
CANADA / JUDGMENT

Harras v. Lhotka

2016 BCCA 246

COURT

British Columbia Court of Appeal

DECIDED

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2016 BCCA 246 Harras v. Lhotka

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Harras v. Lhotka,

2016 BCCA 246

Date: 20160609

Docket: CA42328

Between:

Patricia Ann Harras

Respondent/

Appellant on Cross Appeal

(Claimant)

And

Peter Ivan Lhotka

Appellant/

Respondent on Cross Appeal

(Respondent)

And

Intrepid Films Inc. and Intrepid Entertainment Inc.

(Respondents)

Before:

The Honourable Chief Justice Bauman

The Honourable Madam Justice Garson

The Honourable Madam Justice Fenlon

On appeal from: An order of the Supreme Court of British Columbia, dated September 16, 2014 (Harras v. Lhotka, Vancouver Docket E130640).

Counsel for the Appellant:

M. Slay

Counsel for the Respondent:

M. Cochrane

Place and Date of Hearing:

Vancouver, British Columbia

January 6, 2016

Place and Date of Judgment:

Vancouver, British Columbia

June 9, 2016

Written Reasons by:

The Honourable Madam Justice Garson

Concurred in by:

The Honourable Chief Justice Bauman

The Honourable Madam Justice Fenlon

Summary:

The appellant appeals an order setting his income for child support purposes as the average of his three previous years' income. The parties entered into a separation agreement that calculated the appellant's income based on a five year average, and provided for a yearly review. On review, the appellant sought an order setting his income based on his decreased current year income. The result of the judge's order was that the appellant's income for Guideline purposes increased significantly. The respondent cross appeals the judge's order that the parties bear their own costs. Held: The appeal is allowed, and the cross appeal is dismissed. Where a payor's income fluctuates significantly, depending on the facts, Guideline income may be based on a three year or five year average. It would not have been fair to set the appellant's income at his current year income. However, the judge must not have appreciated the result of setting the appellant's income based

on a three year average. In these circumstances, the fairest method of determining his income is a five year average. Although the judge may not have appreciated the consequences of her order as to income, it would not be appropriate to interfere with her costs decision.

Reasons for Judgment of the Honourable Madam Justice Garson:

Introduction

- [1] Peter Lhotka appeals an order made by a chambers judge calculating his 2014 income for child support purposes as the average of his three previous years' income (*Harras v. Lhotka* (16 September 2014), Vancouver E130640 at para. 14 (B.C.S.C.)). A pre-existing separation agreement set his income at a five year average. Mr. Lhotka sought an order fixing his income without averaging at \$67,000, effective July 1, 2014. The result of the chambers judge's order was that Mr. Lhotka's application to reduce his income resulted in a significant increase in his income for child support purposes.
- [2] The respondent, Ms. Harras, maintains that the chambers judge made no error in applying a three year average. Alternatively, she says that Mr. Lhotka's income should be set according to the formula prescribed in the separation agreement, namely, based on a five year average. Ms. Harras also cross appeals the judge's order that the parties each bear their own costs.

Background

Factual Background

- [3] Mr. Lhotka is 53 years of age, and works in the film industry. His income is earned through two personal service corporations, and is partially derived through dividends.
- [4] Ms. Harras is 51 years of age. She was the primary caregiver of the parties' children during marriage, and worked on a part-time basis as an actor. She says she has found it difficult getting back into the work force.
- [5] The parties married on August 30, 1997. They have two children, now teenagers, born in 1999 and 2001. They separated on June 3, 2012, and subsequently entered into a separation agreement, dated July 26, 2013.
- [6] Clause J. of the separation agreement sets out the parties' income as follows:
 - 1. Peter is a film producer whose annual income, determined in accordance with requirements of ss. 15 to 20 and Schedule III of the Federal Child Support Guidelines and based on a five-year average for the years 2008 to 2012 inclusive, for the purpose of determining the Table Amount under the Guidelines, is \$183,000 ("Peter's Guideline Income").

