
CANADA / JUDGMENT

S.L.D. v. W.A.D.

2020 BCSC 690

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 690 S.L.D. v. W.A.D.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

S.L.D. v. W.A.D.,

2020 BCSC 690

Date: 20200508

Docket: E43290

Registry: New Westminster

Between:

S.L.D.

Claimant

And

W.A.D.

Respondent

Before: The Honourable Madam Justice Norell

Reasons for Judgment

Counsel for the Claimant:

A. Ouellet

Counsel for the Respondent:

D. Greig

Place and Dates of Trial/Hearing:

New Westminster, B.C.

July 11, December 12-13, 2019

and February 13, 2020

Place and Date of Judgment:

New Westminster, B.C.

May 8, 2020

Introduction

- [1] These are reasons on two applications, one filed by each party, to review and vary the quantum of child and spousal support orders made in 2016 and early 2017 following a lengthy trial. The notices of application seek relief other than review and variation of support, but the parties agreed to proceed only on that issue and to adjourn the remainder of the relief sought.

The parties

- [2] The parties began living together in 2004. They married in 2007. Weeks prior to their marriage, they signed a pre-nuptial agreement. They have three children now ages 14, 13 and 11. The parties separated in 2012. The children live approximately half the time with each parent on a week on/week off basis.
- [3] The respondent is 60 years old. He derives his income from the oil and gas industry. He is a 100% shareholder of a holding company called Connor Industries Ltd., which in turn is a 50% shareholder of a company which I have anonymously called X to protect the privacy interests of the other shareholder. The other shareholder of X is the holding company of the widow of the respondent's former business partner. The main asset and income generating property of X is a special purpose industrial property in Alberta used in the pipeline industry. There was no current appraisal evidence of the value of the property, but more dated evidence indicates it is worth millions of dollars. There is a mortgage on the property, and although neither the mortgage nor a current bank statement regarding the mortgage were in evidence, the financial statements indicate the mortgage is several million dollars. There is one tenant of the property. The respondent also receives investment income from marketable securities within Connor Industries and consulting work in the oil and gas industry.
- [4] The claimant is 41 years old. Prior to the parties' relationship she worked as an administrative assistant, and after their second child was born did not work outside the home. At the time of the trial in 2015 she was training to become a yoga instructor but ultimately did not pursue that career. After the trial, she embarked on education to obtain a

diploma in counselling. In the autumn of 2018 she completed the formal part of that training and in 2019 wrote a qualifying exam, but still requires practicum hours prior to certification. In the nearly eight years since the parties' separation she has not earned any income.

History of litigation

- [5] This action went to trial for 29 days before Mr. Justice Harvey and he gave reasons dated April 8, 2016 indexed at 2016 BCSC 616. There were at least 20 applications prior to the trial. There were several after. One of the significant issues at trial was the validity of the pre-nuptial agreement. The claimant sought to set it aside. Mr. Justice Harvey upheld the agreement. The pre-nuptial agreement excluded all of the respondent's corporate holdings and personal assets from division, and restricted the claimant's property claim to an interest in the matrimonial home, an interest in an RRSP and other joint chattels. The result was that of the then approximately \$7.5 million in assets, the claimant received approximately \$450,000 and the remainder was retained by the respondent. At trial, the respondent conceded the claimant's entitlement to spousal support, and Mr. Justice Harvey found that entitlement was established on both a compensatory and non-compensatory basis (para. 413).
- [6] With respect to the respondent's income, Mr. Justice Harvey stated:
- [400] The evidence makes clear that the respondent has arranged his financial affairs so as to minimize his income and augment his day-to-day financial needs utilizing draws from his tax paid shareholders loan account in Connor Industries. While perfectly permissible from a tax standpoint, the determination of the respondent's income requires an analysis of all sources of income available to him to decide the appropriate level of spousal and child support, both retroactively and prospectively.

A. The Respondent's Income

- [401] The respondent's Line 150 income from his 2012 through 2014 T1 General tax returns fluctuated from a high of \$229,000 in 2012, to a low of \$168,000 in 2013.
- [402] His income does not include dividends paid to Connor Industries. From 2012 through 2014 those dividends were at a high of \$223,000 in 2012 and a low of \$152,000 in 2014.
- [403] For the purposes of assessing the respondent's income I am entitled to consider the whole of the pre-tax corporate earnings of any company over which he has a controlling interest absent evidence which persuades me there is a corporate requirement to retain some of the income within the corporation for legitimate business use: *Hausmann v. Klukas*, 2009 BCCA 32.
- [404] The net corporate earnings of Connor Industries for the years 2012 to 2014, inclusive, was \$223,853, \$182,968 and \$152,170, respectively.

[405] Combining Connor Industries' pre-tax corporate earnings with the respondent's reported Line 150 income for the years 2012 through 2014, his income is as follows:

2012

\$452,695

2013

\$350,740

2014

\$328,187

[406] No evidence was presented of any business requirement which would require Connor Industries to withhold earnings.

[407] Therefore, I conclude the respondent's past income for the purpose of considering the claim for retroactive adjustment to the amounts paid in support is as set out above.

[7] With respect to the claimant's income, Mr. Justice Harvey found that the claimant was "intentionally underemployed" (para. 416) and he retroactively imputed income to her of \$30,000 per year commencing June 2014. He also concluded that spousal support "ought to be awarded at the high end of the [Spousal Support Advisory] Guidelines to reflect the significant economic disparity which results from the Agreement" (para. 426). He awarded this for both retroactive and prospective spousal support (para. 428). With respect to a termination date, Mr. Justice Harvey stated:

[430] I will not set a termination date but note that the upper end of the range under the SSAG would see support continue until the youngest child, N.W., finishes high school.

[431] Keeping in mind the disparate division of property, which was significantly enhanced in value during cohabitation, I would think it reasonable that the respondent pay support until N.W.'s completion of Grade 12, subject to earlier variation owing to a material change in circumstances.

[8] Prospective spousal support was ordered at \$6,520 per month (para. 429).

[9] With respect to child support, Mr. Justice Harvey ordered that despite the shared parenting regime, this should be paid solely by the respondent:

[435] I have not adjusted the child support to reflect the income I have attributed to the claimant; but, on the basis of the factors set out in s. 9 of the [Federal Child Support] Guidelines and *Contino v. Leonelli-Contino*, 2005 SCC 63, I conclude that the respondent's vastly superior financial resources make it inappropriate to order other than the basic Guidelines amount payable despite the shared parenting arrangement.

[10] Prospective child support was ordered at \$5,543 per month, excluding amounts to be paid for s. 7 expenses which were to be shared.

[11] Finally, with respect to exchange of financial information, Mr. Justice Harvey ordered:

[439] Commencing for the taxation year 2015, each of the parties shall exchange the relevant financial documents necessary to determine their Guidelines income so as to hopefully allow the parties to annually adjust both spousal and child support to accord with their current incomes.

[440] The exchange of financial information should occur on or before June 1 of each year, commencing June 2016 and thereafter for so long as support, whether child, spousal or both, is payable.

[Emphasis added.]

[12] The entered order states:

22. Effective August 1st, 2015, the Respondent shall pay to the Claimant periodic spousal support in the amount of \$6,520 per month subject to a material change in circumstances; and for the purposes herein, upon the graduation of "NW" from high school, the respondent may apply to cancel, vary or review spousal support.

24. Commencing forthwith, the Respondent shall pay ongoing child support in the amount of \$5,543 per month, until varied by further court order or agreement between the parties;

25. The parties shall exchange financial information each year, by or before June 1st, commencing in 2016, and continuing for so long as child or spousal support (or both) is payable;

[13] On January 27, 2017 Mr. Justice Harvey made a further order upon applications by both parties. One of several issues was that the respondent had claimed a large personal legal expense as a corporate expense. Mr. Justice Harvey added this to the respondent's income for support purposes, and made an adjustment for the amount of child support the respondent pays for a child of a previous relationship. In oral reasons for judgment, Mr. Justice Harvey stated:

59. Accordingly, I conclude that the respondent's income for 2015 is a combination of his line 150 income on his T1 General Tax Return and the pre-tax corporate profit of Connor after adding back in the sum of \$64,449 which is the totality of Mr. Greig's account. The result for 2015 and his income for the respondent for support purposes of \$402,900 is a combination of those three items. Commencing June 1, 2016 support will be varied from the amounts I have set out earlier determined on that income and taking into account the payment for [C], child support will change to \$6,724 and spousal support to \$7,702.

