IN THE FAMILY COURT OF NOVA SCOTIA
Citation: B.M. v. G.W., 2008 NSFC 7

Date: 20080324
Docket: FLBMCA-050939
Registry: Bridgewater

Between:

B. M.

Applicant

v.

G. W.

Respondent

Revised Decision: The text of the decision has been revised to protect the identity of certain parties. This revised version is released on March 4, 2009.

Judge: The Honourable Judge William J. Dyer

Heard: October 31, 2007, in Lunenburg, Nova Scotia

Counsel: Walter Thompson, Q.C., for the Applicant
Philip Gruchy, for the Respondent

By the Court:

[1] B.M. ("M.") and G.W. ("W.") were common-law partners for about five or six years until they separated in late September, 2000. They are the parents of A.M. ("A."), born July 20th, 1994.

[2] Some of the background circumstances were canvassed in a written Decision [2008 NSFC 4] in which I determined that there was no final and binding agreement between (former) counsel for the parties or otherwise which would preclude M. from advancing an originating application for current and retroactive support for A.'s benefit under the **Maintenance and Custody Act** (MCA) and the **Child Maintenance Guidelines** (CMG).

The Issues

[3] W. has been paying child support, although not under a court order. Entitlement is not disputed. The principal issues are whether there should be a "retroactive award" (ie., to a date preceding the application), and the quantum of the child support - retroactive (if awarded), and current.

W.'s Circumstances

General

[4] W. is a self-described carpenter who sometimes works as a labourer and/or truck driver. In July, 2007, he started work as a trucker for a Dartmouth contracting firm for $17.50 hourly, 30 to 40 hours weekly. He anticipated that his job would end in November, 2007, following which he expected to submit a claim for employment insurance (e.i.) benefits.

[5] W. has been living in a common-law relationship with C. for about three years. They occupy a house which he owns. Built in 2005, it is a two-story, 1800 square foot, fully detached home, with a basement garage. (It, and other properties, are discussed later.) The couple has a three year old son. C. is employed locally at an hourly rate of $12. (Her annual income was not disclosed.)

[6] W. submitted two Statements of Financial Information. Exhibit 7, prepared in late March, 2007, demonstrated a gross monthly income from all sources of only about $1,200 or $14,400 annualized. At the time, he noted that he had applied for e.i. benefits. Exhibit 9 shows a monthly income, as at the end of October, 2007, of about $2,780 or about $33,360 annualized. (Through his business, W. bought an expensive snowplow truck-attachment, but claimed he does not earn any income from plowing for his tenants or for anybody else.) Appended to the most recent document is a budget showing household expenses of about $3,200 monthly leaving a small monthly deficit of about $400 after payment of A.'s support. W. earmarked some of the household expenses

paid by Ms. C. (for example food, household supplies, laundry, etcetera). Although there are some discretionary expenses, the budget is modest on its face.

W.'s Business Methods

[7] W.'s evidence was that throughout his working life he has bought, improved and sold real estate. As at the hearing, he owned five properties, including what he is now calling his principal residence. W. has a business strategy: he seeks out and buys properties which often have an existing house and which also have subdivision potential. Thereafter, he renovates the existing house (on the lot he retains); and constructs new houses on the newly created lots which are then rented or sold. There have been variations on this theme, but the foregoing represents his general approach.

[8] Although not clearly articulated, W. provides most of the labour and materials for his building and renovation projects. Likely, there are subcontractors for some trades (eg., electrical; plumbing, etcetera) but he volunteered no particulars. Financing for his construction projects is obtained through mortgages and interim, unsecured loans. Whenever possible, he said, he lives in any renovated residence for at least one year on the assumption he will not be taxed on subsequent disposition. W.'s evidence was that upon a sale he applies the proceeds to any outstanding mortgages or loans taken out for construction costs, and to real estate and legal fees, and to other closing expenses. He stated that the net proceeds from sales are mostly used for other projects.

[9] Unfortunately, for our purposes, W. did not attempt to recapitulate or segregate the amounts “reinvested” from the money he takes for his personal benefit. W. merely said that “it is difficult for me to be specific about how much of the gains from the sale of the above noted properties have been used by me to cover my own living expenses”. If nothing else, this confirms that W. has routinely taken unspecified amounts from the sale proceeds of properties to meet his own financial needs and, more recently, those of his current partner and their child.

[10] W. also broadly stated that the rents he has received from several houses have usually covered his actual carrying costs, but frequently only produced a nominal, net income for him. He did not explain why he continues to build and rent if he is making little or no money; or why he has not raised his rents or otherwise tried to improve his “bottom line” if things are as bad as he says.

Transactions History

[11] Commencing at paragraph 8 of Exhibit 6, W. described the various properties which he has owned since 1998 and their history. I have considered this Exhibit in conjunction with Exhibit 1 which includes a selection of lawyers’ Closing Statements (for purchases and sales) and W.’s income tax returns (included in Exhibits 2 and 7). I have assigned generic identifications below; but they are the same properties, in the same sequence, as they appear in the Exhibit 1. I find as follows:

Lots 4 & 6, M. Drive

The original property was purchased in 1998 with estimated subdivision and development costs exceeding $18,000. W. supplied an unstated amount of personal money. He built a house on 6 M. and occupied it with M. for about two years.

6 M. was sold in late May, 2000 (before the separation) for $124,000. Closing disbursements included realtors, a first mortgage (about $66,450), an interim bank loan (about $23,000) and legal expenses. W. received about $24,400 on the closing.

4 M. was kept as a rental property. It was sold in mid-September, 2006 for $92,000. W. said he spent about $10,000 in renovations before the sale. (He produced no records to prove this.) From the proceeds, he retired a mortgage (about $50,610) and a personal loan ($20,000), and some closing expenses. About $18,900 was received by W. who reported capital gains on the sale of about $4,166 and was taxed on half - $2,083

Lot 34, C. Avenue & Lot 6, B. Street

Lot 34, C. Avenue was purchased in late May, 2000 for $82,000 plus closing costs of about $2,000. W. injected cash (over $25,000) and also had mortgage proceeds of about $59,753 (net) to work with. The property was subdivided, again with W. using his own funds to cover the associated expenses. (M. said they bought the property; and that she later conveyed her interest to him.)

34, C. was sold for $87,000 in early September, 2000 when the parties were on the brink of separation. Before the sale, W. said he completed substantial renovations with estimated costs of about $6,000 (undocumented). Closing Statements show a mortgage payout (about $60,356), payment of realtors and lawyers (about $4,380), and a balance of about $21,777 to W.

According to W., he gave M. $25,000 from the sale which she used as a down-payment for the purchase of a home in Bridgewater. M.'s evidence was that she only received $6,000 from the sale of Lot 34, C. Avenue - not $25,000 - which had been "agreed". That W. received less than $21,200 from the sale casts some doubt on his version. However, neither party introduced any bank or other records to support

their contentions. If there was a dispute, there is no evidence of any formal demands or legal action about it.

W. built a house that became known as 6 B. Street. A small mortgage was placed in March, 2001 (about $20,553 net). It was sold quickly - in April, 2001 for $125,000. After two mortgage payouts (about $91,200) and legal expenses, W. received about $28,127 on closing.

Lot 14, K. Drive and Lot 1B, G. Drive

Lot 14, K. Drive was bought in late June, 2001 for $92,000 and subdivided to create Lot 1B, G. Drive. W. had legal and deed transfer costs on closing. He invested (by deposit and by closing monies) a total of about $26,000; and received mortgage money ($69,000).

W. briefly lived in the Lot 14, K. Drive house, then rented it out, and then sold it in late April, 2002 for $87,000. The turn-around time was less than 12 months. Before the sale, he completed renovations at an estimated cost of $4,000 (undocumented). From the sale proceeds he paid out a mortgage (about $57,700), realtors (about $4,000), and legal bills and incidentals (about $628). He received a cheque for about $24,625 on the closing.

W. built a house on Lot 1B, G. Drive. After Lot 14 was sold in April, 2002, W. said he moved into the house on Lot 1B. He closed a sale in mid-September, 2002 for $135,000. He paid out a mortgage (about $97,225), realtors (about $3,880), and legal expenses (about $558). A cheque for about $29,632 was released to him at the time. The Lot 1B occupation period by W. appears to have been less than six months.

5 H. Road

5 H. Road was bought in March, 2001 for $67,000 plus closing adjustments and closing costs including legal fees etcetera, deed transfer, and taxes totaling about $1,900. The property was mortgaged (net proceeds - $50,250). By my calculation, W. put about $16,750 into the purchase plus his closing expenses. He lived very briefly in the house, renovated it (estimated expenses about $20,000 [not documented]), and then sold it in late June, 2001 for $103,500. The mortgage was paid out (about

$50,861); and he had some legal expenses. The net sale proceeds to W. were about $40,000. On his evidence, his occupation of the house must have been less than four months. (His 2001 personal income tax return is not in the evidence.)

6 & 8 G. Road

G. Road was bought while W. was still living with M. The property was subdivided into 8 and 6 G. Road. The purchase, subdivision and development method was the same as employed for other projects. W. and M. lived in 8 G. Road. It was sold before the end of their relationship.

6 G. was mortgaged for $77,000 in March, 2001. About $55,000 was used to retire another mortgage; there were closing costs (about $600); about $19,000 was directed to another project; and W. received less than $2,300 directly. 6 G. was remortgaged at the end of October, 2002. The earlier mortgage was paid out (about $72,600 at the time); and there were closing expenses. W. received about $19,150 *via* the financing. 6 G. Road was eventually sold in May, 2003 for $118,000. The re-financed mortgage was paid out (about $91,853). W. received about $25,369 from the sale.

31, 31A, 31B, 31C & Lot 10A C. Street

W. bought 31 C. Street in early October, 2003 for $95,000 plus closing costs of just over $2,600. The property was subdivided into five parcels. W. invested about $27,700 at the outset and paid for the development and subdivision costs as on other occasions. A mortgage for $71,250 (net) was put in place.

31 C. Street was sold in early March, 2004 for $70,000. He said he lived in this home before its sale. Renovations had been made with an estimated cost in the range of $15,000 (undocumented). He paid down on the mortgage ($18,840) and incurred some closing costs. About $50,673 was disbursed to him. On his evidence, he lived in this house less than six months.

