

Case Name:

R v. N

Between

**Ms. R, Applicant (Moving Party), and
Mr. N, Respondent (Responding Party)**

[2011] O.J. No. 2105

2011 ONCJ 240

Toronto Registry No. D49657/09

Ontario Court of Justice

C. Curtis J.

Heard: June 9, July 27, September 8 and November 25, 2010.

Judgment: March 15, 2011.

(97 paras.)

Family law -- Maintenance and support -- Child support -- Calculation or attribution of income -- Financial disclosure -- Considerations -- Agreement -- Effect of benefits from third parties -- Variation or termination of obligation -- Changed circumstances -- Retroactive awards -- Quantum -- Payor's annual income -- Number of children -- 1 -- Monthly award -- Special or extraordinary expenses -- Health -- Education -- Extracurricular activities -- Payor's obligation (percentage) -- Motion by mother to vary child support and s. 7 expenses, retroactive to 2006 allowed in part -- Father earned \$91,074 -- 17-year-old son was elite athlete -- 1995 agreement set monthly support at \$300, with cost of living increases and 50/50 extraordinary expense sharing -- Father made no increases until 2005 -- Parties agreed on monthly support of \$733, \$747, \$884 and \$806 from 2006-2009 -- Retroactive s. 7 contribution to 2006 appropriate since father on notice since 2005 -- Mother claimed \$27,375, however, some expenses not appropriate and father not consulted about costs -- Father owed \$8,614 for orthodontics, tutoring hockey and baseball.

Motion by the mother to vary the child support and s. 7 payments, retroactive to 2006. The parties' 17-year-old son was an elite athlete. The mother was married and earned \$41,600. The father was married with two children and earned \$91,074. The parties lived together for less than one year and never married. In 1995, the parties signed an agreement

requiring the father to pay \$250 monthly support until 2006, then \$300, which was to be subject to cost-of-living increases. The parties were to split s. 7 expenses 50/50. The father's income was not stated in the agreement and there was no clause requiring him to make financial disclosure. The agreement pre-dated the Child Support Guidelines. The father did not pay any cost-of-living increases or make financial disclosure. In 2005, the mother asked for a contribution to baseball expenses and for increased support. The father voluntarily increased support each year, but did not make financial disclosure and paid less than the Guideline amount. The parties had agreed that the father was required to pay monthly child support of \$733 in 2006, \$747 in 2007, \$884 in 2008 and \$806 from 2009. The father resisted the retroactive s. 7 expense claim, arguing the mother never asked for a contribution or provided receipts, he was never informed about the child's activities and the mother's husband and a former partner paid these expenses. The mother sought \$27,375.

HELD: Motion allowed in part. The father was required to pay support arrears based on the monthly support amounts agreed to by the parties. There was no doubt the mother put the father on notice in 2005 by requested increased support and a contribution to baseball expenses. The father was blameworthy in not paying any increases until 2005, not disclosing income and not paying child support based on his income. The voluntary payments made were too low. The child did not suffer hardship because of contributions by other father figures in his life. S. 7 expenses were adjusted to 2006. Not all the expenses claimed by the mother were allowable, however. Orthodontics were allowed, as were reasonable and necessary hockey, baseball and tutoring fees. Football expenses were modest and not allowed and personal trainer, vitamins and driving school were not appropriate s. 7 expenses. As the child's other father figures paid some of the expenses and the mother did not consult with the father, the entire amounts were not allowed. The father was to pay \$8,614 in s. 7 expenses since 2006 and 50 per cent of ongoing expenses. The father was to make financial disclosure and the mother was required to advise the father of s. 7 expenses.

Statutes, Regulations and Rules Cited:

Child Support Guidelines, O. Reg. 391/97, s. 7, s. 7(1), s. 7(1.1), s. 14, s. 21, s. 25

Family Law act, R.S.O. 1990, c. F.3, s. 35, s. 37(1), s. 37(2.1)

Court Summary:

Support orders -- Assessment of quantum -- Child support guidelines -- Add-ons -- Calculation of contribution -- Reasonableness of expense -- In relation to means of parents or spouses -- Ordinarily, expense of tutoring for student as supplement to educational program could be legitimate section 7 expense, but quantum of that expense would have to be necessary in relation to child's best interests and reasonable in relation to parents' means -- In this case, custodial mother's evidence about desirability of expense or its necessity in relation to child's best interests had too many gaps and court regarded bill of \$7,757 for 2 years was unreasonable in view of parents' means -- Court limited mother to claiming \$2,000 in each of 2 years.

Support orders -- Assessment of quantum -- Child support guidelines -- Add-ons -- Classes of expense -- Expenses for extracurricular activities -- Cost of custodial parent's attendance at events -- As part of her claim for father's contribution to section 7 expenses, custodial mother had included gate (or admission) fees that she and child had to pay to gain entry to facilities where games were played as well as cost of travel and stay for herself and for child at tournaments -- Court pointed out that such costs as they related to child would be appropriate section 7 expenses, but child support is not intended to cover expenses personally incurred by parent -- Mother's portion of those costs were not proper section 7 expense and she should not have claimed them.

Support orders -- Assessment of quantum -- Child support guidelines -- Add-ons -- Classes of expense -- General -- Entitlement under subsection 7(1) -- List of special and extraordinary expenses under subsection 7(1) of *Child Support Guidelines* is exhaustive and, if custodial parent cannot convince court that alleged expense falls within subsection 7(1), then it will be disallowed -- Custodial parent does not have *carte blanche* to enrol child in variety of extra-curricular activities and then to expect non-custodial parent to share in costs -- Where student loved and excelled in athletic activity, court was prepared to accept direct costs associated with class of sports as proper section 7 expenses, but rejected expenses claimed for personal trainer and for vitamins and dietary supplements -- Court also rejected cost of driver's lessons offered through the Young Driver's program as legitimate section 7 expense.

Support orders -- Form of order -- Retroactive award -- Grounds for making retroactive child support -- General -- Review of all factors -- About 16 1/2 years ago (before promulgation of *Child Support Guidelines*), unmarried parents of boy (now 17 years old) signed agreement for child's support that did not state father's income nor did it require annual financial disclosure -- It did contain clause for annual cost-of-living increases, but no cost-of-living increases were ever paid -- Mother claimed that she had regularly asked father to pay child support on basis of his increased income and father denied that he had ever been asked -- Father apparently chose not to have any relationship with his son and never sought access -- Then 6 years ago, after mother had suddenly asked father for proof of his income and to pay child support according to *Child Support Guidelines*, father began voluntarily paying increased levels of child support, but still did not reveal his income -- Only after mother filed agreement with court under section 35 of *Family Law Act* and applied for variation about 15 months ago did it become clear that father had consistently paid support in amounts well below what guidelines required of his income bracket -- In her claim, mother asked for ongoing support in accordance with guidelines and for father's share of section 7 expenses -- She also asked for retroactive support to date of agreement (16 1/2 years) but on retroactive section 7 expenses, she settled on going only 5 years back -- Court reviewed standard factors:

1. Delay by mother: Mother had no hard evidence of having made requests for increases until father suddenly started making unilateral (but still inadequate) increases in support 6 years ago -- That was arguably date of actual notice to him of her request for increase

2. Blameworthy conduct by father: Court found that father had engaged in blameworthy conduct in failing to pay any cost-of-living after date of agreement, in failing to disclose changes in his income and in not adjusting child support according to his income until 6 years ago -- Yet even then, he still hid his income from mother and his voluntary increases in child support fell below table amounts prescribed by *Child Support Guidelines*.
3. Hardship in child's circumstances: In this case, child was lucky that other father figures had assisted his mother financially, which allowed him to pursue athletic activities at which he excelled -- Child had not suffered hardship, but charity of others did not change father's obligation of financial support towards child
4. Hardship to the payor father: None and none claimed.

