

CANADA / JUDGMENT

MacDonald v. Lachapelle

2022 BCSC 553

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Supreme Court of British Columbia

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2022 BCSC 553 MacDonald v. Lachapelle

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

MacDonald v. Lachapelle,

2022 BCSC 553

Date: 20220406

Docket: E131858

Registry: Vancouver

Between:

Thomas Walter MacDonald

Claimant

And

Jilleeca Jade Lachapelle

Respondent

Before: The Honourable Madam Justice W.A. Baker

Reasons for Judgment

Counsel for Claimant:

C. Linde

Counsel for Respondent:

A. Berrie

Counsel for Director of B.C. Family Maintenance Agency:

J. Anderson

Place and Date of Hearing:

Vancouver, B.C.

March 29 and 31, 2022

Place and Date of Judgment:

Vancouver, B.C.

April 6, 2022

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[1] On this application the claimant, Mr. MacDonald, seeks a number of orders relating to the support of the parties' child, J.M. In essence, Mr. MacDonald says that the method of determining his income which the parties agreed to in 2017 is no longer appropriate due to a change in his circumstances. He disagrees with child support arrears payable, as calculated by the respondent, Ms. Lachapelle, and as accepted by the director of the Family Maintenance and Enforcement ("FMEP"), and seeks a retroactive variation of child support from 2018 to the present.

[2] Ms. Lachapelle opposes the application, and seeks a payment to her of all arrears held by FMEP.

Background

- [3] The child J.M. was born on February 21, 2012, and the parties separated several months after his birth.

2017 Agreement

- [4] They entered into an agreement in 2013 addressing parenting and child support, which was amended in 2017. The 2017 agreement was filed with the court.
- [5] Mr. MacDonald is a musician, and for a number of years was a member of a band called "Hedley". Mr. MacDonald's income from the band fluctuated over the years. Some years the band wrote and recorded songs and albums. Other years they toured. In the touring years, Mr. MacDonald's income was considerably higher than in the production years. As a result, the parties in 2017 agreed that Mr. MacDonald's income for the purposes of child support would be calculated as an average of the three prior years.
- [6] In March 2018 sexual assault allegations were made against one of the members of the band. These allegations were made public, and criminal charges were laid against the member. As a result, the band ceased performing, and effectively broke up. Mr. MacDonald says that this is a change in circumstances which warrants a revisiting of the agreement on child support. He says it is no longer appropriate to average his income over the prior three years, and his child support obligations should be calculated on the basis of his yearly tax returns.
- [7] The 2017 agreement dealt with retroactive child support payable in 2017, and prospective child support. It identifies Mr. MacDonald as owning a holding company, known as Soundgrenade. It further identifies Soundgrenade as a shareholder in Hedley Touring Inc, and Hedley Entertainment Corp. Soundgrenade receives funds or dividends from Hedley Touring, and Mr. MacDonald causes Soundgrenade to pay him. The 2017 agreement further identifies that Mr. MacDonald receives self employment income from a business known as Tom MacDonald and the Beat Lab, which is said to operate at a loss.
- [8] Pursuant to paragraph 4.14 of the 2017 agreement, for future support calculations, Ms. Lachapelle's income is set at \$30,000, unless her actual income exceeds \$30,000, in which case her actual income will be used (4.14(a)). Mr. MacDonald's income is calculated as an average of his income in the three most recent years (4.14(b)).
- [9] Paragraph 4.4 of the agreement set the monthly child support payable by Mr. MacDonald at \$2,821 commencing on April 1, 2017, which is the set off amount after deducting Ms. Lachapelle's child support obligations. It is not clear what annual income was set for Mr. MacDonald in determining the set off payable by him in 2017.
- [10] The amount of \$2,821 was set until the child was no longer a "child" under the Family Law Act, S.B.C. 2011, c. 25 [FLA], and was subject to review as expressly provided for in the agreement.

