SUPREME COURT OF NOVA SCOTIA
FAMILY DIVISION
Citation: *Windrem v. Beck*, 2024 NSSC 71

Date: 20240314
Docket: *SFH* No. 1201-066007
Registry: Halifax

Between:

Jennifer Windrem

Applicant

v.

Patrick Beck

Respondent

Judge:	The Honourable Justice Theresa M Forgeron
Heard:	March 11 and 14, 2024, in Halifax, Nova Scotia
Oral Decision:	March 14, 2024, in Halifax, Nova Scotia
Written Decision:	March 18, 2024, in Halifax, Nova Scotia
Counsel:	Paula Condran for the Applicant, Jennifer Windrem Patrick Beck, not appearing

By the Court:

Introduction

[1] Patrick Beck and Jennifer Windrem are the parents of two dependent children. Ms. Windrem wants to vary the child support provisions of the last court order for three reasons. First, the children now live primarily with her as the shared parenting arrangement broke down several years ago. Second, Mr. Beck's income has increased. Mr. Beck is currently employed in art sales aboard cruise ships. Third, the children are attending university.

[2] Mr. Beck's position was not presented. Despite being personally served with the variation and other documents, Mr. Beck did not file a response, financial disclosure, or any other documents required of him.

[3] How can the children's needs be met in such circumstances? What consequences arise from Mr. Beck's failure to disclose in a child support proceeding? I will now explore these issues.

Issues

[4] In my decision, I will answer the following questions:

- What legal consequences arise from Mr. Beck's failure to disclose?
- What income should be imputed to Mr. Beck?
- Should retroactive child support be awarded?
- What amount of child support should be awarded?
- What is the appropriate costs award?

Background Information

Relationship Timetable

[5] The parties were married in October 2001 and separated in August 2010. Their children were born in October 2003 and July 2005. Following separation, a shared parenting arrangement was adopted, with no child support payable.

Failure to Disclose in Divorce Proceedings

[6] In March 2012, Ms. Windrem initiated divorce proceedings. On March 15, 2012, a direction to disclose was issued so that Mr. Beck would file income information. He did not. On July 30, 2012, an order to disclose issued so that Mr. Beck would file the outstanding income information. He did not.

[7] On April 22, 2013, a corollary relief order issued. It confirmed the shared parenting arrangement and the nonpayment of child support. The order also contained two provisions about income disclosure. First, the preamble stated:

> On the basis of using the best information regarding Patrick Beck's income available to her, while reserving the right to test that information in the future should further or better information become available, Jennifer Beck does not seek an award for child support to be granted in the within Order;

[8] Second, clause 4 of the corollary relief order mandates annual income disclosure:

> 4. No later than June 1st of each year, both parties must provide each other with a copy of his or her income tax return, completed and with all attachments, even if the return is not filed with the Canada Revenue Agency, and also provide each other with all notices of assessment and any notices of reassessment from the Canada Revenue Agency immediately after they are received.

[9] Unfortunately, Mr. Beck did not release his income information on an annual basis as ordered.

Parenting Changes

[10] In 2019, the shared parenting arrangement morphed into a primary care model of parenting with the children remaining with Ms. Windrem most of the time. By 2020, Mr. Beck was exercising his parenting time on an infrequent basis.

Failure to Disclose after Employment Changes

[11] In October 2021, Mr. Beck began working with Park West Gallery where he is involved in the sale of art to cruise ship passengers. Initially, he was employed as an art gallery associate, then promoted to art gallery director, and finally to art gallery auctioneer and first officer. As a first officer, he in entitled to superior accommodations. Accommodations, food, transportation and hotel expenses are part of his employment package and are provided at no cost to him.

[12] Ms. Windrem repeatedly asked Mr. Beck for income information so that child support could be properly calculated. She even provided Mr. Beck with the link to the on-line child support calculator. Mr. Beck continued to reject her disclosure overtures.

[13] In December 2022, during discussions held at a local coffee shop, Mr. Beck told Ms. Windrem that he was one of Park West's top sellers and was earning between $2,000 and $25,000 USD per month. When Ms. Windrem requested proof of income, Mr. Beck laughed and refused to do so. Neither Ms. Windrem nor the court know if Mr. Beck's statements were truthful because he refused to supply proof of his income.

[14] In January 2023, Ms. Windrem told Mr. Beck that she did not agree with the amount of child support that he proposed to pay. Ms. Windrem asked for a copy of his employment contract. Mr. Beck refused to provide it.

