NOVA SCOTIA COURT OF APPEAL
Citation: *Reid v. Faubert*, 2019 NSCA 42

Date: 20190523
Docket: CA 479112
Registry: Halifax

Between:

Dionne Lynn Reid

Appellant

v.

Paul Andre Faubert

Respondent

Judge: The Honourable Justice Cindy A. Bourgeois

Appeal Heard: April 16, 2019, in Halifax, Nova Scotia

Subject: Determination of annual income; undue hardship

Summary: The parties are the parents of a young daughter. They have been engaged in litigation for a significant part of her life.

In January 2014, Ms. Reid filed a Notice of Application in the Supreme Court (Family Division) in which she sought relief, both custodial and financial. Two interim consent orders followed, the latest being issued on November 5, 2014. That order provided that the child was in the primary care of Ms. Reid, with regular parenting time with Mr. Faubert. It further provided Mr. Faubert would pay child support of $594 per month plus $270 towards child care expenses.

The matter came for final hearing in December 2016. The central issue in contention was the appropriate amount of child support to be paid by Mr. Faubert. Ms. Reid argued his income for child support purposes ought to include the pre-tax income of his two companies. Mr. Faubert argued otherwise

and also submitted that his high access costs (he resides in Ontario) created an undue hardship.

The application judge concluded Mr. Faubert's income for the purpose of calculating child support was $85,000, which would provide for a guideline table payment of $762 per month. She also concluded Mr. Faubert had made out a claim of undue hardship. She ordered Mr. Faubert to pay support of $500 per month plus 51% of child care expenses.

Ms. Reid appealed. She alleged the application judge erred in both her determination of Mr. Faubert's income and her finding of undue hardship.

Issues: (1) Did the application judge err in concluding Mr. Faubert's annual income was $85,000 for the purpose of calculating child support?
(2) Did the application judge err in granting Mr. Faubert's undue hardship claim?

Result: The application judge erred in both her determination of Mr. Faubert's annual income as well as in her undue hardship analysis.

The appeal is allowed without costs, and remitted for re-hearing on the issue of child support.

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Appellant

v.

Paul Andre Faubert

Respondent

Judges:	Beveridge, Bourgeois and Derrick, JJ.A.
Appeal Heard:	April 16, 2019, in Halifax, Nova Scotia
Held:	Appeal allowed without costs, per reasons for judgment of Bourgeois, J.A.; Beveridge and Derrick, JJ.A. concurring
Counsel:	Alex Embree, for the appellant Robyn Elliott, Q.C., for the respondent

Reasons for judgment:

[1] Dionne Lynn Reid and Paul Andre Faubert are the parents of a young daughter. They have been engaged in litigation for a significant part of her life.

[2] In January 2014, Ms. Reid filed a Notice of Application in the Supreme Court (Family Division) in which she sought relief, both custodial and financial. Two interim consent orders followed, the latest being issued on November 5, 2014. That order provided that the child was in the primary care of Ms. Reid, with regular parenting time with Mr. Faubert. It further provided Mr. Faubert would pay child support of $594 per month plus $270 towards child care expenses.

[3] The matter came for final hearing before the Honourable Justice Deborah Gass in December 2016. The central issue in contention was the appropriate amount of child support to be paid by Mr. Faubert. Ms. Reid argued his income for child support purposes ought to include the pre-tax income of his two companies. Mr. Faubert argued otherwise and also submitted that his high access costs (he resides in Ontario) created an undue hardship.

[4] The application judge concluded Mr. Faubert's income for the purpose of calculating child support was $85,000, which would provide for a guideline table payment of $762 per month. She also concluded Mr. Faubert had made out a claim of undue hardship. She ordered Mr. Faubert to pay support of $500 per month plus 51% of child care expenses.

[5] Ms. Reid appeals to this Court and alleges the application judge erred in both her determination of Mr. Faubert's income and her finding of undue hardship. For the reasons that follow, I would allow the appeal and remit the matter to the court below for a new hearing to determine an appropriate quantum of child support.

Background

[6] The parties were living together in Ontario when the child was born in November 2013. In January of 2014, Ms. Reid and the child moved to Nova Scotia where they have remained. Ms. Reid, prior to moving to Ontario to reside with Mr. Faubert, had lived and worked in Nova Scotia.

[7] Following their separation, the parties were able to agree to parenting arrangements that included the child spending substantial time with Mr. Faubert

both in Nova Scotia and Ontario. They are to be commended for putting their daughter's need to have positive and meaningful parenting time with both of them, ahead of their other differences of opinion.

[8] The parties have been unable to agree, however, on an appropriate quantum of child support. The source of the difficulty is the nature of Mr. Faubert's income. He is the sole shareholder and director of two companies that operate as a snow removal and landscaping business. In the court below, Ms. Reid advanced the view that Mr. Faubert's income for the purpose of determining his child support obligation ought to include the pre-tax income of his corporations. Mr. Faubert submitted otherwise. Further, Mr. Faubert argued that his high access costs were such that it would create an undue hardship if he paid the guideline table amount of child support.

[9] The matter was heard over three days in December 2016. The parties provided post-hearing written submissions in January 2017. The Order incorporating the application judge's reasons was issued July 4, 2018. Ms. Reid filed a Notice of Appeal on August 7, 2018.

