

# A Miscellany of Recent, Frequently Cited Appellate Child Support Decisions

John-Paul Boyd  
Canadian Research Institute for Law and the Family  
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## I. Introduction

The Federal Child Support Guidelines<sup>1</sup> are now almost twenty years old, having come into force on 1 May 1997 as a regulation to the *Divorce Act*.<sup>2</sup> The Guidelines emerged from work begun by the Federal-Provincial-Territorial Family Law Committee in 1990 in response to widespread dissatisfaction with the determination and tax treatment of child support, and were implemented by government with the intention of helping parents, lawyers and judges set “fair and consistent” amounts of child support.<sup>3</sup> Over the years that followed, the Guidelines were adapted and adopted by most provinces and territories<sup>4</sup> for the purposes of their local domestic relations legislation, and a relatively consistent body of case law developed interpreting the new regulation and addressing tricky issues like the amount of support payable for children over the age of majority, when the payor’s annual income is in excess of \$150,000 and when parents have shared custody of their children.

Although the Guidelines’ goal of improving the predictability of child support awards has generally been realized,<sup>5</sup> the change from a needs-and-means analysis to analyses based on annual income has merely shifted the focus of argument from budgets to earnings and earning capacity. Unfortunately, many counsel practicing family law prior to the introduction of the Guidelines are of the view that child support is litigated more frequently now than before, as a result of this change in focus and the new emphasis on income. Nonetheless, the Guidelines have proven to work well for the majority of payors with relatively commonplace employment and child care arrangements; in general, it is only those with irregular or self-employment income, those with equal or near-equal parenting time and those improperly seeking to minimize their support obligations who find themselves mired in arguments about income.

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<sup>1</sup> Federal Child Support Guidelines, SOR/97-175

<sup>2</sup> *Divorce Act*, RSC 1985, c. 3 (2nd Supp.)

<sup>3</sup> Child Support Team, “Child Support Initiative Research Framework: Discussion Paper” (Ottawa ON: Department of Justice, 1998) at p. 2

<sup>4</sup> Manitoba, New Brunswick and Quebec have each developed their own guidelines that apply when both parents reside in the province. The Child Support Guidelines regulations of Manitoba (Man Reg 58/98) and New Brunswick (NB Reg 98-27) bear a close resemblance to the federal Guidelines; Quebec’s Regulation Respecting the Determination of Child Support Payments (CQLR, c. C-25, r. 6) does not.

<sup>5</sup> Canadian Research Institute for Law and the Family, *Phase 2 of the Survey of Child Support Awards: Final Report* (Ottawa, ON: Department of Justice, 2005)

In this paper I will digest ten of the most frequently cited decisions on child support rendered by Canada's courts of appeal in the last three years. These decisions address the aspects of the Guidelines most prone to litigation, including: ss. 18 and 19 on the imputation of income, s. 3 on adult children, s. 7 on special expenses and s. 17 on the averaging of income. In reviewing the digests below, readers should bear in mind the rigorous standard for appellate reviews of support orders set out in *Hickey v Hickey*:<sup>6</sup>

"[10] When family law legislation gives judges the power to decide on support obligations based on certain objectives, values, factors, and criteria, determining whether support will be awarded or varied, and if so, the amount of the order, involves the exercise of considerable discretion by trial judges. ... Because of its fact-based and discretionary nature, trial judges must be given considerable deference by appellate courts when such decisions are reviewed.

"[11] Our Court has often emphasized the rule that appeal courts should not overturn support orders unless the reasons disclose an error in principle, a significant misapprehension of the evidence, or unless the award is clearly wrong. ..."

## II. Case Digest

### A. *Calver v Calver*

**2014 ABCA 63<sup>7</sup>**

**Retroactive Support and Special Expenses for Adult Child: DA ss. 2, 15.1  
Imputing Income: CSG s. 19**

#### Facts:

Separation 2003. Interim consent order in 2004 giving children's primary residence to recipient, requiring child support of \$500 per month for parties' three children and requiring payor to provide annual notices of assessment. Divorce 2006, final order continuing disclosure obligation. Payor's income increasing steadily following final order.

In 2013, payor living in Kamloops and working in Fort McMurray, receiving annual travel and living allowance from employer ranging between \$36,000 and \$48,000.<sup>8</sup> Payor applying to vary 2004 order as one child reaching age of majority and not attending school and payor having acquired primary residence of another of the children. Recipient crossapplying for increase in child support and payment of special expenses retroactive to 2006. Chambers judge imputing \$18,000 of allowance to payor in absence of evidence of payor's actual expenses in working in

<sup>6</sup> *Hickey v Hickey*, [1999] 2 SCR 518, recently confirmed in *D.B.S. v S.R.G.*, 2006 SCC 37.

<sup>7</sup> Available at <http://canlii.ca/t/g332x>. Cited 8 times as of 12 February 2016, according to CanLII.

<sup>8</sup> Amounts rounded to nearest \$500 here and throughout.

Fort McMurray, ordering payment of special expenses and increase in child support retroactive to 2006 for all children.

Payor appealing on grounds that travel and living allowance should not have been included in income and that retroactive support and special expenses ought not have been awarded in respect of adult child.

### Guidelines:

19. (1) The court may impute such amount of income to a spouse as it considers appropriate in the circumstances, which circumstances include the following:
- (a) the spouse is intentionally under-employed or unemployed, other than where the under-employment or unemployment is required by the needs of a child of the marriage or any child under the age of majority or by the reasonable educational or health needs of the spouse;
  - (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.
- (2) For the purpose of paragraph (1)(g), the reasonableness of an expense deduction is not solely governed by whether the deduction is permitted under the *Income Tax Act*.

### Analysis:

Requirement of definition of child of the marriage at DA s. 2 that child be under age of majority or unable to withdraw from parental control *at the material time* means being under age or unable to withdraw *at time of application* for retroactive support. Child support not intended for adults who formerly had that status. Principles of retroactive child support also apply to applications for retroactive special expenses.

*D.B.S. v S.R.G.*, 2006 SCC 37

*Semancik v Semancik*, 2011 BCCA 264

Court may nonetheless make retroactive support order for adult if payor served with application for support or disclosure while adult qualified as child of the marriage. Existence of prior order for disclosure not sufficient; jurisdiction under *Divorce Act* invoked by application. Application for disclosure or to enforce order for disclosure required.

*D.B.S. v S.R.G.*, 2006 SCC 37

Court has discretion to impute income to party under CSG s. 19, but discretion must be exercised *reasonably*.

*Hawkswell v Ostyn*, 2008 ONCJ 677

Job-related payments received by payors for travel and living costs often not included in income for child support purposes, for reasons including that living allowances are not income under Guidelines and Guidelines allow deduction of travel expenses paid by employee from income.

*McCaffrey v Dalla Longa*, 2008 ABQB 183

*Jordan v Jordan*, 2005 SKQB 129

*O'Brien v O'Brien*, [1999] NWTJ No. 56 (NWTSC)

### **Application:**

Discretion to impute income must be exercised reasonably. Decision of chambers judge not reasonable as: payor's evidence as to cost of living uncontroverted by recipient; cost of living in Fort McMurray notoriously high; chambers judge making assumptions about cost of travel in absence of evidence; and, chambers judge second-guessing payor's "legitimate" choice of transportation. Payor's income to be calculated without imputing income from travel and living allowance.

Adult child not child of marriage when application made for retroactive child support and special expenses. Although retroactive orders may be made in respect of adult children, application for order or disclosure must be made while child is child of marriage. Recipient unable to rely on disclosure requirement of 2006 order as *Divorce Act* is application-based regime. No child support or special expenses payable in respect of adult child.

### **Handy Quotes:<sup>9</sup>**

#### *Test to impute income*

"[19] A court's discretion to impute income must be exercised reasonably. In this case it was not."

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#### *Travel and living allowances not generally treated as income*

"[16] Several cases have declined to impute income based on job-related payments for travel and living expenses ... Various rationales exist: it would be unjust to attribute income that is meant to reimburse a party for costs incurred in the course of employment; the *Income Tax Act* excludes from income certain benefits relating to special work sites or remote work locations; living allowances are not income under the Federal Child Support Guidelines; it would be inconsistent with the Guidelines to add a travel allowance to income when the Guidelines specifically authorize the deduction from income of travel

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<sup>9</sup> Cites from text of judgments omitted here and throughout.

expenses paid directly by an employee; and these amounts can be speculative since they may depend on the number of days away from home. The fact that an employee need not account for such an allowance has been considered irrelevant to the allowance's treatment."

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*Payors not to be penalized for expenses incurred in earning high income*

"[22] ... The [payor's] willingness to frequently absent himself from his family permits him to earn a good wage. He should not be penalized by imputing as income allowances paid to defray expenses arising from the fact that he works a considerable distance from where he lives with his family."

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*Application for disclosure as prerequisite of application for retroactive support*

"[32] ... The *Divorce Act* is an application-based regime. ... The same could be said of any other application to enforce a disclosure obligation, for example, an application for contempt of previous court orders imposing such obligations. Simply put, such applications may be pre-requisites to an application for retroactive support, since without the necessary information a payee will lack the basis for seeking retroactive support."