- [11] If a party opted to review child support, the review was to be initiated by sending a notice in writing to the other prior to July 1 of any given year. If a party opted for a review, the parties agreed to exchange income information by July 31, and any adjustments pursuant to the Federal Child Support Guidelines, SOR/97-175 [Guidelines] would be made as of August 1.
- [12] If no party opted to review child support by July 1 of a given year, child support continued to be paid at the same amount for the upcoming year (para. 4.13).
- [13] Special and extraordinary expenses were to be shared in proportion to the parties' incomes, and would be adjusted in accordance with the new incomes set on any review.
- [14] On August 29, 2017 Ms. Lachapelle asked Mr. MacDonald to provide various financial information. In response, he provided his T1 personal tax return, his 2016 notice of assessment, financial statements for the 2016 year end for Hedley Touring and Hedley Entertainment, and the Soundgrenade T2 corporate tax return for the 2016 year end.
- [15] Mr. MacDonald asked Ms. Lachapelle to provide him with her financial information. Ms. Lachapelle did not respond with any financial disclosure.
- [16] On June 29, 2018, Mr. MacDonald's counsel provided written notice to Ms. Lachapelle that Mr. MacDonald was opting to initiate a review of child support pursuant to the agreement. Ms. Lachapelle was requested to provide her 2016 and 2017 financial information.
- [17] On July 4, 2018 counsel for Mr. MacDonald provided Ms. Lachapelle with his 2017 financial disclosure, including tax returns for Mr. MacDonald and Soundgrenade, and 2017 financial statements for Hedley Touring and Hedley Entertainment. The calculation of Mr. MacDonald's average income over the prior three years was \$294,961. No financial information was provided by Ms. Lachapelle. Pursuant to the agreement, counsel for Mr. MacDonald assumed Ms. Lachapelle's income was \$30,000. Based on these two income amounts, she calculated the monthly child support to be \$2,208.
- [18] In a letter dated July 31, 2018 Mr. MacDonald's counsel confirmed the \$2,208 monthly child support obligation, and advised Ms. Lachapelle that if a review was sought in 2019 he would want to move to an annual income for calculating child support, rather than the three-year average.
- [19] By email dated July 31, 2018 Ms. Lachapelle advised that she did not agree to changing the three-year average income calculation. She also stated that she did not agree to changing the "offset", which I take to mean the monthly child support amount. She also asked for the financial statements of Beat Lab. Mr. MacDonald's counsel responded, advising that Mr. MacDonald exercised his right of review under the agreement, and that the statement of business activities for the company operating as Tom MacDonald and the Beat Lab was contained in Mr. MacDonald's tax return which had been provided to her.

- [20] On August 22, 2019 Mr. MacDonald's counsel provided Ms. Lachapelle with the 2018 tax returns for Mr. MacDonald and Soundgrenade, and the 2018 financial statements for Hedley Touring and Hedley Entertainment. She advised Mr. MacDonald did not provide notice of a review for 2019, but that Mr. MacDonald was seeking a variation of the agreement to remove the three-year averaging for his income determination. She suggested he would agree to use his adjusted 2018 line 150 income in the amount of \$214,937 for the purposes of child support, resulting in a child support obligation of \$1,863 before the set off of \$279 allocated to Ms. Lachapelle pursuant to the Guidelines. The child support payment proposed by Mr. MacDonald for 2019, after set off, was \$1,584. Counsel for Mr. MacDonald also sought financial disclosure from Ms. Lachapelle.
- [21] This proposal was not accepted by Ms. Lachapelle. Mr. MacDonald continued to pay \$2,208 into the fall of 2019, in accordance with para. 4.13 of the 2017 agreement, which provides that if a review is not sought, child support at the then current level is deemed acceptable.
- [22] On January 23, 2020 Mr. MacDonald's counsel wrote to Ms. Lachapelle advising that due to Mr. MacDonald's change in circumstances he could no longer afford to pay child support of \$2,208 per month. Mr. MacDonald sought an amendment to the parties' agreement such that commencing January 1, 2020, Mr. MacDonald would pay a set off amount of child support in the amount of \$1,584, based on his annual income for child support purposes of \$214,937, and that going forward in future reviews Mr. MacDonald's annual income would be based on his most recent year's annual income. Mr. MacDonald's counsel also put Ms. Lachapelle on notice that he would be exercising his right of review in July 2020.
- [23] Ms. Lachapelle failed to provide any financial disclosure to Mr. MacDonald until February 2022.