Court retroactively adjusted father's support obligation to 1 January 2006 in accordance with table amounts prescribed by guidelines -- Court also made certain (but not all) section 7 expenses claimed by mother retroactive to that date.

Cases cited:

D.B.S. v. S.R.G.; L.J.W. v. T.A.R.; Henry v. Henry; Hiemstra v. Hiemstra, 2006 SCC 37, [2006] 2 S.C.R. 231, 351 N.R. 201, 391 A.R. 297, 61 Alta. L.R. (4th) 1, 377 W.A.C. 297, [2006] 10 W.W.R. 379, 270 D.L.R. (4th) 297, 31 R.F.L. (6th) 1, [2006] S.C.J. No. 37, 2006 CarswellAlta 976.

D'Urzo v. D'Urzo (2002), 30 R.F.L. (5th) 277, [2002] O.J. No. 2415, [2002] O.T.C. 419, 2002 CarswellOnt 2104 (Ont. S.C.).

Forrester v. Forrester, 1997 CanLII 15466, 73 A.C.W.S. (3d) 479, 11 O.F.L.R. 61, [1997] O.J. No. 3437, 1997 CarswellOnt 3212 (Ont. Fam. Ct.).

Kilrea v. Kilrea (1998), 82 A.C.W.S. (3d) 952, [1998] O.J. No. 3677, 75 O.T.C. 269, 1998 CarswellOnt 3652 (Ont. Gen. Div.).

Park v. Thompson, 2005 CanLII 14132, 77 O.R. (3d) 601, 197 O.A.C. 158, 252 D.L.R. (4th) 730, 13 R.F.L. (6th) 415, [2005] O.J. No. 1695, 2005 CarswellOnt 1632 (Ont. C.A.).

Selig v. Smith, 2008 NSCA 54, 266 N.S.R. (2d) 102, 851 A.P.R. 102, 56 R.F.L. (6th) 8, [2008] N.S.J. No. 250, 2008 CarswellNS 307 (N.S.C.A.).

Smith v. Smith (1997), 75 A.C.W.S. (3d) 703, [1997] O.J. No. 4833, 48 O.T.C. 316, 1997 CarswellOnt 4493 (Ont. Gen. Div.).

Smola v. Roger, [2002] O.J. No. 1254, [2002] O.T.C. 207, 2002 CarswellOnt 1138 (Ont. Fam. Ct.).

Zimmerman v. Doe, 2007 CanLII 28755, 159 A.C.W.S. (3d) 407, [2007] O.J. No. 2896,

2007 CarswellOnt 4721 (Ont. S.C.).

Authors and Works cited:

Payne, Julien D. and Marilyn A. Payne: *Child Support Guidelines in Canada*, (Toronto: Irwin Law, 2009).

Statutes and Regulations cited:

Child Support Guidelines, O. Reg. 391/97 [as amended], section 7, subsection 7(1), section 14, section 21 and section 25.

Family Law Act, R.S.O. 1990, c. F-3 [as amended], section 35, subsection 37(1) and subsection 37(2.1).

Counsel:

Steven D. Benmor, counsel for the applicant mother (moving party).

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JUDGMENT

C. CURTIS:--

1. OVERVIEW

1 This is the decision in the mother's motion to change the child support terms of an agreement signed by the parents on 26 September 1995.

2 The mother started the motion to change on 18 December 2009, and asked:

- (a) to change the table amount of child support to the proper amount based on the father's income, starting on 1 January 1996, or on the earliest possible retroactive date;
- (b) to change the special expenses portion of child support to the proper amount based on the father's income, starting on 1 January 1996, or on the earliest possible retroactive date;
- (c) for production of the father's income tax returns and notices of assessment for each year from 1996; and
- (d) for costs.

3 The father's response filed on 20 May 2010 asked:

- (a) for an accounting regarding the special expenses;
- (b) that he be required to pay only those special expenses that are reasonable;
- (c) for receipts or proof of payment regarding special expenses since 1996; and
- (d) that any arrears of support determined be repaid at \$350 per month from 1 April 2010.

4 The issues for decision are these:

- (a) Should there be a retroactive adjustment of the child support table amount in accordance with the father's income, and if so, what is the proper start date?
- (b) Should there be a retroactive adjustment of child support for special expenses in accordance with the father's income and the special expenses incurred, and if so, what is the proper start date?

2. BACKGROUND FACTS

5 The applicant (the moving party) is the mother, Ms. R ("the mother") now 41 years old. The mother works for C Entertainment. and earns \$41,600 in 2010. She is married to Mr. G.

6 The respondent (the responding party to the motion) is the father, Mr. N ("the father") now 39 years old. The father is married with two children. No evidence was provided about the father's wife, or her income or the ages of the two children. He works for CMW Inc., and earned \$91,074.19 (including overtime) in 2009 and, at the time of the hearing, earned \$67,362.96 in 2010 base pay (not including overtime).

7 The parents lived together from September 1993 to June 1994, and were not married to each other.

8 There is one child of the relationship, B.D., now 17 years old. He is a full-time student in grade 12 and he is a star athlete.

9 The parents signed a separation agreement, called a "Custody and Support Agreement", on 26 September 1995. The agreement confirmed that both had independent legal advice or the opportunity to obtain it. At the hearing of the motion, both treated the agreement as valid and binding. The agreement provided, among other things, the following:

- (a) custody of the child to the mother with specified access to the father; and,
- (b) child support as follows:
 - (i) \$250 per month from 1 June 1995 to 31 December 1995;
 - (ii) \$300 per month from 1 January 1996;
 - (iii) cost of living increases each year starting June 1995; and
 - (iv) each parent to pay 50% of the cost of post-secondary education (including tuition, residence, supplies, equipment and other incidental expenses).

10 The father's income was not stated in the agreement. There was no clause requiring annual financial disclosure. As the agreement pre-dated the introduction of the *Child Support Guidelines*, O. Reg. 391/97, as amended, in May 1997, that is not surprising. As well, the agreement was entered into at a time when child support was deductible by the payor from income for tax purposes and was required to be included in the recipient's income for tax purposes.