31B, C. Street was mortgaged in June, 2004 at W.'s expense and sold as a completed house in late July, 2004 for $113,798 plus HST. A mortgage payout took about $80,358 and there were closing costs. The net disbursement to W. was about $45,391. This was the first time W. reportedly charged and collected HST.

Lot 10A, C. Street was sold in early September, 2004 for $28,000 plus HST. W.'s net receipt on closing was about $31,704. This is the second (and last) mention of HST in the evidence.

W. still owns 31A C. Street which is a rental property. He claimed rental income in his 2005 and 2006 tax returns.

787, 785 & 787B W. Road

787 W. Road was purchased in late-June 2002 for $111,500 plus closing expenses, and subdivided into three lots. W. invested about $30,800 and received net mortgage proceeds of $83,625. W. occupied 785 W. Road for about one year and then sold it in July, 2003 for $157,000. On closing he paid about $84,205 to his mortgage company, over $8,000 to realtors, and less than $650 for legal expenses. About $63,000 went to W. on the closing.

Houses were built by him on 787 and 787B W. 787 was rented out and shows in the tax returns for years 2002, 2003 and 2004. 787 was sold In late April, 2004 for $112,500. After payment of realtors, lawyers and the mortgage company ($80,400), W. received about $28,720. His evidence was that he "lost money" on this property, and therefore did not report any capital gains.

W. moved into 787B W. Road and lived there for about two years until it was sold in early January 2005 for $214,500. It had been mortgaged late September, 2004 for about $53,400 (net). [There is a notation that the mortgage proceeds, after expenses, went toward another purchase: see below.] The sale attracted closing expenses of over $11,700, and a mortgage payout of about $129,318. The cheque to him on closing was for approximately $73,573.

234, 234A and 236 W. Road

234 W. Road was bought in late September 2004 for $205,000 plus closing costs and subdivided into three parcels - 236, 234, and 234A W. Road. Closing Statements show he injected about $4,260 at the outset, plus mortgage funds of about ($153,750 net), and that another $52,600 was shunted over from the sale of 787B.

W. said he occupied 236 W. Road for about one year, renovated it, and sold it in early August, 2005 for $205,000. He had placed a mortgage in early January, 2005 for about $79,788 (net), and paid out an earlier small mortgage (about $3,440). After closing expenses, he received about $74,975 from the mortgage. On the sale closing, about $79,835 went to retire the mortgage. Closing costs were about $1,300. W. received about $124,274.

Houses were built on 234 and 234A. When the latter was mortgaged for $155,000 in April, 2007, about $78,458 went to retire a prior mortgage. An unexplained $50,000 went to a named individual; some went to closing costs; and the balance of about $25,590 went to W.

234, reportedly assessed at $164,000, is a rental property; the rental income is demonstrated in his 2006 tax return. As at the hearing, W. was living in 234A W and it was listed for sale at $279,900.

59 and 60 B. Court

W. bought these properties in the mid-1990's. W.'s evidence was that he and M. occupied 59 B. Court before moving into the M. Drive property. (M. thought 60 B. was rented from the outset; and both were rented when she and W. relocated.)

59 B. Court was sold in late May 2006 for $145,000 when a mortgage was paid out (about $11,730) along with closing costs totaling about $4,300. Approximately $128,484 was disbursed to W..

W. still owns 60 B. which is assessed at $147,200 and carries a mortgage in the face amount of $95,000.

7B H. Road

The H. Road property was acquired in 2006 at a cost of $40,000. A house was built and completed in September, 2007. It is now rented. It is mortgage-free; all suppliers have been paid. However, some of the construction costs were financed by increasing the mortgage on 234A W. Road (W.'s principal residence) to $175,000.

(If 7B H. Road is sold, it may be subject to capital gains tax treatment because it has never been occupied by W..)

[12] W. produced a table purporting to illustrate his current holdings and their related market values, outstanding mortgage balances, estimated disposition costs and net worth. I have added some information. [M. provided photographs in Exhibit 5(b)].

Property	**Market Value (Estimate)**	**Outstanding Mortgage Balance**	**Estimated Cost of disposition**	**Net Worth**
234A W. Road (Principal res.)	$259,900 (Listed for sale at $279,900)	$155,000	$18,777	$86,123
60 B. Court	$140,000	$ 80,000	$10,576	$49,424
234 W. Road	$175,000	$150,000	$12,970	$12,030
31A C. Street	$ 80,000	$ 45,000	$ 6,472	$28,528
7B H. Road	$175,000	House construction Financed through Mortgage on 234 A W. Road	$12,970	$162,030
Total	**$829,900**	**$430,000**	**$61,765**	**$338,135**

Income Tax Return History

[13] Both counsel acknowledged that what is accepted as income for tax purposes may not be accepted by the court for **CMG** purposes. W.'s counsel conceded that his client "has partially supported himself using funds that do not appear as part of line 150 of his T1 General form submitted annually to Canada Revenue Agency", and that the

"challenge in this matter is to fairly approximate the Respondent's equivalent pre-tax income for the Guideline calculation".

[14] Regarding W.'s returns, I find as follows:

2002

W.'s 2002 personal income tax return was prepared by a chartered accountant. Demonstrated Line 150 income was about $27,350, of which about $15,381 was from employment, $8,500 was from e.i. benefits and only $1,100 was net rental income. Gross rental receipts were $14,400 against which he claimed approximately $14,118 for expenses. The bulk of the expenses were related to loan interest ($11,500).

Two properties were sold by W. in 2002 (14K. and 1B G), from which he received a total of over $54,000. There is no mention of them in his return. However, as mentioned, W. asserted occupation of both during the year, albeit ten months at one and less than six months at the other.

787 W. Road was purchased in 2002; no purchase or other costs were claimed.

2003

The 2003 return was prepared by a chartered accountant. Line 150 income was approximately $12,800. Employment income took an unexplained drop to just $500.

Although reported rental income from 787 W. Road was only $2,800; approximately $9,900 in expenses were claimed. The result was a net loss exceeding $7,100 for this property. The most significant expenses included loan interest ($4,200), maintenance and repairs ($2,746), property taxes ($1,200), and a furnace lease ($1,125).

The same return demonstrates M. Drive rental income of $7,200 against expenses of approximately $6,500, the bulk of which is related to loan interest ($3,566), maintenance and repairs ($1,373) and property taxes ($1,000). Reported net income was less than $680.

Rental income from 59-60 B (two units) was $15,750. Net income from these was disclosed as approximately $5,000, after loan interest (about $5,700), maintenance and repairs ($2,143), property taxes ($1,900), etcetera

W. also filed a Statement of Business Activities in 2003 in which he disclosed total "sales" of $20,000 (from self-employment). His deducted motor vehicle expenses ($5,924) and a vehicle capital cost allowance ($4,300). Presumably related to a home office, W. also claimed some household expenses as business expenses. Two hundred square feet of a 1,400 square foot home were allocated for this purpose to arrive at a $950 deduction. Net self-employment income was reported as approximately $13,100.

785 W. and 6 G. were sold in 2003. There is no reference to either in the return. There is some evidence of occupation of one (785 W.), and pre-separation occupation of the other. 31 C. Street was purchased in 2003; no expenses were claimed.

Cash receipts from the two sales was about $88,370. W. paid less than $1,100 in income tax for the year.

2004

W.'s 2004 tax return was prepared by a chartered accountant. Line 150 income was demonstrated as approximately $5,100. W. reported no employment income (other than from self-employment). There was no explanation.

W.'s Statement of Real Estate Rentals included rental income from 59-60 B. of $15,750 (the same as the previous year). $10,870 was claimed for expenses. Net income of approximately $4,881 was declared from the property. M. Drive rental income of $7,200 was offset with expenses of approximately $6,450. Reported net income from this property was about $750. Rental income of $700 from 787 W. Road attracted expenses of approximately $2,466, generating a net loss of approximately $1,766 that year.

Total net rents from all of the foregoing properties therefore came in at about $3,870.

W.'s Statement of Business Activities included gross income of approximately $13,773. Significant motor vehicle expenses were again claimed ($6,428), plus a vehicle capital cost allowance of about $5,355. "Business-use-of-home" expenses of about $950 were claimed. The resulting net income figure was only about $840.

No significant capital gains or losses were reported even though there were four sales in 2004 including 31 C. Street, 31B. C. Street, 10A. C. Street, and 787B W. Road.

Without a properly completed Gains/Loss Schedule and with no testimony from the return-preparer, I am unable to reconcile the figures in W.'s Closing Statements (discussed above) with the worksheet data (Exhibit 2, Tab 6F). However, regarding 31B., W. wrote it was "sold with Lot 31C (which is not identified on the Statement of Adjustments but is referred to on the 2004 income tax return Capital Gains Working Sheet)". This narrative may help explain the Closing Statement; but the evidence is that occupation of the house on 31C was for only about six months, and that the 31B was a separate, approved building lot.

Regarding 787 W., W. simply stated he lost money on it and therefore decided not to mention it in his return. This assertion is unsupported by any calculations or documents. W. bought 234 W. in 2004; he claimed no acquisition expenses.

Total cash receipts by W. from the sales in this tax year exceeded $156,000. He paid no income tax.

2005

W. claimed a line 150 income "loss" of approximately $6,740. His return was prepared by an accounting service.

The Statement of Real Estate Rentals included references to 59-60 B., 4 M., and 31A C. Street. Gross rentals of $24,600 were offset with claimed expenses of approximately $25,871. As in the past, the most significant expenses claimed included interest ($12,271), maintenance repairs, etcetera ($6,982) and property taxes ($4,100).

W.'s gross income from his construction business was disclosed at a meager $728 but, after expenses, a net loss of about $5,894 was claimed. He reported no employment income; no explanations were given.

Property sales in 2005 included 787B W. Road and 236 W. Road. There are no references to them in the Capital Gains/Losses Schedule which he submitted with his return. There is some evidence that he had occupied one property for about one year, and the other for more than one year, but W. did nor commit to any precise dates.

His cash receipts from the sales were over $197,800. W. paid no income tax.

2006

W. reported line 150 income was $9,175. In arriving at that figure, he reported employment income of about $13,300 plus some modest investment income. The reappearance of "employment income" was unexplained.

Taxable capital gains were disclosed at less than $2,100; and a net loss from self-employment income was claimed at approximately $7,800. An income tax refund in excess of $4,000 was claimed.

