No limits: Imputation of income under the Federal Child Support Guidelines

Take it to the limit
Take it to the limit
Take it to the limit
One more time
"Take it to the Limit"
Lyrics and music
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Introduction

Determination of a party's annual income is the starting point in reaching a decision on what child support is to be assigned in any given case. Once that income is determined, a consideration of the appropriate support based on the applicable table is made. Section 15 of the *Federal Child Support Guidelines* (the "Guidelines") sets out that a spouse's annual income is determined in accordance with sections 16 to 20 of the Guidelines.

The cases that are particularly challenging for the courts in determining income for child support orders involve payors with incomes that fluctuate from year to year, making it difficult to determine an income that fairly reflects the ability to pay. The BC Court of Appeal decision in *Harras v. Lhotka*, 2016 BCCA 246, exemplifies the broad discretion exercised by the courts under section 19(1) of the *Guidelines* to decide a "fair and reasonable" approach to imputing income to a payor whose income fluctuated for the past several years. Section 19 of the *Federal Child Support Guidelines* has been interpreted thus far in such a way by the courts that when considering the income that is available for the purpose of paying child support, their discretion would appear to have few, if any, limits.

This paper will consider the trends in the way the courts have exercised this broad discretion and the factors argued by counsel to limit the imputation of income or expand the same.

The Guidelines

The objective of the *Guidelines* are set out in section 1:

(a) to establish a fair standard of support for children that ensures that they continue to benefit from the financial means of both spouses after separation;

(b) to reduce conflict and tension between spouses by making the calculation of child support orders more objective;

(c) to improve the efficiency of the legal process by giving courts and spouses guidance in setting the levels of child support orders and encouraging settlement; and

(d) to ensure consistent treatment of spouses and children who are in similar circumstances.

Section 16 of the *Guidelines* sets out that Line 150 of a payor's income tax return is used to calculate income, subject to sections 17-20 of the *Guidelines.*

Section 17 of the *Guidelines* deals with patterns of income, and subsection (1) reads:

> 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.

Lastly, section 19(1) provides a wide discretion to impute such amount of income to a spouse as it considers appropriate 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:
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> (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;
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> (b) the spouse is exempt from paying federal or provincial income tax;
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> (c) the spouse lives in a country that has effective rates of income tax that are significantly lower than those in Canada;
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> (d) it appears that income has been diverted which would affect the level of child support to be determined under these Guidelines;
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> (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.

The Court's Discretion

In *Marquez v. Zapoila*, 2013 BCCA 433, the court stated that the test in s. 17(1) of the Guidelines is what is "fair and reasonable", having regard to the payor's income in the preceding three years. On that basis, they recalculated the husband's income to include his past bonus earnings for the purpose of spousal support.

Section 19 gives the court a broad discretion to impute income, and is not subject to the restrictions set out in ss. 16, 17 and 18. Section 19 contains a list of circumstances in which it would be appropriate to impute income, but the list is not exhaustive.[1]

The courts have made it clear that averaging is not always the mechanism to achieve a fair and reasonable approach to imputing income. In fact, the language in s.17(1) does not explicitly state that an average of past income should be used to set Guideline income. Rather, the past three years may indicate the payor's pattern of income, fluctuations and recurring gains. From there, there should be a logical approach to setting a fair income that is most appropriate.[2]

Regardless, when there are fluctuations in income, the courts often use averaging as the appropriate method to set a fair income for the purpose of determining support. In cases where the payor's income fluctuated from noticeably low income to noticeably high income, the approach of averaging the past three years' income has been preferred over reliance on the projected future income as a basis for imputing income.[3]

[1] *Oulette v. Oulette*, 2012 BCCA 145 para. 66.
[2] *Ewing v. Ewing*, 2009 ABCA 227.
[3] *Dornik v. Dornik*, 1999 BCCA 627; *Cornelissen v. Cornelissen*, 2003 BCCA 666.

