

FAMLNWS 2022-41  
Family Law Newsletters  
November 7, 2022

— Franks & Zalev - This Week in Family Law

Aaron Franks & Michael Zalev

© Thomson Reuters Canada Limited or its Licensors (excluding individual court documents). All rights reserved.

**Contents**

- Breaking News: Hey Alberta! Welcome To The Section 19 Club!! (And There's Something for the Rest of Us Too)
- Roses are Red; Violets Are Blue; If You Mean to Have A Binding Agreement then Say So!
- CCB? UGH . . .

**Breaking News: Hey Alberta! Welcome To The Section 19 Club!! (And There's Something for the Rest of Us Too)**

*Peters v. Atchooay*, 2022 CarswellAlta 3110 (C.A.) — Paperny J.A., Watson J.A., Greckol J.A., Pentelechuk J.A., and Feehan J.A.

In its 2001 decision in *Hunt v. Smolis-Hunt* (2001), 20 R.F.L. (5th) 409 (Alta. C.A.), the Alberta Court of Appeal determined that before a court could impute income for intentional unemployment or underemployment under s. 19(1)(a) of the *Child Support Guidelines*, it had to be satisfied that the party in question had "a specific intention to undermine or avoid support obligations, or circumstances which permit the court to infer that the intention of the obligor is to undermine or avoid his or her support obligations."

Although the test from *Hunt* was inconsistent with the one that courts across the rest of Canada applied to claims under s. 19(1)(a) of the *Guidelines*, it remained good law in Alberta for 20 years.

But not anymore.

As we discussed in the 2021-28 (July 26, 2021) edition of *TWFL*, last summer the Alberta Court of Appeal agreed to reconsider *Hunt* in a case called *Peters v. Atchooay*. The appeal was argued before a 5-member panel of the Alberta Court of Appeal in late November 2021, and the Court took its decision under reserve — for a year.

Last week (on October 31, 2022), the Court released its long awaited decision. Not surprisingly, it unanimously decided to overrule the "deliberate evasion test" from *Hunt*, and to replace it with the "reasonableness test" that is applied throughout the rest of Canada. As the Court explained in its reasons:

[41] It is time to replace the deliberate evasion test established by the decision in *Smolis-Hunt*. As signalled by Picard JA's dissent, a test of reasonableness should govern the court's discretion to impute income under s 19(1)(a).

[42] I come to this conclusion for a number of reasons:

- (1) The principles of statutory interpretation do not support the conclusion that income can be imputed under s 19(1)(a) only if there is an intention to evade or undermine child support obligations;
- (2) Application of the deliberate evasion test has proven to be impractical and unworkable. It has often led to an onerous burden on the *recipient* to prove the payor is deliberately evading their support obligations, and has at times

resulted in Alberta trial judges, who work hard to avoid unjust results, straining to find the basis to infer the necessary intent;

(3) The modern approach to child support, as evidenced by the decidedly child-centred nature of the new *Divorce Act* and the *Guidelines* as well as recent Supreme Court jurisprudence, affirms that the best interests of children must remain front and centre. This includes ensuring that children receive a proper level of support; and

(4) Alberta is the only province in Canada requiring evidence of an intention to evade or undermine child support obligations before income can be imputed. Appellate courts of other provinces have endorsed the reasonableness test. Alberta is wrong; the rest of Canada is right.

But the Court of Appeal's decision is not only important for Alberta counsel, because starting at paragraph 92 of its reasons, the Court provided a comprehensive summary of the general principles that must be considered when dealing with claims to impute income that are worth reading in full:

[92] The following is a non-exhaustive list of principles to guide the determination of whether to impute income under s 19(1)(a):

1. General Duty to Work. **There is a duty to seek employment where a parent is healthy and can work.** A parent's limited work experience or job skills do not justify a failure to pursue lower skilled employment or employment in which the necessary skills can be learned on the job. While this may mean a job at the lower end of the wage scale, **parents cannot refuse to take reasonable steps to support their children simply because they cannot obtain interesting or highly paid employment.** Nor can a high-earning or highly skilled parent refuse employment indefinitely by holding out for employment commensurate with their skills and previous level of earning, job title or seniority.