[15] In March 2023, Mr. Beck told Ms. Windrem that he is paid by an international company on behalf of Park West Gallery via the Turks and Caicos, a country with favourable income tax laws.

Variation Application and Continued Failure to Disclose

[16] Recognizing that Mr. Beck would not disclose his income, Ms. Windrem sought legal advice. On May 30, 2023, she filed this variation application. As Mr. Beck had returned to Nova Scotia to attend graduation, Ms. Windrem was able to arrange personal service.

[17] On July 3, 2023, Mr. Beck was personally served with the originating documents, a direction to disclose, and blank family law forms that he needed to complete and file. Upon being served, Mr. Beck signed the acknowledgement of service of the documents he received. Mr. Beck did not file the required forms. He did, however, contact Ms. Windrem directly to voice his displeasure over her decision to involve the courts.

[18] Even though Mr. Beck did not file a response, Ms. Windrem continued to provide Mr. Beck with a copy of all documents filed, hoping that Mr. Beck would finally disclose his income. He did not. Further, Mr. Beck did not participate in any court proceedings.

[19] On October 12, 2023, an order for substituted service issued. On October 26, 2023, this order, in conjunction with other documents, including an order to appear

and disclose were served on Mr. Beck. Mr. Beck did not respond. Mr. Beck did not file any of the required financial statements that had once again been provided to him.

Variation Hearing

[20] A variation hearing was scheduled pursuant to s. 22 (1) (a) of the *Child Support Guidelines*. In advance of the hearing, Ms. Windrem filed another affidavit outlining the income she sought to be imputed to Mr. Beck and the evidence in support. The affidavit, draft variation order, brief, and other documents were provided to Mr. Beck on January 26 and 31, 2024. He still did not disclose even though Ms. Windrem asked me to impute income of $390,330 to Mr. Beck for child support purposes.

[21] On Monday, March 11, 2024, the variation application proceeded as scheduled. The only evidence was that of Ms. Windrem because Mr. Beck did not appear. Nor did he file any income information, nor any other required court form. My decision was adjourned to March 14, 2024.

Late Adjournment Request

[22] On Tuesday, March 12, 2024, a copy of an email written by Mr. Beck to a court employee was delivered to me. Mr. Beck sent the email on Sunday, March 10, 2024 at 9:45PM. The email contained an adjournment request, but none of the mandatory disclosure documents, nor any other required court form. Mr. Beck seemingly treated the court hearing as a hair appointment, which could be cancelled by a simple, belated request.

[23] I declined to adjourn for three reasons. First, Ms. Windrem and the children will experience significant prejudice if there is further delay. Ms. Windrem has taken all reasonable steps, indeed exhaustive steps, to secure Mr. Beck's disclosure – from repeated verbal requests to court orders. Mr. Beck steadfastly refuses to comply. There is no realistic prospect that Mr. Beck will provide disclosure at any time in the future. For approximately 12 years, Mr. Beck ignored court directions and orders to disclose - a practice that did not change with his late filed adjournment request. The child support determination should not be adjourned without day when there is no realistic prospect of disclosure.

[24] Second, Mr. Beck had many months to respond to this variation application, having been personally served on July 3, 2023. Mr. Beck was also aware of his legal

obligation to disclose his annual income because of clause 4 of the corollary relief order, the direction and order to disclose that were served on him, and his discussions with Ms. Windrem. Mr. Beck has possession and control of his income information. Yet, Mr. Beck neither responded to the variation application, nor filed his mandatory disclosure. Further, despite being in Halifax between mid-December 2023 and March 6, 2024, Mr. Beck made no contact with the court until the Sunday before the scheduled hearing when he asked for an adjournment. In this context, any prejudice to Mr. Beck is of his own making.

[25] Third, an adjournment would bring the administration of justice into disrepute given legislative and judicial denunciation of conduct that limits full and frank disclosure, as discussed at paras 30 to 38. It is untenable that an adjournment be granted to a payor who flagrantly disregards court orders to disclose. Comments made by Beaton, JA. in ***Donner v. Donner***, 2021 NSCA 30 are instructive:

> [42] As noted by Ms. Donner, in family litigation trial judges are unfortunately often faced with making decisions without the benefit of adequate information. While this can undoubtedly be frustrating for the opposing party, insufficient disclosure leaves trial judges to do justice as best they can with the limited information provided. **There comes a point in a case where both the opposing party and the judge should end efforts to secure more or better disclosure, and instead forge a way to a hearing and decision. If not, already burdened trial dockets would risk becoming even more congested, and the resolution opposing parties seek further delayed.** The **consequences to the party who falls short of meeting disclosure obligations can be addressed by such "tools" as, for example, adverse inferences the judge might draw, credibility findings and evidentiary conclusions the judge might reach, and potential cost consequences** that might be imposed on a non-disclosing party. *[Emphasis added.]*

[26] I therefore will neither adjourn my decision, nor will I reopen the hearing to allow Mr. Beck to testify given his ongoing failure to disclose.

