COURT OF APPEAL FOR ONTARIO

CITATION: Mason v. Mason, 2016 ONCA 725
DATE: 20161005
DOCKET: C59213

Simmons, Pepall and van Rensburg JJ.A.

BETWEEN

Lise Mason

Applicant (Respondent)

and

Michael Mason

Respondent (Appellant)

Alex Finlayson and Nicole Tellier, for the appellant

David Lanthier, for the respondent

Heard: February 9, 2016

On appeal from the judgment of Justice James A.S. Wilcox of the Superior Court of Justice dated February 3, 2015, with reasons reported at 2014 ONSC 4290.

Simmons J.A.:

A. INTRODUCTION

[1] The main issue on this family law appeal is whether any portion of the profits of a corporation now wholly owned by the husband as a result of the marriage breakdown should be added to his income for spousal support purposes.

[2] The parties married in 1992 and separated in 2011. They have two children. During their marriage, the parties worked together to build a highly successful recreational equipment business in northeastern Ontario.

[3] On the first day of trial, the parties signed Minutes of Settlement resolving all issues between them except spousal support. Among other things, the Minutes of Settlement provided that the husband would buy out the wife's interest in the business and pay to her an equalization payment of $1,636,130, with $1 million payable up front and the balance over five years with interest at four per cent per year.

[4] Following the separation, the wife continued to work in the business, at least part time, until January 2013. Under the terms of two consent interim orders, the parties agreed that each would continue to receive an annual salary of $120,000, even after the wife stopped working in the business, until the issue of spousal support was determined.

[5] For the fiscal year that ended prior to trial, the business sustained an after-tax loss of $235,067. However, during the preceding eight-year period, the business had generated after-tax profits, over and above the parties' salaries and bonuses, averaging almost $355,000 per year. During this period, on average, the parties had drawn salaries and bonuses totaling in aggregate $204,372 per calendar year.

[6] In his reasons for judgment, the trial judge accepted the wife's position that the husband's income for spousal support purposes should comprise both salary and some component of after-tax corporate profits. Apparently based on the incomes the parties had been receiving in the period leading up to the trial and the business's historical after-tax earnings, the trial judge concluded that, going forward, the husband would have salary and after-tax corporate profits available to him for spousal support purposes totaling $400,000 per year.

[7] As for the wife, the trial judge accepted her position that she could earn $35,000 to $40,000 per year as a bookkeeper and that she would also earn $40,000 to $50,000 per year in investment income on $1,000,000, for a total annual income of $75,000 to $90,000. The trial judge relied on $82,500 as her "midpoint" income for spousal support calculation purposes.

[8] Using income figures of $400,000 and $82,500, the trial judge found that the Spousal Support Advisory Guidelines[1] ("SSAGs") produce a range for spousal support of $8,215 to $10,233 per month. Holding that there was no reason to depart from the mid-range, the trial judge ordered the husband to pay to the wife $9,584 per month in spousal support, commencing August 1, 2014.

[9] In oral argument on appeal, the wife acknowledged that, based on the trial judge's income figures, the applicable SSAGs range is less than that cited by the trial judge. The wife also acknowledged that the trial judge failed to take into account the income she is receiving from the balance owing on the equalization payment or consider that she would be able to invest that balance as it is received.

[10] In addition to the issues relating to the SSAGs range and determination of the wife's income, the husband submitted that the trial judge erred in the following ways:

1. by focusing his analysis on the provisions of the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.), rather than the provisions of the *Family Law Act*, R.S.O. 1990, c. F.3, the Act under which the wife advanced her claim;

2. by failing to consider s. 2(10) of the *Family Law Act* and the doctrine of issue estoppel, given that both the Minutes of Settlement and the Final Order into which it was incorporated stipulated the amount of child support payable by the husband to the wife and therefore effectively determined the amount of the husband's income;

3. by attributing income, including corporate profits, to the husband without an adequate basis or explanation and by failing to apply the Ontario *Child Support Guidelines*, O. Reg. 391/97 ("CSGs"), enacted under the *Family Law Act*, to the determination of the husband's income as required by the SSAGs;

4. by failing to properly consider the impact of the property settlement on the spousal support issue; and

5. by holding that the wife is entitled to spousal support.

[11] The husband also applied to introduce fresh evidence on appeal addressing how the equalization payment is being paid and the income tax consequences of the property settlement and support award.

[12] For the reasons that follow, I would dismiss the fresh evidence application but allow the appeal. Although I would not accept all the husband's arguments, I conclude that the trial judge erred in determining both the husband's income and the wife's income. Rather than ordering a new trial, I propose to determine these issues and the quantum of spousal support that is properly payable.

[13] Before turning to the issues, I will briefly set out some background facts relating to the parties, the business, the business's income, the parties' incomes and the provisions of the Minutes of Settlement and child support orders on which the husband relies. I will also set out relevant provisions of the SSAGs and CSGs.

B. BACKGROUND

(1) The parties

[14] According to the trial judge, the parties began cohabiting in either 1989 or 1991. They married on April 23, 1992 and separated on November 6, 2011.

[15] The parties have two children, born in 1993 and 1995. At the time of trial in March 2014, the older child was in the third year of a four-year university program and lived away from home during the school year; the younger child was in the first year of a three-year college program and lived at home with the wife. In addition to the child support to which the parties had agreed, both children had money available to them for educational expenses through RESPs, bank accounts and a family trust.

[16] The wife completed grade twelve and two years of a business administration course at college. Prior to working in the business she had experience in clerking, bookkeeping and retail. When the parties met, she was earning about $20,000 per year working for a restaurant supplier.

[17] When the relationship began, the husband was a miner earning about $80,000 per year. He also had a hobby of purchasing, fixing up and reselling used snowmobiles.

(2) The business

[18] The trial judge found that, in 1989, the parties purchased a small engine and boat repair shop located in Timmins for $5,000. According to the trial judge, by 1995, both had quit their previous jobs to work full-time in their growing business – which eventually expanded to include sales of recreational vehicles, equipment, clothing and accessories. As the trial judge expressed it, the husband was the entrepreneur while the wife handled financial management and administration.

[19] Originally, the business was operated as a sole proprietorship. In 1995, the parties incorporated it. In 2010, they reorganized the business so that it comprised an operating company, Mikey's General Sales and Repair Ltd. ("Mikeys"),[2] and a holding company, M&L Holdings Inc., which owns the buildings from which Mikeys operates. The husband owned 70% of the common shares of the corporations, while the wife owned 30%.

[20] In her evidence at trial, the wife testified about the evolution of the business. She explained that, in 1996, in addition to their original Timmins location, the parties purchased another Timmins business, which carried the Bombardier and Honda lines of recreational vehicles. In 1998, they built a new building at their original location and consolidated the two businesses. Around the same time, they opened locations in North Bay and Cochrane. However, in 2000, they closed both of those locations and struggled for a year or two while they liquidated the inventory.

[21] By 2003, the consolidated Timmins business had taken off. Over time, it expanded into new lines of equipment, including boat and hot tub sales. In 2007, they built a large new showroom. Around the same time, the wife hired an assistant for the office and the husband began to pass off some of his responsibilities to a sales manager, a service manager and a parts manager.

[22] According to the wife, beginning in late 2008, the parties were able to build a new home at a cost of about $800,000 without incurring any debt.

[23] Following the parties' separation in November 2011, the wife continued to work full-time in the business until August 2012, when she began working part-time. The wife stopped working in the business in January 2013.

(3) The trial evidence concerning income

(a) Business income

[24] The trial exhibits included Mikeys' financial statements commencing with the four-month period ended December 31, 1995 through to the fiscal year ended April 30, 2013 as well as financial statements for M&L Holdings Inc. for the fiscal year ended April 30, 2010 through to the fiscal year ended April 30, 2013.

[25] The wife's counsel also filed as trial exhibits: i) a summary he had prepared of Mikeys' gross revenues and net after-tax income or loss after the parties' salaries were deducted ("net after-tax income") for the fiscal years ended December 31, 1995 through to April 30, 2013; and ii) a summary he had prepared of Mikeys' gross revenues and net after-tax income for the fiscal years ended April 30, 2005 through to April 30, 2012, which was the eight-year period before the wife stopped working in the business. Copies of these summaries prepared by the wife's counsel are reproduced in Appendix 'A' to these reasons.

[26] The wife's counsel focused his closing submissions on the latter summary, which showed that Mikeys' total gross revenues for the eight fiscal years ended April 30, 2005 through to April 30, 2012 totaled $87,246,852, and that total net after-tax income for the same period was $2,836,125. Average annual net after-tax income during this eight-year period thus amounted to almost $355,000 ($354,515).

[27] For ease of reference, I have reproduced below the salient portions of counsel's 2005 to 2012 summary and supplemented it with information for the fiscal year ended April 30, 2013 (the fiscal year during which the wife stopped working in the business and during which Mikeys suffered a net after-tax loss of $235,067):

Fiscal Year Ended	Mikeys' Gross Revenues	Mikeys' Net After-tax Income

April 30, 2005	$7,993,232	$199,280
April 30, 2006	$9,796,953	$247,291
April 30, 2007	$11,000,670	$278,152
April 30, 2008	$13,772,320	$655,274
April 30, 2009	$12,628,425	$394,644
April 30, 2010	$11,163,257	$542,945
April 30, 2011	$10,613,419	$291,549
April 30, 2012	$10,278,576	$226,990
April 30, 2013	$8,204,933	($235,067)

(b) The parties' incomes

[28] As described by the trial judge, the parties "took equal salaries and bonuses and enjoyed the other perks of the business" until their separation in November 2011 – and even afterward until January 21, 2013, when the wife withdrew completely from the day-to-day management of the business.

[29] A trial exhibit prepared by the wife's counsel confirmed that, between calendar years 2004 and 2012, the parties drew the same, or virtually the same, income from the business.[3] Over this eight-year period, the husband drew a total of $817,897 in income while the wife drew a total of $817,076 in income. Accordingly, counsel submitted that, on average, over the eight-year period, the parties drew a collective total of $204,371 per calendar year from the business. For ease of reference, I will reproduce the salient portions of this summary here:

Year	Husband's income from business	Wife's income from business
2004	$38,400.00	$38,400.00

2005	$90,300.00	$90,300.00
2006	$102,300.00	$103,800.00
2007	$119,567.00	$120,493.00
2008	$86,450.76	$86,448.76
2009	$142,064.84	$139,456.76
2010	$92,448.76	$92,448.76
2011	$60,293.76	$62,793.77
2012	$122,972.08	$122,835.19

[30] During her evidence, the wife explained that between 2003 and 2010, the parties drew relatively modest salaries from the business, but topped up their income with equal bonuses at the fiscal year-end. The amount of the bonuses fluctuated, but ranged from $60,000 in total to $220,000 in total.[4] According to the wife, both parties purchased RRSPs with a portion of their bonuses – but invested the balance back into the business through shareholder loans. By the time of trial, both parties had accumulated over $200,000 in RRSPs.

