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THE VALUATION LAW REVIEW

Family Law Decision

The Valuation Law Review is a joint publication of the Canadian Institute of Chartered Business Valuators and Harrison Pensa LLP and this issue summarizes family law decisions of interest to business valuators. The Valuation Law Review is not intended to provide legal advice and readers should not act on information in the publication without seeking particular advice on matters that are of concern to them. Readers are cautioned against relying upon the decision abstracts contained herein, which are edited and in outline form only, and are directed to the full report of the reasons of the Court.

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N.P.* v. *M.C.P. 2012 BCSC 1843

The respondent was a sports journalist. He earned little business income. Most of his income was derived from his large stock portfolio which he was constantly turning over by selling and reinvesting. In the early 2000s, he generated large capital gains of between $400,000 to $800,000 annually. In 2008, he lost $1 million, causing him to restructure his portfolio and trade less frequently. As a result, portfolio gains were largely unrealized and were therefore unreported as income.

The court had to determine his income for retroactive and prospective child support purposes.

a) The line 150 approach
This was unsatisfactory as:

- the respondent's income (and losses) varied from year to year;
- the gains were, in the early years, re-invested and not used for lifestyle;
- the gains, in later years, were unrealized and not reported as income; and
- even in the years of losses, the respondent continued to withdraw funds for his own support.

b) The actual withdrawals

- What the respondent actually withdrew bore no relationship to market fluctuations.
- It would leave the respondent in control of his obligations, withdrawing money when he saw fit.

c) The "reasonable rate of return" approach

- The court rejected applying a nominal rate of return as there was actual evidence of the historical rate of return.

d) The actual rate of return

- The court employed the actual rate of return for 2004 to 2010 (employing good and bad years) but made certain adjustments:
  - the rate of return since 2008 is lower;
  - the rate should not require depletion of capital; and
  - the rate should allow for some modest inflation.

Earle-Barron* v. *Barron, 2012 ONSC 2837

The parties were married in 1997, although they had cohabited since approximately 1995. The husband left the matrimonial home in early 2005. The parties had two children who were, at the time of trial, 15 and 13 years of age.

The husband, shortly before the marriage, had declared bankruptcy. He was a Nortel employee and took a buy out from them in 2001. For the next two years he was unemployed, describing himself as a house-husband. It appeared that he had a penchant for bingo and it also appeared that a great deal of evidence was directed towards his bingo playing during his period of unemployment.

In late 2001 and 2002, the wife founded a business with two partners. Each had a one-third interest in the business. The undertaking of the business was to ship goods and provide warehouse spaces to others. There were two divisions known as USC and USD.

The business

The wife and her two business partners had extensive connections in the trucking industry. When the business started in 2002, the United States dollar was at a substantial premium to the Canadian dollar. The trucking company earned significant profits because it billed its invoices in U.S. dollars and paid its expenses in Canadian dollars. Its most significant customer was G.E. Lighting, and after the separation, Phillips Electronics. G.E. Lighting produced significant revenues for the company during 2002 and 2003. Revenues however declined and by 2004 business with G. E. Lighting had tailed off to virtually nothing.

The books of USC revealed irregularities and outright instances of fraud. The company, apparently, paid numerous personal expenses. It provided motor vehicles to the wife. It made payments to a personnel company known as C.R.I. — a company which was an outright sham and which had never placed any personnel with USC. One year a bonus was declared in favour of the wife's daughter. The daughter never received the money and the wife never disclosed the bonus in her personal tax reporting. The company expensed payments to a man named Max P., a Phillips Electronics employee. It appeared that these were "secret commissions" or "kickbacks" relating to the shipping contracts that Phillips gave to USC.

The parties' credibility

Needless to say, the judge found little credibility in the testimony of either party. The judge specifically noted that the wife was slow and selective in making her financial disclosure to both her own business valuator and the husband's business valuator.

The husband fared no better. He was very slow in delivering financial disclosure. Although awarded interim support, he failed to disclose employment income. He neglected to file income tax returns or filed them late. This made financial disclosure very difficult. He repeatedly failed in requests to produce financial and banking records. The judge described him as having been "effectively impeached" in a "classic textbook cross-examination." The judge described him as being wholly inconsistent with respect to most of his testimony by resorting to responses based primarily on guesswork or speculation.

Valuators

The wife retained a valuator who will be known as TL. The husband retained a valuator who will be known as SLF. TL had initially prepared a draft report valuing the wife's business interests at $212,000. The draft was provided to the wife and her new solicitor. Thereupon, the wife communicated with TL and as a result of that communication, he reduced his valuation by $15,000 to $197,000. This reduction in his valuation would later haunt him.

While at trial, he testified that the reason for the reduction in the valuation was an increased awareness of the importance of the role of the wife in the corporation, the court did not believe him. It had this to say:

> If there was new information provided to justify a change, it does not seem to have been provided in subsequent TL reports or referred to in any substantial and reliable manner detail during this witness' testimony. This raises a very serious question in my mind as to whether [TL] demonstrated a willingness to adjust results according to the wishes of the client.

Later the judge said:

> I am satisfied that [the wife] did not merely provide information to [TL], rather she directed, or at minimum influenced, a change to the draft report so that the finalized version would conform to her expectations as to USC's value....I am not persuaded that [TL] was exercising his independent judgment; rather, I find that he made efforts to accommodate his client's wishes.

The husband's valuator was subjected to a strenuous cross-examination by the wife's lawyer. In cross-examination, attempts were made to prove that:

- his opinion was unreliable;
- he was taking on the role of advocate;
- he was making assumptions unsupported by evidence;
- he failed to disclose assumptions upon which his opinion was based;
- he omitted material facts that would detract from his opinion; and
- he was improperly using hindsight evidence.

The court disagreed. The court was prepared to excuse certain changes of opinion because of the fact that SLF had not been provided with timely information. In particular, the court referred to SLF as a true expert witness and not as an advocate of the husband. In particular, relating to SLF's testimony, the court noted that:

- he properly conceded points raised by counsel in cross-examination;
- he provided reasonable explanations for his conclusions; and
- where hindsight evidence was employed, it was done so appropriately.

The court also concluded that SLF had assiduously examined or attempted to examine the primary sources of information of USC such as its financial statements, supporting documentation, and other financial material "to the extent that such material or information was provided to him."

The valuation approach
Both valuators used a similar approach to value. Each calculated the normalized earnings of the corporation and applied a multiple of value to those earnings. The husband's valuator valued the company "en bloc" applying a 10% minority discount. The wife's valuator valued her one-third interest in the company as a sale of her one-third interest. He would apply a discount rate of 15%. In so doing, he also took into account the restriction on transfer of shares together with various restrictions on management set out in the unanimous shareholders' agreement.

There were numerous disagreements between the valuators over issues in the "normalization" process. The court dealt with them on an issue-by-issue basis.

a) Minority discount
TL applied a "non-controlling" discount, specifically noting the substantial restrictions on an individual's right to sell his or her shares in the corporation.

SLF paid little attention to the restriction on disposition. That is because he concluded that the sale would likely be "en bloc."

His assumption was that the notional purchaser would want to acquire all of the earnings of the company. Moreover, he concluded that the wife exercised a substantial

degree of influence and control over the ongoing corporate operations. Thus, the other shareholders would be expected to follow her lead.

b) General Electric Lighting

The GE Lighting contract was a contract which would renew automatically on its anniversary date unless it was cancelled by 90 days' notice. No formal termination notice had ever been given.

However, it was quite clear that by mid-2004, sales with G.E. Lighting had trickled to a virtual halt. Thus, the court concluded that no sensible purchaser would consider G.E. Lighting as a continuing customer of the business.

This had the effect of reducing the normalized earnings of USC by $28,000.

c) Legal fees

There was some evidence that the wife's matrimonial fees were being billed to the company. Certain requests had been made for details of the legal accounts. The requests had not been met.

SLF "estimated" that this amount might be in the neighbourhood of $8,000. However, he lacked the evidentiary foundation for his opinion.

Noting however, that the documents were not forthcoming, the court "split the difference" by adding $4,000 back to the normalized earnings.

d) Insurance

Insurance disagreements amounted to $8,000 of normalized earnings between the valuators.

The shareholders' agreement called for "key man insurance." SLF had asked for proof of payment and copies of the policies. The identification of the payment amount was not forthcoming.

Again, the court split the $8,000 difference.

e) Bad debts

The company had deducted two large debts of $35,000 and $10,000 respectively. SLF concluded that these bad debts were "atypical" and should be classified as non-recurring. He also testified that it would be unlikely that someone with the wife's experience would allow such bad debts to reoccur. Thereupon, he was cross-examined on the extent of the wife's experience in the trucking industry. He was ultimately forced, through effective cross-examination, to concede that there might be some lack of foundation for his opinion.

The court did not "add back" the entire nominal reserve for bad debts. It calculated the bad debts to be $22,000

f) Personal expenses

SLF asked to inspect all of the credit card statements and to provide "full details of all amounts reflected in those statements in excess of $400.00 together with all supporting documentation."

TL had examined the credit card debts with the wife and, if she provided a reasonable explanation, he treated it as an appropriate business expense.

When the credit card information was not provided to SLF, he concluded an arbitrary 30% "add back" into his normalized adjustments. In so doing, he relied on testimony of the husband. The court specifically noted that there was not a substantial cross-examination on a line-by-line basis with respect to the credit card debt.

The court specifically noted that the onus would be on the applicant to prove that the expenses were not personal. The court also noted that it was not its obligation to sift through volumes of receipts and expenses to arrive at an exact amount. In the end the court stated that the applicant had not fully discharged her onus but the court was prepared to accept some, but not all of the explanations offered by the wife. Once again, the court "split the difference", adding back approximately $13,500 to the nominal earnings.

g) Rent expense
The rent expense for the corporation increased significantly in 2003 and 2004. Unfortunately, the rental income did not increase.

SLF opined that such a business decision did not make sense.

The wife explained that the increased rent expenditure was to achieve additional revenue in the warehousing end of the business to offset the decline in trucking revenues. She testified that it appeared to be a reasonable business decision at the time.

The court accepted her explanation.

h) Foreign exchange
Both experts adjusted their normalized earnings for the foreign exchange impact on U.S. sales in U.S. dollars between the years 2002 and 2004.

Interestingly, the valuation date fell on a Sunday. TL used the rate on the following Monday. Later, both valuators agreed that the appropriate rate would be the closing rate on the preceding Friday.

i) The weighting of the adjusted earnings
Both experts applied weighting to the normalized earnings, with each of them weighting the nearer years at a higher amount. It was agreed that a purchaser, having regard to the short existence of the company, would be more interested in the recent experience.