Material Change and Parenting

[27] Before I begin my analysis of the child support issues, I confirm two findings. First, Ms. Windrem proved a material change in the circumstances in that the children have been in her primary care since 2019; Mr. Beck is employed in a new occupation; and the children are attending university.

[28] Second, Ms. Windrem proved that the parenting provisions should be varied based on the children's best interests in conjunction with their current circumstances. The order should recognize that the children are living in Ms. Windrem's primary

care and that Mr. Beck will have parenting time as arranged with the children. Given the children's ages, a provision about decision-making is unnecessary.

Analysis

[29] **What legal consequences arise from Mr. Beck's failure to disclose?**

[30] With the passage of the *CSG*, Canada adopted an income model of child support. In ***DBS v. SRG***, 2006 SCC 37, Bastarache J. confirmed that parents who do not increase their child support payments to correspond with their incomes do not fulfill their obligation to their children:

> 54 In summary, then, **parents have an obligation to support their children in a way that is commensurate with their income. This parental obligation, like the children's concomitant right to support, exists independently of any statute or court order.** To the extent the federal regime has eschewed a purely need-based analysis, this free-standing obligation has come to imply that the total amount of child support owed will generally fluctuate based on the payor parent's income. Thus, under the federal scheme, **a payor parent who does not increase his/her child support payments to correspond with his/her income will not have fulfilled his/her obligation to his/her children.** … *[Emphasis added]*

[31] Sadly, not all parents fulfill their legal obligation. In addition, a small but determined number of payors refuse to disclose their incomes to prevent the just calculation of child support. These parents often do not participate in the court process. Mr. Beck falls within this group. How am I to respond to Mr. Beck's failure to disclose? To answer, I will review the *CSG*, academic literature, and case law.

[32] Legislatures and courts strongly denounce payors who do not disclose financial information. Sections 19, 22, 23, and 24 of the *CSG* provide the court with the discretionary authority to schedule a hearing, draw negative inferences, impute income, and award significant costs when a payor fails to disclose:

> **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:
>
> **…..**
>
> **(f)** the spouse has failed to provide income information when under a legal obligation to do so;

…..

Failure to comply

22 (1) Where a spouse fails to comply with section 21, the other spouse may apply

(a) to have the application for a child support order set down for a hearing, or move for judgment; or

(b) for an order requiring the spouse who failed to comply to provide the court, as well as the other spouse or order assignee, as the case may be, with the required documents.

Costs of the proceedings

(2) Where a court makes an order under paragraph (1)(a) or (b), the court may award costs in favour of the other spouse up to an amount that fully compensates the other spouse for all costs incurred in the proceedings.

Adverse inference

23 Where the court proceeds to a hearing on the basis of an application under paragraph 22(1)(a), the court may draw an adverse inference against the spouse who failed to comply and impute income to that spouse in such amount as it considers appropriate.

Failure to comply with court order

24 Where a spouse fails to comply with an order issued on the basis of an application under paragraph 22(1)(b), the court may

(a) strike out any of the spouse's pleadings;

(b) make a contempt order against the spouse;

(c) proceed to a hearing, in the course of which it may draw an adverse inference against the spouse and impute income to that spouse in such amount as it considers appropriate; and

(d) award costs in favour of the other spouse up to an amount that fully compensates the other spouse for all costs incurred in the proceedings.

[33] Further, Julien Payne and Marilyn Payne in *Child Support Guidelines in Canada, 2022*, (Toronto: Irwin Law, 2021) address the court's obligation to take necessary steps to ensure payor parents do not benefit from their failure to cooperate and disclose at p. 251:

> Courts must take appropriate steps to ensure that a parent does not benefit from failing to provide timely, accurate, and complete financial disclosure. **A strong message needs to be sent to those individuals who are non-compliant with financial disclosure, and who despite being given the opportunity to do so, simply disregard the court process**. An adverse inference may be drawn against a spouse or former spouse who fails to make full disclosure of his or her income and expenses and the resulting income or earning capacity attributed to such a spouse or former spouse may be in a higher amount than that acknowledged in the evidence. A failure to produce accurate and complete financial information may entitle the court to draw an adverse inference that the non-disclosing party earns at least as much income as the other spouse or former spouse. The obligor's concealment of income may justify an order for retroactive lump sum child support that reflects the differential between the acknowledged and the true income of the obligor. *[Emphasis added]*