Decision under Appeal

[10] On June 12, 2017, the application judge provided the parties with her "conclusions" in writing directing they be used to prepare an Order. She advised the reasons for her findings would be provided at a later date. With respect to the issue of child support, the "conclusions" stated:

> For reasons to follow, I am satisfied that income be determined for Mr. Faubert to be $85,000 pursuant to section 18 of the Child Support Guidelines. Such income would result [in] a table amount of $762.00 and a contribution of approximately 51% of the after-tax child care expenses, approximately $275 per month.
>
> Having so found, I am also satisfied that the Respondent has unusually high expenses in relation to access with [*] and should he be required to pay the table amount he would suffer undue hardship and that [he] has met the household standard of living test.
>
> Thus, I am ordering a different amount of child support, taking into account that his after tax costs of exercising access are between $15-20,000 per year. I am therefore reducing his income to reflect those costs and fixing maintenance at $500 per month, effective January 1, 2017. Mr. Faubert shall pay 51% of the child care based on the income I have determined pursuant to section 18.

[11] On October 5, 2017, the application judge released a written decision. It is unreported. With respect to the determination of Mr. Faubert's income, she said:

> *Determination of Income*
>
> [33] The first issue is to determine what the Respondent's income is for setting the base table amount of child support. Once that is established then whether or not he has established a basis for a finding of undue hardship will be considered. There is agreement that he will pay a proportionate share of after tax child care costs and he will pay the after tax costs of special or extraordinary expenses as contemplated by the legislation.
>
> [34] The Respondent is the sole shareholder and director of two companies: MTA and Advance, which operate as a snow removal/landscaping business.
>
> [35] He has grown the company over a period of about 30 years and it is a very successful business; but one which faces competition, and because of its nature carries a high overhead, keeping vehicles and equipment which are as essential as his employees.
>
> [36] He owns and utilizes a 1999 Ford truck and a 2006 Chevrolet truck, a 1980 backhoe, a 1989 dump truck and a fleet of tractors. He runs his business from home and some of his business and personal expenses are combined.
>
> [37] His retained earnings in 2012 were $370,918 and in October 2015, $398,032. Because of the nature of the business and the necessity to keep equipment operational to do the work these earnings are required to maintain the vehicles and does not represent income for child support. However, as the sole owner he has complete control and access to funds at his discretion.
>
> [38] He showed cash at the end of October 2012 as $77,198 and October 31, 2015 [as] $81,498.
>
> [39] For the purpose of setting a table amount I find his income to be in the vicinity of $85,000 per year.

[12] Turning to Mr. Faubert's claim of undue hardship, the application judge wrote:

> *Undue Hardship Circumstances*
>
> [40] Has Mr. Faubert established a claim for undue hardship? In other words, if he is required to pay the table amount would his household standard of living fall below that of Ms. Reid?
>
> [41] The Respondent is responsible for an unusually high [cost] of exercising access. When he comes to Nova Scotia to visit he has airfare, ground transportation, hotel and food expenses. When he picks up "A" to take her back to Ontario for parenting time, he has the expenses of air travel which involves four plane tickets for him and two for his daughter. He has tried to maintain the

> relationship with his daughter through travelling to Nova Scotia approximately monthly, to either be with her here in Nova Scotia or taking her back to Ontario. Furthermore, the parties have agreed on a parenting schedule which I conclude to be in the child's best interest. Such a schedule results in significant access costs of approximately $18-20,000 per year.
>
> [42] He does not meet the criteria for undue hardship by incurring high access costs alone. The court must be satisfied that if given those costs, should he be required to pay the table amount of child support would his household standard of living fall below that of the recipient parent.
>
> [43] The Applicant earns $82,3216 [*sic*] per year at the top of her pay level. She pays into a deferred salary plan.
>
> [44] She has argued that income of $141,000 be attributed to the Respondent, which would result in a table amount of support of $1,202 per moth. I have rejected that argument.
>
> [45] I concluded, for the child support purposes that an income of $85,000 is reasonable to attribute to the Respondent. The Ontario table support would be $762 per month and 51% of the section 7's. Given their incomes are roughly equal and given costs of exercising access, he has met the household standard of living test and his undue hardship argument is substantiated.

[13] Along with the "conclusion" provided earlier, the above constitutes the entirety of the application judge's reasons regarding the issues before this Court on appeal.

[14] In a separate Order of Costs, the application judge, after noting the parenting issues had been resolved at the commencement of the hearing and Mr. Faubert was "substantially successful" on most remaining issues, directed that Ms. Reid pay him costs of $10,000.

Issues

[15] In her Notice of Appeal, Ms. Reid sets out four grounds of appeal. In oral submissions, she confirms two are now abandoned. After considering the remaining grounds and the submissions of the parties, it is my view the two issues this Court must address are as follows:

1. Did the application judge err in concluding Mr. Faubert's annual income was $85,000 for the purpose of calculating child support?
2. Did the application judge err in granting Mr. Faubert's undue hardship claim?

