NOVA SCOTIA COURT OF APPEAL
Citation: *Joudrey v. Reynolds*, 2020 NSCA 60

Date: 20200922
Docket: CA 491910
Registry: Halifax

Between:

David Joudrey

Appellant

v.

Michelle Reynolds

Respondent

Judge:	The Honourable Justice Cindy A. Bourgeois
Appeal heard by way of written submissions:	Last submissions received on August 17, 2020, in Halifax, Nova Scotia
Subject:	Determination of income for child support purposes; retroactive child support
Summary:	Mr. Joudrey and Ms. Reynolds were involved in a lengthy common-law relationship. They separated in February 2015 and entered into a Consent Order in June 2017 that established a shared parenting arrangement and set child support for their three children. Because Mr. Joudrey's income was substantially higher than that of Ms. Reynolds', he was obligated to pay monthly support to her for the benefit of the children on a set-off basis. By 2018, each party sought to vary the Consent Order. Mr. Joudrey wanted to change aspects of the parenting arrangement; Ms. Reynolds was concerned with the quantum of child support. A hearing was held on April 25, 2019. The

parties filed affidavits with numerous exhibits and each were cross-examined. No other witnesses were called.
The hearing judge declined to vary the parenting arrangement as sought by Mr. Joudrey. However, as requested by Ms. Reynolds, he found Mr. Joudrey's income had increased since the Consent Order was issued. As a result, the quantum of prospective child support was varied. Further, the hearing judge found an award of retroactive support, payable to Ms. Reynolds, was warranted.

Mr. Joudrey appeals from the hearing judge's assessment of prospective and retroactive child support. The crux of his argument relates to the hearing judge's identification of his income for the purposes of calculating child support in both 2017 and 2018.

Issues: (1) Did the hearing judge err by relying on Mr. Joudrey's 2018 T1 General form to determine his annual income instead of his paystubs for the purpose of setting prospective support?

(2) Did the hearing judge err by failing to deduct from Mr. Joudrey's 2017 income funds he had received from the Worker's Compensation Board for the purpose of calculating retroactive support?

(3) Did the hearing judge err in ordering Mr. Joudrey to pay retroactive child support?

Result: The hearing judge did not err in declining to use Mr. Joudrey's 2018 paystubs to determine his income for the purpose of prospective child support. The paystubs were acknowledged by Mr. Joudrey to be inaccurate due to problems with the Phoenix paystub. Although he also asserted his T4 slip, used in his T1 General was also inaccurate, the hearing judge had to use something to determine income. His approach was in accordance with s. 16 of the *Provincial Child Support Guidelines*.

Based on the evidence presented, the hearing judge was entitled to include the Worker's Compensation benefits Mr.

Joudrey received in 2017 for the purpose of determining his income.

The hearing judge was entitled, on the evidentiary record before him, to conclude that the payment of retroactive support would not constitute a hardship to Mr. Joudrey. Nor was there any other apparent error in the hearing judge's determination that an award of retroactive support was appropriate in the circumstances.

Appeal dismissed with costs

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Date: 20200922
Docket: CA 491910
Registry: Halifax

Between:

David Joudrey

Appellant

v.

Michelle Reynolds

Respondent

Judges:	Wood C.J.N.S., Bourgeois and Van den Eynden JJ.A.
Appeal Heard:	By way of written submissions
Last submissions received on:	August 17, 2020
Held:	Appeal dismissed with costs, per reasons for judgment of Bourgeois J.A.; Wood C.J.N.S. and Van den Eynden J.A., concurring
Counsel:	Cassandra L. Armsworthy, for the appellant Allison Kouzovnikov, for the respondent

Reasons for judgment:

[1] David Joudrey and Michelle Reynolds were involved in a lengthy common-law relationship. They separated in February 2015 and entered into a Consent Order in June 2017 that established a shared parenting arrangement and set child support for their three children. Because Mr. Joudrey's income was substantially higher than that of Ms. Reynolds', he was obligated to pay monthly support to her for the benefit of the children on a set-off basis.