11 The agreement contained an unusual cost-of-living clause. The clause provided that in no event should the cost-of-living adjustment reduce support below \$300 per month, nor below the adjusted payment per month as calculated pursuant to the previous years' adjustment. The result of this clause is that the cost-of-living adjustment could only operate to increase support.

12 No cost-of-living increases were paid. The agreement was not filed with the Family Responsibility Office. It was filed with the court under section 35 of the *Family Law Act*, R.S.O. 1990, c. F-3, as amended, on 16 December 2009 (just before the motion to change was issued and served).

13 The mother's evidence is that she asked the father, in 1996 and each year after that, to pay child support based on his increased income. She says that, in 1997 after the *Child Support Guidelines* were introduced, she asked the father to provide proof of his income, such as his income tax returns, attachments to the income tax returns and notices of assessment. These requests by the mother were made orally with no written proof of the requests. The mother says that the father did not provide any of this information.

14 The mother says that, suddenly in 2006 when she asked the father for proof of his income and for him to pay child support as due under the *Child Support Guidelines*, the father began paying an increased table amount of child support, as follows (but did not produce proof of his income):

- (a) in September 2005, \$408 per month;
- (b) from October 2005, \$516 per month;
- (c) from February 2006, \$564 per month; and
- (d) from September 2008, \$720 per month.

15 At the hearing of the motion, the father was paying \$720 per month child support. There was no evidence about the income tax status of these payments, that is whether the father continued to deduct the payments from his income for tax purposes.

16 Both parents had lawyers and the father's income tax returns were produced. At an early case conference on 15 March 2010, the parents, to their credit, agreed to the following order amending the table amounts of child support:

- (a) from 1 January 2006, \$733 per month, on income of \$81,709;
- (b) from 1 January 2007, \$747 per month on income of \$83,501;
- (c) from 1 January 2008, \$884 per month, on income of \$100,975; and
- (d) from 1 January 2009, \$806 per month, on income of \$91,074.

17 An order was also made on 15 March 2010 for the father to make annual financial disclosure by 1 June every year, starting in 2010, including copies of his income tax returns and notices of assessment, pursuant to sections 21 and 25 of the *Child Support Guidelines*.

18 The father says that the mother never requested that he pay for any of the section 7 expenses, until once in 2005 when she requested a contribution to the baseball expense, and once in 2008 when she demanded a lump sum of \$15,000 (without any details or invoices provided). The father says that, even when he paid for the baseball expense in 2005, he merely deposited money into the mother's account and was never provided with a receipt or proof of payment.

19 After the order dealing with the table amount of child support was made in March 2010, the mother advised the court that she was seeking section 7 expenses only from 2006 onwards.

20 The father's evidence is that he has had difficulties with access to the child for many years, starting back in 1995 and continuing until now. He does not know what school the child attends or his grades, or why the child requires tutoring. He has never seen a report card. He does not know who is listed on the school records as the child's father. The mother says that the father never asked for any of this information. The mother's evidence is that the father chose not to maintain a relationship with the child, did not request access and did not bring the access matter to court.

21 The father's evidence is that he did not know what sports the child was playing, what team he was on, where the child was playing the games or his schedule of games (apart from learning of one baseball game in Guelph in 2005 (which he attended) and one hockey game in 2007 (which he attended)). The father says that he had so little information about the child's sports activities that, once in 2006, when he was working as a sports producer editing taped material with shots of a hockey game, he learned that the child was playing on that particular team at that game. The mother says that the father never asked for any of this information.

22 From 1994 to 1996, the mother had a relationship with Mr. YR, who parented the child and became quite close to him. The father says that the child has always called Mr. YR his father, and still does. The father says that Mr. YR supported the child financially and still does.

23 The father says that the mother did send him some bills for insurance coverage (orthodontics, for example).

24 The father says that he never received any proof of the special expenses amount until the motion to change was started. He says that those invoices produced show that some of those expenses were paid for by Mr. YR and some by Mr. G.

3. THE FATHER'S POSITION

25 The father says in his pleading that he is prepared to pay expenses for the child, where he is aware of those expenses, and has been provided with invoices continually since 1996. He says that the mother has never requested any contribution to these expenses since 1996 (with some exceptions noted) and that she has never discussed these expenses nor what was affordable with him. He points out that many of the expenses claimed could not have been afforded by the mother from her own resources and that other father figures in the child's life had actually paid these expenses, not the mother. He notes that the mother has not disclosed these sources of income (either as payment for expenses nor as support received from other father figures). He raises concern that the number of activities is excessive and that the extra-curricular activities of the child are hurting his school work, resulting in a need for tutoring. He is willing to pay for the child's medical and baseball expenses.

4. THE MOTION TO CHANGE

26 The mother's motion to change the child support terms of the agreement dated 26 September 1995 was brought under subsections 37(1) and 37(2.1) of the *Family Law Act*:

37. Application for variation. -- (1) An application to the court for variation of an order made or confirmed under this Part may be made by,

- (a) a dependant or respondent named in the order;
- (b) a parent of a dependant referred to in clause (a);
- (c) the personal representative of a respondent referred to in clause (a); or

- (d) an agency referred to in

subsection 33(3).

...

(2.1) *Powers of court: child support.* -- In the case of an order for support of a child, if the court is satisfied that there has been a change in circumstances within the meaning of the child support guidelines or that evidence not available on the previous hearing has become available, the court may,

- (a) discharge, vary or suspend a term of the order, prospectively or retroactively;
- (b) relieve the respondent from the payment of part or all of the arrears or any interest due on them; and

- (c) make any other order for the support of a child that the court could make on an application under section 33 and under section 14 of the *Child Support Guidelines*:

14. Circumstances for variation. -- For the purposes of subsection 37(2.2) of the Act and subsection 17(4) of the *Divorce Act* (Canada), any one of the following constitutes a change of circumstances that gives rise to the making of a variation order:

1. In the case where the amount of child support includes a determination made in accordance with the table, any change in circumstances that would result in a different order for the support of a child or any provision thereof.
2. In the case where the amount of child support does not include a determination made in accordance with a table, any change in the condition, means, needs or other circumstances of either parent or spouse or of any child who is entitled to support.
3. In the case of an order made under the *Divorce Act* (Canada) before May 1, 1997, the coming into force of section 15.1 of that Act, enacted by section 2 of chapter 1 of the Statutes of Canada, (1997).
4. In the case of an order made under the Act, the coming into force of subsection 33(11) of the Act. O. Reg. 391/97, s. 14; O. Reg. 446/01, s. 3.

4.1 The Table Amount of Child Support

27 The test to be applied in a motion to change is whether there has been a change in circumstances of either the parent or the child. The parents agreed implicitly, by their consent order made 15 March 2010, that there had been a change in circumstances under subsection 37(2.1) of the *Family Law Act* and section 14 of the *Child Support Guidelines* sufficient to support a change in child support, as a result of the increase in the father's income.