**B. *Decaen v Decaen***

**2013 ONCA 218<sup>10</sup>**

**Termination of Support for Adult Child: DA s. 15.1**

**Averaging Income: CSG s. 17**

**Facts:**

Separation 2007. Four children, adult child brought into marriage; eldest two children terminating contact with payor. Trial 2012. Payor failing to disclose income. Trial order terminating support for adult child, then in final year of undergraduate degree program, upon completion of degree; judge commenting that payor should not be expected to continue to support adult child, especially given that child refuses to speak to him. Trial judge imputing income to both recipient and payor, but accepting payor's projected earnings for most recent calendar year.

Recipient appealing on bases including that insufficient income imputed to payor as judge failing to average payor's income over past three years, and trial judge erring in ordering termination of support for adult child. Adult child enrolled in post-graduate studies at time of appeal.

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<sup>10</sup> Available at <http://canlii.ca/t/fwngx>. Cited 12 times as of 10 February 2016.

**Guidelines:**

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.

**Analysis:**

Standing of adult children as "child of marriage" entitled to continuing parental support under DA s. 15.1 beyond one course of post-secondary education dependent on parents' ability to pay.

*W.P.N. v B.J.N.*, 2005 BCCA 7

*Farden v Farden* (1993), 48 RFL (3d) 60 (BCSC)

*Martell v Height* (1994), 3 RFL (4th) 104 (NSCA)

CSG s. 17 allows court to consider party's income over last three years where determining income based on T1 Line 150, as required by CSG s. 16, would not yield fairest determination. Although *consideration* of income received over last three years is mandatory in these circumstances, the averaging of income received over last three years is discretionary.

*S.A.N. v J.M.S.*, 2011 BCSC 963

**Application:**

Extensive evidence before trial judge of family's limited financial resources. Responsibility of parents to fund beyond one degree subject to parents' financial capacity. Trial judge's conclusion that payor's obligation to adult child ends with her undergraduate studies not unreasonable. Trial judge's reference to lack of contact between child and payor not determinative factor in decision.

Trial judge concluding that payor had failed to disclose income and considered pattern of payor's income over previous seven years and accepted payor's projected income. Trial judge did consider payor's income over last three years and exercising discretion to not average income. Trial judge not obliged to average income under CSG s. 17(2).

**Handy Quotes:***Support of adult children for more than one post-secondary program*

“[58] ... There was extensive evidence before the trial judge of the family’s limited financial resources. While parents of significant means may be ordered to pay support for a second degree, support for a second degree is very much subject to the parents’ ability to pay. The trial judge concluded that, within the context of this family, it was appropriate that the father’s support obligation to [the adult child] end with her undergraduate studies. We agree. ...”

*Averaging income discretionary*

“[50] Section 17 of the Child Support Guidelines provides that where the court is of the opinion that determining a parent’s income using the T1 General form issued by the Canada Revenue Agency 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’. The language in section 17 is permissive rather than mandatory, allowing the court to look at the spouse’s income over the last three years in appropriate circumstances. Here the trial judge did actually look at the father’s income over those three years. What he did not do was average the income over those three years. There is no requirement that he do so.”

**C. Delichte v Rogers****2013 MBCA 106<sup>11</sup>****Special Expenses: CSG s. 7****Facts:**

Separation 2004. Final order in 2007 requiring payor to contribute to special expenses, including children’s private school, dance and hockey fees amounting to \$22,500. Recipient successfully applying to vary final order in 2010 to relocate; payor unsuccessful in crossapplication to terminate obligation to contribute to special expenses. Recipient relocating in 2011, enrolling children in new private school.

Payor successful in second application to terminate obligation to contribute to special expenses in 2012. Payor’s 2011 income \$277,500; recipient’s 2011 income \$5,000 plus \$12,000 in spousal support. Recipient appealing on grounds including failure to find a material change in circumstances before terminating obligation to contribute to private school fees and failure to correctly apply the Guidelines.

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<sup>11</sup> Available at <http://canlii.ca/t/g25vv>. Cited 11 times as of 9 February 2016.

## Guidelines:

7. (1) In a child support order the court may, on either spouse's request, provide for an amount to cover all or any portion of the following expenses, which expenses may be estimated, taking into account the necessity of the expense in relation to the child's best interests and the reasonableness of the expense in relation to the means of the spouses and those of the child and to the family's spending pattern prior to the separation:
  - (a) child care expenses incurred as a result of the custodial parent's employment, illness, disability or education or training for employment;
  - (b) that portion of the medical and dental insurance premiums attributable to the child;
  - (c) health-related expenses that exceed insurance reimbursement by at least \$100 annually, including orthodontic treatment, professional counselling provided by a psychologist, social worker, psychiatrist or any other person, physiotherapy, occupational therapy, speech therapy and prescription drugs, hearing aids, glasses and contact lenses;
  - (d) extraordinary expenses for primary or secondary school education or for any other educational programs that meet the child's particular needs;
  - (e) expenses for post-secondary education; and
  - (f) extraordinary expenses for extracurricular activities.
  - (1.1) For the purposes of paragraphs (1)(d) and (f), the term "extraordinary expenses" means
    - (a) expenses that exceed those that the spouse requesting an amount for the extraordinary expenses can reasonably cover, taking into account that spouse's income and the amount that the spouse would receive under the applicable table or, where the court has determined that the table amount is inappropriate, the amount that the court has otherwise determined is appropriate; or
    - (b) where paragraph (a) is not applicable, expenses that the court considers are extraordinary taking into account
      - (i) the amount of the expense in relation to the income of the spouse requesting the amount, including the amount that the spouse would receive under the applicable table or, where the court has determined that the table amount is inappropriate, the amount that the court has otherwise determined is appropriate,
      - (ii) the nature and number of the educational programs and extracurricular activities,
      - (iii) any special needs and talents of the child or children,
      - (iv) the overall cost of the programs and activities, and
      - (v) any other similar factor that the court considers relevant.
  - (2) The guiding principle in determining the amount of an expense referred to in subsection (1) is that the expense is shared by the spouses in proportion to their respective incomes after deducting from the expense, the contribution, if any, from the child.
  - (3) Subject to subsection (4), in determining the amount of an expense referred to in subsection (1), the court must take into account any subsidies, benefits or income tax deductions or credits relating to the expense, and any eligibility to claim a subsidy, benefit or income tax deduction or credit relating to the expense.
  - (4) In determining the amount of an expense referred to in subsection (1), the court shall not take into account any universal child care benefit or any eligibility to claim that benefit.

## Analysis:

CSG s. 7 recognizes that needs of families vary and term "extraordinary expense" must be

understood in context of means and circumstances of particular family before the court.

*Andries v Andries* (1998), 159 DLR (4th) 665 (MBCA)

*Correia v Correia*, 2002 MBQB 172

*Holeman v Holeman*, 2006 MBQB 278

Categories of expense in s. 7(1) are exhaustive. Onus lies on applicant to demonstrate that claimed expenses fall within category. Applicant must also provide some evidence of cost of expense, including estimate of cost.

*Graham v Graham*, 2008 MBQB 25

*Ferguson v Thorne*, 2007 NBQB 66

Applicant must also show expense is necessary and reasonable. Necessity doesn't mean necessities for life but expense appropriate to circumstances of child. Courts are split on necessity of private school fees, with some requiring proof that school is in best interests of child. Reasonableness is often root of dispute. Determining reasonableness requires examination of means of parties not just incomes; means is interpreted broadly and includes parties' spending patterns prior to separation.

*Hiemstra v Hiemstra*, 2005 ABQB 192

*Leskun v Leskun*, 2006 SCC 25

Decision to require contribution to expense is always discretionary. Where court determines amount should be awarded in respect of expenses, contribution usually but not always in proportion to parties' incomes, depending on circumstances of case. Requirement of s. 7(2) to share in proportion to incomes is guiding principle not rule.

*E.K.R. v G.A.W.* (1997), 122 ManR (2d) 120 (MBQB)

*Staples v Callender*, 2010 NSCA 49

Lack of consultation on incurrance of expense does not preclude application to apportion cost of expense, but is factor court may consider in exercising discretion.

*Pepin v Jung*, [1997] OJ No. 4606 (OGD)

### **Application:**

Chambers judge correctly held that private school fees are only treated as special expense after consideration of child's needs and circumstances but erring in failing to consider parties' spending patterns prior to separation. Per *D.B.S.*,<sup>12</sup> child support is the right of the child, that right survives separation and children are entitled as much as possible to a standard of living after separation as that enjoyed before separation. If a family considers an expense reasonable and necessary before separation, expense continues to be reasonable and necessary absent a change affecting circumstances of child or means of parties.

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<sup>12</sup> *Supra*, at para. 38.

Onus on variation application lies on party seeking change. Chambers judge erring in putting burden of proof on recipient to establish that private school fees are qualifying special expense. Original order on special expenses presumed to be correct; chambers judge treating as original application for special expenses.

Appeal allowed as to payment of private school fees as special expense.

