship.

[109] All of these factors must be considered and none is dispositive on its own: *D.B.S.*, at para. 99.

11.5 Period of Retroactivity

[110] The Mother describes the amount claimed from September 1, 2006 to April 30, 2017, as "retroactive" child support.

[111] As noted by Justice Bastarache in *D.B.S.*, the use of the word "retroactive" is a bit of a misnomer because setting or adjusting child support going back in time does not impose a new legal standard on parents which did not exist at the relevant time. Rather, it simply ensures that parents pay what, in hindsight, should have been paid before: *D.B.S.*, at para. 2.

[112] In *D.B.S.*, the Supreme Court of Canada did not expressly state whether retroactive child support claims include any support sought prior to the date of the hearing, or whether they are limited to support which pre-dates the commencement of the court proceeding, with claims after then being prospective claims.

[113] Courts across the country have not been consistent on this point. Some courts have relied on comments made by the Supreme Court of Canada in its subsequent decision of *Kerr v. Baranow*, 2011 SCC 10, a case involving retroactive spousal support, to hold that retroactive claims include anything prior to the commencement of the hearing: see para. 211 of *Kerr v. Baranow*. Other courts have treated support sought after the commencement of the court proceeding as prospective claims, with claims for support before then as retroactive claims. The latter approach appears to be the one most often followed in this province: e.g. *Harrison v. Falkenham*, 2017 NSSC 139.

[114] In the present case, I am of the view that this is largely a distinction without a substantive difference in terms of outcome. Specifically, the Mother filed her variation application on February 12, 2013, requesting a retroactive increase of the Father's Table amount of child support going back to September 1, 2006. Starting this proceeding gave clear notice to the Father that the Mother was seeking to adjust child support, and let the Father plan for the fact that it could be eventually ordered. Thus, there is little concern about maintaining certainty for the Father's child support obligations from February 2013 onwards. Furthermore, I do not conclude that the Mother has been guilty of any unreasonable delay since commencing this proceeding in February 2013. Thus, I will look at the period from February 2013 to April 2017 (i.e. the date from her variation application to the date of the hearing) separately from the period from September 1, 2006, to February 2013 (i.e. the truly "retroactive" period which pre-dated her variation application).

11.6 Claim for February 13, 2013, to April 2017

[115] In early February 2013, the Father agreed to the Mother's request that S live in her primary care. From that point onward, he should have paid the Table amount of child support. Again, by filing her variation application within days after S moved back into her primary care, the Mother provided timely notice to the Father that she was seeking to increase his child support obligation. I therefore conclude that the Father's child support obligation should be increased from March 1, 2013, to April 30, 2017.

[116] I have already determined that the full amount of the Father's capital gains should be included in his income for the purpose of child support. I therefore calculate the amount he owes for child support during this period to be as follows:

Table 2 - Child Support Owed by the Father from March 1, 2013 to April 30, 2017

Period Child Support Payable	**Father's Annual Income for Child Support**	**Monthly Table Amount**	**Child Support Payment under 2005 Consent Order**	**Total Underpayment for Year**
March 1 to December 31, 2013	$67,234	$569	$500	$690
January 1 to December 31, 2014	$64,768	$548	$500	$576
January 1 to December 31, 2015	$62,832	$531	$500	$372
January 1 to December 31, 2016	$62,400	$528	$500	$336
January 1 to April 30, 2017	$62,400	$528	$500	$112
			Total Amount Owing	**$2,086**

[117] In doing the above calculations, I have used the Father's known income figures as outlined in Table 1 for each calendar year when setting his monthly child support obligation during that same calendar year, as opposed to the Mother's methodology which appears to base

the Father's monthly child support obligation from June of each year forward based on the income he received in the prior calendar year. In my view, my approach is more consistent with using current income information when calculating child support. I direct that the Father pay the $2,086 owing within 90 days.

11.7 Claim for September 1, 2006 to February 12, 2013

[118] Clearly, the *D.B.S.* factors are much more contentious when analyzing the Mother's claim for retroactive support for this period.

[119] In *D.B.S.,* the Supreme Court of Canada noted that there can be three situations in which a claim for retroactive support can arise – where there is an existing child support order; where there is an existing agreement between the parents; and where there has never been an order or agreement for child support. In situations where there is an existing court order which is followed by the parties, the payor parent's interest is "most compelling": *D.B.S.* at para. 63.

[120] Here, the parties agree that the Father followed the 2005 Consent Order by making his $500 monthly Table amount of child support payments for the over eleven years which followed. They also agree that he voluntarily paid more than he was required to do under that Order with respect to certain section 7 expenses. The rub, so to speak, is the Father's failure to annually provide the Mother with his personal and corporate financial disclosure as required under the 2005 Consent Order which revealed that, in some of the subsequent years, his income was significantly higher than the $60,700 figure contained in the 2005 Consent Order. It is in this context that I will examine the relevant *D.B.S.* factors when assessing the Mother's request for a retroactive increase.

11.8 The Mother's delay

[121] My first consideration is the reason for the Mother's delay in claiming support. In *D.B.S.*, the Supreme Court of Canada provides helpful guidance on how a recipient parent's delay factors into the judge's holistic approach when deciding whether to make a retroactive award. I summarize some of the Court's key statements as follows:

- An unreasonable delay militates against a retroactive child support award. At the same time, courts must be sensitive to the practical concerns associated with a child support application (paras.101 and 104).

- Not awarding retroactive child support where there has been unreasonable delay by the recipient parent responds to two important concerns: the payor parent's interest in certainty and discouraging recipient parents from delaying seeking the appropriate amount of child support (paras. 102-103).

- Generally, the payor's interest in certainty is compelling where the delay is attributable to unreasonableness of the recipient parent, and not blameworthy conduct of the payor (para. 102).