60. I should note that I have made no such analysis of the heading for professional fees for Connor Industries for the year ended 2016 and my finding here should not be taken as determinative of any further variation application for the period commencing June 1, 2017 but it remains incumbent upon the respondent to demonstrate the propriety of the expense.
- [14] The relevant portions of the entered order are:
1. The previous Order herein, made April 8th, 2016, respecting the quantification of the Respondent's obligation for the payment of spousal support, shall be adjusted by counsel for the parties, to permit the Respondent to claim the benefit of the inclusion of an allowance for payments made by him to his prior child [C], in the amount of \$1200 per month, for the period June 2012 to June 2016;
 2. The recalculation aforesaid shall be applicable to spousal support only, and shall not vary the child support payable, except as described below;
 3. Commencing June 1, 2016 and continuing on the first day of each and every month thereafter until further order or agreement, the Respondent shall pay to the Claimant spousal support pursuant to the Divorce Act (Canada) the sum of \$7,072 per month;
 4. Commencing June 1, 2016, and continuing on the first day of each and every month thereafter until further order or agreement, the Respondent shall pay to the Claimant child support in the sum of \$6724 per month;
 12. The 2015 income of the Respondent shall be adjusted to add back legal fees paid by Connor Industries in the amount of \$64,449, such that the Respondent's income shall be adjusted to \$402,000 for 2015, which income amount shall be used to re-calculate the quantum of spousal and child support payable commencing June 1st, 2016;

History of these applications

- [15] By the summer of 2018, the respondent was alleging his income had significantly reduced. On July 31, 2018 the respondent filed an application seeking review of support and seeking a greater imputation of income to the claimant. That application did not proceed. A mediation was set for the autumn of 2018 but it also did not proceed.
- [16] On December 12, 2018 the respondent filed a new application for, amongst other orders, review and variation of the quantum of support payable by him. The bases of his application were that his income had declined and the claimant had remained unemployed since the time of the trial judgment. He sought an order that \$60,000 income be imputed to the claimant. The application was set for January 25, 2019 and the estimate was two hours.

- [17] On January 17, 2019 the claimant filed an application response disputing there was a review provision for spousal support in Mr. Justice Harvey's orders, and arguing that no material change in circumstances had been shown. The claimant now had different counsel than her trial counsel and required an adjournment. The claimant advised the application would take longer than two hours.
- [18] On January 25, 2019 the parties attended before Mr. Justice G.C. Weatherill and he adjourned the respondent's notice of application to March 13, 2019 for a full day hearing.
- [19] On March 4, 2019 the claimant filed an application also to be heard on March 13, 2019, seeking amongst other orders, an order varying child and spousal support, and imputing income to the respondent of the greater of \$425,000 per year or his actual income, and alternatively a lump sum payment of spousal support. The claimant alleged imputation of income was required because the respondent had not made adequate financial disclosure. The claimant also objected to certain evidence filed in support of the respondent's application, in particular letters from the respondent's personal accountant regarding income.
- [20] Both applications which were to be heard on March 13, 2019 were adjourned by consent for two days to May 15 and 16, 2019 but a judge was not available at that time.
- [21] The applications came before me on July 11, 2019. I agreed with the claimant that most of the personal accountant's letters filed by the respondent was not admissible. The material before me was not sufficient to address the accounting issues. The parties required further financial disclosure and proper expert opinion. The matter was adjourned in order for the parties to obtain that evidence.
- [22] The matter came before me again on December 12 and 13, 2019. The parties had now each retained independent accountants and served expert reports. They advised at the outset they had arranged for the experts to be cross-examined and that they would not complete within the time allotted. There was also an issue of proposed new amendments to the claimant's application. Although this was initially opposed, the respondent subsequently agreed to the amendments. On the basis of the expert reports, the claimant was now seeking an order imputing income to the respondent of the greater of \$600,000 or his actual income for prospective support, alternatively a lump sum payment for spousal support, and now also an order for retroactive increased support commencing June 1, 2017 based on what she alleged was the respondent's increased income since 2016.
- [23] The hearing resumed on February 13, 2020. In the meantime, the claimant filed her proposed amended notice of application on December 17, 2019, and the respondent filed his application response on January 3, 2020.
- [24] The current narrowed issues to be decided are the applications to review and vary child and spousal commencing June 1, 2017.

Review or material change in circumstances

- [25] Mr. Justice Harvey ordered that the parties are to exchange financial information each year to "hopefully allow the parties to annually adjust both spousal and child support to accord with their current incomes". The respondent's notice of application refers to a "review" of the quantum of spousal and child support "in accordance with the Reasons for Judgment" of Mr. Justice Harvey. However, the respondent argues there has been a material change in circumstances, being a significant decline in the respondent's income. The claimant also argues there has been a material change in circumstances, but only with respect to an increase in the respondent's income.
- [26] Both parties agree that as between themselves, child support may be reviewed yearly. Pursuant to s. 17(4) of the Divorce Act, R.S.C. 1985, c. 3, the court may vary a child support order upon a change of circumstances. A change in income that would result in a different amount for child support in accordance with the applicable table is deemed to be a change in circumstances: s. 14 of the Federal Child Support Guidelines [Guidelines].
- [27] Unless there is a review provision in the order of Mr. Justice Harvey, spousal support may only be varied upon a change in the condition, means, needs or other circumstances of either former spouse: s. 17(4.1) of the Divorce Act and *Toth v. Toth*, 2016 BCCA 50, at paras. 11-12. Although there is an order for yearly exchange of financial information, I do not read anything in the reasons for judgment of Mr. Justice Harvey that speaks of an intended yearly review of spousal support by the court, as opposed to the possibility of the parties agreeing outside of court to an adjustment of spousal support. I find that spousal support may only be varied upon a material change in circumstances.
- [28] The parties agree it is appropriate for this court to make a retroactive adjustment for child support, and a retroactive variation for spousal support if there is a material change in circumstances.

Respondent's income

Overview of expert opinion

- [29] The respondent relies upon the opinion of Mr. Donald Spence. Mr. Spence is a CA, CPA and chartered business valuator. He prepared three reports. The second report dated November 14, 2019 updates the first report dated August 2, 2019 and contains more current financial information. The third report dated December 5, 2019 makes adjustments to the calculations in the November 14, 2019 report after having had the opportunity to consider the opinions of the claimant's expert.
- [30] Mr. Spence was asked to calculate the respondent's Guidelines income under two scenarios. Scenario one included investment income generated from the respondent's corporate holdings in Connor Industries and X. Scenario two was excluding investment income from these sources.

- [31] The pre-nuptial agreement states that "notwithstanding that income derived from the Corporate Interests is not divisible for the purposes of property division, the parties' ongoing income may be considered in determining income for the purposes of support". Mr. Justice Harvey noted that because of the disparate financial resources, support would be paid at the high end of the range. The parties' F8 financial statements indicate they continue to have widely disparate resources. Mr. Justice Harvey included income from the respondent's excluded assets in determining Guidelines income and I see no reason to deviate from that approach. There was no successful appeal of Mr. Justice Harvey's order, and there is no material change in the financial resources of the parties that would indicate a different approach is required. I therefore do not need to address the scenario two figures.
- [32] Mr. Spence did not provide an opinion regarding 2016 income in his written reports. The parties agreed he could address this in his testimony and he did so. As for the 2019 income, Mr. Spence had the complete financial statements for X for the fiscal year ending in 2019, 10 of 12 months of the financial statements for Connor Industries, and information provided to him from the respondent that he did not earn any consulting income that year. On that basis, Mr. Spence estimated the 2019 income.
- [33] Mr. Spence calculates Guidelines income as follows:
- a) 2016 - \$384,000;
 - b) 2017 - \$531,000;
 - c) 2018 - \$206,000; and
 - d) 2019 - \$191,000 (estimated).
- [34] The claimant relies upon the opinion of Ms. Rosanne Walters. Ms. Walters is a CA, CPA, certified fraud examiner, and chartered business valuator. She provided one report dated November 22, 2019 in response to Mr. Spence's second report of November 14, 2019. Ms. Walters calculates the respondent's Guidelines income as follows:
- a) 2016 - \$544,000;
 - b) 2017 - \$686,000;
 - c) 2018 - \$564,000; and
 - d) 2019 - \$ to be determined.
- [35] Ms. Walters did not opine on 2019 income, stating it was too speculative as the financial year-end for Connor Industries was not known, nor was the respondent's personal tax return available.
- [36] Finally, I note both experts were qualified to opine regarding accounting principles which apply to the determination of Guidelines income. At times these opinions appeared to cross into what could be characterized as a legal rather than accounting opinion. This was not an

attempt by either expert to usurp this Court's function, but a reflection of the fact that there is considerable overlap between what the Court is deciding and the applicable accounting principals. I found the expert opinions of Mr. Spence and Ms. Walters to be of considerable assistance in understanding the issues from an accounting point of view and in making the calculations necessary to assess Guidelines income.