[34] In the November 20, 2023 *Family Law Newsletter*, Franks and Zalev presented case references confirming the court's intolerance in the face of nondisclosure:

> *Cunha v. Cunha*, 1994 CarswellBC 509 (S.C.) (**non-disclosure is the cancer of family law litigation**); *Wu v. Sun* (2011), 97 R.F.L. (6th) 104 (B.C. C.A.) (**non-disclosure is the "Achilles Heel" of family litigation**; *Leitch v. Novac* (2020), 38 R.F.L. (8th) 1 (Ont. C.A.) ("**invisible litigants**"); *Frick v. Frick* (2016), 91 R.F.L. (7th) 129 (Ont. C.A.); *Manchanda v. Thethi* (2016), 84 R.F.L.(7th) 341 (Ont. S.C.J.), aff'd (2016), 84 R.F.L. (7th) 374 (Ont. C.A.) **(a party who does not make early, voluntary, and complete financial disclosure is not participating in the process, and such parties must be assessed a game misconduct and ejected from the proceedings**); *Mackey v. Rerrie*, 2016 CarswellOnt 10853 (C.A.); *Roberts v. Roberts* (2015), 65 R.F.L. (7th) 6 (Ont. C.A.) (**disclosure is the most basic family law obligation and the obligation is immediately, ongoing and automatic and should not require orders**); *Gray v. Rizzi* (2016), 74 R.F.L. (7th) 272 (Ont. C.A.); *Fielding v. Fielding* (2015), 70 R.F.L. (7th) 253 (Ont. C.A.); *Arenburg v. Arenburg*, 2016 CarswellNS 937 (C.A.); *Burke v. Poitras* (2018), 22 R.F.L. (8th) 266 (Ont. C.A.); *Martin v. Watts*, 2020 CarswellOnt 8657 (C.A.); *Mullin v. Sherlock* (2018), 19 R.F.L. (8th) 1 (Ont. C.A.); *Jayawickrema v. Jayawickrema*, 2020 CarswellOnt 6052 (S.C.J.) at 27 (**disclosure is not transactional and it is automatic, immediate and ongoing and nondisclosure strikes at the heart of the administration of family justice**). *[Emphasis added]*

[35] Similar comments are noted in ***Donner v. Donner,*** *supra*, at para 42. In addition, Beaton JA. held that "….**it is disingenuous for a party falling short in their disclosure obligations to maintain post-decision that the court has erred in its determinations made on the basis of the evidence provided**….": para 44.

[36] In ***Michel v. Graydon***, 2020 SCC 24, Brown J. held that a payor parent should not profit from knowingly paying inadequate support or from making inadequate or delayed disclosure as they are subject to a duty of full and honest disclosure:

> 32 **Retroactive child support awards will commonly be appropriate where payor parents fail to disclose increases in their income**. Again, *D.B.S.* is instructive: ". . . 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**" (para. 107). And where the strategy for avoiding child support obligations takes the form of inadequate or delayed disclosure of income, the effect on the child support regime is especially pernicious. This is because the methodology adopted by the *Federal Child Support Guidelines*, SOR/97-175, which are expressly incorporated in the *FLA*, results in information asymmetry. Apart from shared parenting arrangements, the *Guidelines* calculate child support payments solely from the payor parent's income. At any given point in time, therefore, the payor parent has the information required to determine the appropriate amount of child support owing, while the recipient parent may not. Quite simply, the payor parent is the one who holds the cards. While an application-based regime places responsibility on both parents in relation to child support (*D.B.S.*, at para. 56), the practical reality is that, without adequate disclosure, the recipient parent will not be well-positioned to marshall the case for variation.
>
> [33] **Failure to disclose material information is the cancer of family law litigation** (*Cunha v. Cunha* (1994), 99 B.C.L.R. (2d) 93 (S.C.), at para. 9, quoted in *Leskun v. Leskun*, 2006 SCC 25, [2006] 1 S.C.R. 920, at para. 34). And yet, **payor parents are typically well aware of their obligation as a parent to support their children, and are subject to a duty of full and honest disclosure - a duty comparable to that arising in matrimonial negotiations** (*Brandsema*, at paras. 47-49). The payor parent's obligation to disclose changes in income protects the integrity and certainty afforded by an existing order or agreement respecting child support. **Absent full and honest disclosure, the recipient parent and the child are vulnerable to the payor parent's non-disclosure.** *[Emphasis added]*