The Statement of Business Activities from self-employment shows expenses of almost $11,800 against gross income of only $4,000. A vehicle capital cost allowance of almost $3,500 was claimed along with exceptionally high telephone and utilities ($3,351) and bad debts of almost $1,900, none of which were explained.

The capital gains component relates to the sale of 4 M. Drive which had been acquired in 1998. Schedule 3 discloses $94,000 received as proceeds of disposition. An adjusted cost base of $80,800 plus disposition expenses of $1,205 were utilized to arrive at a calculated gain of approximately $3,992, half of which was subject to taxation. Also sold in 2006 was 59 B. There is no reference to this property in the return. When asked about this, W. said he had lived there for "a few months" and therefore did not have to report it.

7B H. Road was bought in 2005; no purchase or related expenses were claimed.

In a Statement of Real Estate Rentals, total gross rentals were disclosed at $20,600 from 60 B., 234 W. Road, and 31A C. Expenses of $20,470 included major expenses for interest, improvements, taxes, and insurance. Net income was shown as less than $130.

W. claimed close to $2,000 as allowable medical expenses in 2006.

Total cash disbursements to W. receipts from the two sales were over $147,380. He paid no income tax.

Income Tax Treatment of Owner Builder Residences

[15] The **Income Tax Act (Canada)** has provisions which lay down the technical rules for “owner builders” and the circumstances under which gains from sales will be treated as income gain versus capital gain, the taxation rates for the respective income types, the factors to be considered when characterizing gains, the principal residence exemption, etcetera There is also a smattering of Interpretation Bulletins (IT-120; IT-218; and IT-459) and Guides (T4037).

[16] M.’s counsel argued that W. has sheltered large amounts of “true income” under the guise of exemptions, plus gains at reduced tax rates, plus unrealized capital gains. Further, it was submitted, there are examples of income (from transactions) which have been arbitrarily disregarded.

[17] In the same vein, M. alleged that W. neither collects nor remits HST despite his many sales and other business activities. This is not entirely accurate because, as already noted, W.’s closing statements do indicate that HST was charged and collected on the sales of 31 B, C Street and Lot 10 A, C Street in 2004. However, these are the only references to HST. It is conceivable that his stance on HST for some years is somehow linked to his stance on principal residence exemption for gains purposes; but there was no testimony directed to the subject. (Nor was any evidence directed to the issue of whether he deducted HST paid by him as a business expense, in those years in which he did not collect or remit HST.)

Implications for CMG Purposes

[18] It is not for this court to “re-assess” W.’s personal income tax returns. However, from the evidence, some features of his owner/builder activities should be highlighted for **CMG** purposes.

[19] The dollar value of the transactions and cash disbursements to W. is striking: since 2001, annual total sales have not been less than $222,000; and once topped $419,000; annual cash disbursements to W. have ranged from $54,000 to almost $200,000.

[20] On the limited and conflicting evidence before me, that I have been unable to determine with certainty which of W.’s many properties were bought or built with the intention of sale at a profit at the earliest opportunity. That said, few of W.’s houses appear to have been bought or built with the intention of living in them for the long term.

[21] With limited exceptions, the principal residence exemption for tax purposes is limited to one designation annually. From the evidence, W. has occupied some houses before selling them. But, the occupation histories were vaguely and imprecisely explained, and undocumented. The occupation of several has been so brief as to suggest the primary intention was to sell at the earliest opportunity for a profit - not to establish principal residency. And, there are instances of multiple and/or conflicting designations within the same years.

[22] There is a history of frequent and similar transactions. There were two sales, each and every year, from 2001 onward with no disclosed gains - except in 2004 in which there were four sales, and in 2006 when there were two. Non-disclosure (to the Canada Revenue Agency) of the sales of some properties hinges solely on W.’s undocumented assertions that he “lost money”.

[23] W.’s trade (carpenter) is closely linked to all of his dealings. The overall development scheme, coupled with repetitive financing to buy and to build *via* mortgages

and private loans with payouts on sale, is not inconsistent with that which one would expect of a company or individual doing so for profit.

Other Evidence from W.

[24] W. wrote that he understands and accepts that his use of the net proceeds of the sale of his properties is relevant to the question of what his income is for calculating his child support. He stated (Exhibit 6, paragraph 9) as follows:

> ...I believe that most of the net proceeds of sale of the above-noted properties was [sic] used to finance the purchase, subdivision, renovation and/or construction of other properties. There is no doubt that some of the equity I built up in these properties was used to supplement my income over the years in question. However, I have always lived frugally and spend very little on myself. My objective over the years has been to build up equity in my properties. Most of what I have managed to build up is reflected in the current net worth of the five properties I own.

[25] To that end, W. confirmed his estimated net worth as at the hearing was just over $338,000, inclusive of his rental properties and principal residence. In addition to these properties, W. also owns a small registered investment worth about $25,000, a truck, a motorcycle, and the contents of his home. He has two bank accounts which usually have sufficient balances to cover his mortgages and other expenses related to his properties.

[26] W. was surprisingly uninformed regarding the details of most of his tax returns. His evidence was that he turns over his records, as need be, to his chartered accountants (more recently, “accounting services” providers) who prepare his statements and returns. When pressed, he stated he does not pay much attention to the work of his accountants, does not know what the accountants “throw in”, and that he does not pay much attention to their work. Knowing that his business practices, his records and

returns would receive close scrutiny at the hearing, his flip comments do not reflect favourably on him and do nothing to answer many legitimate questions raised by M.

[27] Unfortunately, none of W.'s past or present accountants testified. And M. did not challenge W.'s evidence through her own experts. As a consequence, there are still lots of unanswered questions surrounding capital gains treatment (actual and potential) of the realty purchases and dispositions, allocation of business expenses among various projects and between tax years, the segregation of "proprietorship" versus personal income/expenses and assets/liabilities, management of his rental properties, the vexing task tracing W.'s cash flow between personal and business interests, etcetera.

M.'s Circumstances

[28] In my first decision, M.'s past and current circumstances were broadly reviewed. I found that after the separation and about seventeen years in the Dartmouth/Halifax metropolitan area, M. relocated to Bridgewater. She had worked in an insurance claims office and elsewhere in Metro. She volunteered no explanation for the move. Her local education and employment efforts were noted. She now works in the office of a local non-profit organization.

[29] M. disclosed increasing financial difficulties in the intervening years, many of which were not directly linked to her daughter's financial needs or W.'s alleged shortfall in meeting his child support obligations. I find the Bridgewater residence and her motor vehicles have drained M.'s resources. Unlike W., M. did not enter into evidence a detailed Statement of Income and Expenses or a Financial Statement summarizing her current assets and liabilities.

[30] In her final affidavit (Exhibit 5a) , M. wrote that in September, 2000 she withdrew $20,000 out of her RRSP deposits to make the down-payment on her home purchase. The loan was under the Home Buyer's Plan (HBP). She wrote that a payment of

$1,333.33 would be added to her income for 15 years starting in 2002, thereby attracting increased tax liability each year. I judicially notice that under the HBP, home owners who borrow money from their own RRSP's may repay or replenish their RRSP's by annual equal installments and incur no tax liability (and derive no further tax benefit), failing which the annual sum is added to the tax payers income. M. elected to add the un-repaid annual sums to her annual income for tax purposes.

[31] In her recent tax returns, M. has not segregated that portion of her RRSP income which has been added to reflect "repayment" under the HBP from other withdrawals she has taken from the unstated balance of her RRSP deposits. For, example, M.'s 2003 return shows RRSP income of approximately $4,600. For our purposes, I find that approximately $1,333 that year was for HBP repayment; and that the balance reflects other withdrawals which had to be added to her taxable income. This analysis is consistent with M.'s assertions that in 2003 she withdrew about $3,000 from her RRSP's for car repairs, and a credit card debt; and that in 2004 she withdrew a further $3,000 from her RRSP's to make similar expenditures.

[32] According to M., during the summer of 2004 she asked W. if he would construct a patio for her. She asserts that he ignored her request although, I find, he was under no legal obligation to assist her with such a project. W. did instal some outside steps with her materials but she said the work did not meeting Building Code requirements and had to be replaced. At some point, W. also supplied M. with laminate flooring for her residence (which she suggested was diverted from a house he was building). In any event, in order to make some house repairs, to construct a new front porch, and to complete unspecified vehicle repairs, her evidence is that she refinanced and increased her mortgage to $55,000. In 2006, she refinanced her mortgage again, thereby increasing it to approximately $78,750. She attributes the second refinancing to the need to purchase another vehicle. Her current mortgage (taken out in April, 2006) is amortized over 25 years. M. also wrote that she found it necessary to upgrade the heating system in her home and purchased a new heating system at a cost of about $3,700.

[33] M. made passing reference to her “former boyfriend” when discussing her Bridgewater residence. There was no evidence as to whether she and he cohabited at any material time or his role, if any, in her financial situation and that of her daughter.

[34] From her income tax records, M.’s income history is as follows: **2001** - total income: $13,126; **2002** - total income: $16,776; **2003** - total income: $26,671.66, inclusive of employment income ($11,2500), e.i. benefits ($5,526), and RRSP withdrawals and repayment ($4,666.66); **2004** - total income: $28,633.33, inclusive of RRSP income ($4,333.33); **2005** - total income $25,529.59, inclusive of RRSP income ($1,333.33); **2006** - total income $25,087. M. stated her 2007 employment income would be about $26,400 - about twice the amount it was eight years ago, but still quite modest.

[35] There was limited evidence from M. in regard to A.’s so-called “extra-ordinary expenses”, for the purposes of the section 7 **CMG** claims. However, appended to Exhibit 5, is a Statement dated July 23, 2007 purporting to summarize some current expenses which are mainly related to competitive sports. In testimony, she briefly elaborated that A. has been involved with soccer and Tai-Kwon-Do (TKD); and that she would like to become involved in cheer-leading. M. was unable to state the associated expenses with any precision but gave an all-inclusive estimate of about $1,000 annually which W. did not seriously challenge. In her July 23, 2007 demand to W., she used a figure of $599.07, of which she allocated about $308 to W. as his share. (However, that figure only refers to TKD costs.) She did not quantify or prove by statements or receipts any similar section 7 amounts she paid in the intervening years for which she may have asked for assistance; nor did she recapitulate W.’s contributions (or lack thereof). Currently, no child care expenses are being incurred. Although there is no proof of past expense payments under this heading; she asserted that when making requests for more money “every other month or so”, she told W. about day care costs of “at least $170 per month”.