Guidelines and associated case authorities

[37] Almost all of the parties' disputes regarding the respondent's Guidelines income revolve around the income he receives from X and Connor Industries. The starting point in the analysis is s. 16, s. 17 and s. 18(1)(a) of the Guidelines, which state:

- s. 16 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.
- s. 17(1) If the court is of the opinion that the determination of a spouse's annual income under s. 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.
- (2) Where a spouse has incurred a non-recurring capital or business investment loss, the court may, if it is of the opinion that the determination of the spouse's annual income under section 16 would not provide the fairest determination of the annual income, choose not to apply sections 6 and 7 of Schedule III, and adjust the amount of the loss, including related expenses and carrying charges and interest expenses, to arrive at such amount as the court considers appropriate.

18 (1) Where a spouse is a shareholder, director or officer of a 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; or

[Emphasis added.]

[38] In *Hausmann v. Klukas*, 2009 BCCA 32, the Court addressed s. 18 of the Guidelines:

[32] In *Kowalewich* [*Kowalewich v. Kowalewich*, 2001 BCCA 450], Madam Justice Huddart comprehensively analyzed s. 18 and the related sections of the Guidelines. In particular she commented on the purpose and application of s. 18:

- [43] In this regard, I find helpful the view Justice Martinson expressed in *Baum v. Baum* (1999), 182 D.L.R. (4th) 715 (B.C.S.C.) at para. 28:

Valid corporate objectives may differ from valid child support objectives. The purpose of s. 18 is to allow the court to "lift the corporate veil" to ensure that the money received as income by the paying parent fairly reflects all of the money available for the payment of child support. This is particularly important in the case of a sole shareholder as that shareholder has the ability to control the income of the corporation. See *Bhopal v. Bhopal*, [1997] B.C.J. No. 1746 (S.C.), *Blackburn v. Elmitt* (1997), 34 R.F.L. (4th) (B.C.S.C.) and *McCrea v. McCrea* [(1999) 1 R.F.L. (5th) 320].

- [54] The Guidelines allow a court to include all of the pre-tax income of a corporation for the most recent taxation year in a spouse's annual income for Guideline purposes. They do not require it. I am not persuaded they make the inclusion of all pre-tax income the default position.
- [58] It seems to me regard should also be had to the nature of the company's business and any evidence of legitimate calls on its corporate income for the purposes of that business. Justice Drake cautioned about not killing the goose who lays the golden eggs. Monies needed to maintain the value of the business as a viable going concern will not be available for support purposes. In my view they should not be included in determining annual income. In *Hollenbach v. Hollenbach*, 2000 BCCA 620 (B.C.C.A.), the trial judge recognized the need for a reserve for depreciation as an appropriate factor to be considered in a real estate business. Justice Dorgan recognized Mr. Kowalewich's business expansion plan as a valid business purpose in a retail business.
- [59] I do not recite these factors to suggest this Court should tinker with a trial judge's exercise of discretion, nor that a trial judge should second guess business decisions. I do say that a trial judge must have regard to the evidence of legitimate business needs in determining what portion of pre-tax corporate income to include in annual income for Guideline purposes.

Onus of proof and evidentiary issues

- [39] The onus of proof is on the payor spouse to provide clear evidence that a corporation's pre-tax income is not available for support, and the "court should not have to ferret out the necessary information from inadequate or incomplete financial disclosure": *Hausmann* at paras. 51-52, quoting from *Jeffery v. Motherwell*, 2006 BCSC 140.
- [40] I pause to discuss the material filed by the respondent in support of his application to vary support. The claimant makes three arguments.
- [41] The claimant's first argument is that the respondent swears to "conclusions" that are not supported by the expert evidence and financial statements. In his affidavit filed December 12, 2018, the respondent states that his 2017 Guidelines income is \$308,872, down from \$402,900. In his F8 financial statement sworn the same day, he attaches two letters from his

personal accountant, most of which I have already noted is inadmissible. In his affidavit filed March 5, 2019 the respondent states that "his income has been in decline over the past 2.5 years" and states his income will be approximately \$175,000 in 2018. The basis of the decrease in income is a decline in the oil and gas industry in Alberta which led to two situations. The first was that in 2018, the tenant renegotiated the lease of the Alberta property and the rent decreased by \$150,000 per year. The second was a decrease in the respondent's consulting income. The respondent states he has only been able to keep his payments to the claimant current by encroaching on capital. He also alleges that X was "offside" its borrower's mortgage covenant on the Alberta property with respect to a financial ratio. In his affidavit filed April 30, 2019 the respondent attaches a further letter from his accountant dated April 29, again most of which is inadmissible. When the parties attended before me on July 12, 2019, the respondent argued that the evidence showed his income was \$304,000 to \$308,000 in 2017 and about \$225,000 in 2018.

- [42] I agree with the claimant that the respondent's evidence regarding his Guidelines income was not supported by the expert evidence or a close look at the financial statements. Further, statements such as X was "offside" its debt covenant were shown to be not accurate. However, there is no question there has been a decline in the revenue of X as a result of the lease being renegotiated. While a cursory look at the financial statements may have given the appearance of reduced income available for support purposes, the complete facts are more nuanced than that.
- [43] The claimant's second argument is that the respondent has not established clear evidence that certain cash outlays or expenses in the corporations are not income available for support, or to explain why certain business decisions were made. She argues the respondent's F8 financial statement is not complete. The claimant also argues that the respondent has not sworn to all of the underlying facts or produced all of the underlying documents upon which some of Mr. Spence's expert opinions are based. She argues that expert reports do not take the place of the underlying evidence, and the alleged facts upon which the opinions are based must be proven before the opinions can be given any weight. The claimant does not object to the admissibility of Mr. Spence's reports, just the weight they should be given.
- [44] I agree that on some issues the respondent has not directly sworn to the underlying hearsay facts relied upon by Mr. Spence, nor proven all of the underlying documents. I will address each of those specific instances when I discuss the expert opinions in more detail. While the respondent's F8 is not complete, he swore further affidavits appending financial records, and counsel have exchanged other financial documents between themselves. An expert may rely upon hearsay as the basis of his or her opinion, but to the extent the hearsay is not proven by properly admissible evidence, the weight of the opinion is affected: *R v. Lavallee*, [1990] 1 S.C.R. 852.

[45] The claimant's third argument is that some portions of the respondent's affidavits are inadmissible as unattributed hearsay or opinion. For example, the respondent refers to statements from unidentified representatives of the tenant, and the value of the property in Alberta. I agree those are not admissible.

[46] I turn now to each of the accounting issues identified by the experts.

Principal portion of X's long-term debt repayment

[47] This issue is whether the principal portion of the mortgage payments which X makes on the property in Alberta should be included in the respondent's income as money available for support pursuant to s. 18 of the Guidelines. The experts agree that for accounting purposes, only the interest component of the mortgage payments is considered an expense of X in arriving at X's pre-tax income. The principal component of the mortgage payments is not an expense because payments of principal are payments toward capital with a corresponding decline in long-term debt.

Case authority

[48] This issue was addressed in *McKenzie v. McKenzie*, 2014 BCCA 381, and on the facts of that case, the Court held that the principal amount of long-term debt secured by properties which generated income was not to be included as money available to the payor spouse. The payor spouse testified that it was a required cash outlay because he could not go to his bank and say he was no longer paying the principal on the mortgage.

[49] After quoting s. 18(1)(a) of the Guidelines, the Court stated:

[97] The amounts that we are considering in this case - principal payments on mortgages are, effectively, investments in the corporation's capital assets rather than deductible business expenses. The mortgage amounts in issue in this case, therefore, fall within s. 18(1)(a) of the [Guidelines], and the court is able to include all or part of them in Mr. McKenzie's income. The question becomes one of whether it should do so, and the language of s. 18 does not, by itself, answer that question.

[50] I will return to *McKenzie* after reviewing the experts' evidence.

Principal repayments on personal property vs. income generating property

[51] Ms. Walters opines that principal repayments on a mortgage of property personally owned would not be considered an appropriate deduction for calculating income. She draws a parallel between that situation and an indirect interest in real property as a result of being a shareholder of a corporation, and points out that allowing a deduction for principal payments would treat those who hold property via a corporation differently than those who hold property personally. Mr. Spence opines this reasoning is not applicable because a personal residence is not generally an income-producing property. I agree with Mr. Spence. This is a mortgage used to generate business income. They are two different situations.

