
CANADA / JUDGMENT

Vincent v. Vincent

2012 BCCA 186

COURT

British Columbia Court of Appeal

DECIDED

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2012 BCCA 186 Vincent v. Vincent

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Vincent v. Vincent,

2012 BCCA 186

Date: 20120430

Docket: CA038724

Between:

Shawn Peter Vincent

Appellant

(Plaintiff)

And:

Kim Jenny Vincent

Respondent

(Defendant)

Before:

The Honourable Madam Justice Huddart

The Honourable Mr. Justice Groberman

The Honourable Madam Justice Garson

On appeal from: Supreme Court of British Columbia, December 17, 2010

(Vincent v. Vincent, Courtenay Docket D5158)

Counsel for the Appellant:

K. Nordlinger, Q.C.

Counsel for the Respondent:

E. Chesterley

Place and Date of Hearing:

Vancouver, British Columbia

November 3, 2011

Place and Date of Judgment:

Vancouver, British Columbia

April 30, 2012

Written Reasons by:

The Honourable Madam Justice Huddart

Written Reasons Concurring in the Result:

The Honourable Madam Justice Garson (page 40, para. 135)

Concurred in by:

The Honourable Mr. Justice Groberman

Reasons for Judgment of the Honourable Madam Justice Huddart:

- [1] This appeal from the retroactive provisions of an order varying child support under the Divorce Act, R.S.C. (1985), c. 3 requires consideration of one of the most troubling issues in child support cases. Fundamental to this appeal is the chambers judge's application of the discretion given a court by ss. 17-19 of the Federal Child Support Guidelines, SOR/97-175 [Guidelines]. At its root is a small businessman's piecemeal, unorganized and incomplete disclosure of his financial affairs. Timely full disclosure in accordance with the Guidelines and the Supreme Court Family Rules, B.C. Reg. 169/2009, would probably have avoided the application and this appeal and the consequent expense, better spent on his children, the support for the eldest of whom is its subject. Without full disclosure, settlement is nigh impossible.

The Issues

- [2] On 17 December 2010, the chambers judge granted the respondent's application to vary child support and increased the father's monthly child support payments to \$370 per month on an income of \$40,000. He also ordered the exchange of financial information on or before 31 July 2011 and each year thereafter. Neither party seeks to vary those orders. The reasons of the chambers judge are not reported. The father challenges concurrent retroactive variation orders by which he was to pay the following amounts: \$11,977.32 for 2006; \$106,560.91 for 2007; \$34,610.40 for 2008; and \$19,373.88 for 2009 based on incomes of \$150,912, \$1,161,420, \$383,718, and \$237,499 respectively.
- [3] The father submits there was no basis for the retroactive support order given that there had been no blameworthy conduct on his part and no significant change in his income during the relevant years. Moreover, he states there is no evidence that his daughter had unmet needs over the years since the separation and he has a new family who is struggling financially, to whom payment of the impugned order would cause hardship. He does not invoke either s. 4(b)(ii) or s. 10 of the Guidelines.
- [4] The father's income comes from business interests centred in Courtenay on Vancouver Island. Their focus is residential and commercial real estate development and construction. The financial documentation provided to the chambers judge in response to the respondent mother's application to vary was voluminous, intermingled with documents concerning access to his daughter and neither complete nor well-organized. It is somewhat improved and up-dated by evidence the parties agree should be admitted as new evidence on this appeal to avoid the expense of a new hearing, but still incomplete. The major deficiency is the lack of a statement of benefits received from corporations in which the father has a controlling interest for any of the relevant years as required by s. 21(1)(f) of the Guidelines. Those statements would have facilitated counsel's preparation for the hearing, the hearing itself, and this appeal. This deficiency would have been less significant if the father had provided complete financial statements for 2007, 2008 and 2009 of three such corporations: 557571 B.C. Ltd ("557571"), Estate Realty Ltd ("Estate"), and Robannah Developments Ltd ("Robannah"), complete copies of his personal income tax returns as filed for all relevant years as required by s. 21(1)(a) of the Guidelines and a current statement of net worth to permit evaluation of his ability to pay a retroactive order at the date of the hearing (December 2010) in accordance with the principles set down in *S.(D.B.) v. G.(S.R.)*, 2006 SCC 37, [2006] 2 S.C.R. 231 ("D.B.S.").
- [5] In these difficult circumstances, the chambers judge used a memorandum called an "Income Application" prepared by the mother's counsel to determine the father's Guidelines income, after finding unpersuasive the father's submission that only the income shown under the heading "Total income" in the T1 General form issued by the Canada Revenue Agency ("Line 150 Income"), less carrying charges should be included and that adjusted to exclude non-recurring income in some years as permitted by s. 7 of the Guidelines.

[6] The computations on which the chambers judge based the father's annual income for the four relevant years are these:

2006

2007

2008

2009

Line 150 Total Income

T1 General

Income Tax return

(Guidelines, s. 16)

52,170

311,080

33,796

35,000

Add 50% post-tax

corporate income of

Estate (Guidelines, s. 18)

15,214

20,838

Add 100% post-tax corporate

income of Robannah (Guidelines, s. 18

less dividends declared)

83,528

202,499

Add 50% post-tax income

of 557571

Add capital dividend

from 557571

365,482

208,922

Add capital gain on

sale of half interest in

principal residence [Guidelines Schedule III]

464,028

137,000

Guidelines Income

\$150,912

\$1,161,420

\$383,718

\$237,499

Monthly Child Support

1,039.11

9,191.08

3,195.20

1,984.49

Arrears

11,977.32

106,560.91

34,610.40

19,373.88

- [7] The mother acknowledges the Income Application contained errors in the application of the Guidelines not identified during the chambers hearing and agrees this Court should revise the order to correct them by deducting interest paid (Schedule III, s. 8), replacing taxable dividends with actual dividends received (Schedule III, s. 5), replacing post-tax corporate income with pre-tax corporate income (s. 18), removing a capital gain received in 2005 from the computation for 2008, correcting corporate income errors in 2007, and correcting an addition error for 2008. In addition, the record is clear the Universal Child Care Benefit was included in and not deducted from the Line 150 income in 2006. The relevant portions of the Guidelines are appended as Schedule A for ease of reference.

[8] When these corrections are made, the figures are these:

2006

2007

2008

2009

Line 150

52,170

311,080

33,796

35,000

Adjusted for:

UCCB

(1,200)

Interest paid re: 557571

(11,879)

(10,246)

Actual dividends received

from 557571/Robannah

(54,435)

(4,500)

Capital gain on

primary residence

464,028

Adjusted s. 16 income

39,091

710,427

33,796

30,500

Add (s. 18) 50% Estate

pre-tax income

less \$4,848 dividends paid

(not included in Line 150

income in 2006 or 2007)

17,717

27,139

(4,848)

not disclosed

Robannah pre-tax profit

less dividends paid

100,390

128,765

175,113

(s. 19) 557571 capital

dividend

208,922

Guidelines income

157,198

861,483

242,718

205,613

Monthly Child Support

1,358

6,852

2,024

1,736

Arrears

12,564

78,492

20,556

16,392[1]

- [9] The essence of the father's appeal is that the chambers judge erred in finding a basis in the evidence for any retroactive award. It is common ground that the father's income for Guidelines purposes for each of the relevant years must be determined before the ultimate issue can be resolved -- whether a retroactive order was merited having regard to the provisions of the Divorce Act as explained in D.B.S. In that regard, the focus of disagreement is the interpretation of s. 6 of Schedule III and the effect, if any, to be given to ss. 17, 18 and 19 of the Guidelines on the facts of this case.
- [10] In the father's submission, for Guidelines purposes the chambers judge should have considered only his Line 150 Income, adjusted in accordance with s. 8 of Schedule III of the Guidelines by the deduction of carrying charges and interest. Because all the other monies he received in the relevant four years were re-invested for the purpose of earning income or flowed from non-taxable capital gains, they should not be included. For the same reason, he seeks the deduction of the dividends included in his Line 150 Income for 2007 as permitted by s. 17.
- [11] The mother responds that the award is justified on the evidence before the chambers judge on the proper application of ss. 16-19 of the Guidelines, because to do otherwise would benefit the father's capital position at the expense of the daughter's educational opportunities.