4.2: The Section 7 Special Expenses Child Support

28 The mother's claim for special expenses is brought under section 7 of the *Child Support Guidelines*:

7. Special or extraordinary expenses. -- (1) In an order for the support of a child, the court may, on the request of either parent or spouse or of an applicant under section 33 of the Act, 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 parents or spouses and those of the child and to the spending pattern of the parents or spouses in respect of the child

during cohabitation:

- (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, 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.

(1.1) *Definition, "extraordinary expenses"*. -- For the purposes of clauses (1)(d) and (f),

"extraordinary expenses" means

- (a) expenses that exceed those that the parent or spouse requesting an amount for the extraordinary expenses can reasonably cover, taking into account that parent's or spouse's income and the amount that the parent or 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 clause (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 parent or spouse requesting the amount, including the amount that the parent or 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,
- (iv) the overall cost of the programs and activities, and
- (v) any other similar factors that the court considers relevant.

- (2) *Sharing of expense.* -- The guiding principle in determining the amount of an expense referred to in subsection (1) is that the expense is shared by the parents or spouses in proportion to their respective incomes after deducting from the expense, the contribution, if any, from the child.
- (3) *Subsidies, tax deductions, etc.* -- 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 deductions or credits relating to the expense, and any eligibility to claim a subsidy, benefit or income tax deduction or credit relating to the expense.
- (3) *Subsidies, tax deductions, etc.* -- 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 deductions or credits relating to the expense, and any eligibility to claim a subsidy, benefit or income tax deduction or credit relating to the expense.
- (4) *Universal child care benefit.* -- 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.

29 All special expenses must meet the tests of necessity and reasonableness set out in subsection 7(1) of the guidelines. The onus falls on the applicant who seeks special or extraordinary expenses under section 7 of the guidelines to prove that the claimed expenses fall within one of the categories and that the expenses are necessary in relation to the child's best interests and reasonable having regard to the parental financial circumstances. See *Park v. Thompson*, 2005 CanLII 14132, 77 O.R. (3d) 601, 197 O.A.C. 158, 252 D.L.R. (4th) 730, 13 R.F.L. (6th) 415, [2005] O.J. No. 1695, 2005 CarswellOnt 1632 (Ont. C.A.).

30 The mother's evidence about the claim for the section 7 expenses was categorized as follows:

- (a) the question of the proper proportionate sharing of the section 7 expenses; and,
- (b) the amounts incurred each year for the special expenses.

31 These are the amounts claimed by the mother as special expenses for the years in question:

Table 1: Amounts Claimed by Mother as Section 7 Expenses

YEAR	Baseball	Fitness Training	Football	Hockey	Ortho	Tutoring	Vitamins & Supplements	Young Drivers	Yearly Total
2006	\$450	\$551		\$3,993					\$4,994
2007	\$400	\$975	\$100	\$2,301					\$3,776
2008	\$2,090	\$975	\$100	\$3,810		\$4,393			\$11,368
2009	\$1,600	\$975		\$3,700	\$1,135	\$3,364	\$1,800		\$12,574
2010	\$775							\$1,038	\$1,813
TOTAL	\$5,315	\$3,476	\$200	\$13,804	\$1,135	\$7,757	\$1,800	\$1,038	\$34,525

32 The mother says that the father's proportionate share of these expenses over the years is calculated as follows:

Table 2: Mother's Calculation of Father's Proportionate Share of Section 7 Expenses

	Mother's income	Father's income	Father's proportionate share of section 7 expenses
2006	\$711	\$81,709	99%
2007	\$16,86	\$83,501	83%
2008	\$11,797	\$100,977	90%
2009	\$33,103	\$91,074	73%
2010	\$41,600	\$91,537	69%

33 Based on the numbers in these two charts, the mother's claim for retroactive section 7 expenses was that the father's proportionate share of those expenses for the years 2006 to 2010 is the amount of \$27,375.

5. LEGAL ISSUES REGARDING THE MOTHER'S SECTION 7 CLAIMS

34 These are the issues to be determined regarding the section 7 expenses claimed by the mother:

- (a) Is the mother entitled to claim section 7 expenses on a retroactive basis, and if so, starting when?
- (b) Do all the expenses claimed properly qualify as section 7 expenses?
- (c) Is the mother entitled to re-imbursement for the full amounts she has claimed? and
- (d) What is the father's proper proportionate share of those amounts?

5.1: What is the Proper Start Date for Adjusting Child Support?

35 Retroactive child support must be considered in the framework of the principles set out by the Supreme Court of Canada in *D.B.S. v. S.R.G.*; *L.J.W. v. T.A.R.*; *Henry v. Henry*; *Hiemstra v. Hiemstra*, 2006 SCC 37, [2006] 2 S.C.R. 231, 351 N.R. 201, 391 A.R. 297, 61 Alta. L.R. (4th) 1, 377 W.A.C. 297, [2006] 10 W.W.R. 379, 270 D.L.R. (4th) 297, 31 R.F.L. (6th) 1, [2006] S.C.J. No. 37, 2006 CarswellAlta 976 (referred to as "D.B.S.", or "the D.B.S. cases").

36 The umbrella determination in the D.B.S. cases is this: courts have the jurisdiction to award retroactive child support and, in appropriate cases, they should do so.

37 In the D.B.S. cases, the Supreme Court of Canada sets out a process to follow when considering and deciding issues of retroactivity:

- 1 What is the legal status of the support obligation?
 - (a) court order;
 - (b) agreement; or
 - (c) no order or agreement.

- 2 Are there any legal excuses or exemptions that apply (the factors to be considered)?
 - (a) the child's age;
 - (b) delay;
 - (c) blameworthy conduct;
 - (d) hardship to the child; or
 - (e) hardship to the payor.

- 3 What is the proper retroactive amount to be ordered?
 - (a) commencement date; and
 - (b) amount to be ordered.

38 These are the framework principles set out in the D.B.S. cases:

- * the obligation of support arises automatically upon birth: D.B.S., paragraphs [36]-[37];
- * child support is the right of the child; D.B.S., paragraph [60];
- * the term "retroactive" is misleading in the technical sense, as these "retroactive" awards do not hold parents to a legal standard that did

- * not exist at the relevant time: D.B.S., paragraph [2];
- * the specific amounts of child support owed will vary based upon the income of the payor parent;
- * as income levels increase or decrease so will the parents' contributions to the needs of the children, just as they would if the family had remained together;
- * under the general guidelines regime, the underlying theory is that the support obligation itself should fluctuate with the payor parent's income;
- * under the general guidelines regime, when a payor parent does not increase the amount of his support when his income increases, it is the child who loses; the child is the one who is entitled to a greater quantum of support in absolute terms: D.B.S., paragraphs [43], [45], [47];
- * the ultimate goal must be to ensure that children benefit from the support that 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., paragraph [4];
- * it is clear that retroactive awards cannot simply be regarded as exceptional orders to be made in exceptional circumstances: D.B.S., paragraph [5];
- * where ordered, an award should generally be retroactive to the date when the recipient parent gave the payor parent effective notice of her intention to seek an increase in support payments; this date represents a fair balance between certainty and flexibility: D.B.S., paragraph [5]; and
- * courts must be open to ordering retroactive support where fairness to children dictates it, but should also be mindful of the certainty that fairness to payor parents often demands; it is only after a detailed examination of the facts in a particular case that the appropriateness of a retroactive award can be evaluated: D.B.S., paragraph [6].