- Recipient parents must act promptly and responsibly in monitoring the amount of child support paid. Absent blameworthy conduct, a recipient parent who accepts child support payment without raising any problem invites the payor parent to believe that his or her obligations have been met (paras. 102-103).

- The excuse of not being aware that retroactive support may be owed will not suffice, as both parents have a responsibility to inquire into such matters (para. 139).

- Acceptable reasons for delay include:

    - A justifiable fear that the payor would react vindictively to a claim for retroactive child support;
    - Lack of financial or emotional means to bring an application; and
    - Where the recipient was given deficient legal advice (para. 101).

[122] The Mother gave various reasons for her delay in pursuing child support. They include:

- Since the parties separated in 2004, they have been involved in a number of court appearances. She says that she found those proceedings emotionally draining and that the significant legal fees she incurred led to her claiming bankruptcy in 2005;

- She requested the Father's financial disclosure several times between August 2006 and June 2012. Without the disclosure, she did not know if the Father's income increased so she couldn't assess what her claim for increased support might be in order to determine if it was worth the financial and emotional stress to bring an application. She says after going through the expensive court processes in 2004 and 2005, she was hoping that the Father would voluntarily provide financial disclosure.

- She called Legal Aid in 2007 or 2008 but understood her income was too high to qualify. She says she could not afford a private lawyer. She's able to afford legal counsel now due to financial assistance from her father.

- Between January and March 2011, the Father brought five court applications regarding parenting issues. Four of the applications were dismissed by the court and the last was withdrawn. She did not bring her own application to vary child support because she was paying significant legal fees to respond to his applications.

- She was concerned the parenting situation would become worse if she brought an application to vary child support.

- Until she received the Father's disclosure, she had "no idea" how significantly the Father's income had increased through the capital gains he realized each year [Exhibit 1, Tab 4, Paragraphs 18-31 and Paragraph 52].

[123] With respect, I do not find the Mother's reasons persuasive.

[124] First, the Father did not flatly refuse to provide his financial disclosure. Rather, it appears that from early on, he was willing to provide his financial disclosure if the Mother also provided hers. The Mother did not dispute this during the hearing but maintained she was justified in not producing her information on the basis that she was simply following the terms of the 2005 Consent Order which did not require any disclosure from her. Indeed, when the Mother first wrote to the Father requesting his disclosure in August 2006, the Father responded that same month indicating that he was going to have his lawyer forward his information to the Mother or her lawyer and was requesting the same from her. The Mother responded that she would supply her tax return "if I am supposed to" but had not seen in any documents where hers was needed or required [Affidavit of the Mother sworn on February 11, 2013, Exhibit 1, Tab 3, Exhibit B].

[125] Similarly, on November 19, 2012, and December 5, 2012, the Father sent emails to the Mother in which he stated:

> ...You have inquired that you want to see my tax returns.
>
> As [I] said a couple years ago that [I] am totally fine with turning over my tax returns (but in the past you refused to then give yours to me), but then you put your tax returns with your lawyer so that when mine are delivered to your lawyer that yours are turned over to me. When I am notified that yours are ready to be turned over, my tax returns will be delivered to your lawyer.
>
> I am also in favour to book or committing to a specific date with an independent person that will evaluate and determine what the binding table amount of child support will be so that we will pay our proper proportionate amounts for activities and such and what the child support table is for going forward. [Email dated November 19, 2012, Exhibit 1, Tab 3, Exhibit E, Page 28] [Emphasis added].
>
> I have always been in favour of exchanging our financial information
>
> [Y]ou have been aware of this but had refused to give over your information when mine is given.
>
> Please confirm that it is your intention now, not wanting to agree to having [an] independent person determine what the appropriate table amount of child support and proportionate amounts for activities going forward…[Email dated December 5, 2012, Exhibit 1, Tab 3, Exhibit E, Page 27] [Emphasis added].

[126] While it is true that the Father had a legal obligation to provide the Mother with his financial disclosure under the 2005 Consent Order, one should not overlook the fact that, a few months later, Justice Lynch increased the Father's parenting time. Thus, from September 21, 2005, until February 2013, the parties had a shared parenting arrangement.

[127] Child Support in a shared parenting arrangement is governed by s. 9 of the *Guidelines.* It provides:

> 9. Where a parent exercises a right of access to, or has physical custody of, a child for not less than 40 per cent of the time over the course of a year, the amount of the child maintenance order must be determined by taking into account
>
> (a) the amounts set out in the applicable tables for each of the parents;
>
> (b) the increased costs of shared custody arrangements; and
>
> (c) the conditions, means, needs and other circumstances of each parent and of any child for whom maintenance is sought.

[128] Thus, determining child support in a shared parenting arrangement requires both parties to disclose their incomes. This point was made clear by Justice Bastarache in paragraph 58 of *D.B.S.* as follows:

> The same could be said about automatic disclosure requirements. The *Guidelines* provide, at s. 25, that a payor parent must disclose his/her income not more than once per year upon request by the recipient parent. (Though I assume a single custody situation in my discussion here, I should note that this rule will apply to both parents in a shared custody context, as both of their incomes are relevant in determining the amount of child support due: s. 9 of the *Guidelines*.) [Emphasis added].

[129] Thus, the Father's request that both parties exchange financial disclosure to determine the ongoing child support obligation was an entirely reasonable one.

[130] Second, I have difficulty with the Mother's suggestion that she had "no idea" that the Father's income may have been higher in subsequent years than the agreed figure of $60,700 used in the 2005 Consent Order. Indeed, the Father's 2004 income tax return was disclosed to the Mother's counsel before the settlement conference which resulted in the 2005 Consent Order. It revealed he had employment income of $45,500, RRSP income of $4314 and actual capital gains of $82,883. Thus, using the same methodology the Mother now employs when calculating her claim for a retroactive increase to the Father's child support, the Father's 2004 income for the purposes of child support was effectively $132,697. Even if one simply used the Father's Line 150 income, his income was $91,383.90.