Background Facts

- [12] The relevant background facts are few. The parties married at the end of 1995 and divorced on 19 November 1999. They had one child, a daughter, born 2 July 1997. At the time of the divorce D. Smith J. (as she then was) ordered the father to pay monthly child support in the amount of \$311.00 based on a Guidelines income of \$36,000. In addition, he was to pay his proportionate share of her daycare expenses.
- [13] The 1999 order contemplated a review "as soon as practicable" on the basis of documents the father was to provide for Simba Investments Ltd ("Simba"), a video rental business he was then operating, and Courtenay Construction Ltd (amalgamated in February 1998 with, and subsequently known as 557571), a company he co-owned and operated with his father. It owned and managed a commercial building until the building's sale in 2007 and the company's subsequent winding-up.

[14] To be included in the disclosure were revenue and profit statements for Simba and financial statements for 557571. That information appears to have been provided before a contempt application was heard on 11 September 2000 and dismissed. Simba had effectively ceased to operate by 2008. 557571 operated at a loss in 1999 and closed that financial year with retained earnings of \$19,671.

[15] The father's proceeds from the sale of 557571's building in 2007 are the focus of this appeal.

Disclosure

[16] Although the parents were often before the courts on access issues between 2000 and 2007, neither sought a variation of the 1999 child support order. The father made the required payments. At no time did he disclose an increase in his income as being material for Guidelines purposes or suggest his income had increased. About a payor's continuing duty in that regard, Bastarache J. commented, at paras. 124 and 125 in D.B.S.:

124 The date when increased support should have been paid, however, will sometimes be a more appropriate date from which the retroactive order should start. This situation can most notably arise where the payor parent engages in blameworthy conduct. Once the payor parent engages in such conduct, there can be no claim that (s)he reasonably believed his/her child's support entitlement was being met. This will not only be the case where the payor parent intimidates and lies to the recipient parent, but also where (s)he withholds information. Not disclosing a material change in circumstances -- including an increase in income that one would expect to alter the amount of child support payable -- is itself blameworthy conduct. The presence of such blameworthy conduct will move the presumptive date of retroactivity back to the time when circumstances changed materially. A payor parent cannot use his/her informational advantage to justify his/her deficient child support payments.

125 The proper approach can therefore be summarized in the following way: payor parents will have their interest in certainty protected only up to the point when that interest becomes unreasonable. In the majority of circumstances, that interest will be reasonable up to the point when the recipient parent broaches the subject, up to three years in the past. However, in order to avoid having the presumptive date of retroactivity set prior to the date of effective notice, the payor parent must act responsibly: (s)he must disclose the material change in circumstances to the recipient parent. Where the payor parent does not do so, and thus engages in blameworthy behaviour, I see no reason to continue to protect his/her interest in certainty beyond the date when circumstances changed materially. A payor parent should not be permitted to profit from his/her wrongdoing.

[Emphasis added.]

[17] In September 2007, based on observations of a significant improvement in the father's lifestyle, including the acquisition of a new home, recreational property, cars and an airplane, the mother requested income information as to his gross income from the date of the divorce order and a Form 89 Financial Statement, then required by Rule 60D of the Supreme Court Rules of Court (now Form F8 of the Supreme Court Family Rules).

[18] Upon the receipt of such a request, s. 25(1) of the Guidelines provides in its relevant part:

25. (1) Every spouse against whom a child support order has been made must, on the written request of the other spouse ..., not more than once a year after the making of the order and as long as the child is a child within the meaning of these Guidelines, provide that other spouse with

(a) the documents referred to in subsection 21(1) for any of the three most recent taxation years for which the spouse has not previously provided the documents;

...

[19] The father was therefore required to provide at least these documents referred to in s. 21(1):

a. a copy of every personal income tax return filed by the spouse for each of the three most recent taxation years;

b. a copy of every notice of assessment and reassessment issued to the spouse for each of the three most recent taxation years;

c. where the spouse is an employee, the most recent statement of earnings indicating the total earnings paid in the year to date, including overtime or, where such a statement is not provided by the employer, a letter from the spouse's employer setting out that information including the spouse's rate of annual salary or remuneration;

...

f. where the spouse controls a corporation, for its three most recent taxation years

i. the financial statements of the corporation and its subsidiaries, and

ii. a statement showing a breakdown of all salaries, wages, management fees or other payments or benefits paid to, or on behalf of, persons or corporations with whom the corporation, and every related corporation, does not deal at arm's length;

[20] Over the next year the father provided voluminous information and authorized his accountant to provide any further information the mother required at her expense. He did not provide all the documents referred to in s. 21(1). His Form 89 Financial Statement was incomplete and inaccurate. Nevertheless, on 4 January 2009, the mother's counsel acknowledged this disclosure as seeming to "encompass the returns required."

- [21] Then, on 12 January 2009, the father filed an affidavit of his accountant who stated that he and his wife each owned one-half the shares in and both earned their incomes from Robannah, the wife as Building Services Co-ordinator with an annual wage of \$12,500 in 2007, likely to be the same in 2008. The accountant also provided some information about the ownership and affairs of Robannah, 557571, Simba and Belvin Developments Ltd ("Belvin"), a company in which Robannah has a one-third or one-half interest, for all of whom she was the accountant, and advised that she knew little about Estate for whom she did not do the accounting. To her affidavit was appended a document advising of the interest expense related to 557571 to be deducted from the father's income for the years 2004 to 2006 for the purpose of "arriving at a realistic figure."
- [22] On 15 January 2009, the father filed a further affidavit to which he exhibited financial statements for Simba for 2008 and Belvin for 2007 and 2008. Neither showed a profit. Simba owns a car and some computer equipment and showed amortization and other expenses related to those assets. Belvin owns land subject to long-term debt. Both are in a deficit position.
- [23] Finally, triggered by the father's response to the mother's earlier request for an examination on his "financial affairs", on 18 June 2009, the mother formally applied to vary the 1999 child support order under s. 15.1 of the Divorce Act and the Guidelines, commencing 1 January 2000. In her notice of motion, she requested provision of the father's applicable income documents pursuant to Rule 60D (now Family Rule 5-1) within 14 days and stated her intention to request an inference adverse to the father or the attribution to him of income and to examine him on his financial statement.
- [24] In the father's circumstances, the "applicable income documents" would include copies of his personal income tax returns for all relevant years, together with all assessment and re-assessment notices, his T4 slips or other statement of earnings from Robannah, and financial and benefits statement from companies he controls, to the extent they had not previously been disclosed.
- [25] Not all of those documents were provided before the father was examined on his 2008 Form 89 Financial Statement on 2 December 2009. Other information was provided in response to some unanswered questions in subsequent correspondence. Then, by way of exhibits to the father's affidavit on 27 September 2010, the father's accountant advised the father had received \$208,922 in capital dividends in 2008 as a 50% shareholder of 557751, that Robannah had a shareholder's loan in each of Amigo Ventures Ltd ("Amigo") [a one-third interest], Faivco Development Corp. ("Faivco"), Dyvin Developments Ltd ("Dyvin") [a one-third interest, one-sixth by 2009], which owns a recreational property without income], and D.J.V. Holdings Ltd ("DJV"), [a one-half interest], that he has received no personal income from Amigo or Belvin and that he received \$12,500 in wages and \$22,500 in dividends from Robannah in 2009. She also advised Robannah showed a (post-tax) profit of \$202,499 that year (apparently \$218,000 pre-tax) and that

...we now know that there is at least 50% likelihood that an accounts receivable from Grand Coastal in the amount of \$268,416.57 will not be collected due to poor economic conditions for recreational properties. If we had recorded 50% of this amount as a bad debt (\$134,208.29), Robannah's 2009 year-end profit would have been \$68,290.71.