2. Earning Capacity Used to Assess Reasonableness. When determining whether to impute income on the basis of under-employment or unemployment, **a court must consider what is reasonable in the circumstances. The starting point is the payor's earning capacity, which is the objective measure by which the reasonableness of the parent's decision or conduct is assessed.** Earning capacity is determined based on factors like age, education, experience, skills, and health of the payor, along with availability of work, the freedom to relocate, and other obligations.

3. Discretion. **Income will not be imputed where a parent's decision to earn less than the maximum they are capable of making is found to be reasonable. Nor is there a presumption that a career choice resulting in a reduction in income is unreasonable.**

4. Obligation to Support Children is the Overarching Goal. The reasons for under-employment or unemployment must be objectively scrutinized. **A parent is required to act in a manner reflective of his or her obligations and cannot be excused from support obligations in furtherance of unrealistic, unproductive or non-remunerative career aspirations.** Persistence in unremunerative employment or repeated education initiatives may also entitle the court to impute income. **Parental self-fulfillment is a consideration but does not trump child support requirements.**

5. Agreements Contextualize Reasonableness. **The parties' pre-separation agreements or social contracts have some weight in determining *Guidelines* income, but they are not determinative.** The parenting arrangement, and the payor's involvement or lack of involvement with the children, the length or time the arrangement has been in place, and the ages of the children may be considered in assessing the reasonableness of the payor's under-employment or unemployment.

6. Reasonableness Is Not Fixed in Time. The payor's history of paying child support and providing financial disclosure are objective measures by which to assess the reasonableness of the payor's employment decision or conduct. **What is reasonable (or unreasonable) is determined at one point in time and will not necessarily remain static for the entire time the children are owed support.**

7. The Ultimate Onus Rests on the Party Opposing Imputation. Assuming the financial disclosure requirements have been met, **the onus is on the party opposing imputation to prove on a balance of probabilities: 1) that the under-employment or unemployment was not voluntary, that is, not due to their own decision or conduct; or, 2) that the under-employment or unemployment is as a result of one of the listed exceptions in s 19(1)(a). If neither circumstance applies, that party must establish on a balance of probabilities that their under-employment or unemployment is reasonable**, having regard to all the existing circumstances. However, where it is an initial application, the person seeking an imputation of income under s 19(1)(a) has a preliminary onus to establish some basis for the imputation sought. Either way, each stage of the analysis requires evidence that is as objective as possible. Bare assertions will not suffice.

[93] **On the issue of amount, a court cannot choose an arbitrary number; "there must be a rational basis underlying the selection of any such figure . . . grounded in the evidence":** *Drygala* [*v. Pauli* (2002), 19 R.F.L. (6th) 8 (Ont. C.A.)] at para 44. However, if a reasonable figure can be determined in between earning capacity and actual earnings that is grounded in the evidence, it may be the more appropriate amount to impute in circumstances where the payor's actual income is unreasonable. *Horbas* [*v. Horbas*, 2020 CarswellMan 102 (C.A.)] is a case in point, where the Manitoba Court of Appeal found the payor's actual earnings of roughly \$50,000 unreasonable but imputed an income of \$100,000 rather than his \$300,000 earning capacity because this compromise figure was reasonable in the circumstances and grounded in the evidence. [emphasis added]

The Court of Appeal's decision also addresses the *Colucci* framework for retroactively reducing a payor's child support obligations, but we will leave that part of the decision for our full comment next time.

### **Roses are Red; Violets Are Blue; If You Mean to Have A Binding Agreement then Say So!**

*Butler v. Butler*, 2022 CarswellOnt 11499 (S.C.J.) — Himel J.

This case dealt with the issue of settlement privilege with respect to a *closed* mediation, enforcing settlements, and the application of the Supreme Court of Canada's recent decision in *Association de médiation familiale du Québec v. Bouvier* (2021), 64 R.F.L. (8th) 1 (S.C.C.).

The father brought a motion to enforce a Memorandum of Understanding ("MOU") that was *dictated* at the end of a mediation session on January 18, 2022.

The mediator dictated the terms of the MOU in front of the parties and their lawyers at 6:35 pm after an 8 1/2-hour day of mediating. A portion of the MOU specifically stated that the parties would have an opportunity to canvas any concerns with respect to the MOU, which would need to be received by January 25, 2022.