The court concluded that the issue of weighting was merely a "subjective assessment" on the part of the valuators. In the end, the court accepted the SLF weighting as the court concluded that SLF had exercised professional judgment based on his lengthy experience.

j) Income tax rate differential adjustment
The valuators disagreed as to whether or not the purchaser would discount the maintainable earnings at a maximum tax rate of 36% and a minimum business tax rate of 18%. TL used the midpoint whereas SLF was of the opinion that a buyer would be able to access the small business rate.

In cross-examination, SLF admitted that the trend in the industry was for larger trucking or logistics companies to consolidate with smaller ones. He admitted that there was nothing inappropriate with using an average tax rate. The court specifically concluded that there was no evidence to suggest the category or the nature of the

potential purchaser. Accordingly, it found that the averaging of the tax rates would be reasonable in the circumstances.

k) The earnings multiple

SLF used an earnings multiple of between 4.25 and 4.75. This recognized a return on equity only. He explained his multiple by identifying a series of rates of return including an after-tax free rate of return, an equity risk premium, a micro-cap premium, an industry risk discount, and a company-specific adjustment. He concluded that a nominal purchaser would want a return of between 21.05% and 23.5% on his or her investment.

TL used a similar multiple but used rates of return different from those of SLF. In his opinion, the rate of return on equity would be higher as a purchaser would want a quicker return on his or her investment. He believed that the company's specific adjustment would be higher — particularly because the company was tied to the fortunes of Phillips Electronics.

The court noted, once again, that the various rates of return would be "matters of subjective opinion." In that respect, the court found again that TL had been influenced to some degree, to satisfy the wife's expectations. The court noted that a Department of Finance (Canada) report for 2004 spoke of "positive economic growth" in the future. The court noted that the wife had testified that in March of 2004 she was "optimistic about our future prospects."

Thus, the court preferred the multiple of SLR.

l) Management remuneration

There was a sundry group of normalized adjustments which resulted in an $8,000 difference between the valuators. SLF's approach was to remove all compensation and simply add back numbers based on statistical information. The court accepted this approach.

m) CRI

CRI, it will be remembered, was the fictitious personnel agency. TL attempted to deduct a small portion of the payments to CRI as a result of his discussions with the wife.

The court simply concluded that the wife had lied in her testimony and lied to TL about the nature of the payments to CRI.

n) Phillips and Max P.

The wife testified that the price of maintaining the Phillips Electronics accounts was to pay secret commissions to Max P. The amount of the payment was 5% of the sales from the Phillips account.

TL opined that the arrangement between the company and Max P relating to the kickbacks could negatively impact on the value of the company on the valuation date. It created the risk of a complete loss of the Phillips business if the arrangement was discovered. The uncertainty of this potential loss would weigh heavily on the mind of any potential purchaser.

TL further claimed that the loss of the Phillips business could reduce the value of the corporation to only a liquidation value of $103,000. The wife, through her lawyer, relied on the case of *Gregoric* v. *Gregoric* (1990), 4 O.R. (3d) 588 for the proposition that

"a secret commission is a reasonable basis for concluding that the business acquired by that commission payment would normally be lost and a liquidation approach is appropriate."

For factual reasons, the court distinguished the *Gregoric* decision. In *Gregoric*, the payment of secret commissions was admitted. Indeed, prior to the trial, the wife had denied any knowledge of payments made to Max P. At the trial itself, the wife failed to adduce evidence to demonstrate the true state of affairs or the nature of the relationship between USC and Phillips during the relevant period. The underlying facts were not corroborated by the evidence.

Accordingly, the court concluded that there was no factual foundation to conclude that the payments to Max P. should be taken into account in the valuation of USC.

In any event, the court concluded as a matter of public policy, that it should not accept the "alleged secret commissions as a basis for valuation." It said that it would not accept "secret commissions, dishonest invoicing, or questionable business activity" as a basis for valuation. This would amount to an abuse of process and offend the principle that "a court will not aid a litigant who advances his or her claim upon an illegal or immoral act." It applied the legal maxim of *ex turpi causa non oritur actio*.

In the end, the court concluded that the wife's one-third interest in the corporation was $358,500 on the valuation date.

The Equalization of Net Family Property

The court had to determine several small issues between the parties in order to determine the equalization payment due by one party to the other. The primary issue related to the wife's claim for notional disposition costs relating to the matrimonial home.

The matrimonial home was registered solely in the wife's name and, of course, was beneficially owned by her.

Simply put, the wife claimed that if she had to pay her husband an equalization payment based on a corporate valuation of $358,000, she would have little alternative but to sell the matrimonial home. Thus, she urged the court to allow her to deduct the notional realtor's commission and notional legal fees in connection with its sale. She concluded that this would amount to approximately $25,000.

The court reviewed the leading Court of Appeal authorities on the issue and made the following conclusions:

- If an asset must be liquidated in order to satisfy an equalization payment, disposition costs will generally be deducted.
- The court may discount the value of an asset for notional disposition costs if, on balance, it is clear that a disposition will take place at a particular time in the future and such costs will be inevitable when the owner disposes of the asset or is deemed to dispose of the asset.
- Disposition costs will not be allowed if they are merely speculative, meaning, where it is not clear when, if ever, there will be a realization of such costs through a future disposition.

The court concluded that, at the valuation date, there was no evidence of an actual disposition to occur in the future. The court was of the belief that the wife's statement

that she would have to sell the home was "mere posturing." As a result, the court found that the disposition costs were nothing more than speculative.

Post Valuation Date Events and the Unconscionability Claim

In the end, the wife was ordered to make an equalization payment of $183,000. She claimed that the equalization payment should be reduced as being "unconscionable" under s. 5(6) of Ontario's *Family Law Act*. She claimed the following circumstances amounted to unconscionability, or alternatively, that the value of the business for equalization purposes should be adjusted to "nil". Factually, her argument rested on the following:

- The post-separation decline in the value of USC was the direct result of market forces.
- It was not reasonable to liquidate USC following the separation. It provided an on-going income source and it was reasonable to attempt to continue the business.
- The decline in value of USC is now permanent.
- She would have to liquidate her major asset, the home, to satisfy the equalization judgment. This would virtually strip her of her assets.
- Mr. Barron's conduct was also unreasonable.
- The marriage was not of long duration.

The court noted that the threshold for "unconscionability" was exceptionally high. Words such as "unfair", "harsh", or "unjust" do not meet the test. To cross the threshold, the circumstances must "shock the conscience of the court."

The court further noted that unequal divisions of net family property are not dependent upon spousal misconduct. Market-driven forces that occur after the date of separation may lead to the ultimate conclusion that equalizing net family property would be impossible.

However, in the case of pure market-driven forces, the result of the drop in value must fall towards the spectrum of the extreme, rather than trending, as it is in this case. No specific expert evidence was given as to the reason for the decline and demise of the operations of USC. The effect of the currency exchange rates was not sufficiently extreme to satisfy a finding of unconscionability.

The court could also not find that the husband's bingo playing reached a level of unconscionability. There was no evidence that he squandered his income or the family wealth on gambling.

As a result, the court was not prepared to alter the equalization payment.

G. (S.) v. *G. (K.) 2012 BCSC 1937*

The parties, residents of B.C., separated in February, 2009. In July, 2009 the court granted a declaration pursuant to s. 57 of the *Family Relations Act* that there was no reasonable prospect of their reconciliation. Under that statute, the declaration became the "triggering date" for the division. Its effect was to vest an undivided half interest in the family assets in each spouse as of that date.

The husband was a successful investment advisor. On the "triggering date" he was employed by CIBC Wood Gundy. However two months later, he left that employment to

work for Scotia McLeod. He was paid a “signing bonus” of $1,950,000 by way of a loan repayable over 9 years. If he stayed with Scotia McLeod, he would be paid an annual salary equal to one ninth of the loan amount. He would also be paid $600,000 if his assets under administration exceeded $150 million within 15 months of his hire date.

The arrangements with Scotia McLeod also provided that Scotia would forgive the loan if he ceased to be an investment advisor and also that the book of business could be sold to another advisor on specified terms if he retired.

While employed by CIBC Wood Gundy, he had been involved in loan/bonus programs whereby bonuses were paid to him by way of loans repayable over time. These loans fell due on his departure and were largely repaid from the signing bonus.

He also had received “phantom stock” from CIBC Wood Gundy. These were Restricted Share Awards. He would nominally receive annual bonuses based on performance and calculated with reference to the value of CIBC shares. CIBC would “redeem” the “phantom stock” years later and he would receive the funds. His “phantom stock” would forfeit if he left their employ.

The wife alleged that his “book of business” was a family asset. Her argument was that the “book” was the equivalent of “goodwill.” The husband said his arrangement with Scotia McLeod (the signing bonus) was merely income, to be taken into account for support purposes when the guaranteed salary was realized. He alleged that it was merely to compensate him for the adverse effects of the move such as the obligation to repay the bonus loans, the loss of the phantom shares, and to replace income lost for clients who did not follow him.

a) Is the “book of business” property?
The essential characteristic of “property” is that it is something that can be transferred for value, that is, something that a third party is prepared to provide value to acquire. While property excludes purely personal rights, such as a right to work, it would include anything that another person would pay to acquire.

In this case, the book of business is analogous to goodwill. The goodwill belongs, in part, to the investment adviser, as the clients are personally loyal to him. Its value lies in the fact that the adviser also signs a covenant not to compete.

b) The nature of the transactions relating to the move
The transfer of employment by the husband from CIBC Wood Gundy to Scotia McLeod was not a “disposition” of his book of business. The husband was what Scotia McLeod wanted. It was also expected that many of his clients would move with him.

He did not retire or leave the industry. Therefore, it could not be said that he disposed of the goodwill attached to his book of business.

c) Valuation
The court did not have evidence of the present value of the right to sell the book of business on retirement. Therefore, it could not value the book of business in terms of a future disposition.

However, on the date of the declaration the husband had rights under the CIBC Wood Gundy phantom stock plan. Its value was $560,000. The court made a compensation order equal to one-half of the after-tax amount or $174,000.

Danecker* v. *Danecker, 2013 ONSC 1605

The husband and wife were both physiotherapists. At the time of their separation, in late 2009 or early 2010, they were equal partners in an unincorporated clinic, known as the S & P Clinic.

At the time of separation, the wife continued to run the clinic. The husband unsuccessfully attempted to set up his own physiotherapy clinic but eventually found full time employment as a staff physiotherapist at a local hospital.

Following the separation, the wife purchased the husband's interest in the building which housed the clinic.

The evidence indicated that prior to the separation, the parties had divided their labour as follows:

a) The husband saw patients for about 50-60 hours weekly, seeing about 40-50 patients daily;
b) The wife worked about 40 hours weekly, devoting about 15 hours to patient care and 25 hours to administration, banking, and marketing.