History of payments by Mr. MacDonald

- [24] Immediately following the execution of the 2017 agreement, Mr. MacDonald failed to make child support payments for three months. His reason for this failure was not explained in the materials before me.
- [25] Once Mr. MacDonald began making child support payments in 2017, he paid \$2,821 each month through July 2018.
- [26] In August 2018, Mr. MacDonald began making monthly payments in the amount of \$2,208. He continued making monthly payments in that amount until October 1, 2019.
- [27] In November 2019, Mr. MacDonald paid \$1,208. In December 2019, Mr. MacDonald paid \$2,208. In January 2020, Mr. MacDonald paid \$1,000, and this was the last child support payment made by Mr. MacDonald until FMEP became involved.
- [28] On November 17, 2020 Ms. Lachapelle enrolled with FMEP. FMEP determined that \$32,257 in arrears was owing at that time, based on a monthly child support obligation of \$2,821.

- [29] Through FMEP, Mr. MacDonald paid a further \$200 in child support in 2020. In 2021, Mr. MacDonald paid a total of \$1,416 in child support.
- [30] In January 2022, Mr. MacDonald sold property which had an FMEP lien registered on title. From the sale of that property, FMEP collected \$71,255.11 with respect to arrears and \$67,704 with respect to security for payments due, a total of \$138,959.11. By order dated January 24, 2022, the funds held by FMEP were ordered to remain with FMEP pending the hearing of this application, or further court order.
- [31] On February 7, 2022, Mr. Justice Baird ordered the release of \$8,463 to Ms. Lachapelle, which was specifically identified as payment of the child support owing from the three months Mr. MacDonald failed to make payments in 2017.

Disclosure of financial information

- [32] As noted, Ms. Lachapelle failed to make any financial disclosure to Mr. MacDonald until 2022. On February 17, 2022 Mr. Justice Baird ordered, by consent, that Ms. Lachapelle produce a fully compliant F8 within 30 days. Ms. Lachapelle provided her F8 on March 22, 2022.
- [33] Mr. Justice Baird also ordered Mr. MacDonald to produce all corporate and personal tax information. On March 15, 2022 Mr. MacDonald produced an F8 which included personal tax returns and notices of assessment for the years 2018, 2019 and 2020, and the corporate tax returns and financial statements for Soundgrenade, Hedley Touring and Hedley Entertainment for the past three years.
- [34] As part of this application, Mr. MacDonald brought an application for contempt against Ms. Lachapelle, relying on the Guidelines, ss. 21, 22, and 25(7), for her failure to provide financial disclosure.
- [35] Ms. Lachapelle did not bring such an application, but submits that Mr. MacDonald has himself failed to meet his obligation to provide full financial disclosure. Counsel for Ms. Lachapelle spent a great deal of time reviewing the banking records which had been produced by Mr. MacDonald. She argued that a review of his bank records leads to the inference that Mr. MacDonald has failed to make full disclosure of his assets and income, as required under the FLA.
- [36] Counsel for Ms. Lachapelle argued that, on her review of Mr. MacDonald's personal bank statements, the following amounts were deposited into his personal bank account:
- a) 2019 - \$621,165,
 - b) 2020 - \$92,885, and
 - c) 2021 \$57,313.