[31] For the fiscal year ended April 30, 2011, Mikeys apparently stopped declaring bonuses and, in calendar year 2011, the parties drew salaries that were somewhat higher than their pre-bonus incomes in the preceding calendar years, the husband drawing $60,293 and the wife $62,793.[5]

[32] During her testimony, the wife also explained that when the parties separated in November 2011, they initially agreed that the husband would begin taking a salary of $120,000 and the wife a salary of $100,000.[6] They later agreed that the wife would also draw a salary of $120,000.

[33] Under the terms of a consent order dated August 23, 2012, each of the parties was to receive “the same equal wage as they have been” based on an annual salary of $120,000 per year.

[34] A further consent order dated February 15, 2013 provided that the husband would undertake the day-to-day management of the business as of January 21,

2013 but that the wife would continue to receive “the same annual salary of $120,000” as paid to the husband.

[35] The husband’s 2013 T4 slip was not filed as part of the trial record. His financial statement, sworn on February 11, 2014, indicates that his total income from all sources for 2013 was $127,161 and that his then current income from employment was $10,247.67 per month, yielding $122,972.04 per year.

[36] The wife’s 2013 T4 slip showed employment income of $124,295.55.

(4) Interim orders relating to child support

[37] The February 15, 2013 order also provided that wages would continue to be paid to the children from the business in the same manner as they had previously been paid; that the business would continue to cover the children’s cell phone costs and that the parties would cooperate to complete a pending transfer of $30,000 to the family trust to cover expenses for the children.

[38] On October 17, 2013, a temporary order was made requiring the husband to pay to the wife child support in the total amount of $1,510 per month for two children.

[39] In his endorsement concerning temporary child support, the motion judge indicated that the parties had agreed that the husband’s base taxable income was $120,000 per year. The motion judge imputed an additional $16,500 of income per year to the husband, for a total of $136,500, consisting of: $6,000 per year for personal use of a company vehicle; $3,000 per year for personal insurance costs paid by the business; $3,000 per year for personal use gasoline paid by the business; $2,100 per year for health coverage provided by the business and $2,400 per year for personal travel expenses paid by the business.

[40] In applying the CSGs, the motion judge concluded that full “*Guideline*” support for two children of $1,856 per month based on an annual income of $136,500 was not warranted given that one of the children did not live with the wife during the school year, expenses relating to the matrimonial home were being paid by the business and that that child’s expenses while at school were adequately covered by a family trust and wages paid through the business. The motion judge also noted that, for the same reason, the wife was not seeking any contribution toward s. 7 expenses.

(5) The Minutes of Settlement and resulting Final Order

[41] On March 17, 2014, the first day of trial, the parties entered into Minutes of Settlement resolving all outstanding issues between them except spousal support and costs relating to that claim.

[42] In addition to the provisions relating to the husband’s buy-out of the wife’s share of the business and the equalization payment, among other things, the Minutes of Settlement recited that the parties had already agreed that a final order

would be entered to confirm the interim order for child support and the ongoing arrangement for covering the children's s. 7 expenses.

[43] The Minutes of Settlement also provided that the matrimonial home would be sold and the net proceeds (which the parties anticipated would be at least $650,000) divided equally.

[44] Further, to accommodate tax issues relating to the business transfer, the Minutes of Settlement stipulated that neither party would apply for a divorce before July 30, 2014.

[45] The trial evidence was completed on March 28, 2014 and the trial judge delivered reasons on July 16, 2014. In accordance with the Minutes of Settlement, his reasons do not address the issue of a divorce. Although trial counsel had contemplated submitting an order incorporating the Minutes of Settlement to the trial judge prior to the completion of the trial evidence, that was not done. Rather, on April 23, 2014, another judge signed a final order incorporating the terms of the Minutes of Settlement.

[46] The April 23, 2014 order includes the following provision indicating that the interim order for child support would continue until confirmed in a final order and that the ongoing payment of salary and benefits to the wife would continue until her claim for spousal support was adjudicated:

> The provisions of the prior interim Orders shall be suspended, save and except for the child support order dated October 17, 2013 which shall continue until the Interim Order for child support is confirmed as a Final Order and the obligations for continued payment of salary and benefits under the Order of February 13, 2013 which shall continue until this Court finally adjudicates the [wife's] claims for spousal support.

[47] Apart from the trial judge's order, which forms the subject matter of this appeal, there was no additional order.

C. RELEVANT PROVISIONS OF THE SSAGS

[48] The final version of the SSAGs was published in July 2008. As described in their Executive Summary, they were developed to bring more certainty and predictability to the determination of spousal support under the federal *Divorce Act*. However, ss. 3.2.3 and 5.1 note that, in practice, there is much overlap between federal and provincial/territorial support laws. Section 5.1 states that, since the release of the Draft Proposal, the Advisory Guidelines have frequently been used in spousal support determinations under provincial legislation. The SSAGs have not been formally enacted by any level of government.

[49] Section 3.2.2 of the SSAGs makes it clear that whether there is entitlement to any support remains a threshold issue to be determined before the SSAGs guidelines concerning the amount of support apply.

[50] Chapter 6 of the SSAGs addresses income. Section 6.1 states: "[t]he starting point for the determination of income under the *Spousal Support Advisory Guidelines* is the definition of income under the *Federal Child Support Guidelines*."

[51] The commentary to section 6.1 of the SSAGs notes that the *Federal Child Support Guidelines*, S.O.R./97-175, provide an expansive definition of income for child support purposes – and one "that reflects and clarifies much of the pre-*Guidelines* law on income determination." The commentary also notes that "[p]rior to the release of the [SSAGs], most courts used the same definition of income for both child support and spousal support purposes and that practise has continued since January 2005."

[52] Section 9 of the SSAGs addresses using the ranges. Section 9.6 deals with property division and debts and states that:

> Underpinning the Advisory Guidelines is a basic assumption that the parties have accumulated the typical family or matrimonial property for couples their age, incomes and obligations, and that their property is divided equally under matrimonial property laws. Significant departures from these assumptions may affect where support is fixed within the ranges for amount and duration.

Further, "[i]f the recipient receives a large amount of property, the low end of the range might be more appropriate."

D. RELEVANT PROVISIONS OF THE CSGS

[53] I begin by noting that, while the SSAGs refer to the *Federal Child Support Guidelines*, those guidelines and the CSGs are virtually identical. A comparison of the sections relevant to the issues on appeal in the two sets of guidelines reveals no material differences.[7] Accordingly, for the purposes of this appeal, I will treat the two sets of guidelines as identical and, unless the context requires a specific reference, I will simply refer collectively to the Guidelines.

[54] Like the *Federal Child Support Guidelines*, the CSGs include provisions for determining the annual income of a spouse for child support purposes. The issues on appeal involve the interpretation and application of the income determination provisions of the CSGs, ss. 15 to 20. Section 20 addresses non-resident spouses and is not relevant to the issues on appeal. I will set out ss. 15 to 19 in full.

[55] Section 15 of the CSGs provides that, except where a court accepts the parties' written agreement concerning a spouse's annual income, a spouse's annual income is determined in accordance with ss. 16 to 20:

> 15. (1) Subject to subsection (2), a parent's or spouse's annual income is determined by the court in accordance with sections 16 to 20.
>
> (2) Where both parents or spouses agree in writing on the annual income of a parent or spouse, the court may consider that amount to be the parent's or spouse's income for the purposes of these guidelines if the court thinks that the amount is reasonable having regard to the income information provided under section 21.

[56] Section 16 sets out the general rule that 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 ("line 150 income"):

> 16. Subject to sections 17 to 20, a parent's or spouse's annual income is determined using the sources of income set out under the heading "Total income" in the T1 General form issued by the Canada Revenue Agency and is adjusted in accordance with Schedule III.

[57] Sections 17 and 18 permit a court to depart from line 150 income where the court is of the opinion that the determination of the spouse's line 150 income would not be the fairest determination of income.

[58] Section 17(1) allows a court to consider patterns or fluctuations in a spouse's income over the last three years while section 17(2) permits a court to adjust non-recurring capital or business investment losses:

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

[59] Section 18 allows a court to add all or part of pre-tax corporate income for the most recent taxation year to a spouse's income:

> 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.
>
> (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 parent or spouse establishes that the payments were reasonable in the circumstances.

[60] Sections 19 addresses imputing income to a spouse and sets out a non-exhaustive list of circumstances in which income may be imputed:

> 19. (1) The court may impute such amount of income to a … spouse as it considers appropriate in the circumstances, which circumstances include,
>
> (a) the … spouse is intentionally under-employed or unemployed, other than where the under-employment or unemployment is required by the needs of any child or by the reasonable educational or health needs of the parent or spouse;
>
> (b) the … spouse is exempt from paying federal or provincial income tax;
>
> (c) the … spouse lives in a country that has effective rates of income tax that are significantly lower than those in Canada;
>
> (d) it appears that income has been diverted which would affect the level of child support to be determined under these guidelines;

> (e) the … spouse's property is not reasonably utilized to generate income;
>
> (f) the … spouse has failed to provide income information when under a legal obligation to do so;
>
> (g) the … spouse unreasonably deducts expenses from income;
>
> (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 business income or that are exempt from tax; and
>
> (i) the … spouse is a beneficiary under a trust and is or will be in receipt of income or other benefits from the trust.

[61] Section 20 and Schedule III[8] of the CSGs are not directly relevant to the issues on appeal. The full text of ss. 16 to 20 and Schedule III of the CSGs is set out in Appendix 'C' to these reasons.

E. ANALYSIS

(1) Did the trial judge err by focusing his analysis on the provisions of the *Divorce Act* rather than on the provisions of the *Family Law Act*?