[2] By 2018, each party sought to vary the Consent Order. Mr. Joudrey wanted to change aspects of the parenting arrangement; Ms. Reynolds was concerned with the quantum of child support. A hearing was held on April 25, 2019. The parties filed affidavits with numerous exhibits and each were cross-examined. No other witnesses were called.

[3] The hearing judge, Family Court Judge Samuel C. Moreau (as he then was), declined to vary the parenting arrangement as sought by Mr. Joudrey. However, as requested by Ms. Reynolds, he found Mr. Joudrey's income had increased since the Consent Order was issued. As a result, the quantum of prospective child support was varied. Further, the hearing judge found an award of retroactive support, payable to Ms. Reynolds, was warranted.

[4] Mr. Joudrey appeals from the hearing judge's assessment of prospective and retroactive child support. The crux of his argument relates to the hearing judge's identification of his income for the purposes of calculating child support in both 2017 and 2018.

[5] Given the restrictions arising from the COVID-19 pandemic, and with agreement of the parties, the appeal was heard on the basis of the record and written submissions. For the reasons to follow, I would dismiss the appeal.

Decision under Appeal

[6] The hearing judge issued written reasons on August 8, 2019 (2019 NSFC 10). They do not appear to be reported. As it is only his conclusions regarding child support that are relevant to this appeal, I will only comment upon those aspects of the decision.

[7] In the court below, Mr. Joudrey's position regarding child support was:

- Prospective child support should be based on an annual income of $71,869.00, a sum derived from his 2018 paystubs;
- An award of retroactive support was not appropriate; and
- If retroactive support were to be considered, his 2017 income for child support purposes should not include a lump-sum payment he had received from the Workers' Compensation Board ("WCB").

[8] Ms. Reynolds opposed the above views. She submitted:

- In accordance with the *Provincial Child Support Guidelines*, Mr. Joudrey's income, for both retroactive and prospective purposes, ought to be based on the "Total Income" reported in his 2017 and 2018 T1 General forms;
- With respect to Mr. Joudrey's 2017 income, there was no reason to deduct from his "Total Income" funds he had received from the WCB; and
- A retroactive award of child support was warranted in light of the increase in Mr. Joudrey's income and his failure to provide his income tax information as ordered.

[9] There was no dispute in the court below as to Ms. Reynolds' income for the purposes of considering Mr. Joudrey's child support obligation arising from the shared parenting arrangement pursuant to s. 9 of the *Provincial Child Support Guidelines*.

[10] The hearing judge first addressed prospective child support. He identified that establishing Mr. Joudrey's income was the critical determination. He wrote:

> [18] In order to vary D.J.'s current child support obligation as per paragraph 11 of the Consent Order, I first must be satisfied that there has been a material change in circumstances; that there has been a change regarding D.J.'s ability to pay child support on a go forward basis. Paragraph 16 of the *Provincial Child Support Guidelines* states as follows:
>
> > **Calculation of annual income**
> >
> > **16** Subject to Sections 17 to 20, a parent's annual income is determined using the sources of income set out under the heading "(Total Income)" in the T1 General form issued by the Canada Revenue Agency and is adjusted in accordance with Schedule III.

> [19] The parties dispute the amount on which prospective child support should be based. It is the applicant's position that prospective child support be based on the amount of $71,869.00. The applicant, D.J., is employed at the Springhill Penitentiary and is a federal employee. As such his salary is administered by the Phoenix pay system. As addressed by D.J. in paragraphs 6 to 15 of Exhibit 3, there are ongoing issues with the Phoenix pay system. Certainly, these ongoing issues with the Phoenix pay system have been the subject of many media reports.
>
> [20] The problems with the Phoenix pay system have affected and continue to affect D.J.'s rate or level of pay – the amount of money he receives pay cheque to pay cheque is inconsistent. He may receive a certain amount for a pay period and for the following pay period may receive an amount the same, similar or significantly higher or lower. An examination of Exhibits 6 and 10 confirms this.
>
> [21] D.J. contends that his prospective child support should be based on an annual income of $71,869.00. That figure was decided upon by adding together the gross amounts as stated on all of D.J.'s pay cheque stubs for 2018. I confirmed this by conducting my own calculations. I take Judicial Notice of the problems with the Phoenix pay system. As such I find I cannot rely on D.J.'s 2018 paystubs to calculate an appropriate figure on which to base prospective child support. As stated I scrutinized Exhibit 6. The gross amounts indicated on D.J.'s paystubs are inconsistent. Some reveal significant fluctuations. The evidence before me with which to base prospective child support is as contained in Exhibit 6 and Exhibit 9. No other evidence was provided with respect to this issue.
>
> [22] Given my finding with respect to the Phoenix pay system and in accordance with Section 16 of the *Child Support Guidelines* I find I must base D.J.'s prospective child support obligation on his 2018 T1 General form. The amount as stated on his 2018 T1 General form for his total income is $94,202.73, subtracting union dues in the amount of $1,526.25, the remainder being $92,676.48.

