
CANADA / JUDGMENT

Hodgkinson v. Hodgkinson

2011 BCSC 634

COURT

Supreme Court of British Columbia

DECIDED

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2011 BCSC 634 Hodgkinson v. Hodgkinson

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Hodgkinson v. Hodgkinson,

2011 BCSC 634

Date: 20110513

Docket: E012966

Registry: Vancouver

Between:

Sarah Rebecca Pattison Hodgkinson

Plaintiff

And

Robert Lloyd Hodgkinson

Defendant

Before: The Honourable Mr. Justice Grauer

Reasons for Judgment

Counsel for the Plaintiff:

A. E. MacLennan, Q.C.

Counsel for the Defendant:

G. A. Lang

Place and Date of Hearing:

Vancouver, B.C.

June 29-30, November 4-5, and December 16, 2010

Place and Date of Judgment:

Vancouver, B.C.

May 13, 2011

INTRODUCTION

- [1] This family law proceeding is now eight years post trial. Before me are two applications. Given the age of the litigation and the multiplicity of applications, I will dispense with the irritatingly cumbersome description of parties under the new Supreme Court Family Rules as "claimant", "respondent", "applicant" and "application respondent". I will refer instead to the "plaintiff", to whom I will also refer as Ms. Pattison, and to the "defendant", or Mr. Hodgkinson.
- [2] The first application was brought by Mr. Hodgkinson and seeks an order varying the orders of the trial judge and of the Court of Appeal concerning his obligation to pay child support for the child of the marriage, Julia, who is 17. This application was delivered in May of 2009 and arises out of a change in 2008 to Julia's schooling from a respected private day school in Vancouver, West Point Grey Academy, to an exclusive and very expensive private boarding school in California, Cate School. The tuition and boarding fees for the latter amount to something in excess of \$50,000 per year.
- [3] Mr. Hodgkinson has been paying those fees and other school-related expenses. He now seeks an order that in return, he cease paying child support to the plaintiff as of December 31, 2008, for so long as Julia continues to attend Cate School.
- [4] In addition to opposing that application, Ms. Pattison countered with an application for an order varying the child support payable by the defendant retroactive to May 2004. She submits that an appropriate amount would be \$10,000/month. Mr. Hodgkinson's obligation is presently set at \$2,715/month, plus 100% of extraordinary expenses.
- [5] The primary issue is whether there has been a material change in circumstances that justifies varying the existing orders. That requires me to consider what income should be imputed to Mr. Hodgkinson over the years following the trial and appeal for the purpose of assessing an appropriate amount of child support under the Federal Child Support Guidelines. Mr. Hodgkinson asserts that his income has fallen dramatically in step with the economic downturn that occurred in the autumn of 2008. Ms. Pattison maintains that his income is, and has been, significantly in excess of what was found at trial, when all proper sources are examined carefully.

HISTORY

- [6] As both parties seek to vary the existing orders relating to child support, it is important to examine the findings previously made.
- [7] The parties were married on November 6, 1992, and separated on August 29, 2001. They agreed on the issues of guardianship, custody and access relating to their daughter. To resolve all other issues, they proceeded to trial for 9 days in February and March of 2003 before the Honourable Madam Justice Dillon, who delivered judgment on October 7, 2003 (*Hodgkinson v. Hodgkinson*, 2003 BCSC 1538). That judgment included an order for divorce.
- [8] As was the case before me, one of the principal issues before Dillon J. was the determination of Mr. Hodgkinson's annual income for child support purposes pursuant to sections 16 to 20 of the Guidelines. The contentiousness of this issue arises because of the nature of Mr. Hodgkinson's work, the sources of his income, and the sophistication of his financial planning, all of which render precise calculation less than straightforward.
- [9] In her reasons for judgment, Dillon J. outlined Mr. Hodgkinson's work history as follows:
- [3] The defendant ... became a licensed registered securities broker in 1974 and was later certified in financial analysis. He worked in two major brokerage houses, becoming a partner, before leaving in 1990 to become president of a junior oil and gas company in which he was the largest shareholder. The defendant is an experienced and knowledgeable financial investor and consultant, dealing with his own investments through various companies in which he buys and sells business interests and advises others. He has had his own holding company for his investments since the 1980s, merging them in 1993 to become Hodgkinson Equities Corporation.
- [10] As to the plaintiff's work history, Dillon J. had this to say:
- [2] ... Before marriage, the plaintiff had sold her successful deli and catering business, which she had operated for nine years, and had been sailing offshore while she considered whom to marry. She had some university education but turned to culinary arts, training as a chef at exclusive cooking schools in North America and Europe. She then apprenticed at a number of hotels and yachts in Europe, gaining experience and reputable skills. She is a certified chef.
- ...
- [4] Following marriage, the plaintiff did not work outside of the home. She was fully occupied in care of her daughter and maintenance of a wealthy lifestyle.
- [11] With respect to financial matters, Dillon J. found the plaintiff's evidence to be generally unreliable, and preferred the testimony of the defendant, stating in paragraph 8:

Although his business and other transactions were frequent and complex, involving interchanges between his companies at will, his overall financial worth is well documented. The defendant gave credible evidence concerning his business dealings, even when they appeared to be controversial such as the transfer of monies offshore and ultimate repatriation through opaque means. I accept that these dealings were done for the financial benefit of the family and not to hide assets.

- [12] After reviewing the evidence, Dillon J. dealt first with the apportionment of family assets, and concluded that the net family assets totalled \$6,682,729 and should be divided equally. Of the major assets, Her Ladyship awarded the real estate assets to the plaintiff (the matrimonial home in Shaughnessy Heights and the Galiano Island waterfront vacation property), and the business assets to the defendant (shares of the defendant in Hodgkinson Equities Corp., 878642 Alberta Ltd. and 7804 Yukon Inc.). After considering these circumstances, the judge made no award for spousal support.
- [13] Madam Justice Dillon then turned to the issue of child support, and the question of what income ought to be imputed to the defendant pursuant to the Guidelines. That is precisely the question that occupied most of the time before me. After reviewing sections 16 to 19 and Schedule III of the Guidelines, and the decision of the Court of Appeal in *Kowalewich v. Kowalewich* (2001), 92 B.C.L.R. (3d) 38, Dillon J. addressed the issue of including a portion of pre-tax income from the defendant's privately held corporations:
- [83] The learned justice [in *Kowalewich*] also advised trial judges at para.59 to have regard to the evidence of legitimate business needs in determining what portion of pre-tax income to include in annual income for the purpose of the Guidelines. Monies may be needed to maintain a viable business.
- [84] In this case, the cash flow of the businesses is contingent on the future success of high risk ventures. 7804 Yukon Inc. depends on oil and gas wells that are being depleted so that revenue is down and expected to decline. The defendant must be able to support these speculative investments over the short term in order to expect any return later. The corporate income reflects only part of the defendant's available income for child support purposes. Corporate expenses from which the defendant benefited personally have been calculated separately under section 19(h). In the circumstances and having regard to the non-recurring revenue from repatriation monies in 2001, I conclude that the pre-tax income of the corporation's available to the defendant for purposes of child support is \$250,000.
- ...
- [86] To summarize, the annual income available to the defendant for purposes of child support includes \$62,174 under section 16 ["total income" on the T-1 tax form], \$250,000 under section 18(1)(a) [pre-tax income of a corporation], and \$46,483 under section 19(1)(h) [income from dividends, capital gains or other sources taxed at a lower rate than employment income]. Total available annual income for child support is \$358,657.

- [14] On this basis, Dillon J. ordered child support pursuant to the Guidelines in the table amount of \$2,415 per month. In addition, the learned judge ordered the defendant to continue to pay 100% of the extraordinary expenses. These consisted of Julia's private school tuition at West Point Grey Academy of \$7,500 per annum (as it then was), and orthodontic costs of \$300 per month.
- [15] Following the delivery of the trial judgment, Ms. Pattison retained new counsel, A. E. MacLennan, Q.C. On January 28, 2004, Ms. MacLennan served an application to reopen the trial, to introduce further evidence, and to make further submissions. That application was heard from June 1-3, 2004, and dismissed on June 4, 2004. Madam Justice Dillon's reasons for dismissal were released on December 8, 2004 (cited as *S.R.P.H. v. R.L.H.*, 2004 BCSC 1630).
- [16] The premise of this application was that new evidence indicated that the value of the matrimonial home had been overestimated at trial (it had since sold for \$274,000 less than estimated), while the value of two of the defendant's business assets were significantly undervalued: his shares in 878642 Alberta Ltd. and Hodgkinson Equities Corp. Madam Justice Dillon considered that the issues had been fully canvassed at trial, and that in other respects, the plaintiff was trying new arguments as to valuation that could have been advanced at trial, and which she now sought to advance with the benefit of hindsight.
- [17] Ms. Pattison appealed both decisions of Dillon J., and the appeals were heard on September 8 and 9, 2005. Reasons for judgment were handed down on March 31, 2006, cited as *Hodgkinson v. Hodgkinson*, 2006 BCCA 158. The appeal from the trial judgment was allowed in part, and the appeal relating to the application to reopen was dismissed.
- [18] One of the points that Ms. Pattison had pursued in her application to reopen the trial, and also before the Court of Appeal, was that the corporate assets should have been apportioned in specie between the parties, particularly given the difficulty in valuing those assets due to their speculative nature. This had been rejected by Dillon J. and was rejected also by the Court of Appeal.
- [19] With respect to child support, Ms. Pattison contended that the trial judge had erroneously under-imputed income to Mr. Hodgkinson, and had erred in assessing the appropriateness of the amount of child support under section 4 of the Guidelines.
- [20] The Court of Appeal found no basis for interfering with the trial judge's assessment of Mr. Hodgkinson's income but concluded that the amount of child support ought to be increased to \$2,715 per month to match what the judge had found were Ms. Pattison's reasonable monthly expenses relating to Julia, other than the extraordinary expenses. In doing so, the Court of Appeal confirmed that section 4 of the Guidelines, dealing with child support where the payor's income exceeds \$150,000, contemplates the potential for adjustment upward as well as downward from the table amount.
- [21] The final issue considered by the Court of Appeal was the trial judge's dismissal of Ms. Pattison's claim for spousal support. The court commented as follows:

- [67] In this case, the trial judge considered the financial advantages to Mrs. Hodgkinson and the financial advantages to Mr. Hodgkinson of the marriage, Mrs. Hodgkinson's opportunity to re-engage in the business world using her training, her expenses which the trial judge found unreasonable, and her financial capacity to earn income from her capital assets.
- [68] However, the trial judge did not relate that capacity to earn income from her capital assets and from employment to the standard of living the parties enjoyed during the marriage or to the standard of living of Mr. Hodgkinson after trial, or advert to the time lag that would be involved in earning income from the business if Mrs. Hodgkinson immediately resumed work as a chef or caterer. While none of these factors is, by itself, a determinant of Mrs. Hodgkinson's entitlement to spousal support, the absence illustrates what I consider an impermissibly narrow approach to the issue of spousal support.
- [69] Both the question of hardship to Mrs. Hodgkinson (15.2(c) [Divorce Act]) and her self-sufficiency (15.2(d)) bear some relationship to the standard of living enjoyed by the parties during the marriage (tempered by the income available) and by the other spouse after the marriage. While Mrs. Hodgkinson is not entitled to support at a level that would maintain a highly affluent lifestyle the parties shared, particularly as it appears to have been beyond the level of Mr. Hodgkinson's earnings, in the circumstances she is entitled to a degree of comfort well beyond "basic needs".
- ...
- [73] I recognize that Mrs. Hodgkinson was found by the trial judge to be highly trained and capable of stepping back into the workplace. Whether she does so as a matter of her choice, and in the long-term she cannot expect Mr. Hodgkinson to support her decision to refrain from work outside the home. On the near-term, however, she cannot immediately replace the support she received from Mr. Hodgkinson with earnings from her former line of work.
- [74] It was an error, in my view, for the trial judge to fail to recognize these several aspects. The arrangement between the parties during marriage as described by the trial judge, in my view, requires consideration of spousal support from the perspective of the standard of living that is still reasonably available to them, although in two residences. While recognizing that Mrs. Hodgkinson is not necessarily entitled, step for step, to Mr. Hodgkinson's standard of living, something closer is required.
- [75] Doing the best I can from the trial judge's assessment of these issues, the parties' expenses in evidence, and the income reasonably available to the parties and with the aid of tax tables, I would consider an order of spousal support in the amount of \$5,000 per month effective October 7, 2003, for 12 months, reducing to \$3,500 thereafter until October 1, 2006, appropriate, expecting that to be adequate time for Mrs. Hodgkinson to have re-established yourself. In view of the passage of time, however, and the practical effect of such an order, I would instead order lump sum support in the amount of \$150,000 in substitution of such an order, \$100,000 of which would be payable now and the balance being payable by October 1, 2006.

