

CANADA / JUDGMENT

Yip v. Siller

2025 BCSC 1354

COURT

Supreme Court of British Columbia

DECIDED

16 July 2025

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2025 BCSC 1354 Yip v. Siller

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Yip v. Siller,

2025 BCSC 1354

Date: 20250716

Docket: E150808

Registry: Vancouver

Between:

Dave Kwai Ming Yip

Claimant

And

Nelly Aurora Serna Siller

Respondent

Before: The Honourable Justice Lawn

Reasons for Judgment

Counsel for the Claimant:

R.W. Mostar

Counsel for the Respondent:

I. Turaglio

Place and Date of Hearing:

Vancouver, B.C.

April 14-15, 2025

Place and Date of Judgment:

Vancouver, B.C.

July 16, 2025

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Introduction

- [1] These are cross applications under the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.) for the review and variation of spousal support and payment of arrears of both child and spousal support arising from the order of Justice Smith, dated August 29, 2016 (the "Final Order") and varied by consent on February 8, 2019 (the "Consent Order").
- [2] The claimant Mr. Yip and respondent Ms. Serna Siller were married in November 1992 and separated in 2010. They have three adult children, none of whom remain children of the marriage. Between 2010 and their divorce via the Final Order in 2016, the parties lived separate and apart within the same dwelling and operated under shared banking arrangements. The Final Order directed that Mr. Yip pay child support and spousal support, which would be indefinite. The parties agreed to review spousal support for the purpose of calculating quantum each time one of the children ceased to be a child of the marriage. Failing agreement and recourse to a family justice counsellor, either party could apply to court.
- [3] After their first child was no longer a child of the marriage the parties followed this process and agreed on the 2019 Consent Order. Unfortunately, that was the last time they were able to come to an agreement on support. The claimant has paid various amounts in the intervening years, sometimes with lump-sum payments to make up shortfalls, and sometimes overpaying. Both parties now seek a review and/or variation of support.
- [4] The claimant seeks to have support determined "by reference to" his actual T4 income, retroactively since 2022 and going forward. He also seeks to have income imputed to the respondent, arguing that she has the capacity to work more than she does, and because he believes she is earning undeclared income. The claimant concedes that his obligation to pay spousal support to the respondent is ongoing and will terminate only on the happening of a material change in circumstances, which he submits will likely be at the time of his retirement, if that is found to be reasonable when it occurs.
- [5] The respondent seeks arrears of support not paid, and to vary child support going back to 2019, and spousal support to 2020. Her variation application is based on a material change to her income particularly during Covid. She submits that from 2019 to 2022, the parties' actual incomes as recorded on their tax returns should be used to calculate support. From 2023 onwards, the respondent seeks to impute income to the claimant based on his 2022 base salary, and submits that since she declares all her income, no additional income should be imputed to her. She submits that retroactive amounts owing should be tax free to her or, in the alternative, that the parties share in the expense of unpaid taxes.
- [6] The parties provided updated spreadsheets after the hearing, addressing various alternative calculations.

Background

[7] The following background is relevant to these applications.

The Final Order

- [8] The Final Order disposed of divorce, parenting and child support for the three children of the marriage, spousal support, and division of property. The parties consented to joint custody and shared parental responsibilities. Based on guideline incomes of \$115,242 for the claimant and \$12,000 for the respondent, the claimant was ordered to pay \$2174 in child support. They were to share s. 7 expenses equally. Spousal support ordered was \$1600, said to be near the high end of the range.
- [9] The respondent submitted, and I did not understand the claimant to dissent, that she understood Smith J. to have ordered a higher amount of spousal support because he declined to order unequal division of family debt, despite acknowledging that the claimant's greater withdrawals on the parties' joint funds post-separation would leave the respondent with a smaller capital payout than might have otherwise been the case. Smith J. did not expressly say that this was the rationale for his order: only that this was an appropriate case for higher spousal support (see *Yip v. Yip*, 2016 BCSC 1595 at paras. 45-47). The parties agreed before me that the framework of "near the high end of the range" should be continued into the spousal support order made after this application, with both parties accepting that a 5% deduction from the high number provided by any given calculation was appropriate.