[37] In ***Colucci v. Colucci,*** *supra*, Martin J. confirmed that because full and frank disclosure is essential, the court must be cognizant of issues associated with informational asymmetry and adopt mechanisms to incentivize ongoing disclosure, along with tools to move proceedings forward in the face of non-disclosure, including imputing income and costs:

> [48] After applying the *Guidelines* and *D.B.S.* for many years, it has become clear just how much **the child support system**, including s. 17 variations, **depends upon adequate, accurate and timely financial disclosure**. The centrality of

disclosure in child support matters has been recognized in a rich body of jurisprudence both before and after *D.B.S.* (see, e.g., *Shamli v. Shamli*, 2004 CanLII 45956 (Ont. S.C.J.), at para. 8; *Hietanen v. Hietanen*, 2004 BCSC 306, 7 R.F.L. (6th) 67, at para. 11; *Gray*, at para. 63; *M.K.R. v. J.A.R.*, 2015 NBCA 73, 443 N.B.R. (2d) 313, at paras. 14 and 20; *Francis v. Terry*, 2004 NSCA 118, 227 N.S.R. (2d) 99, at para. 9; *Goulding*, at para. 44). Simply stated, **disclosure is the linchpin on which fair child support depends** and the **relevant legal tests must encourage the timely provision of necessary information**.

[49] The pivotal role of disclosure comes as no surprise since the premise underlying the *Guidelines* "is that the support obligation itself should fluctuate with the payor parent's income" (*D.B.S.*, at para. 45). The structure of the *Guidelines* thus creates an informational asymmetry between the parties. In a system that ties support to payor income**, it is the payor who knows and controls the information needed to calculate the appropriate amount of support. The recipient does not have access to this information, except to the extent that the payor chooses or is made to share it.** It would thus be illogical, unfair and contrary to the child's best interests to make the recipient solely responsible for policing the payor's ongoing compliance with their support obligation.

[50] This is why **frank disclosure of income information by the payor lies at the foundation of the child support regime**. In *Roberts v. Roberts*, 2015 ONCA 450, 65 R.F.L. (7th) 6, the Court of Appeal described the duty to disclose financial information as "[t]he most basic obligation in family law" (para. 11). A payor's failure to make timely, proactive and full disclosure undermines the policies underlying the family law regime and "the processes that have been carefully designed to achieve those policy goals" (*Leitch v. Novac*, 2020 ONCA 257, 150 O.R. (3d) 587, at para. 44). **Without proper disclosure, the system simply cannot function and the objective of establishing a fair standard of support for children that ensures they benefit from the means of both parents will be out of reach** (*Michel*, at para. 32, per Brown J.; *Brear*, at para. 19, per Pentelechuk J.A.).

[51] **Full and frank disclosure is also a precondition to good faith negotiation**. Without it, the parties cannot stand on the equal footing required to make informed decisions and resolve child support disputes outside of court. Promoting proactive payor disclosure thus advances the objectives — found in s. 1 of the *Guidelines* — of reducing conflict between the parties and encouraging settlement.

[52] In line with these realities, **courts have increasingly recognized that the payor's duty to disclose income information is a corollary of the legal obligation to pay support commensurate with income** (*Brear*, at paras. 19 and 69, per Pentelechuk J.A.; *Roseberry v. Roseberry*, 2015 ABQB 75, 13 Alta. L.R. (6th) 215, at para. 63; *Cunningham v. Seveny*, 2017 ABCA 4, 88 R.F.L. (7th) 1, at paras. 21 and 26). As explained by Brown J., speaking for the full Court in *Michel*,

> payor parents "are subject to a duty of full and honest disclosure — a duty comparable to that arising in matrimonial negotiations" (para. 33, referencing *Rick v. Brandsema*, 2009 SCC 10, [2009] 1 S.C.R. 295, at paras. 47-49). **Courts and legislatures have also implemented various mechanisms to incentivize and even require regular ongoing disclosure of updated income information by the payor, along with tools to move proceedings forward in the face of non-disclosure. Those mechanisms include imputing income to payors who have failed to make adequate disclosure, striking pleadings, drawing adverse inferences, and awarding costs. By encouraging timely disclosure, these tools reduce the likelihood that the recipient will be forced to apply to court multiple times to secure disclosure.** *[Emphasis added]*

[38] In summary, Mr. Beck had a legal obligation to disclose – an obligation that he consistently refused to meet in the face of court directions and orders and in the face of his obligation to financially support his children based on his income. Mr. Beck's failure has been persistent and pernicious. I must ensure that he does not profit by his misconduct. I must ensure that the children and Ms. Windrem no longer suffer because of his strategic failure to disclose.