Net worth vs. income available for support

[52] Ms. Walters opines that debt repayments do not change a company's net worth because they are simply exchanging one asset (cash) for another asset (increased interest in property). Mr. Spence agrees. The test for Guidelines income is not net worth. The test under s. 18(1)(a) is whether the amount of the spouse's annual income as determined under s. 16 does not fairly reflect all the money available to the spouse for the payment of support.

Borrowing not income

[53] Ms. Walters opines that if reducing Guidelines income by principal repayments were considered appropriate, then for a similar reason, money received from additional principal borrowing should also be considered a source of income. Access to debt is not usually considered income. Mr. Spence opines that this is hypothetical because neither Connor Industries nor X have increased their borrowing. Typically businesses borrow funds to purchase assets which then generate income. The borrowing or adding debt in and of itself does not create available income. I agree with Mr. Spence.

Financial health of X and whether income available

[54] Finally, Ms. Walters opines that she did not identify any relevant reason why X would need to keep funds within the corporation to pay down principal. Mr. Spence disagrees. In my view, this is the real nub of the issue.

[55] Both experts refer to various aspects of X's financial health. The theme of Ms. Walter's points is that X is profitable with cash that could be used to pay the principal, and therefore the principal amount of the mortgage payment is money that is available for support and should be included in income. Conversely, the theme of Mr. Spence's points is that the financial situation of X is such that there is no other money that should be made available to pay the mortgage principal. The issue is whether, given the nature of the company's business and the nature of the expense, the monies are "needed to maintain the value of the business as a viable going concern". The difference in the experts' opinions reflect their views as to the financial health of X and what is "needed". I set out below the various factors each expert addressed.

Cash deposits

[56] Ms. Walters points out that there were large amounts of cash in X at each of its 2016, 2017 and 2018 fiscal year ends: \$610,000, \$646,000 and \$325,000 respectively. These funds could have been available to make the mortgage payments. Mr. Spence points out the mere presence of cash does not mean a corporation can strip its cash. Further analysis would be required to factor in the amount of debt it must pay and when, to avoid insolvency. I agree with Mr. Spence. If X were to distribute all its remaining cash reserve to Connor Industries for the purposes of support, it would have no buffer for expenses it must incur such as for

tenant's improvements, or to protect itself in the event there were an unexpected expense or difficulty with lease payments. Cash is only one side of the equation. This is exemplified by the next factor.

Working capital

[57] Ms. Walters opines that X's working capital (current assets less current liabilities) at the same year-ends as above are \$310,000, \$368,000 and \$197,000, so the company was solvent. Mr. Spence points out that Ms. Walters has not included the amount of the principal on the mortgage payments due during those years, which is approximately \$313,000 per year. If those are included, Mr. Spence opines that X was "technically insolvent" for the 2016 and 2018 year end dates, with insolvent being defined as the inability of a business to repay its debts as they fall due. In cross-examination, Mr. Spence agreed that X has actually paid all of its debts as they come due at all times for the years within the scope of his retainer. In my view, this is a picture of X on one day only, but it does not show an excess amount of working capital to pay current debt.

Repayment of shareholders' loans and purchase of properties

[58] Ms. Walters opines that X's total liabilities consistently declined over the three years and in 2018 it was able to repay shareholders' loans of \$200,000 (50% of which went to Connor Industries) in addition to placing a deposit of \$106,000 on three pre-build condominium investment properties in White Rock, BC, which imply significant cash flow. Mr. Spence agrees liabilities declined, but so did assets, and none of his calculations reflected a requirement for a capital injection. He said he would have advised the respondent against withdrawing the \$200,000 to pay the shareholders' loans. With respect to the properties in White Rock, Mr. Spence said he understood from conversations with the respondent that this was to diversify some of the risk of having all income from one property in Alberta.

[59] This is one of the hearsay statements Mr. Spence relies upon and which the claimant argues is not supported by sufficient evidence. The respondent swore in an affidavit that in an attempt to find something profitable to offset the trends in X, he ventured into the speculative real estate market and bought property in the lower mainland and Phoenix. His plan was to diversify in what seemed like a market upswing. I note that the condominiums were purchased by X, and the Phoenix property was a personal purchase. X sold one condominium and made \$10,000. The other two purchases had yet to complete but he expected a loss and stated X cannot obtain further financing to close the transactions.

[60] The claimant questions the pre-sale payments. She argues there is no evidence of the price and no evidence of a business plan. She says her client cannot disprove something of which she does not have details and the onus is on the respondent. Letters between counsel which are in evidence show that the purchase documents were provided to the claimant, and I do not know why in a business of two people there would have to be a written business plan. In my view, the evidence is sufficient. The purchase of the pre-sale condominiums does not

affect pre-tax income, however I agree with Ms. Walters that this purchase and the repayment of shareholders' loans imply there were some available funds.

Profitability

[61] Ms. Walters opines that X was consistently profitable over the past three years. Mr. Spence opines that is he unsure of the significance other than to state this is the source of the respondent's income. I agree with Ms. Walters that the fact that X's financial statements show X was profitable supports that this is a viable company. However, there are other factors, such as what is happening to the value of the property in Alberta, which would affect the assessment of profitability and availability of funds.

Dividends

[62] Ms. Walters opines that in 2016, X declared dividends of \$282,000. If it was necessary to retain income for X to cover principal repayments, then it would not have been financially prudent to declare a dividend. Mr. Spence states that 2016 was outside the scope of his retainer, but he was advised these funds were used in part to fund past support payments. This is a hearsay comment from Mr. Spence which was not supported by any specific evidence to that effect by the respondent, and I therefore give no weight to that statement. I agree with Ms. Walters that declaration of dividends implies funds are available, but any dividends declared are also captured by the experts' calculations of income.

Debt covenant

[63] Ms. Walters stated in her report she was not aware of any debt covenants which require X to retain income in the business to maintain minimum financial ratios. Mr. Spence opines that X does have a debt covenant "which may potentially become troublesome". Mr. Spence states that the debt covenant requires that X's EBITDA (earnings before interest, taxes, depreciation and amortization) must be greater than the total of its principal plus interest payments. For 2017 and 2018 the ratio was 1.4 and 1.3. However in 2019 this dropped to 1.1. Mr. Spence opines that X is "significantly dependent" on its one tenant and is "precariously close to being in breach of its banking covenant". Neither Mr. Spence nor Ms. Walters have seen the covenant. The covenant was not filed in evidence, although in one of his affidavits the respondent appended an email from the mortgagee bank referring to the EBITDA covenant and making calculations with respect to it. Mr. Spence said the covenant was described to him by the respondent's personal accountant. Ms. Walters opined that from the description, the covenant is an earnings covenant and is not a working capital or a "how-to-use-your cash ratio". She opined it did not have anything to do with the ability to extract cash out of the business.

[64] The respondent swears there is a mortgage covenant. He also swears that at the time of renegotiating the lease and agreeing to make some building improvements of approximately \$147,000, he expected to be able to increase or restructure X's financing to have the

improvements done. However, the bank reviewed updated financial information, and declined any further financing. Counsel for the respondent states the covenant was produced to counsel for the claimant and refers to his letter to claimant's counsel dated November 18, 2019, which attaches the mortgage commitment letter from June 2015, which counsel advises sets out the covenant. Counsel's letter without attachments is in evidence. I conclude there is a covenant, but the exact terms are not before the Court. However, it is a fact that X is dependent on one tenant and this is a specialty building, purposed for coating pipelines. Even on Mr. Spence's calculation of what he was told were the terms of the covenant, X has not yet been in breach of its covenant. Given that the rental income of X has declined over the past two years, it is not surprising that any financial health ratio, whatever its exact terms, has likely declined. The respondent's evidence that X was "off-side" its covenant, at least on Mr. Spence's assumptions, is not correct.

Amortization

[65] Mr. Spence opines that although he deducted principal payments, he added back to pre-tax income all of the amortization because it is a non-cash expense. Ms. Walters agrees that the amortization should be added back to income. Amortization is in theory based on the useful life of assets, but is added back on the assumption that not all property, particularly real property, will depreciate. There was no admissible expert evidence filed at the hearing as to whether the land value of the property was changing and if so how, and how much the building on the property was depreciating.