[62] In his reasons, the trial judge noted that the wife claimed spousal support under the *Family Law Act* and that, although she had not claimed a divorce, the husband had. However, despite the fact that no divorce was being granted, the trial judge focused his analysis on the provisions of the *Divorce Act* and did not refer to any *Family Law Act* provisions. He explained that, in part, this was a matter of expediency, as most of the cases that had been cited to him did the same. Both parties had referred to both Acts – and the husband had argued that the same parameters should apply under both Acts. Further, he was satisfied that, whichever Act applies, policy reasons support ensuring that the same principles and factors govern support awards.

[63] On appeal, the husband submits that the trial judge erred by focusing his analysis on *Divorce Act* principles rather than *Family Law Act* principles. In particular, he points to s. 33(9)(b) of the *Family Law Act*, which specifies that in determining the amount and duration of any support award the court shall consider all the circumstances of the parties, including "the assets and means that the dependant and respondent are likely to have in the future."

[64] The husband claims that no similar requirement exists in the *Divorce Act*. Further, he says that, in this case, this omission is particularly important because of the debt load he assumed to pay the equalization payment.

[65] I would not accept this argument. Not only was it not advanced in the court below, it appears that in that court the husband took a contrary position.

[66] More importantly however, I am satisfied that, like the *Family Law Act*, the *Divorce Act* also requires a court to consider the assets and means the parties are likely to have in the future when making a support award.

[67] Section 15.2(4) of the *Divorce Act* provides that, in making a spousal support order, "the court shall take into consideration the condition, means, needs and other circumstances of each spouse…" (emphasis added).

[68] As a starting point, the Supreme Court of Canada has made it clear that "means" is to be given an expansive interpretation such that it includes "all pecuniary resources, capital assets, income from employment or earning capacity, and other sources from which the person receives gains or benefits": *Leskun v. Leskun*, 2006 SCC 25, 1 S.C.R. 920, at para. 29, citing *Strang v. Strang*, 1992 CanLII 55 (SCC), [1992] 2 S.C.R. 112, at p. 119.

[69] Further, s. 15.2(4) of the *Divorce Act* must be interpreted in accordance with the modern rule of statutory interpretation, which requires that the words of an Act "be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": *Rizzo & Rizzo Shoes Ltd. (Re),* 1998 CanLII 837 (SCC), [1998] 1 S.C.R. 27, at para. 21; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 26; *Wilson v. British Columbia (Superintendent of Motor Vehicles)*, 2015 SCC 47, [2015] 3 S.C.R. 300, at para. 18; *Heritage Capital Corp. v. Equitable Trust Co.*, 2016 SCC 19, 395 D.L.R. (4th) 656, at para. 27.

[70] Particularly when read in the context of s. 17 of the *Divorce Act*, it is clear that s. 15.2(4) requires consideration of the assets and means the parties are likely to have in the future.

[71] Section 17(4.1) of the *Divorce Act* provides that:

> Before the court makes a variation order in respect of a spousal support order, the court shall satisfy itself that a change in the condition, means, needs or other circumstances of either former spouse has occurred since the making of the spousal support order….

[72] Section 17(4.1) has been interpreted as requiring a "material" change in circumstances, meaning a change, "such that, if known at the time, would likely have resulted in different terms": see *L.M.P. v. L.S.*, 2011 SCC 64, [2011] 3 S.C.R. 775, at para. 44, quoting *Willick v. Willick*, 1994 CanLII 28 (SCC), [1994] 3 S.C.R. 670, at p. 688. As Sopinka J. observed in *Willick*, at p. 688, "[t]he corollary to this

is that if the matter which is relied on as constituting a change was known at the relevant time, it cannot be relied on as the basis for variation."

[73] For the purposes of s. 17(4.1), a change requiring a variation of a spousal support order must therefore be a change in the condition, means or other circumstances of a party that is of an unforeseen nature: see e.g. *Zacharias v. Zacharias*, 2015 BCCA 376, 389 D.L.R. (4th) 310, at para. 29. This interpretation makes it clear that the phrase "the condition, means … and other circumstances of each spouse" as it appears in s. 15.2(4) requires consideration of the assets and means the parties are likely to have in the future.

[74] The following statement in *Fisher v. Fisher*, 2018 ONCA 11, 88 O.R. (3d) 241, at para. 96, which involved a claim for spousal support under the *Divorce Act*, also supports this interpretation:

> Importantly, in all cases, the reasonableness of an award produced by the [SSAGs] must be balanced in light of the circumstances of the individual case, including the particular financial history of the parties during the marriage and their likely future circumstances. (Emphasis added.)

[75] Accordingly, I am not satisfied that the husband has identified any material difference between the two Acts or any error in the trial judge's reasons that arises from the trial judge's focus on the provisions of the *Divorce Act*.

(2) Did the trial judge err by failing to consider s. 2(10) of the *Family Law Act* and the doctrine of issue estoppel?

[76] As noted above, the Minutes of Settlement provided that the existing interim order for child support would be confirmed in a final order. The interim order for child support was premised on a finding that the husband had an annual income of $136,500. As the Minutes of Settlement constituted a domestic contract – and were incorporated into a final order before the trial judge delivered his reasons – the husband submits that both s. 2(10) of the *Family Law Act* and the doctrine of issue estoppel compel the conclusion that his income for spousal support purposes was $136,500.

[77] I would not accept these arguments.

[78] Section 2(10) of the *Family Law Act* states: "[a] domestic contract dealing with a matter that is also dealt with in this Act prevails unless this Act provides otherwise."

[79] I agree that the Minutes of Settlement are a domestic contract as defined in the *Family Law Act*. However, I do not agree that the Minutes of Settlement determine the husband's income for spousal support purposes. I say that for three reasons.

[80] First, the Minutes of Settlement do not "deal with" the husband's income for spousal support purposes. Although they recite that the parties had agreed that a final order would be entered to confirm the interim order for child support, they do not include a provision specifying the husband's income. Rather, the Minutes of Settlement stipulate that the parties had not settled the issue of spousal support and state that "nothing contained herein shall be construed as a bar or limitation to the [wife's] claim for compensatory and/or non-compensatory spousal support". In the face of these terms, and in the absence of a provision in the Minutes of Settlement explicitly addressing the husband's income, I fail to see how the Minutes of Settlement can be interpreted as "dealing with" the husband's income within the meaning of s. 2(10) of the *Family Law Act*.

[81] Second, the parties' agreement regarding the amount of child support in this case is not necessarily a reliable indicator of the husband's income for spousal support purposes. Again, as mentioned, the Minutes of Settlement and the subsequent order did not specify the husband's income. In addition, at the time of trial, both children were attending post-secondary educational institutions (one lived with her mother while the other was away during the school year) and the parties had made some other arrangements for their post-secondary educational expenses through RESPs, bank accounts, and a family trust. In these circumstances, it was open to the parties to agree on an amount of child support that did not reflect the husband's income. It was also open to the court to order child support in accordance with the parties' agreement: s. 33(14) of the *Family Law Act*.

[82] Third, the argument raised on appeal was not raised at trial. Had either of the parties intended that the Minutes of Settlement would constitute a binding determination of the husband's income, counsel would undoubtedly have raised that issue at trial.

[83] I see no merit in the husband's argument that the Final Order premised on the Minutes of Settlement creates an issue estoppel in relation to the husband's income for the purposes of spousal support.

[84] The three requirements for issue estoppel are well-established: (i) the same question has been decided in earlier proceedings; (ii) the earlier judicial decision was final; and (iii) the parties to that decision or their privies are the same in both the proceedings. If the moving party successfully establishes these preconditions, a court must still determine whether, as a matter of discretion, issue estoppel ought to be applied: *Danyluk v. Ainsworth Technologies Inc.*, 2011 SCC 44, [2001] 2 S.C.R. 460.

[85] The husband has failed to show that the first two requirements are satisfied.

[86] Beginning with the first requirement, like the Minutes of Settlement, the April 23, 2014 order does not address the husband's income. In any event, for the

reasons I explained in relation to the Minutes of Settlement, I am not satisfied that the child support order constitutes an adjudication on the issue of the husband's income for spousal support purposes.

[87] Turning to the second requirement, even assuming a final adjudication of child support could amount to an estoppel in relation to spousal support, on its face, the April 23, 2014 order does not finally determine the issue of child support. Rather, it states, "the child support order dated October 17, 2013 … shall continue until the Interim Order for child support is confirmed as a Final Order". As it is not a final order for child support, the April 23, 2014 order cannot create an issue estoppel in relation to child support issues.

(3) Did the trial judge err by attributing after-tax corporate profits to the husband?

(a) The trial judge's reasons

[88] Early in his reasons, the trial judge summarized the wife's position concerning the quantum of the husband's income for spousal support purposes:

- salary from the business- $200,000 per year,
- after-tax business profits - $355,000 per year,
- undeclared cash income - $50,000-$100,000 per year (subject to gross up), and
- imputed income for the value of business perks, including payment of personal expenses and use of recreational equipment - $86,706 per year.

Total – as much as $741,706 per year.

[89] The trial judge did not accept the wife's assertion that the husband's income should include undeclared cash or business perks. In his view, including undeclared cash as income - which the husband claimed had only ever consisted of small amounts and, in any event, had stopped - would force the husband to engage in an unethical business practice. And while the trial judge recognized that, prior to separation, the business paid for personal expenses such as food, fuel and home maintenance, he expressed the same view concerning such expenses.

[90] As for the use of demonstration recreational vehicles, the trial judge held such use was largely for promotional purposes and not properly included in income for spousal support purposes.

[91] The trial judge addressed the husband's salary and the corporate after–tax business profits as one category. His reasons are brief and do not explain how he arrived at $400,000 as the total salary plus after-tax corporate profits the husband

would have available to him, or the breakdown between the two categories of income. However, he referred to the following matters:

- figures were available as far back as the mid-1990s;
- gross business revenue and net business income had generally increased until the year ending April 2008, but had trended gradually downward since then;
- the parties had drawn equal individual incomes from the business but their incomes had fluctuated from year to year;
- in making her submissions, the wife relied on averages for the eight-year period prior to her leaving the business in 2013, after which gross revenues dropped and there was a net loss for the first time since 2000; and
- taking a ten-year average would produce lower average numbers.

[92] The trial judge observed that there had been anecdotal evidence at trial about the effects on the business of increased competition, the local economy, the wife leaving the business and the husband being distracted by the litigation. However, he said “predicting the future of the business is an exercise in guesswork”.

[93] The trial judge rejected the suggestion that he should consider that the business would be in a weaker position as a result of having to fund the equalization. In his view, doing so would be akin to making the wife “pay for the assets that she received in the property division.” Nonetheless, he acknowledged that “keeping the business financially healthy and viable” was in the wife’s interests.