[39] **What income should be imputed to Mr. Beck?**

[40] Ms. Windrem urges me to impute income to Mr. Beck based on an annual income of $300,000 USD which should be converted to Canadian currency and grossed up because of the preferential income tax treatment in Turks and Caicos where Mr. Beck is paid. Ms. Windrem submits that Mr. Beck's income should be designated as $390,330 for child support purposes.

[41] As previously noted, the *CSG* provide me with the discretionary authority to impute income to Mr. Beck as I consider appropriate because he failed to provide income information when under a legal obligation to do so. My discretionary authority must be exercised judicially, not arbitrarily. A rational and solid evidentiary foundation, grounded in fairness and reasonableness, must be shown before I can impute income: ***Coadic v. Coadic***, 2005 NSSC 291. The goal of imputation is to arrive at a reasonable and fair estimate of income, not to arbitrarily punish the payor: ***Staples v. Callender***, 2010 NSCA 49.

[42] When determining the amount of imputed income, I am directed to draw negative inferences in the absence of financial disclosure. In ***Jacques Home Town Dry Cleaners v. Nova Scotia (Attorney General)***, 2013 NSCA 4, Saunders JA. clarified how an inference should be drawn:

> [31] An **inference** may be described as **a conclusion that is logical**. An inference is **not a hunch**. A hunch is little more than a guess, a 50/50 chance at best, that may turn out to be right or wrong, once all the facts are brought to light. Whereas an inference is a conclusion reached when the **probability of its likelihood is confirmed by surrounding, established facts.** When engaged in the process of reasoning we are **often** called upon to draw an inference which acts as a kind of **cognitive tool or buckle used to cinch together two potentially related, but still separated propositions.** In the context of judicial decision-making, drawing an inference is **the intellectual process by which we assimilate and test the evidence in order to satisfy ourselves that the link between the two propositions is strong enough to establish the probability of the ultimate conclusion**. We do that **based on our powers of observation, life's experience and common sense**. In matters such as this, **reasonableness is the gauge by which we evaluate** the strength of the conclusion reached through our reasoning. *[Emphasis added]*

[43] In ***R v. John***, 2017 ONCA 622, Watt JA defined inferences as:

> [79] An inference is a **deduction of fact that may logically and reasonably be drawn from another fact or group of facts found or otherwise established in the proceedings. An inference which does not follow logically and reasonably from established facts is forbidden, since it amounts to conjecture and speculation**: *R. v. Morrissey* (1995), 97 C.C.C. (3d) 193 (Ont. C.A.), at p. 209.

[44] In this matter, I am satisfied that Ms. Windrem proved that income of $390,330 should be imputed to Mr. Beck for child support purposes for the following reasons:

- Ms. Windrem testified as to her conversations with Mr. Beck, as well as provided on-line materials which assist with, but are not solely determinative of the imputation calculation, including the conversion rate, and the gross-up rate because of favourable tax treatment: s. 19 (b) of the *CSG*.

- Mr. Beck persistently and perniciously failed to disclose his income for about 12 years – beginning in March 2012 when he failed to respond to a direction to disclose; in August 2012 when he failed to respond to the July 30, 2012 disclosure order; from 2014 to date when he failed to annually disclose his income contrary to clause 4 of the 2013 corollary relief order; and in 2023 to date when he failed to disclose as mandated by the direction and order to disclose.

- Ms. Windrem repeatedly asked Mr. Beck for proof of his income. Mr. Beck refused to cooperate and disclose to her.

- I infer that Mr. Beck refuses to disclose because he hopes to strategically avoid an enforceable child support order based on his actual income.

- I infer that Mr. Beck's income and compensation benefits increased with each of his promotions.

- I infer that Mr. Beck receives a substantial financial benefit from having his accommodations, meals, transportation, and hotel expenses paid on his behalf. Further, Mr. Beck does not maintain a residence in Nova Scotia or elsewhere. When he returns to Nova Scotia, he acquires a short term rental. Mr. Beck's employment results in significant costs savings for daily living expenses which would typically consume most of an individual's budget.