[36] M. confirmed that although she has no medical insurance through her current employment, A. has no immediate or anticipated medical expenses. She conceded that W. paid the total outstanding orthodontist's bills, albeit later than she wished. When reminded of her own proposal that the retroactive claim for basic child support would be waived if this expense was taken care of, M. countered that her waiver was conditional on final settlement of current child support plus an airtight mechanism for ongoing payment of section 7 expenses. (She did not mention that such expenses are normally shared by parents, in proportion to their respective incomes).

[37] M. acknowledged her settlement proposal for basic support in the range of $400 monthly was based on her best estimate of W.'s income based on her knowledge of his business affairs during their cohabitation, her knowledge of his lifestyle, and her understanding that W.'s income for **CMG** purposes was likely higher than that for **Income Tax Act** purposes. There was no evidence from her, or her former lawyers, alleging that (before commencement of the current application) any formal demands for disclosure of income or assets were resisted or ignored. Although I inferred in my first decision that the financial disclosure sought and obtained by M.'s present counsel after the start of proceedings was comparatively greater than in the possession of her last lawyer, and that the ultimate disclosures were necessary for the court to conduct a proper support assessment, there was no evidence and no submission that the professional advice that M. obtained in 2000, or in 2005 - 2006, was inadequate or incompetent. (By agreement, affidavits were submitted on behalf of the former lawyers who did not testify. Consequently, I made no assessment of competence or credibility.)

Analysis

The Legislative Framework

[38] Under section 8 of the **MCA** everyone who is a parent of a child under the age of majority is "under a legal duty to provide reasonable needs for the child except where there is a lawful excuse for not providing the same". To state the obvious, both M. and

W. are obliged to contribute to their daughter's financial needs. Under section 10, when determining the amount of maintenance to be paid, the court must do so in accordance with the **Child Maintenance Guidelines** (**CMG**). The court may make child support orders for a definite or indefinite period of time, or until a specified event occurs; the court may also impose terms, conditions or restrictions as the court "thinks fit and just". A court may award an amount that is different from the amount that would be determined in accordance with the **CMG** if there are special provisions in an order, judgment or written agreement which benefit a child or special provisions have otherwise been made for the child's benefit and the application of the **CMG** would result in a child support quantum that is inequitable given those provisions. In the present case, there are no special provisions in any order or written agreement between the parties. In the same vein, under section 10(5), the court may make an award different from the amount determined under the **CMG** with consent provided the court is satisfied that reasonable arrangements have been made for child maintenance. Again, there is no consent in the present case.

[39] Under section 37 of the **MCA**, the court is granted specific authority to make prospective or retroactive awards where there has been a change in circumstances. There is no comparable section granting specific authority to make retroactive awards in originating applications; but neither are there any constraints on the court's authority to do so when giving effect to section 8.

[40] The objectives of the **CMG** are to establish a fair standard of maintenance for children that ensures that they benefit from the financial means of both parents, to reduce conflict and tension between parents by making the calculation of child maintenance orders more objective, to improve the efficiency of the legal process by giving courts and parents guidance in setting the levels of child maintenance orders and encouraging settlement, and to ensure consistent treatment of parents and children who are in similar circumstances.

[41] Under **CMG** section 3, unless otherwise provided, the amount of child support is the amount set out in the applicable table, plus the amount, if any, determined under **CMG** section 7. Section 7 is reproduced in full:

> Special or extraordinary expenses
>
> 7. (1) In a child support order the court may, on either spouse's request, provide for an amount to cover all or any portion of the following expenses, which expenses may be estimated, taking into account the necessity of the expense in relation to the child's best interests and the reasonableness of the expense in relation to the means of the spouses and those of the child and to the family's spending pattern prior to the separation:
>
> (a) child care expenses incurred as a result of the custodial parent's employment, illness, disability or education or training for employment;
>
> (b) that portion of the medical and dental insurance premiums attributable to the child;
>
> (c) health-related expenses that exceed insurance reimbursement by at least $100 annually, including orthodontic treatment, professional counselling provided by a psychologist, social worker, psychiatrist or any other person, physiotherapy, occupational therapy, speech therapy and prescription drugs, hearing aids, glasses and contact lenses;
>
> (d) extraordinary expenses for primary or secondary school education or for any other educational programs that meet the child's particular needs;
>
> (e) expenses for post-secondary education; and
>
> (f) extraordinary expenses for extracurricular activities.
>
> Definition of "extraordinary expenses"
>
> (1.1) For the purposes of paragraphs (1)(d) and (f), the term "extraordinary expenses" means
>
> (a) expenses that exceed those that the spouse requesting an amount for the extraordinary expenses can reasonably cover, taking into account that spouse's income and the amount that the spouse would receive under the applicable table or,

where the court has determined that the table amount is inappropriate, the amount that the court has otherwise determined is appropriate; or

(b) where paragraph (a) is not applicable, expenses that the court considers are extraordinary taking into account

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

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

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

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

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

Sharing of expense

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

Subsidies, tax deductions, etcetera

(3) Subject to subsection (4), in determining the amount of an expense referred to in subsection (1), the court must take into account any subsidies, benefits or income tax to the expense.

Universal child care benefit

(4) In determining the amount of an expense referred to in subsection (1), the court shall not take into account any universal child care benefit or any eligibility to claim that benefit.

[42] Because W.'s income is critical to any award, the relevant sections of the **CMG** are also reproduced below

Determination of annual income

15. (1) Subject to subsection (2), a spouse's annual income is determined by the court in accordance with sections 16 to 20.

Agreement

(2) Where both spouses agree in writing on the annual income of a spouse, the court may consider that amount to be the spouse's income for the purposes of these Guidelines if the court thinks that the amount is reasonable having regard to the income information provided under section 21.

Calculation of annual income

16. Subject to sections 17 to 20, a spouse's annual income is determined using the sources of income set out under the heading "Total income" in the T1 General form issued by the Canada Revenue Agency and is adjusted in accordance with Schedule III.

Pattern of income

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

Non-recurring losses

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

Imputing income

19. (1) The court may impute such amount of income to a spouse as it considers appropriate in the circumstances, which circumstances include the following:

(a) the spouse is intentionally under-employed or unemployed, other than where the under-employment or unemployment is required by the needs of a child of the marriage or any child under the age of majority or by the reasonable educational or health needs of the spouse;

> (b) the spouse is exempt from paying federal or provincial income tax;
>
> (c) the spouse lives in a country that has effective rates of income tax that are significantly lower than those in Canada;
>
> (d) it appears that income has been diverted which would affect the level of child support to be determined under these Guidelines;
>
> (e) the spouse's property is not reasonably utilized to generate income;
>
> (f) the spouse has failed to provide income information when under a legal obligation to do so;
>
> (g) the spouse unreasonably deducts expenses from income;
>
> (h) the spouse derives a significant portion of income from dividends, capital gains or other sources that are taxed at a lower rate than employment or business income or that are exempt from tax; and
>
> (I) the spouse is a beneficiary under a trust and is or will be in receipt of income or other benefits from the trust.
>
> Reasonableness of expenses
>
> (2) For the purpose of paragraph (1)(g), the reasonableness of an expense deduction is not solely governed by whether the deduction is permitted under the Income Tax Act.

[43] M.'s case largely hinges on the application sections 17. (1) and 19. (1) (d). Looking at all of the evidence, I find that sections 19. (1) (e), (g), and (h) are also relevant. (The exemplified circumstances under section 19 are not exhaustive in any event.)

Retroactive Child Support

[44] The leading case is **D.B.S. v. S.R.G.; L.J.W. *v.* T.A.R.; Henry *v.* Henry; Hiemstra *v.* Hiemstra** 2006 SCC 37. I will highlight some portions of the judgment of Bastarache, J., writing for the majority, which are particularly relevant to the present case. (My emphasis.):

> 1 The present appeals involve the parental obligation to support one's children, and the question of whether this obligation compels parents to make child support payments for

periods of time when the responsibility to do so was never identified, much less enforced. This question will arise when the parent receiving child support (the “recipient parent”) determines that (s)he should have been paid greater amounts than (s)he actually received, despite the fact that no court order or separation agreement provided for these higher payments. These appeals do not concern the non-payment of arrears; they concern the enforceability and quantification of support that was neither paid nor claimed when it was supposedly due.

...

4 ... Whatever the outcome of these individual cases, the ultimate goal must be to ensure that children benefit from the support they are owed at the time when they are owed it. Any incentives for payor parents to be deficient in meeting their obligations should be eliminated.

Against this backdrop, it becomes clear that retroactive awards cannot simply be regarded as exceptional orders to be made in exceptional circumstances. A modern approach compels consideration of all relevant factors in order to determine whether a retroactive award is appropriate in the circumstances. Thus, while the propriety of a retroactive award should not be presumed, it will not only be found in rare cases either. Unreasonable delay by the recipient parent in seeking an increase in support will militate against a retroactive award, while blameworthy conduct by the payor parent will have the opposite effect. Where ordered, an award should generally be retroactive to the date when the recipient parent gave the payor parent effective notice of his/her intention to seek an increase in support payments; this date represents a fair balance between certainty and flexibility.

...

56 ... Except where a court is already seized of a divorce or separation matter, the court’s jurisdiction over child support payments will arise only upon application by a person authorized pursuant to the legislation ... Accordingly, a parent’s child support obligation will only be *enforceable* once an application to a court has been made. This policy choice means that the responsibility of ensuring that the proper amount of support is being paid, in practice, does not lie uniquely with the payor parent.

...

59 Still, the fact that the current child care regime is application-based does not preclude courts from considering retroactive awards ...

60 No child support analysis should ever lose sight of the fact that support is the right of the child ... Where one or both parents fail to vigilantly monitor child support payment amounts, the child should not be left to suffer without a remedy... Thus, while an application is a necessary trigger to the court’s jurisdiction, the court may still retain the power to make a retroactive order once it is properly seized of a matter.

...

5.2.2.3 *Awarding Retroactive Support Where There Has Not Already Been a Court Order for Child Support to Be Paid*

80 Unlike the previous two situations, in this third one, the *status quo* does not involve any existing payment of child support. This fact immediately differentiates the present context in a very important way: absent special circumstances (e.g., hardship or *ad hoc* sharing of expenses with the custodial parent), it becomes unreasonable for the non-custodial parent to believe (s)he was acquitting him/herself of his/her obligations towards his/her children. The non-custodial parent’s interest in certainty is generally not very compelling here.