Despite fluctuations in income, the court has often used the payor's actual income for the previous year as a way of achieving a 'fair' figure rather than taking an average.[4] This approach has resulted in a substantially higher income for the payor than if the court had averaged the income earned for the preceding years. However, when the payor's income has been steadily declining over the years, averaging would not result in a fair income. For example, in *de Bruijn v. de Bruijn*[5], the judge looked at the father's income for the past four years and decided that averaging would result in higher income than his current earnings, which would result in an unjust support order. Similarly, in *Jakob v. Jakob*[6], the Court of Appeal found that that the chambers judge erred in averaging the payor's income for the past three years to impute income because his income has in fact steadily increased in the previous three years and therefore looking at the most recent year's income would be the most accurate reflection of his true income. However, in *Grossi v. Grossi*[7], even though the payor's income had been declining over the years, the court used the averaging approach to impute income. This resulted in higher income being used to calculate support than what was actually available through current earnings.

These trends demonstrate that courts exercise a very broad discretion with respect to imputing income when making orders for support and, although they aim to achieve a fair outcome, there is not always consistency in the adopted approach. The approach taken seems to be dependent on the specific facts of each case.

Harras v. Lhotka

In this case, the payor father, Mr. Lhotka, had a pre-existing separation agreement between himself and Ms. Harras setting his income at a five years' average. He made an application in 2014 to court to have his income fixed at $67,000 without averaging. The chamber's judge calculated his 2014 income for child support purposes as the average of his three previous years' income, causing a significant income for child support purposes. Mr. Lhotka appealed the chamber judge's order.

[4] Bell v. Bell, 1999 BCCA 497; Wallace v. Wallace, 2000 BCCA 81.
[5] 2011 BCSC 1546.
[6] 2010 BCCA 136.
[7] 2005 BCCA 47.

Mr. Lhotka was a film producer whose income fluctuated from having a deficit of $4,292 in 2011 to earnings of $384,611 in 2012; his income dropped again in 2013 to $67,000. For this reason, the parties had negotiated an agreement that his income would be averaged over five years and his guideline income would be $183,000 in the separation agreement in 2013. The chambers judge had to decide whether it would be fair to assess his income for child support based on a five year average, a three year average or solely on the previous year. Although the judge acknowledged that Mr. Lhotka's ability to produce films was declining, she found it would be unfair to set his income based on the previous year's income alone. She also found that it was more fair to use the three year average rather than the five year average

On appeal, although the court agreed that fixing Mr. Lhotka's income based solely on the previous year would not be appropriate, they recognized that averaging his income over three years would result in a substantially increased child support order, which was not the result that the chamber's judge intended. The Court of Appeal found that averaging Mr. Lhotka's income over the past five years was reasonable. They also suggested that had Mr. Lhotka's income declined consistently over the years, it may have been more appropriate to fix his income based on the previous year's income.

The Court of Appeal went well beyond the provisions of s. 17(1) to consider his previous income for the five preceding years rather than the preceding three years. They relied on *Oulette v. Oulette*[8], where the court upheld the five year average approach as an exercise of the broad discretion available under section 19(1). The court in that case stated that a three-year average would not have accurately reflected the potential earning capacity of the father. They also went on to say that looking at a five-year average would be a more cautious approach in the case where the father had manipulated the revenues between the time of separation and trial (3 years) in order to decrease his *Guideline* income for support purposes.[9] However, it should be noted that there was no suggestion that Mr. Lhotka, unlike Mr. Oulette, had failed to make any financial disclosure or had otherwise manipulated his income. There was no evidence that his efforts to obtain employment were other than genuine.

[8] 2012 BCCA 145.
[9] Para 66-67.

The court in *Harras* concluded that averaging Mr. Lhotka's income over a five-year period (2009-2013), as the parties had originally done in the separation agreement in reaching the initial income for support, was a fair and reasonable approach to income determination for the application of the Guidelines. It should be noted that the separation agreement already provided for the averaging of his income over three years in order to calculate reviewable spousal support.

Since *Harras*

In *Smith v. Smith*[10], the orthodontist husband brought an application for termination of spousal support. He argued that he had paid support until he was 72 years of age and, although he continued to work, his income was much lower than it once was. The Court in that case used the three year average as guidance to determine the pattern of income for Dr. Smith. However, the court stated that it would be a mistake to assume that a three-year average would give a good indication of future income in this case. The court calculated his three-year average to be $205,000 after a gross-up of portions of the business expenses and his dividend income. However, his 2015 income was only $90,000. The court found that although Dr. Smith's income was fluctuating, it was declining and would continue to do so until his retirement. As a result, the averaging approach was rejected.