[94] The trial judge also acknowledged that allowance had to be made for replacing the wife’s function in the business – and that it would take more than one bookkeeper, earning $30,000-$40,000 per year, to replace a dedicated part owner like the wife.

[95] The trial judge concluded this portion of his reasons by saying “although the numbers are soft, I would put the annual total of the [husband’s] income and the business’ profits at $400,000 per year going forward for spousal support purposes.”

(b) The husband's position on appeal

[96] On appeal, the husband argues that the trial judge failed to apply the correct legal principles in determining his income and failed to provide sufficient reasons for the determination he made.

[97] According to the husband, courts routinely apply the Guidelines to determine income for spousal support purposes, even where the parties have no dependent children. Moreover, the SSAGs recommend use of the Guidelines to determine income. The husband submits that the trial judge erred in failing to apply the Guidelines in determining his income for spousal support purposes.

[98] The husband points out that, under s. 16 of the Guidelines, his income for support purposes is his line 150 income.

[99] The husband acknowledges that, where the court is of the opinion that a spouse's line 150 income does not fairly reflect all the money available for the payment of child support, s. 18 of the Guidelines permits a court to add to a payor's line 150 income all or part of the pre-tax corporate income of a company of which the payor is an officer, director or shareholder.

[100] While case law concerning the interpretation of s. 18 of the Guidelines is unsettled, the husband submits that corporate income can only be added where the corporation had pre-tax income (as opposed to a loss) in the most recent taxation year: *Bear v. Thompson*, 2014 SKCA 111, 378 D.L.R. (4th) 649. That is not the case here, as Mikeys suffered a loss for the fiscal year ended April 30, 2013, the year preceding the trial.

[101] Accordingly, the husband submits that the trial judge erred in adding any portion of the salary the wife formerly received from Mikeys to his line 150 income or any other averaged calculation of corporate profits. However, he accepts that it would be appropriate to fix his income for spousal support purposes at $136,500, the figure underlying the child support figure in the Minutes of Settlement and Final Order.[9]

[102] In any event, the husband submits that at most, the case law supports including in a payor's income some portion of average pre-tax corporate profits over the preceding three years in keeping with s. 17(1) of the Guidelines: *O'Neill v. O'Neill* (2007), 2007 CanLII 14631 (ON SC), 39 R.F.L. (6th) 72 (Ont. S.C.).

[103] According to the husband, several factors militate against attributing any portion of the average of Mikeys' pre-tax corporate income between 2011 and 2013 to his line 150 income. These factors include Mikeys' historical pattern of retaining earnings, its debt level, the fact that the husband's salary is reasonable and the fact that the business requires rebuilding.

[104] However, at worst, the husband claims that, under s. 17(1) of the Guidelines, his income for spousal support purposes should have been his line 150 income plus Mikeys' average pre-tax corporate income for the three years prior to trial.

[105] The husband says Mikeys' average pre-tax corporate income for the three years prior to trial was $112,157.33.[10] Accordingly, even if that entire amount were added to his income (an outcome he disputes), at most, his income for spousal support purposes should have been fixed at $232,157.33, being $120,000 in salary plus $112,157.33 in average pre-tax corporate profits for the three-year period preceding the trial.

[106] In contrast, the trial judge arrived at a total income for spousal support purposes for the husband of $400,000. The trial judge did not explain how he arrived at that figure. However, it is apparent that he considered after-tax corporate profits over at least an eight-year timeframe. The husband submits that no authority supports this approach. Moreover, the trial judge provided no rationale for adopting it.

(c) The wife's position

[107] The wife relies on the following facts: that the parties had been drawing $240,000 per year in aggregate salary from Mikeys in the years leading up to the buy-out of the business; that the cost of a replacement bookkeeper would be about $40,000; and that Mikeys averaged $355,000 in annual after-tax corporate profits in the eight-year period after it limited its operations to its consolidated facility in Timmins and before the wife left the business. Even if the 2013 loss is accounted for, that reduces average annual after-tax corporate profits from 2005 onward to about $289,000. The wife does not suggest that 100% of Mikeys' average annual after-tax corporate income should be added to the husband's income. However, she points out that at the time of the buy-out, Mikeys had term deposits totaling $568,000, was completely debt-free and was not using its $700,000 line of credit.

[108] Taking account of all these factors, and the lifestyle enjoyed by the parties during the marriage, the wife submits that the trial judge's conclusion that the husband would have available to him a combined total of $400,000 in annual salary and after-tax corporate profits for purposes of paying spousal support is fully justified.

[109] Moreover, the issue of applying the Guidelines to determine income for spousal support purposes was never raised at trial.

(d) Standard of review

[110] Because of the fact-based and discretionary nature of support awards, a trial judge's order for spousal support is entitled to significant deference on appeal. This deferential approach to support awards promotes finality in family law litigation and also recognizes the importance of the trial judge's role in seeing and hearing the parties and other witnesses testify. An appeal court is not entitled to overturn a

spousal support order simply because it would have balanced the relevant factors differently or arrived at a different decision: *Hickey v. Hickey*, 1999 CanLII 691 (SCC), [1999] 2 S.C.R. 518, at paras. 10-12.

[111] Nonetheless, an appeal court must intervene where the trial judge's reasons disclose an error in principle, a significant misapprehension of the evidence or if the award is clearly wrong: *Hickey*, at para. 11.

(e) Discussion

(i) Introduction

[112] For reasons I will explain, I conclude that, in the particular circumstances of this case, the trial judge erred when determining the husband's income. Despite using the SSAGs to determine the *range* for support, he arrived at an income figure without either applying the Guidelines or explaining why they are inapplicable and by adopting an unreasonable approach to determining income.

[113] Accordingly, I would set aside the trial judge's determination of the husband's income.

[114] Having regard to the expense involved in ordering a new trial, I consider it in the interests of justice that I determine the husband's income for spousal support purposes.

(ii) The trial judge erred by failing to either apply the Guidelines or explain why they are inapplicable and by adopting an unreasonable approach to determining income

[115] I acknowledge that the SSAGs are advisory in nature, not mandatory. The trial judge was therefore not required to apply the SSAGs to determine the quantum of spousal support – it was open to him to use a different methodology.

[116] However, the wife's position at trial was that the trial judge should apply the SSAGs to determine the amount of support the husband should pay. She did not ask that spousal support be determined on a budget-based approach; nor did she advance an alternative theory for determining her claim to compensatory support. Rather, the wife asked the trial judge to rely on the SSAGs' ranges to determine the quantum of spousal support.

[117] The trial judge accepted the wife's position. He relied solely on the SSAGs ranges to determine the quantum of spousal support.

[118] Section 6.1 of the SSAGs provides that the starting point for determining income is the definition of income under the Guidelines.[11]

[119] As the trial judge was using the SSAGs to determine the amount of spousal support, it was incumbent on him to *either* rely on the Guideline provisions for determining income – *or* to explain why they should not apply.

[120] In this regard, I note that the SSAGs are income-based guidelines that require careful attention to the actual incomes, or the income earning capacities, of both spouses.[12] Where, as here, a party's income is in dispute, it makes little sense to determine the amount of spousal support that is payable solely by applying the SSAGs ranges without considering the SSAGs provisions for determining income.

[121] In *Fisher v. Fisher*, a case decided in January 2008, this court examined how the SSAGs were then being used across the country. While commenting at para. 97 that, at least as of that time, "the Guidelines cannot be used as a software tool or a formula that calculates a specific amount of support for a set period of time", the court also cautioned that "[t]hey must be considered in context and applied in their entirety (emphasis added)".

[122] Further, in *The Spousal Support Advisory Guidelines: A New and Improved User's Guide to the Final Version*,[13] the authors note, at p. 1 of the Introduction, that one of the challenges of the SSAGs "is the problem of unsophisticated use." The authors continue by stating:

> For too many, using the Guidelines means just plugging the income figures into the software program, getting the range and choosing the mid-point. There is more to the advisory guidelines than this, and using them in this way can lead to inappropriate results.

[123] Given that the trial judge in this case relied solely on the SSAGs to determine the amount of spousal support, I conclude that he erred in failing to either apply the Guidelines provisions for determining income or to explain why they are inapplicable. In fairness to the trial judge, trial counsel did not bring s. 6 of the SSAGs to his attention or direct him to ss. 15-18 of the Guidelines.

[124] The trial judge's failure to either apply the Guidelines or explain why they are not applicable is exacerbated by the paucity of his reasons. He did not explain how he arrived at $400,000 as the combined salary and after-tax corporate profits that the husband would have available to him going forward for spousal support purposes. In particular, and among other things, he did not explain: what amount, if any, he attributed to the husband from the wife's former salary; over what period of years (if any) he averaged past corporate profits; why he chose that number of years; whether, and why he included, or did not include, in any averaging, the loss Mikeys sustained in 2013; and what percentage of anticipated corporate profits he included in the husband's income and why he chose that percentage.

[125] That said, viewed in the context of the parties' submissions, it appears likely that the trial judge adopted one of several scenarios advanced by the wife's counsel during closing submissions at trial. If this assumption is inaccurate, the

trial judge's reasons were wholly inadequate. See *R. v. Sheppard*, 2002 SCC 26, [2002] 1 S.C.R. 869.

[126] In one of the scenarios advanced on behalf of the wife, counsel submitted that it would be reasonable to assume that the husband would have available to him $200,000 in management salaries previously paid (being the parties' $120,000 salaries added together less $40,000 as the cost of bookkeeper(s) to replace the wife) plus $200,000 of the approximately $300,000 to $355,000 in average annual after-tax corporate profits the company had generated in the last eight to nine years, depending on whether 2013 was included in the average – for a total of $400,000 in available income. Counsel pointed to the husband's lifestyle in the preceding year, in which the husband took numerous vacations, as supporting this level of income.

[127] If the trial judge did not adopt this scenario to reach the $400,000 figure, then his conclusion on income lacks any meaningful explanation or rational basis. As noted by this court in *Drygala v. Pauli* (2002), 2002 CanLII 41868 (ON CA), 61 O.R. (3d) 711 (C.A.), at para. 44, when considering the proper basis for imputing income under s. 19 of the Guidelines, there must be "a rational basis" underlying the figure selected and the exercise of the court's discretion must be "grounded in the evidence."

[128] If the trial judge did adopt this scenario then, in my view, the trial judge's conclusion that the husband would have $400,000 available to him for spousal support purposes going forward is unreasonable and clearly wrong.