The Consent Order

- [10] The parties also agreed in the Final Order that when each child ceased to be a child of the marriage, spousal support would be reviewed for quantum based on the parties' incomes. This occurred in 2018, when the eldest child ceased to be a child of the marriage. The resulting Consent Order, entered in 2019 but effective as of September 1 2018, set child support for the remaining two children at \$1795 per month and spousal support at \$2178 based on the claimant's guideline income of \$121,062, and the respondent's income of \$12,000.

Child Support payments - 2019 to 2024

- [11] Initially the claimant made payments under the Consent Order without any issues. At the end of December 2021, the parties' middle child, aged 19, ceased attending full-time school. The claimant did not learn of her departure from school until July 2022, however, so for seven months he continued paying child support for her when none was owing. When he learned that she was no longer a child of the marriage, he stopped paying child support altogether, despite the youngest child still being a child of the marriage.

- [12] Although the respondent experienced a drop in income in 2020 due to Covid, and despite the fact that the claimant had ceased paying child support as of July 2022, she did not bring a court application in 2020, 2021 or 2022, due she says to the cost of legal fees. Once the claimant brought his application in 2023, she brought her own application to vary, reaching back to 2019 for child support, and 2020 for spousal.
- [13] The parties have tried and failed to agree to revised support amounts at several points over the years. In 2022, the claimant paid some child support, including a lump sum to address arrears, but acknowledges that there is still a shortfall for 2022, which he says is \$4152. He began making child support payments of \$616 per month in January of 2023, based on his then income, he says, of \$65,000. This continued throughout 2023.
- [14] The respondent's position is that the claimant has been in breach of the February 2019 consent order since August 2022.
- [15] The parties' youngest child ceased to be a child of the marriage in October of 2023, but for reasons that were never explained to me, the claimant continued child support payments through July of 2024, and then ceased.

Spousal Support payments - 2019 to 2025

- [16] The claimant continued to pay spousal support of \$2178 monthly up to the end of 2022. At the end of the year, he added a one-time payment of \$4334, again to address a shortfall. Apparently, the claimant was calculating his 2022 support obligation using income figures of \$139,000 for himself, which the respondent says was lower than his actual income, and \$32,500 for the respondent, which the respondent argues was triple her actual income.
- [17] Starting in December 2022, the claimant reduced his spousal support payments to \$407 per month, based on his own calculations and determination of income as set out above.
- [18] He paid spousal support of \$407 per month throughout 2023 and until June of 2024, stopped briefly, then made payments totalling \$6000 in the last three months of the year. In 2025, he paid spousal support of \$1000 monthly up to the date of this application.

Lump sum payment in March 2025

- [19] In March of 2025, the claimant made a one-time payment of \$64,727 to the respondent's lawyer's trust account, in an effort to address arrears.

Disclosure

- [20] Each party alleges that the other has failed to make proper disclosure. In the claimant's case, he did not find out that his middle child had stopped school, and thus ceased to be a child of the marriage, for seven months. The respondent points to the fact that despite her demanding it, the claimant did not disclose his income for prior years until 2023, when he provided his F8 with all attachments. At that point, since she had to be in court in any event on the claimant's application, the respondent brought her own application.
- [21] Disclosure is the linchpin on which fair child support depends: *Colucci v. Colucci*, 2021 SCC 24 at para 48. While neither party has been blameless in this regard, they tried early on to be forthright with one another and did succeed at the outset, when they agreed on spousal support and, by extension, child support when their eldest ceased to be a child of the marriage. This level of co-operation is to be encouraged, but it can only occur with proper disclosure. The claimant lost trust in the respondent when she kept him in the dark about the cessation of their middle child's schooling, for reasons which the respondent said were related to her pre-occupation with the needs of another child. The respondent was delayed in applying to vary support in part, she says, due to the claimant's tardy financial disclosure
- [22] As the order I grant will require the parties to exchange tax information yearly, I would underline the importance of prompt compliance going forward.