Lease

[66] It is uncontroverted that in the spring of 2018 the rent from the lease went down \$150,000 per year. The rent will increase again in the autumn of 2021 but only by \$50,000. The lease expires in 2023. The respondent swore that as part of the renegotiation of the lease, X agreed to make approximately \$147,000 in tenant's improvements, although that agreement does not form part of the lease. In my view, this is an example of why not all cash should necessarily be stripped out of a company for support purposes. Only a small portion of the cost of the tenant's improvements has been incurred so far. Claimant's counsel argues that improvements will result in the rent being increased, but the amount of the increase was not provided.

Parties' other arguments

[67] The respondent relies upon McKenzie as authority to deduct the principal amount of the mortgage payment. The respondent argues that courts will not second guess legitimate business decisions and if a shareholder demonstrates that some corporate funds should be properly stored for a rainy day to safeguard against pending expenses or liability, those are relevant considerations. The determination of Guidelines income is not strictly arithmetic, and is based on what is reasonable and fair. The shareholder is not required to strip the

corporation of every dollar to pay support. The respondent argues he could have taken all his excluded assets and put them in a house and have no income generated. Or, he could have put everything in 1.5 percent treasury bills which would have generated a much lower rate of return. I expect if the respondent did so he would be faced with an imputation of income argument from the claimant, but as this is a hypothetical I make no determination regarding it. In this case, X has a mortgage on property which has generated income for this family.

- [68] The claimant argues that McKenzie is limited to the situation where there is not enough pre-tax corporate income to do all the things the company needs or wants to do. For example, where there is no money left to pay the capital and there needs to be an injection from the shareholder or a raising of finances. The claimant further argues that the onus is on the respondent to demonstrate with clear evidence that the funds are needed for the company to stay viable and not so the respondent can build his own wealth at the expense of the claimant and his children. The claimant argues the respondent has not met the evidentiary burden; for example, there is no evidence from the other shareholder of X, or that the mortgage is not being paid down at an accelerated rate. The claimant argues the onus is on the respondent to show that he "must use the pre-tax corporate profits for that purpose and that there are no discretionary amounts available". If the respondent continues to draw out shareholders' loans or to diversify the portfolio of X he may be "running short and tight" and he may need to inject cash or principal to avoid "going into foreclosure and losing the business" but "he has not proven he is in that position now".
- [69] The claimant argues that in ordering spousal support at the high end of the range, and child support without set off, Mr. Justice Harvey was trying to maximize the amount of support given the disparate financial situations of the parties. The court should look at pre-tax corporate income with that lens in mind. The claimant argues it cannot have been the intention of Mr. Justice Harvey that the respondent continue to build his investment portfolio and his retirement base when he already had 95% of the assets, nor should the court permit this. Finally, the claimant argues correctly that the court does not have a binary choice between deductibility and non-deductibility of principal, and can choose an amount in between.

Analysis

- [70] In McKenzie, there were mortgages on property that were used for business purposes and which generated income. The payor spouse testified that he could not "go into the bank and say I'm no longer paying the principal on this mortgage". The Court found these were not funds that were available for support:
- [101] I am of the view that the evidence, particularly Mr. McKenzie's own testimony, establishes that the amounts paid in respect of mortgage principal were necessary to sustain the company. The mortgages were in respect of property used for business purposes. Indeed, the land and buildings were core components of one aspect of the company's business. Both

the property holdings and the mortgages were long-standing, and there is no suggestion that the company acquired the properties or entered into the mortgages as part of a scheme to manipulate amounts that might be available for support purposes. The principal payments were obligatory--they were ordinary payments made under mortgage contracts and were not the result of any decision to accelerate the retirement of the mortgages.

- [102] Hausmann establishes that the payor spouse bears the onus of demonstrating that corporate income is not available for support purposes. It should not, however, be read as requiring the payor spouse to demonstrate that the business could not be run in a fashion that generates more available income. In that regard, attention must be paid to certain passages of Kowalewich not quoted in the judgment in Hausmann:
- [42] The purpose of the [FCSG] is to permit an impartial assessment of "money" available to a spouse to pay child support. They are not just about actual income as a parent directly or indirectly determines it to be.
- [44] A court's effort to ensure fairness does not require a court to second-guess business decisions nor, as Justice Pitfield so colourfully noted in Stamoulos [Stamoulas v. Pavlakis, (1997), 32 R.F.L. (4th) 75 (B.C.S.C.)], at para. 44, to "place the largest available shovel in the company store." What it does require is that a spouse's allocation of pre-tax corporate income between business and family purposes be assessed for fairness by an impartial tribunal when parents cannot reach agreement on priorities as they would in an intact family and may upon separation under s. 15(2).
- [45] To determine whether "Total income" fairly reflects money available for child support, a court might ask what an objective well-informed parent would make available for child support in the circumstances of a particular business over which the parent exercised control, having regard to the objectives of the [FCSG] the underlying parental obligation to support children in accordance with one's means, and any applicable situation in s. 17.
- [103] Addressed in this light, Camaxco's decision to use income to pay down its mortgages in an ordinary, long-established manner, in accordance with its mortgage covenants, is eminently reasonable. The alternative--refinancing the existing mortgages--would make no business sense. Considered in light of the financial positions of the parties and the established pattern of running the business, it is entirely appropriate that corporate income was directed to mortgage payments and not made available for support purposes. In the result, corporate income used to pay the business's mortgage payments (including the principal amounts) cannot be said to be available for support purposes and should not have been included in Mr. McKenzie's guideline income under the SSAG.

- [71] Using the test in McKenzie, has the respondent established by clear evidence that the principal portion of the monthly mortgage payments should be deducted from the accounting determination of pre-tax corporate income because they were needed to sustain the company as a viable enterprise and do not fairly reflect all the money available to him for the payment of support?
- [72] In my view, the respondent has established that the principal amounts paid on the mortgage are needed to sustain X as a viable business. I do not agree that McKenzie is limited to facts where a company has no other resources to pay the mortgage so that it has to in effect strip itself of cash. The mortgage is on property used solely for business purposes. There are some cash reserves in the corporation, but considering that the property is at present the sole revenue generating asset of X, there is one tenant, it is a special purpose building, there is presently not an excess of working capital, the decrease in rent, what the respondent views as a decline in the industry, and that some tenants improvements will be made, I do not think it is unreasonable for the corporation to keep some cash to shield itself in the event of a negative financial event. I do not consider that X is retaining cash that could otherwise be used for support without affecting the viability of the company. X owes substantial shareholders' loans to its shareholders in addition to the mortgage.
- [73] The property and its business were in existence prior to the separation. There is no suggestion that X entered into the mortgage as part of a scheme to manipulate amounts that might be available for support. Nor is there evidence that the mortgage payments were accelerated to decrease the amount of money available for support. The experts have indicated the principal paid was approximately \$313,000 each year. However, I will comment on what appears to be an increase in the mortgage sometime in 2016.
- [74] The parties have exchanged financial information. Not all of it is in evidence (for example general ledgers) but the financial statements of the corporations, including comparative information for 2016 are in evidence. There is also evidence of extensive correspondence between counsel as to various financial issues and disclosures of further information. Not every issue which was raised between counsel became an issue on this hearing. The financial statements that are in evidence do not show an increase in the total amount of the long term debt (being the mortgage plus shareholders loans) of X. However the financial statements do show that sometime in 2016, X refinanced with an approximately \$2.2 million increase in the mortgage and a corresponding approximate \$2.2 million decrease in shareholders' loans, 50% of which appears to have been subsequently paid to Connor Industries. In one letter from claimant's counsel she requests the mortgage documents from 2015 to date, including but not limited to the refinancing which allowed the respondent to draw one million dollars in February 2017. I conclude claimant's counsel was aware of the event. Correspondence between counsel shows the 2015 mortgage commitment letter was produced. I do not see an explanation in the written correspondence between counsel as to the one million dollar repayment of the shareholders loans, however neither counsel referred to any of this in argument. In the absence of that, I assume any concern was

satisfied. Claimant's counsel argued that on the approach used by the accountants, shareholders loans were not treated as income, but are relevant to whether money is available within the corporations for the payment of principal. The financial information that is before the court is sufficient for the respondent to establish that the total long term debt has not increased above what it was at the time of the trial decision, even though it appears there was a reallocation of that debt between the mortgage and the shareholders loans.