The husband engaged a Chartered Business Valuator. He estimated that the business goodwill value was $443,000. It was the only expert evidence at the trial. The reason for valuing goodwill only was the absence of a balance sheet. In preparing his estimate of value, the valuator concluded that:

- the husband could command a salary of $80,000;
- the wife could command a salary of $25,000; and
- any notional purchaser would incorporate the business.

The wife's position was simple. She said she believed that the goodwill value of the business was $175,000. She said that the husband could have any of three options:

a) she'd buy him out for half the price;
b) he could buy her out for half that price; or
c) the business could be put on the market.

The wife called evidence to challenge the underlying assumptions of the husband's valuator. The evidence attacked the salaries attributed to her and her husband and the fact that the business was an unincorporated entity.

a) The absence of incorporation
The court accepted that a notional purchaser would incorporate. Thus the corporate tax rate of 16% was appropriate to determine the after tax income stream. The court noted that the wife "...did not put forth any evidence to effectively refute..." this assumption.

b) The salaries issue
The wife led evidence from a former associate and partner who had left the practice years earlier and set up a competing practice. He testified that given the wife's description of her managerial duties and the need to engage a physiotherapist to cover for vacations, he estimated her salary to be about $50,000 as an administrator and $25,000 as "vacation coverage."

He also testified that the husband, working 50-60 hours weekly and seeing 40-50 patients daily (as opposed to 18–25 normally) would command a salary of $100,000 annually.

Another self-employed physiotherapist testified that an average physiotherapist would see 17–20 patients daily and could command a salary of $85,000 annually. She testified that her partner who performed managerial duties and vacation relief was paid $90,000 annually.

The court stated, having regard to the sharp factual disagreements that it was "perplexed" that the wife did not call independent valuation evidence of her own. The court did note that as the business was not incorporated, it lacked jurisdiction to compel the wife to purchase her husband's interest. Thus, the court may have viewed the wife's failure to call evidence in a more cynical fashion.

Finally, the court rejected the suggestion put forth by the wife's counsel that the valuator "ran the numbers" based on the court's determination of notional incomes. The court declined to do so noting that the business valuations utilize complex formulas and calculations.

In the end, although the court accepted the methodology put forth by the husband's valuator, the court concluded that there was some evidence to contradict his assumptions. The court averaged the valuator's valuation ($443,000) and the wife's estimate ($175,000) concluding that its value was $309,000.

c) The buyout or sale issue

The partnership was unincorporated and jointly owned. Citing Ontario case law that requires a court to order the sale of joint assets in the event that the parties cannot agree on a buyout price, the court ordered its sale.

However, the court ordered that the wife would owe the husband one-half of the business value of $154,500 calculated as of the valuation date. She had run the business as her very own for 3 years. She had not accounted to her husband for any of the profits.

The court declined to order the sale of the business but did state that the wife could sell it to meet the equalization payment if that was her wish.

d) Other accounting issues

In the course of the proceedings, it was discovered that the wife withheld depositing about $30,000 in business receipts until after the husband left the partnership. She argued that she should only have to account to the husband for a net amount after overhead (about $6,000) and personal income taxes.

The court noted that there was no further overhead associated with the receipts. It did discount the amount by 38% or $11,500. It added one half the remainder ($18,500 divided by 2) or $9,250 to the amount owed by the wife to the husband.

The court also dealt with a number of personal adjustments for post-separation payments paid by the wife. To the extent that they were proper business expenses and written off exclusively by the wife, the adjustments were denied.

***Dwyer* v. *Lewis*, 2013 ONSC 826**

The case was complex in virtually every respect. The parties disagreed on the valuation date by two years (2009 or 2011), due to a failed reconciliation attempt. During this time, certain assets were sold and a business incorporated. The husband had interests in several corporations. His income was estimated to be $590,000 annually. The wife had no income.

The husband had obtained reports from a Charted Business Valuator regarding the value of his business interests in 2009, and reporting on his level of income.

The wife sought an order for interim costs which, in Ontario can cover both disbursements and legal fees. She testified that she owed her lawyers $99,000 and her experts estimated that their reports on valuation would cost between $14,000 to $22,000 and on income between $6,000 and $10,000.

The court allowed suit money of $75,000 to advance the case to the stage of a settlement conference. Her lawyers were to hold the money in trust to firstly pay the experts, and secondly, to pay themselves.

In making its award, the court applied the principles set out in *Stuart* v. *Stuart* [2001] O.J. 5172, namely:

> The discretion should be exercised to ensure all parties can equally provide or test disclosure, make or consider offers or possible [*sic*] go to trial. Simply described the award should be made to level the playing field.
>
> An order under section [*sic*] 24(12) should not immunize a party from cost awards. The order is to allow the case to proceed fairly and should not be such that a party feels a license to litigate…
>
> The claimant must clearly demonstrate that the disbursements are necessary and reasonable given the needs of the case and the funds available…
>
> The claimant must demonstrate that he or she is incapable of funding the requested amounts.
>
> The claim or claims being advanced in the case must be meritorious as far as can be determined on the balance of probabilities at the time of the request for disbursements.

Specifically, the court found that the wife's claims were meritorious. She needed to test the opinions of the husband's experts, and there was every likelihood that the husband would be repaid out of the property award or as a setoff against support if he ultimately obtained a costs award.

***Currie* v. *Currie*, 2013 ONSC 464**

[Ed note: This case does not follow the principles set out in Stuart *v.* Stuart*, [2010] O.J. 5172, referred to in this paper in the decision of* Dwyer *v.* Lewis*.]*

Rather, the court founded its award on the principle that the equalization process results in the sharing of the value of properties. Thus, the costs of valuation should be shared, except in unusual circumstances.

Specifically, the court had this to say:

> I agree with the Respondent that payment of expenses is warranted. The rule speaks of fees and disbursements. It is obvious that the Respondent, represented as she is by competent and experienced counsel, has and will incur lawyer's fees. The matter promises to be sufficiently complex and expensive. There is a *prima facie* entitlement to an equalization payment. It is not unreasonable to assume that the Respondent will need to retain a business valuator to assess the value of two businesses in which the Applicant has an interest. I adopt the reasoning found in the case of *MacKinnon* v. *MacKinnon*, 2004 CanLII 8945 (ON SC), [2004] O.J. 2297, 7 R.F.L. (6th) 121 (Ont. S.C.J.) that, through the equalization process, the parties share in the value of an asset. Accordingly, they should share in the cost of the valuation of that asset, except in unusual circumstances. The Applicant shall therefore make a payment to the Respondent in the amount of $25,000 within ninety days of the date of this order.

Heidel* v. *Heidel, 2013 SKQB 8

Mr. Heidel was a farmer. He calculated his income on a cash basis. His tax returns revealed the use of optional inventory adjustments each year, inappropriate deductions for personal and living expenses, and excessive write offs (for family law purposes) and for capital cost allowances. His tax returns showed the following income:

Year	Gross Income	Net Income
2009	$503,662	$8,266
2010	$708,582	$76,717
2011	$775,080	$17,588

An accountant called by the wife calculated, after "clawing back" certain expenses, his income to be on an accrual basis:

Year	Income
2008	$161,238
2009	$61,834
2010	$12,633
2011	$328,411
Average over 4 years	$141,029

a) Cash basis accounting

The court noted the difficulty posed in the determination of farmer's incomes. It stated:

> [16] This Court has frequently dealt with the difficulties posed by determinations of farmers' income levels. Given the unique nature of that vocation, it is fair to state that Line 150 income will seldom be an accurate approximation of the true income of a farmer. The legitimate tax-purposed adjustments available to farmers regarding the reporting of their income serve to obfuscate (perhaps unintentionally, but nevertheless quite effectively) the true cash flow and income picture in many cases.

The court further noted that accrual-based accounting had been endorsed by the Saskatchewan Court of Queen's Bench in *Poff* v. *Fenell*, 1998 CanLII 13796. In that case the court stated:

> [10] Because of the latitude farmers have to "manage" their income under the cash method of accounting and through the use of deferred crop payments, prepaid expenses, inventory adjustments, capital cost allowance, the treatment of operating expenses and incentive programs, the courts would be greatly assisted in the discharge of their function if an accounting of farm production and expenses was presented on an accrual basis. This would provide a more realistic picture of true farm income.
>
> [17] An accounting on an accrual basis would identify the farm's production for the year, the expenses specifically related to that production and would identify the changes in the farm inventory. The optional inventory adjustments employed in the cash method of accounting distort the true picture.

b) Always a question of fact

Which method to use is always a question of fact for the trial judge: *Saskatchewan Government Insurance* v. *Schmitz*, 2009 SKCA 62. In that case, the Court of Appeal held that the accrual method need not be universally applied in the case of farmers.

c) The outcome

The judge applied the accrual method with the adjustments proposed by the accountant. It accepted the accountant's opinion that the accrual basis "...would be more indicative of the earning capacity of the farming operation."

However, the court declined to use the accountant's four-year average. Instead, it used a three-year average noting that that was the frame provided in s. 17 of the *Guidelines*.

That produced an annual income of $125,871.

Stelter v. *Stelter, 2012 SKCA 117*

The husband appealed from several findings made by the trial judge. Reported here is the Saskatchewan Court of Appeal ruling on the husband's income and the value of the husband's business interests.

The trial judge determined the father's income to be $80,000. Between 2007 and 2009 he reported an income of $60,000. The husband argued that the judge did not articulate any reason for imputing income or refer to s. 19 of the *Child Support Guidelines*.

The trial judge determined the value of the husband's business interest at $77,538. He accepted the wife's expert's testimony that its value was two times the average of corporate profits and losses over a three-year period less its retained deficit (2 x $82,836 in profits less $88,134 retained deficit). He rejected the husband's valuator's evidence that the business had no value — its assets being exceeded by its liabilities.

a) The role of the trial judge and the appeal court

It is up to the trial judge to determine the facts of the case. Unless the trial judge has misapprehended the facts or there is no factual underlay for the judge's conclusion or finding, the appeal court will not intervene. Because the issues surrounding support and the "fair and equitable" division of property (in Saskatchewan) the judge is vested with considerable discretion. Professional opinions or conclusions are facts.

b) The judge's support decision was justified

The Court of Appeal held that the trial decision regarding support could be justified under ss. 17 and 18 of the *Guidelines*. The impact of those sections enables a judge

to depart from the "Line 150" approach of s. 16. Both sections enable the court to determine a "fair income" or a "fair amount" available for child support.