Issues

- [23] These applications came before me on notices of application filed by the parties in May and June 2023 but not pursued at the time.
- [24] In his May 2023 application, the claimant Mr. Yip sought to have his guideline income declared to be \$65,000 and the respondent's to be \$34,840. He sought a variation of the Final Order to set child support at \$616 per month and spousal support at \$419 per month from January 1, 2022 onwards. Although the claimant's application uses the term "varied", his materials and his submissions were consistent with a review, based on paragraph 7 of the Final Order. In submissions before me he sought different relief, arguing that his guideline income from 2022 onwards should be based on his actual T4 income. His position on the years before 2022 was that the guideline income amounts in the Consent Order should prevail. He also sought to impute income to the respondent of \$40,000.
- [25] The respondent's application filed in June of 2023 sought a variation in both child and spousal support and other relief related to the claimant's job searches. In the hearing before me she sought a variation of child support from 2019 onwards; a variation of spousal support from 2020 onwards based on a material change in circumstances; the imputation of income for Mr. Yip from 2023 onwards; and arrears. She sought an order that spousal support payments from past years would be tax free to her.
- [26] Therefore, the issues for determination on these applications are:

1. Is there a basis to vary support from 2019 to 2021?
2. What are the appropriate guideline incomes for the parties from 2022 on?
3. What are the resulting support obligations retroactively and going forward?
4. How ought the payment of retroactive spousal support, if any, to be treated for tax purposes?

Legal Principles

[27] The following principles are relevant to these determinations:

1. The right to a review of a support order is created by a term or condition of an agreement or court order and does not require a preliminary threshold finding of a change of circumstances: *Jordan v. Jordan*, 2011 BCCA 518 at para 33. In this case, according to the Final Order, that right arose when each of the parties' remaining two children ceased to be children of the marriage: the end of December 2021; and October 22, 2023.
2. Section 17 of the Divorce Act provides the Court with jurisdiction to vary a spousal support order on an application by one or both spouses where there has been a material change in circumstances.
3. What amounts to a material change will depend on the actual circumstances of the parties at the time the original order was made. The threshold variation question is the same whether or not the order incorporated consented-upon terms: *L.M.P. v. L.S.*, 2011 SCC 64 at paras. 34-36.
4. In varying spousal support, a court should consider the objectives in Divorce Act s. 17(7), which says:

Objectives of variation order varying spousal support order

- (7) A variation order varying a spousal support order should
 - (a) recognize any economic advantages or disadvantages to the former spouses arising from the marriage or its breakdown;
 - (b) apportion between the former spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;
 - (c) relieve any economic hardship of the former spouses arising from the breakdown of the marriage; and
 - (d) in so far as practicable, promote the economic self-sufficiency of each former spouse within a reasonable period of time.

5. A parent cannot avoid child support obligations by a self-induced reduction of income, such as by being intentionally unemployed or underemployed: *Watts v. Willie*, 2004 BCCA 600 at para 16.
6. In seeking to show a material change due to reduction of income, the onus is on the person with knowledge of their income to show a material decrease with some degree of continuity, that is real and not one of choice: *Colucci v. Colucci*, 2021 SCC 24 at para. 113; *McAlister v. Dunkley*, 2022 ONCJ 71 at para. 31.
7. When an employment decision results in a significant reduction of child support, the payor spouse must be able to justify it in a compelling way: *Riel v. Holland*, [2003] O.J. No. 3901 at para. 23, 2003 CanLII 3433 (C.A.).
8. The court has broad discretion to impute income. However, the party seeking to have income imputed to the other spouse has the burden of establishing an evidentiary basis for such a finding: *Marquez v. Zapiola*, 2013 BCCA 433 at para. 36.
9. In considering an award for retroactive spousal support, similar factors to those set out with regard to child support in *DBS v SRG*, 2006 SCC 37 ought to be considered, but weighed in light of the different legal principles and objectives that apply to spousal support. Those factors are: the needs of the recipient, the conduct of the payor, the reason for the delay in seeking support and any hardship the retroactive award may occasion on the payor spouse: *Kerr v. Baranow*, 2011 SCC 10 at para 207-208.

Decision

1. Variation of support 2019 - 2021
- [28] Only the respondent requests that I address child support in 2019 and child and spousal support from 2020 to the end of 2021, when the parties' middle child ceased to be a child of the marriage and the parties agreed-upon review term kicked in. For the sake of simplicity, I have considered the timeline for the review based on the middle child's status, to start in January 2022.
- [29] 2019 can be dealt with separately and briefly. I do not agree that there is a basis to vary 2019 child support due to a material change in circumstances.
- [30] First, the claimant's income rose only slightly between 2018 and 2019, and the respondent's barely changed. I was not taken to evidence of any other change in circumstances that could be considered material in 2019. Second, two children were and remained children of the marriage and the parties had just signed off on the Consent Order, in February of 2019, in the wake of the eldest child's change of status just a few months previously.