Standard of Review

[16] The standard of review is not contentious. This Court affords significant deference to the decisions of hearing judges in family law matters, including those pertaining to support. Recently in *D.A.M. v. C.J.B.*, 2017 NSCA 91, this Court wrote:

> [28] This is an appeal. As C.J.B. argues, we do not overturn a custody or support order unless the judge has made an error in principle, has significantly misapprehended the evidence or unless the decision is clearly wrong, (*Murray v. MacKay*, 2006 NSCA 84, ¶ 22, citing *Hickey v. Hickey*, [1992] 2 S.C.R. 518, ¶ 10, 11 and 12; *Van de Perre v. Edwards*, [2001] 2 S.C.R. 1014, ¶ 12; and *Willick v. Willick*, [1994] 3 S.C.R. 670, ¶ 27).
>
> [29] In *Van de Perre*, Justice Bastarache noted the narrow grounds of appellant intervention:
>
> > [15] … If there is an indication that the trial judge did not consider relevant factors or evidence, this might indicate that he did not properly weigh all of the factors. … an omission is only a material error if it gives rise to the reasoned belief that the trial judge must have forgotten, ignored or misconceived the evidence in a way that affected his conclusion. …

[17] I will apply the above standard of review to the issues raised on appeal.

Analysis

Did the application judge err in concluding Mr. Faubert's annual income was $85,000 for the purpose of calculating child support?

[18] It is helpful to set out the relevant provisions and legal principles that will frame the analysis to follow.

[19] This application was brought pursuant to the *Maintenance and Custody Act*, R.S.N.S. 1989, c. 160, as amended, and the "*Child Maintenance Guidelines*" made thereunder. That statute has now been re-named the *Parenting and Support Act*, with the Guidelines now entitled the "*Provincial Child Support Guidelines*". The substance of the provisions relating to the determination of child support have not changed. I will reference the "*Child Maintenance Guidelines*" as the "Guidelines". It is worthy of note that the provisions relevant to this appeal under both the provincial Guidelines and the *Federal Child Support Guidelines*, SOR/ 97-175, are identical in substance.

[20] The Guidelines set out a comprehensive scheme for determining the appropriate quantum of child support to be paid in a given situation. The objectives of the Guidelines are stated as follows:

> **Objectives**
>
> 1 The objectives of these Guidelines are
>
> (a) to establish a fair standard of support for children that ensures that they benefit from the financial means of both parents;
>
> (b) to reduce conflict and tension between parents by making the calculation of child support orders more objective;
>
> (c) to improve the efficiency of the legal process by giving courts and parents guidance in setting the levels of child support orders and encouraging settlement; and
>
> (d) to ensure consistent treatment of parents and children who are in similar circumstances.

[21] For children under the age of majority, the Guidelines presume that the quantum of child support will be determined by the applicable table, and based on the paying parent's income (s. 3(1)(a)).

[22] Section 3(3) requires that child support be paid based on the table for the province in which the parent against whom support is sought, resides. Here, the parties agree the Ontario tables are applicable.

[23] One way in which the Guidelines strive to meet the above objectives is to provide a method for the determination of a parent's annual income. Sections 15 through 20 set out a mechanism for determining income; however, only 16 through 18 are relevant to the issues before us. They provide:

> **Calculation of annual income**
>
> 16 Subject to Sections 17 to 20, a parent's annual income is determined using the sources of income set out under the heading "(Total Income)" in the T1 General form issued by the Canada Revenue Agency and is adjusted in accordance with Schedule III. **Section 16 replaced: O.I.C. 2000-554, N.S. Reg. 187/2000; amended: O.I.C. 2007-321, N.S. Reg. 294/2007.**
>
> **Pattern of income**
>
> 17(1) If the court is of the opinion that the determination of a parent's annual income under Section 16 would not be the fairest determination of that income, the court may have regard to the parent's income over the last 3 years and determine an amount that is fair and reasonable in light of any pattern of income,

fluctuation in income or receipt of a nonrecurring amount during those years.
Subsection 17(1) replaced: O.I.C. 2000-554, N.S. Reg. 187/2000.

Non-recurring losses

(2) Where a parent has incurred a non-recurring capital or business investment loss, the court may, if it is of the opinion that the determination of the parent's 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, Adjustments to Income, as adopted herein, and adjust the amount of the loss, including related expenses and carrying charges and interest expenses, to arrive at such amount as the court considers appropriate.

Shareholder, director or officer

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

(a) all or part of the pre-tax income of the corporation, and of any corporation that is related to that corporation, for the most recent taxation year; or

(b) an amount commensurate with the services that the parent provides to the corporation, provided that the amount does not exceed the corporation's pre-tax income.

Adjustment to corporation's pre-tax income

(2) In determining the pre-tax income of a corporation for the purposes of subsection (1), all amounts paid by the corporation as salaries, wages or management fees, or other payments or benefits, to or on behalf of persons with whom the corporation does not deal at arm's length must be added to the pre-tax income, unless the parent establishes that the payments were reasonable in the circumstances.

[24] The starting point for an income analysis is s. 16, often referenced as a determination of "line 150" income. In *Johnson v. Barker*, 2017 NSCA 53, Justice Hamilton said:

> [23] Section 16 of the *Child Support Guidelines* provides the starting point for determining the appellant's income:
>
> > 16 Subject to sections 17 to 20, a spouse's annual income is determined using the sources of income set out under the heading "Total income" in the T1 General form issued by the Canada Revenue Agency and is adjusted in accordance with Schedule III.