### **Handy Quotes:**

#### *Qualification of expenses as special is case specific*

“[26] Expenses are extraordinary if they exceed an amount that the requesting spouse can reasonably cover, taking into account the income of the requesting spouse and any child support received. Thus, the term ‘extraordinary expense’ must be understood within the particular family’s means and circumstances. If the expenses do not exceed an amount the requesting spouse can reasonably cover, then the court will consider the factors listed in s. 7(1.1)(b) to determine whether the expenses can still be classified as extraordinary in the circumstances.”

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#### *Test to qualify expense as extraordinary*

“[33] What must be remembered is that the classification of the expenses as extraordinary is only the first step in determining the issue of whether to order the sharing of the expenses. Even if the expenses are classified as extraordinary and they come within one of the categories listed in the section, the court must still be satisfied that the expenses are reasonable and necessary before ordering the sharing of the expenses.

“[34] In determining whether the two-part test of necessity and reasonableness outlined in s. 7(1) has been satisfied, the court is to take the following factors into account:

1. the necessity of the expense in relation to the child’s best interests; and
2. the reasonableness of the expense in relation to
  - a. the means of the spouses and those of the child; and
  - b. the family’s spending pattern prior to the separation.

“[35] Courts have generally considered that the test of necessity does not connote only the necessities of life, but, rather, may include things that are ‘suitable to or proper for his station in life bearing in mind his requirements at the time’. ...”

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#### *Estimates of cost of expense may be used*

“[29] When the actual amount of [a proposed extraordinary] expense is difficult to ascertain, the expenses may be estimated; however, there must be some evidence to support the estimation of the

expenses, otherwise the court cannot determine whether the requesting spouse is able to reasonably cover a totally unknown expense. “

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### *Deference to discretion of trial judge on review not unlimited*

“[48] ... A judge does not have an unfettered discretion to simply decide the case on the facts and his or her individual consideration of what a just outcome should be. The judge, in exercising his or her discretion, must apply the applicable principles of law set out in the statute and apply those principles to the facts in a manner consistent with the purpose of the statute. ...”

## **D. Fraser v Fraser**

**2013 ONCA 715<sup>13</sup>**

**Calculation and Imputation of Income: CSG ss. 3, 19**

### **Facts:**

Separation 2002. Interim child support order 2003. Consent final order 2007. Payor employed as psychiatrist during marriage but losing licence prior to final order as a result of mental health issues. Order terminating payor’s child support obligation but requiring payor to deposit \$200,000 from sale of family home in trust, to be returned upon him meeting future child support obligation between 2007 and 2010, and establishing review mechanism. Between 2008 and 2012, payor receiving funds from sources including capital, interest, social assistance, CPP disability, an insurance settlement and RRSPs of \$800,000.

Payor applying for return of \$200,000. Chambers judge finding payor subsisting by drawing \$80,000 each year from capital. Judge not satisfied that payor unable to work and, given history of non-payment, ordering lump sum child support of \$281,500, for payor’s past and future child support obligations, based on payor’s ability to earn untaxed income of \$80,000, grossed up to \$118,000 for support purposes.

Payor appealing on basis that chambers judge erred in conflating capital with income and imputing income when unable to work. Appeal raising further questions about determination of payor’s income and retroactive and future support obligations.

### **Guidelines:**

3. (1) Unless otherwise provided under these Guidelines, the amount of a child support order for children under the age of majority is
  - (a) the amount set out in the applicable table, according to the number of children under the age of majority to whom the order relates and the income of the spouse against whom the

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<sup>13</sup> Available at <http://canlii.ca/t/g1zk0>. Cited 10 times as of 10 February 2016.

order is sought; and

(b) the amount, if any, determined under section 7.

(2) Unless otherwise provided under these Guidelines, where a child to whom a child support order relates is the age of majority or over, the amount of the child support order is

(a) the amount determined by applying these Guidelines as if the child were under the age of majority; or

(b) if the court considers that approach to be inappropriate, the amount that it considers appropriate, having regard to the condition, means, needs and other circumstances of the child and the financial ability of each spouse to contribute to the support of the child.

(3) The applicable table is

(a) if the spouse against whom an order is sought resides in Canada,

(i) the table for the province in which that spouse ordinarily resides at the time the application for the child support order, or for a variation order in respect of a child support order, is made or the amount is to be recalculated under section 25.1 of the Act,

(ii) where the court is satisfied that the province in which that spouse ordinarily resides has changed since the time described in subparagraph (i), the table for the province in which the spouse ordinarily resides at the time of determining the amount of support, or

(iii) where the court is satisfied that, in the near future after determination of the amount of support, that spouse will ordinarily reside in a given province other than the province in which the spouse ordinarily resides at the time of that determination, the table for the given province; and

(b) if the spouse against whom an order is sought resides outside of Canada, or if the residence of that spouse is unknown, the table for the province where the other spouse ordinarily resides at the time the application for the child support order or for a variation order in respect of a child support order is made or the amount is to be recalculated under section 25.1 of the Act.

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

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

(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.

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

**Analysis:**

CSG s. 3 establishes basic rule that child support determined according to payor's income. CSG s. 15 provides that income is determined in accordance with ss. 16 to 20. Income presumptively determined by reference to T1 Line 150 under CSG s. 16, however CSG s. 19 allows court to impute income in circumstances listed at s-s. (1). When income is imputed a rational basis must exist for the amount that is determined.

*Drygala v Pauli* (2002), 61 OR (3d) 711 (OCA)  
*Kowalewich v Kowalewich*, 2001 BCCA 450

RRSP income is reported at Line 150 and is therefore included in payor's income for child support, even though the income originates from capital and even though the RRSP account may have been previously divided between the parties as family property.

*Stevens v Boulerice* (1999), 49 RFL (4th) 425 (OSC)

Court may treat a portion of insurance settlement as income, even where settlement fails to distinguish between amounts awarded for lost wages and amounts awarded for pain and suffering. Party receiving settlement bears onus of establishing amounts allocated to pain and suffering. Court should not, however, make arbitrary decision allocating settlement proceeds.

*Neufeld v Neufeld*, 2001 BCSC 1197  
*Zoldy v Zoldy*, 2007 ONCJ 24

CSG s. 19(1)(e) allows court to impute income to party not reasonably using own property to generate income.

*Sedlmair v Sedlmair* (1999), 3 RFL (5th) 294 (BCSC)

**Application:**

No evidence supporting conclusions of chambers judge that payor able to return to work and generate a before-tax income \$80,000, however payor's income for support purposes not nil.

RRSP income is income for child support.

Unreasonable for payor not to have invested \$800,000 received between 2007 and 2010 in light of his child support obligation and inability to find work matching income received as psychiatrist. Payor should have at least invested insurance settlement and sale proceeds from disposal of personal property totaling \$611,000. Interest income therefore imputed at an annual rate of 3%.

Court recalculating payor's income as including: interest income on \$200,000 held in trust; RRSP income; CPP disability; imputed interest income from capital; and, imputed interest income from insurance settlement. Payor's income in 2013 fixed at \$31,000; arrears fixed at \$54,000. Arrears to be paid from funds held in trust, payor prospective child support based on income of \$31,000.

**Handy Quotes:**

*RRSP income can be included in income for support despite its previous equalization*

“[103] ... The clear wording of the Guidelines includes RRSP withdrawals as income and no special exception for RRSP withdrawals has been provided in Schedule III. Although I would acknowledge the possibility that the facts of a particular equalization [between spouses] could in theory reach the threshold of unfairness, I have no evidence about the specifics of the equalization calculation that occurred in this case and cannot so conclude.”

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**Obligation to invest property to generating income**

“[117] Section 19(1)(e) of the Guidelines permits a court to impute income to a spouse where the spouse’s property is not reasonably utilized to generate income. As I have said, in this case, the father received monies, consisting of both capital and income, in excess of \$800,000 during the period between September 1, 2007 and September 1, 2010. Having regard to the father’s obligations to support his children and his inability to continue to work at employment that would generate a significant income when he had done so in the past, I consider it unreasonable that he would not have invested some significant portion of those receipts to generate income that could be used in part to help support his children.”

**E. *Goett v Goett***

**2013 ABCA 216<sup>14</sup>**

**Imputation of Income: CSG ss. 18, 19**

**Facts:**

Payor employed by own company, numbered Alberta corporation. Separation 2007. Trial 2010. Payor subsequently transferring interest in numbered corporation to new partner as sole shareholder. Payor’s income declining from \$200,000 in 2007 to \$80,000 in 2010. Trial order for ongoing child support plus three years’ retroactive support, arrears fixed at \$91,000. Numbered corporation ordered to keep recipient apprised as to payor’s income and made subject to garnishment in event arrears accumulate. After trial, business of numbered corporation transferred to new company.

Payor subsequently applying to decrease child support; recipient applying to increase. Payor claiming continuing decline in income while new company’s retained earnings increasing and new partner’s salary increasing. Evidence establishing that payor remaining controlling mind and owner of new company. Chambers judge finding: no evidence to support payor’s claim that business slowing; no justification for increase in new partner’s salary; payor diverting income;

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<sup>14</sup> Available at <http://canlii.ca/t/fz66d>. Cited 14 times as of 10 February 2016.

and, new company used to avoid effect of trial order against numbered corporation. Order imputing income to payor of \$80,000 under CSG s. 19(1)(d) and extending disclosure order to new company. New company not subject to garnishment.