- [37] Counsel for Ms. Lachapelle argued that these figures do not correspond with his reported income. Some of these deposits were made by transfers between bank accounts, and she argues those bank accounts must be owned by Mr. MacDonald and were not disclosed by him.
- [38] Counsel for Ms. Lachapelle pointed to a very large deposit of \$494,803 in June 2019, followed by immediate transfers out of Mr. MacDonald's account in the amounts of \$190,000 and \$212,645. She suggested that the source of these funds and the recipient of these funds have not been identified, and suggests that Mr. MacDonald is receiving income and improperly moving it out of his accounts. She noted that in 2019 Mr. MacDonald received purchase refunds in the total amount of \$32,339 from an instrument supply store, which has not been accounted for in any tax return.
- [39] Counsel for Ms. Lachapelle argued that Mr. MacDonald has not provided Ms. Lachapelle with all bank statements of all his personal bank accounts, and the bank accounts of the companies where he has authority to withdraw funds, and any joint accounts he holds with any other person. In the absence of this full disclosure, no change to child support should be made.
- [40] The difficulty I have with the submissions of Ms. Lachapelle is that Mr. MacDonald did comply with the order of Mr. Justice Baird to produce his tax information, and he provided financial statements for the companies. In addition, Mr. MacDonald provided correspondence from the accountant for the companies, and the corporate lawyer for the companies, explaining the finances of the companies, explaining the earnings and distributions in Hedley Touring, Hedley Entertainment, and Soundgrenade, and explaining the corporate structure of the companies.
- [41] In addition, while on February 11, 2022, Mr. Justice Funt ordered that the parties complete discoveries in March 2022, counsel for Ms. Lachapelle declined to conduct a discovery of Mr. MacDonald. I was provided no evidence that Ms. Lachapelle has made any attempt to examine Mr. MacDonald on these issues, pose questions through counsel, or in any way give Mr. MacDonald an opportunity to explain the entries in his bank statements.
- [42] At no time did counsel for Ms. Lachapelle suggest that she could not proceed on this application because she needed to question Mr. MacDonald about his bank records. To the contrary, counsel for Ms. Lachapelle insisted that this application proceed on March 29, 2022. Now, counsel for Ms. Lachapelle simply asks the court to draw inferences that Mr. MacDonald is hiding his income information, based on suppositions and assumptions she has made based on her own review. However, counsel's guesses and assumptions are not evidence upon which I can base a decision.

- [43] Mr. MacDonald has not been given an opportunity to answer the questions posed by Ms. Lachapelle, and there may be legitimate explanations for the transactions in his accounts. For example, the deposit of close to \$500,000 in 2019 occurred several months after he split with his ex-wife Bobbie-Ann MacDonald. It is possible that the deposit relates to the sale of matrimonial property.
- [44] It is just as easy to imagine legitimate explanations for the transactions as it is to imagine nefarious explanations. Courts do not decide issues based on speculation, however. Courts decide issues based on evidence.
- [45] If Ms. Lachapelle had asked to adjourn this application to allow her examine Mr. MacDonald on his bank statements, I would have considered that. But she did not. She insisted that application proceed, and I am prepared to make my decision on the evidence that has been filed in support.
- [46] I am satisfied that the financial information produced by Mr. MacDonald on this application is adequate. It clearly sets out the financial status of the companies. The financial statements of the companies together with their tax returns set out a clear picture of the assets in the companies available for distribution. It is clear these companies are not holding back substantial funds. In 2020 Soundgrenade had \$13,856 in retained earnings. In 2020 Hedley Touring had assets of \$53,085 and liabilities of \$137,583 (including \$96,943 due to shareholders) leaving retained earnings in the negative of -\$84,498. In 2020 Hedley Entertainment had \$24,698 in retained earnings. The other band members, or their holding companies, are also shareholders in the Hedley companies.
- [47] Mr. MacDonald's personal tax returns disclose his income from Soundgrenade and from his business Tom MacDonald and the Beat Lab. Mr. MacDonald has not provided his tax return for 2021. His tax return is not due until the end of April, 2022. Mr. MacDonald does not seek a determination of his income for child support commencing on August 1, 2022 on this application. He argues child support should be determined in the summer of 2022 based on the parties' 2021 tax returns.
- [48] Mr. MacDonald provided Ms. Lachapelle with all financial information required under their agreement in 2017, 2018, and 2019, and received no reciprocal disclosure from Ms. Lachapelle in those years.
- [49] It is clear that there has been a lack of good will between the parties in relation to child support. Ms. Lachapelle seems to have taken the position that she is entitled to simply ignore the review process agreed to in the 2017 agreement, and receive child support in the amount of \$2,821 regardless of the review mechanism she agreed to, and regardless of any change in Mr. MacDonald's income. Mr. MacDonald appears to have ignored his obligation to the child to pay any meaningful child support after 2019. Without coming to court to seek a variation in a timely way, Mr. MacDonald simply stopped paying child support at all.