[129] As a starting point, the wife called no evidence at trial to support her submission that a reasonable basis for estimating Mikeys' future corporate profits would be to average after-tax corporate profits over the preceding eight- or nine-year period. Nor did the wife's counsel submit any authority, either at trial or on appeal that would support this approach to estimating future corporate income.

[130] Further, as I will explain more fully in a later section, the Guidelines adopt a substantially different approach to addressing corporate income and calculating personal income than that advocated by the wife and apparently adopted by the trial judge – and, as I will explain, they produce a much lower income for the husband, and one which appears more realistic in the face of Mikeys' recent performance.

[131] For example, rather than long-term averaging, the Guidelines permit an examination, in certain circumstances, of any pattern of income or fluctuation in income over the last three years to allow the court to determine an income that is fair and reasonable: s. 17 of the Guidelines.

[132] In addition, rather than after-tax corporate income, the Guidelines focus on pre-tax corporate income in assessing whether any portion of corporate profits should be added to a payor's income: s. 18 of the Guidelines.

[133] Several case specific factors demonstrate that the trial judge's unexplained departure from the Guidelines in determining income was unreasonable and clearly wrong in this case.

[134] First, Mikeys' gross revenues and income had both peaked in the fiscal year ended April 30, 2008 and had been on a downward trend since then. In these circumstances, using a simple long-term average to determine future corporate income gave equal weight to all years and failed, without explanation, to recognize the downward trend in both sales and income that had been occurring since 2008.

[135] Using the wife's after-tax corporate income figures (which are net of the parties' salaries), Mikeys had not generated net after-tax corporate income in the range of the $300,000 to $355,000 average on which she relied since the fiscal year ended April 30, 2010. Rather, net after-tax income was $291,549 for fiscal 2011 and $226,990 for fiscal 2012. Mikeys sustained a loss in the fiscal year ended April 30, 2013, the most recent taxation year prior to trial.

[136] According to Mikeys' accountant, the 2013 loss was attributable to several factors, including local economic conditions, which resulted in decreased gross revenues, and increased costs. The accountant also acknowledged that the husband may have been distracted because of the litigation.

[137] Apart from commenting that there was anecdotal evidence concerning the local economy, the impact of the litigation and the wife's departure from the business, the trial judge did not review this evidence. Significantly, he made no findings that either the downward trend or the loss was manipulated or artificial and did not explain how Mikeys could return, in the near future, to pre-2011 levels of profit.

[138] As mentioned above, the Guidelines rely on the more recent past to predict the near future and do not adopt averaging as a default methodology.

[139] Second, the after-tax corporate profits average used by the trial judge did not adjust for non-recurring sources of income other than operations (for example, dividends received during the 2010 corporate reorganization). The Guidelines rely on pre-tax corporate income, which, depending on the pre-tax income figure adopted, can provide a more complete picture for analysis of recurring and non-recurring sources of income.

[140] Third, averaging net after-tax profits did not recognize that Mikeys' net profit levels tended to be higher in years with higher gross revenues.[14] I highlight again that the Guidelines do not adopt averaging as a default methodology.

[141] Fourth, the trial judge's apparent assumption that the parties' $120,000 salaries paid in the years leading up to trial formed part of corporate profits was patently incorrect.

[142] According to the wife, the parties began receiving salaries in the $120,000 range around the date of separation in November 2011.

[143] However, Mikeys sustained an after-tax loss of $235,067 in the fiscal year ended April 30, 2013. Accordingly, the parties' $120,000 salaries paid between April 30, 2012 and April 30, 2013 (i.e., the fiscal year ended April 30, 2013) were paid from retained earnings, not from profits - as the trial judge apparently assumed. Moreover, the husband's and wife's salaries in the preceding calendar year, 2011, were not in the same range: $60,293 and $62,793, respectively. Had the trial judge adopted the Guidelines methodology, he could not have added any portion of the wife's salary from a year in which Mikeys sustained a loss to the husband's line 150 income: s. 18 of the Guidelines.

[144] Based on the foregoing reasons, I conclude that the trial judge's approach to determining the husband's income, including his unexplained departure from the Guidelines, was unreasonable and clearly wrong.

[145] I would not give effect on appeal to the wife's argument that the husband failed to raise at trial the issue of applying the Guidelines to the calculation of income. For the reasons I have explained, because the trial judge relied solely on the SSAGs to determine the quantum of spousal support (as the wife asked him to do), he was obliged to consider the Guidelines when determining the husband's income.

[146] Finally, I would note that although there was evidence at trial that the husband had undeclared cash income in prior years and that the business paid various personal expenses for the parties, I am not persuaded that such evidence would support the trial judge's approach to determining the husband's income or his finding that the husband had business income and profits totaling $400,000 available to him for spousal support purposes.

[147] The evidence concerning the extent of the undeclared cash income varied widely. The trial judge made no findings concerning cash income in prior years, declined to impute cash income on a going forward basis and did not otherwise advert to the issue in his reasons for determining the husband's income. In my view, the trial judge's reasons do not reflect a conclusion that the business generated significant undeclared cash income in prior years.

[148] As for the personal expenses paid by the business, the trial judge made no findings concerning the extent of such expenses that had been paid in the past and the corporate tax returns are not part of the appeal record. Further, the trial judge made no reference to such payments in arriving at the $400,000 figure. Finally, where the parties accessed corporate funds through their shareholders' loan accounts, this did not artificially reduce corporate income.

[149] In all the circumstances, I would set aside the trial judge's finding concerning the husband's income as being unreasonable and therefore clearly wrong.

(iii) Determining the husband's income

[150] To determine the husband's income, I would follow the approach set out in the SSAGs and use the Guidelines as the starting point for determining income.

[151] For reasons that I will explain, I conclude that a proper interpretation of s. 17 of the Guidelines permits a court to consider a payor's income "over the last three years" to determine an income that "is fair and reasonable" and that, in that context, the payor's income over the last three years includes amounts of pre-tax corporate income that the court considers appropriate to add to the payor's income under s. 18 of the Guidelines for each such year.

[152] In this case, I have considered the husband's income for 2011 to 2013, including amounts available to him from pre-tax corporate income, and have determined an amount that I consider fair and reasonable.

(a) Determining Income under the Guidelines

[153] As noted in my summary of the husband's position, the interpretation of the Guidelines' provisions regarding adding pre-tax corporate income to a payor shareholder's income is unsettled.

[154] The controversy in the case law surrounds whether, in the case of a payor who is a shareholder, director or officer of a corporation and where the court is of the opinion that the payor's line 150 income does not fairly reflect all the money available to the payor for the payment of support, the court is restricted to including in a payor's annual income pre-tax corporate income from *only* the most recent taxation year. Relying on *Bear v. Thompson*, a decision of the Saskatchewan Court of Appeal, the husband supports this position. I would adopt a different approach.

[155] I will repeat the relevant portions of ss. 15 to 18 of the CSGs for ease of reference:

> 15. Subject to subsection (2), a … spouse's annual income is determined by the court in accordance with sections 16 to 20.
>
> …
>
> 16. Subject to sections 17 to 20, a … spouse's annual income is determined using the sources of income set out under the heading "Total income" in the T1 General form issued by the Canada Revenue Agency and is adjusted in accordance with Schedule III.
>
> 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.
>
> …
>
> 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 …

[156] As I have said, s. 19 sets out a non-exhaustive list of circumstances in which a court may impute income to a spouse and is set out in full both at para. 60 above and in Appendix 'C'.

[157] In *Bear v. Thompson*, the Saskatchewan Court of Appeal conducted an extensive review of the case law relating to the proper interpretation of ss. 17 and 18 of the Guidelines and also considered the interpretation of those provisions having regard to the modern rule of statutory interpretation.

[158] The court concluded that s. 17 is a stand-alone provision directed at allowing the court to consider the payor's line 150 income over the last three years and to determine an amount that is fair and reasonable in light of any pattern of, or fluctuation in such income during that period or receipt of a non-recurring amount. The court found that s. 17 does not permit including pre-tax corporate income as a source of funds in making this assessment. Further, while s. 18 permits considering corporate income over the last three years to determine the amount of any pre-tax corporate income that should be added to a payor's line 150 income, it does not permit adding to line 150 income amounts of pre-tax corporate income that exceed the corporation's income for the most recent taxation year.

[159] I agree that the modern rule of statutory interpretation should be used to interpret the Guidelines.[15] Nonetheless, I would not adopt this restrictive interpretation of ss. 17 and 18. In my view, a review of the Guidelines as a whole compels a different conclusion.

[160] In particular, as I read the Guidelines, s. 17 does not restrict a court to considering line 150 income over the last three years; rather a court may also consider amounts of pre-tax corporate income included in a spouse's income under s. 18 for each of the last three years.

[161] The purpose of ss. 15 to 20 is to arrive at a number that fairly and fully reflects the payor's income. The default is that this number will simply be determined using line 150 income. Where, however, the court determines that this default determination would be unfair, the Guidelines permit an expanded view of income.

[162] For the purposes of this appeal, I see the highlights of the income determination provisions of the Guidelines as being:

- s. 15 provides that a spouse's annual income is determined in accordance with ss. 16 to 20;
- s. 16 provides that, subject to ss. 17 to 20, a spouse's annual income is the spouse's line 150 income;
- under s. 17, if a court determines that s. 16 produces an amount that would not be the fairest determination of annual income, the court may have regard to the spouse's income over the last three years to determine a fair and reasonable amount in light of, among other things, any pattern of, or fluctuations in, income;
- under s. 18, if the spouse is a shareholder, director or officer of a corporation and the court determines that s. 16 produces an amount of annual income that does not fairly reflect all the money available to the spouse to pay support, the court may determine the spouse's annual income to include all or part of the pre-tax income of the corporation for the most recent taxation year; and
- s. 19 sets out a non-exhaustive list of circumstances in which a court may impute income to a spouse.[16]

[163] In my view, the scheme of these provisions is that s. 18 permits a court to take an annual snapshot of a spouse's income – and include in it pre-tax corporate income from the most recent taxation year. If the corporation suffered a loss in the most recent taxation year, no amount of pre-tax corporate income may be included. Under s. 17 however, the court may determine an amount that is fair and reasonable having regard to the spouse's income over the last three years in light of, among other things, any pattern of, or fluctuations in, income over the three-year period. And "income" for that purpose may include amounts of pre-tax corporate income added to line 150 income under s. 18 for each of those years.