[11] The parties had agreed Ms. Reynolds' income was $28,167.00 for child support purposes. The hearing judge calculated Mr. Joudrey's prospective support obligation using the income from his 2018 T1 General Return:

> [94] Commencing July 1, 2019, the applicant, D.J., shall pay child support to the respondent, M.R., in the amount of $1,119.75 per month. This amount is a set-off amount with D.J obligated to pay $1,692.69 and M.R., $572.94. Child support in the amount of $1,119.75 shall continue to be paid to M.R. by D.J. on the 1st day of each month.

[12] The hearing judge then considered Ms. Reynolds' claim for retroactive support. After stating he was only prepared to consider a claim for retroactive

support for the period after the Consent Order was issued on June 15, 2017, he wrote:

> [25] To evaluate the quantum of child support for the period in question I must examine and determine D.J.'s income for the 2017 tax year. As per paragraph 13 of the Consent Order issued June 15, 2017, the parties were ordered as follows:
>
> > 13. The parties shall exchange no later than June 1st copies of their income tax returns, completed and with all the attachments even if the return is not filed with the Canada Revenue Agency. This will commence on the 1st day of June, 2017, and continue every year thereafter.
>
> [26] In my analysis/discussion regarding the most appropriate determination of D.J's income with respect to prospective child support, I found that I must base his obligation in accordance with his total income as stated on his 2018 T1 General form. Likewise, my examination and analysis regarding any retroactive award must be based on his tax return information.
>
> [27] Evidence included in Exhibit 9 is a piece of correspondence to D.J. from Nadine Zwicker, Case Manager, Workers' Compensation Board of Nova Scotia. Ms. Zwicker's letter establishes that D.J. experienced a workplace accident on October 28, 2013. As per Exhibit 9, Line 150 of D.J's 2017 T1 General form states a total income of $111,599.63. Included in that amount is a payment of $30,445.96. The evidence establishes that this payment/benefit was an amount received from the Workers' Compensation Board of Nova Scotia. D.J. argues that this payment/benefit should not be included in determining his income for 2017 as it was a one-time non-recurring payment.
>
> [28] M.R. rejects this argument and takes the position that the Workers' Compensation Board benefit should be included in determining D.J.'s 2017 income as it was not a one-time, non-recurring payment but fifth consecutive payment/benefit D.J. received from the Workers' Compensation Board of Nova Scotia. Again, in referencing Exhibit 9, specifically the 2016 tax year, D.J. received a payment/benefit from Workers' Compensation in the amount of $6,413.45 and during the 2015 tax year in the amount of $25,118.63. D.J.'s 2014 Canada Revenue Agency Notice of Assessment – a tax return was not provided for 2014 – Line 236 indicates a deduction from net income in the amount of $31,988. Correspondingly, as contained in his 2017 T1 General form 5 Year Summary shows a payment/benefit received in 2014 in the amount of $31,988.39. D.J.'s 2013 Notice of Assessment indicates Workers' Compensation benefits in the amount of $5,096.00.
>
> [29] I find the evidence confirms D.J. received payments/benefits from the Workers' Compensation Board of Nova Scotia during the years 2013 to 2017, inclusive. The benefit received from Workers' Compensation in the stated amount of $30,445.96 shall be included in determining D.J.'s 2017 income. As per existing case law, *Darlington v. Moore*, 2014 NSSC 358, *Piasecki v. Piasecki*,

> 2015 NSSC 210, the benefit received from Workers' Compensation shall be grossed up.