[50] I am not satisfied that an order for contempt against Ms. Lachapelle will advance matters between the parties, Given the very low reported income of Ms. Lachapelle, I do not find it is in the best interests of the child to order payment of a contempt order which would represent a significant percentage of her yearly income. As such, I decline to make the order for contempt sought by Mr. MacDonald. If Ms. Lachapelle continues to be non-compliant in the future, a different application may garner a different result.

Variation of child support

[51] The FLA sets out the following provisions with respect to changing, suspending, or terminating child support:

152(1) On application, a court may change, suspend or terminate an order respecting child support, and may do so prospectively or retroactively.

- (2) Before making an order under subsection (1), the court must be satisfied that at least one of the following exists, and take it into consideration:
 - (a) a change in circumstances, as provided for in the child support guidelines, has occurred since the order respecting child support was made;
 - (b) evidence of a substantial nature that was not available during the previous hearing has become available;
 - (c) evidence of a lack of financial disclosure by a party was discovered after the last order was made.

174(1) On application, a court may reduce or cancel arrears owing under an agreement or order respecting child support or spousal support if satisfied that it would be grossly unfair not to reduce or cancel the arrears.

- (2) For the purposes of this section, the court may consider
 - (a) the efforts of the person responsible for paying support to comply with the agreement or order respecting support,
 - (b) the reasons why the person responsible for paying support cannot pay the arrears owing, and
 - (c) any circumstances that the court considers relevant.
- (3) If a court reduces arrears under this section, the court may order that interest does not accrue on the reduced arrears if satisfied that it would be grossly unfair not to make such an order.
- (4) If a court cancels arrears under this section, the court may cancel interest that has accrued, under section 11.1 of the Family Maintenance Enforcement Act, on the cancelled arrears if satisfied that it would be grossly unfair not to cancel the accrued interest.

[52] In *Caillier v. Viray*, 2021 BCSC 2512, Chief Justice Hinkson helpfully laid out the relevant and principles, including as set out in *Colucci v. Colucci*, 2021 SCC 24 [Colucci], in an application to retroactively vary child support:

[13 In *D.B.S. v. S.R.G.*, 2006 SCC 37 [D.B.S.], the Court considered the principles and competing interests underlying recipients' applications for a retroactive increase in child support. Ultimately, the payor parent's interest in certainty must be balanced with the need for flexibility and fairness to the child. The Court identified four factors to consider when deciding on a retroactive award. Once it is determined that a retroactive award should be ordered, the general rule is that it should not extend more than three years prior to the date of effective notice. At para. 123, Justice Bastarache explained the three-year limit when retroactively increasing 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.

[14] *D.B.S.* was adapted and applied in *Colucci v. Colucci*, 2021 SCC 24 [Colucci] for the context of a payor seeking a retroactive decrease in child support and rescission of arrears.

[15] *Colucci* clarifies the appropriate framework for determining when child support under s. 17 of the Divorce Act can be retroactively decreased, and how that framework applies where the payor also seeks a rescission of the arrears based on a current inability to pay, rather than past changes in circumstances.