- [31] Finally, although the claimant did not press the point before me, 2019 is now six years ago, and four years before the respondent's notice of application for a variation was filed. Presumptively the court will only consider retroactive support going back three years from the date of notice (DBS, *supra*, para 123). I do not find a basis to alter that presumption in regard to 2019.
- [32] In 2020 and 2021, the respondent argues that there was a material change in circumstances because her income dropped due to Covid. The Consent Order amount was \$12,000. In 2020, it was \$6300, \$4000 of which was government CERB benefits. In 2021, she had net business income of \$10,140. At the same time, the claimant's income increased from the Consent Order amount of \$121,062, to \$131,768 in 2020 and \$139,351 in 2021.
- [33] The respondent argues that in failing to increase child support as his income increased through this period, the claimant engaged in "blameworthy conduct" warranting a retroactive child support order, citing *Hinds v. Hinds*, 2008 BCCA 547 and DBS, *supra*. She argues, citing DBS, that a payor is required to pay child support commensurate with their income.
- [34] The claimant did not offer written submissions on this point, and his oral submissions focussed on the period from 2022 onwards.
- [35] I find that the respondent has established a basis for a retroactive adjustment to the support paid in 2020-2021. I assess the DBS factors in coming to this conclusion.
- [36] First, these periods are within the three years established in DBS as the presumptive period beyond which it is usually inappropriate to order retroactive support. Second, the respondent gave the claimant ample notice that she would be seeking a variation over this period. Third, despite asking for updated financial information, she only received the claimant's 2023 F8 attaching his older tax returns in 2023, the same year in which she applied for the variation.
- [37] In the circumstances I do not find there was undue delay, even weighing the factor of delay and possible resulting prejudice to the payor spouse as telling more heavily against the respondent in the context of the different legal principles and objectives that apply to spousal support (see *Kerr v. Baranow* at para 208).
- [38] Finally, I observe that the retroactive amounts, though not insignificant, are not so huge as to create a hardship for the claimant, who was recently able to fund a \$65,000 lump sum payment in an apparent acknowledgement of the appropriateness of some, at least, of past shortfalls.
- [39] I therefore find that there is a basis to vary the support in 2020 and 2021, and that the parties' guideline incomes in those years should be their T1 General incomes as follows:

Year

Mr. Yip

Ms. Serna Siller

2020

\$131,768

\$6,300

2021

\$139,351

\$10,140

[40] I will return to the question of the amount of spousal support below.

2. Guideline incomes 2022 onwards

[41] As noted above, the parties agree that spousal support was to be reviewed for quantum based on the parties' incomes, whenever a child ceased to be a child of the marriage. Such a review was due to occur as of January 1 2022.

The Claimant's Income

[42] Up until November 21, 2022, when he resigned, the claimant worked as a Director, Account Management, for a large parking lot company. Post-resignation, a non-competition clause stopped him from working in the parking lot industry for six months, and a non-solicitation clause prevented him from soliciting any clients of his former employer for nine months.

[43] The uncontradicted evidence was that within two months of the claimant's leaving his job in November 2022, eleven other employees at a similar level also resigned. In this application, the claimant led affidavit evidence of internal changes and developments at the company in the wake of a change of ownership, which prompted these resignations.

[44] The claimant and three former co-workers detailed business practices which jeopardized their ability to solicit business and maintain relationships with long-term customers. These practices included: remitting client parking revenue months late without explanation or justification; increasing prices without informing clients and without justification; pressure to extract revenue from other ventures; and failing to pay contractors to perform services clients had already paid for, resulting in cancelation of those services. In these instances, the claimant and others in his position would be left to deal with clients' reasonable complaints, without support or proper explanations to offer. The claimant was of the view that his reputation and longer term success in a small industry where his role depended on client relationships, would be permanently damaged if he stayed. The evidence of the three other affiants who left was consistent with this concern. This evidence was unopposed and I accept it.