- [75] The claimant suggests that X could restructure the mortgage so that just interest was being paid. However, as stated in McKenzie, restructuring is not something that is necessarily required of the payor. While the respondent did not give evidence that he tried to restructure the mortgage to be interest only, there is evidence that he tried to increase the mortgage in 2018 to fund improvements and was declined, and there is evidence of a debt covenant. Given this evidence, in my view, it is unlikely the bank would agree to interest payments only. Further, although there was no evidence from the other shareholder filed on the applications, I have considered that to refinance, the other shareholder would have to agree to a principal only mortgage. In my view, the respondent has established that the principal payments are obligatory for X to earn income and that restructuring is unlikely.
- [76] To borrow the words of McKenzie, in my view, X's decision to "use income to pay down its mortgage in an ordinary, long-established manner, in accordance with its mortgage" is reasonable, and it is not required to restructure millions of dollars of mortgage (even if that were possible) to in the short term provide increased support. In all the circumstances, I find it is appropriate that corporate income be directed to the presently structured mortgage payments and is not money fairly available for support.
- [77] I agree with the claimant that Mr. Justice Harvey intended that spousal support be paid at the high end of the range and that child support be paid without set-off in recognition of the parties' disparate financial circumstances. This is a factor to consider, but this is not an appeal of Mr. Justice Harvey's order, nor should this be an attempt to reallocate through support payments what the claimant sees as an unfair distribution of assets. These are the respondent's assets that were excluded by the pre-nuptial agreement and he is entitled to make use of them to earn a living, with all fair, reasonable and needed expenses to maintain these as a viable business. The spousal support will, however, continue at the high end of the range, and the child support without set-off.
- [78] I therefore deduct from the pre-tax income of X the amount of the mortgage principal in the amount of \$156,000 (being the respondent's 50% interest in the principal repayments) per year. All non-cash amortization of assets, as done by the experts, must correspondingly be added to the pre-tax income.

Write-off of the Line-Travel loan

- [79] During the fiscal year ended September 30, 2018, X wrote off a loss of \$221,402 related to a loan or investment in "Line Travel". The experts agree this was a non-cash accounting loss for an investment, most of which occurred many years before.
- [80] Ms. Walters has added back 50% of this loss (\$110,701, being the respondent's 50% interest in X) as income available to the respondent. Mr. Spence disagrees. Ms. Walters states that her instructions were to calculate income on a prospective basis. She opines that X is not in the business of lending money, so this type of transaction is unlikely to recur in the future and is a non-recurring loss.
- [81] Mr. Spence states his instructions were to calculate income on a year-by-year basis (a retrospective basis), and this was therefore included in the year it was determined by management to be not collectible. Mr. Spence testified that typically realized capital gains are included in income (unless it is a non-recurring event where the parties are trying to determine future income), so it would be inconsistent to not claim realized capital losses. He opines that with the benefit of hindsight, it would be appropriate to reduce X's income for those prior periods when the funds were advanced, however this is not practical. Generally accepted accounting principles require assets to be written down at the time the net realizable value becomes known. In cross-examination, Mr. Spence agreed that if there was evidence that years ago it was concluded by X that the Line Travel investment was worthless, that is when it should have been written off. He also agreed he saw no documents concerning the Line Travel investment but relied upon information provided to him by the respondent and his personal accountant. The respondent had told him he tried to sell the technology in 2012 and then again in 2017 or possibly 2018, and it became evident the technology had become redundant or stale-dated. Ms. Spence did not know if Line Travel had been canvassed at trial before Mr. Justice Harvey.
- [82] There is no allegation that the Line Travel investment was not a legitimate business loss. The issue is the timing of the write-off. The claimant argues this was an investment from many years prior to the trial, that was known to be bad at the time of trial, was canvassed at trial, and the decision to write off the investment in 2018 is an attempt to decrease income for support purposes. The claimant again notes that the respondent did not swear any affidavit regarding this expense and why X decided to write it down in 2018, however she accepts as true, the representation of the respondent's counsel in a letter to her dated October 11, 2019 regarding this expense. That letter, which is in evidence, states:

As to your questions about Line-Travel, I confirm that the information about the write down on Line Travel is notorious and replete throughout the materials. The \$221,402 write down relates to the original capital cost of the Line Travel equipment and subsequent costs Line Travel incurred for its pro rata share. That's ancient history and the business of Line Travel was explored at trial. In any event, the company was unable to realize any of those sums until the equipment and business were commercialized. Multiple attempts were made, (there was evidence about this at

trial) however the company was unable to get off the ground at all. The reason for that is that there were technical challenges and design shortcomings. In the intervening years, new technology has eclipsed the Line Travel centerpiece, and accordingly, the investment is worthless. The debt to [X] cannot and will never be repaid. None of the tangible or intangible value in Line Travel is recoverable and so it was written down as is entirely permitted;

[Emphasis added.]

- [83] The claimant argues that if the issues regarding Line Travel were "notorious and replete throughout the materials", then the write off should have happened prior to 2015, and this is not a material change in circumstances.
- [84] The respondent argues that the Line-Travel expense was written off in accordance with accounting principles when it was determined it was worthless, and the court is not required to nor should it second-guess the timing of the write-off.
- [85] The test in s. 17(2) of the Guidelines is whether the fairest determination of the respondent's annual income would be to allow this investment loss as a deduction in the calculation of Guidelines income. In my view, the respondent has not discharged the evidentiary burden of demonstrating why this non-cash expense was written down in 2018 as opposed to an earlier time, and should not result in a finding that those funds are available for support purposes. The respondent did not swear an affidavit regarding this write-off and the onus is on him. The parties agree the Line Travel investment was canvassed at trial, although the trial transcripts were not in evidence on these applications. In my view, the fairest determination is that this was a non-cash accounting entry and the respondent has these funds available for the support of his children and the claimant.
- [86] I therefore add to the pre-tax income of X the amount of the Line-Travel write-off, which results in an increase of \$110,701 for the respondent's Guidelines income for 2018.

Other adjustments by experts

- [87] These are all relatively small amounts compared to the above two issues. I will address each.

Rental reported by the respondent in his 2017 personal tax return

- [88] Ms. Walters adds the amount of \$4,481 back to income because it is non-recurring. Mr. Spence does not "necessarily disagree" it is non-recurring, but did not add this back because he was calculating Guidelines income on a year-by-year basis, and not prospectively. In cross-examination Mr. Spence said he was not aware this expense related to a personal home the respondent purchased in Arizona. He appears not to have had any documents relating to this. The only evidence of the respondent was that he was diversifying, and he purchased the home in Phoenix which was an "absolute bargain". He states it is a "speculative venture which [he] can enjoy in the interim and possibly recover some funds from in the future". In my view, this is a personal expense. I find the respondent has not discharged the burden of establishing these funds were not available for support. I find this

should be added back to the respondent's income for support.

Legal fees expensed by Connor Industries in 2018

[89] The parties disagree whether this was a personal expense and therefore not deductible or whether it was a business expense and therefore deductible. Ms. Walter added it back on the assumption it was personal. The expense is a costs award that the respondent was required to pay to the claimant's former counsel for an unsuccessful action for alleged breach of privacy. I have reviewed the reasons for judgment in the Supreme Court and the Court of Appeal and find this is a personal expense, and not an expense that should be considered a corporate expense for the purposes of support. The action concerned disclosure of certain personal information in the course of this family law litigation. I find the amount of this expense, grossed-up for income tax benefits (\$69,721) should be added back to the respondent's income as money available for support.

Unrealized loss in 2017 and an unrealized gain in 2018 in foreign exchange fluctuation in Connor Industries' investment portfolio

[90] These were accounted for in Connor Industries' financial statements. They represent unrealized gains/losses in foreign currency investments which were translated to Canadian dollars for the purposes of the financial statements. Usually, unrealized gain/losses are not reflected in financial statements. Mr. Spence makes an adjustment for these because they are unrealized gains/losses. Ms. Walters makes adjustments because they reflect the performance of Connor Industries' investment portfolio during the year. In my view, Mr. Spence's approach is correct, and these gains and losses are not available for support.

Amortization of chattels in 2017 and 2018 in X

[91] These are included in X's financial statements for calculation of income. Mr. Spence added back amortization reported by X of both real property and chattels. Ms. Walters states that "it is our understanding that only amortization relating to real property should be added back". In the absence of any evidence from the respondent as to the nature of the chattels being amortized, I find that amortization for both chattels and the building on the real property, should be added back to pre-tax corporate income. They are non-cash accounting entries.

Differences in employee insurance plan amounts

[92] Ms. Walters opines that the employee benefits expense recorded in fiscal 2017 was in excess of "normal" amounts, and compared it to other years. She added back the difference on the assumption this was a personal expense. Again, there is correspondence between counsel discussing this issue, but little evidence from the respondent. The respondent swears that he pays through X 100% of the extended medical and dental coverage at a cost of about \$5000 per year. Until 2017 he paid the full premiums on that coverage for the benefit of the

claimant as well. Since 2017, only the children and he are covered. I am not satisfied the respondent has established the children's extended health benefits are a corporate expense for the purposes of calculating Guidelines income so I add this back.