- [26] Also exhibited to that affidavit were copies of personal income tax summaries for 2008 and 2009, and the father's 2009 personal income tax return with an attached T5 slip from Robannah showing the actual amount of dividends paid as \$18,000, as well as partial financial statements for 2009 for Amigo, Belvin, Simba and Robannah. The statements of liabilities are missing from those for Amigo, Belvin and Robannah. Amigo, like Belvin, owns real estate being held for development. Amigo purchased property in Comox intended for use as a public mini storage facility for \$410,000 in August 2005. Its 2009 assessed value was \$705,000. At that time, Robannah and its two partners in Amigo were awaiting municipal approval for that facility and contemplating other uses.
- [27] On this appeal, by way of an affidavit sworn on 28 September 2011, the father provided additional documents to support his claim that the chambers judge erred in fixing his income available for child support for each of the years 2006 to 2009. All were available in December 2010, most long before. Included was an updated financial statement in Form F8, declaring his child support Guidelines income as \$3750 monthly, moderately more than the \$40,000 at which the chambers judge set his income for 2010. That income includes \$1250 paid monthly by Robannah to his wife. Attached were his Tax Return Summaries for 2008-2010 with Schedule 4 and documents relating to his principal residence and recreational property in which he has a one-quarter interest.
- [28] Counsel agree the father's personal income tax returns for 2004 and 2005 were not before the chambers judge and are not included in the new evidence application. Neither could explain their absence. Of more importance is the absence of the benefit statements required by s. 21(1)(f)(ii) of the Guidelines and Rule 5-1 of the Supreme Court Family Rules for all relevant years, and financial statements of 557571, Estate, and Robannah.
- [29] The benefit statements appear not to have been expressly sought or voluntarily provided, despite their obvious relevance to the issues dividing the parties and benefit to a court. It seems both parties were content to rely on the corporate financial statements and the provisions of s. 19(1)(h) of the Guidelines. The absence of complete financial statements for Estate for 2008 and 2009, for 557571 for 2008 and for Robannah for 2009 is regrettable, for reasons that will become apparent when I turn to a discussion of the alleged additional errors in the computations.
- [30] The father explained his lack of earlier disclosure before, at or after his examination for discovery at paragraph 12 of his new affidavit:

At the time of the hearing of this matter, I was away in treatment at Edgewater Treatment Centre for alcohol addiction from November 19, 2010 to January 4, 2011. Prior to that, I had developed a drinking problem as the result of all the stress in my life. I am now sober and realize that I may

not have provided all of the necessary information to the court, particularly with regard to the properties. However I was never asked to provide further details, either at the Examination for Discovery or after. I was not available to deal with the Respondent's income calculations that counsel presented on the day of the hearing.

- [31] In his new affidavit, the father states that an investment Robannah made in a recreational real estate venture called "Island Coastal" has ended in such costly litigation that Robannah's cash has been depleted and he and his wife have gone into further debt to support that litigation. To that same affidavit is exhibited a current Form F8 Financial Statement. Despite indicating in Part 1B of that form that he was providing financial statements for corporations he controls for the three most recent financial years, no financial statement of any company was appended. Robannah's 2009 Financial Statement would have been helpful to a court called upon to exercise its discretion under ss. 17, 18 and 19 of the Guidelines. In his current F8 Financial Statement, the father lists the value of his shares in Robannah as "unknown" and his shareholder's loan as \$366,147.45. He does not mention Estate or 557571. In his 2008 Form 89 statement, he left "Part 3 - Property" blank.
- [32] In circumstances where an applicant is seeking adverse inferences from failure to disclose all relevant financial information and the imputation of income under s. 19 of the Guidelines, and the respondent is seeking the benefit of the court's discretion under s. 17, a court would ordinarily also expect to receive complete financial and benefit statements from companies the responding spouse jointly controls, without the need for an order. Little in the way of financial disclosure for the years 2004 to 2007 was made regarding other companies in which the father has an interest indirectly through Robannah (Amigo, Belvin, DJV, Faivco, Dyvin, and Island Coastal Developments Ltd), some or all of whom may have provided benefits to him or his wife directly. More was provided regarding the years 2008 to 2009, by which time the downturn in the economy is said to have affected all of them. Although reasonably complete financial statements were provided for the relevant years for Simba and Estate, no benefit statements were.
- [33] The father did not explain his failure to provide the complete 2009 financial statements of Robannah, nor those for 557571 for that year. He explained the absence of information about Estate in a paragraph agreed to have been erroneous.
- [34] On this record, it is not surprising the chambers judge relied on the mother's Income Application and varied it only to the extent one or other counsel identified errors in it after he granted an adjournment for that purpose. As the chambers judge noted in his brief comments, "much of the information was in the hands of Mr. Vincent."

The Legislative Scheme

- [35] All determinations of child support begin with finding the spouse's Line 150 income, a relatively straight-forward step one. The second step is to make whatever adjustments to that amount are required by Schedule III. Once these two steps are completed, the court must look to sections 17 to 20, to determine whether any of the exceptions set down in those provisions applies, and, if so, what effect they should be given on the facts of the case.
- [36] Section 17 gives the court discretion to deal with the problem of an income which fluctuates from year to year and with non-recurring income or losses such that the determination of a spouse's income under s. 16 is not the fairest determination of that income. As it relates to this case, this provision permits the inclusion of non-recurring capital gains and the exclusion of non-recurring dividends.
- [37] Section 18 provides discretion to deal with the situation where a spouse is in a position to manipulate income in his or her capacity as shareholder, director or officer of a corporation, such that a person's income under s. 16 does not fairly reflect all the money available to that spouse for the payment of child support. It permits the inclusion of pre-tax corporate income and benefits paid to non-arm's length persons.
- [38] Section 19 addresses situations where the spouse's disclosed income does not fairly reflect what should be paid in child support by permitting imputation of income. It permits the imputation of income in a variety of situations, including income which is tax exempt, under-utilized capital investments, and when there is a failure to provide income information.
- [39] Section 20 makes provision for non-resident payor spouses. It is not relevant in this case.
- [40] Guidance for the exercise of the discretion conferred by ss. 17 to 19 can be found in the authorities counsel provided: *Kowalewich v. Kowalewich*, 2001 BCCA 450, [2001] 9 W.W.R. 626; *Plett v. Plett*, 2009 BCSC 227; *Hausmann v. Klukas*, 2009 BCCA 32, 91 B.C.L.R. (4th) 201; *Hodgkinson v. Hodgkinson*, 2003 BCSC 1538, 44 R.F.L. (5th) 82; *Marinangeli v. Marinangeli* (2003), 66 O.R. (3d) 40, 38 R.F.L. (5th) 307; and *Shields v. Shields*, 2006 ABQB 368. Additional guidance can be found in *Ewing v. Ewing*, 2009 ABCA 227, 457 A.R. 238; *Schick v. Schick*, 2008 ABCA 196, 433 A.R. 242, and *J.M.D. v. R.M.J.D.*, 2011 BCSC 1295.

Discussion

- [41] Because the chambers judge relied on the computation of income for each of the four relevant years by the mother's counsel, he must be taken as having agreed with the understanding and application of the Guidelines reflected in the Income Application to which he referred as the mother's "chart" in his brief unpublished oral reasons. The first task of this Court is to decide whether there is a reviewable error in the computation of the father's income under s. 16 for any year additional to those identified by counsel in this Court.

- [42] The main task for this Court is to determine whether the chambers judge erred in principle or significantly misapprehended the evidence, or the award is otherwise clearly wrong: *Hickey v. Hickey*, [1999] 2 S.C.R. 518 at para. 11. The award will be clearly wrong to the extent the father has shown the chambers judge reached a conclusion which cannot reasonably be supported by the evidence: *Nielson v. Nielson*, 2007 BCCA 604, 75 B.C.L.R. (4th) 81 at para. 29.
- [43] I begin with the alleged errors of principle.