39 Although the payor parent does not shoulder the burden of automatically adjusting payments, or automatically disclosing income increases, this does not mean that he will satisfy his child support obligation by doing nothing. If his income rises and the amount of child support paid does not, there will remain an unfulfilled obligation that could later merit enforcement by a court: D.B.S., paragraph [59]. This means that a parent will not have fulfilled his obligation to his children if he does not increase child support payments when his income increases significantly.

40 The certainty offered by an agreement does not absolve parents of their responsibility to continually ensure that their children receive the appropriate amount of support: D.B.S., paragraph [64].

41 Parents should not have the impression that child support agreements are set in

stone. Even where an agreement does not provide for automatic disclosure, variation or review, parents must understand that it is based upon a specific snapshot of circumstances that existed at the time the agreement was made. For this reason, there is always the possibility that agreements may be varied when these underlying circumstances change: D.B.S., paragraph [64].

42 An increase in income that would alter the amount payable by a payor parent is also a material change in circumstances: D.B.S., paragraph [66].

43 A retroactive child support order does not involve imposing an obligation on a payor parent that did not exist at the time for which support is being claimed: D.B.S., paragraph [68].

44 In a situation where the payor parent is found to be deficient in his support obligation to his children, it will be open for a court to vary an existing order retroactively. The consequence will be that amounts that should have been paid earlier will become immediately enforceable: D.B.S., paragraph [74].

5.2 Was There Delay by the Recipient?

45 Delay in seeking an increase in child support is a factor in determining whether a retroactive award is justified: D.B.S., paragraphs [100], [101].

46 The mother says that she asked the father regularly from 1996 to increase child support in accordance with his income. The father says she did not. But there is no doubt that she asked for and the father made a contribution to the child's baseball expenses in 2005. As well, in September 2005, the father voluntarily (that is, without court order or signed agreement) adjusted the table amount payments of child support from \$300 per month to \$408 per month, and later made similar additional adjustments (to \$516 per month in October 2005; to \$564 per month in February 2006; to \$720 per month in September 2008). The latest date on which the father can rely as the date of actual notice is 2005. The mother is seeking retroactive section 7 expenses only from 2006.

5.3: Blameworthy Conduct of the Payor

47 The payor parent's interest in certainty is least compelling where he engaged in blameworthy conduct: D.B.S., paragraph [105].

48 Blameworthy conduct is anything that privileges the payor parent's own interests over his children's right to an appropriate amount of support: D.B.S., paragraph [106].

49 A payor parent should not be permitted to profit from his wrongdoing: D.B.S., paragraph [125].

50 A payor parent cannot hide his income increases from the recipient parent in the hopes of avoiding larger child support payments: D.B.S., paragraph [106].

51 No level of blameworthy behaviour by payor parents should be encouraged. Even where a payor parent does nothing active to avoid his obligations, he might still be acting in a blameworthy manner if he consciously chooses to ignore them. Put simply, a payor parent who knowingly avoids or diminishes his support obligation to his children should not be allowed to profit from such conduct: D.B.S., paragraph [107].

52 Whether a payor parent is engaging in blameworthy conduct is a subjective question: D.B.S., paragraph [108].

53 Even if the father could argue he did not know that child support was based on his income when he signed the agreement in 1995 (which this father did not argue), that argument is no longer available to him as of September 2005, when he increased the payments of the table amount of support. Even while doing this and doing it voluntarily (that is, without court order or signed agreement), the father made no disclosure to the mother of his increased income.

54 The father engaged in blameworthy conduct in not paying any cost-of-living increases from 1996 onwards, in not disclosing his changes in income and in not adjusting the child support according to his income until September 2005. Even then, as he had not disclosed his income to the mother, it was not possible for her to know whether the table amount adjustments that he made voluntarily in 2005, 2006, and 2008 were in accordance with the proper *Child Support Guidelines* amounts for his income level. As it turns out, they were not.

- * In 2006, he paid \$564 per month, when the proper table amount for his income would be \$733 per month;
- * in 2007, he paid \$564 per month, when the proper table amount for his income would be \$747 per month; and
- * in 2008, he paid \$564 per month and then, from September, he paid \$720 per month, when the proper table amount for his income would be \$884 per month.

5.4: Hardship in the Circumstances of the Child

55 Courts should consider the present circumstances of the child -- as well as the past circumstances of the child -- in deciding whether a retroactive award is justified: D.B.S., paragraph [110].

56 This child has had the good fortune of other father figures who assisted his mother financially. This allowed him to pursue the athletic activities that he loves and at which he excels. There was no argument put forward that this child had suffered hardship. However, the existence of contributions from others in the child's life does not change the obligation of a parent to financially support the child.

5.5: Hardship to the Payor

57 The father did not plead hardship and did not argue hardship. In any event, a

retroactive child support adjustment does not visit hardship on the payor in this case.

5.6: Start Date of the Order

58 The court in D.B.S. identified four choices for the date to which the award should be retroactive:

- (a) the date when an application was made to a court;
- (b) the date when formal notice was given to the payor parent;
- (c) the date when effective notice was given to the payor parent; or,
- (d) the date when the amount of child support should have increased.

59 The court adopted the date of effective notice as a general rule for the commencement date of retroactive support awards: D.B.S., paragraph [118].

60 "Effective notice" means 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 interest in certainty becomes less compelling: D.B.S., paragraph [121].

61 Once a court decides to make a retroactive award, it should generally make the award retroactive to the date when effective notice was given to the payor parent. But where the payor parent engaged in blameworthy conduct, the date when circumstances changed materially (that is, the date when the amount of child support should have increased) will be the presumptive start date of the award: D.B.S., paragraph [134].

62 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 he reasonably believed that his child's support entitlement was being met: D.B.S., paragraph [124].

63 The presence of blameworthy conduct will move the presumptive date of retroactivity back to the time when circumstances changed materially. A payor parent cannot use his informational advantage to justify his deficient child support payments: D.B.S., paragraph [124].

64 In this case, the date of formal notice is 30 December 2009 when the mother served the father with her motion to change and claimed a retroactive adjustment of both table amount and section 7 expenses for child support from 1996. However, the date of actual notice is 2005.

65 Certainly by 2005, and perhaps even earlier, the father knew that his child support obligation was tied to his income. He knew that his income had increased. He did not

disclose his increase in income and, although in 2005, 2006 and 2008, he adjusted the table amount of child support payments, he did not do so in accordance with the correct amounts owing under the *Child Support Guidelines*. This is blameworthy conduct.