[16] At para. 55, Justice Martin, for the unanimous Court stated:

[55] In building a framework for the variation of child support and the rescission of arrears, judicial discretion must be structured to safeguard the child's interest in receiving the appropriate amount of support to which they are entitled. Alongside this paramount interest, there must be a fair balancing of certainty and flexibility to reach a just result in light of fluctuations in payor income and the particular circumstances of each case. In addition, the framework under s. 17 must promote the timely disclosure of accurate information, which in turn encourages equal bargaining and fair settlements, as the payor parent "holds the cards" when it comes to child support (*Michel v. Graydon*, 2020 SCC 24], at para. 32, per Brown J.). Above all, "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" (D.B.S., at para. 4). Payors should not be better off from a legal standpoint if they do not pay the child support the law says they owe. Nor should payors receive any sort of benefit or advantage from failing to disclose their real financial situation or providing disclosure on the eve of the hearing.

[17] At para. 113, Martin J. summarized the framework to be applied where a retroactive decrease in child support and/or the rescission of arrears of child support are sought:

113 where the payor applies under s. 17 of the Divorce Act to retroactively decrease child support, the following analysis applies:

- (1) The payor must meet the threshold of establishing a past material change in circumstances. The onus is on the payor to show a material decrease in income that has some degree of continuity, and that is real and not one of choice.
 - (2) Once a material change in circumstances is established, a presumption arises in favour of retroactively decreasing child support to the date the payor gave the recipient effective notice, up to three years before formal notice of the application to vary. In the decrease context, effective notice requires clear communication of the change in circumstances accompanied by the disclosure of any available documentation necessary to substantiate the change and allow the recipient parent to meaningfully assess the situation.
 - (3) Where no effective notice is given by the payor parent, child support should generally be varied back to the date of formal notice, or a later date where the payor has delayed making complete disclosure in the course of the proceedings.
 - (4) The court retains discretion to depart from the presumptive date of retroactivity where the result would otherwise be unfair. The D.B.S. factors (adapted to the decrease context) guide this exercise of discretion. Those factors are: (i) whether the payor had an understandable reason for the delay in seeking a decrease; (ii) the payor's conduct; (iii) the child's circumstances; and (iv) hardship to the payor if support is not decreased (viewed in context of hardship to the child and recipient if support is decreased). The payor's efforts to pay what they can and to communicate and disclose income information on an ongoing basis will often be a key consideration under the factor of payor conduct.
 - (5) Finally, once the court has determined that support should be retroactively decreased to a particular date, the decrease must be quantified. The proper amount of support for each year since the date of retroactivity must be calculated in accordance with the Guidelines.
- [53] While Colucci was decided with reference to the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.), which is not applicable in the case before me, the principles it sets out are equally relevant to an application pursuant to the FLA.

Material change

- [54] Mr. MacDonald has the onus of showing that there has been a material change in his income that is real and not of his choice. I am satisfied that when the 2017 agreement was drafted, as referenced within the agreement itself, the understanding of the parties was that Mr. MacDonald was a musician with a variable, and significant, income. The parties attempted to smooth out the variations in Mr. MacDonald's income by using a three-year average to determine income for child support purposes.
- [55] As disclosed in the 2017 agreement, Mr. MacDonald's income from 2012 to 2015 ranged from \$106,023 to \$580,384. In 2017, using the three-year average, Mr. MacDonald's income was over \$290,000, and justified an offset child support payment of \$2,821. In 2018, using the three-year average, Mr. MacDonald's income was \$294,961. In 2019, Mr. MacDonald was no longer a musician, and his annual income (not averaged) dropped to \$89,837. In 2020, Mr. MacDonald's annual income (not averaged) was \$96,023.68.
- [56] In 2018 one or both of the Hedley companies issued dividends to their shareholders, including Soundgrenade, after the group effectively wound up. Mr. MacDonald recorded payment of dividends in the amount of \$85,560 from Soundgrenade in his 2019 and 2020 personal tax returns. But for the dividends which originated in Hedley, Mr. MacDonald's income in 2019 and 2020 would have been nominal. There are no further dividends of this magnitude expected in 2021.
- [57] It is not known what income will be reported in Mr. MacDonald's 2021 tax return, but from submissions of counsel it is expected to be less than his 2020 income.
- [58] I am satisfied that Mr. MacDonald has established a material change in income which is continuous, real and not out of choice. The reduction in income flows from the alleged criminal activity of a band member, which resulted in the collapse of the band Hedley, Mr. MacDonald's primary source of income in 2017 and previously. There is no evidence before me which would justify a continued averaging of Mr. MacDonald's income over a three-year period, and I find that such a mechanism in the face of Mr. MacDonald's changed circumstances would be unfair.