Tax-exempt profit on sale of principal residence

- [44] In the absence of any evidence as to costs incurred in 2007 to build their house on a lot on View Avenue the father and his wife purchased in 2005, the chambers judge included the difference between the purchase price of the lot and the sale price of the principal residence in determining the father's income for 2007. That was the "Not subject to tax" amount included in his 2007 Income Calculation on the mother's chart.
- [45] The father alleges the chambers judge erred when he accepted the mother's counsel's interpretation of s. 6 of Schedule III to require the inclusion of the profit on the sale of his interest in his primary residence on View Avenue in Courtenay. He then submits the chambers judge erred further when he determined the amount of that gain by deducting the purchase price from the sale price without regard to the cost of improvements made to the property in money and labour by the father and his wife. In his new affidavit, the father sets the costs of the improvements at \$638,000. That evidence is not disputed.
- [46] The mother reads the words "replace the taxable capital gains ... with the actual amount of capital gains" in s. 6 as stating clearly that all non-taxable capital gains are to be included. The father says the section requires an adjustment only to the taxable capital gains required to be included in Line 150 Income and does not require that profits from the sale of primary residences, which are not capital gains under the Income Tax Act, be included.
- [47] The mother's reading of the provision is consistent with the objectives of the child support provisions set down in the statement of objectives in s. 1 of the Guidelines, particularly (a) and (d). Children are to benefit from the financial means of both parents after separation and spouses and children in similar circumstances are to receive consistent treatment. This reading is justifiable because all profits realized from the sale of property which has increased in value provide "means" comparable to income from which children are entitled to benefit, whether or not they are taxable under the Income Tax Act. However, I prefer the reading of the appellant.
- [48] Section 16 is clear that a payor's annual income is to be determined "using the sources of income set out under the heading 'Total income' in the T1 General form issued by the Canada Revenue Agency" [emphasis added]. The Income Tax Act does not require the reporting of the sale of a property which qualifies as a "principal residence" during the entire period of ownership. Moreover, s. 6 is best read in conjunction with the definition of

"taxable capital gains" in s. 38(a) of the Income Tax Act. Essentially, a taxable capital gain is $\frac{1}{2}$ of the actual capital gain. The direction in s. 6 requires inclusion of the whole of the capital gain. The profit earned on the sale of a principal residence is exempt from taxation because, for the purposes of income tax, that profit and therefore the "capital gain," will be "nil" in circumstances like those in this case, as defined by the formula set down in s. 40(2)(b) and the description of capital gain in s. 39(1)(a) of the Income Tax Act.

- [49] Section 19(1)(h) of the Guidelines provides for the imputation of income from sources "exempt from tax" if the payor "derives a significant portion of income" from them. The inclusion of that provision negates any argument a profit from the sale of a principal residence is to be disregarded for purposes of the Guidelines. In my view, a profit from the sale of a principal residence may be considered in the exercise of this discretion given under s. 19(1)(h) and, when realized, as a non-recurring receipt under s. 17 of the Guidelines.
- [50] In appropriate circumstances, some or all of the profit realized on the sale of a principal residence may be included in income available for child support purposes. This view is consistent with those expressed about tax-free income in *Caterini v. Zaccaria*, 2010 ONSC 6473; *Colafranceschi v. Colafranceschi*, 2005 CanLII 10646 (ON SC); *Riel v. Holland* (2003), 232 D.L.R. (4th) 264 (ON CA); *Orser v. Grant*, [2000] O.J. No 1429 (Ont. S.C.J.).
- [51] Because the profit realized on the sale of a principal residence is not to be included by way of adjustment under Schedule III, it falls to consider the mother's alternative argument that a discretionary adjustment should be made under s. 19. I will consider that submission when I consider the discretionary adjustments for 2007.

Receipt of Dividends

- [52] The father states that his receipt of large amounts of money by way of dividends in 2007 and 2008 should not change his support obligations because they were one-time occurrences. He would have the Court deduct the entire amount of the 557571 dividend from his 2007 adjusted s. 16 income because Robannah needed all those monies for its continuing operation and he made that loan. For the same reason, he would have the Court refuse to impute any of the capital dividends as income under s. 19(1)(h) in 2008.
- [53] Counsel agree the dividend the father declared in his personal income tax return in 2007 comprised his share of the total dividends paid out (\$118,042) and the amount paid to redeem the owners' shares (\$99,700), and the gross-up required by the Income Tax Act.
- [54] As the father's counsel recognized, these are issues to be resolved under s. 17(1), not in the determination of the father's adjusted s. 16 income for either year. In *Plett, Hinkson J.* (as he then was) used this discretion to exclude a portion of dividends received in comparable circumstances (the payor had invested them in income-earning property), noting that the net revenue of any such investment would likely be income in the payor's hands for the purposes of the Guidelines. He also deducted the portion of the dividends that could be seen

as return of capital.

- [55] Clearly, both the income and capital dividends were available to the father for personal use and thus for child support. He chose to invest them in Robannah by way of a shareholder's loan in 2007, thereby increasing his equity in that company. In Hausmann, Kirkpatrick J.A., writing for this Court, noted at para. 11 that shareholders' loans are properly treated as equity, not debt, just as retained earnings are equity, not cash (at para. 66).
- [56] The real question is what portion, if any, of a non-recurring receipt of this Line 150 Income should be excluded from income by virtue of s. 17(1) of the Guidelines.
- [57] The father says all of them, because they did not represent any "sudden increase in [his] lifestyle," recalling the words of Weiler J. A. of the Ontario Court of Appeal in Marinangeli at para. 30:

While the courts have differed in their approach when dealing with non-recurring income, the recurring theme is that the child of the marriage should benefit from a sudden increase in lifestyle and money available to the family.

- [58] The mother submits their daughter should benefit from the sale of the building owned by 557571 as she would have were she living with the father -- in the recreational property, cars, and larger residential property in which he was able to acquire an interest. To permit the father a deduction for the 2007 dividends and refuse her the inclusion of the 2008 capital dividend, in circumstances where he was also having his shareholder's loan repaid, would be unfair to the daughter. For that reason, the mother considers the chambers judge was justified in his exercise of the discretion given him by s. 17(1), not only in refusing to deduct the income he received from 557571 in 2007, but also in adding the amount of the capital dividend received in 2008. She relies on Shields.
- [59] The actual amount of income dividends is properly included in the adjusted s. 16 income for 2007, regardless of their source or their use. However, the capital dividends received in 2008 are not to be included at that step. I agree with counsel they are to be considered by way of the discretion granted by s. 19(1)(h) and s. 17(1), as they were in Plett, to the extent they are comparable to income. Whether the chambers judge erred in refusing to exclude the taxable income or adding the entire capital dividend is a question to which I will return when I come to discuss the application of these provisions in 2007 and 2008.

Income from Estate

- [60] The remaining issue relevant to the determination of the father's adjusted s. 16 income relates to 2006 and 2007. It is one of fact. The mother points to the financial statements of Estate for those years, which show payment of management wages of \$9,000 and a dividend of \$9,696. She asserts that the father's 50% share of those recorded payments should be added to his Line 150 Income for 2006 or 2007.

- [61] The father denies having received any money at any time from Estate. He declared no income from that company in any year. The financial statements state otherwise. His accountant (who prepared his income tax returns) stated she had no knowledge of Estate or its affairs. In these circumstances, the best evidence is the financial statements of Estate provided for 2006 and 2007 and the inferences which can reasonably be drawn from them.
- [62] The father's position, that he never received any income from Estate and that it is not reasonable to include any part of its pre-tax corporate income in his income for 2006, "given the nature of its investment business," makes little sense. The father has a one-half interest in Estate. Estate owns a Coldwell Banker real estate franchise and operates Coldwell Banker Real Estate in Comox. It operated on a restricted shareholder's loan of about \$37,000 in the two years for which financial statements were provided (2006 and 2007) and a very small unrestricted loan. While it opened its fiscal year ending in 2006 with a deficit of \$8,661 it closed with retained earnings of \$21,766 after paying management wages of \$9,000 and declaring dividends of \$9,696. No portion of either was included in the father's income tax return for either year, although Estate's 2007 financial statement notes the dividends were paid in that fiscal year.
- [63] In this situation, I would not include the income in the s. 16 computation, but take it into account under the discretionary adjustments of income permitted by ss. 17 to 19, to the consideration of which I will now turn.
- [64] It follows I find no error in the determination of the adjusted s. 16 incomes for the four years, as corrected in accordance with counsels' submissions.