> Schedule III provides for adjustments, including those to neutralize the favourable tax rates for dividends and capital gains, as compared to other income, and to take into account non-cash expenses such as capital cost allowance.
>
> [24] Section 17 provides that if the court is of the opinion that s. 16 does not provide the fairest determination of the appellant's income, the court can determine an amount based on the spouse's pattern of income over the last three years.

See also *M.C. v. J.O.*, 2017 NBCA 15 at para. 14; *Gosse v. Sorensen-Gosse*, 2011 NLCA 58 at paras. 90-91; and *Bembridge v. Bembridge*, 2009 NSSC 158 at para. 9.

[25] Failing to start with a consideration of a payor's line 150 income as directed by s. 16 may open a trial judge's income determination to appellate review. This is especially so where the reasons do not illustrate the judge's rationale.

[26] Such was the case in *Wehrhahn v. Murphy*, 2014 ABCA 194. There, the Alberta Court of Appeal set aside a chambers judge's income determination as a result of a failure to start her analysis at the payor's line 150 income. Although the chambers judge identified the father's line 150 income, she did not use it, opting instead to utilize a figure obtained from the operating statement of his business. In finding such an approach constituted an error in principle, the Court of Appeal observed:

> [16] The father filed his 2012 income tax return with a total line 150 income of $33,526. In support of that figure, he filed his company's 2012 unaudited operation statement for the taxation year. Rather than rely on the line 150 income as the starting point, the chambers judge referenced two corporate operating statements; one for the six months ending March 31, 2012 and one for the year ending March 31, 2013 and determined his 2012 income to be $42,143.
>
> [17] The *Guidelines* provide a judge with various avenues for increasing or decreasing income for support purposes. (See: sections 17 through 20 of the *Guidelines* as well as Schedule 3 of the *Income Tax Act* as noted in section 16.) **Unfortunately, we cannot discern the basis the chambers judge relied upon when she rejected the line 150 income contained in the 2012 return.** There is no reference to any of the adjustments permissible under Schedule 3 of the *Income Tax Act.* Nor do the reasons suggest that the chambers judge was exercising her discretion under sections 17 through 20 in arriving at the figure of $42,143. For example, the chambers judge did not say she determined the line 150 income was not appropriate based on a pattern of income, fluctuation of income or receipt of a non-recurring amount during those years in making this determination as allowed by section 17.

> [18] It appears the chambers judge simply averaged the year-end statements ending March 31, 2012, and multiplied that average times three, plus the average monthly amount for the period ending March 31, 2013 times nine as a means of calculating the starting point income rather than using line 150. But she does not say so and **she does not explain why and by what authority she was altering the line 150 income which is the starting point for variation under section 16 of the *Guidelines*.**
>
> …
>
> [20] **Departure from the section 16 requirement of line 150 income as the starting point should be done in keeping with the variations contemplated and allowed by the *Guidelines*, and should be supported with logical reasons explaining the rationale for a higher or lower income for support purposes and the authority for the departure. Here, we cannot determine from the reasons why and on what basis the chambers judge rejected the line 150 income figure.** We agree with the father that the starting point for support should have been the total line 150 income in the T1 General Form (the line 150 income) contained in his 2012 income tax return. It is then quite proper to look at allowable justification for moving income either up or down. (Emphasis added)

[27] In *Wehrhahn*, the chambers judge's error appears to have been grounded in her premature consideration of s. 18. As set out above, s. 18 contemplates a court considering business income where it has been determined a payor's line 150 (s. 16) income "does not fairly reflect all the money available" for the payment of child maintenance.

[28] In *Goett v. Goett*, 2013 ABCA 216, the Alberta Court of Appeal summarized the principles relating to the application of s. 18:

> [11] In developing the guidelines, the legislators recognized that determination of income (and disclosure of income) by reliance on s 16 alone may be insufficient or unreasonable in fixing a fair amount of income for the purpose of child support. Specifically, the true income of someone who is self employed or operating a business is not necessarily reflected in their personal tax returns for the purpose of determining child support obligations. Section 18 provides that 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 s 16 does not fairly reflect all the money available to the spouse for the payment of child support, the court may consider, among other things, all or part of the pre-tax income of the corporation for its most recent taxation year or an amount commensurate with the services that the spouse provides to the corporation provided the amount does not exceed the pre-tax income of the corporation. In determining the pre-tax income of a corporation for this purpose, all amounts paid by the corporation as salaries, wages or management fees, or other payments to or on behalf of persons with whom the corporation does not

> deal at arms length must be added, unless the shareholding spouse establishes that the payments were reasonable in the circumstances: *Nesbitt* v. *Nesbitt*, 2001 MBCA 113, [2001] M.J. No. 291; *Kowalewich v. Kowalewich*, 2001 BCCA 450, [2001] B.C.J. No. 1406.

[29] Numerous courts have concluded that in applying s. 18, the onus rests on the payor to adduce clear evidence demonstrating that some or all of the pre-tax corporate income is unavailable for the payment of child support. See *Richards v. Richards*, 2012 NSCA 7 at para. 44; *Hausmann v. Klukas*, 2009 BCCA 32 at paras. 51-61, leave to appeal to S.C.C. refused [2009] S.C.C.A. No. 135; *Cunningham v. Seveny*, 2017 ABCA 4 at para. 28; and *Potzus v. Potzus*, 2017 SKCA 15 at para. 13.