[164] As I see it, it would make little sense to permit consideration of a spouse's income over the three-year period without permitting consideration of the spouse's access to pre-tax corporate income in each year of the three-year period. This is particularly the case where, as here, the payor spouse now wholly owns the corporation (which was formerly owned by him and the wife). Otherwise, the exercise of considering a pattern of, or fluctuations in, income would be artificial.

[165] Further, this interpretation, is consistent with the language of s. 17:

> 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. [Emphasis added.]

[166] Had it been the legislature's intention to restrict the three-year review of the spouse's income to line 150 income, the legislature could easily have said the court may have regard to the spouse's annual income over the last three years as determined under s. 16. But instead of using that or similar language, s. 17 refers to the "spouse's income over the last three years." "Income" in this context is not restricted to the spouse's annual income as determined under s. 16; it can fairly be read as meaning the payor's annual income as defined under s. 15 – meaning the payor's income as determined in accordance with ss. 16 to 20.

[167] In addition, interpreting the sections in this way avoids any incentive to manipulate corporate income leading up to a trial or the inevitability of a variation in the event of an unusual year.[17]

[168] This approach is also consistent with the fundamental object of the *Guidelines*, which is to ensure fairness to both spouses, and to their children, in determining what amount of money is in fact reasonably available for the payment of support.

[169] Finally, I am not persuaded by the concerns expressed in *Bear v. Thompson*, that this type of interpretation will lead to unfair or egregious results for corporations or that courts will disregard legitimate corporate interests. In attributing pre-tax corporate income to a payor for any particular year, it will be incumbent on the court to have regard to the status of the corporation as a distinct legal personality as well as to legitimate corporate interests in retaining pre-tax corporate income and the degree of the payor's involvement in the corporation. See *Brophy v. Brophy*, (2002), 2002 CanLII 76706 (ON SC), 32 R.F.L. (5th) 1 (Ont. S.C.J.), aff'd (2004), 2004 CanLII 25419 (ON CA), 180 O.A.C. 389 (Ont. C.A.), at para. 36, and *Thompson v. Thompson*, 2013 ONSC 5500, at para. 92, where the courts highlight the relevant considerations.

(b) Application to this case

[170] Neither party led much evidence, be it expert or otherwise, concerning the question of what, if any, amount of pre-tax corporate income should be included in the husband's income. As such, a court is left to do its best to resolve the issue with the evidence that is available. This is also consistent with achieving a just, expeditious and least expensive determination of the parties' dispute.

[171] Beginning with 2013 and s. 18, the husband's income for 2013 was $127,161.[18] However, Mikeys suffered a loss in 2013. It is not therefore possible to attribute any pre-tax corporate income to the husband for 2013 under s. 18.

[172] Turning to s. 17, I conclude that the husband's line 150 income for 2013 would not be the fairest determination of his income for two reasons.

[173] First, although Mikeys suffered a loss in 2013, a review of Mikeys' pre-tax income for past years as well as the prevailing circumstances in 2013 demonstrates that 2013 was an exceptional year and that Mikeys was likely to rebound from that loss.

[174] Second, the parties had a history of using corporate income to pay various personal expenses and taking monies from the corporation when they required them, albeit often through the mechanism of accessing their shareholders' loan accounts. In the light of this history, it is reasonable to assume the husband would continue to access corporate profits in the future.

[175] Beginning with Mikeys' future prospects, as a starting point, the company had generated a profit in both 2011 and 2012. Moreover, Mikeys had not previously sustained a loss since 2000. In addition, many of the circumstances surrounding the 2013 loss were unusual.

[176] For example, the wife began working part-time in August 2012 (part of the fiscal year ended April 30, 2013) and left the day-to-day management of the business in January 2013. Throughout fiscal 2013, the matrimonial dispute between the two owners was ongoing – and, at times, apparently disruptive to the working environment. Further, the bookkeeping system was changed through an update to the existing software program.

[177] These factors would not only have been disruptive to the business; they would also have contributed to increased bookkeeping costs. At trial, the husband testified that issues arising out of the change to the bookkeeping system had been resolved. And while the trial judge found that the wife would have to be replaced by more than one bookkeeper, Mikeys would no longer be paying her salary in addition to the salary of the replacements bookkeepers.

[178] Mikeys' accountant testified that other factors contributing to the 2013 loss included the local economy and increased inventory financing costs. However, he provided no assistance concerning whether these factors were likely to continue to impact Mikeys' profitability. In his evidence, the husband seemed to suggest that increased inventory financing costs were the result of the wife's refusal to sign a guarantee while she remained a shareholder. And while the husband expressed concerns about the future profitability of the business, on the first day of trial, he agreed to purchase the wife's interest in the business, apparently based on valuations that had been prepared as of October 2011.

[179] Taking account of all the circumstances, it is reasonable to project that Mikeys would rebound from its loss in 2013.

[180] As for the parties' past use of corporate income, it was undisputed at trial that the parties used significant funds from their shareholders' loan accounts to pay construction costs when they built their new house. Further, as illustrated by the motion judge's ruling on interim child support, historically, the company also paid various personal expenses for the parties such as house related expenses, gasoline, insurance, health coverage and personal travel expenses. In addition, around the time of separation, the husband withdrew close to $100,000 from his shareholder's loan account to buy a sports car. And around the same time, although the expense was eventually disallowed either in whole or in part by the Canada Revenue Agency, the business paid around $60,000 for a Cadillac SUV for the wife. The husband also took several vacations in the time frame leading up to trial.

[181] In the circumstances, I conclude that it would be reasonable to notionally include some component of pre-tax corporate profits in the husband's income for past years for the purpose of assessing a fair and reasonable amount under s. 17. Although the wife remained a shareholder during these years, this is a notional calculation performed to assess the husband's current income. Moreover, for the future, any component of the salary the wife would have received that is not required to pay for bookkeeping expenses and that can be paid from pre-tax corporate income may be available for distribution to the husband.

[182] For 2011 and 2012, the husband's line 150 income was $60,293 and $127,161 respectively while Mikeys' pre-tax corporate income, over and above management salaries, was $346,549 and $269,165 respectively.[19]

[183] The wife did not take the position that 100% of corporate profits should be added to the husband's income. Nor would that be reasonable. Historically, Mikeys operated on the basis of accumulating significant retained earnings while, at the same time, at least in the recent past, generating a comfortable standard of living for the owners.

[184] In all the circumstances, I consider it reasonable to attribute a significant portion of the company's pre-tax earnings to the husband for the years 2011 and 2012. I would attribute $200,000 (of $346,549) to the husband for 2011 and $130,000 (of $269,165) for 2012. The husband's line 150 income in 2011 was $60,293, $127,161 in 2012 and $127,161 in 2013. Adding these amounts together yields the following incomes for the three-year period 2011 to 2013: $260,293 in 2011; $257,161 in 2012; and $127,161 in 2013.

[185] Section 17 of the Guidelines permits a court to determine an amount of income that is "fair and reasonable in light of any pattern of income, fluctuation in income or receipt of a non-recurring amount" during the preceding three years.

[186] For the reasons I have already explained, I have concluded it was likely that Mikeys would rebound from the loss it sustained in 2013. While declining somewhat, the husband's income was essentially stable in 2011 and 2012, revealing a pattern of income prior to the year in which Mikey's incurred an exceptional loss. That said, taking account of the 2013 corporate loss, it would be unfair to attribute a current income to the husband at the level of his 2011-2012 income. In these particular circumstances, to bring a measure of fairness to both parties, I conclude that it would be appropriate to average the husband's income over the last three years. This yields an annual income of $214,872.

(4) Did the trial judge err in determining the wife's income?

[187] As I said in the Introduction, during oral argument, the wife acknowledged that the trial judge failed to take account of the interest she is receiving in relation to the balance owing on the equalization payment or consider that she would be able to invest that balance once it is received.

[188] The husband submits that the wife would receive average interest pursuant to the Minutes of Settlement of $16,800 per year during the first three years of the payout of her equalization payment, $10,000 in the fourth year and $5,000 in the fifth year. The husband also claims that the wife could generate investment income of $15,000 per year on the remaining equalization payment. Adding these sums to the $82,500 the trial judge used for his support calculation, the husband submits that the wife's income is at least $114,500[20] over the next three years, and then gradually decreases to $97,500, as the equalization installments are paid.

[189] In my view, the husband's calculations are incorrect. The wife will only begin generating additional interest on the full balance of the equalization payment once it is received. However, until she receives the full balance, she will receive interest at 4% on the outstanding balance as required under the Minutes of Settlement and she will also be able to generate interest on payments on account of the outstanding balance as they are received. I would estimate the total of these amounts taking account of the following factors.

[190] In determining the wife's income, the trial judge adopted an effective interest rate of 4.5% for the income he attributed to the wife from investing the upfront equalization payment of $1,000,000 ($40,000 to $50,000, or a midpoint of $45,000).

[191] Given that the wife is receiving 4% interest on the balance owing on the equalization payment from time to time and assuming the wife will be able to invest the installments she receives at the 4.5% rate used by the trial judge, I would adopt 4.25% as an appropriate rate at which to attribute income to the wife on the balance of the equalization payment until it is received in full.

[192] As the balance owing on the equalization payment was $636,130, using an effective interest rate of 4.25%, I would attribute interest income to the wife of

approximately $27,035 per year. This brings her income for the purposes of determining spousal support to a total of $109,535.

(5) Did the trial judge err in failing to consider the impact of the settlement on the appellant's earning capacity?

[193] As recommended under s. 9.6 of the SSAGs, I will consider this issue when assessing the proper level of support. Taking that and the adjustments I have made to the husband's income into account, I consider it unnecessary to address this issue further.

(6) Did the trial judge err in holding that the wife is entitled to spousal support?

[194] The husband points to the significant payouts the wife received under the Minutes of Settlement and asserts that the trial judge failed to recognize the modern nature of the marriage and the benefits the wife received from the marriage. Moreover, having regard to the payments the wife received and her business skills, the husband contends that the trial judge erred in failing to find she was self-sufficient.

[195] I would not accept this submission. Although the wife did acquire substantial benefits from the marriage, the business and the marriage were intertwined. The trial judge recognized that, because of the breakdown of the marriage, it was virtually inevitable that the wife would have to relinquish her stake in the business. In doing so, the wife lost the ability to generate the significant income she was able to earn while married and working in the business as an owner. Although the assets the wife received would generate some income, those earnings plus her income from employment would not approach the income the wife earned in the business. The trial judge did not err in recognizing that the wife suffered a significant disadvantage as a result of the breakdown of the marriage or in awarding spousal support to the wife as a result.