5.7: The Fairness Umbrella Regarding Retroactive Child Support

66 In the D.B.S. cases, the Supreme Court of Canada inserted a new test in child support cases, that is, an umbrella test of "fairness", into this analysis. The court repeatedly refers to the "balance between certainty and flexibility" in this area of the law, describing it as fairness to children and certainty for the payor.

67 The payor parent's interest in certainty must be balanced with the need for fairness and for flexibility. In doing so, a court should consider whether the recipient parent has supplied a reasonable excuse for any delay, the conduct of the payor parent, the circumstances of the child, and the hardship the retroactive award might entail: D.B.S., paragraph [133].

68 This requires the judge to examine all the factors and weigh those factors, keeping in mind the need to balance these interests. It is curious that the S.C.C. suggests that the interest of the child in fairness is a competing interest to that of the parent in certainty. Surely the child's need for fairness should not be competing with the parent's needs and should have a higher priority.

69 The father, by his own behaviour, acknowledged that he knew he had a responsibility to pay an increased amount of child support in accordance with increases in his income. He made a voluntary contribution to a section 7 expense in 2005. He increased the table amount of child support on four occasions (in September 2005, in October 2005, in February 2006 and in September 2008). He was not paying the correct amount of child support and he knew it.

70 On an overall fairness analysis of all the circumstances in this case, it is fair, just and appropriate that there be an order for adjustment of the section 7 expenses of child support starting in 2006.

5.8: Retroactive Child Support and Section 7 Expenses

71 The principles set out in the D.B.S. cases regarding retroactive child support apply to the table amount and to section 7 expenses. See *Selig v. Smith*, 2008 NSCA 54, 266 N.S.R. (2d) 102, 851 A.P.R. 102, 56 R.F.L. (6th) 8, [2008] N.S.J. No. 250, 2008 CarswellNS 307 (N.S.C.A.), paragraphs [25] and [26]. The court in the D.B.S. cases makes no distinction between the table amount of child support and section 7 expenses for child support.

5.9: The Question of Entitlement -- Do All the Expenses Claimed Properly Qualify as Section 7 Expenses?

72 Expenses for usual or ordinary extracurricular activities for a particular family are included in the table amount of support. See *Smith v. Smith* (1997), 75 A.C.W.S. (3d) 703 Ex[1997] O.J. No. 4833, 48 O.T.C. 316, 1997 CarswellOnt 4493 (Ont. Gen. Div.), paragraph [14] and [16]; *D'Urzo v. D'Urzo* (2002), 30 R.F.L. (5th) 277, [2002] O.J. No. 2415, [2002] O.T.C. 419, 2002 CarswellOnt 2104 (Ont. S.C.); *Park v. Thompson, supra*; *Zimmerman v. Doe*, 2007 CanLII 28755, 159 A.C.W.S. (3d) 407, [2007] O.J. No. 2896, 2007 CarswellOnt 4721 (Ont. S.C.).

73 An order for contribution to special and extraordinary expenses under section 7 of the Guidelines is discretionary as to both entitlement and amount. See Julien D. Payne and Marilyn A. Payne: *Child Support Guidelines in Canada*, (Toronto: Irwin Law, 2009), at pages 227 and 231.

74 Therefore, the court must first determine the issue of entitlement for a particular expense. A review of the cases reveals that judges across Canada have wildly differing views of what constitutes reasonable and necessary extracurricular expenses -- even in the case of the same type of expense and with parents with incomes in the same range. Sometimes they are allowed and sometimes they are not. See *Smola v. Roger*, [2002] O.J. No. 1254, [2002] O.T.C. 207, 2002 CarswellOnt 1138 (Ont. Fam. Ct.), paragraph [11].

75 A custodial parent does not have *carte blanche* to enrol a child in any number of extra-curricular activities and then to look to the non-custodial parent to share all of the costs. See *Forrester v. Forrester*, 1997 CanLII 15466, 73 A.C.W.S. (3d) 479, 11 O.F.L.R. 61, [1997] O.J. No. 3437, 1997 CarswellOnt 3212 (Ont. Fam. Ct.), paragraph [4]; *Zimmerman v. Doe, supra*, paragraph 11.

76 This is the list of extraordinary expenses covered by subsection 7(1) of the guidelines:

- (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, 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.

77 The list of special and extraordinary expenses under clauses 7(1)(a) to (f) is exhaustive; if a claim does not fall within any of the listed categories, it must be dismissed. See *Kilrea v. Kilrea* (1998), 82 A.C.W.S. (3d) 952, [1998] O.J. No. 3677, 75 O.T.C. 269, 1998 CarswellOnt 3652 (Ont. Gen. Div.), paragraph [13].

78 Son (now 17 years old) is a talented athlete. He has been playing hockey since he was 4 years old and playing baseball since he was 7. He plays both sports at an elite level, has been chosen as captain on his school teams, has won MVP honours in both sports and has won other prizes and awards for his athletic abilities. He is striving for an athletic scholarship for university and wants to play professional sports.

79 Son is on a strict nutritional diet to maximize his potential in professional sports. He works closely with his coaches. He receives personal training for strength and endurance. He takes vitamins and nutritional supplements for maximum output. He is a B student. He receives tutoring in order to maintain his good marks.

80 The mother has claimed reimbursement for these section 7 expenses:

- * Baseball
- * Fitness training
- * Football
- * Hockey
- * Orthodontist
- * Tutoring
- * Vitamins and supplements
- * Young Drivers training

81 The mother did not categorize the expenses claimed according to the section 7 list in either her pleadings or in her argument. These are the entitlement findings regarding these various expenses:

- (a) **Orthodontist:** The orthodontist expense is a health related expense being claimed under clause 7(1)(c). The expense for the orthodontist qualifies as a proper section 7 expense. The father has a medical plan but it was not clear from the evidence whether he can obtain reimbursement for any portion of these expenses or, in fact, whether he has already made a claim for these expenses. However, the expense claimed was not contested or disputed by the father. The parents shall proportionately share the amount of this expense that cannot be reimbursed under the father's plan.
- (b) **Athletic-related expenses -- football, baseball, hockey:** The expenses claimed for baseball, football, hockey, fitness training, vitamins and supplements are expenses for extra-curricular activities, being claimed under clause 7(1)(f). The athletic-related expenses are more complicated. The child is involved in a lot of activity and seems to be thriving from it. He plans a career in professional sports. Baseball, football and hockey would qualify as section 7 expenses, provided the amounts involved met the appropriate tests (that is, necessary in relation to the child's best

interests, and reasonable in relation to the means of the parents). The issue will not be whether each of the sports qualifies, but whether all three sports together are necessary and appropriate. The father has already contributed to the baseball expense and offers to continue to do so in the future. In comparison to the other expenses claimed, the football expense is a modest one and does not therefore qualify as an extra-ordinary expense under clause 7(1)(f). But the expenses claimed for baseball and hockey are substantial. These sports qualify as section 7 expenses (that is, the entitlement test is met as an extraordinary expense for extra-curricular activities), but the claims made will need to meet the "necessary and reasonable" test.