A Net Family Property calculation was also circulated by the mediator at the same time as the MOU.

On January 25, 2022, the mother advised the mediator and the father that she had various comments and questions. The e-mail she sent stated that she was "not in agreement with certain terms." The father, however, was of the view that the MOU was clear and unambiguous, took the position that the matter was settled, and refused to negotiate further.

The mother's specific concern was that while the mediator said that the mother's date of separation figures had been used for the NFP calculation, the father's preferred date of separation had been mistakenly used. She also thought there were other errors in the calculation. The father disagreed.

Ultimately, the parties were unable to agree on whether the mother was seeking to correct errors in the calculation, or whether she had just changed her mind and was trying to resile from the agreement.

The father brought a motion to enforce the MOU. He put forward the MOU, a redacted e-mail from the mother's counsel, an e-mail from the father, and e-mails from the mediator. The mother objected to the disclosure of information about the mediation. She claimed that all such communication was privileged.

Again, this was closed mediation. The mediation agreement had the following two paragraphs regarding disclosure:

- Paragraph 9: All information, documents, notes, correspondence, calculations, memoranda of understanding, drafts or any other communications prepared or provided by any person for the purpose of the mediation shall, **unless otherwise discoverable, be treated as without prejudice settlement discussions**, and shall be inadmissible for any purpose, including the mediator's file.
- Paragraph 11: Closed mediation is a confidential, off-the-record process. Although the mediator cannot guarantee absolute confidentiality, the purpose of a confidentiality rule is to help parties feel comfortable freely exchanging information, ideas, options, offers and concerns. **The parties agree not disclose any communications made during the mediation process to anyone who was not present, including memorandum of understanding and emails from or to the mediator or between themselves, unless they all consent.** [emphasis added]

Justice Himel (correctly) determined that the Supreme Court's decision in *Association de médiation* applied. As discussed in that case, there is an exception to settlement privilege that allows otherwise privileged documents and communications to be used to prove the fact of and terms of an alleged agreement. And, a mediation agreement does not remove this exception to settlement privilege unless the agreement contains very specific language confirming that this exception does not apply.

Here, there was nothing in the mediation agreement to suggest that the exception to settlement privilege did not apply, and paragraph 9 of the agreement anticipated that documents from the mediation might be discoverable in certain circumstances.

While the Court found that it could receive evidence of an alleged agreement, the MOU in this case fell short of being enforceable. Under s. 55(1) of the Ontario *Family Law Act*, R.S.O. 1990, c. F.3, a domestic contract is unenforceable unless it is made in writing, signed by the parties and witnessed. The Court stated that a court could enforce a settlement that did not comply with the *Family Law Act* if there was a "meeting of the minds." There must be a consensus between the parties. In order to reach a consensus, the terms of an agreement must be clear enough to give effect to the reasonable expectations of the parties:

[27] While the court can enforce a settlement in the absence of compliance with the *Act*, there must be a meeting of the minds: *Williams v. Williams*, 2022 ONSC 3867. Moreover, in order to relax the strict provisions of section 55(1) of the *Act* there must be consensus between the parties. In order to reach a consensus, the terms of an agreement must be clear enough to give effect to the reasonable expectations of the parties: *Aberback v. Bellin*, 2019 ONSC 3866.

To this we would add the point that, again in Ontario, to avoid the strictures of s. 55(1) of the *Family Law Act*, the parties need be in litigation (as litigation can always be settled): *Geropoulos v. Geropoulos* (1982), 26 R.F.L. (2d) 225 (Ont. C.A.). [For more on this topic, see our comment on *Williams v. Williams* (2022), 73 R.F.L. (8th) 373 (Ont. S.C.J.) in the 2022-35 (September 26, 2022) edition of *TWFL*, and our upcoming comment on Justice Breithaupt Smith's decision about s. 55(1) in *Greve v. Shaw* (2022), 71 R.F.L. (8th) 293 (Ont. S.C.J.).]