(7) Should the husband's fresh evidence be admitted?

[196] The husband applies to introduce fresh evidence in the form of two affidavits, one from him, explaining how the property settlement has been paid and the impact that has had upon him and the second from his new accountant, explaining income tax consequences arising from the spousal support award and property settlement.

[197] I would not admit this evidence. Both the husband and his accountant at the time testified at trial. The husband does not seriously contest that the evidence he now seeks to adduce could have been led at trial. The proposed evidence thus fails on the first branch of the test for admission of fresh evidence as articulated in *Palmer v. The Queen*, 1979 CanLII 8 (SCC), [1980] 1 S.C.R. 759, at p. 775. See, also, *Sengmueller v. Sengmueller*, 1994 CanLII 8711 (ON CA), 17 O.R. (3d) 208 (C.A.), at p. 210-11. It is not in the interests of justice in this case to permit the

husband to adduce evidence that was delivered close to the eve of the appeal hearing that could have been led at trial.

(8) Adjusted SSAGs calculation

[198] Based on the revised income figures of $214,872 per year for the husband and $109,535 for the wife, a total period of cohabitation of 20 years commencing in 1991, and the "with child" support formula, the SSAGs produce a range for spousal support of $0 to $1,678, with a mid-range of $767.

[199] The *Spousal Support Advisory Guidelines: The Revised User's Guide*[21] provides that courts should avoid the tendency to "default" to the mid-range amount of spousal support. Section 9 of the 2016 Revised User's Guide explicitly states, "[t]he mid-point of the SSAG ranges for amount should NOT be treated as the default outcome." In determining the appropriate quantum of support within the range, a court is required to consider the support factors and objectives found in the *Divorce Act* and the *Family Law Act*. The SSAGs also provide a number of factors to consider while choosing a location within the range, including the strength of the recipient's compensatory claim, the recipient's need, property division and debts, and the payor's needs and ability to pay.

[200] Section 9.1 of the SSAGs provide, "[a] strong compensatory claim will be a factor that favours a support award at the higher end of the ranges both for amount and duration." The wife has a strong compensatory claim. The parties cohabited for at least 20 years. During their marriage, the wife worked with the husband to establish a successful business. Post-separation, the wife is no longer in a position to work in and benefit directly from the business. She suffered a significant disadvantage as a result of the breakdown of the marriage: *Divorce Act*, s. 15.2(6)(a); *Bracklow v. Bracklow*, 1999 CanLII 715 (SCC), [1999] 1 S.C.R. 420, at para. 41; see also *Racco v. Racco*, 2014 ONCA 330, 44 R.F.L. (7th) 348, at para. 24.

[201] The issue of need is measured against the parties' marital standard of living. The wife will be able to convert some of her assets from equalization into income, but it will not compare to that produced by the business. As the trial judge stated, self-sufficiency during the wife's working life, measured against the marital standard of living, will be an elusive goal. On the whole, the wife's claim to support suggests a result towards the high end of the range.

[202] On the other hand, s. 9.6 clarifies that the SSAGs assume that the parties have accumulated the typical family property for couples of their age, incomes, and obligations, and property is divided equally. Significant departures from those assumptions may affect where support is fixed within the ranges. If the recipient receives a large amount of property, the low end of the range might be more appropriate. Here, the wife has received a substantial equalization payment of $1,636,130. Moreover, the equalization payment will negatively impact the funds

available to the husband to pay support. These factors support a result in the lower end of the range.

[203] A further factor not directly addressed by the SSAGs, is that the parties agreed to a figure for child support that is based on the husband having an income of $136,500 and that is below full Guidelines support for that income in any event. This factor supports a figure in the upper end of the range.[22]

[204] In all the circumstances, I am of the view that spousal support in the amount of $1,500 per month is appropriate.

F. DISPOSITION

[205] Based on the foregoing reasons, I would allow the appeal, set aside the trial judge's order and substitute an order requiring the husband to pay the wife $1,500 per month on account of spousal support commencing August 1, 2014.

[206] I would order no costs of the appeal, set aside the trial judge's costs award and order no costs of the trial.

[207] Beginning with the costs of the trial, the trial judge made a partial costs award in favour of the wife based on an offer to settle that was less than the amount she received at trial. However, the offer to settle exceeded the amount awarded on appeal. And the trial judge ordered no costs up to the date of the offer. It is also significant in my view that neither party brought the relevant provisions of the CSGs to the trial judge's attention.

[208] As for the costs of the appeal, although successful on appeal, the husband raised numerous issues on which he did not succeed. Further, the thrust of the husband's argument concerning the main issue on which he did succeed (determination of his income) was not raised at trial.

Released:

"OCT -5 2016" "Janet Simmons J.A."
"JS" "I agree S.E. Pepall J.A."
"I agree K. van Rensburg J.A."

Appendix ‘A’

Summary of Revenues and Net Earnings - Mikeys’ General Sales & Repairs Ltd.		
YEAR ENDING	**GROSS REVENUES**	**NET INCOME OR LOSS (after taxes)**
Dec. 31, 1995 - 12 months	$ 1,153,282.00	$ 23,120.00
April 30, 1996 - 8 months	$ 1,534,617.00	$ 118,533.00
April 30, 1997	$ 3,660,545.00	$ 90,696.00
April 30, 1998	$ 5,905,477.00	$ 36,510.00
April 30, 1999	$ 6,296,815.00	$ (70,495.00)
April 30, 2000	$ 5,326,162.00	$ (242.00)
April 30, 2001	$ 5,150,886.00	$ 24,407.00
April 30, 2002	$ 5,681,789.91	$ 6,515.36
April 30, 2003	$ 6,170,709.00	$ 76,082.00
April 30, 2004	$ 6,601,479.00	$ 74,057.00
April 30, 2005	$ 7,993,232.00	$ 199,280.00
April 30, 2006	$ 9,796,953.00	$ 247,291.00
April 30, 2007	$ 11,000,670.00	$ 278,152.00
April 30, 2008	$ 13,772,320.00	$ 655,274.00
April 30, 2009	$ 12,628,425.00	$ 394,644.00
April 30, 2010	$ 11,163,257.00	$ 542,945.00
April 30, 2011	$ 10,613,419.00	$ 291,549.00
April 30, 2012	$ 10,278,576.00	$ 226,990.00
April 30, 2013	$ 8,204,933.00	$ (235,067.00)

Summary of Revenues and Net Earnings - Mikeys’ General Sales & Repairs Ltd.		
For the Period 2005 to 2012		
YEAR ENDING	**GROSS REVENUES**	**NET INCOME OR LOSS (after taxes)**
April 30, 2005	$ 7,993,232.00	$ 199,280.00
April 30, 2006	$ 9,796,953.00	$ 247,291.00
April 30, 2007	$ 11,000,670.00	$ 278,152.00

April 30, 2008	$ 13,772,320.00	$ 655,274.00
April 30, 2009	$ 12,628,425.00	$ 394,644.00
April 30, 2010	$ 11,163,257.00	$ 542,945.00
April 30, 2011	$ 10,613,419.00	$ 291,549.00
April 30, 2012	$ 10,278,576.00	$ 226,990.00
Total Revenues 2005-2012	**$ 87,246,852.00**	
Total profits 2005 to 2012		**$ 2,836,125.00**

Appendix 'B'

Cal. Year	Husband's Income	Husband's Bonus	Wife's Income	Wife's Bonus
2004	$38,400	$30,000	$38,400	$30,000
2005	$90,300	$73,000	$90,300	$73,000
2006	$102,300	$63,000	$103,800	$63,000
2007	$119,567	$110,000	$120,493	$110,000
2008	$86,450	$40,000	$86,448	$40,000
2009	$142,064	$100,000	$139,456	$100,000
2010	$92,448	$65,000	$92,448	$65,000
2011	$60,293		$62,793	
2012	$122,972		$122,835	
2013	$127,161		$124,295	

Appendix ‘C’

Child Support Guidelines, O. Reg. 391/97

Determination of annual income

15. (1) Subject to subsection (2), a parent’s or spouse’s annual income is determined by the court in accordance with sections 16 to 20.

Agreement

(2) Where both parents or spouses agree in writing on the annual income of a parent or spouse, the court may consider that amount to be the parent’s or spouse’s income for the purposes of these guidelines if the court thinks that the amount is reasonable having regard to the income information provided under section 21.

Calculation of annual income

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

Pattern of income

17. (1) If the court is of the opinion that the determination of a parent’s or spouse’s annual income under section 16 would not be the fairest determination of that income, the court may have regard to the parent’s or 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.

Non-recurring losses

(2) Where a parent or spouse has incurred a non-recurring capital or business investment loss, the court may, if it is of the opinion that the determination of the parent’s or spouse’s annual income under section 16 would not provide the fairest determination of the annual income, choose not to apply sections 6 and 7 of Schedule III, and adjust the amount of the loss, including related expenses and carrying

charges and interest expenses, to arrive at such amount as the court considers appropriate.

Shareholder, director or officer

18. (1) Where a parent or spouse is a shareholder, director or officer of a corporation and the court is of the opinion that the amount of the parent's or spouse's annual income as determined under section 16 does not fairly reflect all the money available to the parent or spouse for the payment of child support, the court may consider the situations described in section 17 and determine the parent's or 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 parent or 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 parent or spouse establishes that the payments were reasonable in the circumstances.

Imputing income

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

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

(b) the parent or spouse is exempt from paying federal or provincial income tax;

(c) the parent or spouse lives in a country that has effective rates of income tax that are significantly lower than those in Canada;

(d) it appears that income has been diverted which would affect the level of child support to be determined under these guidelines;

(e) the parent's or spouse's property is not reasonably utilized to generate income;

(f) the parent or spouse has failed to provide income information when under a legal obligation to do so;

(g) the parent or spouse unreasonably deducts expenses from income;

(h) the parent or spouse derives a significant portion of income from dividends, capital gains or other sources that are taxed at a lower rate than employment or business income or that are exempt from tax; and

(i) the parent or spouse is a beneficiary under a trust and is or will be in receipt of income or other benefits from the trust.

Reasonableness of expenses

(2) For the purpose of clause (1) (g), the reasonableness of an expense deduction is not solely governed by whether the deduction is permitted under the *Income Tax Act* (Canada).