[13] The hearing judge then considered whether an award of retroactive support was appropriate in the circumstances before him. He considered the four factors outlined in *D.B.S. v. S.R.G.*, 2006 SCC 37. He found:

- Ms. Reynolds could not be faulted for any delay in seeking a support variation;
- Mr. Joudrey had not disclosed his updated tax information to Ms. Reynolds as required by the 2017 Consent Order and, as such, had engaged in blameworthy conduct;
- Given Ms. Reynolds' modest financial means, a retroactive award would be of benefit to the three children; and
- Given his current income and expenses, Mr. Joudrey had a monthly surplus of $989.80, and the payment of retroactive support would not constitute a hardship.

[14] Based on the above findings, the hearing judge concluded an award of retroactive child support, calculated from July 1, 2017 to June 30, 2019 on a set-off basis was warranted.[1]

Issues

[15] In his Notice of Appeal Mr. Joudrey sets out the following complaints of error:

> 1. The Learned Trial Judge erred in law and in fact by relying on the Appellant's T1 General Form to determine his income for child support purposes in 2017 and 2018 considering that judicial notice was taken of the problems caused by the Phoenix pay system.
>
> 2. The Learned Trial Judge erred in law and in fact by finding that a retroactive award of child support would be appropriate.

[1] The trial judge set out a detailed breakdown of the calculation of retroactive support in his reasons. Neither his identification of the applicable legal principles, nor his methodology for calculating retroactive support (other than his determination of Mr. Joudrey's income) have been challenged on appeal.

> 3. The Learned Trial Judge erred in law and in fact by including the lump-sum Permanent Impairment Benefit the Appellant received from Workers' Compensation in 2017 as income for the purposes of retroactive child support.

[16] After considering the submissions of the parties, I would reframe the issues on appeal as follows:

1. Did the hearing judge err by relying on Mr. Joudrey's T1 General form to determine his annual income for child support purposes instead of his 2018 paystubs?
2. Did the hearing judge err by failing to deduct from Mr. Joudrey's 2017 income funds he had received from the WCB when calculating the quantum of retroactive child support?
3. Did the hearing judge err in ordering Mr. Joudrey to pay retroactive child support?

Standard of Review

[17] The standard of review to be applied is not controversial. In *Laframboise v. Millington*, 2019 NSCA 43, Justice Saunders explained:

> [14] The standards of appellate review in cases such as this are so well-known as to hardly require elaboration. Questions of law are reviewed on a standard of correctness. When interpreting and applying the law the judge must be right. On questions of fact, or inferences based on accepted facts, or questions of mixed law and fact where the legal point is not readily extricable, a trial judge's factual findings will only be disturbed if they evince palpable and overriding error. "Palpable" means obvious. "Overriding" means dispositive; a mistake so serious as to have likely influenced the outcome. In appeals from a trial judge's exercise of discretion, deference is owed. We will only intervene if we are satisfied that in the exercise of that discretion the judge erred in law or the outcome is patently unjust. Unless an appellant can persuade us that the trial judge either erred in law, or erred in fact, or erred in the exercise of discretion in the ways I have just described, the appeal will fail. See generally, *Housen v. Nikolaisen*, 2002 SCC 33 at ¶8 *ff.*; *Gwynne-Timothy v. McPhee*, 2005 NSCA 80 at ¶31-34; *Laushway v. Messervey*, 2014 NSCA 7 at ¶27-29; *Homburg v. Stichting Autoriteit Financiële Markten*, 2016 NSCA 38 at ¶18-19; and *McPherson v. Campbell*, 2019 NSCA 23 at ¶17-20.