Although the company lost money in 2005 and 2006, it made money in 2007 and 2008. The profits could be averaged within s. 18. Moreover, the husband had the personal use of company assets at a value of $21,000. Thus, under s. 18(2), after his salary and benefits were added back to the profits or losses, $80,000 could be attributed to him. *[Ed note: his salary and benefit are added back as he, does not deal with the corporation at arm's length.]*

The fact that the company has a retained deficit is irrelevant to the s. 18(2) analysis.

c) The valuation was justified
The court concluded that, factually, the assumptions of the wife's expert more accurately portrayed the reality of the situation. The judge concluded that there would be a "nominal liquidation" of the company (although both of them used a "going concern" methodology):

- Its sales volumes were increasing.
- It had a significant customer base.
- It was in the process of hiring a new, additional employee.
- The husband had been refinancing the company.
- It provided the father with an income.

Secondly, there was nothing "inappropriate" with the rule of thumb approach. The husband's expert, admitted in cross-examination that it "could" be an appropriate approach. His quarrel was that neither could find any actual justification for the multiple.

Kosior* v. *Kosior, 2013 SKQB 42

The husband was a financial planner and investment advisor. In 2006-2012, he continued with his investment business and was able to generate about $155,000 in trailer fees and rent which were generally eaten up in expenses. However, in those six years he engaged in short-term investments and individual consulting assignments. These were one-time ventures and opportunities that provided a high income — between $250,000 to $385,000 annually.

All of his business activities were handled through his corporation, KWS Inc. It had retained earnings of $431,000. Through KWS, he became the CEO of GARS Inc., which he was attempting to turn around. A salary of $180,000 was paid to him via KWS who was paid that amount by GARS.

The court found that the husband had no control over his income from GARS as a minority shareholder. The court characterized KWS as being similar to a professional services corporation as he was completely in control of his revenues, expenses, and assets. He was its sole income generator.

He argued his income was $153,000 (being $180,000 less certain employment expenses). The wife argued that one should look to his historical income or, in any event, force him to pay out the retained earnings as income for support purposes.

The case was at a very early stage as the hearing before the judge was for interim support. It appeared that there was some expert evidence introduced by the wife.

a) Attribution of income on interlocutory motions
The court noted that the best evidence to be obtained through the process of production, discovery and the subsequent utilization of expert evidence to ultimately determine the factual and true analysis of the husband's income for support purposes.

b) Averaging past income
While s. 17 of the *Child Support Guidelines* allows the court to determine a "fair and reasonable amount" of income where there are fluctuations or non-recurring amounts, it could not do so in this case. The speculation and assignments were non-recurring. The husband's income was in a state of flux. Thus, the historical analysis was not a sound or logical basis for income determination.

c) Retained earnings and pre-tax annual profits
Section 18(1) of the *Guidelines* allows the court to attribute all or a portion of the corporation's pre-tax profits for the most recent year to a shareholder, director, or officer if the court forms the opinion that it is available for child support.

"Annual pre-tax profits" should not be confused with "retained earnings." The retained earnings may not be "available" as they merely represent the shareholder's "equity" in the business. They do not represent "cash" available for distribution: *Nykiforuk* v. *Richmond*, 2007 SKQB 433.

The court noted that several appellate courts across Canada have rejected the use of retained earnings as a means of determining pre-tax corporate income: *Hausman* v. *Klukas*, 2009 BCCA 32; *Miller* v. *Joynt*, 2007 ABCA 214; and *Gosse* v. *Sorenson-Gosse*, 2011 NLCA 58.

d) When will income be attributed?
Referring to other cases, namely, *Kowalewich* v. *Kowalewich*, 2001 BCCA 450 and *Nykiforuk* v. *Richmond*, supra, the court listed several factors to be considered:

1. The pre-tax income of the corporation
2. The nature of the business
    - capital-intensive or a service-orientation
    - seasonal fluctuations
    - business-cycle sensitivity
3. Its corporate structure
    - single or multiple shareholders
    - obligations imposed by shareholders' agreements
4. The company's financial position and operations
    - operating requirements and bank covenants
    - the state of its inventory
    - its accounts receivable and payable
    - its need for funds to replace or upgrade equipment or facilities
5. Its history
    - is it well-established
    - is it a start-up

6. Its capital needs
   - to expand
   - to maintain working capital

e) The court's summary of s. 18 principles

The court quoted, extensively, from a paper prepared by Dinyar Marzban and Jamie Woods, "Lifting the Corporate Veil: Income Determinations for Shareholders, Directors and Officers under s. 18(1) of the *Federal Child Support Guidelines*" (2012), 31 Can. Fam. L. Q. 1 at pp. 11-12. He adopted a list of principles that the authors identified in their paper:

1. Retained earnings are not equivalent to pre-tax corporate income and are not relevant to a s. 18 analysis.
2. Blameworthy conduct on the part of the payor parent is not a prerequisite to triggering the application of s. 18.
3. A shareholder, director or officer bears a heavy onus to lead clear evidence of the corporation's legitimate business needs. It is not open to a court to speculate about a corporation's needs.
4. Evidence of the corporation's economic volatility may be a factor in determining how much pre-tax corporate income is available to a shareholder, director or officer.
5. What a shareholder, director or officer does with the available pre-tax income of the corporation is irrelevant to a s. 18 analysis, even where it is paid to the support recipient for other reasons.
6. In the absence of clear evidence demonstrating a corporation's legitimate business needs, all pre-tax corporate income should be attributed to the shareholder, director or officer for child support purposes.
7. Incorporated professionals are less likely than others to establish legitimate business calls on pre-tax corporate income.
8. Minority shareholders are not immune to attributions of pre-tax corporate income, but the appropriateness of making these attributions must be determined on a case-by-case basis.
9. Averaging pre-tax corporate income over a three-year period is a common practice, but attributing the three-year average to a payor parent may be inconsistent with the wording of s. 18(1)(a) where a corporation's pre-tax income for the most recent taxation year is lower than the three-year average. There is no consensus on this issue.

f) The result

The court concluded that the attributed income of the husband should be $230,000 consisting of:

1. the $180,000 "salary" paid into KWS; and
2. a $50,000 dividend as the company appeared to have sufficient cash resources to pay it and the husband was "the sole mind and will of the company."

Robinson* v. *Robinson, 2012 BCCA 497

The trial judge concluded that spousal support should be satisfied by a lump sum payment. The lump sum was ordered because the husband had moved to Germany and had established a new relationship there.

The court quantified the lump sum by:

1. determining a time over which the periodic payments should be paid — 114 months;
2. determining a monthly payment — $6,000;
3. discounting it to reflect the absence of the tax consequences — 35%; and
4. a "contingency discount — 20% (as the husband had certain health problems that might disable him prior to normal retirement).

After discounts the net award was $330,782.

The wife appealed, stating that the judge made an error in calculating the taxes as her average tax rate would be 28.9%, not 35%. This adjustment would increase the award by $41,724.

The appeal was dismissed. While the judge made her calculations based on an estimated rate of tax, the judge must consider the tax position of *both* parties — not merely one of them. The husband, a German resident had only a limited ability to deduct payments of 4 000 Euros yearly. Over 19 years, 4 000 Euros would translate to about $49,000, so there was no clear error.

Rogers* v. *Rogers, 2013 ONSC 1859

The parties were married in 2000 and separated in 2009. One of the issues was a valuation of the husband's 20% interest in a company known as Digital Holdings on the date of marriage. During the course of the marriage, all of the shares of the corporation were sold to a third party purchaser for $2.5 million.

A year before the marriage, in 1999, the firm's external Chartered Accountants had done a valuation of the company for estate freeze purposes. At the time the estate freeze, the common shares in the company were valued at zero and the preferred shares were valued at $1.3 million.

The external Chartered Accountants had been the Chartered Accountants for the company from 1995 until its sale in 2006.

The husband had commissioned Mr. Goldsmith, an accountant, to prepare a report valuing his 20% interest in the company on the date of marriage. The court refused to recognize Mr. Goldsmith as an expert or to give opinion evidence. The court stated a host of reasons including:

1. He was a social friend of Mr. Rogers' parents. They socialized together. Thus, Goldsmith could not be described as being at arm's length;
2. He worked actively in the negotiations, resulting in the successful sale of the business in 2006. As such, the court viewed him as an "employee" of the husband's father;

3. He admitted in cross-examination, that the respondent's father was a "fan" of his and referred business to him;
4. He admitted that he was paid or compensated to prepare his report and to give testimony;
5. He admitted that he was not a chartered business valuator (although he testified that he did business valuations in his practice);
6. He had never been qualified as an expert witness prior to his court appearance;
7. He admitted that he never had any training or education offered by the Canadian Institute of Chartered Business Valuators. He admitted that he was not familiar with their Practice Standards;
8. The report, itself, lacked any "scope of review", "key assumptions", and any "restrictions" due to the limited material available to him;
9. He testified that he relied on information that was "largely in his head" retrospectively as to the documents he would have needed. It appeared that such documents were not made available to him;
10. He admitted that the company's potential "future" contracts were based on his memory;
11. He testified that if documents produced to him contradicted his memory, he would have to change his opinion;
12. He admitted, in cross-examination, that there would be no purchaser for a 20% interest in the closely-held corporation.

***Goett* v. *Goett*, 2013 ABCA 216**

The following is the chronology of events:

1. In 2007, the father and mother separated. They had 5 children. The husband owned a numbered company which employed him.
2. Following the separation, but before the child support order, the father transferred his shares to his girlfriend for no consideration. He continued to be employed by the numbered company.
3. In 2010, the child support order was made. In effect, it was indirectly made binding on the numbered company.
4. Shortly after the child support order was made, the girlfriend (who later became the wife of the father) transferred the assets of the numbered company into a newly-incorporated company PNP Inc. She became its sole shareholder and director. The father continued to be employed by the new company PNP Inc.

Both parties applied to vary the 2010 child support order. Between 2010 and 2012, PNP Inc. was profitable, its retained earnings increased, and although the father's salary declined, his girlfriend/wife's salary grew in an equivalent amount. The trial judge however, declined to apply s. 18 of the *Guidelines* in his income determination as the father was not a shareholder, director, or officer of PNP Inc. If applied, s. 18 would require the father to:

1. Justify the need to retain corporate profits; and
2. Prove that the girlfriend's/wife's income was "reasonable" in the circumstances.

The mother appealed. The Alberta Court of Appeal reversed the trial judge.

1. Interpretation of the Federal Child Support Guidelines
The interpretation of the *Guidelines* demands a purposive approach. Any interpretation requires reference to their stated objectives in s.1 which include establishing a fair standard of support and that children continue to benefit from the financial means of both parents after separation.

2. The impact of s. 18 in determining annual income
Effectively, s. 18 allows the court to "pierce the corporate veil" if the standard s. 16 analysis does not fairly reflect the amount available to the payor to pay child support.