Recipient appealing chambers decision on grounds including that income should also have been imputed to payor under CSG s. 18.

**Guidelines:**

- 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 spouse establishes that the payments were reasonable in the circumstances.
- 19.** (1) The court may impute such amount of income to a spouse as it considers appropriate in the circumstances, which circumstances include the following:
- (a) the spouse is intentionally under-employed or unemployed, other than where the under-employment or unemployment is required by the needs of a child of the marriage or any child under the age of majority or by the reasonable educational or health needs of the spouse;
  - (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.
- (2) For the purpose of paragraph (1)(g), the reasonableness of an expense deduction is not solely governed by whether the deduction is permitted under the *Income Tax Act*.

**Analysis:**

Guidelines recognize that fairest determination of income may not be as determined by reference to T1 Line 150 as required by CSG s. 16. CSG s. 18 is available where court is of the view that s. 16 approach would not reflect all of the money available to the party for the payment of child support.

*Hilliar v Stasiuk*, 2002 SKQB 377

Under s. 18(1), court may consider pre-tax income of company to determine party's income for support purposes where party is shareholder, director or officer of company, usually net income reported in income statement of company's financial statement. Under s. 18(2), to net income must be added payments and benefits given to non-arm's-length person, with onus on party to establish that payments are reasonable if they are to be excluded.

*Nesbitt v Nesbitt*, 2001 MBCA 113

*Kowalewich v Kowalewich*, 2001 BCCA 450

Where ownership of company has been transferred for purposes of avoiding child support obligation and company and party are not dealing at arm's length, pre-tax income of transferred company may be considered in determining party's income to avoid unfairness that would result from use of corporate structure to divert or manipulate income to avoid payment of appropriate amount of child support. Decision to consider income of transferred company is discretionary as transfer may have occurred for legitimate business purposes.

*Baum v Baum* (1999), 182 DLR (4th) 715 (BCSC)

*Kowalewich v Kowalewich*, 2001 BCCA 450

CSG s. 19 provides general authority for court to impute income where income stated at Line 150 does not represent income available to party. CSG s. 18 provides one method of determining appropriate income for purposes of child support.

*Patrick v Taylor*, 2013 ONSC 2971

*Dickson v Dickson*, 2009 MBQB 274

Onus to establish imputing income appropriate lies on party making claim. Once established that imputation is appropriate, onus shifts to other party to prove that accumulation of retained earnings or incurring of expenses is reasonable given nature of business.

*Johnson v O'Neil*, 2014 ONSC 7272

*Crowe v McIntyre*, 2014 ONSC 7106

**Application:**

Trial judge finding payor remaining controlling mind of new company and no legitimate business purpose behind transfer of numbered corporation, but balked at applying CSG s. 18 as payor not shareholder, director or officer of new company although applied s. 19(1)(d) in finding payor diverting income.

As evidence establishing payor remaining “*de facto* shareholder” of new company and no evidence that considering pre-tax income of new company would be unfair, no basis for declining to use income determination methodology provided in s. 18 and trial judge erring accordingly. Judge also erring in placing onus on recipient to establish inappropriateness of new company’s expenses and in failing to extend garnishment order to new company.

Court ordering payment of child support on income of \$150,000, based on new company’s pre-tax income of \$35,500, personal use business expenses of \$8,000 and wages of \$118,500 paid to payor and new partner.

### **Handy Quotes:**

#### *Piercing the corporate veil*

“[12] Put simply, where a payor operates through a corporation, the guidelines expressly provide that the corporate veil can be pierced if the court is satisfied that the income as determined under s 16 does not fairly represent the amount available to pay child support. ...

“[13] When the corporate veil is lifted in a commercial context, certain factors are considered: for example, whether the individual exercises complete control of finances, policy, and business practices of the company, whether the control has been used by the individual to commit a fraud or wrong that would unjustly deprive a claimant of his or her rights, and whether the misconduct (for example the transfer) is the reason for the loss. These factors are also relevant, although not applied as stringently, in the family context. ...

“[20] ... Where a payor has transferred shares to a non-arms length party to avoid the payment of child support, a purposive interpretation of the guidelines and the discretion afforded under them, particularly s 19, permits a s 18 analysis to be undertaken by piercing the corporate veil. To interpret the guidelines otherwise is to allow the payor to avoid his or her obligations by employing a corporate structure, potentially creating fraudulent conveyances, and deprive the children of the support to which they are reasonably entitled.”

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#### *Balancing interests of child and actual needs of company*

“[16] A body of jurisprudence has developed under s 18 in an effort to address the fundamental unfairness that arises if a parent can divert, manipulate or shelter income through the use of a corporate structure to avoid the payment of adequate child support. At the same time, in an effort to balance legitimate business expenses and capital requirements, criteria [have] developed to inform the exercise of judicial discretion. These criteria include the role the payor plays in the corporation, whether he or she is the sole shareholder, the degree of control the payor exercises, the evidence as to the availability of retained earnings to pay child support, and whether those earnings are required to manage the business and ensure its ongoing financial viability.”

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*CSG ss. 18 and 19 work in tandem*

“[18] ... Section 19 of the guidelines affords the court a discretion to impute income in circumstances where the court is of the view that the income as stated in the tax returns does not truly represent the income available to pay child support. Section 18 is one method that assists the court in determining what is appropriate income for the purpose of child support. The sections are inextricably linked, designed to work in tandem, and are not mutually exclusive means of ascertaining that income.”

## **F. *Gould v Gould***

### **2013 SKCA 34<sup>15</sup>**

#### **Income in Excess of \$150,000: CSG s. 4**

#### **Facts:**

Separation 2006. Payor remitting child support of \$4,000 per month prior to trial in 2011. Trial judge fixing payor’s income at \$802,000, average of income over previous three years. Trial judge also finding that table amount of \$13,000 “inappropriate” under CSG s. 4, relying on the recipient’s financial statement, ordering child support of \$7,000 per month for parties’ three children.

Recipient appealing on bases including that table amount \$13,000 not inappropriate. Recipient also arguing that trial judge should not have relied on her financial statement in determining children’s needs as statement reflected expenses at time of trial based on previous child support payments of \$4,000.

#### **Guidelines:**

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

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<sup>15</sup> Available at <http://canlii.ca/t/fwxcg3>. Cited 10 times as of 10 February 2016.

**Analysis:**

Court must have reason to depart from the table amount of child support. Circumstances justifying departure from table amount will vary from case to case, however factors listed in CSG s. 4(b)(ii) as relevant to determining appropriateness also relevant to initial determination of inappropriateness and court must consider all of these factors.

*Francis v Baker*, [1999] 3 SCR 250

Tables presumptively apply where payors have incomes in excess of \$150,000, party seeking to deviate from table bears onus of rebutting presumption. "Inappropriate" means unsuitable, evidence must be sufficient to raise a concern that table amount inappropriate. Once presumption rebutted, court may increase or decrease support order from table amount.

*Ewing v Ewing*, 2009 ABCA 227

Once presumption rebutted, court must consider children's condition, means, needs and other circumstances to determine the appropriate amount of support. Recipient's failure to adduce evidence on these points may result in lower support order.

*Ewing v Ewing*, 2009 ABCA 227

*Tauber v Tauber* (2000), 48 OR (3d) 577 (OCA)

*D.B.S. v S.R.G.*, 2006 SCC 37

Actual circumstances of children are critical to CSG s. 4 analysis; court may rely on current statement of children's expenses. Child expense budgets, although desirable, are not mandatory. Necessity of budget at discretion of judge.

*Francis v Baker*, [1999] 3 SCR 250

**Application:**

Purpose of financial statement is to give court information upon which it may act. Utility of statement in CSG s. 4 analysis depends on how recent, complete and detailed it is. Recipient relied on financial statement to demonstrate current and future expenses, financial statement was not only evidence relied on by trial judge in s. 4 analysis. Trial judge erring neither in relying on financial statement nor in failing to order recipient to produce child expense budget.

Onus lies on payor to show table amount inappropriate. Once issue is raised, court must consider evidence of inappropriateness in its entirety. Judge considered expenses of children, extracted from recipient's financial statement, recipient's income, payor's income, standard of living provided to children at payor's home, and that table amount twice as much as children's current and future expenses. Judge's decision discretionary and supportable; appeal dismissed.

**Handy Quotes:***Role of financial statement in s. 4 analysis*

“[22] ... the whole purpose of [a financial statement] is to provide evidence upon which the court *may* act if it is appropriate. Whether it will have much or little weight in a s. 4 analysis and how useful it will be in the context of all the s. 4 factors depends on how current, how complete and how detailed it is.

“[23] Even if the form is not a prospective ‘budget’ in the sense of disclosing future needs of the children, it may nevertheless provide some evidence of the needs of the children. ...”

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*Child expense budgets not mandatory*

“[29] The trial judge is likewise not obligated to order [a party] to provide a [child expense] budget; whether to do so is in her discretion. It is apparent that the lack of a discrete budget did not hinder the trial judge. She was able to extract the expenses referable to the children from what she had before her.”