[131] Thus, the Mother, represented by experienced counsel, arguably had actual or implied knowledge prior to entering into the 2005 Consent Order that the Father's actual income was significantly higher than the agreed figure of $60,700 upon which his monthly Table amount of child support of $500 was based, and included over $80,000 of capital gains realized in 2004.

[132] The Father indicates that the reason a much lower income figure for him was agreed to by the parties was because his monthly Table amount of $500 was "reverse sourced" to arrive at that income number, and that his child support obligation was negotiated as part of an overall financial settlement which resulted in the 2005 Consent Order. While I do not know why the parties agreed to use the lesser income figure of $60,700, it clearly was arrived at as part of a negotiated agreement at the settlement conference which also resolved a number of parenting issues and required the Father to make additional contributions to an RESP and various section 7 expenses over and above his monthly Table amount of child support. Both parties, represented by experienced counsel, must have felt that the agreement was a reasonable one and their agreement was ultimately accepted by Justice Legere-Sers who presided at the settlement conference and granted the 2005 Consent Order.

[133] Given these circumstances, I am hesitant to second-guess their agreement or simply accept, as the Mother suggests, that in any subsequent year in which the Father had an income more than $60,700, this should automatically trigger an increase to his child support obligation. Indeed, as stated by Justice Bastarache in paragraph 78 of *D.B.S.*:

> In most circumstances, however, agreements reached by the parents should be given considerable weight. In so doing, courts should recognize that these agreements were likely considered holistically by the parents, such that a smaller amount of child support may be explained by a larger amount of spousal support for the custodial parent. Therefore, it is often unwise for courts to disrupt the equilibrium achieved by parents. However, as is the case with court orders, where circumstances have changed (or were never as they first appeared) and the actual support obligations of the payor parent have not been met, courts may order a retroactive award…

[134] Similarly, in *Dyck v. Bell*, 2015 BCCA 520, the British Columbia Court of Appeal held that the trial judge erred when awarding retroactive support to a mother when the parenting arrangement changed approximately three years after the parties entered into a consent order. The court noted:

> The 2009 consent order was an example of a compromise that should have been viewed holistically. The child support incorporated in that order is less than what would have been ordered on the basis of the parties' actual *Guideline* incomes at the time. Here, the chambers judge gave the agreement no weight (para. 38).

[135] Thus, in light of the financial disclosure the Mother had before entering into the 2005 Consent Order which revealed the Father had a much higher income than $60,700, I have difficulty accepting any suggestion now that she had "no idea" that the Father's income could have been higher than $60,700 in subsequent years and that this presents a reasonable excuse on her part for not seeking to vary his child support obligation until many years later.

[136] Third, both parties have repeatedly demonstrated that they are not hesitant to access the courts to resolve issues beginning in 2004 when S was less than a year old. In 2011, they were

back litigating a number of parenting issues in four separate applications dealing with issues such as whether S should receive the sacrament of first communion in the Father's Church, whether the terms of S's summer access with the Father should be changed, and whether a custody and access assessment (which would include psychological testing) should be ordered. The Mother correctly points out that these applications were initiated by the Father. However, she provides no persuasive explanation why, when the parties were already in court litigating these more emotional parenting issues, she never once, despite being represented by her current counsel, raised that there could be a disclosure issue in relation to child support or asked the court's assistance with respect to same. Indeed, while the Mother claims she delayed in seeking financial disclosure out of fear it would make the parenting situation worse, asking for such disclosure when already before the court litigating multiple contested parenting applications runs far less risk of upsetting the then existing swirling parenting waters than if those waters had been still, with the parties peacefully co-parenting S out of court.

[137] While the Mother's counsel correctly pointed out that the issue of child support was technically not before the court in 2011, I don't accept that the Mother would have been precluded from raising the disclosure issue then. Many requests are routinely made of judges of this court irrespective of whether a litigant has ticked off a box claiming the specific relief being sought. To turn a blind eye to that reality ignores the costs and delays involved in bringing multiple proceedings and that judicial resources should, as much as possible, be used efficiently in this day of pressing access to justice issues. If the judge were inclined not to deal with the Mother's request for disclosure simply because the appropriate box was not ticked, he or she could certainly decline to do so and require the Mother to make a formal application seeking the Father's disclosure. My point, however, is that if disclosure was a pressing issue for the Mother, she had ample opportunity to raise it with the court on any of the multiple appearances when the parties were before a judge prior to February 2013.

[138] Indeed, it's worth noting that in the present proceeding, these parties were given multiple settlement conferences in 2016 which resolved many parenting issues, and I have determined other parenting issues. This comes despite the fact that neither party magically ticked off "parenting" in their respective variation applications or response to variation application documents. Indeed, at no time did either party run into an immoveable brick wall which prevented them from having these parenting issues dealt with by judges of this court simply because they did not check off the appropriate box in their documents.

[139] Fourth, at least since the parties were back in court litigating parenting issues in 2011, the Mother has been represented by her current very senior counsel specializing in family law. I therefore cannot conclude that she was unaware of her obligation to act promptly and responsibly in monitoring the amount of child support paid and press the financial disclosure issue if she was seeking to retroactively increase the Father's child support. I also cannot conclude that she was unaware that the Father's child support obligation could change on account of the fact that, within days after the 2005 Consent Order was issued, the parenting arrangement was ordered changed by Justice Lynch from one where S was in the Mother's primary care to a shared parenting arrangement.