3. Can s. 18 be employed within the context of s. 19
Section 19 allows the court to impute income to a potential payor where the court determines that the standard s. 16 approach does not truly reflect the income available to pay child support. Thus, ss. 18 and 19 are inextricably linked and designed to work in tandem. They are not mutually exclusive. Their goal is to determine income available to pay child support.

Accordingly, if there is a basis for imputing income under s. 19, s. 18 may be employed as the mechanism whereby the determination of income is made.

4. The appropriateness of using s. 18 to impute income under s. 19
The trial judge found that s. 16 was inappropriate to determine the father's income. He was prepared to impute income to the father based on diversion of income under s. 19(1)(d) or unreasonable deduction of expenses under s. 19(1)(g). Moreover, the trial judge found that the original transfer was for no consideration, it was not at arm's length, the father continued to have *de facto* control of the corporation and its successor, there was no change in the undertaking or enterprise of the business, and there was no justification in the girlfriend/wife's salary increases and the father's corresponding salary decreases.

5. The impact of the s. 18 determination
The trial judge, employing only s. 19, held that the father's income was $80,000 — the same amount upon which the 2010 order was made.

The Court of Appeal determined that the father's income was $150,000. They did so by:

a) adding the wife's increased salary to the father — an increase by $56,000;
b) attributing the corporation's pre-tax profits of $35,000 to the father's income; and
c) disallowing certain corporate expenses (in home office and vehicle benefit) resulting in an addition of $8,000 to the father.

Richardson* v. *Richardson, 2013 BCCA 378

[Ed note: The case is designed to provide the reader with a glimpse of the appeal process and why it is important to get it right at trial]

The parties were the parents of a son, now 19 years old. The father operated a construction company in the 1990s, specializing in mechanical contracting, plumbing and

fire sprinkler installations. It began to transition itself to a commercial realty company in the early 2000's.

In 2001, the parties entered into a separation agreement. Though there was little disclosure, the father agreed that he could earn $160,000 annually. Child support was set at that level, resulting in a payment of $1,816 monthly.

In the years that followed, the father appeared to live a lavish lifestyle. The mother obtained disclosure orders that indicated that he had a higher personal income and that the company had significant pre-tax profits. Summarized, the wife's valuator filed a report which set out the valuator's opinion.

Table 1 — Line 150

2002	2003	2004	2005	2006	2007	2008	2009	2010
$103,146	$83,191	$249,921	$289,945	$335,293	$180,010	$197,935	$406,333	$122,762

Table 2 — Corporate pre-tax profits

2002	2003	2004	2005	2006	2007	2008	2009	2010
$225,635	($4,098)	$136,452	$274,681	$388,592	$52,990	$239,065	$154,135	$208,238

Table 3 — Amount "available" after attribution

2002	2003	2004	2005	2006	2007	2008	2009	2010
$329,000	$79,000	$390,000	$571,000	$720,000	$233,000	$437,000	$813,000	$311,000

The trial judge rejected many of the income theories that were presented by the wife at trial. She appealed.

a) The role of an appeal court

When it comes to support orders, appeal courts give trial judges' decisions considerable deference. They will not interfere with the trial judge's discretion unless:

a) the trial judge made an error in principle (i.e. applied the law incorrectly);

b) significantly misapprehended the evidence; or

c) it was clearly wrong.

b) The failure to attribute pre-tax earnings

The judge did not attribute all of the corporation's pre-tax earnings to the father. She only incorporated those earnings from any year that the debt to equity ratio exceeded 2:1.

While the onus of proving that the corporation needs its pre-tax income is on the shareholder, the judge believed that the father met that onus, in part. It was reasonable for him to diversify his business interests. The trial judge concluded that the business needed reserves of working capital. On appeal, the mother simply sought to dissect the trial evidence to show the business affairs in a new light. However, this falls short of demonstrating a "misapprehension of the evidence" or a "clear and palpable error."

c) The Miami property

The father purchased, through a holding company, an upscale condominium in Miami, Florida for $870,000. The mother attempted to impute $80,000 annual personal benefit to the father.

The court declined to impute income to him, accepting his testimony that he planned to rent it to Canadian "snowbirds" as part of the overall diversification process.

As there was evidence to support the judge's conclusion, it was not open to the appeal court to reach a different conclusion.

d) Unrealized capital gains on corporately-held realty
The mother argued that the corporation's unrealized capital gains on realty was a "diversion of income." The thrust of her argument was that he could wait and reap the benefits of such gains after his child support obligation ended.

The appeal court disagreed. The purchases were for the *bona fide* diversification of the business according to the trial judge. Moreover, the capital assets (the commercial real estate) was generating rental income.

e) Capital gain on sale of residence
After the separation, the father used his share of the property reapportionment to buy a personal residence for $1.8 million in a highly-leveraged transaction. Later, he sold it for $2.8 million and loaned the tax free capital gain to a holding company. The holding company then invested the money in the completion of construction of a warehouse. On completion, the warehouse was mortgaged to finance the $870,000 Miami condo.

The court noted that a non-recurring capital gain may or may not be treated as income under s. 17 of the *Guidelines*. The trial judge did not conclude that the capital sum enhanced the father's income. Thus, it ended there.

f) The net worth of the payor
The mother noted that the father had $7.8 million in assets less about $5.6 million in liabilities and that the trial judge had erred in her calculation by $500,000 (valuing a mortgage at $1.47 million when it was actually $975,000).

In essence, the Court of Appeal said "So what?" The task under the *Guidelines* is not to measure a spouse's net worth or increase in net worth. The task is to determine the payor's income available for child support purposes.

g) Capital Cost Allowance on commercial property
Section II of Sch. III of the *Guidelines* prohibits an individual spouse from deducting Capital Cost Allowance (CCA). on personally-held real estate for *Guideline* purposes (even though it may be a legitimate deduction for income tax purposes). It is silent on corporate CCA on real estate. Thus, there is no blanket allowance or disallowance.

To the extent that the trial judge held that an allowance was "automatic" as s. 11 did not refer to corporations, she erred in principle.

It is normally up to the shareholding spouse to establish the legitimacy of corporate expenses and especially CCA. That is because CCA does not involve any actual expenditure in the taxation year in which it is claimed. Rather, it is a means by which the taxable income can be reduced to take account of the fact that assets depreciate over time. Accordingly, there is no outflow of cash. Finally, it is the taxpayer who makes the decision on whether to claim CCA and, if claimed, the amount.

Through a combined effect of s. 18 (attribution of corporate income) and s. 19 (unreasonable deduction of expenses), corporately-claimed CCA can be challenged.

The matter was remitted to the trial judge to resolve the CCA issue.

[Ed. Note: The issue of retroactive and ongoing support was also remitted to the trial judge as the CCA determination could affect the outcome of both support issues].

M. (P.R.)* v. *M. (B.J.), 2013 BCCA 327

The parties separated in 2006 after a traditional 23 year marriage. In 2007, proceedings were instituted and, due to unusual delays, in 2009 the family assets of $12 million were reapportioned 65% to 35% in the husband's favour.

To effect the reapportionment, the husband received $8.5 million of business assets. The wife received the family home, a family vacation property and a commercial property (which she used as her own photography studio). The values of these properties were $1.75 million, $425,000 and $340,000 respectively. Thus, of the $4 million received by the wife, about $2.5 million was non-revenue producing. This fact was noted by the trial judge in the reapportionment decision.

After further delays, in 2012 the trial judge, awarded the wife $10,000 monthly spousal support. In making the award, she declined to impute income to the wife based on a nominal income that could be produced from the wife's property. Evidence led at the support hearing demonstrated that the family home had, since the reapportionment, risen in value by approximately $575,000.

The husband appealed, arguing that:

- The wife's non-income-producing assets were, nevertheless, part of her "means".
- The trial judge treated the parties differently in that income drawn from the business by him as dividends represented his capturing, on a current basis, the company's growth. By contrast, the growth in the wife's assets was ignored.
- Her housing choices exceeded her reasonable needs.

1. "Means"
The appeal court looked to the Supreme Court of Canada decision of *Strang* v. *Strang*.

> "..this interpretation of "means" [in s. 15.2(4) of the *Divorce Act*] is consistent with the historical interpretation of the term including all pecuniary resources, capital assets, income from employment or earning capacity, and other sources from which a person receives or gains benefits."

The appeal court also noted that s. 19(1) of the *Federal Child Support Guidelines* [also used to determine income under the *Spousal Support Advisory Guidelines*] allows the court, in s. 19(1)(e) to impute income if "...the spouse's property is not reasonably utilized to generate income."

The trial judge was aware that the wife was receiving assets that were non income-producing. While the assets could be sold or put to an income-producing use, there was no mandate to do so. The trial judge exercised her discretion not to impute income.

2. Asset appreciation and differential treatment
It is unreasonable to impute income based on the post-separation growth of an asset. To do so erodes the finality of the division of assets.

In this particular case, the growth in value of the family home is merely paper wealth. Short of a sale, the increase in value cannot be easily extracted without incurring further expense.

3. The "overhousing" argument
No one on behalf of the husband suggested a viable plan to recognize a hypothetical return on the assets. The wife did not want strangers using the vacation home nor was

there evidence as to the expenses associated with its potential rental. Evidence as to the financial impact of the sale of the photography studio [presumably commissions and taxes] had not been put before the court.

The family home "did not present such a mismatch of residence to family needs and marital standard" that the trial judge erred in failing to impute income to that asset.

MacNutt v. *MacNutt, 2013 BCSC 504*

The parties

Mr. MacNutt, called "the husband" was born in 1949. He went to work at an early age as a truck driver. He founded his own company in 1979. Originally, the company hauled sawdust from sawmills. Following the recession of 1981–2, the company expanded its operations, hauling sawdust, bark mulch, and other debris including manufacturing soil and compost. The company expanded rapidly in the 1980s. Real estate was acquired for its manufacturing activities and to act as "buffers" for safety and noise concerns relating to neighbours. Real estate was also purchased as a source of gravel. The various corporations and properties will be dealt with *seriatim*.

Mrs. MacNutt, called "the wife", was 7 years younger than her husband. Following her schooling, she entered the Canadian Forces where she married an army dentist. They had 3 children. They separated in 1993. They entered into a separation agreement but the first husband paid virtually no child support. Evidence was led that he had psychiatric and other problems that precluded him from gainful employment. The court noted that there was very little medical or other evidence led from which it could draw a definitive conclusion.

Following the separation, the wife retrained to become a helicopter pilot. She was employed as a helicopter pilot for a couple of years during the 1990's. During this time, she also became involved in the selling of soil.

The husband and wife were introduced as a result of their common interest in the soil business. They dated and eventually began to cohabit in 1998. They married in 2002. They separated in 2007.