In *Reid v. Reid*[11], the wife appealed from a trial judgment dismissing her action to set aside a separation agreement. The trial judge found that the income attributed to the husband in the separation agreement, which was considerably higher than his actual income for 2011 to 2013, was a fair estimate of his earning potential, given the nature of his work. The amount in question was Mr. Reid's income of $2,246,732 in 2010. This amount was substantially higher than in the years prior to and after 2010. He was a businessman and his substantial increase in income related to the shares of a company that he sold and payments made to him resulting from that sale. The Court of Appeal agreed with the trial judge's decision with respect to not imputing income to Mr. Reid. In paragraph 122, the court stated:

> Section 17 offers the Court broad discretion to average income over a period of years (see *Harras v. Lhotka*, 2016 BCCA 246 (CanLII)), though this is generally used to smooth out fluctuating incomes rather than to account for extraordinary gains in a single year.

[10] [2016] B.C.J. No. 1966
[11] [2017] B.C.J. No. 275

Section 17 also allows a court to exclude certain income. While the discretion under that provision is broad, it is not to be exercised arbitrarily. In *Brown v. Brown*, 2014 BCCA 152 (CanLII), this Court said:

> [28] As this Court noted in *Vincent*, at para. 36, s. 17(1) "permits the … exclusion of non-recurring dividends." It does not, however, require the exclusion of such dividends. The extent to which dividends should be excluded depends on the court's assessment of the "fairest determination of income."
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> [29] The "fairness" referred to in s. 17(1) is not of a subjective or elusive sort. Rather, it is a fairness that is determined in accordance with the values inherent in the *Guidelines* as reflected in the objectives expressly set out in s. 1. In particular, a court should keep in mind the objective that children benefit from the financial means of their parents (s. 1(a)), and that spouses and children in similar circumstances are treated consistently (s. 1(d)).
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> [30] In many cases, the objective that the parent's financial means be available for child support will be of overriding importance. The observation of Weiler J.A. in *Marinangeli v. Marinangeli* (2003), 2003 CanLII 27673 (ON CA), 66 O.R. (3d) 40 continues to be an accurate summary of the law in this area:
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> > [30] While the courts have differed in their approach when dealing with non-recurring income, the recurring theme is that the child of the marriage should benefit from a sudden increase in lifestyle and money available to the family.

The court refused to use the averaging approach in *Steiger v. Steiger*[12], on the basis that the respondent was not self-employed and there was no evidence of history of fluctuating income. The payor had one year of income which was unusually high for him and another year when he only earned $50,000. The court stated:

> The Court in *Harras* stated that averaging income is very fact specific. Averaging applies when income is fluctuating or where a decline in income or earnings in not lasting. Averaging may not be justifiable if in a year the receipt of income is not re-occurring. [13]

[12] [2017] B.C.J. No. 1383
[13] Para 24.

In *Gavriel v. Gavriel*[14], the wife sought to have income imputed to the husband for the purpose of spousal support by taking an average of his income for the past three years. The income that was available to the husband through his company over the years was $191,000 in 2014, $222,000 in 2015, and $171,000 in 2016. The husband successfully argued that the last year's income is the fair approach in setting his Guideline income because his earnings had been elevated in prior years due to large contracts he had with respect to big pipeline projects. Since he did not have any contracts of a similar scale, his prospective earnings were expected to be comparable to his 2016 income. Therefore, the court in this case found that there is no logical basis for using a three-year average.

In *Laxton v. Coglon*, [15], the wife applied for a retroactive variation of child support and variation of the sharing of special expenses, the court noted that the variation of the husband's income from 2003 to 2014 was due in part to the collapse of the world economy as a result of the sub-prime mortgage crisis and related events in 2008. Therefore, the court found that it was imperfect but nonetheless reasonable to rely on the respondent's income tax return for those years. The court found that the fairest way to determine the respondent's Guideline income was to average his last three years of reported income based on his tax returns for 2012 to 2014. It is interesting to note that had the court averaged the husband's income for the past five years, his Guideline income would have been lower and if they had abandoned the averaging approach and based his income on his 2014 earnings, it would have resulted in a higher prospective payments.