[18] Recognizing the discretionary nature of support orders, this Court applies a deferential standard of review. In *Hickey v. Hickey*, [1999] 2 S.C.R. 518, an appeal court's ability to intervene was described as follows:

> 10 When family law legislation gives judges the power to decide on support obligations based on certain objectives, values, factors, and criteria, determining whether support will be awarded or varied, and if so, the amount of the order, involves the exercise of considerable discretion by trial judges. They must balance the objectives and factors set out in the *Divorce Act* or in provincial support statutes with an appreciation of the particular facts of the case. It is a difficult but important determination, which is critical to the lives of the parties and to their children. Because of its fact-based and discretionary nature, trial judges must be given considerable deference by appellate courts when such decisions are reviewed.
>
> 11 Our Court has often emphasized the rule that appeal courts should not overturn support orders unless the reasons disclose an error in principle, a significant misapprehension of the evidence, or unless the award is clearly wrong. These principles were stated by Morden J.A. of the Ontario Court of Appeal in *Harrington v. Harrington* (1981), 33 O.R. (2d) 150, at p. 154, and approved by the majority of this Court in *Pelech v. Pelech*, [1987] 1 S.C.R. 801, *per* Wilson J.; in *Moge v. Moge*, [1992] 3 S.C.R. 813, *per* L'Heureux-Dubé J.; and in *Willick v. Willick*, [1994] 3 S.C.R. 670, at p. 691, *per* Sopinka J., and at pp. 743-44, *per* L'Heureux-Dubé J.
>
> 12 There are strong reasons for the significant deference that must be given to trial judges in relation to support orders. This standard of appellate review recognizes that the discretion involved in making a support order is best exercised by the judge who has heard the parties directly. It avoids giving parties an incentive to appeal judgments and incur added expenses in the hope that the appeal court will have a different appreciation of the relevant factors and evidence. This approach promotes finality in family law litigation and recognizes the importance of the appreciation of the facts by the trial judge. Though an appeal court must intervene when there is a material error, a serious misapprehension of the evidence, or an error in law, it is not entitled to overturn a support order simply because it would have made a different decision or balanced the factors differently.

Analysis

Did the hearing judge err by relying on Mr. Joudrey's T1 General form to determine his annual income for child support purposes instead of his 2018 paystubs?

[19] In the court below, Mr. Joudrey asked the hearing judge to take judicial notice of the problems associated with the Phoenix payroll system. He submitted these well-documented concerns gave rise to legitimate questions about the accuracy of the income information generated by the system. In Mr. Joudrey's pre-hearing submissions to the hearing judge, he said:

> Unfortunately, the federal government's "Phoenix" payroll system has created irregularities with Mr. Joudrey's T4 and Paystubs.
>
> The complications caused by that program have been well-documented in the media. Mr. Joudrey, like many other federal employees, has had weeks where he was not paid, where he was paid less than expected, or where he received overpayments. Unsurprisingly, the complications have spilled over into record-keeping. **The paystubs Mr. Joudrey receives are confusing and misleading**. For instance, they list amounts of "non-taxable"; as a salaried, federal employee subject to a collective agreement, Mr. Joudrey does not receive any income or benefits which are not taxable.
>
> (Emphasis added)

[20] On appeal, Mr. Joudrey argues that because the hearing judge took judicial notice of the difficulties with the Phoenix payroll system, he erred by then relying on the "Total Income" (obtained from his Phoenix-generated T4 slip) on his T1 General forms. He writes in his factum:

> [29] It is respectfully submitted that, having taken judicial notice of the problems caused by the Phoenix pay system, it was no longer open to the learned Trial Judge to then conclude that the Appellant's income as determined under section 16 of the *Child Maintenance Regulations*, *supra*, was the fairest determination of his income for child support purposes.

And further:

> [32] … The Appellant, in his evidence, was clear that the problems he had experienced with the Phoenix pay system extended beyond inconsistent pays, including generating inaccurate T4s, which then forced him to file income tax returns that did not accurately reflect his income. Further, at no point in his decision did the learned Trial Judge provide any reasons as to why he could conclude that the Appellant's T4s were a *prima facie* reliable reflection of the Appellant's income when he had already deemed that the pay stubs, generated by the same faulty system, were unreliable.

[21] With respect, I see no reason to interfere with the hearing judge's approach to determining Mr. Joudrey's income for child support purposes.