The court action

The court action was commenced in 2008. The matter came on for trial in April of 2010. The trial lasted over 50 days with evidence being heard intermittently between April of 2010 and September of 2012.

The British Columbia legislation

[Editor's Note: the statute in force at the time has been repealed and replaced. Therefore, the outcome regarding "reapportionment" will be different under the new Family Law Act*. The valuation principles remain the same.]*

The statute in force at the time, the *Family Relations Act* mandated that each spouse has a presumptive one-half vested interest in any family asset. The court can reapportion the interests of the parties if one of the parties can show that an equal division of any family asset would be unfair. This was known as "reapportionment." Normally, assets were valued at the date of trial. As a preliminary matter, the court concluded that it would value the assets as of July 31, 2010. That was the year end closest to the commencement date of the trial. The husband argued, unsuccessfully, that because

the assets had changed in value, this would be unfair to him. The court concluded that it would address the issue of unfairness through the process of reapportionment. The court concluded that it would deal with the assets on an asset-by-asset basis rather than adjust the valuation date.

The experts
Both the husband and wife engaged Chartered Business Valuators to testify to the underlying value of certain of the assets. In some cases, assets were valued at both the date of marriage and as of 2008 (the earliest valuation date under the legislation).

Both valuators prepared reports for 2008 values. The husband's valuator did not up-date his report to take into account 2010 values.

MacNutt Enterprises Limited

a) History
MacNutt Enterprises Limited (hereinafter called "MEL") was the original trucking company. It was incorporated in 1990. As mentioned earlier, it evolved from a single truck hauling sawdust to a large composting and soil producing facility located in both Victoria and Nanaimo. Its major operation is located on property owned by the hus-band's mother. She allows the corporation to carry on the operation over approximate-ly ten acres. There is no formal lease. There is no specific arrangement regarding rent. Rent payments are occasional and sporadic.

b) The real estate and equipment valuations
Real estate valuations were obtained from a man named Mercer. Both the husband's business valuator and the wife's business valuator relied upon the Mercer appraisals. Mercer provided two opinions relating to the value of the equipment. The first was "fair market value in continued use." The other was for "liquidation value."

The fair market value in continued use assumed that the asset would be sold as part of an ongoing operating business that would be able to generate a sufficient level of profits to justify the purchase price. It is also known as "value in use" as noted in the "Chartered Valuation Service" (called C.V.S.). Liquidation value assumed that the as-sets would be sold at auction or by some other method. It would assume that there was some level of compulsion to sell. The definition was consistent with the definition of "value in exchange" referred to by the C.V.S. The liquidation value could entail a forced liquidation or "fire sale" or could be conducted in a more orderly and planned fashion where a plan for selling the equipment was developed as part of a plan to wind up the business. The husband's valuator valued the equipment on an orderly liquida-tion basis.

Mercer opined that the "value in use" was $1,754,000. At liquidation value, it was $1,053,000.

c) The husband's valuator
The husband's valuator, Mr. Goodburn, testified that an asset-based method was the appropriate valuation approach for MEL. He opined that a prudent purchaser would not be satisfied that the earning potential of a business would exceed its asset value. After taking into account selling costs and taxes, Goodburn estimated the value of MEL to be approximately $1,100,000 in 2008. He also stated that because valuation was not "a precise science", it was reasonable to express his final valuation in a range of plus or minus 10%. In the end, he arrived at a final estimate in the range of $990,000

to $1,210,000. His final analysis was that the company had a value of $905,000 because of the probability that a company owned by Mrs. MacNutt would never repay a debt owed by it to MEL. In cross-examination, the following points emerged:

- He did not account for inventory due to the fact that there was a "lack of information."
- The purchasers would have several different options rather than merely liquidating assets. He stated, however, that such other options were "speculative."
- He conceded that a purchaser could create efficiencies in the business.
- He confirmed that he did not speak to the wife, who, at one time, had a previous involvement in the business.
- He relied solely on information he received from the husband
- He conceded that he relied on the husband's estimation that the inventory had virtually no value.

The wife's valuator, Mr. Bing, was initially asked to only perform a "limited critique report." His report was entitled as such. In cross-examination, he admitted that a "limited critique report" cannot contain a valuation conclusion. He testified, however, that despite the limitation contained in the report itself, he made a "judgment call" to go beyond that step in order to provide something usable and of value. He testified that his report was, despite its name, a "share valuation." The court specifically noted that it would treat the report as a "calculation value" report (one which provides the lowest level of assurance in a share valuation. The court treated Goodburn's "estimation value" as one which provided a mid-level of assurance).

Bing concluded that a review of the five-year history of the business prior to 2008 led to the conclusion that there should be no goodwill value associated with the business. Notwithstanding, it was his opinion that the business should be valued on a going concern basis. To that end, he used an "adjusted net book value" approach. He testified that this would be appropriate for an operating business that may not generate sufficient earnings to realize a reasonable rate of return on its net operating assets.

Consequently, Bing opined that he would use a mid-point analysis between liquidation value and value in use.

He concluded that using this approach, MEL would have a value of $1.72 million as a "going concern" using the adjusted net book value approach. He ignored the consideration of any contingent liabilities.

Using the same methodology, he placed the valuation of MEL at $3.239 million when he adjusted it to the 2010 value.

d) Areas of dispute between the valuators

1. Notional Rent:
Goodburn placed substantial emphasis on the fact that MEL was a tenant at will of the husband's mother. Bing testified that he took into account "notional rental rates." Under cross-examination however, he admitted that he had treated Victoria and Nanaimo rental rates as being equal. It also appeared that some of the property used by the corporation was a legal non-conforming use.

In reviewing this evidence, the court specifically noted that it "presents but one example of the extreme positions taken by the parties when providing information to their respective experts."

2. Equipment and Capital Expenditures

Goodburn estimated that the company would require about $450,000 annually for capital expenditures. He based this on his analysis of the spending pattern of the company over the past five years. He admitted in cross-examination that he did not make any independent inquiries of any of MEL's competitors.

Bing did not base his estimate of future capital expenditures on MEL's recent actual experience. He stated that the recent expenditures were much higher and that that level of spending would not have to be sustained. He admitted that his original estimate of $200,000 was "not very precise." He later conceded that based on the actual expenses, a figure of $450,000 would be more acceptable.

The court accepted this figure.

3. Inventory

Bing estimated the inventory to be $350,000. He relied on other expert reports and aerial photographs showing large "mounds" and various "piles" of materials on the company lands. Based on information from Mrs. MacNutt, he considered these "mounds" and "piles" to be inventory. He assigned an arbitrary "$5 per yard" to the piles which he counted.

In cross-examination, he acknowledged that the "piles" would go through various stages of processing and would have different values depending on the stage.

Ultimately, at trial, the husband testified that the inventory might have a value of $52,000. The court accepted this figure.

4. Transition to new ownership

Essential to Bing's opinion was that a vendor would assist a purchaser in a smooth transition as a basis of maximizing value. The husband testified that a key employee was a man named Mr. Kirsch. Kirsch testified that he would not continue with the new ownership but would retire.

Bing was fiercely cross-examined on this point. He suggested that "every man has his price", that he would not "speculate" on Kirsch's role and that the importance of Kirsch was only one of many factors that a purchaser would consider.

5. The availability of low cost material

The availability of low cost free sand and sawdust was an issue. Many mills were shutting down. Bing testified that it would not materially affect his opinion. However, the court felt this was a justifiable concern for any future purchaser on a going concern basis.

e) Criticism and the Bing approach

Goodburn criticized the adjusted net book value approach adopted by Bing. He noted that "adjusted net book value" is usually a risk management aid and is seldom used as a primary valuation methodology.

Goodburn also criticized the fact that Bing "worked backwards" in determining his approach. He said that Bing first calculated maintainable cash flow and arrived at a multiple to arrive at his adjusted net book value.

He was critical of the multiples applied by Bing. Goodburn testified that if the multiples were too high, they would be inappropriate. He used the differing value between Bing's 2008 report and 2010 report as illustrative of his point.

In defense of his position, Bing pointed out that the C.V.S. text permits a "value in use." Quoting from it, "...in effect, valuation in use is the value where the value of a business is to be valued upon an on-going concern basis."

f) Independence and bias

The court, at many instances in its judgment, used words like "Mr. MacNutt points out..." or "Mrs. MacNutt argued...." It was clear that the court wished to side-step any suggestion that either expert overstepped his or her bounds. The court did point out however, that the wife strenuously argued that her husband had overspent on capital equipment between 2008 and 2010. She alleged that it was a clear attempt to reduce the profitability of the companies.

Finally, the court noted that corporate valuation is a particularly difficult issue given that everyone is gazing into the future and, on the facts of this case, the valuation methodology employed was a "liquidation" methodology despite the fact that there was no evidence that the business will actually be liquidated.

g) The Judge's comments on expert testimony

One theme underlay the trial judge's assessment of the evidence. It was that the parties were at extreme odds and their extreme positions were reflected by similarly divergent expert opinions. In those circumstances, the court noted that it is "unwise to adopt entirely the position of one or the other.... It is more likely that [fair value]... be somewhere in between two extremes." The court noted the frailties of each expert's position, exposed in cross-examination, or by nature of the very facts.

Examples of the court's concern relating to the Bing analysis were:

- Bing's underestimation of rental rates
- Bing's uncertainty as to the reasonable valuation of inventory
- Bing using an applied rate of return to arrive at an appropriate multiplier

The court noted certain frailties with respect to Goodburn's valuation, largely by ignoring positive factors with respect to the corporation which included:

- a history of solid earnings
- continued economic success
- the increasing tangible asset value
- its dominant market position in Vancouver Island
- its increase in capital expenditures post-separation
- his failure to update the valuation from 2008 to 2010

In the end, the court valued MEL at $1.9 million.

Valuation of Rainbow Valley Nurseries

Rainbow was a holding company incorporated by the husband in 1992. Initially, it owned a property on Hector Road in Victoria. In 2006, it purchased properties in Nanaimo as "buffer properties" for MEL's Nanaimo operations.

The parties had divergent views as to residue impacting on the values. The husband testified that the soil might be contaminated. The wife testified that there was substantial "wood waste" underlying the properties and that the extraction of such "wood waste" would more than offset the potential costs of any remediation.

The properties were valued by a real estate appraiser. Both Mr. Goodburn and Mr. Bing expressed opinions.

Both of them agreed that the 2008 value was $657,250.

Bing provided an updated report to 2010. He increased the value of the real estate by $120,000 and increased the overall value of the shareholders' equity by a further $70,000. He concluded that the final value of Rainbow would be $811,000 "net of income tax considerations" and excluding "any contingent liabilities." Goodburn did not disagree with this value.