- [22] The appeal did not concern Mr. Hodgkinson's responsibility to pay 100% of Julia's private school tuition and her orthodontic expenses. Accordingly, that term of the trial order remained intact.
- [23] Julia did not, however, remain at West Point Grey Academy. With the approval of both parents, she applied to Cate School in Carpenteria, California, and was accepted into the grade 10 class for the 2008-2009 academic year. As noted, the fees for this elite American boarding school are significantly higher than those charged by West Point Grey Academy.
- [24] The parties were unable to come to an agreement about how, if at all, these new expenses were to be shared. Mr. Hodgkinson therefore paid almost all of the expenses associated with Julia's attendance at Cate School, other than a deposit of \$8,000 paid by Ms. Pattison for 2008, and has continued to pay all of Julia's school-related expenses.
- [25] Because of this additional burden, Mr. Hodgkinson thought it appropriate to stop paying child support to Ms. Pattison, which he did in January of 2009. This was an entirely unilateral move that resulted in cross-applications heard before the Honourable Madam Justice Ross on August 7, 2009. Mr. Hodgkinson applied to vary the Court of Appeal's support order by terminating his obligation to pay child support while Julia attended the Cate School. The order was sought on an interim basis pending the hearing of the application presently under consideration. Ms. Pattison's cross-application was for the production of all attachments required for Mr. Hodgkinson's Form 89 financial statement.
- [26] Madam Justice Ross dismissed the defendant's application concerning support and reinstated the child support as previously ordered. Her Ladyship emphasized the court's disapproval of unilateral action. The plaintiff's application was allowed.

DISCUSSION

1. The Issue

- [27] Both parties' applications are premised upon a material change in circumstances having occurred since the trial and appeal. The circumstances in question consist of the amount of income available to Mr. Hodgkinson for the purpose of calculating child support, and the cost of Julia's education. Mr. Hodgkinson says that his income has been significantly reduced, so that the child support order should be cancelled. Ms. Pattison asserts that the income available to Mr. Hodgkinson is and always has been considerably higher than that upon which the existing child support order was based, so that the child support should be increased retroactively.
- [28] Consequently, in order to determine whether there has been a material change in circumstances, it is necessary to inquire into Mr. Hodgkinson's income.

2. The Applicable Guidelines

- [29] Mr. Hodgkinson's income earning activity takes place primarily in the arena of venture capital. This includes financing early-stage companies, both public and private, through the purchase of debt and equity. This activity is undertaken through several corporate vehicles. The principal one is Hodgkinson Equities Corp. (HEC), a holding company that also acts as a consultant to emerging businesses, primarily in the petroleum resource industry.
- [30] Mr. Hodgkinson also owns 7804 Yukon Ltd. (Yukon). Together, Yukon and HEC hold interests in oil and gas projects from which they derive much of their income. A third company owned by Mr. Hodgkinson is 858642 Alberta Ltd. (Alberta). Alberta owns 0809284 BC Ltd., a single-purpose company that holds a royalty on future production from the Northern Lights oil sands project.
- [31] In addition, Mr. Hodgkinson is chairman and CEO of Dejour Enterprises Ltd. (Dejour) and president of its subsidiary, Dejour Energy (Alberta) Ltd. Dejour is a publicly traded oil and gas exploration and production company with 22 employees and three projects in North America. Mr. Hodgkinson owns approximately 7% of the shares of Dejour.
- [32] As noted above, through no fault of Mr. Hodgkinson, the nature of his business complicates considerably the determination of what amount of annual income ought to be imputed to him pursuant to the Guidelines for the purposes of calculating child support.
- [33] Section 16 of the Guidelines begins the process with the following direction:

16. CALCULATION OF ANNUAL INCOME

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.

- [34] In Mr. Hodgkinson's case, that determination yields the following amounts:

Year

Total income

Net Income

2006

\$370,110

\$350,037

2007

\$134,012

\$122,252

2008

\$198,353

\$122,713

2009

\$217,633

\$87,941

[35] The information covers several years because of section 17, which provides as follows:

17. PATTERN OF INCOME

- (1) 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.

...

[36] As was the case at trial, no one suggested that the inquiry should end here. I pause to observe that the significant reduction from total income to net income for 2009 included a deduction of \$60,366 for legal fees expended by Mr. Hodgkinson that year on these proceedings, as fees incurred for child support. Given that these fees (which naturally grew through 2010 into a six-figure amount) were largely incurred in an attempt to bring an end to the payment of child support, Ms. Pattison disputed the propriety of the deduction. Mr. Hodgkinson disagreed, but no longer seeks to have it taken into account. I expect that the fees he has incurred to date would have covered a considerable amount of Julia's education costs, if devoted to that end instead of litigation.

[37] Where the parties join issue is the effect of the application of section 18 of the Guidelines:

18. SHAREHOLDER, DIRECTOR OR OFFICER -

- (1) Where a spouse is a shareholder, director or officer of the Corporation and the court is of the opinion that the amount of the spouse's annual income as determined under section 16 does not fairly reflect all the money available to the spouse for the payment of child support, the court may consider the situations described in section 17 and determine the spouse's annual income to include
 - (a) all or part of the pre-tax income of the corporation, and of any corporation that is related to that corporation, for the most recent taxation year; ...