[22] The *Provincial Child Support Guidelines* apply to this matter. Sections 15 through 20 address how annual income is to be ascertained for the setting of child support. The provisions relevant here are:

> Calculation of annual income

> 16. Subject to Sections 17 to 20, a parent's annual income is **determined using the sources of income set out under the heading "(Total Income)" in the T1 General form issued by the Canada Revenue Agency** and is adjusted in accordance with Schedule III.
>
> Pattern of income
>
> 17(1) If the court is of the opinion that the determination of a parent's annual income under Section 16 would not be the fairest determination of that income, the court may have regard to the parent's income over the last 3 years and determine an amount that is fair and reasonable in light of any pattern of income, fluctuation in income or receipt of a non-recurring amount during those years.
>
> (Emphasis added)

[23] Schedule III of the *Provincial Child Support Guidelines* adopts its federal counterpart. That Schedule sets out a number of deductions from a payor's "Total Income" for the purposes of determining income for child support purposes. Benefits received from a workers' compensation program, or other wage replacements, are not included as a deduction.

[24] In accordance with Section 16, the determination of a payor's income starts with his or her T1 General form. That starting point is only displaced if a court is satisfied some other method of calculation would result in a more fair determination of income. The hearing judge here would only be required to move away from using Mr. Joudrey's T1 General forms if he were satisfied the alternate suggestion, using the aggregate income produced from the 2018 paystubs, would create a more fair result.

[25] The hearing judge was not satisfied the aggregate income reported in Mr. Joudrey's 2018 paystubs was superior to the method of income determination set out in Section 16. He had to make an income determination based on the evidence before him. The paystubs were clearly problematic—their misleading and confusing nature was acknowledged by Mr. Joudrey. Further, the hearing judge was only provided with paystubs from 2018, not those from past years or for the months prior to the hearing.

[26] On the other hand, the hearing judge had a number of years of T1 General forms, completed on Mr. Joudrey's behalf by a professional accountant, and Notices of Assessments that seemingly confirmed the accuracy, at least in the view of the Canada Revenue Agency, of the filed returns. Although Mr. Joudrey testified the T4 slips used in his returns were inaccurate, and that he was forced to rely on them for the purposes of his T1 General form, there was little other

evidence to support this claim. Arguing both the T4s and paystubs were inaccurate, Mr. Joudrey did not present compelling evidence that his paystubs ought to be preferred.

[27] The hearing judge had to use something to determine Mr. Joudrey's income. The evidence adduced did not satisfy him the misleading and confusing paystubs would produce a fairer result than using the T1 General forms. Having considered the entirety of the record, his approach was warranted and his rationale clear.

[28] Before concluding my analysis in relation to this issue, I wish to address a novel argument advanced by Mr. Joudrey in his reply submissions. He asserts if the hearing judge found the accuracy of the evidentiary record pertaining to his income to be questionable, then he should have sought further evidence on that point from the parties. Mr. Joudrey submits the hearing judge's failure to do so was an error of law. In support of this proposition, he relies on this Court's decision in *Woodford v. MacDonald*, 2014 NSCA 31 and, in particular, the following passage:

> [3] Courts, even parents, have become accustomed to a rote calculation of child support through the application of federal and provincial child support guidelines. When shared parenting exists, both federal and provincial guidelines accord a great deal of discretion to trial judges on the issue of appropriate child support. The emphasis is on fairness, flexibility, and recognition of the actual conditions, means, needs and other circumstances of each parent and the children. The exercise of judicial discretion must be reasonably tied to the evidence so as to allow for a logical, rational explanation, and if necessary, review by courts of appeal. If there is insufficient evidence to conduct an analysis then neither the judge of first instance, nor a court on appeal, can determine if in fact the objectives of the legislative provisions have been properly addressed. I am satisfied that, in this case, there was insufficient evidence to enable the trial judge to make a decision as to the appropriate child support within the provisions of s. 9 of the *Guidelines* made pursuant to s. 55 of the *Maintenance and Custody Act.* It was an error in law for the trial judge to determine child support in this case in the absence of an adequate evidentiary foundation.