2. Patricia is an actor whose annual income, determined in accordance with requirements of ss. 15 to 20 and Schedule III of the Federal Child Support Guidelines, for the purpose of determining the Table Amount under the Guidelines, is imputed to be \$25,000 ("Patricia's Guideline Income").

[7] Accordingly, Mr. Lhotka's income for child support purposes was set at \$183,000. The chambers judge summarized his actual income between 2008 and 2013 as follows:

2013

\$ 67,000

2012

\$384,611

2011

\$252,601

2010

\$251,209

2009

\$ 27,603

2008

(\$ 4,292)

[8] Clauses 44 (a) to (c) of the separation agreement provide for an annual review of child support. The first such review was to occur on May 31, 2014:

- (a) The Parties will review child support and, if necessary, revise it to ensure that it accords with the requirements of the Federal and British Columbia Child Support Guidelines by May 31 of every year from the making of this Agreement, with the first review to be completed on or after May 31, 2014.
- (b) If the Parties do not review the child support as provided under sub clause (a), or review the child support and do not vary it in writing, both Parties are deemed to consider that the child support continues to satisfy the requirements of the Federal and British Columbia Child Support Guidelines.
- (c) Any adjustment to child support on a review under this clause will not apply retroactively, but will be in effect from July 1 of the year of the review.

[9] In light of his decreased earnings in 2013, Mr. Lhotka applied to have his income for support purposes reduced. His application sought the following orders pertinent to this appeal:

1. An Order for a review of Child Support pursuant to the terms of the Separation Agreement, dated July 26, 2013;
2. An Order that effective July 1, 2014 that Respondent's guideline income shall be declared as \$67,000 and his Child Support Obligations shall therefore be \$625/month for both Children, and any overpayment by the Respondent since July 1, 2014 should be a credit to him against future Child Support;

Reasons for Judgment of the Chambers Judge

- [10] After reviewing the background to the application, the chambers judge noted the parties' agreement to use the figure of \$67,000 as representative of Mr. Lhotka's Guideline income for 2013 (at paras. 17-18). Ms. Harras is content with the accountant's calculation of this figure and I need not detail the manner in which it was arrived at; the parties and the chambers judge accepted it. Ms. Harras asserted, however, that Mr. Lhotka's comparative decrease in earnings was the result of deliberate underemployment or under reporting of income, in order to reduce his support obligations (at para. 21).
- [11] Having accepted that Mr. Lhotka's income in 2013 was \$67,000, the judge identified the issue before her as whether it was fair, in all the circumstances, that his income for support purposes be assessed on the basis of a three year average, a five year average, or the previous year alone (at para. 22). She instructed herself, correctly, that the application before her was a review, and that it was not necessary for Mr. Lhotka to establish a material change in circumstances (at para. 29). Citing s. 17(1) of the Federal Child Support Guidelines, SOR/79-175, and *Brown v. Brown*, 2014 BCCA 152, she held that fairness was the overriding consideration (at paras. 31-34).
- [12] While noting the possibility that Mr. Lhotka's ability to produce films might be declining, the judge considered it fair to determine his income based on a three year average. At paras. 35-37, she wrote the following:

In all of the circumstances, I find that it is fair to use an analysis of Mr. Lhotka's income for the previous three years. Given the express provisions of the Child Support Guidelines, I do not find that it would be fair to examine solely the last year's income alone.

I appreciate that there is language in the separation agreement that had analyzed the previous five years; however, I am now bearing in mind the words of fairness in considering the guideline language of s. 17 the previous three years as set out in the relevant section.

It may be that Mr. Lhotka's ability to produce films is declining, in which case there will be a further review. However, at this time I find that considering all the circumstances, the fairness to the parties, as well as the overarching concern that child support is the right of the children, that to analyze this situation given the previous years of income, to use one year alone would not be fair. I find similarly that it would be more fair to use the previous three years.