Discretionary Adjustments

- [65] Because the Income Application did not include the computation required by s. 16 and Schedule III, it is not possible to determine how or why the chambers judge concluded that the father's s. 16 annual income would not be the fairest determination of his income in any year for the purposes of ss. 17 and 18. It seems likely, however, he was satisfied the conditions of ss. 17, 18 and 19 were met. This is a fair inference on the record affected by the new evidence only as to the profit from the sale of the View Avenue property and the amounts.
- [66] It is appropriate to consider these adjustments on a year by year basis, since their purpose is to achieve a fair determination of the father's income in each relevant year before determining whether a retroactive order is appropriate.

2006

Estate Income

- [67] As I just indicated, on the information the father provided, it would be appropriate to impute one-half of the management fees paid by Estate as income to him in 2006 under the provisions of s. 19(1)(f). It follows I would add \$4,500 to the adjusted s. 16 income for management wages paid.
- [68] In the absence of any evidence of the need to retain capital for operating purposes or any other reason, I see no error in the inclusion of one-half of Estate's pre-tax corporate income. The opinion that the income determined under s. 16 "does not fairly reflect all the money available" to the father for the payment of child support would be easily reached.

Robannah Income

- [69] The next alleged error is the inclusion in the father's income of Robannah's income.
- [70] The chambers judge included all the post-tax income of Robannah in his computation of the appellant's income in the three years it showed a pre-tax profit, perhaps because, as the mother submits, there was no evidence as to how or when his wife became a shareholder and some evidence that the wages Robannah paid to her reflected her worth to the company as an employee. The inclusion of post-tax income rather than pre-tax income and the failure to add back the wife's wages in determining that income as required by s. 18(2) in an income-splitting situation favoured the father.
- [71] Although he provided no evidence as to when or how his wife acquired her interest in Robannah and provided no evidence of any equity investment by her, the father submits the most the chambers judge could add to his s. 16 income under the provisions of s. 18 is one-half of that pre-tax profit after deduction of one-half of the declared dividends. I see no reason on the evidence to treat the company as other than the property of the father. He owns all the equity in Robannah. It seems likely the chambers judge inferred the father transferred shares to his wife for no consideration and thus owns all the equity in Robannah. Such a finding is supported by the evidence.
- [72] The father further submits that as an operating company doing construction work, Robannah was acting reasonably in not paying out all its profit to the shareholders. In *Kowalewich*, at para. 59, this Court noted 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 Guidelines purposes." However, it is not open to a trial judge to speculate about the needs of a corporation in the absence of supporting evidence. In *Hausmann*, this Court placed the onus squarely on the payor to provide evidence "to convince the court there are valid business reasons" for retaining corporate earnings.

- [73] While Robannah declared dividends of \$33,777 in its 2006 Statement of Financial Performance, the father's Income Tax Summary for 2006 does not show any dividend income received from Robannah. This remains a curiosity because no one suggested the deduction of dividends was inappropriate and no one suggested any part of them should be added to the father's s. 16 income.
- [74] Having reviewed Robannah's financial statements in the framework of ss. 17 and 18 of the Guidelines, I agree with the father that Robannah's pre-tax profits should not have been added to the father's income in 2006. The financial statements alone support the reasonableness of the decision made by the father as the controlling mind of and only investor in Robannah to retain most of the 2006 profit as working capital in one form or another with a view to stabilizing, if not improving, its income flow in future years.
- [75] Robannah's pre-tax profit was \$134,168. If all the wages paid by Robannah were paid to persons not at arm's length to the company and not for money's worth value to the company, as required by s. 18(2), the additional income would be at most \$30,000. The profit that year resulted from the gain on disposal of property and equipment and constituted a dramatic increase from the \$9,300 earned the previous year. The "shareholder's loans" account, nil in 2005, ended 2006 with a balance of \$138,496. Retained earnings went from a deficit of \$11,161 to a not unreasonable \$72,367 when considered in the context of a dividend of \$33,777 and the nature of a construction company.
- [76] With these variations to the corrected chart at para. 8, I would fix the father's income available for child support in 2006 at \$61,308 [$\$157,198 + 4,500 - 100,390$].

2007

- [77] The nature of the father's disclosure makes determination of his income in 2007, as in 2008 and 2009, difficult.
- [78] After the sale of its building in 2007, the father received \$122,949 in repayment of his shareholder's loan outstanding on 30 September 2006 and an advance of \$241,036, in addition to actual income by way of dividend and share redemption, establishing that all the monies paid to shareholders in 2007 flowed from a capital gain on the sale of its building. The father appears to have loaned the entire amount (\$582,000) to Robannah by way of shareholder's loan in 2008. The 2008 financial statements of Robannah and the 2007 financial statements of 557571 support an infusion of equity into Robannah by way of an increase in the father's shareholder's loan of about \$613,000 that year. Some of that investment would have replaced \$53,000 the father was repaid by Robannah during the financial year 2007, when his shareholder's loan was reduced from \$138,000 to \$85,000, presumably from the 2006 financial profit.
- [79] Because the father regards his entire share of the proceeds as return of capital which he has re-invested with a view to future income, he seeks the exclusion as a non-recurring amount, the actual income he received from 557571 in 2007.

- [80] In the absence of evidence suggesting otherwise, it is a reasonable inference from the financial history of 557571 as reported in its financial statements that these income dividends are income earned over previous years by way of the increasing value of the building it was operating at a modest loss. Such an inference underlies their treatment under the Income Tax Act and s. 16 and Schedule III of the Guidelines. That being so and no persuasive evidence having been provided as to why Robannah needed this money, I can find no error in the chambers judge's refusal to exercise his discretion not to exclude some or all of the father's Line 150 income from the income available for child support as determined by s. 16.
- [81] The father did not persuade the chambers judge and has not provided new evidence to persuade me the chambers judge erred in failing to find unfairness in that determination.

Robannah Income

- [82] The father submits the chambers judge erred further in including any of Robannah's pre-tax profit, arguing its retention was necessary to sustain that operating company's ongoing operations in difficult economic times for a construction and real estate development business. That submission is made with the benefit of hindsight.
- [83] In 2007, before the downturn in the economy, the father, effectively a self-employed businessman, chose to use the proceeds of the sale of the building he co-owned with his father through 557571, to expand construction activity in his operating company by acquiring an interest in properties through companies in which it held an interest with other investors. It may have appeared at that time to be a reasonable investment decision to put all his eggs in one basket. Now, he says his family is suffering. Certainly, there has been no significant change in the father's prospective income from that on which he began to pay support in January 2009. The prospective order is consistent with an annual income stabilized at about \$40,000.
- [84] Nevertheless, I am not persuaded the chambers judge erred in including all the Robannah pre-tax profit in 2007. The father's evidence of Robannah's need is unpersuasive. Robannah was doing well without any additional investment. Retained earnings increased to \$196,631 from \$72,367 in 2006; the father had chosen to invest in it all the monies he received on the winding-up of 557571. It is important to note that annual income is a measuring rod for child support. Inclusion in a measuring rod does not mean most of the money is not available for investment purposes. The corporate profit was available for child support, just as it was for investment.

Estate Income

- [85] I would also reject the father's submission that the chambers judge erred in imputing one-half of Estate's corporate income for 2007 to him for the reasons I gave with regard to the imputation of his share of Estate's income in 2006.

- [86] Although it may be technically desirable to also impute the dividends as unreported income and then deduct them from the imputed corporate income, it matters not in this case whether receipt of the dividends is imputed to the father or not deducted from the corporate income. I would remove the deduction of \$4,848 from the income for 2007, the year in which they were paid.