[30] How does a court determine how much of a payor's pre-tax corporate income is available for the payment of child support? Courts have identified a number of factors that are relevant to a s. 18 analysis. In *Bembridge*, *supra*, Justice MacDonald pointed out there are multiple factors that courts should consider, and focusing solely on retained earnings can lead to problematic results. She wrote:

> [36] Other courts examining this issue have commented that decisions made pursuant to section 18 require a court to understand (for example):
>
> - the historical practice of the corporation for retaining earnings;
>
> - the restrictions on the corporation[']s] business including the amount and cost of capital equipment required;
>
> - the type of industry is involved and the environment in which it operates;
>
> - the potential for business growth or contraction;
>
> - the level of debt;
>
> - how the corporation obtains its financing and whether there are banking or financing restrictions;
>
> - the control exercised by the parent over the corporation.
>
> [37] This list is not exhaustive. Failure to understand exactly where the additional money can be found to increase the parent's income can lead to an incorrect result and ultimately, if the parent cannot find the expected additional money, may undermine the operation of the corporation and eventually "kill the goose that lays the golden egg".

[31] A proper s. 18 analysis requires a broad contextual approach. In *Child Support Guidelines in Canada, 2017* (Toronto: Irwin Law Inc., 2017), Julien D. Payne and Marilyn A. Payne write at page 165:

> **It is pre-tax net corporate earnings and not retained earnings that should be used in applying section 18 of the Guidelines.** [*Miller v. Joynt*, 2007 ABCA 214; *Johnson v. Barker*, 2017 NSCA 53; *Mayer v. Mayer*, 2013 ONSC 7099] In *Nykiforuk v. Richmond* [2007 SKQB 433; *Johnson v. Barker*, 2017 NSCA 53], Ryan-Froslie J. (as she then was) of the Saskatchewan Court of Queen's Bench (Family Division) observed that, in determining whether to exercise its discretion pursuant to section 18 of the Guidelines, the court must be satisfied that additional money is actually available and that it can be paid to the shareholder without endangering the financial viability of the company. **Merely looking at the retained earnings of the corporation is of limited assistance. Retained earnings are a shareholder's equity in the corporation (its assets less its liabilities). They do not represent cash available for distribution, nor do they reflect the pre-tax income of the corporation.** In making a determination pursuant to section 18 of the Guidelines, a wide range of factors must be considered, including:
>
> 1) The pre-tax income of the corporation;
>
> 2) The nature of the business involved (Is it capital intensive or service-oriented? Is it subject to seasonal fluctuations or economic cycles?);
>
> 3) The corporate share structure, including any obligation imposed by shareholders' agreements;
>
> 4) The financial position and general operations of the company (What are the company's operating requirements, its inventory, accounts receivable and accounts payable? Are there bank covenants which may affect payment out of funds? Is there a necessity to upgrade equipment, etc.?); and
>
> 5) Is the company a well-established one or merely in its start-up phase?
>
> (Emphasis added)

[32] Hearing judges are well-advised to apply the above approach. Considering retained earnings as the sole factor or starting point of a s. 18 analysis has been found to constitute an error in principle. For example, in *Miller v. Joynt*, 2007 ABCA 214, the Alberta Court of Appeal said:

> 1. Retained Earnings or Pre-tax Income?
>
> [27] In my view the judge erred in utilizing the annual net change in retained earnings as his starting point, rather than the corporation's pre-tax income. Retained earnings are the result of subtracting from pre-tax earnings income tax and shareholder dividends, and other changes to the capital accounts.
>
> [28] As the Mother points out, section 18(1)(a) refers to pre-tax earnings. Likewise, Schedule 1 of the *Guidelines* uses pre-tax (Total Income from Line 150 of the T1 General form) income: s. 16. This suggests that Parliament intended pre-tax earnings to provide the starting point for determining income under the

> *Guidelines*, subject to any allowable deductions pursuant to Schedule 3 of the *Guidelines*.
>
> [29] While there are cases where retained earnings have been used as the starting point for determining the amount to attribute to the payor's income (see e.g., *Broumas, Rattenbury v. Rattenbury*, [2000] B.C.J. No. 889, 2000 BCSC 722 and *Cook v. McManus*, 2006 NBQB 138, 301 N.B.R. (2d) 372), there has generally been no explanation given for the use of retained earnings.
>
> [30] The Father's submission that the use of retained earnings by the judge was tantamount to ascribing only part of the pre-tax income to the Father (as permitted by section 18(1)(a)) cannot be accepted. If that was the judge's intention, he should have said so. Absent such an explanation, the judge erred in principle in using the corporation's retained earnings rather than its pre-tax income as a starting point for his calculations.

[33] Recently, this Court in *Johnson*, *supra*, has similarly found that a hearing judge erred "by resting her decision only on retained earnings and failing to consider the whole of the company's financial situation" (at para. 45).

[34] I now turn to the decision under appeal. I am satisfied that given her reasons, it is impossible to determine whether the application judge applied the correct legal principles. Indeed, a review of her reasons, in combination with the record and Order, suggests it is probable she did not. I will explain.