- [13] The judge seems to have found it unnecessary to resolve the conflicting evidence on the question of whether Mr. Lhotka was deliberately unemployed or underemployed. I note finally that her decision applies only to the period July 1, 2014 to July 1, 2015.

Issues

- [14] The issue on appeal is whether the chambers judge erred in settling Mr. Lhotka's income on the basis of a three year average.

Discussion

Legal Basis for the Application

- [15] I begin by briefly discussing the legal basis for the application that is before the Court.
- [16] As noted above, the separation agreement provides for an automatic review of child support. The order under appeal does not specify whether it was made pursuant to the provisions of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.), or the Family Law Act, S.B.C. 2011 c. 25. The jurisdictional basis of the order is not clearly indicated in the chambers judge's reasons, nor was it argued by the parties on appeal. However, the final order for divorce, made pursuant to the Divorce Act on September 20, 2013, adjourns the question of child support generally. It seems likely that the chambers judge's order was made under the Divorce Act, given that the initiating application was filed in the divorce proceeding.
- [17] Where one spouse seeks a review of child support obligations in a separation agreement, the agreement explicitly provides for a review of such obligations, and there is no pre-existing court order respecting child support obligations, it is not necessary for the applicant to prove a material change of circumstances as a basis for the review: *Kopp v. Kopp*, 2012 BCCA 140 at paras. 39-44. When the court has made no prior determination as to child support, the hearing is a hearing de novo, conducted pursuant to s. 15.1 of the Divorce Act. Subject to limited exceptions, originating orders must be made in accordance with the requirements of the Guidelines. The relevant provisions of the Guidelines, discussed in further detail below, allow for discretionary adjustments to income based on the preceding three years, in the event that the ordinary annual calculation of income would not be fair (see: ss. 15-20).
- [18] The application before the chambers judge was a hearing de novo, conducted as an initial application for support.

Averaging under the Guidelines

- [19] The purpose of the Guidelines is to permit the assessment of the money available to a spouse to pay child support: *Kowalewich v. Kowalewich*, 2001 BCCA 450 at para. 42. The objectives of the Guidelines, set out in s. 1, are:
- (a) to establish a fair standard of support for children that ensures that they continue to benefit from the financial means of both spouses after separation;

- (b) to reduce conflict and tension between spouses by making the calculation of child support orders more objective;
- (c) to improve the efficiency of the legal process by giving courts and spouses guidance in setting the levels of child support orders and encouraging settlement; and
- (d) to ensure consistent treatment of spouses and children who are in similar circumstances.

[20] Section 15 of the Guidelines stipulates that a spouse's annual income is to be determined in accordance with ss. 16-20. Accordingly, the starting point in the determination of income is s. 16, which reads as follows:

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

[21] The Guidelines provide courts with the discretion to adjust income based on the preceding three years, in the event that annual income under s. 16 does not represent the "fairest" determination of income. Section 17(1) reads as follows:

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

[22] The test in s. 17(1) is what is "fair and reasonable", having regard to the payor's income in the preceding three years: *Marquez v. Zapiola*, 2013 BCCA 433 at para. 53.

[23] Section 19(1) provides the wide discretion to impute income to a spouse as it considers appropriate. Section 19 is not subject to the restrictions set out in ss. 16, 17 and 18: *Oulette v. Oulette*, 2012 BCCA 145 at para. 66.

[24] While s. 17 allows the court to examine income over the previous three years, there is nothing in the language of the section that requires the use of averaging in setting income. This makes sense; accepting that one of the goals of the Guidelines is the fair determination of the amount available to pay child support, fairness is unlikely to be achieved by the mechanical application of averaging. The remarks of the Alberta Court of Appeal in *Ewing v. Ewing*, 2009 ABCA 227 at paras. 37-38 on this point are apposite:

But we would point out, for future cases, that section 17 does not suggest that the way to establish fair income is to average. It merely directs the court to set a fair and reasonable amount taking into consideration the past three years' income and any patterns of income, fluctuations in income and non-recurring gains. The court has the discretion to elect the fairest method, and that could be done by averaging the three years prior to the gain, or a court could remove part, or all, of the non-recurring gains, or take whatever steps it determines are appropriate to arrive at an income figure that is fair for the purposes of support.

although setting a fair income is highly discretionary, there should be a logical basis for the method chosen and averaging will not always be appropriate.