- [38] Neither party disputed that section 18 is properly engaged in Mr. Hodgkinson's circumstances. Both parties proceeded on the basis that I should have regard to an average of the income found to be available to Mr. Hodgkinson over several years. The defendant's materials referred to the last three years (at the time of the hearing, 2007, 2008 and 2009), in accordance with section 17(1) of the Guidelines. The plaintiff's materials included 2006 as well, no doubt because it was a much better year than the succeeding three.
- [39] Neither party addressed the interplay between section 17(1), which permits the court to have regard to a spouse's income over the last three years if it is of the opinion that the determination of the income under section 16 would not be fair, and section 18(a), which permits the court to consider all or part of the pre-tax income of a relevant corporation for the most recent taxation year. Section 18 says nothing about considering the pre-tax income of a corporation over the last three years.
- [40] The issue does not appear to have been squarely addressed in British Columbia. The jurisdictions that have addressed the issue have not reached a consensus. In *Nesbitt v. Nesbitt*, 2001 MBCA 113, 19 R.F.L. (5th) 359, for instance, Chief Justice Scott for the Manitoba Court of Appeal concluded that fairness, equity and common sense mandated a three-year-averaging process to determine the imputation of income to be made under section 18. In *Boser v. Boser*, 2003 SKQB 477, 47 R.F.L. (5th) 259, however, Wright J. of the Saskatchewan Court of Queen's Bench disagreed that the Guidelines permitted that approach.
- [41] In British Columbia, the averaging approach seems to have been adopted without any particular discussion of the issue: see, e.g., *Cotter v. Cotter*, 2009 BCSC 488 at para. 13, and *Chapman v. Summer*, 2010 BCCA 237, 4 B.C.L.R. (5th) 262. I propose to follow the same approach. In my respectful view, the Guidelines do indeed permit it where it would be unfair to do otherwise.
- [42] As we have seen, section 16 starts with an assessment of the sources of income set out in the spouse's most recent income tax return. Where the spouse is, like Mr. Hodgkinson, the shareholder, director or officer of a corporation, and the court concludes that looking at the most recent personal income tax return as mandated by section 16 does not fairly reflect all the money available to the spouse for the payment of child support, then section 18 allows the court to include in the spouse's annual income all or part of the pre-tax income of the corporation for the most recent taxation year. Putting these two together, then, the court looks at the personal income tax return of the spouse, and the pre-tax income of his corporation(s), both for the most recent taxation year, in order to determine the spouse's "annual income". The court then looks to section 17 for the discretion to have regard to the last three years of "annual income" to determine an amount that is fair and reasonable in light of patterns of income, fluctuation, et cetera. This is consistent with the fundamental object of the Guidelines, which is to ensure fairness to both spouses, and to their children, in determining what amount of money is in fact reasonably available for the payment of child support.

3. The Expert Evidence

[43] Both parties filed expert reports analyzing the question of section 18's effect over the years in question. These experts came to markedly different conclusions.

[44] The plaintiff's expert, Cheryl Shearer, B. Comm., CA, CFE, of Blair Mackay Mynett Valuations Inc., concluded that the income available to Mr. Hodgkinson over the years 2006-2009 resulting from his employment by Dejour and his interests in HEC, Alberta and Yukon, after applying the factors set out in section 17(2) and Schedule III of the Guidelines, was as follows:

Year

available income

2006

\$3,785,000

2007

\$1,993,000

2008

\$128,000

2009

\$1,918,000

On this basis, the plaintiff seeks an order retroactively varying the child support by increasing it to \$10,000 per month from May 2004.

[45] The defendant's expert, Lyn Perry, CGA, CFP, FDS, of Lyn Perry Consultants Ltd. concluded that the income available to Mr. Hodgkinson from those same sources over the years 2007-2009 was rather less:

Year

available income

2007

\$537,459

2008

\$(95,899)

