

News

B.C. child support ruling sets 'precedent'

ANN MACAULAY

The Court of Appeal for British Columbia has ruled that a man's fluctuating income should be calculated for child support purposes as the average of five years instead of three as indicated in s. 16 of the Federal Child Support Guidelines.

Justice Nicole Garson ruled on behalf of a unanimous court in *Harras v. Lhotka* 2016 BCCA 246 that it would not have been fair to set the man's income at the one-year significantly lower income as he had requested. She increased the amount to five years, writing: "Where a payor's income fluctuates significantly, depending on the facts, guideline income may be based on a three-year or five-year average."

After earning significantly less than usual in 2013, film producer Peter Lhotka applied to have his income for support purposes reduced based on that year's income. Supreme Court of British Columbia Justice



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We have a lot more certainty and frankly we've had higher amounts of child support paid than was historically the case in general.

Nicholas Bala
Queen's University

Miriam Maisonville accepted that he earned \$67,000 in 2013. She looked at whether it was fair, in all the circumstances, to assess his income for support purposes on a three- or five-year average or on the previous year alone. She chose a three-year average.

Since that significantly increased Lhotka's income to \$183,000, he appealed. His lawyer, Mark Slay of North Shore Law LLP in Vancouver, said the court "has made it clear that even though the guidelines spe-

cifically say in s. 17 that we can look to a pattern of income over three years, in B.C. the courts have said in fact we can use s. 19 to go broader than that — we can go to five years."

Section 16 of the guidelines determines annual income using the T1 General form's total income line 150. But since self-employed people may have fluctuating incomes, s. 17 says that if the court determines that the annual income under s. 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."

Justice Garson relied on several Court of Appeal decisions for guidance. In *Kowalewich v. Kowalewich* 2001 BCCA 450, the court ruled that the purpose of the guidelines "is to permit the assessment of the money available to a spouse to pay child support." She added that "the test in s. 17(1) is what is 'fair and reasonable,' having regard to the payor's income in the preceding three years: *Marquez v. Zapiola* 2013

BCCA 433."

According to *Oulette v. Oulette* 2012 BCCA 145, "Section 19(1) provides the wide discretion to impute income to a spouse as it considers appropriate. Section 19 is not subject to the restrictions set out in ss. 16, 17 and 18."

Justice Garson found that "averaging over a five-year period may be an appropriate exercise of the court's discretion under s. 19 where it would more accurately reflect the income available to a payor spouse than a three-year average would." She concluded that the fairest manner to assess Lhotka's 2013 income "is to apply the same type of formula that the parties agreed to in the separation agreement; that is, a five-year average, for the years 2009-2013. The result of that calculation is \$196,604."

Slay said the court was "mistaken" in its reference to the separation agreement. It "didn't say it would be based on a one-year or three-year or anything else for Slay, Page 27

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News

Slay: No 'certainty' for those with fluctuating incomes

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that matter but it said it would in accordance with whatever the provisions of the child support guidelines were.”

The court dismissed the cross-appeal by respondent Patricia Harras of the chambers judge's order for the parties to each bear their own costs on the basis that success was divided.

The guidelines, which came into force in 1997, have dramatically changed how child support cases in general are resolved, said Nicholas Bala, Queen's University professor of law in Kingston, Ont. “We have a lot more certainty and frankly we've had higher amounts of child support paid than was historically the



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Counsel I think has generally accepted that if it's fluctuating incomes, in practical terms we'll default to s. 17, which calls for a three-year consideration and we'll probably average the income.

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North Shore Law LLP

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He said one remaining major issue, however, is determining the income of self-employed people. “This is a helpful reminder that trial judges have

discretion about how to step back what a fair figure is.” In deciding just what that fair figure should be, “this is certainly a precedent that can and will be cited in other provinces.”

Slay said advising self-employed clients whose incomes fluctuate will be “troubling” because “counsel I think has generally accepted that if it's fluctuating incomes, in practical terms we'll default to s.

17, which calls for a three-year consideration and we'll probably average the income.”

He added that “as lawyers we're always looking for certainty, but unfortunately I would say that even though we thought the child support guidelines would provide certainty, it's again an instance where they provide anything but.” Future reviews of income are uncertain, he added. “Do we look at three years? Do we look at five years? Or do we look at something else? That's not resolved yet.”

Mark Cochrane of Gordon J Kopelow Law Offices in Vancouver, who represented Harras, could not be reached for comment by press time.

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