[25] This raises the question of when averaging is considered appropriate.

[26] In some cases, averaging is considered appropriate (or "fair") where the payor's income has fluctuated substantially from year to year. For example, in *Dornik v. Dornik*, 1999 BCCA 627, this Court held that the chambers judge erred in determining Guideline income based on the respondent's sworn statement as to his anticipated income, rather than averaging income from the preceding three years. The respondent was self-employed through a personal corporation, apparently in the construction industry. At paras. 18-19, the Court said the following:

On behalf of the respondent, Mr. Lecovin submitted that it was reasonable to take the respondent's sworn statement as to his anticipated income for 1997 as the guideline income, because the most recent earnings are the best guide for payments that are to be made in the future. As a general proposition that submission may have force, but in this case, the tax forms and financial statements plainly show that the respondent's source of income was fluctuating. Given the nature of the business the respondent is in, that is hardly surprising.

In light of the provisions in the Guidelines and the material before the chambers judge to which I have referred, I am of the view that the chambers judge erred in finding that the respondent had a guideline income of \$31,500.

[27] Similarly, in *Cornelissen v. Cornelissen*, 2003 BCCA 666, this Court applied three year averaging where the preceding five years disclosed wide fluctuations in income, ranging from a low of \$155,477 to a high of \$943,822. At para. 31, Prowse J.A. said the following:

For the purposes of the application of s. 17, Mr. Cornelissen's income over "the last three years" was \$155,477 (1999), \$468,300 (2000) and \$943,822 (2001), inclusive of those amounts the trial judge found should have been added back into Mr. Cornelissen's income. In my view, these three years present a fair picture of Mr. Cornelissen's historical income in that they include a year in which his income was noticeably low (1999), and a year when his income was noticeably high (2001). In these circumstances, I conclude it would be fair and reasonable to apply s. 17 by using the average of these three years' income as the basis for determining Mr. Cornelissen's income for Guidelines purposes with respect to ongoing child support. [Emphasis added.]

[28] Thus, the trial judge was held to have erred in principle by relying on the payor's income in 2001 as the sole basis for estimated income in 2002 (at para. 26).

[29] However, in *Bell v. Bell*, 1999 BCCA 497, this Court held that actual income earned was a fairer representation of income available for child maintenance, despite (and apparently because of) "considerable fluctuation" in the payor's income:

- [12] Turning to the question of the maintenance for the children, it is my view that the learned trial judge erred in fixing Mr. Bell's income at a figure far in excess of what he was earning. The guidelines that apply in this case require a fair fixing of income for this purpose. I think that the amount that the husband actually earns is a far better indicator of what figure should be used for this purpose than is achieved by averaging, particularly in an economy where employment is sometimes scarce and where there can be wide fluctuations. [Emphasis added.]
- [30] This passage has been held to stand for the proposition that "wherever possible, salaries should be fixed for guideline purposes on the basis of amounts actually earned": *Wallace v. Wallace*, 2000 BCCA 81 at para. 19.
- [31] While perhaps not determinative of the results in each case, it is noteworthy that in both *Dornik* and *Cornelissen*, three year averaging resulted in an income lower than the payor's most recent earnings, while in *Bell*, averaging resulted in an income substantially higher than the payor's most recent earnings.
- [32] Lower courts have often considered averaging more appropriate in cases where income fluctuates. For example, in *de Bruijn v. de Bruijn*, 2011 BCSC 1546, Fenlon J. (as she then was), refused to average income where the respondent's income showed a pattern of decline over the preceding four years. At para. 35, she said the following:

With respect, I do not accept Ms. de Bruijn's submission that Mr. de Bruijn's income should be fixed at an average of his 2008, 2009 and 2010 earnings under s. 17(1) of the Guidelines. This is not a situation in which Mr. de Bruijn's income regularly fluctuates up and down. For the past four years his income has been in decline. To ignore that reality and base his support obligations on a number greater than his current earnings would, in my view, be unjust. [Emphasis added.]