[140] The fact that the Mother did not act promptly suggests that both parties were content with the certainty provided by the 2005 Consent Order despite the fact that a shared parenting arrangement was subsequently ordered. Indeed, it seems somewhat telling that it was only a few days after the Father agreed to return S to the Mother's primary care in February 2013, that the Mother filed her variation application seeking to increase the Father's child support obligation retroactively to September 1, 2006.

[141] Finally, while the Mother suggests that she could not afford a lawyer before 2011, she also indicates that she has been able to retain her current senior counsel with the financial assistance of her father. If that is the case, the Mother has given no credible explanation why she could not have done this prior to 2011 or even why, as a self-represented litigant, she could not simply ask the court to order disclosure so that she would be aware of the Father's income and then, if necessary, seek legal advice based on that disclosure. Indeed, the Mother strikes me as an intelligent individual who, like the Father, is no stranger to coming to court. Furthermore, self-represented litigants routinely come to this court and get help with disclosure issues through the assistance of court staff without ever setting foot in a court room (i.e. court officer's often issue Orders to Disclose, etc.).

[142] Thus, when I consider all the circumstances, I find that the Mother has failed to "act promptly and responsibly in monitoring the amount of child support paid" which militates against a retroactive award.

11.9 The Father's conduct

[143] My second consideration is the Father's conduct and whether it is blameworthy. Again, it is helpful to look to *D.B.S.* for guidance:

- A payor parent's interest in certainty is least compelling when he or she has engaged in blameworthy conduct (para. 105).

- Courts should take an "expansive view" of what constitutes blameworthy conduct. It consists of "anything that privileges the payor parent's own interests over his/her children's right to an appropriate amount of child support" (para. 106).

- Examples of blameworthy conduct that favour awarding a retroactive claim include:

    - Hiding income increases from a recipient parent in the hope of avoiding a larger child support payment (para. 106);

    - Intimidating a recipient parent in order to dissuade a child support claim from being advanced (para. 106);

    - Misleading the recipient parent into believing that the payor's child support obligation is being met when the payor knows it isn't (para. 106);

    - Failing to increase child support when the payor has had a significant increase in income while being aware that the children were living at levels commensurate with the lower income of the recipient parent (para. 147).

- No level of blameworthy conduct by a payor parent should be encouraged. Even when a payor does nothing to actively avoid his or her child support obligations, he or she may still be acting in a blameworthy manner if consciously choosing to ignore them. A payor parent who knowingly avoids or diminishes a child support obligation should not be allowed to profit from such conduct (para. 107).

- A payor parent who does not automatically increase child support payments is not necessarily engaging in blameworthy behaviour. Whether the conduct is blameworthy is a subjective question although there are objective indicators. For example, if the payor has an honestly held belief that he or she is meeting the child support obligation, this may be a good indicator that the payor is not engaging in blameworthy conduct (para. 108).

- A helpful objective indicator in assessing the reasonableness of the payor's belief is to assess the extent to which the amount the payor was paying diverges from the amount he or she should have been paying; the closer the two amounts, the more reasonable the payor's belief that his or her child support obligation was being met (para. 108).

- In cases where a payor is following a previous court order or agreement, a payor parent should be presumed to be acting reasonably by conforming to the order. However, this presumption can be rebutted if there has been a change in circumstances that is sufficiently pronounced that is no longer reasonable for the payor to rely on the previous order and not disclose a revised ability to pay (para. 108).

- A payor's positive conduct can also militate against a retroactive award if it helps fulfill his or her child support obligation. For example, a payor who contributes to expenses beyond what was required may have met his or her increased child support obligation indirectly. Thus, having regard to all the circumstances, if it appears that a payor has contributed to his or her children's support in a way that satisfied the child support obligation, no retroactive award should be ordered (para. 109).

[144] In the present case, the Father argues that he is not guilty of any blameworthy conduct for the following reasons:

- He has always been willing to disclose his financial information to the Mother if she also disclosed hers so that the appropriate amount of child support could be revisited. He relies on the fact that from November 2005 (the date when Justice Lynch's Order was issued), the parties had a shared parenting arrangement which requires both parents to provide their financial information if requested by the other parent. He says the Mother

always refused to provide hers until 2014 despite being represented by her current counsel since at least 2011.

- He has faithfully made all the child support payments required of him under the Order even when it was difficult to do. He says he put S's needs first over his own needs and also provided for her in various ways which he was not obliged to do under the 2005 Consent Order. For example, from 2005 to 2012, he paid for 100% of S's childcare costs extracurricular activities, hot lunches at school, etc., even though he was not required to do this under the 2005 Consent Order and despite the parties having a shared parenting arrangement since November 2005.

- When the parties agreed to his income for Table amount of child support being $60,700 in the 2005 Consent Order, this was "reverse sourced" to provide a monthly payment of $500 per month. This figure was not based on his actual 2004 Line 150 income of $91,383.90 or include his full capital gains realized of over $80,000 that year. Thus, he did not believe that his child support obligation should automatically increase in subsequent years when his income was above $60,700 particularly because the parties had moved to a shared parenting arrangement.

- He understood that it was only his employment income which counted towards his child support obligation, not his "non-recurring" capital gains which he considered to be "windfall income". His employment income has remained close to the $60,700 figure outlined in the 2005 Consent Order. He did not believe he was wrong to not consider non-recurring capital gains as part of his income for child support purposes.