Profit on Sale of Principal Residence

- [87] The difficult issue for 2007 is whether the chambers judge erred in including all or any part of the father's share of the tax-exempt profit he realized that year on the sale of the View Avenue property.
- [88] The mother relies on Land Registry documents and evidence the father provided on his cross-examination on the 2008 Financial Statement and in affidavits to support her view that his profit from the sale of his principal residence in 2007 may be properly imputed to him as income under s. 19(1)(h) of the Guidelines because he had established a pattern of using principal residences as an investment vehicle to earn income and increase his capital while avoiding the payment of tax or to enjoy the personal benefits of increased value by increased borrowing repaid upon sale. By also suggesting it was appropriate to include the profit because the father was doing much of the construction work himself, thereby reducing his income from paid construction or other work, and because of the father's assertion that he had used some of the proceeds of the sale for living expenses for himself and his second family, the mother's counsel also invokes s. 19(1)(a). She cites s. 19(1)(f) and the lack of proof of costs incurred for improvements to justify the amount.
- [89] Because an appeal is from an order not from the reasons for it, this Court must determine whether the evidence supports the order the chambers judge made. In my view, the new evidence establishes the order was clearly wrong as to the amount included. At most, the father's profit from the purchase, improvement and sale of the View Avenue property was \$437,400.
- [90] The Land Registry documents and the father's answers to questions about the property he purchased in 1999 and sold in 2001 (Noel Ave), and those he and his wife purchased in 2001 and sold in 2003 (Hobson Place), purchased in 2003 and sold in 2005 (Zerkee Place), and purchased in 2004 and sold in 2007 (View Avenue) combine with the nature of Robannah's business and its comparable projects, to support the mother's submission. In each case a vacant lot was purchased, improved and sold. The sale prices ranged from four to eleven times the cost of the lot.
- [91] The father was either unable or unwilling to provide particulars on the costs he says reduced his profit on any of these properties on cross-examination in 2009 or otherwise before the hearing in December 2010. As he commented at his examination, he had no reason to keep these records because he is not required to report any profit earned on his home. It appears the father considered he was not required to disclose the profit earned on the sale of any of

those principal residences to the mother, because all were exempt from income tax and not a source of income to be considered under s. 16 or 19 of the Guidelines, although he asserted in an affidavit sworn on 15 January 2009 that "[t]he money made on each home was used by our family to build the next home and other living expenses." He had said much the same thing at his cross-examination on his financial statement in 2009.

[92] In his new affidavit he addressed that issue with regard to the property sold in 2007:

The property at 935 View Avenue cost approximately \$638,000 to construct and my wife and I did most of the work ourselves. The lot cost \$136,960 plus GST to purchase, for a total of \$775,800. . . .

Taking into account those building costs, the father's profit would be \$437,400 [(\$1,650,000 - 775,800) / 2]. Because I accept his uncontradicted new evidence of the expenses incurred to improve the View Avenue property, that is the maximum amount that need be considered. If considered as income, that amount would have been earned over the approximately two years of ownership and occupation.

[93] The father argues no part of that profit should have been imputed to him as income under s. 19 or considered as a non-recurring receipt of tax exempt income under s. 17(1) because he sold one principal residence and acquired another. In his view, the Guidelines do not permit the inclusion of any profit made on such a transaction.

[94] I do not agree that a profit realized on the sale of a principal residence can never be imputed as income under s. 19 or considered under s. 17. The fundamental principle underlying the Guidelines is that children have a presumptive right to support based on the payor spouse's income. The profit earned on the sale of a principal residence is income to the person earning the profit and s. 19 permits its inclusion in the income available for child support in appropriate circumstances. Those circumstances may well include a situation where the payor spouse is deliberately investing in a principal residence with a view to future profit, from the realization of which his or her child may never benefit because the investment will earn no income before that child is no longer entitled to support. They may also include a situation where the profit from a sale of a principal residence reinvested in a new home improves that parent's standard of living, whether by the direct enjoyment of a more expensive home or from the proceeds of borrowings secured by the increased market value of the home.

[95] The mother argues that the father and his wife have established a recurring pattern of buying and developing properties on which they live, which entails borrowing money as the equity increases, only an unknown portion of which increases the value of their previous principal residence, while the balance provides benefits to their family, but not to his daughter. The apportionment between property improvement and personal spending is exclusively within the father's knowledge. Why should the daughter not have benefited from support computed on the basis of the receipt of that profit, whatever use the father chose to make of it?

- [96] As I noted earlier, there was considerable evidence before the chambers judge to support that submission. The new evidence suggests the father's profit constituted his entire equity in the View Avenue property. He and his wife appear to have borrowed all the money used to purchase and improve that principal residence. They appear to have used the net proceeds of the sale of their previous principal residence on Zirkee Road received in September 2005 to pay debt, some of which may have been incurred to purchase the View Avenue vacant lot in 2004 (for \$136,960) on which they subsequently built their new home (at a cost of \$638,000) which they sold for \$1.65 million in 2007.
- [97] There is little evidence as to how the father and his wife spent the profit from the sale.
- [98] The father and his wife paid \$595,000 for the Anderton Road property in May 2007. In the next three years, they borrowed \$1.183 million on the security of that property. On 31 August 2007 they registered a mortgage in favour of Coastal Community Credit Union on which the balance owing on 8 June 2011 was \$389,900. Two years later, on 14 September 2009, they registered a mortgage to secure a line of credit with the same institution in the amount of \$450,000 on which the balance owing on 30 April 2011 was \$433,000. On 28 September 2010 they registered a third mortgage in favour of Slegg Construction Material Ltd in the amount of \$300,000. Aside from the father's statement in his new affidavit that the proceeds of this last short-term loan were used to finance litigation against Island Coastal, the record contains very little evidence as to the use of these funds or the \$279,200 remaining from the View Avenue profit after the purchase of the Anderton Road property.
- [99] Although I could find no evidence in the record of construction costs relating to the Anderton Road property, it is reasonable to infer from the assessed values in 2007 (land \$162,000; improvements \$292,000) and 2011 (land \$395,000; improvements \$734,000) that a significant portion of the View Avenue profit and of the borrowing was used to finance them. These assessment notices suggest an increase in the buildings' value of \$442,000. If that increase is attributed to the owners' investment of money, then they have invested all their profit from the sale of View Avenue and \$162,800 from their borrowing in a replacement principal residence, which, on the father's evidence, is not yet habitable. Not even this rough accounting is possible regarding the use of the balance of the borrowed funds. Given the father's evidence, an unknown portion of that probably represents personal spending.
- [100] The difficulty in accepting the mother's submission is that the mother does not appear to have sought the imputation of this profit under s. 19(1)(h) as income available for child support at the chambers hearing, the chambers judge did not address the issue, and the evidence does not merit a finding as to what, if any, equity the father and his wife had in their three other principal residences. While that evidence is uniquely within the knowledge of the father, so common is the sale and replacement of a principal residence and so uncommon is an accurate accounting of capital expenses incurred with regard to one, that it seems unfair to require a payor spouse in every case to keep records of the capital costs incurred in improving one and to lead evidence to avoid a potential inference

not sought on an application, particularly a retroactive one. Every payor parent who owns a home has a legitimate need to replace it.

- [101] When a s. 19(1)(h) issue is raised on a child support application, one would expect the payor parent to provide evidence to persuade the court the use of the profit was not such as to permit the imputation as income available for child support. In such a case, it may be appropriate to draw inferences from an inadequate information base in a child support application, but where the imputation is not specifically sought, I would not accede to a submission made for the first time on appeal in the absence of evidence of unusual or exceptional circumstances.
- [102] In this case, it appears the father and his wife, for better or worse, invested the profit from View Avenue in the Anderton Road property with a view to tax exempt profit in future years from its subdivision. Before they were able to complete that project and realize a profit, the Grand Coastal/Island Coastal project's difficulties enveloped them, causing them to put their principal residence up as security to advance litigation either personally or by Robannah. It is highly probable they spent some of the very large amount of cash they received in ways that benefitted their family, but not the daughter.
- [103] Nevertheless, in these circumstances, however unfair it may appear to the daughter, her mother and her step-father, and despite my view that a profit from the sale of a principal residence may in appropriate circumstances be imputed under s. 19(1) as income available for child support, I am not persuaded the evidence supports doing so on this retroactive application.
- [104] As I am not persuaded the evidence supports the inclusion of this profit in the income for 2007, it must be deducted from the corrected adjusted s. 16 income. It follows I would fix the father's income available for child support in 2007 at \$402,303 (\$861,483 + 4848 - \$464,028).