...

82 In my view, the legislatures left it open for courts to enforce obligations that predate the order itself. This interpretation is consistent with the *Guidelines*, which are meant to "establish a fair standard of support for children that ensures that they continue to benefit from the financial means of both spouses after separation" (s. 1(*a*)). So long as the court is only enforcing an obligation that existed at the relevant time, and is therefore not making a retroactive order in the true sense, I see no reason why courts should be denied the option of making this sort of award.

...

84 As is the case for awards varying existing court orders and awards altering previous child support agreements between the parents, courts will have the power to order original retroactive child support awards in appropriate circumstances

....

5.3 *Factors to Determine Whether Retroactive Child Support Should Be Ordered*

94 The foregoing analysis only confirms that courts ordering child support will generally have the power to order it retroactively. But having determined that a court may order a retroactive child support award, it becomes necessary to discuss when it should exercise that discretion.

95 It will not always be appropriate for a retroactive award to be ordered. 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. Retroactive awards may also cause hardship to a payor parent in ways that a prospective award would not. In short, while a free-standing obligation to support one's children must be recognized, it will not always be appropriate for a court to enforce this obligation once the relevant time period has passed.

...

97 Lest I be interpreted as discouraging retroactive awards, I also want to emphasize that they need not be seen as exceptional. It cannot only be exceptional that children are returned the support they were rightly due. Retroactive awards may result in unpredictability, but this unpredictability is often justified by the fact that the payor parent chose to bring that unpredictability upon him/herself. A retroactive award can always be avoided by appropriate action at the time the obligation to pay the increased amounts of support first arose.

...

99 I will now proceed to discuss the factors that a court should consider before awarding retroactive child support. None of these factors is decisive. For instance, it is entirely conceivable that retroactive support could be ordered where a payor parent engages in no blameworthy conduct. Thus, the British Columbia Court of Appeal has ordered retroactive support where an interim support award was based on incorrect financial information, even though the initial underestimate was honestly made: see *Tedham v. Tedham* (2003), 20 B.C.L.R. (4th) 56, 2003 BCCA 600. At all times, a court should strive for a holistic view of the matter and decide each case on the basis of its particular factual matrix.

5.3.1 Reasonable Excuse for Why Support Was Not Sought Earlier

100 The defining feature linking the present appeals is that an application for child support — either as an original order or a variation — could have been made earlier, but was not.

The circumstances that surround the recipient's choice (if it was indeed a voluntary and informed one) not to apply for support earlier will be crucial in determining whether a retroactive award is justified.

101 Delay in seeking child support is not presumptively justifiable. At the same time, courts must be sensitive to the practical concerns associated with a child support application. They should not hesitate to find a reasonable excuse where the recipient parent harboured justifiable fears that the payor parent would react vindictively to the application to the detriment of the family. Equally, absent any such an anticipated reaction on the part of the payor parent, a reasonable excuse may exist where the recipient parent lacked the financial or emotional means to bring an application, or was given inadequate legal advice: see *Chrintz v. Chrintz* (1998), 41 R.F.L. (4th) 219 (Ont. Ct. (Gen. Div.)), at p. 245. On the other hand, a recipient parent will generally lack a reasonable excuse where (s)he knew higher child support payments were warranted, but decided arbitrarily not to apply.

102 Not awarding retroactive child support where there has been unreasonable delay by the recipient parent responds to two important concerns. The first is the payor parent's interest in certainty. Generally, where the delay is attributable to unreasonableness on the part of the recipient parent, and not blameworthy conduct on the part of the payor parent, this interest in certainty will be compelling. Notably, the difference between a reasonable and unreasonable delay often is determined by the conduct of the *payor* parent. A payor parent who informs the recipient parent of income increases in a timely manner, and who does not pressure or intimidate him/her, will have gone a long way towards ensuring that any subsequent delay is characterized as unreasonable: compare *C. (S.E.) v. G. (D.C.)*. In this context, a recipient parent who accepts child support payments without raising any problem invites the payor parent to feel that his/her obligations have been met.

103 The second important concern is that recipient parents not be encouraged to delay in seeking the appropriate amount of support for their children. From a child's perspective, a retroactive award is a poor substitute for past obligations not met. Recipient parents must act promptly and responsibly in monitoring the amount of child support paid: see *Passero v. Passero*, [1991] O.J. No. 406 (QL) (Gen. Div.). Absent a reasonable excuse, uncorrected deficiencies on the part of the payor parent that are known to the recipient parent represent the failure of *both* parents to fulfill their obligations to their children.

104 In deciding that unreasonable delay militates against a retroactive child support award, I am keeping in mind this Court's jurisprudence that child support is the right of the child and cannot be waived by the recipient parent: *Richardson*, at p. 869. In fact, I am not suggesting that unreasonable delay by the recipient parent has the effect of eliminating the payor parent's obligation. Rather, unreasonable delay by the recipient parent is merely a factor to consider in deciding whether a court should exercise its discretion in ordering a retroactive award. This factor gives judges the opportunity to examine the balance between the payor parent's interest in certainty and fairness to his/her children, and to determine the most appropriate course of action on the facts.

5.3.2 Conduct of the Payor Parent

105 This factor approaches the same concerns as the last one from the opposite perspective. Just as the payor parent's interest in certainty is most compelling where the recipient parent delayed unreasonably in seeking an award, the payor parent's interest in certainty is least compelling where (s)he engaged in blameworthy conduct. Put differently, this factor combined with the last establish that each parent's behaviour should be

considered in determining the appropriate balance between certainty and flexibility in a given case.

106 Courts should not hesitate to take into account a payor parent's blameworthy conduct in considering the propriety of a retroactive award. Further, I believe courts should take an expansive view of what constitutes blameworthy conduct in this context. I would characterize as blameworthy conduct anything that privileges the payor parent's own interests over his/her children's right to an appropriate amount of support. A similar approach was taken by the Ontario Court of Appeal in *Horner v. Horner* (2004), 72 O.R. (3d) 561, at para. 85, where children's broad "interests" — rather than their "right to an appropriate amount of support" — were said to require precedence; however, I have used the latter wording to keep the focus specifically on parents' support obligations. Thus, a payor parent cannot hide his/her income increases from the recipient parent in the hopes of avoiding larger child support payments: see *Hess v. Hess* (1994), 2 R.F.L. (4th) 22 (Ont. Ct. (Gen. Div.)); *Whitton v. Shippelt* (2001), 293 A.R. 317, 2001 ABCA 307; *S. (L.)*. A payor parent cannot intimidate a recipient parent in order to dissuade him/her from bringing an application for child support: see *Dahl v. Dahl* (1995), 178 A.R. 119 (C.A.). And a payor parent cannot mislead a recipient parent into believing that his/her child support obligations are being met when (s)he knows that they are not.

107 No level of blameworthy behaviour by payor parents should be encouraged. Even where a payor parent does nothing active to avoid his/her obligations, (s)he might still be acting in a blameworthy manner if (s)he consciously chooses to ignore them. Put simply, a payor parent who knowingly avoids or diminishes his/her support obligation to his/her children should not be allowed to profit from such conduct: see *A. (J.) v. A. (P.)* (1997), 37 R.F.L. (4th) 197 (Ont. Ct. (Gen. Div.)), at pp. 208-9; *Chrintz*.

108 On the other hand, a payor parent who does not increase support payments automatically is not necessarily engaging in blameworthy behaviour. Whether a payor parent is engaging in blameworthy conduct is a subjective question. But I would not deny that objective indicators remain helpful in determining whether a payor parent is blameworthy. For instance, the existence of a reasonably held belief that (s)he is meeting his/her support obligations may be a good indicator of whether or not the payor parent is engaging in blameworthy conduct. In this context, a court could compare how much the payor parent should have been paying and how much (s)he actually did pay; generally, the closer the two amounts, the more reasonable the payor parent's belief that his/her obligations were being met....

109 Finally, I should also mention that the conduct of the payor parent could militate against a retroactive award. A court should thus consider whether conduct by the payor parent has had the effect of fulfilling his/her support obligation. For instance, a payor parent who contributes for expenses beyond his/her statutory obligations may have met his/her increased support obligation indirectly. I am not suggesting that the payor parent has the right to choose how the money that should be going to child support is to be spent; it is not for the payor parent to decide that his/her support obligation can be acquitted by buying his/her child a new bicycle: see *Haisman v. Haisman* (1994), 22 Alta. L.R. (3d) 56 (C.A.), at paras. 79-80. But having regard to all the circumstances, where it appears to a court that the payor parent has contributed to his/her child's support in a way that satisfied his/her obligation, no retroactive support award should be ordered.

5.3.3 Circumstances of the Child

110 A retroactive award is a poor substitute for an obligation that was unfulfilled at an earlier time. Parents must endeavour to ensure that their children receive the support they deserve when they need it most. But because this will not always be the case with a retroactive award, courts should consider the present circumstances of the child — as well as the past circumstances of the child — in deciding whether such an award is justified.

111 A child who is currently enjoying a relatively high standard of living may benefit less from a retroactive award than a child who is currently in need. As I mentioned earlier, it is a core principle of child support that, after separation, a child's standard of living should approximate as much as possible the standard (s)he enjoyed while his/her parents were together. Yet, this kind of entitlement is impossible to bestow retroactively. Accordingly, it becomes necessary to consider other factors in order to assess the propriety of a retroactive award. Put differently, because the child must always be the focus of a child support analysis, I see no reason to abstract from his/her present situation in determining if a retroactive award is appropriate.

112 Consideration of the child's present circumstances remains consistent with the statutory scheme. While Parliament has moved away from a need-based perspective in child support, it has still generally retained need as a relevant consideration in circumstances where a court's discretion is being exercised: see ss. 3(2)(*b*), 4(*b*)(ii) and 9(*c*) of the *Guidelines*....