[145] Some of the Father's arguments have merit. For example, I accept that both parties should have, when requested by the other parent, provided their financial disclosure because S was in a shared parenting arrangement. I also accept that the Father's conduct falls short of being a blatant effort to deprive S of appropriate child support given that he paid for additional things beyond what he was required to do under the 2005 Consent Order. Notwithstanding this, I do conclude that the Father's conduct, when viewed expansively, can be considered blameworthy for the following reasons:

- While both parties should have, when requested, exchanged their financial disclosure once a shared parenting arrangement was ordered on September 21, 2005, this does not relieve the Father of his clear legal obligation to annually disclose his personal and corporate tax information under the 2005 Consent Order. Parties are expected to follow court orders or seek to have them changed in the event circumstances change. They cannot unilaterally decide to disregard or not comply with them. Had the Father provided the Mother with his annual financial disclosure, the Mother would clearly have had knowledge of the Father's actual income. If she then failed to take reasonable steps to increase the Father's child support obligation over the last 10+ years, her delay alone may have been fatal to any retroactive claim she later sought.

- Even if I accept the Father's argument that the parties were aware that his Line 150 income was $91,383.90 in 2004, his Line 150 income, and overall capital gains, increased significantly in 2006 and, to a lesser extent, in some of the following years. As noted from *D.B.S.,* payors should disclose significant increases in their income. I have already concluded that the Father's capital gains are not "non-recurring" gains and should be considered when determining the Father's income for child support purposes.

11.10 S's past and present circumstances

[146] My third consideration is S's past and present circumstances. Again, Justice Bastarache's comments from *D.B.S.* are instructive:

- Retroactive awards will not always resonate with the purposes behind the child support regime. This will be so where the child would get no discernible benefit from the award (para. 95)

- A retroactive award is a poor substitute for a past child support obligation that was unfulfilled at an earlier time. Both parents must endeavour to ensure that children receive the support they deserve when they need it the most. Thus, the court should consider both the past and present circumstances of a child in deciding whether a retroactive award is justified by considering the extent to which the child would benefit from same (paras. 110-111).

- A child who currently enjoys a relatively high standard of living may benefit less from a retroactive award than a child who is currently in need (para. 111).

- A child who suffered hardship in the past may be compensated through a retroactive award. On the other hand, the argument is less convincing where the child already enjoyed all the advantages he or she would have received had both parents provided proper support (para. 113).

- Judges should not delve into the past to remedy all old familial injustices through a retroactive child support award. For example, hardship suffered by other family members, like recipient parents forced to make additional sacrifices, is irrelevant (para. 113).

[147] When I consider the evidence in relation to S's past and present circumstances, I am not persuaded that they favour granting a retroactive award now. It appears that S has lived, and continues to live, a comfortable lifestyle with both parents even without the additional retroactive increase which the Mother seeks. I point to the following:

- From 2005 to 2012, S was able, mostly through the Father's exclusive financing of same, to participate in an impressive list of extracurricular activities or events such as swimming lessons, private and group skating lessons and equipment, ballet lessons with

associated costs of clothes and shoes, 2 levels of gymnastics, step dance lessons and shoes, 2 years of fiddle lessons, 3 years of piano lessons, 2 levels of sailing lessons, Gaelic language lessons, Bodhran lesson, a session of Brownie's, band including costs for instruments, a season of Neptune Theatre acting lessons, and downhill ski lessons.

- She lived with her Mother in a home from 2005 to the Summer of 2008 and then moved with her Mother to a relatively new two-bedroom apartment in Bedford. The Mother claims she did this in part because Bedford was a great community and a school in Bedford was recommended to her by the school board. Both of the Mother's places had underground parking. S's living arrangements therefore seem to have been comfortable with both parents.

- As noted earlier, S has flourished over the years. She was at the top of her Grade 8 class academically and the Mother arranged for after school care as needed with the cost largely being borne by the Father.

- S was able to make a number of trips outside of Nova Scotia and internationally with the Mother. This included trips to Ottawa to see family, trips to Labrador, a trip to Disney World and a vacation to Punta Cana where she stayed in a four to five star Dreams Resort Hotel.

- The parties have agreed on prospective Table amount of child support to help ensure S's present and future needs and expenses are appropriately met.

[148] In these circumstances, I do not conclude that a retroactive child support increase is needed to address any past hardship suffered by S, or to better ensure that her future requirement for support will be more appropriately met.

11.11 Creation of hardship by a retroactive award

[149] My final consideration is whether a retroactive award would result in hardship.

[150] In *D.B.S.,* Justice Bastarache discussed this factor as follows:

- Retroactive awards may also cause hardship to a payor parent in ways that a prospective award would not (para. 95).

- A "broad consideration" of hardship is appropriate (para. 114).

- Courts should recognize that hardship considerations are not limited to the payor parent. It is appropriate to consider if hardship would cause hardship to the payor parent's other children (para. 115).

- Court should be attentive to the fact that retroactive awards disrupt payor parents' management of their financial affairs in ways that prospective awards do not (para. 115).

- Hardship will be much less of a concern where it is a by-product of the payor's blameworthy conduct (para. 116).

- While ordering retroactive support can be done by a lump sum, hardship can, in some cases, be minimized by spreading over the payment of a retroactive award through a series of periodic payments or a combination of a lump sum and periodic payments (para. 116).

[151] Here, the parties agree that the Father's current income for child support purposes is $62,400.00, only $1,700.00 more than his agreed income approximately twelve years ago in the 2005 Consent Order. His 2016 Line 150 income is $62,400 which is significantly less than his 2004 Line 150 income of over $90,000. Furthermore, unlike in 2004 when he had over $80,000 in capital gains, he had no capital gains in 2016.

[152] Not only has the total income of the Father decreased since the 2005 Consent Order, but his personal circumstances have changed. He has remarried and, at the time of the hearing, had two children who were five years old and five months old, respectively. His wife was on a maternity leave as a teacher without any guarantee that she would have a job in the future. Thus, the Father no longer has to just meet his own financial needs, but also has to contribute to the financial needs of his growing family.