Difference in personal legal fees that were paid by Connor Industries in 2017

- [93] This relates to a minor difference in the amount of personal legal expenses that were recorded as corporate expenses. I have accepted Mr. Spence's figure as he is the respondent's accountant.

Other arguments of parties

- [94] The respondent argues that his income is decreasing and he is encroaching on capital, and in support of this refers to Connor Industries' balance sheet which shows decreasing assets. The claimant points out that liabilities have also decreased, the respondent has changed the way he is taking money out of the companies, and he has not produced the marketable securities statements nor details in his F8 financial statement of how he may have drawn on capital and how his assets have been depleted. The claimant further argues that even if the respondent is encroaching on capital, that is a function of how he is spending, not his income.
- [95] I find that while accounting income has recently decreased, it does not correlate exactly with a decrease in money available for support, nor has the respondent established that he has been required to encroach on his capital to make the support payments. A review of the financial statements shows the following:
- a) It is impossible to tell from only the balance sheets of X whether its assets are increasing or decreasing in value because the current market value of the Alberta property is not shown. The balance sheet shows that long-term debt is being paid down, that cash decreased in 2018, but in the same year there was a \$200,000 payment of shareholders' loans. There is no balance sheet for 2019 contained in Mr. Spence's report.
 - b) Income in X has decreased starting in 2018 primarily because the lease revenue decreased, and the mortgage interest expense increased. Rental revenue dropped from \$1,001,000 to \$836,000 from 2017 to 2019. At same time, interest expense increased from \$163,000 to \$212,000 over the same time period. On those two factors alone, comparing 2019 to 2017, that is a decrease in annual income of \$214,000.
 - c) It is impossible to tell from only the balance sheets of Connor Industries whether its assets are increasing or decreasing, because the primary asset is marketable securities and they are recorded at book value. The financial statements shows a \$315,000 decrease in the book value so presumably some were sold. At the same time, there was a net \$150,000 repayment of shareholders loans to the respondent in 2018, \$100,000 of which came from X, and an approximately \$50,000 increase in cash. There is no interim balance sheet for 2019 contained in Mr. Spence's report.

- d) The income of Connor Industries decreased for two main reasons. Dividends from marketable securities have remained somewhat constant, but the combined gains/losses on disposal of investments plus interest income has decreased. The net gains and interest were approximately \$41,000 in 2016, \$65,000 in 2017, \$7,000 in 2018 and \$2,000(projected) in 2019. This decrease was not explained by the respondent. The second reason is that there were no consulting fees earned by the respondent in 2019. He had previously earned consulting fees of \$55,000 in each of 2017 and 2018. The respondent states that the oil and gas industry declined and that is why he did not earn any consulting income.
- e) Any assessment of the balance sheets and income statements of the two corporations has to take into account how funds have flowed between them. Since the trial judgment, X has changed the way it distributes money to Connor Industries. Since 2017, X has not declared a dividend, however, the experts have now included the income of X in their calculations of Guidelines income, so any income in X is captured. However, funds have now also been distributed by way of repayment of shareholders loans.
- f) The respondent's personal financial records and statements of investments were not in material before the court, and further the marketable securities within Connor Industries were not valued (nor was the company) in the respondent's F8 financial statement, so it is impossible to say if these have been encroached upon.

2019 income

- [96] There is a dispute whether the court should determine 2019 Guidelines income at this time. This is a high-conflict matter and there would be a benefit in trying to avoid another application to court. However, the complete financial statements of the corporations have not been produced and in the absence of those, and when the claimant and Ms. Walters have not had an opportunity to consider them, I decline to determine the 2019 Guidelines income. The rental revenue of X has decreased while the mortgage interest has increased, and there will be decreased revenue from that source to some extent until 2023. However, the decline in investment income and consulting income is uncertain and there is missing information for 2019.
- [97] Although I have decided not to make a determination of 2019 Guidelines income for the respondent at this time, I have included Mr. Spence's calculations and the experts' comments below as providing an approximation of how Guidelines income may be affected by the decrease in rental revenue. I advised the parties at the hearing I was seized of their next application regarding fines and other financial issues. By the time the parties appear before me again, if not already, the complete financial statements for 2019 should have been produced. If the parties cannot agree on the 2019 income I will hear the parties then on that issue.
- [98] The issues raised by the experts so far regarding calculation of 2019 Guidelines income are as follows:

- a) Mr. Spence estimated interest and investment income of \$9,000 in 2019, which is the same amount the respondent earned in 2018. Ms. Walters states that in 2017 and 2018 the respondent earned \$11,000 and \$17,000 respectively in interest and investment income, and questions why 2019 is lower.
 - b) Ms. Walters questions travel expenses of \$3600 estimated from \$3000 incurred for the first 10 months. Ms. Walters states it is "unclear to us why the company would incur travel expenses if it was assumed it would only be generating passive income through its investments". She also questions whether this was personal or discretionary assuming consulting activities were not undertaken. Mr. Spence responds that he was advised this was business travel to market consulting services.
 - c) Ms. Walters questions why X had interest and bank charges that were significantly higher than interest in the three previous years. Mr. Spence responds that he was advised that the interest rate on the X mortgage varies with the prime rate, and in 2019 the prime rate was 46% higher than previously, and the interest figure was not an estimate, but was actually in the financial statements.
 - d) Ms. Walters questions a \$10,000 travel expense, and suggests it may be discretionary travel expenditures. She states it is "unclear to us why travel expenses of this magnitude were incurred given the nature of X's operations as a property holding company, with one lessee". Mr. Spence states he was advised that these were business expenses to travel to Alberta to meet with contractors performing work on the property and to attend meetings with the tenant.
 - e) Ms. Walters' comment regarding the differences in employee insurance expenses discussed in para. 92 above, caused Mr. Spence to reconsider his add back of the 2019 benefits expense on the assumption it was a personal expense. He states that he had previously added back the entire amount of employee insurance benefit dental expense (\$22,000) for 2019, plus tax gross-up (a total of \$41,000), on the assumption it was a personal expense. He now thinks this was an error because he was informed this was a "pay as you go" plan and the increase is a function of the type of the plan and they were "primarily for the benefit of [the respondent's] children".
- [99] For the purposes of the chart below, I have added back the grossed-up dental expenses to Mr. Spence's calculations, but I am not making a determination on this issue. As to the other items above, on the assumption the hearsay facts relied upon by Mr. Spence are true, I have not made an adjustment to income based on Mr. Spence's projection, but again am not making a determination with respect to these matters. Hopefully the parties can agree on these issues.

Determination of respondent's Guidelines income

[100] I make the following determination of the respondent's Guidelines income for 2016 to 2018, and include Mr. Spence's projection for 2019 with the adjustment for employee insurance expense:

2016

2017

2018

2019

Income available from Spence report

\$531,000

\$206,000

\$191,000

Income available from Ms. Walters report

\$540,000

Add back Line Travel

\$110,701

Add back personal legal fees, grossed-up

\$69,721

Add back rental loss

\$4,481

Less adjustment for mortgage principal

\$(156,000)

Add back personal dental expenses, grossed-up

\$41,000

Total

\$384,000

\$535,481

\$386,422

\$232,000

[101] The above determinations for 2016 to 2018 are to be used for the calculation of child support. As I have been able to make determinations of income, there is no need to impute income to the respondent as argued by the claimant. The claimant's Guidelines income is not relevant to the calculation of child support because Mr. Justice Harvey ordered that the amount paid be without set-off. There is no material change in circumstances that would indicate this part of his order should be changed, nor was it suggested by the parties.

[102] The above does not include any s. 7 expenses which the parties did not address. The respondent states he has been paying the amount of \$6724 per month in child support. I will leave it to the parties to calculate any overpayment or arrears as there is a dispute as to whether a prior amount owing arising out of the January 2017 order has been determined.

Has there been a material change in circumstances for spousal support?

[103] Pursuant to s. 17(4.1) of the Divorce Act, before a court makes a variation order, the court must be satisfied that a change in the "condition, means, needs or other circumstances" of either spouse has occurred since the making of the last order. As stated in L.M.P.:

- a) the change of circumstances must be material, meaning if known at the time, would like have resulted in different terms: para. 32;
- b) the focus is on the prior order and the circumstances in which it was made: para. 33. What amounts to a material change will depend on the actual circumstances at the time of the last order: para. 34; and
- c) in general, the material change must not be temporary: para. 35.