**G. *Goulding v Keck*****2014 ABCA 138<sup>16</sup>****Retroactive Support: DA s. 15.1****Support and Special Expenses for Adult Child: CSG ss. 3, 7****Facts:**

Brief unmarried relationship in 1994 resulting in child born in 1995. Agreement requiring payment of child support, disclosure and annual review reached 2000. Neither party providing disclosure. Payor’s income subsequently increasing, payor not advising recipient. Recipient applying for child support order, with retroactive effect, plus special expenses for child’s university costs in 2013. Payor refusing to provide disclosure prior to 2009.

Chambers judge dismissing retroactive claim on bases that payor’s failure to disclose increase in income not blameworthy and no evidence that child’s need was significant during period when support claimed. Child support ordered at less than table amount for eight months per year when child in school. Payor’s contribution of \$22,500 held to satisfy his obligation to contribute to university costs.

Recipient appealing on ground that retroactive application should not have been dismissed and that child support should not have been ordered in less than table amount, seeking retroactive support from 2009 to 2012.

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<sup>16</sup> Available at <http://canlii.ca/t/g6n43>. Cited 13 times as of 14 February 2016.

## Guidelines:

3. (1) Unless otherwise provided under these Guidelines, the amount of a child support order for children under the age of majority is
    - (a) the amount set out in the applicable table, according to the number of children under the age of majority to whom the order relates and the income of the spouse against whom the order is sought; and
    - (b) the amount, if any, determined under section 7.
  - (2) Unless otherwise provided under these Guidelines, where a child to whom a child support order relates is the age of majority or over, the amount of the child support order is
    - (a) the amount determined by applying these Guidelines as if the child were under the age of majority; or
    - (b) if the court considers that approach to be inappropriate, the amount that it considers appropriate, having regard to the condition, means, needs and other circumstances of the child and the financial ability of each spouse to contribute to the support of the child.
  - (3) The applicable table is
    - (a) if the spouse against whom an order is sought resides in Canada,
      - (i) the table for the province in which that spouse ordinarily resides at the time the application for the child support order, or for a variation order in respect of a child support order, is made or the amount is to be recalculated under section 25.1 of the Act,
      - (ii) where the court is satisfied that the province in which that spouse ordinarily resides has changed since the time described in subparagraph (i), the table for the province in which the spouse ordinarily resides at the time of determining the amount of support, or
      - (iii) where the court is satisfied that, in the near future after determination of the amount of support, that spouse will ordinarily reside in a given province other than the province in which the spouse ordinarily resides at the time of that determination, the table for the given province; and
    - (b) if the spouse against whom an order is sought resides outside of Canada, or if the residence of that spouse is unknown, the table for the province where the other spouse ordinarily resides at the time the application for the child support order or for a variation order in respect of a child support order is made or the amount is to be recalculated under section 25.1 of the Act.
7. (1) In a child support order the court may, on either spouse's request, provide for an amount to cover all or any portion of the following expenses, which expenses may be estimated, taking into account the necessity of the expense in relation to the child's best interests and the reasonableness of the expense in relation to the means of the spouses and those of the child and to the family's spending pattern prior to the separation:
    - (a) child care expenses incurred as a result of the custodial parent's employment, illness, disability or education or training for employment;
    - (b) that portion of the medical and dental insurance premiums attributable to the child;
    - (c) health-related expenses that exceed insurance reimbursement by at least \$100 annually, including orthodontic treatment, professional counselling provided by a psychologist, social worker, psychiatrist or any other person, physiotherapy, occupational therapy, speech therapy and prescription drugs, hearing aids, glasses and contact lenses;
    - (d) extraordinary expenses for primary or secondary school education or for any other educational programs that meet the child's particular needs;
    - (e) expenses for post-secondary education; and

(f) extraordinary expenses for extracurricular activities.

- (1.1) For the purposes of paragraphs (1)(d) and (f), the term “extraordinary expenses” means
- (a) expenses that exceed those that the spouse requesting an amount for the extraordinary expenses can reasonably cover, taking into account that spouse’s income and the amount that the spouse would receive under the applicable table or, where the court has determined that the table amount is inappropriate, the amount that the court has otherwise determined is appropriate; or
  - (b) where paragraph (a) is not applicable, expenses that the court considers are extraordinary taking into account
    - (i) the amount of the expense in relation to the income of the spouse requesting the amount, including the amount that the spouse would receive under the applicable table or, where the court has determined that the table amount is inappropriate, the amount that the court has otherwise determined is appropriate,
    - (ii) the nature and number of the educational programs and extracurricular activities,
    - (iii) any special needs and talents of the child or children,
    - (iv) the overall cost of the programs and activities, and
    - (v) any other similar factor that the court considers relevant.
- (2) The guiding principle in determining the amount of an expense referred to in subsection (1) is that the expense is shared by the spouses in proportion to their respective incomes after deducting from the expense, the contribution, if any, from the child.
- (3) Subject to subsection (4), in determining the amount of an expense referred to in subsection (1), the court must take into account any subsidies, benefits or income tax deductions or credits relating to the expense, and any eligibility to claim a subsidy, benefit or income tax deduction or credit relating to the expense.
- (4) In determining the amount of an expense referred to in subsection (1), the court shall not take into account any universal child care benefit or any eligibility to claim that benefit.

### **Analysis:**

Parents are encouraged to settle family law disputes, may make agreements on child support. Such agreements are subject to court’s continuing jurisdiction to ensure children’s best interests are met and adequate support is paid. However, if agreement not unconscionable and parties’ intentions and expectations adequately comply with the law, court must respect their settlement.

*Doe v Alberta*, 2007 ABCA 50

*L.L. v G.B.*, 2008 ABQB 356

Parties to agreement under strict liability to comply with agreement. Where failure to comply redounds to detriment of child, court must enforce those obligations in absence of unfairness.

*L.L. v G.B.*, 2008 ABQB 356

*Koback v Koback*, 2013 SKCA 91

Parents have free-standing duty to support children in amount commensurate with income. Where payor has not increased support as a result of increased income, court may order retroactive support. To balance the payor’s interest in predictability with child’s interest in

proper amount of support, court will consider explanation for delay in application, payor's conduct, child's circumstances and hardship resulting from retroactive award.

*D.B.S. v S.R.G.*, 2006 SCC 37

Recipient's delay does not free payor from liability.

*D.B.S. v S.R.G.*, 2006 SCC 37

Failure to disclose income generally viewed as blameworthy behaviour militating in favour of retroactive award. The payor's intentions are usually irrelevant, the question is whether the payor's conduct had the effect of putting his or her interests ahead of the child's right to support.

*Greene v Greene*, 2010 BCCA 595

*Witwicki v Seifner*, 2013 ABQB 334

*Young v Smith*, 2013 ABQB 521

Child's circumstances and needs to be measured against the benefits and supports child would have had if supported by both parents. Loss of benefits is presumed where payor failed to pay table amount over long period of time. Court may consider whether child benefited from other form of support beyond that which recipient could provide alone. Recipient is not required to prove "significant" need.

*Burchill v Roberts*, 2013 BCCA 39

*Swiderski v Dusseault*, 2009 BCCA 461

Onus lies on payor to establish facts from which finding of hardship could be made. A mere assertion of hardship is insufficient, nor is the requirement to pay the proper amount of support for a prior period of time.

*Greene v Greene*, 2010 BCCA 595

In absence of order or agreement providing for disclosure, general limit of retroactive order is date of notice to payor.

*D.B.S. v S.R.G.*, 2006 SCC 37

### **Application:**

Parties' agreement not only fixed amount of child support payable but imposed obligations on payor to disclose income and pay support commensurate with his income under the Guidelines. In accepting obligations, payor could not rely on amount of support set out in agreement; payor's obligation was variable. Payor's lack of ill will or bad faith irrelevant.

Recipient's delay not unreasonable as she was unaware of increase in payor's income and relied on expectation that changes in income affecting quantum would be disclosed per the parties' agreement.

Payor's behaviour blameworthy as failure to disclose increases in income breached contractual obligation. Blameworthy conduct not, in any event, required to make retroactive order.

Child's need is presumed from payor's prolonged failure to provide support commensurate with income. Further, child would benefit now from retroactive award while attending university. Payor providing no evidence from which finding of hardship could be made.

Chambers judge erring in not ordering retroactive support. Retroactive support ordered in amount of \$21,500, applying payor's actual income. Appeal court not considering potential entitlement prior to 2009 as relief not sought by recipient.

Chambers judge erring in ordering child support under CSG s. 3(2), as agreement made under BC law and child still minor under BC legislation. Prospective support ordered in table amount.

Chambers judge also erring in limiting payor's obligation to contribute to child's special expenses and overlooking obligation to enforce parties' agreement. Payor further obliged to contribute to all of child's special expenses under CSG s. 7, not just university costs.

### **Handy Quotes:**

#### *Factors for retroactive support order*

"[21] In cases where a payor has not increased support to mirror the increase in his or her income, courts can enforce the payor parent's obligation by awarding retroactive child support corresponding to the support thus owing. ... The Supreme Court declined to impose an automatic legal obligation on the payor to disclose an increase in his or her income that might otherwise require an increase in support payments. In that circumstance, the payor has a compelling interest in certainty and predictability in reasonably relying on the existing court order. To balance the payor's predictability interest with the child's right to support, *D.B.S.* shaped entitlement to retroactive support based on four fact-driven, relevant, but non-exhaustive factors:

1. whether there was a reasonable excuse for why support was not sought earlier;
2. the conduct of the payor, and whether the payor engaged in 'blameworthy conduct';
3. the circumstances of the child; and
4. any hardship occasioned by a retroactive award.