[153] The Mother nevertheless argues that the Father has the ability to pay retroactive child support without hardship. She also argues that any hardship created was due to the Father's own failure to adjust child support when his income increased. Finally, she argues that the Father's lifestyle is not suffering and he and his family were able to enjoy the Father's increased income for the last twelve years and live in a large home assessed at over $700,000.

[154] The Father argues that any retroactive award would cause hardship to his current family and would adversely affect his ability to pay ongoing child support to S. In support of his position, he stated:

- While he was fortunate to realize capital gains "windfall income" during the 2006 to 2012, he has since incurred tremendous losses in the stock market. He has used his capital gain windfall income to pay some of S's extracurricular costs, special expenses, health care costs and RESP contributions. He has also used some of funds to renovate a more adequate bedroom for S in his home.

- He once had investment account worth over $500,000 but it has dwindled to a little over $7000. He once had RRSPs worth over $300,000. It has dwindled to a little over $27,000.

- Because of the decline in the stock market, he has had tremendous pressure to try to pay his bills such as credit cards, mortgage, child support and house taxes. He says the following has occurred:

    - He has a bad credit record due to not paying bills on timely basis;
    - His Mastercard was cancelled in 2015;
    - He received notification that his house was going up for tax sale in January and November 2015 and March 2016 due to not paying taxes in the previous 3-4 years;
    - The water was disconnected at his home for non-payment in 2015 and he received a notification of disconnection in 2016;
    - He has been refused requests to borrow money from banks;
    - He cannot afford a lawyer to assist him in these proceedings;
    - He had to borrow funds from his sister to pay down some of his bills so he can live in his current home;
    - He is indebted to RBC for over $662,000;
    - He has had NSF payments between 2012-2015;
    - He was unable to repair leaks in his home;
    - His wife had to go live with her parents in Cape Breton for the majority of 2012-2013 school year so her parents could look after their daughter while she substituted in the Cape Breton school system as they could not afford childcare in Halifax.
    - He had his auto insurance policy cancelled in 2016 due to non-payment; and
    - He had to borrow money from his family in 2014.

[155] The Father provided documentary evidence in support of some of the above assertions. He argues that, despite all of this, he has paid his child support for S faithfully over the last eleven years as required under the 2005 Consent Order.

[156] I am satisfied that ordering a retroactive award now would result in hardship to the Father and his other children. Indeed, the amount claimed by the Mother of over $72,000 in retroactive support exceeds the Father's entire 2016 income. I am also satisfied that hardship would result even if I ordered a lesser retroactive award with a payment schedule.

[157] Causing hardship to the Father and his other children through a retroactive award now which provides little discernible benefit to S would not only be detrimental to them, but, in my view, could be detrimental to S as well. It could make it more difficult for the Father to ensure S's future needs are met by potentially jeopardizing his ability to make his prospective child support payments. I would rather have more certainty that both parents will meet S's future financial needs than grant a retroactive award as an attempt try to correct a perception of a past inequity which simply is not borne out by the evidence.

11.12 Conclusion on the Mother's Retroactive Claim from September 1, 2006, to February 12, 2013

[158] When I consider all the factors together as part of the holistic approach mandated by *D.B.S.*, I find that, in the exercise of my discretion, it is not appropriate to award child support on a retroactive basis for the period from September 1, 2006, to February 12, 2013. While, as *D.B.S.* indicates, no one factor is dispositive, I conclude:

- the Mother has unreasonably delayed in seeking a retroactive variation to the Father's child support obligation;

- the Father's conduct, while blameworthy, was not a blatant attempt to prefer his own interests over S's right to an appropriate amount of child support. He covered additional expenses beyond what he was required to do under the 2005 Consent Order and was willing to have both parents disclose their financial information to help determine ongoing child support when S was in a shared parenting arrangement;

- S's past and present circumstances militate against ordering a retroactive award; and

- A retroactive award would result in hardship to the Father and his other children and could jeopardize his ability to make ongoing child support payments for S.

[159] Notwithstanding the fact that I have exercised my discretion to not award any retroactive support to the Mother for the period from September 1, 2006, to February 12, 2013, had I been otherwise inclined to make such an award, I would have another fundamental problem with the Mother's claim. Specifically, her claim entirely ignores the fact that the parties had a shared parenting arrangement during this entire period and that child support should be calculated using s. 9 of the Guidelines. As noted earlier, this requires a consideration of each parent's income as well as the increased costs of shared custody and the condition, means, needs and other circumstances of each parent.

[160] As noted from paragraph 45 of *D.B.S.,* in situations of shared parenting, "different considerations apply" as the assumption that an increase in income will automatically increase the total amount of support does not necessary hold true.

[161] The proper approach to calculating child support in shared parenting situations was outlined by the Supreme Court of Canada in *Contino v. Leonelli-Contino,* 2005 SCC 63. In *Contino,* the Supreme Court of Canada noted that s. 9 of the *Guidelines* involves an exercise of a judge's discretion, based on the three factors, as opposed to a simple application of a mathematical formula. It held:

- The three factors in s. 9 are conjunctive; none of them should prevail (para. 27);

- Consideration should be given to the overall situation of shared parenting and the costs related to it while paying attention to the needs, resources and situation of the parents which allows sufficient flexibility to ensure a fair level of child support (para. 27);

- Section 9(c) gives the court a broad discretion for conducting an analysis of the resources and needs of both parents and the children (para. 68);

- A strict mathematical analysis is at odds with the approach for determining child support under s. 9 of the *Guidelines* (para. 75);

- The determination of an equitable division of the costs of support for children in shared parenting situations is a difficult matter which is not amendable to simple solutions. Any attempt to apply strict formulae will fail to recognize the reality of various families. A contextual approach which takes into account all three factors in s. 9 must be applied (para. 82).