113 Because the awards contemplated are retroactive, it is also worth considering the child's needs at the time the support should have been paid. A child who underwent hardship in the past may be compensated for this unfortunate circumstance through a retroactive award. On the other hand, the argument for retroactive child support will be less convincing where the child already enjoyed all the advantages (s)he would have received had both parents been supporting him/her ... This is not to suggest that the payor parent's obligation will disappear where his/her children do not "need" his/her financial support. Nor do I believe trial judges should delve into the past to remedy all old familial injustices through child support awards; for instance, hardship suffered by other family members (like recipient parents forced to make additional sacrifices) are irrelevant in determining whether retroactive support should be owed to the child. I offer these comments only to state that the hardship suffered by children can affect the determination of whether the unfulfilled obligation should be enforced for their benefit.

5.3.4 Hardship Occasioned by a Retroactive Award

114 While the *Guidelines* already detail the role of undue hardship in determining the quantum of a child support award, a broad consideration of hardship is also appropriate in determining whether a retroactive award is justified.

115 There are various reasons why retroactive awards could lead to hardship in circumstances where a prospective award would not. For instance, the quantum of retroactive awards is usually based on past income rather than present income; in other words, unlike prospective awards, the calculation of retroactive awards is not intrinsically linked to what the payor parent can currently afford. As well, payor parents may have new families, along with new family obligations to meet. On this point, courts should recognize that hardship considerations in this context are not limited to the payor parent: it is difficult to justify a retroactive award on the basis of a "children first" policy where it would cause hardship for the payor parent's other children. In short, retroactive awards disrupt payor parents' management of their financial affairs in ways that prospective awards do not. Courts should be attentive to this fact.

116 I agree with Paperny J.A., who stated in *D.B.S.* that courts should attempt to craft the retroactive award in a way that minimizes hardship (paras. 104 and 106). Statutory regimes may provide judges with the option of ordering the retroactive award as a lump sum, a series of periodic payments, or a combination of the two: see, e.g., s. 11 of the *Guidelines*. But I also recognize that it will not always be possible to avoid hardship. While hardship for the payor parent is much less of a concern where it is the product of his/her own blameworthy conduct, it remains a strong one where this is not the case.

5.4 *Determining the Amount of a Retroactive Child Support Award*

117 Once a court determines that a retroactive child support award should be ordered, it must decide the amount of that award. There are two elements to this decision: first, the court must decide the date to which the award should be retroactive, and second, the court must decide the amount of support that would adequately quantify the payor parent's deficient obligations during that time. I will consider each issue in turn.

5.4.1 Date of Retroactivity

118 Having established that a retroactive award is due, a court will have four choices for the date to which the award should be retroactive: the date when an application was made to a court; the date when formal notice was given to the payor parent; the date when effective notice was given to the payor parent; and the date when the amount of child support should have increased. For the reasons that follow, I would adopt the date of effective notice as a general rule.

...

121 Choosing the date of effective notice as a default option avoids this pitfall. By "effective notice", I am referring to any indication by the recipient parent that child support should be paid, or if it already is, that the current amount of child support needs to be re-negotiated. Thus, effective notice does not require the recipient parent to take any legal action; all that is required is that the topic be broached. Once that has occurred, the payor parent can no longer assume that the *status quo* is fair, and his/her interest in certainty becomes less compelling.

122 Accordingly, by awarding child support from the date of effective notice, a fair balance between certainty and flexibility is maintained. Awaiting legal action from the recipient parent errs too far on the side of the payor parent's interest in certainty, while awarding retroactive support from the date it could have been claimed originally erodes this interest too much. Knowing support is related to income, the payor parent will generally be reasonable in thinking that his/her child's entitlements are being met where (s)he has honestly disclosed his/her circumstances and the recipient parent has not raised the issue of child support.

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

same rough guideline can be followed for retroactive awards: it will usually be inappropriate to make a support award retroactive to a date more than three years before formal notice was given to the payor parent.

124 The date when increased support should have been paid, however, will sometimes be a more appropriate date from which the retroactive order should start. This situation can most notably arise where the payor parent engages in blameworthy conduct. Once the payor parent engages in such conduct, there can be no claim that (s)he reasonably believed his/her child's support entitlement was being met. This will not only be the case where the payor parent intimidates and lies to the recipient parent, but also where (s)he withholds information. Not disclosing a material change in circumstances — including an increase in income that one would expect to alter the amount of child support payable — is itself blameworthy conduct. The presence of such blameworthy conduct will move the presumptive date of retroactivity back to the time when circumstances changed materially. A payor parent cannot use his/her informational advantage to justify his/her deficient child support payments.

125 The proper approach can therefore be summarized in the following way: payor parents will have their interest in certainty protected only up to the point when that interest becomes unreasonable. In the majority of circumstances, that interest will be reasonable up to the point when the recipient parent broaches the subject, up to three years in the past. However, in order to avoid having the presumptive date of retroactivity set prior to the date of effective notice, the payor parent must act responsibly: (s)he must disclose the material change in circumstances to the recipient parent. Where the payor parent does not do so, and thus engages in blameworthy behaviour, I see no reason to continue to protect his/her interest in certainty beyond the date when circumstances changed materially. A payor parent should not be permitted to profit from his/her wrongdoing.

5.4.2 Quantum of the Retroactive Award

126 Finally, a court will need to determine the quantum of the retroactive award. This determination will need to be ascertained consistent with the statutory scheme that applies to the award being ordered.

127 ... so long as the date of retroactivity is not prior to May 1, 1997 — i.e., when the *Guidelines* came into force — the *Guidelines* must be followed in determining the quantum of support owed...

128 That said, courts ordering a retroactive award pursuant to the *Divorce Act* must still ensure that the quantum of the award fits the circumstances. Blind adherence to the amounts set out in the applicable Tables is not required — nor is it recommended. There are two ways that the federal regime allows courts to affect the quantum of retroactive awards.

129 The first involves exercising the discretion that the *Guidelines* allow. Thus, the presence of undue hardship can yield a lesser award: see s. 10. As stated above, it will generally be easier to show that a retroactive award causes undue hardship than to show that a prospective one does. Further, the categories of undue hardship listed in the *Guidelines* are not closed: see s. 10(2). And in addition to situations of undue hardship, courts may exercise their discretion with respect to quantum in a variety of other circumstances under the *Guidelines*: see ss. 3(2), 4 and 9.

> 130 A second way courts can affect the quantum of retroactive awards is by altering the time period that the retroactive award captures. While I stated above that the date of effective notice should be chosen as a general rule, this will not always yield a fair result. For instance, where a court finds that there has been an unreasonable delay after effective notice was given, it may be appropriate to exclude this period of unreasonable delay from the calculation of the award. Unless the statutory scheme clearly directs another outcome, a court should not order a retroactive award in an amount that it considers unfair, having regard to all the circumstances of the case.
> .....

[45] The foregoing provides a convenient framework for closer analysis:

Type of Application

[46] This is an originating application under the **MCA**. There are no prior court orders or written agreements between the parents. It was issued January 27, 2007; it claims retroactive child support “to the date of Separation in 2000", plus a contribution to section 7 **CMG** expenses. [In his October 24, 2007 Memorandum, Mr Thompson modified the retroactive claim-date to January 1, 2001.**]**

Child’s Circumstances

[47] A. is about 13 years old. She has resided primarily with M. since the separation, subject to access by W. Although M. painted a vague and unflattering picture of W. as a father who frequently and needlessly involved A. in their episodic disagreements over child support, he has enjoyed regular, ongoing access for about eight years; and his parenting is not in issue in this proceeding.

[48] Little attention was devoted by either parent to A.’s circumstances, past or present. There is no evidence of problems within the home, school or community. There is a perceived need for help with the costs of her extra-curricular activities. A.’s interests are unexceptional for her age and stage. There is no evidence that she excels in any particular academic, social or athletic endeavours, or that she has any special needs.

Reportedly she enjoys good health. Neither of her parents have medical, dental, drug or other insurance coverages for A.'s benefit through employment.

[49] A. cannot be said to be enjoying a high standard of living, such that she would not benefit from a retroactive award. At best, she and her mother live very modestly. If A. faced any hardship because of past under-funding of support, it was likely offset by M. (to her credit) who redirected her resources which, in turn, may have contributed to the reported crunch in general household finances.

Support Payment History

[50] W. paid $200 monthly to M. for A.'s benefit from the time of separation until January, 2006 when his payments increased to $350 monthly. His payments of "basic support" were therefore $2,400 annually from late 2000 until 2006. W.'s payments totaled $4,200 in 2006 ($350 x 12); and $3,500 in 2007 ($350 x 10) , up until the hearing.

[51] W.'s evidence was that he also periodically contributed to A.'s expenses, over and above monthly support. He wrote that he has always bought A.'s school supplies in September, that he has purchased clothes for her, and that he has given M. cash to assist with extra-curricular activities and camps. However, he introduced no records to exemplify those contributions and attached no precise dollar figures to them; and M. downplayed their value. He wrote (and it is not disputed) that he paid orthodontic bills in 2006 (for a retainer etcetera) at a cost of $2,000 which he appears to have claimed at income tax time. He said that he has also assisted M. with some improvements to her house in Bridgewater and provided other assistance as exemplified in paragraph 12 of Exhibit 6 (which were again down-played by her).

M.'s Delay

[52] As mentioned in the first decision, M. made broad assertions that after the separation she “frequently voiced” her concerns about the amount of support W. was paying ($200 monthly), his resistance to paying anything greater, and propensity to claw-back any help with extras from his regular payments but she was short on specifics, (She also cited one recent episode during which he immaturely tore up a list of extra-curricular expenses.)

[53] I find that M. was well-informed as to her rights and responsibilities as a parent, as well as W.’s (including those tethered to A.’s support), by virtue of legal advice she obtained at the time of separation. Her lawyer’s bill at separation makes specific reference to the “various homes owned by her and her common law spouse”, preparation of a “Statement of Rental Income in regards to the various properties”, as well as child support and division of assets and debts. In testimony, she confirmed she and W. moved frequently while cohabiting - “seven times in five years” - and her knowledge of W.’s business methods. Although she was unable to recount with any precision the couple’s (former) household financial arrangements, she remembered they both made contributions and each had some assets in her/his own name. She did not advance any claims against W. for an interest in, or for compensation for any contribution she have made to the accumulation of, any of W.’s holdings. There was no spousal support claim; and child support was agreed to informally.

[54] There is no evidence that M.’s decision to relocate to the South Shore was connected to problematic conduct by W.; and I find it was prompted, as likely as not, by a personal choice to start a new life in her preferred location.