- I infer that if Mr. Beck was earning less than $390,330, he would have produced his income information. Ms. Windrem provided Mr. Beck with a copy of her affidavit, brief, and draft order which unequivocally outlined her request to have Mr. Beck's income set at $390,330. Despite having notice of this imputation request, Mr. Beck did not disclose. I therefore draw a negative inference that Mr. Beck is earning at least $390,330 annually or he would have disclosed. This is a logical and reasonable inference to be drawn from the connecting facts. As previously noted in ***Colucci v. Colucci***, *supra*, Mr. Beck has control of his income information. Ms. Windrem cannot produce what she does not possess. Because informational asymmetry benefits Mr. Beck, he must not be permitted to profit from his strategic failure to disclose. In this context, my conclusion about Mr. Beck's income is appropriate, logical and reasonable.

[45] **Should retroactive child support be awarded?**

[46] Ms. Windrem seeks retroactive child support effective January 1, 2022. I grant her request. In so doing, I apply the law as reviewed in ***DBS v. SRG***, *supra*; ***Michel v. Graydon***, *supra*; and ***Colucci v. Colucci,*** *supra, at para 114:*

> [114] It is also helpful to summarize the principles which now apply to cases in which the recipient applies under s. 17 to retroactively increase child support:
>
> a) The recipient must meet the threshold of establishing a past material change in circumstances. While the onus is on the recipient to show a material increase in income, any failure by the payor to disclose relevant financial information allows the court to impute income, strike pleadings, draw adverse inferences, and award costs. There is no need for the recipient to

make multiple court applications for disclosure before a court has these powers.

b) Once a material change in circumstances is established, a presumption arises in favour of retroactively increasing child support to the date the recipient gave the payor effective notice of the request for an increase, up to three years before formal notice of the application to vary. In the increase context, because of informational asymmetry, effective notice requires only that the recipient broached the subject of an increase with the payor.

c) Where no effective notice is given by the recipient parent, child support should generally be increased back to the date of formal notice.

d) The court retains discretion to depart from the presumptive date of retroactivity where the result would otherwise be unfair. The *D.B.S.* factors continue to guide this exercise of discretion, as described in *Michel*. If the payor has failed to disclose a material increase in income, that failure qualifies as blameworthy conduct and the date of retroactivity will generally be the date of the increase in income.

e) Once the court has determined that support should be retroactively increased to a particular date, the increase must be quantified. The proper amount of support for each year since the date of retroactivity must be calculated in accordance with the *Guidelines*.

[47] In granting Ms. Windrem's request, I find as follows:

- Ms. Windrem proved a material change in circumstances.
- Ms. Windrem has consistently requested financial disclosure.
- Once Ms. Windrem was aware that Mr. Beck had secured new employment, she asked for disclosure to calculate child support.
- Ms. Windrem unsuccessfully tried to negotiate an agreement but was stymied because Mr. Beck refused to disclose.
- Ms. Windrem filed a variation application because Mr. Beck refused to disclose.
- Ms. Windrem is seeking retroactive support for less than three years before formal notice.

- Mr. Beck engaged in blameworthy conduct and prioritized his own needs over those of the children by his failure to disclose, although he did pay child support in amounts which he selected. In 2022, Mr. Beck paid $7,933.48 plus half of the tutoring expenses for one of the children. In 2023, he paid $11,287.91. He continues to make payments in 2024.

- Ms. Windrem disproportionately shouldered the children's direct and indirect expenses for many years.

- Mr. Beck provided no evidence of financial hardship.

[48] Child support is varied retroactively to January 1, 2022. Mr. Beck is granted credit for all child support payments made after January 1, 2022, excluding his share of the tutoring expenses - a reasonable and necessary s. 7 expense which the parties already paid. Ms. Windrem's suggestion that the retroactive award be payable at a rate of $2,000 per month is accepted.

[49] **What amount of child support should be awarded?**

[50] My decision will address both the table amount and s. 7 expenses as claimed by Ms. Windrem. Both children live with Ms. Windrem and are dependent on her. Ms. Windrem is responsible and pays for their shelter and living expenses. One child is 18 years old and started attending university in September 2023. The other child, who is 20 years old, started university in 2022.

Table Amount

[51] Because both children's circumstances mirror those of a child under the age of majority, I find that Mr. Beck must pay Ms. Windrem the table amount of child support in keeping with the approach taken by Martinson J. in the oft cited case of ***Wesemann v. Wesemann,*** [1999] BCJ No 1387 (SC). I therefore order Mr. Beck to pay Ms. Windrem the monthly table amount of $9,842. In so doing, I find that there is no clear and compelling evidence to suggest that the table amount is inappropriate: ***Francis v. Baker***, [1999] 3 SCR 250.

Section 7 Special Expenses

[52] For the purposes of calculating the proportionate sharing of s. 7 expenses, I find Ms. Windrem's income to be $157,548 in 2022 and $161,758 in 2023 and 2024.