[104] Neither party argues any change except income. Mr. Justice Harvey set 2015 Guidelines income at \$402,900 and ordered spousal support based on this amount moving forward unless varied by the court or agreement. In the four years prior to the trial judgment, income had varied from a high of \$453,000 to a low of \$328,000, a difference of \$125,000. Variations of income were part of the circumstances that existed at the time of the making of the orders, and some variation is therefore not necessarily a change in circumstances. Further, pursuant to s. 17(1) of the Guidelines, fluctuations in a spouse's income over the past three years may be considered in determining what is fair and reasonable.

[105] The issue is how much change in income is required to constitute a material change of circumstances on the facts of this case. The average of 2016 to 2018 Guidelines income is \$435,301 per year. If the projected 2019 income based on Mr. Spence's calculations is either eventually agreed upon by the parties or is in some measure reflective of what may eventually be determined by the court if necessary, then the average Guidelines income from 2017 to 2019 is \$384,967.

[106] While the increase and decrease surrounding the 2018 income is large, it was temporary, and the court has the benefit of being able to assess this in the context of three years of income where an average can be calculated. In my view, considering the fluctuations of

income that would have been known to have taken place at the time of the trial orders, the \$435,301 average is not a material change in circumstances. This is a \$32,000 increase. While the absolute dollar figures may be a material change for some families of more modest means, on the income of the respondent, I do not consider this a material change in circumstances as it is less than a 10% change.

[107] I find neither the respondent nor the claimant have established the threshold requirement under s. 17(4.1) of the Divorce Act to vary the order of January 2017 with respect to the respondent's Guidelines income and spousal support. The existing January 2017 order is not varied with respect to spousal support.

Claimant's income

[108] The respondent is seeking an increased imputation of income to the claimant starting from 2019 forward, and argues this should be between \$50,000 and \$80,000.

[109] Pursuant to s. 17(4.1) of the Divorce Act, the respondent must establish a material change in circumstances. The respondent argues that the change in circumstances is that the claimant continues to be intentionally underemployed, and that enough time has now passed since the trial judgment that the imputation of income to her should be increased.

[110] The respondent argues the claimant has exactly the same obligations to work as he does. In 2016, Mr. Justice Harvey found she was intentionally underemployed and imputed income of \$30,000 going back to 2014. Pursuant to s. 19(1)(a) of the Guidelines, the court may impute income:

19 (1) The court may impute such amount of income to a spouse as it considers appropriate in the circumstances, which circumstances include the following:

(a) the spouse is intentionally under-employed or unemployed, other than where the under-employment or unemployment is required by the needs of a child of the marriage or any child under the age of majority or by the reasonable educational or health needs of the spouse;

[111] Four years after the trial judgment, the claimant has still not earned income. The respondent argues that prior to having children, the claimant made \$80,000 per year as an administrative assistant from an employer that was arms-length. The claimant has skills, time and resources. The parties separated in June 2012 and she has received over a million dollars in support. She has the children one-half the time and has her other time free. After separation she trained as a yoga instructor and then a counsellor. She is 20 years younger than the respondent. The respondent refers to the claimant's F8 financial statement where she indicates she won't be able to make more than what is imputed to her in 2020.

- [112] The claimant states the most she earned from an arms-length employer prior to having children was \$45,000 per year. She made \$90,000 when employed by the respondent, and earned \$80,000 when employed by the company who purchased the respondent's interest in a business and who kept her on after the sale. This was not arms-length employment.
- [113] The claimant says that after separation she trained to become a yoga instructor but then decided this was not viable. Starting in October 2016 she embarked on education to have a career and build toward self-sufficiency. She completed the formal course work to become a counsellor in 2018. In 2019 she wrote the qualifying exam to become a "candidate". She can take clients but only on a very limited scope until she completes practical hours under supervision. She must pay for practical hours at about \$100/hour. She expects it will take another 350 hours before she completes the training. She states she is also looking into further courses specializing in different theories of interest to her while she gains clinical supervised hours to bolster her credentials and attract clients.
- [114] The cost to date of the education has been approximately \$20,000. She anticipates it will be a further 18-24 months and more than \$50,000 before she is fully qualified and earning income. After taking into account expenses to set up and run her business, she expects "it's likely to be several years before I earn the income imputed to me by Justice Harvey let alone more than that". She states her previous experience was as an executive assistant in the oil industry and she had no work experience or references in BC. She has otherwise has been occupied by what she alleges is harassment by the respondent. She is forced to devote time to applications such as these.
- [115] In my view, the claimant continues to be intentionally underemployed. While retraining to be a counsellor may be something she is interested in, she has not provided any information as to what she eventually expects her income will be and whether it will be more than she could be making as an administrative assistant, or legal assistant for which she also has training. She states she believes this course will be better in the long term but she does not expect to be making even \$30,000 for several more years. I note that \$30,000 equates to approximately full time work at minimum wage.
- [116] The claimant already has training and other skills where she could have been employed for the past four years since the trial. She previously worked as an administrative assistant and previously had trained as a legal assistant. She has not provided any information as to why she did not return to a job in that area. The fact that the work as an administrative assistant was in the oil and gas field is in my view not a significant negative factor in employability as I would expect those skills to be transferrable. Further, the fact she had not yet worked in BC is not a significant negative factor.
- [117] In my view, the lack of any income for four years after the trial judgment, and with apparently no prospect of even earning minimum wage for several more years, constitutes a material change in circumstances. It is not reasonable to take this training, this many years after separation, at the expense of the respondent, particularly when there is no evidence

she will make more than what she could earn at other jobs for which she has training and experience. If the claimant had commenced employment in the fields in which she already had training or experience in 2014, or even 2016 after the trial judgment, she would likely be earning more than \$30,000 per year. Alternatively, if she had embarked on this training in 2014 rather than training to be a yoga instructor which she abandoned, she would now be in a position which she believes would be more beneficial for her in the long term.

- [118] Considering the factors in s. 17(7) of the Divorce Act, in particular taking into account the findings of Mr. Justice Harvey, that the claimant stopped her career to have children and support the respondent through the home; that there is a significant disparity in the parties resources as a result of the pre-nuptial agreement; and that "in so far as practicable" one of the objectives of a spousal support order is to promote economic self-sufficiency within a reasonable period of time, I find that the increase in the imputed income must be modest. I impute income to the claimant of \$40,000 per year commencing 2019 for spousal support payable effective June 1, 2020.
- [119] The respondent also argues that the claimant withdrew \$70,000 from her RRSP in 2019 and this should be imputed to her in the calculation of her income. I do not accede to this argument. The claimant states that in early 2019 she purchased a condominium near where the respondent lives. She used part of the RRSP withdrawal to fund the purchase and part to fund legal and expert fees for this litigation. The claimant argues that even if the RRSP withdrawal were considered income, the use of these funds for this purpose is not a material change in circumstances. It is a one time event and does not reflect a lasting change in funds available.
- [120] In *McKenzie v. Perestrelo*, 2014 BCCA 161, at paras. 82-83, the Court summarized case law on whether RRSP withdrawals should be included in Guidelines income. There is no clear rule. RRSP withdrawals are presumptively included in income for the purposes of child support, but not necessarily for spousal support. The court will consider the reason for the withdrawal. For example, where amount had been accounted for in the division of assets and was used to fund legal fees it was excluded: *de Bruijn v. de Bruijn*, 2011 BCSC 1546 at para. 34.
- [121] In this case, the claimant's Guidelines income is not relevant to child support because child support is to be calculated without set-off. In my view, considering the disparate financial circumstances of the parties, that this was a non-recurring event, that the funds were withdrawn to partially fund the payment for a home near where the respondent lives, and to fund legal fees, the most fair and reasonable determination is that the \$70,000 is not included in the claimant's income for the purposes of spousal support.

Orders

- [122] The respondent's Guidelines income for the purposes of child support is as follows:

- a) 2016 - \$384,000
- b) 2017 - \$535,481
- c) 2018 - \$386,422

[123] Based on the above Guidelines incomes, I order that paragraph 4 of the January 27, 2017 order is varied so that the respondent pays to the claimant monthly child support payments as follows:

- a) commencing effective June 1, 2017, the amount of \$6,452;
- b) commencing effective June 1, 2018, the amount of \$8,816;
- c) commencing effective June 1, 2019, the amount of \$6,490, until further court order or agreement between the parties.

[124] The respondent's and the claimant's applications to review and vary spousal support based on an alleged change in the respondent's Guidelines income is dismissed.

[125] The claimant will have an imputed income of \$40,000 per year commencing 2019 for the purposes of calculating spousal support payable effective June 1, 2020, until further order of this court or agreement of the parties.

"Norell J."

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