Presumptive date of retroactivity

- [59] The presumptive date of retroactivity is the date of effective notice to Ms. Lachapelle. Mr. MacDonald argues that effective notice was given in 2018, and the adjustment should be made beginning in the 2018 year. I disagree.
- [60] In 2018 Mr. MacDonald followed the agreement between the parties, and opted for a review under the agreement. He provided his financial information and, based on the formula agreed to by the parties, reduced his child support payment to \$2,208 commencing August 1, 2018. On this application, Ms. Lachapelle characterized this reduction in child support as an improper unilateral act by Mr. MacDonald. I disagree. Mr. MacDonald was entitled to set a

review, and he properly followed the steps to recalculate child support pursuant to the agreement. The fact that Ms. Lachapelle chose not to participate does not invalidate Mr. MacDonald's actions. The agreement does not require both parties to seek a review. One party can seek a review and, if Ms. Lachapelle did not want to participate, Mr. MacDonald was entitled to rely on the income attribution to her set out in the agreement.

[61] In 2019, Mr. MacDonald advised Ms. Lachapelle that he was not seeking a review under the agreement. However, he did advise Ms. Lachapelle that he was seeking a reduction in child support to \$1,584 based on his adjusted 2018 income. This proposal was rejected by Ms. Lachapelle. While until January 2020 he continued to follow para. 4.13 of the 2017 agreement, which resulted in a monthly child support payment amount of \$2,208, I find that Mr. MacDonald did give notice to Ms. Lachapelle on August 22, 2019 of his intention to vary child support.

[62] As such, I find that the presumptive date of retroactivity is September 1, 2019.

Quantum and terms of variation order

[63] Beginning on September 1, 2019, Mr. MacDonald's income for the purposes of calculating child support payable under the Guidelines will be based on his adjusted 2018 income, which I fix at \$214,937.

[64] Beginning on August 1, 2020, Mr. MacDonald's income for the purposes of calculating child support payable under the Guidelines will be based on his 2019 income, which I fix at \$89,837.

[65] Beginning on August 1, 2021, Mr. MacDonald's income for the purposes of calculating child support payable under the Guidelines will be based on his 2020 income, which I fix at \$96,023.68.

[66] There is no application before me to vary para. 4.14(a) of the agreement, which deals with the income of Ms. Lachapelle. There will be no change to para. 4.14(a).

[67] Using an income of \$214,937 for Mr. MacDonald and \$30,000 for Ms. Lachapelle, the setoff child support payable by Mr. MacDonald commencing September 1, 2019 is \$1,584 per month.

[68] Using an income of \$89,837 for Mr. MacDonald and \$30,000 for Ms. Lachapelle, the setoff child support payable by Mr. MacDonald commencing August 1, 2020 is \$579.87 per month.

[69] Using an income of \$96,023.68 for Mr. MacDonald and \$30,000 for Ms. Lachapelle, the setoff child support payable by Mr. MacDonald commencing August 1, 2021 is \$633.19 per month. This child support amount will remain in effect until reviewed pursuant to the 2017 agreement.

- [70] Paragraph 4.14(b) of the 2017 agreement is amended to read: "Thomas's annual income will be calculated in accordance with ss. 16-20 of the Guidelines;"
- [71] Beginning in 2022, either party may seek a review of child support in accordance with the review process set out in the 2017 agreement.