In *Butler*, the Court did not have to address the *Geropoulos* issue because Justice Himel was not, in any case, prepared to find that the parties had a requisite meeting of the minds to enforce the terms of the MOU for the following reasons:

- A. The late hour in the day when the mediator dictated the terms of the MOU, following a long day of negotiation.
- B. The lack of opportunity on January 18, 2022, for each party to review the written MOU privately with their lawyers.
- C. The statement in the MOU that both parties would have a chance to canvas concerns.

D. The fact that neither party adduced evidence that unequivocally showed that they agreed or disagreed with or wanted to vary any term of the MOU itself after hearing the mediator's dictation on January 18, 2022.

E. The disagreement between the parties about whether the mother's concerns were a result of errors or the mother changing her mind.

F. The e-mail sent by the mother on January 25, 2022 clearly indicating that she did not agree to the terms of the MOU.

The lesson here? If you are in mediation, and you want a binding deal, sign an agreement that make the binding nature of the deal clear. Or, if the mediator is going to dictate a MOU (as often happens), one of those terms must clarify that the parties agree that the MOU is, in fact, a binding agreement, and not just an agreement to agree. Anything less is just a trip to court waiting to happen.

### CCB? UGH . . .

*Cook v. Ballantyne*, 2022 CarswellSask 394 (Q.B.) — Crooks J.

*Friesen v. The Queen* (2022), 72 R.F.L. (8th) 44 (T.C.C. [Informal Procedure]) — Graham J.

These two brief decisions tell you everything you will ever need to know — and certainly more than you ever wanted to know — about the Canada Child Benefit (the "CCB"), which can provide eligible families with significant tax free payments of up to \$6,997 a year for each child under age 6, and \$5,903 a year for each child between ages 6 to 17. So, in essence, these cases are about parties arguing over free money from the government.

In the first case, *Cook v. Ballantyne*, Justice Crooks dealt with the question of whether a provincial Superior Court has jurisdiction to deal with disputes about the CCB.

The respondent father claimed that he was entitled to the CCB because he was the parties' child's primary caregiver. As his application to the Canada Revenue Agency (the "CRA") for the CCB had been denied, the father brought a motion against the CRA in the Saskatchewan Court of Queen's Bench (as it then was) in his family law case against the applicant mother for an order requiring the CRA to pay him the CCB (both retroactively and prospectively).

This, was a problem.

While the Saskatchewan Court of King's Bench *is* a superior court of record with inherent jurisdiction, the inherent jurisdiction of a superior court is not wholly unfettered. And unfortunately for the father, s. 12(1) of the *Tax Court of Canada Act*, R.S.C. 1985, c. T-2 provides that the Tax Court of Canada has "exclusive jurisdiction to hear and determine references and appeals to the Court on matters arising under" a number of statutes, including the *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.). As disputes about the CCB are dealt with under the *Income Tax Act's* objection process, they are clearly covered by s. 12(1). Accordingly, they fall within the exclusive jurisdiction of the Tax Court. As Justice Crooks explained in her decision:

[6] The benefits payable through the Canada Child Benefit flow from the *Income Tax Act*. The CRA conducts its own eligibility assessment for benefits under the *Income Tax Act*. It falls to the parties to provide documentation to assist the CRA in making their determination regarding entitlement to these benefits, including information regarding parenting arrangements for any children to whom the disputed benefit applies. While an agreement between the parties or a court order may assist in formalizing the parenting arrangement, that alone may not be determinative of eligibility for the Canada Child Benefit as assessing entitlement rests with the CRA.

[7] In the event a party is dissatisfied with a determination made by the CRA, their recourse is to the Tax Court of Canada, which has exclusive jurisdiction to determine matters arising under the *Income Tax Act*.

As a result, the father's motion was dismissed.

In the second case, *Friesen v. The Queen*, Justice Graham of the Tax Court of Canada reviewed the principles that the Tax Court will consider when dealing with decisions from the CRA about entitlement to the CCB.

The parties in *Friesen* separated in December 2018 and had three children together.

After they separated, the CRA paid the CCB to the mother from January 2019 to June 2021. However, it subsequently took the position that the parties had, in fact, been "shared-custody parents" from January 2019 to June 2021, and claimed that the mother had been overpaid.

The mother challenged the CRA's decision in the Tax Court.