In *M.C.D. v. D.A.D.*[16], the husband brought an application for a review of child and spousal support. The husband had his own company. Counsel for the husband argued that his income should be fixed at $141,000 based on his previous year's income. Counsel for the mother argued that his income should be the $184,000, which was the

[14] [2017] B.C.J. No. 1859
[15] [2017] B.C.J. No. 1735
[16] [2017] B.CJ. 2060.

highest income earned between 2012 and 2016 or that, in the alternative, an average should be used and income should be fixed at $167,000. DJ. Dardi J. stated:

> Given the degree of fluctuation in D.D.'s available income source over the last several years, it would be unjust to base the determination of his Guideline income on his 2016 pre-tax corporate income alone. In all the circumstances, I find it appropriate to fix his income on the three year average of his 2014 to 2016 pre-tax corporate income. The three year average results in a Guideline income for D.D. of $168,310.
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> In my view, this amount fairly reflects D.D.'s income earning capacity and income available to him for the payment of support. The three year average takes into account the fluctuations in the business of *DFS* in recent years while eliminating any potentially unfair distortion resulting from the high level of income of $184,000 D.D. earned in 2014.

In *H.S.S. v. S.H. D.*[17] the husband's available income was comprised of his Line 150 income plus the pretax income of the three corporations he controlled. There was a significant degree of fluctuation in his income between 2007 and 2014. The court found that it would have been unjust to use his 2014 income alone, given that it was considerably higher than in previous years. The court applied the *Oulette* and *Harras* approach of averaging the husband's income over the past five years, from 2010 to 2014, to determine his Guideline income for the purpose of paying child support.

In an Ontario decision, *Quiquero v. Quiquero*[18], the applicant sought to have child and spousal support adjusted. She submitted that the sharp decrease in the respondent's 2015 income raised a red flag and on that basis asked for child and spousal support to be awarded from June 2012 onwards based on the payor's actual income, and for 2015 onwards to be based on an imputed income using an average of the previous years' incomes.[19] The court noted the former language of section 17(1) prior to the 2001 amendments read as follows:

> 17**.** (1) Where the court is of the opinion that the determination of a spouse's annual income from a source of income under section 16 would not provide the fairest determination of the annual income from that source, the court may determine the annual income from that source

[17] [2016] B.C.J. No. 1508
[18] [2016] O.J. No. 6280
[19] Para 10.

> (a) where the amount in respect of the source of income has increased in each of the three most recent taxation years or has decreased in each of those three years, to be the amount from that source of income in the spouse's most recent taxation year;
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> (b) where the amount in respect of the source of income has not increased or decreased as described in paragraph (a), to be the average of the amount received by the spouse from that source of income in the three most recent taxation years, or such other amount, if any, that the court considers appropriate; or
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> (c) where the spouse has received a non-recurring amount in any of the three most recent taxation years, to be such portion of the amount as the court considers appropriate, if any.[20]

Using the broad discretion available in the current version of s. 17(1), the court did not use the averaging approach to impute income to the respondent payor. Rather, it set his income using his actual 2015 income, which was substantially lower than previous years.

Similarly, in a New Brunswick decision, *Basque v. Basque*[21], the court refused to average the payor's income because the fluctuations were not "significant". M.A. Robichaud J. stated:

> Subsection 17(1) of the Child Support Guidelines refers to income averaging. The average applies primarily when there has been a significant discrepancy or fluctuation from one year to the next in the past three years.
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> Unfortunately, there is no rule for determining what constitutes a significant discrepancy or fluctuation. I do not believe that the average for the past three years applies in this case, because there is only a $22,000 discrepancy between the petitioner's income at line 150 for 2014 (the year of separation) and 2015. The evidence also reveals that the petitioner's income had increased by $20,000 to $25,000 annually since 2013, which in my view is not a "significant discrepancy or fluctuation."