[162] Here, the Mother based her calculations for retroactive child support using a strict mathematical formula solely based on the Father's income. Her analysis treats the period from September 1, 2006, to February 12, 2013, as if she was still the primary care parent of S as was the case when the parties entered into the 2005 Consent Order. In my view, that methodology is untenable given that the parties had a shared parenting arrangement during this entire period. Rather, what is required is a *Contino* analysis involving a "contextual approach" applying s. 9 of the *Guidelines.*

[163] Thus, had I been otherwise inclined to award the Mother retroactive support during the period from September 1, 2006, to February 2013, neither party has provided me with the necessary information to do a *Contino* analysis during this period to reasonably determine what support, if any, may be owing by the Father. A contextual approach, as required by *Contino,* could also potentially involve considering the additional amounts the Father voluntarily paid over and above that required of him in the 2005 Consent Order, as well as the fact that the Mother received all the tax and other benefits associated with S even though the parties had a shared parenting arrangement.

[164] The absence of any meaningful analysis of what impact shared parenting has on the Mother's retroactive claim or attempt to do a *Contino* analysis is problematic. Indeed, prior to the hearing, I sent both parties a letter on April 24, 2017, in which I stated, *inter alia*:

> …based on the materials I have read, there are some questions which I intend to raise during the hearing. I am giving you the courtesy of advising you of some of them now so that you can consider them in advance of the hearing:
>
> 1. Is it agreed that the parties essentially had a shared parenting arrangement from November 2005 to February 2013? If so, if I am being asked to go back in time to consider whether I should exercise my discretion to award retroactive child maintenance from September 1, 2006, onwards, what impact, if any, does

the fact that the parties had a shared parenting arrangement from November 2005 to February 2013 have on this case?

[165] After the evidence portion of the hearing was concluded, the parties were given the opportunity to make oral argument on July 18, 2017. They also filed written submissions in which they addressed the issue of shared parenting. Thus, neither party should now be caught by surprise that I remain concerned about the impact that the parties' shared parenting arrangement had on the Mother's retroactive claim.

[166] Again, when seeking her significant retroactive increase to the Father's child support obligation from September 1, 2006 to February 2013, the Mother's analysis ignores the fact that the parties had a shared parenting arrangement during this entire time. Thus, even if she had otherwise persuaded me that a retroactive increase was appropriate, it would be exceedingly difficult to reasonably determine what amount should be awarded when neither party made any attempt to do a *Contino* analysis.

[167] With respect, judges are not Rumpelstiltskins. Absent being provided with proper evidence by the parties, we cannot take straw and magically weave it into gold. Thus, to attempt to undertake a financial autopsy of shared parenting going back to 2006 to 2013 in circumstances where I do not have adequate information would not do justice to these parties. Adjourning the hearing to obtain additional information would also not do justice to the parties. All this would accomplish is to fuel more litigation between parties who have spent an inordinate amount of time fighting in court over the years. Furthermore, to the extent the Mother had advanced a large retroactive claim while represented by capable senior counsel, she had a responsibility to present the court with the necessary evidence to reasonably assess the amount of her retroactive claim had I otherwise concluded that a retroactive increase was appropriate. Thus, to adjourn the matter to allow her to present such evidence only gives her a second chance to perfect her claim in circumstances which do not warrant doing so.

12.0 Parties' Claims for Retroactive Contribution to Section 7 Expenses (Issue 8)

[168] Both parties seek retroactive contributions from the other for claimed retroactive s. 7 expenses. Given that the Mother's income is relevant to any retroactive claim for retroactive section 7 expenses, I outline her income from 2005 to 2016 in Table 3 below.

Table 3 – Mother's Income from 2005 to 2016

Year	Mother's Line 150 Income
2005	$3,461 (employment income). However, she indicates that was her "post-bankruptcy tax return", not her "pre-bankruptcy return". Her T4 revealed an income of $30,000.10 (Exhibit 1, Tab 4, Paragraph 57)
2006	$32,259.87 (employment income of $31,659.87 and UCCB of $600.00)
2007	$32,781.84 (employment income)
2008	$34,637.56 (employment income of $33,437.56 and UCCB of $1200)
2009	$33,937.56 (employment income of $33,437.56 and UCCB of $500)

2010	$34,421.70 (employment income)
2011	$35,454.01 (employment income)
2012	$37,118.77 (employment income)
2013	$37,859 (employment income)
2014	$33,312.71 (employment income of $31,123.33 and EI of $778.00 and severance of $1402.38)
2015	$41,750.71 (employment income)
2016	$50,000 (employment income)

a) Mother's Position

[169] The Mother seeks a contribution from the Father for costs she incurred from late 2012 onwards in relation to things such as swimming lessons, clarinet rental, running shoes, skating equipment, horseback riding camp, past summer camps, the portion of medical insurance premiums attributable to covering S under the Mother's plan from March 2013 to May 2015, uninsured health-related costs, oboe lessons, volleyball costs, badminton costs, Maritime Dance Academy costs, yoga club costs, school-related costs, sports clothing costs, etc.

[170] She claims a 100% contribution from the Father in relation to some of the expenses, and a two-thirds contribution from the Father in relation to others. The total contribution claimed is $8,486.63. In several instances, she indicates that she sought the Father's agreement by email to share in the expense but that he did not respond.

b) Father's Position

[171] The Father seeks a proportionate contribution from the Mother in relation to various costs for activities or programs he enrolled S in going back from 2005. He first filed a Statement of Expenses claiming contribution for these expenses shortly before the hearing.