Reduction or cancellation of arrears

- [72] When Ms. Lachapelle registered with FMEP in November 2020, the arrears calculated by FMEP were based on a monthly support payment of \$2,821. This was incorrect. The arrears at enrollment must be recalculated by FMEP in accordance with these reasons, and any adjustments for overpayments in September and October 2019 must be taken into account.
- [73] Similarly, the ongoing arrears must be recalculated in accordance with these reasons.
- [74] All arrears, and interest accruing thereon, must be recalculated in accordance with the following child support obligations payable by Mr. MacDonald:
- a) August 2018 up to and including August 2019: \$2,208 per month
 - b) September 2019 up to and including July 2020: \$1,584 per month
 - c) August 2020 up to and including July 2021: \$579.87 per month
 - d) August 2021 to the present and until a review is initiated by either party: \$633.19 per month
- [75] Counsel for the director of FMEP has indicated that such calculations will be performed by FMEP in accordance with my reasons. If there is a dispute between the parties with respect to the calculations performed by FMEP, they may appear before the Registrar to settle the exact amounts.
- [76] Once the arrears have been adjusted in accordance with my reasons, the director shall release to Ms. Lachapelle all arrears properly owing to her. The remaining funds held by FMEP on account of arrears will be released to Mr. MacDonald, net of any charges or expenses properly payable to FMEP. I will deal with the funds held by FMEP for security separately in these reasons.

Section 7 expenses

- [77] There is no application before me for any payment of section 7 expenses, or for any variation of section 7 expenses. The 2017 agreement directs that section 7 expenses will be paid proportionate to the parties' incomes. I see no reason why this should change. The parties' shares of section 7 expenses can be calculated in accordance with the incomes I have determined in these reasons.
- [78] The agreement requires the parties to consent in writing in advance to section 7 expenses. There was no evidence before me as to whether the parties have agreed to section 7 expenses as required by the agreement. However, I note that Ms. Lachapelle has listed costs

of tutoring and braces on her F8 as section 7 expenses, which she says have not been contributed to by Mr. MacDonald. While I make no orders in this respect, given the fact there is no application before me regarding payment of section 7 expenses, I note that tutoring and braces would ordinarily be payable and I encourage the parties to reach agreement between themselves in this respect.

Security

- [79] FMEP currently holds \$67,704 in trust as security for payment of Mr. MacDonald's child support obligations. It was not explained to me how this number was arrived at, but it seems to approximate two years of child support payments at \$2,821 per month.
- [80] The director of FMEP argues that security should continue to be held, given the long period of time over which Mr. MacDonald has been a delinquent payor, and given a text message where Mr. MacDonald appears to use non-payment of child support as a means to influence Ms. Lachapelle.
- [81] I agree that Mr. MacDonald has been a delinquent payor for an inexcusable amount of time. It was open to him to come to court in 2020 to vary child support, but instead he chose to simply stop paying. Child support is a right of the child, and it should not be used as a weapon between parents, or as an expression of frustration when one party is unreasonable, as was Ms. Lachapelle in her dealings with Mr. MacDonald.
- [82] Given his past failure to pay child support, I am not convinced that security is unnecessary. However, I will order that the security presently held by FMEP be reduced to \$15,000. These funds are held as security for non-compliance by Mr. MacDonald with his support obligations. It is not intended that the security forms a "pre-payment" of future obligations.
- [83] After a year from the date of these reasons, Mr. MacDonald has leave to apply for an order releasing this security. It will be up to the court on the evidence before it on any such future application to be satisfied that security is no longer necessary.
- [84] FMEP will retain \$15,000 as security for Mr. MacDonald's future obligations. All remaining funds which have been held by FMEP as security, including any accrued interest, will be released to Mr. MacDonald.

Costs

- [85] The parties have leave to make submissions on costs. If no application to speak to costs is made, each party will bear their own costs.

"W.A. Baker J."

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