2008

- [105] The error alleged in the corrected 2008 computation is the inclusion of a capital dividend 557571 declared that year which the father submits should not be included as income because it was entirely invested in Robannah.
- [106] It is unclear whether this income was imputed under s. 19(1)(h) or simply taken into account under s. 17(1) as a non-recurring receipt comparable to income. It seems likely it was included because it was treated as a capital gain and thus imputed income under s. 19(1)(h), unlike the return of equity by way of the shareholder's loan repayment. Regardless, as I discussed earlier in these reasons, the record supports the father's evidence that he invested the entirety of this dividend in Robannah.

- [107] The 2008 financial statement establishes that the advance was repaid in 2008, in part with an increase in the shareholders' loan to \$90,340, of which one-half is attributable to the father. It also establishes that "Wages payable" owing at the end of 2007 were paid in 2008 and that the company showed a deficit of \$84,656 at the end of that financial year. The father did not report the receipt of any wages from 557571 on his personal income tax return for 2008.
- [108] I accept this dividend was re-invested in Robannah by way of payment on account of the advance received the previous year. Like the 2007 income dividend and the proceeds from the share redemption, the 2008 capital dividend resulted from the sale of 557571's building. It represented the balance of the proceeds of sale retained as earnings [from the capital gain] after payment of the income dividend and redemption of shares. This was exactly the type of income anticipated when the father and his father borrowed money to buy and improve the building they sold.
- [109] The question is not whether the father could choose to invest this dividend, clearly comparable to income, in Robannah. It is whether the money was available for child support, and if so, how much of it should be included to arrive at a fair determination of the father's income in 2008 for the purpose of determining child support.
- [110] Earlier in these reasons, I noted that the profit from a successful investment in a principal residence made with borrowed money might in appropriate circumstances be imputed as income available for child support under s. 19(1)(h). Indeed, if the father realizes a profit on Anderton Road by completing the house he is building, subdividing the property and selling one of the two buildings, it may well be considered income for the purposes of child support. So can this investment made through a company in a commercial building. In my view, the only question is whether there is evidence Robannah needed the investment of some or all of that money when it was effectively made in 2007. The chambers judge was not persuaded. Nor am I.
- [111] Not finding any error in the chambers judge's computation of the father's income available for child support in 2008, I would accept that it is \$242,718.

2009

- [112] The situation in 2009 is different. Robannah recorded an operating loss in 2008, then a very significant profit in 2009 and a significantly higher profit margin than Robannah had experienced in other years for which financial statements were provided, driven, it appears, by one major project. The mother's Income Application made no allowance for the risk of non-collection, known no later than September 2010 when Robannah's accountant advised the father's counsel of that risk she then put at 50%. A bad debt allowance of 50% would have reduced its [post-tax] profit to \$68,290. The mother did not challenge that evidence. Nor has she challenged the father's new evidence about subsequent related litigation and its effect on Robannah's cash flow and thus on his current family's financial situation. She takes the view the father's income for 2009 is to be determined without regard to events

subsequent to 2009.

[113] That may be so, but on an application being heard in December 2010 for retroactive child support for the years 2006 to 2009, a payor's current financial circumstances are relevant, if not to the determination of income retrospectively, then to the ultimate decision as to whether retroactive support should be awarded on the principles laid down in D.B.S. The lack of a challenge to evidence about the risk of non-payment and the prospective child support award both suggest the chambers judge was alive to the risk. It appears the risk was there at the end of the financial year, but only became evident to the father and his accountant within the following months. In my view, that risk was a factor the chambers judge should have taken into account when he was considering what, if any, portion of the Robannah profit should be added under s. 18(1), as money available for child support. He should also have taken into account Robannah's operating loss in 2008. I reach that conclusion despite the minimal evidence about Robannah's financial affairs in 2008 and 2009, and, in particular, the absence of any evidence of its liabilities in 2009 and 2010 or the current value of its equity in real estate.

[114] To reflect the risk of non-payment and to take account of the loss in 2008, I would reduce the portion of the profit the chambers judge determined to be available for child support in 2009 to 40% of Robannah's pre-tax income (rounded to \$70,000). With that variation, the father's 2009 income available for child support would be \$100,500 (\$230,613 - (165,613 x .6)).

[115] With these variations, the computations are these:

2006

2007

2008

2009

Line 150

52,170

311,080

33,796

35,000

Adjusted for:

UCCB

(1,200)

Interest paid re: 557571

(11,879)

(10,246)

Actual dividends received

from 557571/Robannah

(54,435)

(4,500)

Adjusted S. 16 income

39,091

246,399

33,796

30,500

Add (S. 19(1)(f) 50% of

Estate Management Fees

4,500

Add (s. 18) 50%

Estate pre-tax income

17,717

27,139

not disclosed

not disclosed

Robannah pre-tax profit

less dividends paid (and

included in s. 16 income)

128,765

70,000

557571 capital dividend

208,922

Guidelines income

61,308

402,303

242,718

100,500

Monthly Child Support

573

3,270

2,024

910

Arrears

3,144

35,508

20,556

6,480

Did the chambers judge err in ordering retroactive support?

[116] These (rounded) annual incomes for Guidelines purposes should have been shared: \$61,300, \$402,300, \$242,700 and \$100,500 for the years 2006 to 2009 inclusive as they were received: D.B.S. at paras. 68 and 127. These incomes would have resulted in monthly payments of \$573; \$3,270; \$2,024; \$910 respectively. The father paid \$311 monthly to December 2008 and \$370 thereafter. Thus, the chambers judge had the power to make a retroactive order directing the payment of \$65,688: D.B.S. at para. 94.

[117] However, a court may refuse to exercise that discretionary power. On a retroactive application to vary, these incomes are relevant facts, but neither decisive nor controlling. In this regard, the Supreme Court stated at paras. 95 to 97 in D.B.S.:

95 It will not always be appropriate for a retroactive award to be ordered. Retroactive awards will not always resonate with the purposes behind the child support regime; this will be so where the child would get no discernible benefit from the award. Retroactive awards may also cause hardship to a payor parent in ways that a prospective award would not. In short, while a free-standing obligation to support one's children must be recognized, it will not always be appropriate for a court to enforce this obligation once the relevant time period has passed.

96 Unlike prospective awards, retroactive awards can impair the delicate balance between certainty and flexibility in this area of the law. As situations evolve, fairness demands that obligations change to meet them. Yet, when obligations appear to be settled, fairness also demands that they not be gratuitously disrupted. Prospective and retroactive awards are thus very different in this regard. Prospective awards serve to define a new and predictable status quo; retroactive awards serve to supplant it.

97 Lest I be interpreted as discouraging retroactive awards, I also want to emphasize that they need not be seen as exceptional. It cannot only be exceptional that children are returned the support they were rightly due. Retroactive awards may result in unpredictability, but this unpredictability is often justified by the fact that the payor parent chose to bring that unpredictability upon him/herself. A retroactive award can always be avoided by appropriate action at the time the obligation to pay the increased amounts of support first arose.

[Emphasis added.]

[118] What is required at this stage of a court's exercise of discretion is a "holistic view of the matter" and a decision in "each case on the basis of its particular factual matrix": D.B.S. at para. 99.

[119] The chambers judge did not explain what factors persuaded him to make a retroactive award. The record suggests three factors dominated: as the result of the realization of capital gains in 2006 and 2007, the father had a significant amount of income available for child support in the four years from 2006 to 2009; he used a significant portion of that income to benefit his second family in comparison to what he provided to his oldest child; and his failure to make the required timely and complete disclosure of his financial affairs.

[120] As the father stated in his affidavits, Robannah's business is by its nature subject to fluctuating risks and income. The question is whether the chambers judge erred in finding retroactive child support was appropriate to permit the father's oldest child to benefit from the good years, in circumstances where the chambers judge was refusing an application for increased support for 2002 to 2005, and some, if not most, of the income received in the years 2006 to 2009 reflected earlier growth in his net worth. This question was complicated by the fact that the father's income had stabilized by the date of the hearing of the mother's application, at the income on which he had paid child support since the beginning of 2009.

[121] I will organize the discussion of that question around the four factors identified by the Supreme Court in its discussion in D.B.S. at paras. 100 to 116.