[55] Having carefully considered her testimony and all of the other evidence, I do not attach much weight to the assertions that W. intimidated her, emotionally black-mailed her (my phrase), and otherwise prevented her from taking any earlier steps to advance a claim through lawyers or through the courts to address what she now says was wholesale under-funding of child support for many years. With respect, if M. harboured any fears,

she did not prove them on a balance of probabilities. Further, I find she did not give a reasonable explanation for not seeking further or alternate legal advice or starting proceedings sooner, after she relocated and was settled, many kilometers away from W. That the pursuit of remedies might attract legal expenses is not unique to M.; more to the point, she did not cite costs as an insurmountable barrier. Moreover, I find she was generally aware of W.'s circumstances at all material times as a result of her contact with him for access and likely by virtue of A.'s reporting to her.

[56] On her evidence, the first written communique to W. was not until April, 2005 when she asked him to increase his payments to $350 monthly and that they "cost share extra expenses such as child care/dentist appt/medication, etc." for which she would provide a detailed list at the end of each month. Her hand-written letter referred to legal advice she had received that "the very least" he should be paying was $375 monthly plus extras such as child care. She referred to the impact on her own finances of shortfalls she was covering from her limited income. She mentioned the need for "income tax information"; and that if he chose to ignore her request he would be contacted by her lawyer.

[57] As discussed earlier, after formal negotiations between lawyers were underway, it was M. who first ventured an appropriate basic child support outcome (by then $400 monthly) and for "extras"; and it was she who set the stage for possible abandonment of any retroactive claims pre-dating January 1, 2006.

W.'s Conduct

[58] Although unreasonable delay by M. may be seen as militating against a retroactive award, it must be weighed against any evidence of blameworthy conduct on W.'s part. As envisaged by the Supreme Court of Canada, this is an expansive concept and may include "anything that privileges the payor parent's own interests over his/her children's right to an appropriate amount of support".

[59] In this context, I find W. has continued to live and work in the same community. For about eight years, he has had regular parenting times, by agreement (including alternate weekends, shared holidays, and summer vacation). His business methods have not changed appreciably since the separation, even if the scale of his operations and his personal wealth have. Outwardly, W. continues to live a modest lifestyle at home; he has assumed the responsibilities of a second family. There is no evidence that his second child is benefitting at the expense of the first.

[60] The support payments were not compelled or sustained by any court order. However, the level of basic support remained unchanged for about five years; and was adjusted only when litigation was threatened. I am satisfied that A.'s financial needs increased during the intervening time, with age and with normal cost of living increases. I find that a reasonable parent would foresee this and strive to meet those increasing needs. Before lawyers became involved, and to some extent afterward, I find that W. was unreasonably tight-fisted when occasionally faced with informal requests for help with "extras" when he was in a financial position to help. When help was forthcoming, it was delivered inconsistently and begrudgingly, and often late. (The orthodontic bills are a good example.)

[61] Although negotiations between the (former) lawyers in 2005 and 2006 were protracted and ultimately failed, there is no evidence that W. rebuffed any enquiry, request or demand by M., or any lawyer on her behalf, for disclosure of personal and/or business income or assets, before her formal application. (Any delay or resistence after the start of proceedings may be addressed when it comes to costs.)

[62] Support continued at an agreed, higher level pending the outcome of negotiations or court decision. Indeed, there was a comprehensive draft agreement on the table, prepared by M.'s lawyer - much of which was acceptable to both parties. When assessing the reasonableness of W.'s conduct, with hindsight, M.'s demands and position on child support during this time are relevant, but not determinative. Rightly or wrongly, there was

an extended time period when W. was under the impression that he was in the right “ball park” for basic child support plus “extras”, and that a retroactive claim likely would not be pursued. On the other hand, he knew or ought to have known he was still “at risk” if the negotiations failed, as they did. (I should add, that obstinance by either of the parties in the course of without prejudice discussions is not “blameworthy conduct”, in and of itself.)

[63] Based on the foregoing, it could be argued that W.’s general attitude toward support as demonstrated by conduct only straddled the line of a “payor who knowingly avoids or diminishes his/her support obligations”. However, that conduct must be viewed against the wider backdrop of questionable financial maneuvers and income minimizing schemes which were revealed after considerable “shovel work” on the part of M.’s present counsel and, of course, with hindsight. I find the cumulative impact is to push his conduct over the line into the blameworthy arena.

[64] Under the 1997 Tables (Nova Scotia), the $200 monthly W. was paying can be related to a payor with a gross annual income of $23,900. It is now known that the annual cash disbursements to him from realty sales alone never dipped below $54,000 from 2001 to 2006; and reached close to $200,000 one year.

[65] Without going into all the intricacies of owner builder tax law, and allowing that some of that money may be subject to legitimate shelter by exemptions, the fact remains that W. regularly directed large sums of money to, and gave preference to, his personal and business interests in priority to A.’s right to more assistance in the wake of his successes. I find he gave no thought to even a modest improvement in support, until forced. It is now known that the cost to him may have been a more gradual accumulation of personal wealth - a cost he was not prepared to shoulder.

[66] W.’s allusive income from rental properties and self-employment activities is not just a hallmark of questionable business ethics; it goes to the issues of his credibility in disclosing his true circumstances and whether he consciously ignored his obligations. I

am satisfied that W. has known for a long time that when he retains properties, whether they are revenue-producing or not, any value gains are sheltered pending sale and not treated as income for annual income tax purposes; and that only upon a sale will any gains be taxed at a reduced rate or not at all (if exempt). Unless income is attributed, by "reinvesting" W. avoids the appearances of much annual income for **CMG** purposes while accumulating considerable wealth. A corollary is that child support (if solely based on Line 150 income) could continue at artificially low levels until A. is no longer a dependent child and when the holdings could be disposed of - without regard to support.

Potential Hardship to W. (of a retroactive support award)

[67] If one takes W.'s household budget figures and his tax returns at face value, he appears to have limited current income to respond to any significant retroactive award. However, if one accedes to the propositions that his past and current income statements are a ruse, that his modest budget simply mirrors chronically and grossly understated income, and that he has both the capital (and income on capital) and a large cash flow which can be applied to any award, a hardship argument cannot be sustained.

[68] On the evidence, I conclude that W. can respond to an award from demonstrated, significant cash receipts derived from realty sales, rentals, employment income, self-employment income, and seasonal employment insurance benefits without causing any hardship to him or his new family.

Award

[69] All of the foregoing assists the court in determining if a retroactive award should be made. In the result, I am satisfied there should be a retroactive award for basic support. However, there is insufficient evidence to quantify and sustain a retroactive section 7 **CMG** award. Entitlement to current support was not in issue; an award follows. M. was

put to the strict proof of her claim for help with current section 7 expenses; an award follows.

Retroactivity Date

[70] The potential commencement dates for any award include the date of “effective” notice of the claim(s), the date proceedings were started, or a date before effective notice upon a finding of blameworthy conduct on W.’s part. (In the last scenario, a three year retroactive cap will apply in all but exceptional cases.)

[71] Although M.’s stated claim reaches back to 2001, I find that the “effective date of notice” was early April, 2005 when W. was informed in writing , in unambiguous terms, that the amounts being voluntarily paid were inadequate to meet A.’s financial needs. On the evidence and in law, I have no hesitation in opening up the claim retroactively to April, 2005 when “effective notice” was given.

[72] I also find there was sufficient blameworthy conduct on W.’s part to warrant consideration of an earlier start date for the award. On the other hand, I find that M. could have acted more responsibly and promptly. In brief, both parents have failed to meet their obligations to their daughter. The outcome should balance these findings.

[73] In my opinion, it is unreasonable to impose an award going back to 2001 and the months immediately following the separation. However, by January, 2004, the parties had been separated for over three years - yet the support quantum had not budged. Another two years would elapse before support finally increased by $150 monthly, on a without prejudice footing; and yet another year would pass before the application was issued. In the intervening time, I find W. had the means to pay more than he did and should have done so.

[74] I exercise my discretion and set January 1, 2004 as the retroactive award date. Although it extends beyond any date postulated by W.'s counsel, it also falls short of that put forward on behalf of M.. In striking that date, my intent is to balance parental responsibility without losing sight of the child.

W.'s Past and Current Income for the Award Period

[75] As already noted annual income must be determined in accordance with sections 16 - 20 of the **CMG**. Many of the reported cases mentioned by counsel are fact-specific with outcomes propelled by objective evidence, by the extent of financial disclosure, and by witness credibility.

[76] In broad terms, annual income is the deciding factor - not monthly income which varies for many individuals. Insofar as current support is concerned, courts will generally determine a payor's income for the upcoming 12 months. Such prospective awards assume that a parent will earn about the same amount of money as was earned in the previous year, in the absence of evidence to the contrary.

[77] I am mindful that child support is paid from "income", not capital. Under **CMG** section 16, annual income is presumptively determined by using the sources of income set out under the heading "Total Income" at line 150 in the T-1 General Form issued by the Canada Revenue Agency, adjusted in accordance with Schedule III of the **CMG**. The court may only consider sections 17 to 19 of the **CMG** if section 16 income does not fairly reflect the money available to a parent. In light of the positions advanced by both counsel, there is no question that the present case falls under the scope of the latter provisions.

[78] Courts have held that some deductions that may be legitimate for income tax purposes or accounting purposes may not be acceptable to reduce income for child support purposes. The general intent seems to be to put a self-employed person's income on the same footing as the income of most employees, keeping in mind that many

business expenses and write-offs are legitimate. In circumstances where the court does add back certain expenses into income, the court should gross up the numbers by the payors marginal tax rate for the year to convert the “net benefit” to the equivalent of the pre-tax income it would take to have enough (after tax) to pay for the benefit.

[79] W., like others, is normally required to justify his expenses if a believable or credible challenge to an expense is raised. I have already highlighted some business expenses which, on their face, seem to deserve scrutiny. This was accentuated by W.’s failure to document and/or credibly explain many aspects of his business dealings and holdings; and not helped by the absence of any opinion evidence from either side on the subject of business expenses. In the end, M.’s focused primarily on the income side of the ledger. So, it would be inappropriate to wade in too far when M. chose not to. [See: **Dean v. Brown**, 2002 NSCA 124]

[80] On the income side, although not flagged by counsel, I note that **CMG** Schedule 3, section 1.6 reads:

> Capital gains and capital losses
> 6. Replace the taxable capital gains realized in a year by the spouse by the actual amount of capital gains realized by the spouse in excess of the spouses actual capital losses in that year.