[172] The Father provides various calculations under difference scenarios: going back to 2005; going back to February 2010 (i.e. three years before the date of the Mother's variation application; going back to July 2011 (the year when the parties were in court litigating several parenting issues); and going back to February 2013 (the date of the Mother's variation application). Based on each of those dates, he says the amount owed to him by the Mother is $17,714, $11,287, $9,053 or $5,715 (Exhibit 10, Paragraph 108).

c) Decision on Retroactive Section 7 Expenses

[173] Retroactive claims for s. 7 expenses are different from retroactive claims for basic child support. Unlike basic child support, there is no inherent obligation on a parent to pay for same. Julien D. Payne and Marilyn A. Payne, in *Child Support Guidelines in Canada, 2015* (Toronto: Irwin Law Inc., 2015), make this point as follows:

> Many of the policy issues and factors that are addressed in relation to retroactive basic child support are also applicable to claims for a contribution to section 7

> expenses […] However, there is one fundamental difference. Basic child support reflects the right of the child to have his essential needs met. Extraordinary expenses […] are not a basic right of the child and there is no inherent obligation in the parents to pay for such activities. An order for a retroactive contribution to such expenses may be deemed unfair where the [payor] had no knowledge of these expenses and had no idea that he might ultimately be called to contribute towards them […] Limits may be judicially imposed on the retroactivity of an order for a contribution to section 7 expenses so as to promote fairness in light of the attendant circumstances…(p. 462) [Emphasis added].

[174] The 2005 Consent Order only required the parties to share the costs of extracurricular activities which were agreed to prior to the expenses being incurred. It did not give either parent the right to enroll S in extracurricular activities and later claim a contribution from the other parent. Here, neither party has persuaded me that there has been a change of circumstances which warrants me varying that order by now requiring that either parent contribute to costs for extracurricular activities incurred, in many cases, several years ago without the agreement of both parents.

[175] Furthermore, while both parties have advanced significant retroactive claims for section 7 expenses, neither has addressed in any significant way:

- how these claimed expenses were necessary in S's best interests or reasonable in relation to the means of each party and to the family's spending pattern prior to separation.
- whether claimed health-related expenses were necessary;
- whether extracurricular activities were "extraordinary" keeping in mind the requirements of s. 7(1.1)(a) and (b) of the *Guidelines.* For example, neither party gave evidence about any special needs or talents of S which would support certain extracurricular activity expenses as being "extraordinary";
- the relevant *DBS* factors when, unlike the dispute over retroactive Table amount of support, these expenses were all known at the time they were incurred without requiring disclosure from the other party. For example, the Father gives no explanation for his lengthy delay in pursuing same or suggest how a retroactive award towards s. 7 expenses would benefit S given that she was not deprived from engaging in those activities for which he now seeks a contribution from the Mother.

[176] The parties have failed to provide me with sufficient evidence to properly assess their retroactive s. 7 claims. Absent being provided with same, I am not in a position to reasonably assess these claims. Thus, to the extent that retroactive s. 7 claims are arguably even more discretionary than retroactive awards of Table amount of child support, I exercise my discretion not to award any amount to either party for retroactive section 7 claims except for the Mother's claim for a retroactive award for the additional cost of medical insurance premiums attributable to S for the period from March 2013 to May 2015. However, consistent with the guiding

principle of the *Guidelines,* I order that the parties share this cost proportionately as opposed to requiring the Father pay a larger percentage as requested by the Mother. Again, in the event the parties are unable to agree on the appropriate figure, I reserve the jurisdiction to deal with that limited issue.

13.0 Conclusion:

[177] As stated earlier, the parties' agreements outlined in paragraph 13 shall be incorporated into the order arising from my decision. With respect to the disputed issues, I order:

- The Father is no longer required to annually contribute towards an RESP for S;
- From March 2013 onwards, the parties shall proportionately share the additional premium costs attributable to covering S under the Mother's medical plan;
- From June 2015 to March 2017, the parties shall proportionately share the Mother's claimed health expenses not covered by insurance which exceed $100 annually except for the costs associated with S's braces for which the Father is not obliged to make any further contribution;
- The Father will annually make a contribution of $275 towards the costs of S's extracurricular activities which should be paid by no later than December 15th of each year for the following calendar year. He owes this amount for December 15, 2017, which shall be paid within 90 days;
- The Father's child support obligation for the period from February 13, 2013, to April 25, 2017, is increased by $2,086. He will pay this additional amount to the Mother within 90 days;
- All other claims sought by either party are dismissed except as otherwise provided for in my decision.

[178] I direct that the Mother's counsel prepare the appropriate form of order reflecting my decision which should be sent to the Father for his consent as to form. The order should be sent to me within three weeks.

14.0 Costs

[179] Both parties have claimed and are entitled to be heard on costs. My decision, however, results in neither party being entirely successful. While the Father was largely successful in resisting the Mother's retroactive claim, I am troubled by the fact that he simply did not annually provide the Mother with his financial disclosure as required under the 2005 Consent Order. Thus, while costs normally follow the event, this is subject to the proviso unless a judge orders otherwise leaving costs in the discretion of the judge: *Civil Procedure Rule* 77.03(3). Thus, the

Father's failure to abide by the terms of the 2005 Order is something the parties should consider and address should it be necessary for me to render a decision on costs.

[180] Having said that, I strongly encourage these parties to reach an agreement on costs. Needless to say, given their history of litigation which has spanned almost S's entire life, I hope they will be able to close this latest chapter and move on with co-parenting S in a way which ensures she continues to flourish. S is a blessing to both. Both parents clearly love her very much. Thus, for her sake, I hope they can find a way to peacefully co-exist outside of the courtroom as opposed to making her the focus of more litigation inside it.

[181] In the event, the parties cannot agreed on costs, each party should file a submission on costs no later than 30 days from today's date.

Jesudason, J.