[20] Para 15.
[21] [2016] N.B.J. No. 297

In a recent Newfoundland case, *Burton v. Griffin*[22], the court used a three-year average to impute income to the husband for child and spousal support purposes. In paragraph 165, the court said:

> Courts have tended to use a simple three-year average (i.e. 2013 to 2015) in determining a fair and reasonable income to even out fluctuations where a similar pattern of income can be assumed. This achieves the goal of providing certainty for both Ms. Griffin and Jarrod while still allowing Mr. Burton the right to make an application for variation should it be determined that the three-year average no longer represents a fair determination of income available to him for support purposes.

It is interesting to note that BC has a significantly higher number of cases where the courts have averaged income for the purpose of determining support in comparison to other provinces in the country.

Statutory Interpretation

The authors of this paper are troubled by the broad discretion that the Courts in BC have ascribed to themselves through the use of section 19(1), in particular, with the arbitrary determination of utilizing a five year average for income in certain cases when the statute does not reference such a provision. In fact, the only reference to averaging is in section 17(1), which speaks of a three year term. It does not appear to have been argued yet that the canons of statutory interpretation should be considered to limit the use of the court's discretion in this regard.

For instance, "e*xpressio unius est exclusio alterius*" ("the express intention of the one thing excludes all others") could be considered to explicitly limit the consideration of a five year averaging approach.

> "An implied exclusion argument lies whenever there is reason to believe that if the legislature had meant to include a particular thing within the ambit of its legislation, it would be referred to that thing expressly. Because of this explanation, the legislature's failure to mention the thing becomes grounds for

[22] [2017] N.J. No. 203

> inferring that it was deliberately excluded. Although there is no express exclusion, exclusion is implied".[23]

Also, in considering section 19(1), on its face, it makes no reference to averaging. In fact, the matters listed in section 19(1)(a) to (i) would appear to be in reference to circumstances where a party has intentionally, or otherwise, because of their particular circumstances, artificially manipulated their income in order to pay less child support than they ought to. However, it does not speak of income averaging. The maxim of e*jusdem generis* provides that general wording, such as "…it considers appropriate in the circumstances…" is usually restricted to things of the same type as the listed items, such as in section 19(1) (a) to (i). Therefore, if there was a suggestion of a circumstance of manipulation of income or artificially suppressing the same, then 19(1) should apply. However, again, if there is to be any averaging, it is unclear how the court would derive such authority from section 19. Nonetheless, the principle could be considered as another means to ascertain the intention of the legislature:

> "…should be used prudently and with caution since it is not always a sure indication of the legislature's intention (*Johnston v. Canadian Credit Men's Trust Association*, [1932] S.C.R. 219) and other principles of interpretation may apply. See *Ferguson v. MacLean*, [1930] S.C.R. 630, and *United States of America v. Couche*, [1976] 2 F.C. 336 (C.A.). As well, the rule may not have any application in certain cases. See *Superior Pre-Kast Septic Tank Ltd. v. The Queen,* [1978] 2 S.C.R. 612, and *Construction Equipment Co. v. Bilida's Transport Ltd*. (1966), 58 D.L.R. (2d) 674 (Alta. S.C.)."[24]

Conclusion

While the current language of section 17(1) and the broad discretion bestowed by section 19 aim to achieve the objectives set out in the Guidelines, which is to establish a fair support order, the use of that discretion has steered the courts in different directions. Given that these cases are fact specific, it is difficult, if not impossible, to adopt a "one size fits all" approach to imputing income where there has been fluctuations in income pattern.

[23] Sullivan, R. *Driedger on the Construction of Statutes*, 3rd (Butterworths 1984) p. 186.
[24] *Watt v. Trail*, [2000] N.B.J. No. 298 para 17.

Examining the jurisprudence in this area may leave one to believe that there is always room for argument when it comes to establishing what is a fair outcome in fixing income for support purposes. Counsel may argue that the averaging approach should be used when it benefits their clients. However, the question becomes whether the broad discretion vested in the court has deviated from the objectives of the Guidelines by increasing conflict in support-related disputes, disrupting the efficiency of the legal process, and increasing litigation.