Justice Graham started his decision by summarizing the three-part test for determining whether a person qualifies as a "shared-custody parent" with respect to the CCB:

1. The parents "must not be cohabitating spouses or common-law partners;"
2. The parents "must reside with the child either at least 40 percent of the time in the month or on an approximately equal basis;" and
3. The parents "must each primarily fulfil the responsibility for the care and upbringing of the child when the child resides with them."

In this case, there was no dispute that the first part of the test was met, as the mother and father had not cohabited during the period of time in question. Furthermore, during closing submissions, the CRA conceded that the mother had been the primary caregiver for one of the parties' children — V — for the entire period in dispute, and that she had been the primary caregiver for the other two children — N and C — from January to March 2019, July to August 2019, and April 2020 to June 2021. Based on the evidence, Justice Graham was also satisfied that the mother had been N and C's primary caregiver from April 2019 to June 2019.

Accordingly, that just left the period from September 2019 to March 2020 in dispute for only two of the three children.

With respect to September 2019 to November 2019, and January 2020 to February 2020, Justice Graham recognized that, as family law practitioners across Canada already know from dealing with s. 9 of the *Child Support Guidelines*, "[h]ourly calculations can often be difficult", and "[t]here is a significant risk that they will be skewed by slight changes in pick-up and drop-off times or will be manipulated by the parents." The court should not be turned into a calculator and should not be a slave to units of time; a holistic approach is necessary: *Berry v. Hart* (2003), 48 R.F.L. (5th) 1 (B.C. C.A.); *Cabot v. Mikkelson* (2004), 3 R.F.L. (6th) 269 (Man. C.A.); *Froom v. Froom* (2005), 11 R.F.L. (6th) 254 (Ont. C.A.); *Mehling v. Mehling* (2008), 62 R.F.L. (6th) 25 (Man. C.A.).

Nevertheless, his Honour was ultimately satisfied on the evidence before him that, no matter how the total time was calculated, N and C had, in fact, lived with the father at least 40% of the time during these months.

But that was not the end of the analysis, because Justice Graham still had to determine whether the father had been primarily responsible for N and C's care and upbringing during the months in question. Pursuant to Regulation 6302 of the *Income Tax Act*, this required him to consider "the supervision of the daily activities and needs of the child; the maintenance of a secure environment for the child; the arrangement of and transportation to medical care at regular intervals and as required for the child; the arrangement of, participation in, and transportation to educational, recreational, athletic, or similar activities of the child; the attendance to the needs of the child when the child is ill; the attendance to the hygienic needs of the child; and the provision of guidance and companionship to the child."

Although Justice Graham determined that the mother had been primarily responsible for more of the factors listed in Regulation 6302 than the father, he was satisfied that the father had, nevertheless, been primarily responsible for N and C's care and upbringing of N and C when they were with him:

[31] It is, however, important to emphasize that the question I must determine is not who primarily fulfilled the responsibilities listed in Regulation 6302, or which parent was more involved in the children's lives. **The question I must determine is whether [the father] was primarily responsible for the care and upbringing of N and C when they resided with him.** I find that he was. While it is clear to me that [the mother] fulfilled more of the responsibilities described in Regulation 6302, I am satisfied that [the father] was nonetheless primarily responsible for the care and upbringing of N and C when they resided with him. [emphasis added]

With respect to December 2019 and March 2020, the children had resided primarily with the mother when school was closed for the Christmas holidays and March break. Accordingly, there was no real dispute that they had not resided with the father at least 40% of the time,. However, the CRA argued that the Court should look at the surrounding months in order to find that the children had still resided with the father on an approximately equal basis in December 2019 and March 2020. Justice Graham rejected this argument, as he was satisfied that the evidence clearly showed that the father "essentially never cares for the children during the day on weekdays when they are on school vacation", and that the mother was almost entirely responsible for their care when they were off from school.

Accordingly, Justice Graham allowed the appeal, and referred the matter back to the CRA for reconsideration based on his findings that the mother was the sole person entitled to the CCB for V from January 2019 to June 2021, and the sole person eligible for N and C from January to August 2019, December 2019, and March 2020 to June 2021, but that she had only been a "shared-custody parent" for N and C from September 2019 to November 2019, and January 2020 to February 2020.

If anyone knows of a *better* reason to not sit on the Tax Court of Canada . . .