[29] With respect, *Woodford v. MacDonald* has no application to the present case. There, support was being established on a *de novo* basis in relation to a shared parenting arrangement as opposed to a variation of an earlier court order. More significantly, in that instance the parties had not filed complete financial information. In particular, Statements of Income and Expenses were non-existent as was cost information pertaining to the expenses relating to the children. Additionally, in fixing the quantum of support payable by the father, the hearing judge did not use the sum produced by a set-off of the parents' respective incomes,

but an increased amount to reflect the financial benefits he enjoyed by virtue of his rental properties. This Court found there was no evidence adduced at trial to permit the hearing judge to find the father enjoyed such benefits and, accordingly, the enhanced support obligation had no evidentiary foundation.

[30] The evidentiary record in the present case does not suffer from the same deficiencies. Mr. Joudrey and Ms. Reynolds filed the materials that were required in order for the hearing judge to make findings of fact as to their respective incomes, to consider their budgets, and to make a determination regarding child support on the basis of the shared parenting arrangement as required by s. 9 of the *Provincial Child Support Guidelines*. The outcome here was a result of the hearing judge not preferring the paystubs over the T1 General Return as a means of establishing Mr. Joudrey's income, not as a consequence of a deficient record.

[31] I would dismiss this ground of appeal.

Did the hearing judge err by failing to deduct from Mr. Joudrey's 2017 income funds he had received from the WCB when calculating the quantum of retroactive child support?

[32] At the outset, it is helpful to note the following:

- The evidence at trial established that from 2013 through 2017, Mr. Joudrey had claimed funds received from the WCB on his T1 General forms, said amounts being part of his "Total Income";
- Mr. Joudrey did not receive income from the WCB in 2018;
- There was no dispute Mr. Joudrey had received the sum of $30,445.96 from the WCB in 2017; and
- The hearing judge did not utilize Mr. Joudrey's 2017 income for the purpose of setting prospective child support.

[33] It is also useful to consider how Mr. Joudrey's receipt of WCB benefits was framed as an issue before the hearing judge. In his pre-hearing submissions Mr. Joudrey wrote:

> Section 17(1) of the *Guidelines* states as follows:
>
> > If the court is of the opinion that the determination of a parent's annual income under Section 16 would not be the fairest determination of that income, the court may have regard to the parent's income over the last 3

> years and determine an amount that is fair and reasonable in light of any pattern of income, fluctuation in income or receipt of a non-recurring amount during those years.
>
> Although worker's compensation payments are included as income on the T1 General, it must be noted that this was a non-recurring payment; accordingly, it is submitted that section 16 would not provide the fairest determination of Mr. Joudrey's income for support purposes and that it would be inappropriate to include the worker's compensation payment as income for the purposes of child support. **The amount was a one-time, non-recurring payment and does not fairly represent the income Mr. Joudrey has available to him for prospective child support purposes**.

And further:

> The Worker's Compensation payment is not current income, nor will it be repeated. It was a one-time amount awarded to Mr. Joudrey. Including it for the purposes of child support would not [a]ffect a fair determination of his income for child support purposes.

(Emphasis added)

[34] From the above submissions, it is clear Mr. Joudrey was concerned with the possibility of his 2017 income, which included a sizeable payment of WCB benefits, being used to establish prospective child support in 2019. That position was entirely reasonable. Given the hearing judge's determination to base prospective child support on Mr. Joudrey's more current 2018 "Total Income", evidently he thought so too.

[35] On appeal, Mr. Joudrey's concerns with the inclusion of the WCB benefits in his 2017 income has expanded from those argued in the court below. He now seeks to highlight a distinction between his receipt of benefits in 2013 through 2016 (not referenced at all in his pre-hearing submissions) as being "wage replacement benefits", and the benefits he received in 2017, which he asserts were a "permanent impairment benefit". He argues the hearing judge fell into error by not recognizing the difference between the two types of benefits and by not deducting the benefits received in 2017, a non-recurring amount, from his "Total Income".