- (c) **Athletic-related expenses -- personal trainer:** The expenses claimed for personal training do not qualify as section 7 expenses (that is, the entitlement test is not met). There was very little evidence offered regarding the fitness training. As well, some of the invoices produced showed expenses for bottled water bought at the gym (which is not a proper section 7 expense and should not have been claimed). There was no breakdown of the costs of the gym membership, the personal trainer and the number of hours spent with the trainer. This is not to say that the choice to belong to a fitness club and to hire a personal trainer is an inappropriate one for an elite athlete. An athlete such as this child may benefit from gym membership and a personal trainer. However, those expenses are not necessary in relation to his best interests under section 7 of the guidelines. The amounts claimed are not a reasonable expense in relation to the means of the parents for purposes of subsection 7(1).
- (d) **Athletic-related expenses -- Vitamins and Supplements:** The expenses claimed for vitamins and supplements are not section 7 expenses (that is, the entitlement test is not met). That expense is covered by the table amount of child support.
- (e) **Young Driver's Training:** Driver's lessons offered through the Young Driver's program are perhaps being claimed as an educational program under clause 7(1)(d) (although it was not clear under what category the mother claims this expense). The expense claimed for Young Drivers does not qualify under section 7 (that is, the entitlement test is not met). It is not the type of educational program intended to be covered under clause 7(1)(d). This expense has not been accepted as a proper section 7 expense, nor as an extraordinary expense as contemplated by the guidelines. See *D'Urzo v. D'Urzo, supra*, paragraph [52]; *Zimmerman v. Doe, supra*, paragraphs [9] and [35]-[37].

(f) **Tutoring:** Tutoring is an expense for an educational program, perhaps being claimed under clause 7(1)(d) (again, it was not clear under what category the mother claims this expense). Some judges have not permitted this expense as a proper section 7 claim. See *D'Urzo v. D'Urzo, supra*, paragraph [52]. However, like the claims for the sports, the court finds that the claim for tutoring qualifies as a

clause 7(1)(d) expense (that is, the entitlement test is met), but the amounts claimed will need to meet the "necessary and reasonable" test.

5.10: The Question of Amount -- Is the Mother Entitled to Re-imbusement for the Full Amounts She Has Claimed?

82 Claims for section 7 expenses must be supported by relevant evidence. But the court has the discretion to make an order based on estimates; see subsection 7(1) of the *Child Support Guidelines*. The court also has discretion to order a contribution for all or any portion of a proper section 7 expense; see subsection 7(1) of the guidelines.

83 Although the mother produced a large package of material in support of her claim for retroactive section 7 expenses, the quality of the materials produced was generally inadequate and varied widely. The mother produced documented proof for some, but not all, of the various special expenses claimed. Only few of the documents produced were receipts, some were e-mails or letters confirming fees paid or due, and some were hand-written amounts of the cost of a given activity or the estimate of the cost.

84 There was no evidence about the amount of money received by the mother from either Mr. YR or from her husband Mr. G towards the expenses of the child generally, or towards the section 7 expenses of the child at the time that those expenses were incurred. However, from the amounts of those expenses and the years in which they were incurred, compared to the mother's disclosed income during those years, it is obvious that those men contributed financially to those expenses and may have paid those expenses entirely.

85 The court should not have to struggle through the many pages of evidence provided to be able to determine whether the amounts claimed are properly proven, whether the amounts claimed fall properly under special expenses and whether the amounts are reasonable. That, however, is what was required in this case. At the request of the court, the mother prepared a chart of the amounts she wanted. But in support of the chart, she simply produced a large amount of paper and basically asked the court to consider this her evidence about the cost of the activities. The material was not organized, was incomplete and was often difficult to follow. The onus is on her to prove these expenses.

86 Inferentially, then, the mother relied on subsection 7(1) of the *Child Support Guidelines*, permitting a parent to estimate the amount of the expense claimed and permitting a court to make an order based on such an estimate, and an order for all or any portion of the expenses.

87 These are the findings regarding the proper amount that the mother can claim for these expenses (that is, the determination of the question of amount):

- (b) **Athletic-related expenses -- baseball, hockey:** The expenses claimed for baseball and hockey are substantial. The mother claims baseball costs of \$5,315 over five years and hockey costs of \$13,804 over four years. The mother provided the court with very few receipts to support her claims for these expenses. As well, the mother is claiming a contribution from the father to gate fees, that is, the cost of admission to the rinks where the hockey games are played. Both the child and the mother must pay admission to go to the games. Child support is not intended to cover expenses incurred by the parent. The mother's admission fees are not a proper section 7 expense and she should not have claimed them. The child's admission costs, however, can be considered an allowable expense.

The mother also claimed \$3,100 for hockey tournaments (for four trips in three different years) and \$2,795 for baseball tournaments (for two trips in two different years). No receipts or even a breakdown of costs were provided for the hockey tournaments. With both the hockey and baseball tournaments, it is not clear whether the mother is claiming the cost of her travel and stay at these tournaments, or the cost of the child's trip, or both. The onus is on the mother to provide the evidence to support the claim; she has not done this. Child support is not intended to cover expenses incurred by the parent. The mother's costs to go to the tournament would not normally be an allowable section 7 expense. Again, she should not have claimed this. If it is her intention to continue to claim the tournaments as a section 7 expense, she needs to keep much better records and to produce receipts for the cost of the child's expenses only.

To be allowed as section 7 expense, the amounts claimed must be necessary in relation to the child's best interests and reasonable in relation to the means of the parents. This child is a star athlete who achieves in many sports, and whose life is built around sports and directed towards a life as a professional athlete. The amounts claimed by the mother will be adjusted to remove the cost of the mother's admission to the games and the cost of the tournaments (for the reasons noted).

This child is an accomplished athlete with plans for a career in professional sports. These are not expenses that the mother could ordinarily afford on her own without the contribution of the father. These expenses may be considered extraordinary for the average

child; however, they are appropriate for this child and can be seen as necessary in relation to his best interests. These expenses are necessary for this child to meet his potential as an athlete and as a person. As well, these expenses (as allowed below) are reasonable in relation to the means of the parents. These are the amounts that the mother may claim as proper section 7 expenses for baseball and hockey:

Table 3: Amounts Allowed for Section 7 Expenses for Baseball and Hockey

	Baseball	Hockey	Yearly Total
2006	\$450	\$2,208	\$2,658
2007	\$400	\$2,010	\$2,410
2008	\$295	\$2,555	\$2,850
2009	\$600	\$2,800	\$3,400
2010	\$775		\$775
TOTAL	\$2,520	\$9,573	\$12,093

- (c) No amounts may be claimed as section 7 expenses for football, fitness training, vitamins and supplements, or Young Drivers training (for the reasons set out above regarding eligibility of these expenses).
- (d) **Tutoring:** To be allowed as a section 7 expense, the amounts claimed must be necessary in relation to the child's best interests and reasonable in relation to the means of the parents. The information provided about the tutoring is inadequate. There is no evidence about the circumstances in which the expense was incurred, no reference to discussion between the parents about this expense (about its desirability or its necessity in relation to the child's best interests), no detail about who the tutor is, what subjects are provided, the hourly rate, the frequency of the sessions, the length of the sessions. The amount claimed is substantial (\$7,757 for two years). This is a significant expense. Tutoring is an expense for an educational program, perhaps being claimed under clause 7(1)(d). The claim for tutoring qualifies as a clause 7(1)(d) expense, but the amounts claimed need to meet the "necessary and reasonable" test. Tutoring to help a student achieve may be necessary in relation to the child's best interests. But an expense this large is not reasonable in relation to the means of the parents. The court will have to estimate a suitable amount for this expense. A reasonable amount in relation to the means of these parents

would be a total expense for tutoring of \$2,000 per year. The mother may claim an expense of \$2,000 per year for two years for tutoring.