"[22] But one must not assume other restrictions. *D.B.S.* does not say any of these things:

1. that the terms of an agreement can be overlooked;
2. that there must be 'blameworthy conduct' to award retroactive child support;
3. that the recipient must put forward evidence of significant financial need by the child before a retroactive award is granted; nor
4. that the payor can avoid a retroactive award by asserting hardship without evidence of it.

"[23] The chambers judge held otherwise on each of these points, and so erred and misunderstood *D.B.S.*"

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### *Continuing obligation to comply with support agreement*

“[31] The respondent urges us to acknowledge that he did not knowingly fail to increase support in accordance with the Agreement; he simply ‘put the Agreement in a drawer and forgot about it’. Assuming that is so, the point is irrelevant. Parties have a duty to know what they have agreed to. There can be no justification based on the respondent’s ignorance of the Agreement, the Guidelines, or his support obligations in general.

“[32] The general rule is that liability to perform contracts is strict. Negligence or intent to do harm is not needed.”

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### *Establishing blameworthy conduct*

“[45] In this case, it is clear that the respondent’s conduct in not honouring his contractual obligation prejudiced his daughter’s right to receive greater support. It would be no justification that he simply forgot. He could not have reasonably assumed that he was meeting his support obligations. Indeed, the evidence shows that the respondent was aware that he owed greater support to his daughter, having voluntarily decided to increase his monthly payments to \$900.00 in December 2012 after the appellant asked for a copy of his most recent paystub.

“[46] The respondent’s [failure to disclose his income], whether intentional or not, was in breach of his obligations under the Agreement and was blameworthy. Forgetting is not a defence in the law of contracts. Moreover, even an honest and blameless error on the part of the payor does not absolve him or her of responsibility for paying the support to which the child has been entitled.”

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### *Establishing need*

“[50] ... The child is entitled to a standard of living that he or she would have enjoyed while his or her parents were together. ... With this key principle in mind, *D.B.S.* says that the child’s circumstances could be considered as one factor in the court’s exercise of discretion in awarding retroactive support.

“[51] In considering this, *D.B.S.* does not impose an evidentiary burden on the recipient parent to prove ‘significant need’ on the part of the child in order to succeed in an application for retroactive support. A payor parent cannot avoid a retroactive award by arguing that, despite his or her past default, the recipient parent was able to sufficiently care for the child on his or her own.

“[52] The ‘needs’ of the child must be approached through a more specific inquiry: did the child receive the same benefits and support as if he or she had been supported by both parents? To answer this question, a loss of benefits must be presumed where the payor parent has failed to pay the amount of support required under the Guidelines over a prolonged period of time. ...”

## H. *Graham v Graham*

**2013 MBCA 66<sup>17</sup>**

**Retroactive Support: DA s. 15.1**

**Shared Custody: CSG s. 9**

### Facts:

Recipient bringing one child into marriage, two children born during marriage. Separation 2006. Payor terminating relationship with step-child. Interim support orders made in 2006, 2008 and 2010, latter two by consent. At time of trial in 2011, parties sharing custody of two children of the marriage, recipient having sole custody of step-child. Trial judge finding no evidence to support conclusion that parties bore extra costs as a result of shared custody, nor that recipient's costs decreased. Given disparity between household circumstances, trial judge requiring payor to pay full table amount of child support for all three children with retroactive effect to date of separation, resulting in arrears of child support of \$18,000.

Payor appealing support orders on grounds including that he should not be required to pay full table amount when custody of two children shared and that order should not have been made retroactive in face of previous interim orders.

### Guidelines:

9. Where a spouse exercises a right of access to, or has physical custody of, a child for not less than 40 per cent of the time over the course of a year, the amount of the child support order must be determined by taking into account
  - (a) the amounts set out in the applicable tables for each of the spouses;
  - (b) the increased costs of shared custody arrangements; and
  - (c) the conditions, means, needs and other circumstances of each spouse and of any child for whom support is sought.

### Analysis:

Interim orders, including interim orders going by consent, are made without the benefit of the full evidence available at trial and may not reflect the orders that would be made with all of the available evidence. Trial judges are not bound by interim orders; retroactive orders superseding interim orders serve to "correct" those orders.

*Dickson v Dickson*, 2011 MBCA 26

*D.B.S. v S.R.G.*, 2006 SCC 37

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<sup>17</sup> Available at <http://canlii.ca/t/fzlmw>. Cited 8 times as of 14 February 2016.

Jurisdiction to make retroactive support awards found in DA s. 15.1. No restriction as to date from which court may direct order take effect.

*Dickson v Dickson*, 2011 MBCA 26

*D.B.S. v S.R.G.*, 2006 SCC 37

Objective of Guidelines is to avoid disparities between households. Necessary to compare situation of the parents while living together with their separate situations living apart. Child should not suffer noticeable decline in standard of living.

*Contino v Leonelli-Contino*, 2005 SCC 63

*Francis v Baker*, [1999] 3 SCR 250

### **Application:**

Trial judge finding that payor not having limited cash flow and assets, and having household income nine times that of recipient, excluding spousal and child support. Children should not be deprived of similar lifestyles in both parents' homes.

Trial judge had discretion and authority to make retroactive support award. Absent error in principle or misapprehension of evidence, no basis to interfere with retroactive order. Trial judge applying discretion to facts and no basis to interfere with decision.

### **Handy Quote:**

*Retroactive support orders superseding interim orders*

"[14] Although not a common occurrence, there exists ample authority to justify making final orders retroactive even in the face of prior consent interim orders. This court has stated many times that the bringing of appeals of interim orders is to be discouraged. That being so, if those interim orders do not properly reflect the state of things when all of the evidence has been adduced in a trial, it then stands to reason that corrections can be made. ..."

## **I. *Martin v Sansome***

**2014 ONCA 14**<sup>18</sup>

**Retroactive Support: DA ss. 2, 15.1**

### **Facts:**

Married 1996. Agreement waiving recipient's entitlement to family farm signed 2000. Separation 2007, no subsequent support payments for parties' one child. Proceedings commenced 2009, following which payor receiving \$420,000 from mother's estate. Child finishing college 2010. Trial 2012, resulting in imputation of income of \$52,000 to payor, order

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<sup>18</sup> Available at <http://canlii.ca/t/g2tf7>. Cited 23 times as of 14 February 2016.

for retroactive child support between date of separation and child's graduation and order that support bear interest at rate of 10% until paid.

Payor appealing on bases including that claim for retroactive support made when child ceased to be child of marriage, judgment not explaining why retroactive order made, judgment not explaining unusually high rate of post-judgment interest.

**Analysis:**

In exercising discretion to order retroactive child support, court must consider explanation for delay in application, payor's conduct, child's circumstances and hardship resulting from retroactive award.

*D.B.S. v S.R.G., 2006 SCC 37*

Situations where application seeks retroactive increase in existing support payments to be treated differently from *de novo* application for support; where no existing order or agreement and support not paid, no reasonable basis for payor's actions. In such cases, no restriction as to date on which court may order that retroactive payments begin.

*D.B.S. v S.R.G., 2006 SCC 37*

Legislation allows court to order interest be paid in amount different than fixed pre- or post-judgment rates considering factors such as party's conduct and circumstances of case.

*Society of Lloyd's v McNeill, 2003 PESCTD 76*

*Wildwood Cabinets v Stelor Holdings, 2015 NBQB 83*

*Plotogea v Heartland (2007), 60 CCEL (3d) 216 (ONSC)*

**Application:**

At time of recipient's claim for child support, child attending college and therefore unable to withdraw from parents' charge and still child of marriage. As child qualifying as child of marriage, trial judge entitled to order retroactive support.

Payor's conduct blameworthy as child support never paid and payor dissipating all of money received from mother's estate without benefit to child. Need of child working while living at home and incurring student loans evident. Payor unlikely to suffer hardship in light of assets and income. Trial judge not erring in ordering retroactive support.

Trial judge erring in ordering higher than usual interest rates without giving reasons for ordered rate.

**Handy Quote:***Blameworthiness presumed where no child support paid*

“[89] ... Bastarache J.’s reasons in *D.B.S.* distinguish between situations in which there is an existing support order or agreement and what is sought is a retroactive *increase* in support versus situations in which there has not already been a court order for child support to be paid. This is because, unlike the payor who paid support in reliance upon an existing order or agreement, the non-custodial parent who has paid *no* support had no reasonable basis for his actions; he knew or ought to have known that he should have been paying something. As Bastarache J. stated regarding cases where no child support has been paid:

[T]he *status quo* does not involve any existing payment of child support. This fact immediately differentiates the present context in a very important way: absent special circumstances (e.g., hardship or *ad hoc* sharing of expenses with the custodial parent), it becomes unreasonable for the non-custodial parent to believe (s)he was acquitting him/herself of his/her obligations towards his/her children. The non-custodial parent’s interest in certainty is generally not very compelling here. ...