Surprisingly, the wife disagreed with her own expert relating to income tax considerations. Her solicitor cited the Supreme Court of Canada decision in *Rick* v. *Brandsema*, 2009 SCC 10 in which the court stated:

> Accordingly, the wife argued that as there was no evidence that her husband intended an imminent or eventual sale, there should be no deduction for notional tax or disposition costs.

The judge noted the difficult position that confronted Bing. Both valuators had agreed that notional tax and disposition costs had to be taken into account. Moreover, the court considered it unreasonable to assume that the husband would hang onto the properties indefinitely.

In the end, the court exercised its discretion and applied the valuators' agreed-upon value of $811,000.

With respect to the contamination issue, there was substantial expert testimony.

The court dealt with the testimony on the basis that the husband was in the best position to actually establish and quantify the degree of contamination. He did not do so but sought a substantial benefit by a significant reduction in the value of Rainbow.

The court allowed a modest remediation cost of $50,000, rejecting the $250,000 cost suggested by the husband.

Finally, it was discovered that the wife was actually a 50% shareholder in Rainbow. Mr. MacNutt stated that this was a mistake. The court gave them the option of either seeking a rectification order or taking steps to buy her out. In any event, because Rainbow and MEL were so closely integrated, it was clear that the wife would be obliged to transfer her shares to her husband in some fashion.

Similar expert evidence was led with respect to Rainbow, including the costs of remediation of gravel removed from the property. Once again, the court noted the speculative nature of any such costs going forward due to the lack of evidence as to how long the property would be held, the cost of ongoing monitoring and mitigation, and the extent of the mediation that might be required.

Finally, the court had to determine the value of the "wood waste." The "wood waste" was an asset capable of being reprocessed and sold at a profit. None of the financial statements assigned any value to the underlying materials. Expert evidence was led

concerning the possible amount of wood waste to attempt to value it at a per cubic metre basis. There was conflicting evidence as to the nature and quality of the wood waste and the practicality of attempting to excavate it.

In the end, the court assigned a modest value to the waste.

Happy Valley

The wife was the sole shareholder in the company. Most of its sales and revenues came through its association with MEL. It had its own customers. It appeared that there was an attempt to divert some of the MEL income into Happy Valley.

The wife removed $236,000 from the company when the parties separated in 2007. Otherwise, its equipment was subsumed into MEL.

The court was faced with the unusual situation where the cash was removed by the wife between the date of separation and the “triggering event.” The court was precluded from choosing a valuation date that is prior to the triggering event. To remedy this problem, the wife’s compensation payment was reduced by $118,000, being one-half of the funds removed by her from the corporate bank account.

Reapportionment

Under the former legislation, the court could make an order to reapportion the presumed equal ownership of assets. It could be done on an overall basis or on an asset-by-asset basis. The considerations were set out in section 65 of the *Family Relations Act* and took into account the duration of the marriage, the duration of the separation, when properties were acquired or disposed of, whether properties were acquired by inheritance or gift, the needs of each spouse to become or remain economically independent and self-sufficient, and any other circumstances (a “catch-all” relating to the acquisition, preservation, maintenance, improvement or use of property or the capacity or liabilities of the spouse).

The court took into account the various factors enumerated above. Of course, under the current *Family Law Act*, judicial discretion has been largely curtailed.

Duration of the marriage

First, the court noted that this was an unusual factor. The parties remained married to each other for five years after the separation in 2007. The reason was largely income tax considerations.

However, the court noted that cohabitation under the marriage was only five years. This would tend to favour the husband’s position that there should be an unequal division of the relevant family assets.

With respect to MEL, the company was created long before the marriage and operated by the husband throughout his whole working life. The growth in the company however, occurred during the period of the marriage at a time when the wife was involved in it. Conflicting arguments were raised because the property grew in value after the date of the triggering event. They remained married to each other for five years, largely because of income tax implications. Moreover, case law tends to favour the sharing of growth following the post-separation triggering event because their interests in the assets have, by this time, vested. The court, possesses a residual discretion to reapportion where it would be unfair to do so. Specifically, the court noted the tremendous change in the Bing report between 2008 and 2010.

In the end, the court reapportioned 65/35 in favour of the husband. The result would likely be different under the *Family Law Act*.

Rainbow was also reapportioned
The increase in the value of Rainbow was largely a function of rising real estate values as opposed to the management of either the husband or the wife. During the marriage, the value of Rainbow was attributed largely to the increase in value of the Hector Road property. The other two properties were bought in 2006.

Concluding that an equal sharing of this property would be unfair, Rainbow was reapportioned 70/30 in favour of the husband.

443 Hector Road
This property was purchased by the husband in his own name in 1996. Although the court found it to be a family asset, the court acknowledged that the husband had made all of the mortgage payments and other costs of the property since the date of separation. It was owned by him long before his relationship with the wife began. The property was apportioned 90/10 in his favour.

The court deferred the final judgment until updated appraisals and mortgage balances with respect to 443 Hector Road, measured at the date of trial, could be obtained.

Mr. MacNutt acquired a property in Deroche, British Columbia prior to their relationship. Although the wife did not formally seek reapportionment of the property, the husband agreed to a 90/10 apportionment in the wife's favour.

Drinkwater Road
The parties owned a property as joint tenants in Duncan, British Columbia, known as the Drinkwater property. The main reason for the purchase of the Drinkwater property was because of the large gravel pit located on it. Once again, the cost of remediation would come into play. Some of the gravel was removed prior to the parties' marriage. However, they would bear the cost of remediation of this amount personally. Gravel was removed from the property during the marriage and following the separation up to the date of trial. Accurate records with respect to the amount of gravel actually removed were unavailable. It also occurred that allowances were made for future remediation and depletion costs as the gravel was extracted.

In the end, the court simply concluded that the net equity of the property was $52,000. This was the amount that would be necessary to remediate the property for the gravel extracted prior to the marriage.

The husband paid all of the mortgage costs on the Drinkwater property. However, he remained living in that property for four years following their separation. He also removed gravel from the Drinkwater property but paid a separate mortgage related to the gravel operation.

In the end, the court apportioned the property 55/45 in favour of the husband and ordered the wife to transfer her one-half interest in the property to him as part of the ultimate compensation order.

Yellow Point
The Yellow Point property was a property upon which a residential building existed. It was subject to a "no-occupancy" order. The husband carried the mortgage post-separation.

The court apportioned the property 60/40 in favour of the husband.

Notwithstanding the "no-occupancy" order, evidence was led that the parties could sell it and claim the principal residence exemption. The court assumed that the property would likely be sold to enable the husband to meet his obligations under the compensation order. Otherwise, the wife was to transfer her half interest in the property to him.

Tax Advice

The court withheld its final judgment in order to ensure that the parties could be given an opportunity to obtain tax advice. In so doing, the court followed the decision of *Johnson* v. *Lougheed*, 2001 BCSC 1464.

The court directed the parties to draft and submit a consent order with the professional tax advice given to them.

Spousal Support

The husband had been paying interim spousal support of $5,500 monthly since May of 2008. Each of them advanced the traditional arguments. The wife argued that she should be entitled to maintain a reasonable standard of living and be compensated for the economic disadvantages that had befallen her as a result of the breakdown of the marriage. By contrast, the husband argued that the relationship was of brief duration and that the wife maintained employment skills and had acquired credentials as a helicopter pilot. In other words, the wife argued that her support should be determined at the higher end of the *Spousal Support Advisory Guideline* ranges for both quantum and duration. The husband argued the opposite.

In order to calculate spousal support, the incomes of each party must be known.

The wife consented to an imputed income of $36,000.

The husband argued that his income should be based on his income tax return which showed his line 150 income as being $321,000. Because it consisted primarily of a "grossed up" dividend, he asserted that his actual income was $281,000.

Mr. Bing was asked to perform an income determination on behalf of the wife. Unfortunately, Mr. Bing did his income determination analysis based on corporate pre-tax "cash flow" instead of corporate "pre-tax profit". The income under the *Spousal Support Advisory Guidelines* adopts the income analysis of sections 16 through 21 of the *Federal Child Support Guidelines*. Thus, by section 18 of the *Child Support Guidelines*, corporate pre-tax profits can be "attributed" to the shareholding spouse.

The court considered the leading British Columbia cases and, following their consideration, determined that not all of the pre-tax corporate income could be attributed to the husband. The husband's income sources were MEL, Rainbow, and Drinkwater. Arguments were raised that MEL was overspending on capital outlays and that the husband was claiming substantial write offs and reclamation costs with respect to Drinkwater equal to its revenues.

In the end, the court reminded itself that Bing had testified that MEL would require $450,000 annually to renew capital investment. The court found that approximately $100,000 of corporate income was available to the husband.

In the end, the court imputed an income of $440,000 to the husband.

The court noted that the overall period of cohabitation was nine years.

The court determined that the wife should have a time-limited support order as she was a licensed pilot with past work experience. The order should reflect encouragement for her to return to the work force. The court also noted that she would be receiving a large compensation order. As a result, the court imposed a duration limit of 6.7 years (being the mid-point between the lowest of the duration ranges (one-half the period of cohabitation) and the highest range (the full period of cohabitation).

The court concluded that the range for the amount should also be in the mid-range. This was effectively the amount that the husband had been paying, namely, $5,500 monthly.

The court concluded that spousal support should end with the March 1, 2013 payment.

Child Support
The husband was not the child's natural father. However, no attempt was made to join the child's natural father as a party to the court action. Applying *H. (U.V.)* v. *H. (M.W.)*, 2008 BCCA 177, the court held that if the natural or adoptive parent is not present or is unable to pay any support, the step-parent may well be obliged to pay his or her full table amount.

The court awarded $20,000 as lump sum child support as counsel had agreed on this figure should the court determine that the husband was fully liable.

Witwicki* v. *Seifner, 2013 ABQB 354
The facts of the case were straight-forward. In 2008, the father was ordered to pay $1,760 monthly child support for the parties' 12 year-old daughter. The court order required annual financial disclosure.

The husband did not disclose. His income, over the next three years, rose from $200,000 to $441,000. If disclosure had been made, the monthly amount would have increased. Thus, the underpayment agreed upon by the parties was $38,000.

However, in 2011 the daughter, now 16, moved from the mother's home to the father's home.

The father, a lawyer, argued that a retroactive award would be unreasonable in light of the fact that the child now lived with him. Therefore, the beneficiary of the child support award would only be the mother.