- [45] The claimant's last pay stub, annualized, indicates that his yearly income would have been approximately \$138,500. When he left, he also received a one-time payment of \$33,592 which he stated in his affidavits was vacation pay owing, making his total gross income \$170,034.61 in 2022.
- [46] The respondent questions the characterization of "vacation pay" but does not suggest that it should form part of his imputed income going forward. She observes, however, that he received these funds at a time when he had ceased paying child support altogether, despite there still being one child of the marriage.
- [47] The claimant found a job in another industry (the "interim job") with an annual salary he stated was \$65,000 - the income he used to calculate the payments he made in 2023 of child support of \$616 and spousal support of \$407. However, his tax return for 2023 reveals T4 income of \$77,194, not \$65,000. In oral argument, I was told that the amount was higher because it included a car allowance. This additional amount must be considered as part of the claimant's guideline income. The claimant's 2023 tax return also revealed net rental income of \$4926 which ought to be included in guideline income. I therefore find that his 2023 income was actually \$82,334 as is set out in line 15000 of his 2023 T1 General tax return. \$65,000 is not an accurate amount of his yearly income for 2023 or any other time.
- [48] The respondent argues for imputation of income to the claimant in 2023 based on underemployment, due to his November 2022 decision to leave his job and accept the much lower paying interim job, evidently without much of a job search. There are two bases to the respondent's argument: first, that he quit his higher-paying job when he ought not to have done so; and second, that he quickly accepted a much lower paying position in a different industry without searching for something closer to the income he had left.
- [49] I find that the claimant has succeeded in showing that his decision to leave his job in 2022 was reasonable in the circumstances. Several colleagues left at about the same time, and the uncontested evidence of three of them, in addition to the claimant's, sets out a reasonable rationale for the decision. The claimant's decision to leave was also based on his health and job-related stress for which he was under a doctor's care: he provided affidavit evidence to this effect, which distinguishes his case from a case like *Childs v. Childs*, 2017 BCSC 916, where the payor's reliance on stress as a rationale for quitting his job, was not supported by any medical evidence.
- [50] The respondent argued that the claimant ought to have sued his former employer for constructive dismissal. I find that the claimant's decision not to pursue a constructive dismissal lawsuit was reasonable in the circumstances. Specifically: the classic indicia of constructive dismissal were absent; such a suit was unlikely to be successful given that while the employer's actions made the claimant's job more difficult, the employer did not evidence an intention no longer to be bound by the contract; and even if successful, the cap on damages in his contract would subsume the legal fees required to pursue it. The claimant sought and obtained legal advice in this regard.

- [51] Further, I find that it was reasonable for the claimant to accept and remain at the job he currently holds, despite the lower starting salary. He expects his income to increase starting next year, and he has established that positions at other parking companies were not easily available. At his age, it is also reasonable for him to wish to stay in the industry in which he developed expertise, particularly given his lack of formal qualifications. It was reasonable for him to assume that this would result in greater total remuneration for the working years he has left, compared to a switch to a new industry at an entry-level position.
- [52] What is less clear, however, is why the claimant did not even try to look for higher-paying work before accepting the interim job, and then why it took the claimant until January 2024 to move back into the parking industry. This was seven months after the non-competition clause expired and four months after the non-solicitation clause expired.
- [53] The claimant submitted that he continued to "search diligently" for more lucrative work prior to the expiry of his non-competition clause, and that he was in touch with people at his new job in May 2023, but he offered no evidence detailing any search, diligent or otherwise, at any time, either before or after the expiry of the clauses. In December of 2023, he finally signed a contract with his present employer, to start work the following month.
- [54] In the absence of evidence or an explanation for this delay, I impute additional income for the last seven months of 2023, in the amount of \$10,000, which represents the claimant's earning potential if he had re-entered the parking industry sooner. The delayed entry back into the industry, where the claimant says he has the highest earning potential, may also have delayed the receipt of increases and bonuses that he expects, eventually, to receive from his current job.
- [55] The claimant's final paycheck in November of 2022 included over \$30,000 for vacation accrued but not taken over the previous three years. While the respondent does not seek to have that amount included in the claimant's imputed income going forward, she argues that 1/3 of this amount should be added to the income for each of the preceding three years. The claimant disagrees. He submits that his 2022 income should be determined based on his actual T4 income, which includes the entirety of this additional amount.
- [56] In my view, the claimant's position is correct. It may be that in accepting the interim job at a base salary of \$65,000, the claimant considered the additional \$30,000 he had just received from vacation pay in his former job as making up some of the shortfall. In any event, those are employment income funds that should have been available for the payment of support in the year they were received, even if they ought not to be imputed on a yearly basis going forward, given the one-time nature of the payment.
- [57] In summary, I agree with the claimant that his past support obligations for 2022-2024 should be based on his actual Line 15000 income, with two exceptions.