2009

\$118,956

- [46] Both were at least agreed that 2008 was not a good year. It should surprise no one, and I have no difficulty in accepting, that the economic collapse of 2008-2009 had a significant impact on Mr. Hodgkinson's business. The value of the shares of Dejour, for instance, fell by 90% during that crisis and has not significantly recovered since. This has impaired, among other things, the shares' usefulness as security for the purpose of raising capital. Moreover, as Mr. Hodgkinson deposed, energy prices fell and capital dried up, two factors of critical importance to his business. Recent events may have gone some distance to correcting the former in so far as oil is concerned, but the latter factor remains problematic as far as the evidence demonstrates.
- [47] Counsel for the plaintiff took great exception to the defendant's reports for three reasons. First, Ms. MacLennan argued that the reports should be rejected because of bias. Second, she objected that they did not contain the certification required by Rule 13-2 of the Supreme Court Family Rules. Third, Ms. MacLennan reported, as she rose to continue her cross-examination of Ms. Perry, that she happened to stop at Il Giardino the previous evening where, to her understandable astonishment, she observed Ms. Perry dining with Mr. Hodgkinson and his wife. Ms. Perry's cross-examination had commenced the previous day, and I had warned her not to discuss the case with anyone during the adjournment. Ms. MacLennan's appearance, I suspect, did not add to the ambience of that celebrated restaurant.
- [48] The argument concerning bias was based on the fact that Ms. Perry was for a number of years in a relationship with one Ted Kozub, the father of Mr. Hodgkinson's present wife, and a business associate of Mr. Hodgkinson. Technically, then, Mrs. Hodgkinson (the second) was Ms. Perry's stepdaughter, although she was already an adult by the time Ms. Perry began living with her father. Ms. Perry has not had a relationship with either Mrs. Hodgkinson or Mr. Kozub since 1999 when she and Mr. Kozub separated.
- [49] I concluded, in all of the circumstances, that there was no evidence of actual bias on the part of Ms. Perry, no suggestion of a personal interest in the outcome, or of manipulation of numbers, and the potential for apprehended bias did not go far enough to justify exclusion of the report. I must say, however, that I cannot understand why a sophisticated litigant represented by senior counsel would choose to retain an expert with whom he had a previous connection, regardless of the expert's abilities. It is a practice to be strongly discouraged. There is, after all, no shortage of persons qualified to render opinions on the issues covered by Ms. Perry. Moreover, I would have thought that a professional in Ms. Perry's position would have declined the retainer. This is particularly so given the added emphasis in the Supreme Court Civil Rules on the duty of an expert to assist the court and not be an advocate.
- [50] Given her failure to see the problem inherent in providing expert opinion evidence for a party in these circumstances, it is perhaps not surprising that Ms. Perry was also blind to the perils of dining with that party while under cross-examination. Ms. Perry explained that she took to heart my admonition that she should not discuss the case, and did not do so. But she

had not seen Mr. Hodgkinson and his wife for some years, and this was their only opportunity to catch up socially before Ms. Perry had to return to Kelowna. I accept her explanation; nevertheless, it was an opportunity that would have best been passed up. That it was not demonstrates a lamentable lack of judgment, but not, I think, a breach of my warning to her.

- [51] As to Ms. Perry's failure to include the required certification, I was not prepared to rule the report inadmissible on that account, given the relative newness of the rule, and the generally unsatisfactory manner in which this litigation had proceeded in terms of the development and exchange of expert evidence on both sides. I doubt I will be so lenient again in this regard. The certification is not optional.
- [52] The question remains of what weight I should accord Ms. Perry's opinions in these peculiar and, I trust, unique circumstances. I conclude that while I must approach her reports with caution, I should not reject her opinions out of hand.
- [53] Turning to the plaintiff's expert report, I note that Ms. Shearer's analytical framework is consistent with the accepted practice for imputing income to shareholders, adopting the accrual method. She follows the appropriate Guidelines, and her analysis is clear.
- [54] Ms. Perry's principal criticism of Ms. Shearer's report is that it makes no allowance for the companies' requirements for working capital before assessing what amount of the pre-tax corporate income is available to Mr. Hodgkinson. Ms. Perry has a point. As the Court of Appeal noted in both *Kowalewich v. Kowalewich*, 2001 BCCA 450, and *Hausman v. Klukas*, 2009 BCCA 32, monies needed to maintain the value of the business as a viable going concern should not be included in the determination of annual income, as they will not be available for support purposes.
- [55] Ms. Shearer cannot, however, be faulted for her approach given that the onus is on Mr. Hodgkinson, not Ms. Pattison, to establish the extent to which pre-tax corporate income is not available to the payor for that reason: *Hausman* at para. 51.
- [56] Thus Ms. Shearer concludes that all of the pre-tax corporate income is available to Mr. Hodgkinson, while Ms. Perry asserts, in essence, that none of it is, and that Mr. Hodgkinson has put far more into the companies than he has taken out.
- [57] On the basis of the evidence adduced before me, I find that neither is correct.
- [58] The plaintiff has laboured long and hard in her attempts to demonstrate that the defendant's income, properly assessed in accordance with the Guidelines, is considerably higher than what has hitherto been attributed to him. She argued forcefully that the nature of his business, together with the sophistication of his tax planning, has disguised what his lifestyle reveals: the use of a great deal of pre-tax corporate income for his own purposes. She pointed out that when Mr. Hodgkinson prepared a statement of his personal net worth for the HSBC Bank, he disclosed his assets as totalling some \$17 million, which perforce included corporate assets. This confirmed, she submitted, how he uses the corporate wealth

as his own.