The court disagreed.

a) Preliminary observations
The court, before addressing the "DBS factors" *[Ed. Note: the factors to be considered in making a retroactive award]* made certain preliminary observations:

- child support is the right of the child
- a child should enjoy the same standard of living as his parents
- parents are obliged to support their children
- parents are obliged to support their children commensurate with their income
- payors who fail to increase child support payments to correspond with increases in their income have failed to fulfill their obligation
- mere compliance with an order or agreement in the face of a rising income can be a failure to fulfill the obligation

- the term "retroactive support" is a misnomer. The obligation of parents to fulfill their obligation is always present (and should have been fulfilled at the right time)

b) Delay
The mother and father's evidence as to whether the mother had asked for disclosure was contradictory. The court accepted the evidence of the mother that disclosure had been sought but refused. In so doing, the court noted the "tone and content" of the father's email messages.

c) The payor's conduct
Any time a parent places his or her interests ahead of the child's, such conduct is "blameworthy." *Prima facie*, where a parent knowingly avoids a child support obligation, the parent should not be allowed to profit from such conduct.

The father's argument that he assumed that the child's needs were being met completely was rejected by the court. He knew his income was increasing and, as a lawyer, he knew that his obligations would also increase. The order required him to disclose — and it did not require any request by the mother. Finally, the 2008 order itself required him to pay retroactive support — so he certainly knew the consequences of not increasing child support.

d) The circumstances of the child
The court rejected the father's argument that the mother bore an onus to identify how a retroactive award will benefit the child. Nothing in the *Guidelines* requires a parent to account for any amount received as periodic support. Similarly, no legal or policy requirement requires the parent to identify how a retroactive award will be spent.

Moreover, continued residency with the claimant parent is not a condition precedent to a retroactive award. Such an award can be made on a compensatory basis for hardships suffered as a result of increased support not being paid when due and needed.

Proof of borrowing or asset depletion is not necessary to attract a compensatory award.

e) Hardship to the payor
There was no evidence of hardship.

f) The "windfall" argument
The father argued that payment of $38,000 to the mother now that the daughter lived with him would constitute a "windfall" to the mother. The court disagreed noting that a "windfall" is something one gets for nothing. To fail to enforce the father's former obligation would be a "windfall" for him.

From a policy standpoint, a failure to enforce the past obligation would send the wrong message to support payors — namely, that as long as one gets away with it, he or she may never have to pay.

L. (D.N.) v. *S. (C.N.), 2013 BCSC 1211*

The husband and a business associate equally owned GRP Ltd. Its balance sheet consisted of assets of $260,000, being $130,000 advanced to each of its shareholders. It had accounts payable of $108,000. Thus its retained earnings were $152,000.

The wife stated that half of the retained earnings should be attributed to the husband under s. 18 of the *Guidelines*. The husband said the retained earnings were not “available for the purposes of paying child support” unless and until he had his associate repay their loans.

However, in its T-2 corporate income tax returns, GRP Ltd. reported that it had a dividend tax refund available to it since 2010 of $75,000. If the corporation applied for the refundable dividend tax on hand (called “RDTOH”), the husband would have $35,000 available to pay child support.

RDTOH is governed by s. 129 of the *Income Tax Act*. Normally, to claim the refund, the corporation must make an actual payment to shareholders. As the *Income Tax Act* allows a shareholder who owes money to the corporation to offset the shareholder’s debt by a declared dividend, the offset will constitute payment of a dividend.

Therefore, half of the RDTOH or $35,000 was “available for the payment of support.”

The court also noted that by s. 15(2) of the *Income Tax Act*, the husband should have reported the loan as income when the loan was not repaid within the year. It showed little sympathy for the husband’s potential tax problems.

Chekowski* v. *Howland, 2013 ABCA 299

The father was the majority shareholder of a survey company. He lived in and was based in Edmonton. He compensated himself based on what a journeyman surveyor would be paid. The minority shareholder was paid more — but he worked out of Fort McMurray, often lived in work camps and worked substantially more hours. Historically, the company had a prudent policy of maintaining cash reserves. In 2010, the company lost money due to a slowdown in the oil patch. Its reserves enabled it to weather that particular downturn.

The trial judge concluded that half the company’s net income before taxes (half of $216,000) should be added to the father’s salary of $103,000. She applied s. 18 of the *Guidelines* which enables a court to attribute corporate income to a shareholding parent. In so doing, the trial judge relied heavily on the opinion of an expert called by the mother.

The father appealed

a) Appeals
The appeal court will be slow to intervene with a trial judge’s discretion — and s. 18 of the *Guidelines* gives a judge the discretion to attribute all or part of the corporate pre-tax profits to a shareholder.

Appellate intervention will be required if the trial judge ignored conclusive or relevant evidence, misunderstood the evidence or has drawn erroneous conclusions from it.

In exercising its discretion was s. 18, the court must act in a manner consistent with the evidence of a corporation’s plans or needs.

b) The purpose of s. 18
S. 18 of the *Guidelines* enables the court to address the fundamental unfairness that arises if a parent can divert, manipulate or shelter income through the use of a corporate structure to avoid the payment of adequate child support.

In other words, the court must ensure that there is a fair allocation of pre-tax corporate income between business and family purposes.

c) The considerations relevant to s. 18

- The onus is on the shareholder to call forth evidence justifying the corporation's retention of funds;
- Whether the shareholder is the sole shareholder;
- The shareholder's role in the corporation and the degree of control he or she exercises;
- The availability of funds to actually pay child support;
- Whether the funds are required to ensure its ongoing viability,
- The nature of the company's business;
- Needs for expansion;
- Replacement of equipment;
- Any cyclicality in the business;
- Return or invested capital; and
- Historical practices.

d) Piercing the corporate veil

"Piercing the corporate veil" may be another way of allocating corporate income to a shareholder. In a family context, the tests are applied less stringently. The test is:

1. Does the individual exercise complete control over the finances, policies and business practices of the company?
2. Did the individual use that control to commit a fraud or wrong that unjustly deprives the claimant of his or her rights?
3. Does the misconduct complained of create the deprivation?

e) The errors of the trial judge

The trial judge failed to consider the company's historical trends and practices. In so doing, she disregarded the uncontested evidence of the father about the company's obligations to its major lender and its future capital expenditures.

Moreover, the CBV who testified came up short. She only looked at the father's tax returns and the corporate financial statements. By her own admission she did not contact the father or the company accountant about the business. She was unaware of its business or any of its projects in a given year. She was unaware of the company's actual financial covenants. She did not know how many employees the company had, who its major customers were or the age of its equipment and vehicles.

Fraser* v. *Fraser, 2013 ONCA 715

The father, who at one time had been a prominent psychiatrist, developed a personality disorder. From time to time, he was institutionalized. He was incapable of employment or earning a professional income.

He received disability benefits but also, over the last five years, received capital payments as follows:

2008	RRSP income	$153,000
	proceeds of sale of wine collection	$300,000
2009	balance of proceeds of sale of wine collection	$ 42,000
2010	proceeds of settlement of 2005 car accident	$270,000

The father's CPP benefits were about $12,000 yearly and he received modest amounts of interest estimated to be about $1,600 annually.

The mother argued that the RRSP withdrawal and the entire car accident settlement should be treated as income. She also argued that income should be imputed to him as he deployed his capital unreasonably contrary to s. 19.(1)(e) of the *Guidelines*.

The father argued that the RRSP had been part of the property equalization, was a non-recurring event, and was capital (not income).

He argued that the car accident proceeds represented damages for pain and suffering and were capital in nature (and not income replacement).

a) the RRSP withdrawal

1. The structure of the *Guidelines*
Section 15 directs that income be determined according to ss. 16-20 of the *Guidelines*. Section 16, which is expressly subject to ss. 17–20 of the *Guidelines* provides that a spouse's annual income is determined using the sources of income set out under the heading "Total Income" on the T1 General tax form.

Section 17 of the *Guidelines* permits a Court to depart from the determination made under s. 16 if it is satisfied that the s. 16 determination is "not the fairest determination of income". In such a case the Court may have regard to the spouse's income over the last three years and "determine an amount that is fair and reasonable" in light of any pattern of income, fluctuation in income or receipt of a non-recurring amount during those three years.

2. RRSPs are income
Section 16 of the *Guidelines* requires that RRSP withdrawals be included as income for child support purposes. It is noteworthy that Schedule III of the *Guidelines* that provides special rules relating to adjustments to income does not make any special provision for RRSP income.

3. Double dipping
There is no absolute rule that assets which have been equalized cannot be treated as income for support purposes. Rather, it is a question of fairness. The Court concluded that as it did not have evidence of the equalization calculation, it was unable to consider the question of fairness.

Second, the Court questioned whether the concept of "double dipping" even applied in questions of child support. Equalization was a matter between the parents while the issue before the Court was child support. The RRSP income was not being paid to increase the mother's lifestyle. It was a source of funding for child support.

The Court found these two reasons — the non-exclusion in Schedule III and the absence of a true double dip to be "persuasive."

4. The use of the RRSP funds
The Court rejected the father's argument that the RRSP funds were needed for his own support (he had used the funds to buy a four bedroom home). The father cannot choose to deprive his children of an available source of child support. Moreover, as he was not working, his first obligation was to ensure that his children were fully supported. *[Editor's note: The argument appears to take into account "blameworthy conduct" though not specifically articulated as such.]*

5. No relief under s. 17
The Court simply stated that employing the s. 16 analysis as set out above did not produce the "fairest determination of income."

Second, the Court held that it could not employ s. 17 as it had no evidence of the husband's income for the two years that preceded the withdrawal. *[Editor's note: It did have evidence of the two years after the withdrawal.]*

b) The car accident settlement
The father maintained that no portion of the car accident settlement was for lost income. Rather it was all damages for pain and suffering. Normally, child support will be based only on that portion of the settlement that represents income replacement: *Rivard* v. *Hankiewicz*, 2007 ONCJ 180.

The Court was not persuaded — noting that the husband offered no proof of the specific heads of damage and noting that the other cases had treated the entire settlement as available for child support. It also doubled that the magnitude of the award would exclude a last income component.

Without evidence of details of the settlement or its income tax consequences, the Court preferred to treat it as a capital sum capable of generating an investment return.

c) Imputing income — capital generating income
The Court noted that between 2007 and 2010, the father received in excess of $800,000. Some portion of this should have been invested to generate income.

In the end, the Court concluded that all of the proceeds of sale of the wine collection and the entire car accident proceeds should have been invested. The Court imputed income pursuant to s. 19.(1)(e) — where property is not reasonably utilized to generate income. In the absence of evidence, the Court employed a conventional rate of 3%. That produced an annual imputed income of $31,600.

d) Income over $150,000
Because the Court brought the RRSP withdrawal of $153,000 into 2008 income, coupled with other income sources, resulted in the father's income being slightly above the $150,000 threshold of s. 4. Due to the husband's illness, the Court concluded that it was not "inappropriate" to assess the full table amount.