[81] There is also section 12 of the Schedule:

> Partnership or sole proprietorship income
>
> 12. Where the spouse earns income through a partnership or sole proprietorship, deduct any amount included in income that is properly required by the partnership or sole proprietorship for purposes of capitalization.

[82] Capital gains were declared by W. in two tax years and I have factored this into my findings. On the extent to which the court may take into account capital gains, realized or unrealized, I adopt the reasoning of Levy, J.F.C. in **T. (D.M.C.) v. S. (L.K.)** (2007), 39 R.F.L. (6th) 428, at page 440 to 443:

> **33** Counsel for the father was insistent that there is no Canadian case where capital gains were taken into account in determining the payor's income. I would observe that section 16 of the guidelines directs a court to the total income' figure in the income tax returns, (line 150) and that that figure includes realized capital gains, or, more accurately one-half of such gains. It is abundantly clear through section 18(1)(a) and 19(1)(h) of the Guidelines, and even more so given the amendment to section 17(1) of the Guidelines of the year 2000, that to an extent determined by the court in its discretion to be appropriate, realized capital gains can be taken into account. (See in this respect **Mascarenhas v. Mascarenhas** (2000), 18 R.F.L. (5th) 148, (Ont. Div. Crt.), (U.S. capital gains were included), and **Arnold v. Washburn** (2000), 20 R.F.L. (5th) 236 (Ont. C.A.), which upheld a lower court's exclusion of stock option income' while saying that it is clear that in a court's discretion it can very well be included).
>
> **34** The father has historically left the capital gains alone and lived off of interest or dividends, and it would appear that continues to be his plan. In my view allowing capital gains to go unrealized year after year, and thus discounting them entirely, in this particular situation generates an unfair and an unreasonable picture of the father's true position and capacity to pay child maintenance. The rate of return which he would have the court regard as his income, that which he actually draws from the company, in my view invokes section 19(1)(e) of the Guidelines and amounts to the same thing as not reasonably utilizing his property to generate income, at least for the purposes of the legislation and Guidelines. The issue is analogous, it seems to me, to the not-infrequently raised issue of how to treat retained earnings.
>
> **35** The argument is put that while on the face of it there appears to be "x" amount of money available, that really the health of or strategy for the company requires that all or most of the ostensible surplus be plowed back into the company. That proposition did not explicitly make it to the surface of this proceeding otherwise than obliquely by the father indicating his investment strategy that capital gains go unrealized until some unidentified future date or event so that his investments will provide both income and growth...

> **43** I conclude, per section 19(1)(e) of the Guidelines, that for the purposes of this legislation and the maintenance of this child, that the father's property, "... is not reasonably utilized to generate income"...
>
> **44** I hold that the increase in the value of his investments, be that by way of interest, dividends or capital gains, realized or unrealized, simply has to be taken into account to obtain a realistic understanding of his capacity, his "financial ability to pay" child maintenance. His considerable assets are constituent elements in his "means" and "circumstances" addressed in section 2(k) of the Act ...

[83] In toting up the money received by W. from realty sales as a sole proprietor (all other income aside) coupled with his assertion that much of it was “reinvested” in projects, I have directed myself that under the **CMG** he may deduct from income amounts “properly required” for capitalization. Here again the court was handicapped by the lack of evidence about W.’s personal versus business capital situation. And, as mentioned, it was virtually impossible to track disposal of his income, let alone to identify and quantify his business capital needs. To the extent he wanted the court to afford him credit under the section, the onus was on him to map out and justify his position through evidence. He did not do so.

[84] After conceding that W. was hard-working and successful, M.’s counsel submitted that W.’s “simple” business strategy has been, and continues to be, a convoluted scheme to mislead and deceive both her and the Canada Revenue Agency. W. was characterized not only as a self-employed carpenter but a crafty speculator who derives most of his income and makes most of his living “in the underground economy”. In the absence of any paper trail (other than publicly recorded documents, closing statements prepared by real estate lawyers, and his tax returns), M. postulated that W. likely pays for building supplies, trades, and services largely through mortgage proceeds, and that he likely pays in cash for supplies and labour as work is done. In that scenario, it was argued, it would

not be surprising if records were not kept or expected by anyone involved, and therefore it is not surprising few records are in the evidence. In his Pretrial Memorandum, M.'s counsel expressed it this way, "We do not expect that underground economy workers or even reputable suppliers would be waiting for cheques arising out of sales. We expect they had all been paid out of the mortgages that were obtained." In further support of the underground economy theory, M. referred to W.'s evidence that he does not even have written leases with his tenants; therefore, there is not even proof of the rental incomes. (In terms of corroboration, the same may be said, regarding expenses he claimed against rental income.) Although the Applicant's theory was mapped out before the start of the hearing, W. did not counter it with any evidence from his business records during the hearing.

[85] Against this background, W.'s total realty sales, between 2001 and 2006, exceeded $1.6 million [by my calculation]. Over the same time span, W. completed purchases valued at about $610,500 [by my calculation]. The latter may be construed as some evidence of "reinvestment", but he also utilized mortgage money (and, of course, always claimed interest as a business expense). The important point here is that sales have historically outstripped purchases by a wide margin. This is magnified by the total cash disbursements to W. on closings, for the same period, which exceeded $714,000 by my calculation ($738,000 by Mr. Thompson's). Further, the equity in current holdings has swollen to an estimated (by him) $338,000.

[86] The notion of W. flourishing in an underground economy is glaringly illustrated, in M.'s view, by several other factors: for three recent taxation years (2004, 2005 and 2006) which included substantial realty sales plus various amounts of employment income, rentals, self-employment income, etcetera, W. paid no income tax. And, he demonstrated no source deductions or withholdings in his own operations for income tax, Canada Pension Plan, Employment Insurance, Workers' Compensation, or similar items.

[87] When asked on cross-examination about what he thought his “income” was in 2005 and 2006 (income tax returns and closing statements aside), W. answered “$65,000" and “$75,000" - “clear, after bills”. That telling admission lands his income well above the $40,000 “grossed-up” income he had clung to in negotiations and before the court.

[88] I agree with Mr. Thompson’s submission that in the circumstances the fairest way to determine income for the retroactive award period would be to strike an “average”. Making the best of the evidence I have to work with, I determine W.’s **CMG** income for the years 2004 to 2006, inclusive, to be $70,000 annually, on average.

[89] The Table amount of basic support for this income level was $566 monthly until May 1, 2006 when it changed to $608 monthly. I calculate the balance of retroactive basic support due and payable by W. to M. as of December 31, 2006 as follows:

	Due	**Paid**	**Balance Due**
Jan. 1, 2004 - Dec. 31, 2004	$566 x 12 = $6,792	$200 x 12 = $2,400	$4,392
Jan. 1, 2005 - Dec. 31, 2005	$566 x 12 = $6,792	$200 x 12 = $2,400	$4,392
Jan. 1. 2006 - April 30, 2006	$566 x 4 = $2,264	$350 x 4 = $1,400	$ 864
May 1, 2006 - Dec. 31, 2006	$608 x 8 = $4,864	$350 x 8 = $2,800	$2,064
Total			**$11,712**

[90] There is insufficient evidence to sustain a retroactive section 7 **CMG** award.

Current Support

[91] M.'s formal application was started in January, 2007. This is an appropriate time to start "current" support. There is no evidence that W.'s business activities and the pattern of his income will change in the foreseeable future. Accordingly, basic current support is ordered at the rate of $608 monthly, due and payable effective January 1, 2007, and to continue on the first day of each month thereafter until otherwise ordered. As at the hearing, there would therefore be another $6,080 due ($608 x 10) with credits of $3500 ($350 x 10). The balance of current support due and payable to October 31, 2007 is therefore **$2,580**.

[92] W. did not baulk at helping with the cost of A.'s extracurricular activities until the hearing. Under section 7 (1.1) of the **CMG**, I find the 2007 expenses documented by M. exceed those she can reasonably cover taking into account the enumerated factors, and that they are compensable under section 7 (1) (f) having regard to the preamble in section 7 (1). I determine the parties' income ratios to be 73:27. I round the proven expenses up to $500. W.'s share is **$365** which he shall pay forthwith. As at the hearing, M. was anticipating some additional expenses for 2007, but they were not precisely quantified. She did say that A.'s total section 7 expenses might approach $1,000 for the year. I would encourage the parties to discuss and sort out any outstanding 2007 expenses under this heading, failing which M. may seek a review and court determination. For 2008 and beyond, the applicable ratio remains the same. Therefore, W. should be prepared to pay his proportionate share as and when receipts are presented to him, failing which M. may seek review and decision on the issue. I would suggest, but will not order, that the parties agree before the end of each calendar year on a figure for the estimated compensable costs for the coming year, subject to proof by

invoices or receipts. This could be embodied in a consent order or in an agreement to be filed under the **MCA** for enforcement purposes.

Costs

[93] M. gave notice that she seeks court costs but counsel devoted no attention to the subject in their closing submissions. I order that M. shall have her costs to be determined by the court unless agreed upon by the parties. If there is no agreement, written submissions are invited.

MEP

[94] All payments pursuant to this decision shall be made through the Maintenance Enforcement Program (MEP), Central Payment Processing Unit, P. O. Box 803, Halifax, N.S. B3J 2V2.

Security for Payment

[95] M. seeks payment security by way of a blanket mortgage. When it comes to collection of support orders, MEP has broad authority and powers, including the right to place liens against realty. [**Maintenance Enforcement Act**.(MEA), section29.] In the circumstances, the most expedient and effective way to allay M.'s concerns about payment is for the court to order that she shall have Judgment for her retroactive award ($11,712) plus her current award ($2,580) and proven section 7 claim ($365) - total $14,657- plus costs to be agreed upon or as may later be fixed by the court. I will so order. M. may obtain a Certificate of Judgment and arrange for registration in the Registry of Deeds. That said, there is nothing to preclude the parties from negotiating a mortgage

or other security in lieu of Judgment registration, directly or through MEP. [**MEA** section 17].

[96] Enforcement of current support is best left to MEP since there is no history of non-payment by W. when under a court order or written agreement. In my opinion, he should be given an opportunity to comply.

Order

[97] Mr Thompson shall submit an order capturing the results of this decision as well as the agreed parenting arrangements.

Dyer, J.F.C.