[35] Ms. Reid challenges the application judge's income determination on two primary bases:

- She did not start her analysis with a consideration of Mr. Faubert's s. 16 income as required; and
- She misapplied s. 18 by failing to consider the pre-tax income of Mr. Faubert's companies and by failing to require him to establish that all of the corporate income ought not to be considered for child support purposes.

[36] In my view, there is merit to the above assertions. A review of the application judge's reasons disclose that she did not reference s. 16 of the Guidelines at all. At no point did she identify what she considers Mr. Faubert's "line 150" income to be. She neither looked at the last year (as per s. 16) nor whether she ought to consider income patterns over the past three years (as per s. 17(1)).

[37] I agree with Ms. Reid that a failure to identify Mr. Faubert's base line 150 income is problematic. This is not a case where it is obvious from the record what

that figure should be. As such, it creates uncertainty as to the foundation for the application judge's analysis. The problem is compounded when one tries to ascertain how much corporate income the application judge later added by virtue of her s. 18 analysis. Ms. Reid asserts, and I agree, that both parties are entitled to understand how the application judge determined Mr. Faubert's global income for child support purposes to be "in the vicinity of $85,000".

[38] To illustrate the difficulty, the record shows that Mr. Faubert's line 150 income for 2015 was $79,544. If the application judge accepted this figure, as contemplated by s. 16, then she must have added the remaining balance of $5,456 (to total $85,000) as a result of her s. 18 analysis. However, if the application judge found it inappropriate to consider only the 2015 income, and she looked at the past three years (2014 and 2013 line 150 amounts were $67,815 and $60,296 respectively) as permitted by s. 17(1), then her foundation may have been different. It is not uncommon that courts, pursuant to s. 17(1), will apply an averaging approach. In this case, if the application judge did so, it would have created an average line 150 income of $69,218, resulting in the balance of $15,782 presumably being added by virtue of the s. 18 analysis. Perhaps the application judge used some other approach, but if so, it is not ascertainable from her reasons.

[39] It is impossible to know what figure the application judge found as Mr. Faubert's "line 150" income. Further, there is no explanation why she viewed that amount as not being a fair reflection of his income available for child support purposes. The parties are further left uninformed as to what amount from corporate resources was added to the payor's income. In addition to not being able to identify what sum she determined was to be added to Mr. Faubert's personal line 150 income (whatever it may be), the application judge's reasons highlight additional concerns.

[40] Section 18(1)(a) specifically contemplates a court considering "all or part of the pre-tax income of the corporation … for the most recent taxation year". However, in her reasons, the application judge does not reference the pre-tax income of Mr. Faubert's companies at all. The evidence before her demonstrated total pre-tax corporate income of $88,616 for 2015. It does not appear, at least from her reasons, that this was factored into her analysis. Although the authorities noted above endorse a multi-factorial approach to determining the "pre-tax income of the corporation", a failure to consider the reported pre-tax income is, in my view, an error in principle.

[41] What the application judge did make mention of was the corporate retained earnings shown in 2012 and 2015 ($370,918 and $398,032 respectively) as well as cash on hand of $77,198 and $81,498 for the same years. She does not explain why these figures were relevant, or how they resulted in Mr. Faubert's personal income being supplemented from corporate sources to arrive at $85,000 for child support purposes.

[42] I would also note the application judge does not clearly explain how Mr. Faubert met his burden to establish that all or some of the corporate pre-tax income should not be included for child support purposes. In my view, it was incumbent on the application judge to explain not only how that burden was met, but what portion of the pre-tax income was not available for child support purposes. Without doing so, this Court is unable to ascertain whether she appropriately considered the totality of the evidence before her and applied the correct legal principles.

[43] For the reasons above, I would allow this ground of appeal and set aside the application judge's finding that Mr. Faubert's income was $85,000 for child support purposes. Given that the application judge then proceeded to use that income to assess Mr. Faubert's undue hardship claim, her finding in that regard must also fall. However, Ms. Reid has raised other concerns with the undue hardship analysis which, in my view, require a response.

Did the application judge err in granting Mr. Faubert's undue hardship claim?

[44] Section 10 of the Guidelines governs a claim of undue hardship. The most relevant provisions for the issues on this appeal are as follows:

> **Undue hardship**
>
> 10(1) On the application of a parent, a court may award an amount of child support that is different from the amount determined under any of Sections 3 to 5, 8 or 9 if the court finds that the parent making the request, or a child in respect of whom the request is made, would otherwise suffer undue hardship.
>
> **Circumstances that may cause undue hardship**
>
> (2) Circumstances that may cause a parent or child to suffer undue hardship include the following:
>
> …
>
> (b) the parent has unusually high expenses in relation to exercising access to a child;

…

Standards of living must be considered

(3) Despite a determination of undue hardship under subsection (1), an application under that subsection must be denied by the court if it is of the opinion that the household of the parent who claims undue hardship would, after determining the amount of child support under any of Sections 3 to 5, 8 or 9, have a higher standard of living than the household of the other parent.

Standards of living test

(4) In comparing standards of living for the purpose of subsection (3), the court may use the Comparison of Household Standards of Living Test referred to in Schedule II.