- [59] These are not new issues. They formed a significant part of the trial before Madam Justice Dillon. After Dillon J. delivered judgment, the plaintiff sought unsuccessfully to reopen the trial to address these issues further. All of these issues were addressed as well by the Court of Appeal.
- [60] One of the factors noted at trial and on appeal was the complexity of the defendant's businesses and business dealings. That is inherent in the nature of what he does, and has yielded very comfortable lifestyles for both parties and their daughter.
- [61] There are two other important features that, I find, characterize Mr. Hodgkinson's business. First, it is highly dependent upon the availability of capital because, after all, venture capital is its core. Second, it is highly dependent upon commodity markets and the economy, as recent developments have demonstrated. There will be some very good years, and there will be some truly awful years. The former will allow Mr. Hodgkinson the luxury of a Bentley motor car, first-class travel and other lifestyle indulgences enjoyed personally at his companies' expense. The latter will leave him scrambling to borrow large sums of money personally for injection into his businesses, at considerable personal risk. Hence his expansive approach to the calculation of his net worth when applying to the HSBC for financing.
- [62] Consequently, I am unable to accept Ms. Shearer's position that all of his pre-tax corporate income is available to him within the meaning of the Guidelines. She attempts to support this by noting that an increase in his child support does not mean that all the attributed income on which it is based will be unavailable to him for capital. But that is not how the law approaches this aspect of the assessment of what income is available for child support purposes.
- [63] Section 18 of the Guidelines is grounded upon a determination of the fair reflection of the money "available to the spouse for the payment of child support", and permits all or part of the pre-tax income of a corporation to be included for that purpose. The Court of Appeal has warned against killing the goose that lays the golden egg, noting that monies needed to maintain the business as a viable going concern are not to be considered as "available" for support purposes (Kowalewich and Hausman, *supra*).
- [64] I have no difficulty in finding, on the evidence, that Mr. Hodgkinson's businesses require substantial amounts of their pre-tax corporate income in order to be maintained as viable going concerns. The nature of these businesses is such that those amounts inevitably must vary from year to year. They are not susceptible of precise calculation, and Ms. Shearer did not attempt the task given the basis upon which she came to her conclusions. It is evident to me that large amounts were required in 2008 and 2009. Less was required in 2006 and 2007. This is not a situation where the payor is attempting to retain earnings in his company, or accumulate savings, to the detriment of the child. Rather, there are legitimate, if variable, calls on the pre-tax corporate income. This case is thus distinguishable from *A.R.J. v. Z.S.J.*,

2009 BCSC 1662, and *Teja v. Dhanda*, 2009 BCCA 198.

[65] Because of my view of the evidence, Ms. Perry is also of little assistance in this regard. Her opinion that all of the companies' pre-tax income is always required for working capital is as unsupportable as the suggestion that none of it is. On the evidence, that may have been true in some years, but was not in others. This is amply demonstrated by her schedule of detailed drawings made by Mr. Hodgkinson from his companies. That Mr. Hodgkinson contributed equal amounts of money to the companies under other circumstances does not alter the fact of the personal drawings, which were evidently monies not required by the companies for working capital at the time they were made.

4. Disposition

[66] Where does this take us? The trial judge deemed the annual income available to Mr. Hodgkinson for child support to be \$358,657, and set child support at \$2,415 per month, being the applicable Guideline amount. The Court of Appeal increased this to \$2,715 per month to match what Dillon J. had found were Ms. Pattison's reasonable monthly expenses relating to Julia. In the meantime, Dillon J. declined to reopen the trial to take into account evidence that the value of the matrimonial home had decreased, while the value of the defendant's businesses had increased. This was upheld by the Court of Appeal.

[67] Since then, on the evidence, the pre-tax income of the corporations controlled by the defendant, upon which the finding of available income was largely based, has varied considerably. There have no doubt been years in which his total available income was significantly higher than at \$358,657; recently, his available income has been considerably less. In addition, with Julia attending boarding school in California, the cost of her education has increased substantially. Meanwhile, at least some of the monthly expenses incurred by the plaintiff relating to Julia have decreased while Julia is at school, though others have increased as Julia has grown.