1. For 2023, I find that an additional \$10,000 should be imputed to the claimant's income on the basis that he was underemployed and has failed to show evidence that he attempted (a) to find work closer in remuneration to the job he left in 2022, and (b) to re-enter the parking industry promptly after his non-competition and non-solicitation restrictions ended in 2023.
 2. The claimant rejoined the parking industry in January of 2024, where his 2024 salary was \$85,000 plus a monthly car allowance totalling \$8352 per year. His 2024 T1 General Tax Return was not put in evidence, but his 2024 T4 reveals an employment income of \$94,404. While the evidence suggests that the claimant owned an investment property until July 2024, I was not taken to an amount of rental income for 2024. In the absence of this evidence, I impute to him an additional \$2500, or approximately half of the amount he earned in income from his rental property in 2023. This brings his 2024 income to \$96,904.
- [58] Going forward, it is possible to determine the claimant's 2025 income with a fair degree of certainty. A pay stub from March 1 to 15, 2025 indicates that the claimant is still being paid a yearly salary of \$85,000 plus a car allowance of \$8352. The same pay stub also reveals year-to-date bonus income of \$5000 for 2025.
- [59] In his affidavit of April 8, 2025 explaining his employment decisions in the November 2022 to January 2024 period, the claimant stated:
- My current salary of \$85,000 per annum (plus approximately \$9000 per annum car allowance as I do a significant amount of driving in connection with my position) will likely rise when the company becomes profitable. I see good potential for my salary to rise and for bonuses when this happens. I am optimistic that this will occur in approximately a year's time.
- [60] The claimant added that he does not intend to seek other employment, since the prospect of advancement and higher earnings motivated him to stay where he was for the foreseeable future. In oral argument, the claimant's position was that his optimism about a rising salary and bonuses justified his staying in his current job, despite the lower starting salary, but did not justify the imputation of any additional income beyond his 2024 T4 income.
- [61] On balance, I agree with the claimant that although he is optimistic about salary increases, this optimism does not provide enough certainty to warrant the imputation of significant additional income. The \$5000 bonus, however, is clearly part of his 2025 remuneration. Adding in the \$5000 bonus received at some point between January 1, 2025 and March 1, 2025, and factoring in a slight increase to account for a modest inflationary raise, I find that the claimant's 2025 income for the purpose of calculating spousal support is \$100,000 per year.
- [62] As I will set out below, the parties will be required to exchange tax returns yearly going forward. Thus the respondent will be able to apply for an increase in support should the claimant's income change materially.

[63] In summary, the claimant's income for the purpose of calculating child and spousal support 2020 to November 1, 2023, and spousal support only thereafter, is as follows:

- a) 2020 - \$131,768 (Line 15000 T1 General);
- b) 2021 - \$139,351 (Line 15000 T1 General);
- c) 2022 - \$170,034 (Line 15000 T1 General);
- d) 2023 - \$92,334 (Line 15000 T1 General plus imputed \$10,000);
- e) 2024 - \$96,904 (T4 income plus \$2500 rental income); and
- f) 2025 - \$100,000 (estimate based on March 2025 pay stub).

The Respondent's Income

[64] Prior to having children, the respondent ran a house-cleaning business, eventually employing two part-time staff. In 2002, when the parties' second child was born, she ceased working outside the home. In 2011, she went back to work as a house cleaner because it was flexible work which allowed her to work around the children's needs.

[65] Between 2020-2021, the respondent's work was restricted by Covid-19. She could not enter customers' homes to clean them, and customers were slow in allowing her re-entry. Her net income in 2020 was \$6300, including CERB benefits received during Covid. In 2021, her net business income was \$10,141. I have already determined that this constituted a material change.

[66] The respondent's 2022 income was unaffected by the pandemic, though the parties' youngest child still lived at home and the uncontradicted evidence is that this child had medical and other issues which required a great deal of the respondent's time. Her T1 for 2022 revealed \$17,983 in net business income.

[67] The respondent's 2023 T1 reveals net business income of \$30,908. Her gross business income was \$41,257. The respondent expects her 2024 income to be similar to 2023 or perhaps \$5000 more in gross income. Her 2024 T1 General Tax Return was not available at the time of the hearing and her affidavit evidence regarding her expected 2024 and 2025 income is unclear. The respondent expects her 2025 income to be \$10,000 less than 2023/2024 (which are two different amounts, 2024 being an estimate only), because she has lost customers and had not yet replaced them in April of this year.