Reasonable excuse for why support was not sought earlier

[122] As my discussion of the father's disclosure establishes, there is no evidence to suggest an application should have been made before 18 June 2009. The mother requested disclosure of his financial information in September 2007 after observing a significant improvement in the father's lifestyle. After that request, the father was at all times aware the mother was

seeking child support based on his Guidelines income. It was not until November 2008 that the father disclosed his 2007 income from 557571. He continues to deny having received any benefit from Estate in 2006, despite the dividends and management wages reported on its financial statements.

Conduct of the Payor Parent

- [123] In circumstances where a payor parent fails to provide a copy of his personal income tax return which would reveal a taxable income in excess of \$200,000 --even if a one-time occurrence -- which has resulted in an observably improved standard of living, it is difficult to comprehend how that parent could reasonably argue his conduct was unblameworthy, especially in circumstances where he alleged a Guidelines income of \$40,000 and adjusted his support accordingly. At every step from 2007 to 2009, the father privileged his own interests and those of his second family over those of his older daughter, thereby minimizing his obligation to her.
- [124] The difference between the amount he paid and what he should have paid is significant in the circumstances of these parents. The change of circumstances, however temporary it turned out to be, was pronounced. There is no evidence to support any alternative contribution to the daughter's support during those years.

Circumstances of the Child

- [125] The only evidence of the child's circumstances is the mother's unchallenged statement that she and her husband consider themselves unable to provide the educational opportunities the older daughter deserves. At the date of the chambers judge's order, she was 13, and according to the mother, an A student described by her teachers as a leader at school, admired by her peers. Over the years, she has been involved in a number of extracurricular activities, including figure skating, swimming, horseback lessons, gymnastics, and dance lessons. The mother is of the opinion that her daughter has a lot of potential which she should be given every opportunity to realize.

Hardship occasioned by a retroactive award

- [126] This is the nub of the father's submission. His financial circumstances have worsened so severely that he cannot afford to pay any retroactive award without hardship to his current family. He does not suggest he could not have afforded to make the payments when they should have been made, nor does he invoke the provisions of s. 10 of the Guidelines. His statement that he and his wife have used up the cash available to them and had to increase their debt in order to support litigation over the business deal in which Robannah invested -- suggest a cash flow problem. They say nothing about the father's current net worth.

[127] The evidence does suggest that the father's investment decisions have not improved his income or his economic prospects; they appear to have worsened them, both before and after the order under appeal was made. However, because his capital base cannot be ascertained on the disclosure he has made, it is impossible to discern the effect on his current economic position of a lump sum award of retroactive support in any amount.

[128] In these circumstances, I would set aside the order of the chambers judge, replacing it with an order to pay the amount I am persuaded the evidence supports: \$65,688.

[129] Although the father did not invoke s. 4(b)(ii) of the Guidelines with regard to his 2007 income, D.B.S. suggests regard must be had to it in the interests of fairness whenever a claim for retroactive support is being considered. Section 4 provides:

4. Where the income of the spouse against whom a child support order is sought is over \$150,000, the amount of a child support order is
 - (a) the amount determined under section 3; or
 - (b) if the court considers that amount to be inappropriate,
 - (i) in respect of the first \$150,000 of the spouse's income, the amount set out in the applicable table for the number of children under the age of majority to whom the order relates;
 - (ii) in respect of the balance of the spouse's income, the amount that the court considers appropriate, having regard to the condition, means, needs and other circumstances of the children who are entitled to support and the financial ability of each spouse to contribute to the support of the children; and
 - (iii) the amount, if any, determined under section 7.

[130] In *Francis v. Baker*, [1999] 3 S.C.R. 250, at paras. 42-3, the Supreme Court explained that this discretion may be exercised only where the payor parent rebuts the presumption that the Guidelines figures should apply to their income. To do so, the parent must put forward clear and compelling evidence sufficient to persuade the court to depart from the Guidelines figures. The father has not.

[131] This section permits "courts [to] conclude that the applicable Guidelines figure is so in excess of the children's reasonable needs that it must be considered to be a functional wealth transfer to a parent or de facto spousal support" (*Francis*, at para. 41). In *Hollenbach v. Hollenbach*, 2000 BCCA 620, 194 D.L.R. (4th) 151, at para. 47, this Court rejected an argument the Guidelines amount should be deviated from because it would create a transfer of wealth from the father to the mother, effectively replacing the spousal maintenance which the trial judge had decided to terminate. The payor parent failed to prove the payments were excessive in that they would be so large they could not reasonably be used for the benefit of the child, such that the mother would receive them.

[132] I can find no reason to deviate from the Guidelines amount in this case. Had the father invoked this provision, on the record before this Court, the Guidelines amount of support would be useful to the child, and not out of proportion to the standard of living of other children who have parents with the income of the father during the relevant years. As the mother submits, the child could benefit from additional funds to realize her educational potential. There is no indication that the retroactive payment would be so excessive that it would be unreasonable to conclude it could not be spent furthering those goals.

[133] In summary, I would allow the appeal and vary the order of the chambers judge to provide for the payment of \$65,688, with interest from the date of the Supreme Court order.

[134] I would not interfere with the order for costs in the Supreme Court. In the unusual circumstances of this case, where both parents contributed to the difficulties which faced the chambers judge, I would require each to pay their own costs of the appeal.

"The Honourable Madam Justice Huddart"

Reasons for Judgment of the Honourable Madam Justice Garson:

[135] I have had the privilege of reading in draft the reasons for judgment of my colleague Madam Justice Huddart. I agree with her disposition of this appeal and with her reasons for that disposition. My colleague concluded that in this case the trial judge erred in including the profit from the sale of Mr. Vincent's principal residence in the assessment of his income for the purposes of the FCSG. I agree with this conclusion. However she also expresses the view that income from profit realized on the sale of a principal residence could be imputed under s. 19(1)(h) or considered under s. 17 of the FCSG in appropriate circumstances. The evidence in this case did not justify such an order, and about whether such an order could ever be made, I prefer to say nothing in this judgment.

"The Honourable Madam Justice Garson"

I agree:

"The Honourable Mr. Justice Groberman"

Schedule A

15. (1) ... a spouse's annual income is determined by the court in accordance with sections 16 to 20.
16. Subject to s. 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 3.

Schedule III

Adjustments to Income

3. SPOUSAL SUPPORT AND UNIVERSAL CHILD CARE BENEFIT -- To calculate income for the purpose of determining an amount under an applicable table, deduct
 - (b) any universal child care benefit that is included to determine the spouse's total income in the T1 General form issued by the Canada Revenue Agency.
5. DIVIDENDS FROM TAXABLE CANADIAN CORPORATIONS -- Replace the taxable amount of dividends from taxable Canadian corporations received by the spouse by the actual amount of capital gains realized by the spouse in excess of the spouse's actual capital losses in that year.
6. CAPITAL GAINS AND CAPITAL LOSSES -- Replace the taxable capital gains realized in a year by the spouse by the actual amount of capital gains realized by the spouse in excess of the spouse's actual capital losses in that year.
8. CARRYING CHARGES -- Deduct the spouse's carrying charges and interest expenses that are paid by the spouse and that would be deductible under the Income Tax Act.

Pattern of Income

- s. 17(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.

Shareholder, director or officer

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
- b. an amount commensurate with the services that the spouse provides to the corporation, provided that the amount does not exceed the corporation's pre-tax income.

Adjustment to corporation's pre-tax income

- (2) In determining the pre-tax income of a corporation for the purposes of subsection (1), all amounts paid by the corporation as salaries, wages or management fees, or other payments or benefits, to or on behalf of persons with whom the corporation does not deal at arm's length must be added to the pre-tax income, unless the spouse establishes that the payments were reasonable in the circumstances.

Imputing Income

- s. 19 (1) The court may impute such 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;
 - ...
 - f. the spouse has failed to provide income information when under a legal obligation to do so;
 - ...
 - h. the spouse derives a significant portion of income from dividends, capital gains or other sources that are taxed at a lower rate than employment or that are exempt from tax.
- [1] Based on Mr. Vincent having had voluntarily increased his child support to \$370/month as of January 2009.

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