[68] I turn now to consider whether these circumstances are materially different from those that were before Dillon J. and the Court of Appeal.

[69] A "material change" means a change such that, if known at the time of the original order, would likely have resulted in different terms. Moreover, the "sufficiency" of the "change" must be defined in terms of the parties' overall financial situation. The test of materiality is intended to encourage certainty and stability, and to discourage the parties running to court over every temporary change. See *Willick v. Willick*, [1994] 3 S.C.R. 670, *Bockhold v. Bockhold*, 2006 BCCA 472 and *Turpin v. Clark*, 2009 BCCA 530.

[70] Given the history of this matter, the evidence that was before both the trial judge and the Court of Appeal, and the rulings of those courts, I am not persuaded that there has been any material change in the circumstances of these parties of the degree that the authorities require, with one exception.

- [71] With respect to Mr. Hodgkinson's available income, Ms. Pattison referred in the Court of Appeal to the speculative nature of the companies' assets (para. 34). That was always understood. That worked initially in Mr. Hodgkinson's favour; lately, not so much. The kind of variation that I find has occurred in Mr. Hodgkinson's available income over the years since the trial is, in my view, well within what was contemplated at the time of the trial and in the Court of Appeal.
- [72] It was also recognized that Ms. Pattison would not be entitled to the same standard of living she enjoyed before the separation, yet much of the plaintiff's argument seems to me to have been aimed at what would really amount to a claim for spousal support. That claim has already been litigated to its conclusion. This argument included the submission that proper child support would enable Ms. Pattison to buy an appropriate house in Vancouver, instead of renting as she is presently obliged to do.
- [73] Although some of the plaintiff's expenses relating to Julia have decreased during Julia's absence at school, the principal expenses continue, and some have increased. The plaintiff must continue to maintain a home and all associated costs. She can hardly downsize while Julia is away and upgrade again upon her return. I do not see this as a material change in the context of these parties' affairs, and I therefore decline to vary the Court of Appeal's order fixing child support at \$2,700 per month.
- [74] The defendant's application for an order cancelling child support retroactively in lieu of his paying 100% of the costs of attendance at Cate School amounts to a request to vary the existing order for extraordinary expenses by requiring the plaintiff to contribute \$32,400, being the annual amount of the child support. The increase in Julia's private school fees has no doubt been substantial. But I have no reason to suppose that the trial judge would have made any different order had this information been before her, other than to include along with tuition such additional costs as must now be paid as part of Julia's schooling.
- [75] To transfer responsibility for any portion of the cost of Julia's education from Mr. Hodgkinson to Ms. Pattison would upset the balance that both Dillon J. and the Court of Appeal sought to achieve between these parties. The trial judge recognized that an extraordinary expense of that nature should in fairness be borne entirely by the party who financially was best equipped to absorb the cost without deleterious effect. As the Court of Appeal observed (para. 58), the trial judge had found a "vast discrepancy between the parties' incomes for purposes of extraordinary expenses". Under those circumstances, if Ms. Pattison was not expected to share in the cost of a private school education at the less-expensive local level, how could it make sense to require her to contribute a substantial portion of a much greater sum?

- [76] It may be that Cate School is not truly affordable, but that must be for Mr. Hodgkinson to decide. I decline to vary the existing order as to the payment of Julia's extraordinary expenses except as required to take into account that Julia's private school education now includes not only tuition, but also boarding fees, tutoring costs and travel expenses. In order to maintain the balance referred to above, I am satisfied that all of these extraordinary costs should be borne by Mr. Hodgkinson alone.
- [77] It follows that Ms. Pattison is entitled to be reimbursed the sum of \$8,000 that she paid to Cate School as a deposit, in order to hold Julia's place, when the money was not forthcoming from Mr. Hodgkinson.

CONCLUSION

- [78] The defendant's application for an order varying the orders of the trial judge and the Court of Appeal concerning the payment of child support is dismissed.
- [79] The order of the trial judge concerning the payment of extraordinary expenses is varied to provide that the defendant shall be responsible for 100% of the private school costs of the daughter of the marriage, including tuition, boarding fees, tutoring costs and necessary travel expenses.
- [80] The defendant shall reimburse the plaintiff for the sum of \$8,000 paid by the plaintiff towards their daughter's tuition fees, together with interest pursuant to the Court Order Interest Act, R.S.B.C. 1996, c. 79.
- [81] The plaintiff's application for an order varying the orders of the trial judge and the Court of Appeal concerning the payment of child support, and for an order for retroactive child support, is dismissed.
- [82] As success has been divided, I consider that the parties should each bear their own costs.
- "GRAUER, J."

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