“[91] It is clear that the trial judge considered the appellant’s conduct blameworthy. The evidence revealed a child of the marriage who needed financial help. Given the appellant’s assets and income, it was apparent from the record that he would not suffer material hardship as a result of a retroactive award. In all of these circumstances, neither the lack of a direct explanation why the respondent waited some two years before claiming child support, or the trial judge’s failure to comment on this factor, is fatal.”

**J. Senos v Karcz**

**2014 ONCA 459<sup>19</sup>**

**Support for Adult Child: CSG s. 3**

**Facts:**

Separation 1991. Trial order in 1993 requiring payment of child support in pre-Guidelines amount. Support amount subsequently increasing with changes in cost of living. Child diagnosed with schizophrenia, bipolar disorder 2007 at age 18. Recipient applying for disability benefits for child in 2009, payor ceasing payments. Benefits totaling \$10,000 per year approved 2010, retroactive to 2008.

Payor applying to vary support 2012. Chambers judge dismissing application. Payor appealing, seeking order that support obligation be reduced by amount of benefit. Recipient making peculiar argument that disability payments belong to child while child support payments “belong” to her.

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<sup>19</sup> Available at <http://canlii.ca/t/g7djw>. Cited 11 times as of 14 February 2016.

### Guidelines:

3. (1) Unless otherwise provided under these Guidelines, the amount of a child support order for children under the age of majority is
  - (a) the amount set out in the applicable table, according to the number of children under the age of majority to whom the order relates and the income of the spouse against whom the order is sought; and
  - (b) the amount, if any, determined under section 7.
- (2) Unless otherwise provided under these Guidelines, where a child to whom a child support order relates is the age of majority or over, the amount of the child support order is
  - (a) the amount determined by applying these Guidelines as if the child were under the age of majority; or
  - (b) if the court considers that approach to be inappropriate, the amount that it considers appropriate, having regard to the condition, means, needs and other circumstances of the child and the financial ability of each spouse to contribute to the support of the child.
- (3) The applicable table is
  - (a) if the spouse against whom an order is sought resides in Canada,
    - (i) the table for the province in which that spouse ordinarily resides at the time the application for the child support order, or for a variation order in respect of a child support order, is made or the amount is to be recalculated under section 25.1 of the Act,
    - (ii) where the court is satisfied that the province in which that spouse ordinarily resides has changed since the time described in subparagraph (i), the table for the province in which the spouse ordinarily resides at the time of determining the amount of support, or
    - (iii) where the court is satisfied that, in the near future after determination of the amount of support, that spouse will ordinarily reside in a given province other than the province in which the spouse ordinarily resides at the time of that determination, the table for the given province; and
  - (b) if the spouse against whom an order is sought resides outside of Canada, or if the residence of that spouse is unknown, the table for the province where the other spouse ordinarily resides at the time the application for the child support order or for a variation order in respect of a child support order is made or the amount is to be recalculated under section 25.1 of the Act.

### Analysis:

CSG s. 3(1) establishes presumption in favour of table amounts. Party seeking to deviate bears onus of rebutting presumption. Evidence available must in total suffice to raise concern that table amount inappropriate, and must be clear and compelling to depart from table amount. Factors are condition, means and needs and other circumstances of child and ability of parents to contribute. When presumption is rebutted, judge may order greater or lesser amount than table amount.

*Francis v Baker*, [1999] 3 SCR 250

Exception for adult children in CSG s. 3(2)(b) only applies when court first determines that table *approach* inappropriate. “Approach” refers to s. 3(2)(a) methodology; court may not depart from application of approach merely because table amount is inappropriate. Court must conclude that approach itself inappropriate. The closer the circumstances of child are to those

for whom approach is designed, the less likely that usual Guidelines calculation will be inappropriate.

*Lewi v Lewi* (2006), 80 OR (3d) 321 (OCA)  
*Canada v Canada-Somers*, 2008 MBCA 59

Disability benefits available for adult children reflect government intention to shift burden of care to society as a whole when disabled child becomes an adult, although policy does not imply shifting of entire cost to society from parents. Benefits include basic needs amount that assists with cost of food, clothing and shelter.

*Krangle v Brisco*, 2002 SCC 9  
*Briard v Briard*, 2010 BCCA 431

Benefits received by adult child can be taken into account in determining appropriate amount of support.

*Magne v Magne* (1990), 26 RFL (3d) 364 (MBQB)  
*Cossette v Cossette*, [2003] OJ No, 4923 (SC)  
*Henry v Henry*, 2010 ONSC 6990

### **Application:**

Table approach inappropriate as adult child's receipt of benefits of such magnitude sufficiently different from children for whom approach designed. Benefits not an allowance for child to spend at own discretion but intended for specific living needs and coupled with reporting requirement. Further, clear overlap between purposes of benefits and amounts covered by child support.

Once onus of showing table approach is inappropriate is met, question turns to determination of appropriate amount of support. However, insufficient evidence of adult child's condition, means, needs and other circumstances to allow court to make decision. Appeal allowed and matter remitted to trial for determination of support on more complete record.

### **Handy Quotes:**

#### *Test to depart from table amount*

"[37] In *Francis v Baker*, the Supreme Court discussed the circumstances in which the presumptive Table amount in the Guidelines can be displaced. Section 3 of the Guidelines establishes a presumption in favour of the Table amount and the party seeking to deviate from that amount bears the onus of rebutting the presumption. That party is not obliged to call evidence and may simply choose to question the opposing party's evidence. However, the evidence must, in its entirety, be sufficient to raise a concern that the Table amount is inappropriate. There must be 'clear and compelling evidence' for departing from the Guidelines amount. The factors to be considered in determining both whether the Guidelines approach is 'inappropriate' and the 'appropriate' level of support, are the conditions, means, needs and other circumstances of the child and the financial ability of both parents to contribute. Only after examining all the circumstances of the case should a court find the table amount to be

inappropriate and craft a more suitable support award. To determine ‘appropriateness’, the Court must have sufficient evidence. Trial judges have the discretion to determine on a case-by-case basis whether a child expense budget is required and they have the power to order it. When the presumption in s. 3(2)(a) is rebutted, child support can then be set above or below the Table amount.”

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### *Purpose of disability benefits*

“[41] The [disability benefit program] recognizes that government, communities, families and individuals share responsibility for providing support to persons with disabilities. The intent of the program, as expressed in its Directives, is to provide supports necessary to enable individuals and families to live as independently as possible in the community and to lead more productive, dignified lives.

“[42] To these ends, the program provides income support, health benefits and employment supports to people with disabilities in financial need. The policy of the [disability benefit program], insofar as it applies to adult children with disabilities, reflects the principle expressed by the Supreme Court of Canada in *Krangle (Guardian ad litem of) v Brisco* that society shares the responsibility of caring for adults with disabilities:

It is the policy of the Province of British Columbia to provide care for disabled adults. This policy is expressly stated in the *BC Benefits (Income Assistance) Act*, which confirms in the preamble that ‘British Columbians are committed to preserving a social safety net that is responsive to changing social and economic circumstances’. When a disabled person becomes an adult, the burden of his or her care shifts from the parents to society as a whole, and it is accepted as fair and just that the continued burden of care of disabled adults should be spread over society generally. At one time, it may well have been the moral responsibility of parents to care for a disabled child for as long as they lived. But for some decades now, that moral responsibility has shifted to British Columbia society as a whole, as expressed by legislation enacted and preserved by successive governments. No evidence was presented for the proposition that it is shameful or wrong for parents to accept the benefits provided by the government which allow adult disabled children to be cared for under the social security network of the state. Great as social and medical progress may be, disability will inevitably strike some members of society, randomly and irrationally. It is not immoral for a society to say that when this happens, the burden will not be confined to the individual and his family, but will be shared by society as a whole.

“[43] I agree with the observation in *Briard v Briard* that this statement does not mean that the entire burden of caring for disabled adult children has shifted to society. Chief Justice McLachlin acknowledged at para. 35 that, under the British Columbia *Family Relations Act*, both parents must contribute equally when a child cannot leave home and remains a charge or burden on his or her parents.”

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### *Balancing of support obligations for adult children receiving benefits*

“[67] The Table amount is predicated on the parents alone sharing responsibility for the financial support of their child. In the case of adult children with disabilities, the [disability benefit program]

commits society to sharing some responsibility for support. In my view, this makes the s. 3(2)(a) approach inappropriate, and s. 3(2)(b) should be applied to achieve an equitable balancing of responsibility between Antoni, his parents and society.”

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### *Test to remit to trial*

“[74] While I am conscious that the parties have already invested a considerable amount in this dispute, the thrust of their evidence has been misdirected. It would not be fair to them, or more importantly to [the adult child], for this court to attempt a back-of-the-envelope calculation of the amount of support under s. 3(2)(b). In such circumstances, it is appropriate for an appellate court to refer the matter to trial so the issue can be addressed on a complete record.”

## III. Summary

The decisions discussed in this paper suggest that certain areas of the law on child support under the Guidelines, such as the ability to apply for retroactive support for adults who have ceased to be children of the marriage, have been exhaustively resolved, while others, such as the quantum of support payable by persons with incomes in excess of \$150,000 per year, are still being developed. Regardless of the extent to which the law on child support has stabilized, however, the degree of flexibility and uncertainty provided by the Guidelines guarantees continued litigation on the subject by payors and recipients who find themselves, or wish to find themselves, in situations to which s. 3(1)(a) does not apply.