- [33] This Court has likewise described the application of averaging to steadily increasing income as an error in principle: *Jakob v. Jakob*, 2010 BCCA 136 at para. 48. In *Jakob*, the payor's income had increased from \$15,276 to \$35,333 over three years. The chambers judge had applied a three year average to determine his income for Guideline purposes. At paras. 46-48, the Court said the following:

The calculation of income for the payment of support is based on a payor's capacity to pay; it is a payor's income or earning capacity that determines the amount of support he or she will be required pay. Actual income may not always reflect a payor's capacity to pay. Where income has fluctuated in previous years, in the sense that it has increased and decreased over a fixed period of time, and it is anticipated that it will continue to fluctuate in that manner, it may be appropriate to take an average of fluctuating income for a fixed number of years to calculate a payor's income or earning capacity.

Those were not the respondent's circumstances. Between 2005 and 2008, his income had steadily increased from \$15,276 in 2005, to \$22,454 in 2006, to \$35,333 in 2007. Based on the new evidence, his actual income at the time of the application was about \$35,000, or at least three times higher than his 2005 income. Therefore, his capacity to pay spousal support was materially greater than the \$23,029 found by the chambers judge.

In my view, the chambers judge erred in law by calculating the respondent's income based on an average of his previous three years' annual income, when his income was increasing over that period of time. Given the steady increase in the appellant's income, his 2007 income (being the last year of the three-year period) more closely reflected his actual income or income capacity.

- [34] By contrast, in at least one case, this Court has applied averaging in circumstances where there has been a drop-off or decline in income, and the resulting average exceeds current earnings: see *Grossi v. Grossi*, 2005 BCCA 47.
- [35] In summary, the averaging approach to income determination under s. 17 is very fact specific. Generally speaking, averaging will be applied where income fluctuates, or where the payor has not demonstrated a lasting decline in earnings. Ultimately, it depends on fairly calculating the amount of income reasonably available to pay child support. Depending on the reasons for a pattern of fluctuating income (or, as in *Grossi*, declining income), averaging may be more or less appropriate. If, for example, a substantial increase in income in one of the three previous years is due to receipt of what might be fairly viewed as a non-recurring amount, averaging may be inappropriate. If, however, the nature of a payor's employment or business is such that wide fluctuations in income are normal and expected, averaging may be more appropriate. As the Court stated in *Jakob* at para. 46, "[w]here income has fluctuated in previous years, in the sense that it has increased and decreased over a fixed period of time, and it is anticipated that it will continue to fluctuate in that manner, it may be appropriate to take an average of fluctuating income for a fixed number of years" to determine current income.
- [36] Outside the context of s. 17, in rarer cases, courts have upheld the use of averaging of income over a period of longer than three years. In *Oulette*, the payor spouse earned income through his involvement in a trucking and excavation business, as the owner of a holding company which operated in partnership with a company owned by his brother. In determining prospective child support, the trial judge noted that revenues were declining, but held that a five year average of the income available to the payor would be the fairest method of determining his Guideline income. The payor appealed on the basis that s. 17 does not permit averaging outside of a three year period. This Court upheld the five year average approach as an exercise of the broad discretion available under s. 19(1). At paras. 66-67, Tysse J.A. (for the Court) wrote the following:

Although the judge did not expressly state that he was imputing income to Mr. Ouellette in using the five-year average, it is my view that he was exercising the broad discretion under s. 19.