[36] Again, the hearing judge had little evidence, beyond the briefest of references in Mr. Joudrey's testimony, to explain the nature of the benefits, particularly those received in 2017. The hearing judge did have before him a letter from the WCB that indicated the benefits received in earlier years were wage replacement benefits. His finding that Mr. Joudrey "received payments/benefits

from the Workers' Compensation Board of Nova Scotia during the years 2013 to 2017" was available to him on the evidence. Further, the distinction in the nature of benefits Mr. Joudrey is now attempting to establish for the purposes of this appeal is irrelevant to the outcome. I will explain.

[37] As noted earlier, in 2017 Mr. Joudrey received WCB benefits in the amount of $30,445.96. For the purposes of his T1 General form, that amount was added to his reported employment income to constitute his "Total Income". The hearing judge, in accordance with Schedule III, deducted the union dues paid by Mr. Joudrey in order to ascertain his income for the purposes of child support. Schedule III does not direct workers' compensation benefits (of any type) be similarly deducted. As such, these benefits are included in income for child support purposes unless a judge finds it would not be fair to do so.

[38] Whether the inclusion of WCB benefits in income used to determine child support would be unfair is a contextual determination to be made by the hearing judge. Here, the hearing judge did not use Mr. Joudrey's "Total Income" in 2017 to set the rate of prospective support. If he had, perhaps Mr. Joudrey's argument would carry more weight. Rather, the hearing judge used the 2017 "Total Income" only to determine what support Mr. Joudrey should have paid based on the income he had available to him at that time. In other words, Mr. Joudrey received income in 2017 that included $30,445.96 in WCB benefits and the judge determined a portion of this money ought to have been paid for the benefit of his children.

[39] Based on the record and the context, I see no reason to interfere with the hearing judge's determination to use Mr. Joudrey's "Total Income" in 2017, including WCB benefits, to calculate retroactive support. I would dismiss this ground of appeal.

Did the hearing judge err in ordering Mr. Joudrey to pay retroactive child support?

[40] Mr. Joudrey's complaint regarding the retroactive award is very narrow. He submits the hearing judge "erred in law and in fact by concluding that a retroactive award of child support would not cause hardship to him as the payor". His assertions of error relate back to how the hearing judge determined Mr. Joudrey's income.

[41] In his factum, Mr. Joudrey submits:

> 55. By relying solely on the Appellant's T1 General Form to determine his monthly income and expenses, the learned Trial Judge created and attributed a monthly surplus to the Appellant that did not, in fact, exist. He then relied on that monthly surplus to find that a retroactive child support claim would not create a financial hardship. Such an approach ignores the realities of the Appellant's financial circumstances and as such, does not reflect the "broad consideration of hardship" espoused by the majority in ***DBS v SRG***.

[42] Mr. Joudrey complains the hearing judge did not accept his testimony that he experienced a monthly financial deficit, and erred when he concluded otherwise. I disagree.

[43] There was ample evidence upon which the hearing judge could conclude Mr. Joudrey's financial circumstances were better than his budgeting suggested. I note in particular:

- Mr. Joudrey's Statement of Income and Expenses used the lower income generated by his 2018 paystubs, a source appropriately rejected by the hearing judge. In cross-examination, Mr. Joudrey acknowledged he was able to cover the alleged deficiency but could not explain what income sources permitted him to do so;
- Mr. Joudrey had modest debt payments; and
- Mr. Joudrey's Statement claimed 100% of his household expenses, notwithstanding they were shared with his new partner.

[44] Having considered the evidence, the hearing judge rejected Mr. Joudrey's assertion he experienced a monthly deficit. He further found Mr. Joudrey enjoyed a monthly surplus. Both were findings of fact that were available to the hearing judge on the record. It is not this Court's role to reweigh and reassess the evidence upon which those findings were made.

[45] Having found Mr. Joudrey had a monthly surplus, I also see no reason to interfere with the hearing judge's conclusion that requiring him to pay retroactive support would not constitute a hardship.

[46] I would dismiss this ground of appeal.

Disposition

[47] For the reasons above, I would dismiss the appeal. Mr. Joudrey shall pay costs of $2,000.00, inclusive of disbursements, to Ms. Reynolds.

Bourgeois J.A.

Concurred in:

Wood C.J.N.S.

Van den Eynden J.A.