### A. Retroactive Orders

The decision of Bastarache J. in *D.B.S.* continues to shape the law on applications for retroactive child support. It is clear that the child for whom support is sought must qualify as a child of the marriage at the time the application is made, although an exception may be made if the payor was served with the application for retroactive support, an application for disclosure or an application to enforce an agreement or order for disclosure while the child qualified as a child of the marriage. The decision in *Calver* suggests that such applications may in fact be a prerequisite of applications for retroactive support.

The factors to be considered on such applications are nicely summarized in *Goulding*, in the context of an agreement on child support, as well as certain factors that are not enunciated in *D.B.S.*, despite perceptions to the contrary, including that: agreements between litigants may be overlooked; blameworthy conduct is necessary for retroactive support to be ordered; evidence of the children’s “significant financial need” is necessary for retroactive support to be ordered; and, payors can avoid retroactive orders by claiming hardship without proof of hardship. *Martin* reminds us that the analysis of blameworthiness required on *de novo* applications for retroactive support differs from applications made with an existing order or

agreement for child support. Where there is no existing order or agreement, payors have no justification for the nonpayment of support.

The decision in *Goulding* is also important for its discussion of the effect of agreements on child support. Despite the court's *parens patriae* jurisdiction, the court must respect settlements that are not unconscionable and comply adequately with the law. However, the parties to agreements are to be held to strict compliance with the terms of their agreements, and the court must enforce breaches that redound to the detriment of children.

The *Graham* judgment helpfully discusses the impact of interim decisions on applications for retroactive support. In *Graham*, the court states that trial judges are not bound by interim decisions on support. Interim orders, including those going by consent, are necessarily made without the benefit of the full evidence adduced at trial; retroactive orders made with that evidence may serve to correct earlier orders made without that evidence.

Where arrears are owing as a result of a retroactive order, the *Martin* decision emphasizes that interest need not be assessed at the standard post-judgment interest rate where that rate is not compulsory. The court may set a higher interest rate considering factors including the payor's conduct and the other circumstances of the case.

## B. Support for Adult Children

The decision of Joyce J. in *Farden v Farden*<sup>20</sup> continues to play a pivotal role in determining adult children's status as children of the marriage. The Farden Factors, as they have become known, include the child's enrolment in a course of study, eligibility for student loans, career plans, ability to contribute to his or her own support, age, academic performance and, in the case of adult children, whether the child has terminated his or her relationship with the proposed payor. The decision in *Deacan* emphasizes that mere attendance at a post-secondary institution is not enough to qualify an adult as a child of the marriage, the parents' resources and ability to continue to support the child must also be examined, and assume even more weight when support is sought for additional degrees beyond the first.

Where an adult child is found to be eligible for continuing support, the court may determine the quantum of support owing under Guidelines s. 3(2)(b) if the usual Guidelines approach is inappropriate. *Senos* emphasizes that the test in such circumstances requires that the *approach* under s. 3(2)(a) be found inappropriate, not that the table amount be found inappropriate, requiring an assessment of the closeness of the situation of the adult child for whom support is sought to the situations of the children for whom the usual approach is designed. The more the circumstances of the adult child diverge from those children, the less likely it is that the table amount will be appropriate.

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<sup>20</sup> *Farden v Farden* (1993), 48 RFL (3d) 60 (BCSC)

## C. Imputing Income

The options available in ss. 17, 18 and 19 of the Guidelines to determine a party's income for the purposes of child support may be pursued when the methodology described in s. 16 would not produce the fairest determination of income, or reflect all of the money available for the payment of child support, as the court put it in *Goett*. The court in *Fraser* described the determination of income by reference to a party's income at Line 150 of the T1 Income Tax and Benefit Return<sup>21</sup> under s. 16 as the "basic rule," and held that although additional income may be imputed to a party, a rational basis for the amount imputed is required.

### **Pattern of Income, CSG s. 17:**

The *Deacan* decision clarifies that although the court must consider a party's income over the previous three years where the s. 16 methodology would not produce the fairest determination of income, the court is not obliged to determine income by averaging the party's income in those years. The averaging of income under s. 17(2) is discretionary, not mandatory.

### **Corporate Income, CSG s. 18:**

Guidelines s. 18 allows the court to consider the pre-tax income of a company in determining income where the party is a shareholder, director or officer of a company and the amount determined under the basic rule would not be exhaustive of the income available to the party for support purposes. In *Goett*, the court considered s. 18 as a means of imputing income as permitted by s. 19(1), holding that the two sections "are designed to work in tandem."

The decision in *Goett* is important as the court applied Guidelines s. 18 to impute corporate income to a party who was not a shareholder, director or officer of the company in question, holding that where the transfer of a corporate interest is effected to avoid the payment of child support, a s. 18 analysis can be conducted as a means of quantifying the amount of income to be imputed under s. 19.

### **Other Reasons to Impute Income, CSG s. 19:**

The *Calver* decision suggests that travel and living expenses paid by employers should generally not be included in a party's Guidelines income, especially where the allowance is taxable income in the hands of the party or the allowance falls within the excluded income sources set out in s. 1 of Schedule III to the Guidelines. The onus to include such income lies on the moving party, who must produce some evidence to establish that the allowance exceeds the recipient's actual travel and living costs.

The decision in *Fraser* confirms that income may be imputed to a party from the lost earnings portion of court awards or insurance settlements, with the onus lying on the recipient to

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<sup>21</sup> The T1 for 2015 is available at <http://www.cra-arc.gc.ca/E/pbg/tf/5000-r/5000-r-15e.pdf>.

establish the amounts not allocated to lost earnings. Although some decisions have characterized undifferentiated awards or settlements as lost earnings, *Fraser* admonishes judges to refrain from making arbitrary allocations of awards or settlements to lost earnings. Instead, income may be attributed to the party under the provisions of Guidelines s. 19(1)(e) which allow the court to impute income where property is not reasonably used to generate income.

#### **D. Incomes in Excess of \$150,000**

Guidelines s. 4 allows the court to depart from the usual calculation of support under s. 3 where the party's annual income is in excess of \$150,000. *Gould* provides a helpful summary of the analysis required by s. 4 and the nature of the evidence the court must have to depart from the table amount of child support.

The court in *Gould* held that the tables presumptively apply to parties with high incomes, and that the party seeking to deviate, up or down from the tables, bears the onus of proof in rebutting this presumption. To depart from the tables, the available evidence must suffice to raise a concern about the appropriateness of the table amount. Once the presumption is rebutted, the court must consider the condition, means, needs and other circumstances of the children, and the recipient bears the burden of adducing evidence on these points.

The actual, current circumstances of the children are central to the analysis required by Guidelines s. 4. However, the decision in *Gould* states that budgets, although desirable, are not mandatory, and that the court may rely on the expenses itemized in the parties' financial statements. This aspect of *Gould* should raise a red flag for recipients as it suggests a certain degree of risk if the expenses portion of a financial statement describes the children's current expenses, especially if those expenses are lower than they might be if a different amount of support were paid.

It seems to me that recipients dealing with an application under Guidelines s. 4 should either adapt the standard form financial statement to express both current and prospective expenses or provide a prospective child expense budget. Either way, recipients must provide evidence of the things the children are currently doing without or they risk the court concluding that the children's needs are being adequately met with whatever support is being provided.

#### **E. Special Expenses**

The decision in *Delichte* usefully summarizes the law on special expenses. First, the expenses must qualify as "extraordinary" because they exceed the amount that the applicant can reasonably cover on his or her income and the amount of child support received. Even if the applicant can cover the expenses, the expenses may still qualify as extraordinary having regard to the factors listed in Guidelines s. 7(1.1)(b). Second, even where an expense qualifies as extraordinary, the expense must also, under s. 7(1), be necessary for the child and reasonable in light of the parties' means. The onus to establish that an expense is extraordinary, necessary

and reasonable lies on the applicant, although the applicant may rely on estimates of the cost of an expense.

*Delichte* also confirms that the decision to require contribution to a special expense is discretionary and that the sharing of an expense in proportion to the parties' incomes is only a guiding rule, not a mandatory direction.

## F. Shared Custody

The *Graham* decision offers a helpful reminder that the discretion available to the court under Guidelines s. 9 in cases of shared custody is truly discretionary. Given the Guidelines' overall objective of minimizing disparities in the living conditions of the child between parents' households, the court need not order that the payor provide support in other than the tables amount. The analysis required by s. 9 requires examination of the circumstances of the parties and a comparison of their household standards of living, and the amount of support payable should not deprive the child of a similar lifestyle in both homes.<sup>22</sup>

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<sup>22</sup> There is, however, an interesting line of cases developing in British Columbia which interpret *Contino v Leonelli-Contino*, 2005 SCC 63 as stating that Guidelines s. 9 establishes its own factors for the determination of child support without any presumption in favour of the tables. See *B.P.E. v A.E.*, 2015 BCSC 2416 and *L.M.R. v J.R.F.*, 2010 BCSC 363.