[53] Ms. Windrem seeks contribution for expenses associated with the children's health plan and university attendance. The children's health coverage is about $46 per month. Given the quantum of the monthly table amount, I find that the health plan expense should be paid from the $9,842 and that no additional s.7 award should be granted for this expense.

[54] I will now address the university expenses. In 2022, only the oldest child attended university where she incurred tuition and book expenses of $8,415. This amount should be proportionally shared between the parties after deducting:

- The child's contribution which I designate as $2,000.
- The amount of the income tax saving produced by the transfer of eligible education credits to Ms. Windrem.

[55] In 2023, both children attended university. Ms. Windrem notes that the oldest child's tuition, books, and transportation expenses were $12,081. This amount should be proportionally shared after deducting:

- The child's contribution of $4,790.
- The transportation expenses which are more appropriately included as part of the $9,842 table amount.
- The amount of the income tax saving produced by the transfer of eligible education credits to Ms. Windrem.

[56] In September 2023, the youngest child began his university studies. Tuition, books, and transportation expenses were $5,672. This amount should be proportionally shared after deducting:

- The child's contribution of $1,890.
- The transportation expenses which are more appropriately included as part of the $9,842 table amount.
- The amount of the income tax saving produced by the transfer of eligible education credits to Ms. Windrem.

[57] In 2024, the oldest child is expected to incur tuition, books, and transportation costs of $11,081 to attend university. This amount should be proportionally shared after deducting:

- The child's contribution of $3,000. The child is not able to work as much as she did in 2023.

- The transportation expenses which are more appropriately included as part of the $9,842 table amount.

- The amount of the income tax saving produced by the transfer of eligible education credits to Ms. Windrem.

[58] In 2024, the youngest child is expected to incur tuition, books, and transportation costs of $8,630 to attend university. This amount should be proportionally shared after deducting:

- The child's contribution of $3,000. Although the child does not yet have a job, I infer that he will do so during the summer.

- The transportation expenses which are more appropriately included as part of the $9,842 table amount.

- The amount of the income tax saving produced by the transfer of eligible education credits to Ms. Windrem.

[59] The proportional sharing of university expenses for subsequent years shall follow the same formula. The court retains jurisdiction to clarify the amount in the event of a dispute upon either party filing a motion.

[60] **What is the appropriate costs award?**

[61] Where there is a failure to disclose, s. 22 (2) of the *CSG* indicates that courts can award costs "up to an amount that fully compensates the other spouse for all costs incurred in the proceedings."

[62] Counsel provided three cases for my review on the costs issue. In ***Robillard-Cole v. Cole***, 2000 CanLII 3305 (NSSC), Davison J. interpreted the words "fully compensates" to mean "reasonable fees of the petitioner's counsel on a solicitor and client basis together with all costs including costs of travel."

[63] In ***Friedt v. Fraser,*** 2002 SKQB 79, McIntyre J. awarded solicitor and client costs where the payor failed to respond in a timely manner and the recipient expended much effort "to gather the information necessary to lay a foundation for the imputation of income": para 27.

[64] In ***DA v. NA***, 2017 BCSC 1368, Morellato J. awarded costs that "will fully compensate the Mother for all costs in the proceeding and ought to be ordered": para 41.

[65] In determining the appropriate costs award pursuant to the *CSG*, I find that counsel's fees and disbursements are reasonable, especially given that her fees were discounted because of Ms. Windrem's circumstances. I award costs on a solicitor and client basis for all services and disbursements incurred after July 3, 2023, when Mr. Beck was served with the variation application and direction to disclose. I award costs of 80% of all fees and disbursements incurred before July 3, 2023. This ruling results in a costs award of $22,933.46 which is composed of $17,280.83 (solicitor and client costs post July 3, 2023) and $5,652.63 (80% of costs incurred prior to July 3, 2023).

Conclusion

[66] In my decision, I granted Ms. Windrem's variation application given the material changes in circumstances. In determining the quantum of child support, I drew negative inferences and imputed an annual income of $390,330 to Mr. Beck. Effective January 1, 2022, I ordered Mr. Beck to pay the monthly table amount of $9,842, together with his proportionate sharing of the s. 7 university expenses. The retroactive award is payable at a rate of $2,000 per month. Support is payable through the Maintenance Enforcement Program. The usual disclosure provisions are to be included in the order.

[67] Costs of $22,933.46 are awarded.

[68] Counsel is to draft and circulate the variation order.

Forgeron J.