In my opinion, the judge did not err in finding it appropriate in the circumstances to use a five-year average of the Partnership's earnings in determining the amount of income to be attributed to Mr. Ouellette for support purposes. Mr. Ouellette testified that the two years prior to the trial had been financially hard for the business as a result of the economic downturn in 2009, and a three-year average would not have accurately reflected the potential earning capacity of Mr. Ouellette. In addition, the parties separated approximately three years prior to the trial, and Mr. Ouellette may have manipulated the revenues and expenses of the business during this period in order to minimize the amount available to him for support purposes. A five-year average was more representative.

[Emphasis added.]

[37] Thus, averaging over a five year period may be an appropriate exercise of the court's discretion under s. 19 where it would more accurately reflect the income available to a payor spouse than a three year average would.

Application to the Facts

[38] Mr. Lhotka's income may be described fairly as fluctuating. At the time the parties negotiated their separation agreement, they considered it fair that Mr. Lhotka's income be averaged broadly over a five year period for support purposes. Now, on the first occasion that Mr. Lhotka has an opportunity to review the agreement, he argues that the averaging formula should be set aside and his income set at his new low. I agree with the chambers judge that this would not have been a fair method to approach the review.

[39] Given that the chambers judge averaged his income in any event (effectively imputing income), she must have considered it unnecessary to make findings of fact about Mr. Lhotka's explanation for his sudden lack of employment. I note in passing that the downturn in Mr. Lhotka's financial prospects occurred exactly contemporaneously with the separation.

[40] It is clear that the chambers judge considered that, for support purposes, using a three year average would be fairer than using Mr. Lhotka's actual 2013 income. However, she did not explain why she chose to use a three year period as opposed to continuing a five year averaging model, which was within her jurisdiction under s. 19 of the Guidelines. The average of Mr. Lhotka's income over 2011-2013 is \$234,737, some \$51,737 higher than his income as imputed under the separation agreement. At para. 38 of her reasons, the chambers judge indicated some lack of certainty about the figures. I am drawn to the conclusion that she could not have appreciated that the calculation over three years would result in a higher figure than the average over five years. It seems unlikely that on Mr. Lhotka's application to decrease his support obligation, the judge intended to substantially increase it. There is nothing in her reasons that suggests that she intended such a result.

[41] In my view, the fairest manner to assess Mr. Lhotka's income for 2013 is to apply the same type of formula that the parties agreed to in the separation agreement; that is, a five year average, for the years 2009-2013. The result of that calculation is \$196,604. This is not a case

where there is evidence of a year-over-year decline in earnings that would justify the use of current-year income for support purposes. Indeed, Mr. Lhotka expressed optimism in his affidavit evidence that the film industry would improve in 2014 and he would find employment.

- [42] Subsequent reviews, if not already conducted, will no doubt deal with the question of Mr. Lhotka's ability to earn income consistent with his earlier success and the fairness of continuing to use a five year average. However, on the facts available to the chambers judge, Mr. Lhotka did not demonstrate a lasting decline in his income or an inability to pay support based on the averaged figure.

Cross Appeal

- [43] I turn next to the cross appeal. Ms. Harras cross appeals the chambers judge's order that the parties each bear their own costs on the basis that success was divided. The chambers judge's reasons on costs appear at paras. 41 and 42 of the judgment:

In respect of the insurance matter, that went by way of a consent agreement only in the middle of the afternoon of a near full day of argument. While I am happy to deal with costs at this point, I would note that that part of the consent agreement only went after nearly a full day of argument. Consequently, the success of the parties is not exactly clearly with one party on this application. However, I am prepared to deal with costs at this time and the issue of special expenses.