[68] The claimant argued that I ought to impute income of \$40,000 per year to the respondent for two reasons. First he says that, when the parties were married, the respondent earned income which she did not declare and was likely continuing to do so given her industry's propensity for cash payments. Second, he argues that their youngest child's needs have abated and therefore the respondent has more time to work.

- [69] The respondent's evidence as to undeclared income was that when the claimant took care of her accounting, he made a choice to avoid declaring all of her income. By contrast, her evidence was that she is now mostly paid by cheque and she declares all her income, however earned. That evidence is uncontradicted. I therefore find that income ought not to be imputed to her on the basis of possible undeclared income as the claimant urges. There is no direct evidence of this occurring in recent years. I accept the respondent's evidence that she is mostly paid by cheque and declares all her income.
- [70] As for the respondent's client base and capacity to work, I do not accept that because between January and April the respondent lost some customers, she is necessarily doomed to a \$10,000 reduction in her yearly gross income. There is time for her to seek out new customers and recoup at least some of this loss.
- [71] I agree with the claimant that now that the parties' youngest child is more fully employed and apparently less in need of her mother's ongoing parenting time, the respondent should be able to devote more time to finding and maintaining clients. I find that \$35,000 is a reasonable net business income to impute to the respondent for 2025 in the circumstances.
- [72] In summary, I find that the respondent's business income for the purpose of calculating spousal and child support for the period between 2020 and November 2023 and spousal support only after November 2023 is as follows:
- a) 2020 - \$6,300 (T1 General Line 13500);
 - b) 2021 - \$10,141 (T1 General Line 13500);
 - c) 2022 - \$17,983 (T1 General Line 13500);
 - d) 2023 - \$30,908 (T1 General Line 13500);
 - e) 2024 - \$35,000 (estimated increase from 2023);
 - f) 2025 - \$35,000 (imputed amount based on capacity to work).

3. Calculation of Support

- [73] The parties agreed that the "near the high end" framework for the calculation of spousal support which Smith J. set out in the Consent Order should carry through to the support payments arising from these applications. This was a sensible concession on the part of the claimant, as the apparent rationale for the decision of Smith J. for finding a high end range, is a factor that continues to impact the respondent negatively and remains a fair basis for keeping spousal support at this level. The parties also agreed that a 5% reduction from the "high" end calculation of spousal support in the tables is an appropriate translation of this framework into number form.

- [74] By way of example, the parties' current incomes have been determined as \$100,000 for the claimant and \$35,000 for the respondent. This results in a SSAG calculation of a monthly spousal support payment from the claimant to the respondent of \$1950 at the high end. A 5% reduction in this amount leaves a payment of \$1852.50.
- [75] The result of these findings will be, that the claimant will owe at least a modest amount stretching back to 2020, based on the guideline amounts at the respective incomes determined as set out above, with spousal support calculated "near the high end" as a 5% reduction to the "high" number generated by the tables. To these amounts should be added interest under the Court Order Interest Act, from the date upon which the support was owed: see *JCH v. SMBH*, 2024 BCSC 54 at para 75-78.
- [76] The parties have agreed that the obligation to pay child support ended on November 1, 2023 when the last child was no longer a child of the marriage. As of the end of December 2021, there was only one child of the marriage and not two. Child support for the period from January to October 2023 (inclusive), should therefore be calculated with this in mind.
- [77] The claimant made a sizeable payment to the respondent in March of 2025. This amount should be set off against the amounts owing, calculated according to the above. Also to be set off are the amounts that the claimant has already paid, in particular the overpayment of child support after the parties' youngest child was no longer a child of the marriage, from November of 2023 to July of 2024.
4. Income Tax Treatment
- [78] At the close of submissions, questions arose as to the appropriate calculation of interest on arrears, as well as the income tax treatment of payments of spousal support pertaining to past tax years. I have already dealt with the question of interest.
- [79] Relying on *Kerman v. Kerman*, 2008 BCSC 852, the respondent argues that she ought to receive payment of retroactive spousal support tax-free. In *Kerman*, the court ordered that the retroactive award and interest be paid tax free to the recipient with no corresponding deduction to the payor because the payor's delayed disclosure prevented the recipient from applying to increase the amounts in a timely way. Due to his own actions, the payor could not complain that he would have been better off had he paid the amounts when they were due. The respondent submits that the same logic ought to apply in this case. In the alternative, the respondent submits that the award be one that can be declared retroactively using the CRA's Tax Form T1198, and that the claimant be ordered to pay to the respondent half of any tax liability that arises from the application of taxes to the amounts for each tax year.
- [80] The claimant's position is that once arrears of spousal support are identified, they ought to be tax deductible to him in the year(s) to which they apply. He states that although there may be a minimal tax implication to the respondent, it will be low because she is in a lower tax bracket. He also submits, in response to the respondent's argument that he ought to be