88 In summary, these are the amounts for which the mother may claim a contribution under section 7:

Table 4: Allowable Amounts for Section 7 Expenses, All Categories

YEAR	Baseball	Fitness Training	Football	Hockey	Ortho	Tutoring	Vitamins & Supplements	Young Drivers	Yearly Total
2006	\$450			\$2,208					\$2,658
2007	\$400			\$2,010					\$2,410
2008	\$295			\$2,555		\$2,000			\$4,850
2009	\$600			\$2,800	\$1,135	\$2,000			\$6,535
2010	\$775								\$775
TOTAL	\$2,520			\$9,573	\$1,135	\$4,000			\$17,228

5.11: What Is the Father's Proper Proportionate Share of those Amounts?

89 The mother asks that the father contribute to the section 7 expenses in proportion to their incomes for the relevant years. These are mother's numbers and proposals regarding the proper sharing of the expenses (the mother's proposal and numbers only relate to the incomes and proportions, not the expenses, as the expenses in Table 5 are the amounts determined by the court as allowable):

Table 5: Mother's Proposal re Proportionate Sharing as Applied to Amounts Allowed by the Court

	Mother's income	Father's income	Father's proportionate share of section 7 expenses	Total allowable section 7 expense	Father's contribution
2006	\$711	\$81,709	99%	\$2,658	\$2,631
2007	\$16,860	\$83,501	83%	\$2,410	\$2,000
2008	\$11,797	\$100,977	90%	\$4,850	\$4,365
2009	\$33,103	\$91,074	73%	\$6,535	\$4,771
2010	\$41,600	\$91,537	69%	\$775	\$535
				\$17,228	\$14,302

90 The mother's position, based on the numbers permitted by the court as proper section 7 expenses, would be that the father owes her \$14,302 for retroactive section 7 expenses.

91 The total of the allowable section 7 expenses for the years 2006 to 2010 is \$17,228 (see Table 4 above). On an overall fairness analysis of all the circumstances in this case, it is fair, just and appropriate that the father contribute 50% of the special expenses up to 31 December 2010. The parents shall share these expenses equally. The father shall pay to the mother \$8,614 as his contribution to the section 7 expenses of the child as of 31 December 2010, for the years 2006 to 2010.

92 There are several reasons for this. It is unclear whether the father knew of all these activities. In any event, he was not consulted about the activities and he did not participate in the child's outstanding athletic career, at least not so far. He has an opportunity to change that now. This arrangement (equal sharing of the expense) is also the arrangement to which the parents agreed regarding the child's post-secondary expenses in the "Custody and Support Agreement" signed on 26 September 1995. Also, it is not possible, on the evidence given, to determine who paid for all the section 7 expenses over the years. On her income alone, clearly, it was not the mother. And finally, these expenses are being calculated and awarded on a retroactive basis.

6: CONCLUSION

93 This litigation and the resulting retroactive award of both the table amount and the section 7 expenses is not a good process for the payment of child support for anyone in this family. It was not in the child's interest to have been receiving a lower amount of child support than to which he was entitled for many years. It was not in the mother's interest and, certainly now, it will not be in the father's interests.

94 As well, the evidence produced by the mother for many of the section 7 claims fell far short of being adequate to support those claims. She also made claims for certain items that were clearly outside the scope of claims permitted under section 7. It may be that the mother has valid supportable claims, but those claims were not adequately proven in many circumstances.

95 The parents should not have allowed this to happen and they must not allow this to happen again. The parents have communicated poorly over these issues. This is regrettable. There will need to be sufficient contact between them to avoid this situation arising again.

7: ORDERS

96 There will be the following final order:

- (a) The agreement dated 26 September 1995 is changed as follows.
- (b) The father shall pay the table amount of child support for Son, as follows:
 - (i) from 1 January 2006, \$733 per month, on income of \$81,709;
 - (ii) from 1 January 2007, \$747 per month on income of \$83,501;

- (iii) from 1 January 2008, \$884 per month, on income of \$100,975; and
- (iv) from 1 January 2009, \$806 per month, on income of \$91,074.

- (c) The father shall pay his 50% share of the following special expenses for the child for the period from 2006 to 2010. As of 31 December 2010, the father shall pay to the mother \$8,614 (50% of \$17,228 = \$8,614) as his contribution to the section 7 expenses of the child for the years 2006 to 2010:

Table 6: Total of Allowable Section 7 Expenses for Contribution

	Baseball	Hockey	Ortho	Tutoring	Yearly Total
2006	\$450	\$2,208			\$2,658
2007	\$400	\$2,010			\$2,410
2008	\$295	\$2,555		\$2,000	\$2,410
2009	\$600	\$2,800	\$1,135	\$2,000	\$6,535
2010	\$775				\$775
TOTAL	\$2,520	\$9,573	\$1,135	\$4,000	\$17,228

- (d) the father shall produce to the mother every year, by 1 June, starting in 2011, copies of his income tax returns and notices of assessment, pursuant to sections 21 and 25 of the *Child Support Guidelines* and the parents shall adjust support accordingly;
- (e) This order results in arrears in child support for both the table amount and the section 7 expenses. The father shall pay arrears of child support, in addition to the ongoing table amount and section 7 expenses, in the amount of \$200 per month starting on 1 April 2011, until all arrears are paid in full. If there is any default in the child support monthly payments of longer than 30 days (either for ongoing support or for arrears support payments), the entire amount of arrears then owing is due and payable immediately;
- (f) For any future section 7 expenses (other than post-secondary education):
 - (i) the mother shall advise the father in writing of the category and the expense;
 - (ii) for any expense claimed by the mother, she shall deliver proof of the expense to the father on a quarterly basis; and
 - (iii) the parents shall share these expenses equally.

- (g) For post-secondary education, each parent will contribute equally towards the cost of post-secondary education, which costs include tuition, residence, supplies, equipment and other incidental expenses; and,
- (h) For certainty and clarity, these child support payments (both retroactive and on-going) are not deductible by the father from his income for tax purposes and are not included in the mother's income for tax purposes.

8: COSTS

97 The parties may make submissions for costs. The scheduling office can set up a date for costs to be argued.