In all of the circumstances, given that there is a delicate balance between the parties in all of these matters I am going to order that each party bear their own costs. I appreciate that there was an effort to settle - and in the future that there be efforts to settle would, of course, be more fruitful. But in all the circumstances, given that there was divided success of that nature noted I am going to order that each party bear their own costs. In other circumstances it may have been appropriate to award costs but here in the circumstances I believe that to be the fair approach given the Court determined the matter on a middle ground. In the circumstances of the life insurance that is not sufficient to warrant an award of costs against Ms. Harras given the factual circumstances.

- [44] Ms. Harras says that success could not have been divided because Mr. Lhotka sought an order that his income be fixed at \$67,000. She says that the chambers judge must have misapprehended the evidence or the positions of the parties to have concluded that success was divided.
- [45] Mr. Lhotka notes that the parties spent a full day of the chambers hearing arguing about Ms. Harras's insurance obligations. He acknowledges that the parties did settle the issue, but he says the settlement was fully in his favour and that he was obliged to prepare for and conduct a hearing on the point. Mr. Lhotka maintains that in ruling that the application resulted in divided success, the chambers judge must have taken into account the late settlement of the insurance issue, which went in his favour.

- [46] Ms. Harras says she was wholly successful on the support issues, which were the only issues left for disposition by the judge. She says that costs should follow the event. She says this is not one of those cases where costs should be attributed to specific issues, particularly given that the insurance issue was settled mid-trial.
- [47] Rule 16-1(7) of the Supreme Court Family Rules mandates that costs be awarded to the successful party unless the court otherwise orders. Due to the discretionary nature of costs, appellate review is limited: *Hartshorne v. Hartshorne*, 2011 BCCA 29 at para. 23.
- [48] "Success" for the purposes of costs means substantial success. The "substantial success" standard was described by Bouck J. in *Fotheringham v. Fotheringham*, 2001 BCSC 1321 at para. 45, endorsed by this Court in *Marquez v. Zapiola*, 2014 BCCA 35 at para. 16:

Success in the event has been interpreted as "substantial success": see *Fotheringham v. Fotheringham*, 2001 BCSC 1321, 13 C.P.C. (5th) 302, leave to appeal ref'd 2002 BCCA 454. In *Fotheringham*, Mr. Justice Bouck described this standard as follows:

- [45] Gold now seems to say that substantial success in an action should be decided by the trial judge looking at the various matters in dispute and weighing their relative importance. The words "substantial success" are not defined. For want of a better measure, since success, a passing grade, is around 50% or better, substantial success is about 75% or better. That does not mean a court must descend into a meticulous mathematical examination of the matters in dispute and assign a percentage to each matter. Rather, it is meant to serve as a rough and ready guide when [looking] at all the disputed matters globally.
- [49] It is important to emphasize that the evaluation of substantial or divided success is not a mechanical, mathematical exercise. It seems apparent – as stated in my reasons on the main appeal – that the judge was not aware of the precise effect of her order on the support issue. Nevertheless, it is clear from her reasons that she considered that enough time was expended on the insurance issue to warrant an order that the parties bear their own costs. In my view, it would not be appropriate to interfere with the judge's order on costs, regardless of whether any misapprehension occurred.

Disposition

- [50] I would allow the appeal and order that Mr. Lhotka's income for the year 2014 be set at \$196,604, based on the average of his income in the years 2009 to 2013 inclusive.
- [51] I would dismiss the cross appeal.
- [52] In this Court success has been divided. Mr. Lhotka has not prevailed in his argument that his income be set as \$67,000. On the other hand, his appeal has been allowed in respect to setting aside the chambers judge's three year averaging formula.

[53] I conclude that neither party enjoyed "substantial success" on appeal, as that term has been defined in the case law. In such circumstances, this Court's practice is to order that each party bear their own costs or to award the more successful party (as determined by their success on the more important and time-consuming issues) a portion of their costs:

Marquez at para. 17.

[54] In this case, I would order that the parties each bear their own costs on appeal.

"The Honourable Madam Justice Garson"

I AGREE:

"The Honourable Chief Justice Bauman"

I AGREE:

"The Honourable Madam Justice Fenlon"

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