punished for a failure to pay these amounts in the past, that neither party is blameless here. The claimant was not told that his daughter had left school for seven months, during which time he continued to pay support that the respondent was not entitled to. The situation gave rise to conflict and suspicion. The claimant submits that the imposition of additional tax liabilities in the circumstances will be unfair. The claimant also submits that history does not justify the claimant being punished by a declaration that the respondent ought to receive these funds tax free without the usual tax break to the claimant.

- [81] I agree with the claimant that this is not a case where the payor's blameworthy conduct disentitles him from taking the tax deduction available for spousal support payments in the normal course; nor ought there to be an order that he pay a portion of her taxes. As Justice Veenstra held in *Linklater v. Mardukhi*, 2025 BCSC 631 at para 25, where the SSAG formulas are used to calculate a retroactive payment, the award is premised on the amounts being tax deductible to the payor, and taxable to the recipient.
- [82] The claimant here should complete the CRA's Form T1198 so that the retroactive payments will be allocated to the years during which they ought to have been paid. As was ordered in *Linklater*, if the CRA refuses to accept this tax treatment of the payments, then the parties have liberty to apply for an adjustment to the amounts owing (see *Linklater* at para 35). I observe that in *Linklater*, Veenstra J. also identified a risk that the recipient would be assessed interest by the CRA, on taxes not paid in the years during which retroactive spousal support was found owing. As Veenstra J. did in that case, I would order that should the claimant be assessed interest by the CRA, the respondent will indemnify her for those amounts.

Conclusion

- [83] The parties' past incomes for the purpose of support calculations is therefore as follows:

Year

Claimant Mr. Yip's income

Respondent Ms. Serna Siller's income

2020

\$131,768

\$6,300

2021

\$139,351

\$10,141

2022

\$170,035

\$17,983

2023

\$92,334

\$30,908

2024

\$96,904

\$35,000

[84] Spousal support for 2025 is based on an income of \$100,000 for the claimant, and \$35,000 for the respondent, and is set at \$1852.50 per month to be paid by the claimant to the respondent. The claimant also owes the respondent arrears of \$852.50 per month from January 1, 2025 to the date of the first payment under this order, given that he has been paying only \$1000 per month.

[85] Child support based on two children is payable based on the guideline incomes set out above, from January 2020 to December 2021. Child support is based on one child from January 2022 until the end of October 2023, at which point there were no remaining children of the marriage. Retroactive spousal support based on the incomes set out above is payable for 2020 to 2024, at a figure calculated as a 5% reduction from the "high" number provided by the relevant SSAG calculation for that year.

[86] Against these amounts are set off the amounts already paid, which the parties have detailed in their various spreadsheets and about which I do not understand there to be any dispute. The one-time payment made in March 2025 is to be set off, first against any child support owing, and then against arrears of spousal support starting with the oldest such amounts.

[87] For the 2025 tax year and every tax year thereafter, the parties will exchange:

1. Copies of their respective income tax returns for the previous year, including all attachments, within two weeks following receipt; and
2. Copies of any Notice of Assessment or Reassessment provided to them by the Canada Revenue Agency, immediately upon receipt.

[88] For the 2024 tax year, the parties will exchange copies of their respective income tax returns, including all attachments and copies of any Notice of Assessment or Reassessment provided to them by the Canada Revenue Agency, within 2 weeks following the date of this judgment, or within two weeks of receipt, whichever is earliest.

[89] Either party is free to apply for a variation of spousal support should there be a material change in circumstances.

[90] Success has been divided. Subject to submissions the parties may wish to make, I order that the claimant and respondent will each bear their own costs. If the parties would like to make submissions as to costs, they may provide brief written arguments on a schedule to be agreed upon by counsel, but in any event to be received within 30 days of the release of these reasons.

"Lawn J."

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Prepared on 28 October 2026 · Esheria