Non-resident

20. (1) Subject to subsection (2), where a parent or spouse is a non-resident of Canada, the parent's or spouse's annual income is determined as though the parent or spouse were a resident of Canada.

Non-resident taxed at higher rates

(2) Where a parent or spouse is a non-resident of Canada and resides in a country that has effective rates of income tax that are significantly higher than those applicable in the province or territory in which the other parent or spouse ordinarily resides, the non-resident parent's or

spouse's annual income is the amount which the court determines to be appropriate taking the higher rates into consideration.

SCHEDULE III

ADJUSTMENTS TO INCOME (SECTION 16)

Employment expenses

1. Where the parent or spouse is an employee, the parent's or spouse's applicable employment expenses described in the following provisions of the *Income Tax Act* (Canada) are deducted:

(a) Revoked: O. Reg. 446/01, s. 10 (1).

(b) paragraph 8 (1) (d) concerning expenses of teacher's exchange fund contribution;

(c) paragraph 8 (1) (e) concerning expenses of railway employees;

(d) paragraph 8 (1) (f) concerning sales expenses;

(e) paragraph 8 (1) (g) concerning transport employee's expenses;

(f) paragraph 8 (1) (h) concerning travel expenses;

(f.1) paragraph 8 (1) (h.1) concerning motor vehicle travel expenses;

(g) paragraph 8 (1) (i) concerning dues and other expenses of performing duties;

(h) paragraph 8 (l) (j) concerning motor vehicle and aircraft costs;

(i) paragraph 8 (1) (l.1) concerning Canada Pension Plan contributions and *Employment Insurance Act* (Canada) premiums paid in respect of another employee who acts as an assistant or substitute for the parent or spouse;

(j) paragraph 8 (1) (n) concerning salary reimbursement;

(k) paragraph 8 (1) (o) concerning forfeited amounts;

(l) paragraph 8 (1) (p) concerning musical instrument costs; and

(m) paragraph 8 (1) (q) concerning artists' employment expenses.

Child support

2. Deduct any child support received that is included to determine total income in the T1 General form issued by the Canada Revenue Agency.

Support other than child support and universal child care benefit

3. To calculate income for the purpose of determining an amount under an applicable table, deduct,

(a) the support, not including child support, received from the other parent or spouse; and

(b) any universal child care benefit that is included to determine the parent or spouse's total income in the T1 General form issued by the Canada Revenue Agency.

Special or extraordinary expenses

3.1 To calculate income for the purpose of determining an amount under section 7 of this Regulation, deduct the support, not including child support, paid to the other parent or spouse and, as applicable, make the following adjustment in respect of universal child care benefits:

(a) deduct benefits that are included to determine the parent or spouse's total income in the T1 General form issued by the Canada Revenue Agency and that are for a child for whom special or extraordinary expenses are not being requested; or

(b) include benefits that are not included to determine the parent or spouse's total income in the T1 General form issued by the Canada Revenue Agency and that are received by the parent or spouse for a child for whom special or extraordinary expenses are being requested.

Social assistance

4. Deduct any amount of social assistance income that is not attributable to the parent or spouse.

Dividends from taxable Canadian corporations

5. Replace the taxable amount of dividends from taxable Canadian corporations received by the parent or spouse by the actual amount of those dividends received by the parent or spouse.

Capital gains and capital losses

6. Replace the taxable capital gains realized in a year by the parent or spouse by the actual amount of capital gains realized by the parent or spouse in excess of the parent's or spouse's actual capital losses in that year.

Business investment losses

7. Deduct the actual amount of business investment losses suffered by the parent or spouse during the year.

Carrying charges

8. Deduct the parent's or spouse's carrying charges and interest expenses that are paid by the parent or spouse and that would be deductible under the *Income Tax Act* (Canada).

Net self-employment income

9. Where the parent's or spouse's net self-employment income is determined by deducting an amount for salaries, benefits, wages or management fees, or other payments, paid to or on behalf of persons with whom the parent or spouse does not deal at arm's length, include that amount, unless the parent or spouse establishes that the payments were necessary to earn the self-employment income and were reasonable in the circumstances.

Additional amount

10. Where the parent or spouse reports income from self-employment that, in accordance with sections 34.1 and 34.2 of the *Income Tax Act* (Canada), includes an additional amount earned in a prior period, deduct the amount earned in the prior period, net of reserves.

Capital cost allowance for property

11. Include the parent's or spouse's deduction for an allowable capital cost allowance with respect to real property.

Partnership or sole proprietorship income

12. Where the parent or spouse earns income through a partnership or sole proprietorship, deduct any amount included in income that is properly required by the partnership or sole proprietorship for purposes of capitalization.

Employee stock options with a Canadian-controlled private corporation

13. (1) Where the parent or spouse has received, as an employee benefit, options to purchase shares of a Canadian-controlled private corporation or a publicly traded corporation that is subject to the same tax treatment with reference to stock options as a Canadian-controlled private corporation, and has exercised those options during the year, add the difference between the value of the shares at the time the options are exercised and the amount paid by the parent or spouse for the shares and any amount paid by the parent or spouse to acquire the options to purchase the shares, to the income for the year in which the options are exercised.

Disposal of shares

(2) If the parent or spouse has disposed of the shares during a year, deduct from the income for that year the difference determined under subsection (1).

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[1] (Ottawa, Department of Justice Canada, 2008).
[2] For ease of reference, I have deleted the apostrophe to avoid using Mikey's' to denote the possessive.
[3] Counsel's figures were drawn variously from the parties' income tax returns, T4 slips and Notices of Assessment, depending on the year. Accordingly, in years for which only a Notice of Assessment was available, the income figure reflected income from all sources rather just employment income.
[4] The bonus amounts for each year are shown in Appendix 'B'.
[5] In calendar year 2010, each party received employment income totaling $92,448. On April 30, 2010, Mikeys declared management bonuses of $65,000 in favour of each party payable at the close of business that day.
[6] This was because the husband had to incur the expense of renting a condominium.
[7] The only significant differences between the relevant provisions of the two sets of guidelines (ss. 15 to 20) are references to "parent or spouse" (or derivative language) in the CSGs, as compared to references to "spouse" (or derivative language) in the *Federal Child Support Guidelines*; and a reference to "a child of

the marriage or any child under the age of majority" in s. 19 of the *Federal Child Support Guidelines* as compared to a reference to "any child" in s. 19 of the CSGs.

The other differences are inconsequential. The preamble to s. 19 of the *Federal Child Support Guidelines* includes the words "the following"; the preamble to s. 19 of the CSGs does not include those words. Section 20(2) of the *Federal Child Support Guidelines* uses the phrase "the amount that", while s. 20(2) of the CSGs uses the phrase "the amount which". Section 20(2) of the CSGs refers to the "province or territory" in which the other parent or spouse resides, while s. 20 of the *Federal Child Support Guidelines* refers only to "the province". Section 20(2) of the CSGs also specifies "the non-resident parent's or spouse's" annual income, whereas s. 20(2) of the *Federal Child Support Guidelines* refers to "the spouse's" annual income.

[8] There are differences between Schedule III of the CSGs and Schedule III of the *Federal Child Support Guidelines*. As the provisions of Schedule III do not affect this appeal, I have not catalogued these differences.

[9] See para. 39, above, where the calculation of this figure is explained.

[10] The husband did not explain how he calculated this figure. Based on my review of Mikeys' financial statements for 2011 to 2013, it appears that he used a figure shown as "Income (loss) before income taxes" on Mikeys' Statement of Income for each of those years: 2011 - $346,549; 2012 - 266,990; 2013 – ($277,067). These figures yield a three-year total of $336,472 and a three-year average of $112,157.33. I will return to this issue later, but I am not persuaded that "Income (loss) before income taxes" is the proper number on the Statement of Income to use when applying s. 17 of the Guidelines in this case.

[11] The remaining provisions of s. 6 go on to explain distinctive income issues that arise in the spousal support context.

[12] Ann C. Wilton and Noel Semple, *Spousal Support in Canada*, 3d ed. (Toronto: Carswell, 2015), at c. 11.3, p. 509.

[13] Carol Rogerson and Rollie Thompson, *The Spousal Support Advisory Guidelines: A New and Improved User's Guide to the Final Version* (Ottawa: Department of Justice, 2010), at p. 1. See also: Carol Rogerson & Rollie Thompson, *Spousal Support Advisory Guidelines: The Revised User's Guide* (Ottawa: Department of Justice Canada, 2016).

[14] As explained by Mikeys' accountant at trial, this is because when sales are higher, costs tend to be relatively the same. However, when sales are lower, increased costs in any particular area put more pressure on the bottom line.

[15] As set above, the modern rule of statutory interpretation requires that the words of a statute be read "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": see *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC), [1998] 1 S.C.R. 27, at para. 21, quoting from Elmer Driedger, *Construction of Statutes*, 2d ed. (Toronto: Butterworths, 1983), at p.87.

The rules governing statutory interpretation apply equally to regulations. Importantly, a regulation must be read in the context of the enabling Act, having regard to the purpose of the enabling provisions: *Bristol-Myers Squibb Co. v. Canada (Attorney General)*, 2005 SCC 26, [2005] 1 S.C.R. 533 (S.C.C.) at paras. 37-38.

[16] Section 20 addresses non-resident spouses and is not relevant for the purposes of this appeal.

[17] See: *O'Neill v. O'Neill and Nesbitt v. Nesbitt*, 2001 MBCA 113, 156 Man. R. (2d) 238, albeit those cases addressed the availability of averaging under s. 18 and permitting the court to include pre-tax corporate income in excess of corporate income for the most recent taxation year under that section.

[18] As explained above, the husband did not file at trial any 2013 income tax documents. Therefore, his exact line 150 income for 2013 is not available.

[19] These figures are "Income from operations" figures on Mikey's Statement of Income and do not include either other income or other expenses.

[20] Adding these sums actually comes to $114,300.

[21] Carol Rogerson & Rollie Thompson, *Spousal Support Advisory Guidelines: The Revised User's Guide* (Ottawa: Department of Justice Canada, 2016).

[22] For example, the 2016 SSAGs User's Guide encourages adjustments to the "with child" formula, where appropriate. The User's Guide states the following at s. 8(k):

So, if one parent has the primary care of two children, one in high school and another away at university, then the basic [with child support] formula will apply, but with some adjustment required if the adult child's support is assessed under s. 3(2)(b), as was done in *Robitaille v. Trzcinski*, 2015 ONSC 4621 and *McConnell v. McConnell*, 2015 ONSC 2243.