[45] Applying s. 10 engages a two-step process. Firstly, a payor seeking to rely on the provision must establish that the payment of support as otherwise directed by the Guidelines (ss. 3 to 5, 8 or 9) would create an undue hardship as a result of one of the non-exhaustive factors in s. 10(2). Only if the court is satisfied that an undue hardship exists, does it proceed to the second step, namely, a consideration of whether the payor's household standard of living is lower than the recipient's (s. 10(3)).

[46] The above has been long recognized as the proper approach to undue hardship claims. In *Hanmore v. Hanmore*, 2000 ABCA 57, leave to appeal to S.C.C. refused, [2000] S.C.C.A. No. 182, the Alberta Court of Appeal wrote:

> [9] The Child Support Guidelines provide a detailed road map for the Court to follow in deciding whether guideline amounts should be reduced because of undue hardship. The applicant who seeks a reduction on grounds of undue hardship must satisfy a two stage test. The first stage requires the applicant party to prove specific facts establishing the undue hardship. S. 10(2) sets out a non-exhaustive list of circumstances that may give rise to such a claim. If undue hardship is established, the applicant must show that his or her household would enjoy a lower standard of living than the household of the other parent should child support not be reduced. However, even where such a finding is made, the Court retains a discretion to refuse to reduce the guideline amount. (See *Van Gool v. Van Gool* (1998), 166 D.L.R. (4th) 528 (B.C.C.A.); See *Adams v. Loov*, [1998] A.J. No. 666, (Q.B.); *Walkeden v. Zemlak* (1997), 33 R.F.L. (4th) 52 (Sask. Q.B.); *Camirand v. Beaulne*, [1998] O.J. 2163 (Ont. Gen. Div.). In giving his written reasons, the chambers judge recognized the appropriate test set out above.

See also *Ellis v. Ellis*, 1999 NSCA 31 at paras. 35-38; *Gaetz v. Gaetz*, 2001 NSCA 57 at paras. 15-17; and *Blanchard v. Blanchard*, 2019 ABCA 53 at para. 35.

[47] It is also important to note this Court has adopted the view that establishing "undue hardship" places a heavy burden on a payor. In *Ellis*, *supra*, Justice Bateman quotes with approval the hearing judge as follows:

> [37] The party seeking relief must first satisfy the judge that his situation qualifies within s. 10(2) as one of "undue hardship" and, if that is found to be so, that the household to which the child support would be paid would enjoy a higher standard of living than that of the payor (s. 10(3)). Justice Tidman determined that Mr. Ellis had not satisfied the threshold of demonstrating undue hardship. In this regard he said at p. 253:
>
> > …
> >
> > *S. 10* places a heavy burden on a spouse wishing to reduce the amount of child support from the *Guideline* levels. The section does not permit reduction for hardship alone but only for "undue" hardship. In the World Book Dictionary (1985 ed.) "hardship" is defined as "hard condition of living". **By the same dictionary "undue" is defined as "too great, too much, excessive". The paying spouse must therefore show that excessively hard living conditions would result from having to pay the *Guideline* amount.** (Underlining of Bateman, J.A; Emphasis added)

[48] A similar view was expressed in *Hanmore*, *supra* (leave to appeal denied) where the court wrote:

> [10] The objectives of the Guidelines are set out in s. 1. The primary objectives are "to establish a fair standard of support for children that will ensure that they continue to benefit from the financial means of both spouses after separation", and "to ensure consistent treatment of spouses and children who are in similar circumstances". **Such objectives will be defeated if the Courts adopt a broad definition of "undue hardship"** or if such applications become the norm rather than applying to exceptional circumstances. That has been the consistent message of the Courts since the Guidelines came into force. I will refer to only a few decisions.
>
> [11] In *Barrie v. Barrie*, [1998] A.J. No. 460 (Q.B.), Perras J. stated at para. 23:
>
> > It is clear, in my view, that the wording of s. 10 places the onus to establish undue hardship upon the person claiming such. It is also clear that this safety valve is also very narrow in scope as the legislation mandates the establishment of not just hardship but undue hardship. **"Hardship" in various main stream dictionaries is defined as "difficult, painful suffering" while "undue" is generally defined as "excessive, disproportionate".** Hence, in order for a claim of undue hardship to be made out, a claimant of such must satisfy the court that the

> difficulty, suffering or pain is excessive or disproportionate - a very steep barrier under the circumstances.

…

[14] The British Columbia Court of Appeal, in *Van Gool*, considered the authorities and concluded at para [51]:

> Since the basic tables were designed to be a "floor" for the amount of maintenance payable, rather than a ceiling, it is not surprising that the authorities have held that the threshold for a finding of undue hardship is high. **Hardship is not sufficient; the hardship must be "undue", that is, "exceptional", "excessive" or "disproportionate" in all of the circumstances.**

…

[17] It is evident from these authorities that the burden of establishing a claim of undue hardship is a heavy one. We agree with the comment of Wright J. that the objectives of the Guidelines will be defeated if Courts deviate from the established guidelines without compelling reasons. **The hardship must be more than awkward or inconvenient.** It must be exceptional, excessive, or disproportionate in the circumstances. Further, it is not sufficient that the payor spouse has obligations to a new family **or has a lower household standard of living than the payee spouse. The applicant must specifically identify the hardship which is said to be undue.** A general claim regarding an inability to pay or a generic reference to the overall expense of a new household will not suffice. We adopt the words of Prowse, J.A. in *Van Gool*:

> [51] The onus is on the party applying under s. 10 to establish undue hardship; it will not be presumed simply because the applicant has the legal responsibility for another child or children and/or because the standard of living of the applicant's household is lower than that of the other spouse. **The applicant must lead cogent evidence to establish why the table amount would cause undue hardship.** (Emphasis added)

[49] The second step engages s. 10(3) which directs a court to consider the respective standards of living of the payor's and payee's households. If the payor enjoys a higher standard of living, then the claim of undue hardship must be denied. Section 10(4) indicates that a court "may" use the Comparison of Household Standards of Living Test in Schedule II. Although the permissive wording allows a court to use an alternative approach, the Schedule is most commonly used (*Stoddard v. Atwood*, 2001 NSCA 69 at para. 12).

[50] I turn now to the application judge's finding of undue hardship. I agree with Ms. Reid's assertion that, from her reasons, it appears the application judge

misapplied the two-step test, and her reasons are insufficient for determining how she concluded, other than by a straight comparison of income, Mr. Faubert's household standard of living fell below that of Ms. Reid's.

[51] I repeat the relevant portions of the application judge's reasons:

> [40] **Has Mr. Faubert established a claim for undue hardship? In other words, if he is required to pay the table amount would his household standard of living fall below that of Ms. Reid?**
>
> [41] The Respondent is responsible for an unusually high costs of exercising access. When he comes to Nova Scotia to visit he has airfare, ground transportation, hotel and food expenses. When he picks up "A" to take her back to Ontario for parenting time, he has the expenses of air travel which involves four plane tickets for him and two for his daughter. He has tried to maintain the relationship with his daughter through travelling to Nova Scotia approximately monthly, to either be with her here in Nova Scotia or taking her back to Ontario. Furthermore, the parties have agreed on a parenting schedule which I conclude to be in the child's best interest. Such a schedule results in significant access costs of approximately $18-20,000 per year.
>
> [42] He does not meet the criteria for undue hardship by incurring high access costs alone. **The court must be satisfied that if given those costs, should he be required to pay the table amount of child support would his household standard of living fall below that of the recipient parent.**
>
> …
>
> [45] I concluded, for the child support purposes that an income of $85,000 is reasonable to attribute to the Respondent. The Ontario table support would be $762 per month and 51% of the section 7's. Given their incomes are roughly equal and given costs of exercising access, he has met the household standard of living test and his undue hardship argument is substantiated. (Emphasis added)

[52] The application judge was clearly of the view that if Mr. Faubert paid table support of $762 per month plus 51% of child care, that he would suffer undue hardship. She accordingly reduced his monthly payment by $262 to alleviate that situation.

[53] I have three concerns with the application judge's conclusion. Firstly, she does not, with clarity, set out the proper two-step test required under s. 10. Paragraphs [40] and [42] of her reasons suggest that she may have collapsed the two inquiries into one. She does not appear to make an initial finding of undue hardship before proceeding to consider the parties' respective household living standards. Rather, the reasons suggest the application judge utilized the

comparison of household standards to reach a conclusion that Mr. Faubert would suffer an undue hardship. Such an approach is incorrect.

[54] Secondly, the application judge does not explain how the payment of the table amount (an additional $262.00 in support each month) would have resulted in Mr. Faubert suffering "excessively hard living conditions". Although she clearly finds Mr. Faubert to have "unusually high" and "significant" access costs, the application judge does not explain how the high threshold for finding an undue hardship has been met. Simply having unusually high access costs, coupled with a purported lower standard of living, does not establish an undue hardship as required by s. 10. It would appear the application judge erroneously concluded that it did.

[55] Finally, the application judge did not use Schedule II to compare the parties' respective standards of living. This, in and of itself, is not an error. However, should an alternative approach be used, it is incumbent upon a hearing judge to clearly explain how the comparison was undertaken. Given the objectives of the Guidelines and the high threshold for successfully establishing an undue hardship claim, the reasons should, with respect, be more than an acknowledgement that the parties had similar incomes, with Mr. Faubert having high access costs. Certainly the fact that Ms. Reid had primary care of the child within her household would be a factor, as it is in Schedule II, impacting her household standard of living. It does not appear the application judge considered this factor, or any others.

Disposition

[56] Prior to concluding, I wish to make clear that the outcome of this appeal should not be taken as a criticism of the position advanced by Mr. Faubert in the court below, or his conduct. The record amply demonstrates that he has readily undertaken responsibility for his daughter, both financially and emotionally. Mr. Faubert provided full financial disclosure, as is expected, but not always done in such matters. I would encourage the parties to continue to attempt to find a satisfactory resolution to any differences of opinion in relation to their daughter, including those concerning her financial support.

[57] I would allow the appeal without costs to either party, set aside the application judge's determinations relating to child support in her July 4, 2018 Order, and order a new hearing accordingly.

[58] Given that it was based in significant part on the determinations relating to child support, I would further set aside the application judge's Order for Costs. If Ms. Reid has paid any of those costs as ordered, they should be returned to her forthwith. On the re-hearing, costs, if any, arising from the proceeding before Justice Gass should be determined by the new hearing judge.

Bourgeois, J.A.

Concurred in:

Beveridge, J.A.
Derrick, J.A.