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— Franks & Zalev - This Week in Family Law

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Issues: Ontario — Support — Imputation of Income

Osanebi and *de Pimentel* both deal with the same issue: the amount of income to impute when dealing with a recalcitrant support payor who refuses to provide disclosure or participate in the process. But despite their similarities, the cases approach the issue of imputation quite differently. Justice Myers took the common approach of using minimum wage to set a floor for the payor's income, and then considering whether the evidence in the case before him justified imputing the payor with more than minimum wage.

Justice Akazaki, however, chose to depart from and to question the common approach, and preferred to rely on statistical data about the mean and median income levels for Canadians in general instead of "defaulting" to minimum wage.

Which approach is right? As discussed further below, Justice Myers was, in our view, justifiably quite critical of the approach taken by Justice Akazaki, and unless and until an appellate court suggests otherwise, we expect to see many more support recipients *try* to rely on *Osanebi* to impute payors with artificially high levels of income.

***Osanebi v. Osanebi* (2023), 95 R.F.L. (8th) 476 (Ont. S.C.J.) — Akazaki J.**

The parties in *Osanebi* were married for six years and had two children together.

After they separated, the father moved to Nigeria, and had limited contact with the mother and the children. He did not defend or participate in the proceedings that the mother brought against him claiming a divorce, decision making, and child support. As a result, the mother proceeded with an uncontested trial that came on before Justice Akazaki.

The reasons do not mention what the father did for work during the marriage — they merely indicate he was self-employed. In the materials she filed in support of the uncontested trial, the mother asked Justice Akazaki to order the father to pay her $491 a month in child support based on an income of $32,100 a year, which is what she said he would earn from a full-time job that paid minimum wage.

Given that the mother only requested $491 a month in child support (based on the father earning minimum wage in Ontario), and did not lead any evidence to show that the father was capable of earning more than minimum wage, the outcome seemed obvious. The law has been clear since at least 2002 (save for our friends in Alberta that were a bit late to the imputation of

income party: *Peters v. Atchooay*, 2022 CarswellAlta 3110 (C.A.)) when the Ontario Court of Appeal released its decision in *Drygala v. Pauli* (2002), 29 R.F.L. (5th) 293 (Ont. C.A.). In *Drygala*, the Court of Appeal held at para. 44 that while courts have broad discretion to impute income in appropriate circumstances, "[s]ection 19 of the *Guidelines* is not an invitation to the court to arbitrarily select an amount as imputed income", and that "[t]here must be a rational basis underlying the selection of any such figure" that is "grounded in the evidence." Furthermore, "[t]he onus is on the person requesting an imputation of income to establish an evidentiary basis for such a finding": *Homsi v. Zaya* (2009), 65 R.F.L. (6th) 17 (Ont. C.A.) at para. 28.

But in his relatively short time on the Bench, we have already seen a number of decisions from Justice Akazaki where — *stare decisis* be damned — he suggested that it might be time to "reconsider" a number of long-standing family law principles. For example, in *Rathee v. Rathee*, 2023 CarswellOnt 20384 (S.C.J.) at para. 62, which is currently under appeal (full disclosure — our office acts for the appellant), his Honour opined that, notwithstanding the countless cases from across Canada that say otherwise [see e.g. *Kerr v. Baranow* (2011), 93 R.F.L. (6th) 1 (S.C.C.) at para. 208; *Farrar v. Farrar* (2003), 32 R.F.L. (5th) 35 (Ont. C.A.); *Osborne v. Wilfong* (2009), 66 R.F.L. (6th) 358 (Sask. Q.B.); *Metcalfe v. Metcalfe* (2013), 37 R.F.L. (7th) 471 (Alta. Q.B.); *Lee v. Lee* (2014), 52 R.F.L. (7th) 34 (B.C. C.A.); *Aquila v. Aquila* (2016), 76 R.F.L. (7th) 1 (Man. C.A.); *Dorey v. MacNutt*, 2013 CarswellNS 618 (S.C.)], the law of spousal support ought to be that "[w]here one spouse's income far exceeds the other's, the law presumes an immediate division of income." That is simply an incorrect statement of the law. Equalization of incomes has ***never*** been a basis for spousal support: *Fielding v. Fielding* (2015), 70 R.F.L. (7th) 253 (Ont. C.A.).

Therefore, it is not terribly surprising that in *Osanebi*, his Honour questioned whether the judicially-accepted approach of considering minimum wage when imputing income (absent evidence of higher income) should be reconsidered. And, according to his Honour, instead of relying on *minimum wage* when dealing with payors who refuse to provide disclosure, courts ought to rely on the *median hourly wage* in Canada (about $30 an hour instead of approximately $17 an hour for minimum wage):

> [9] **The idea of minimum wage as the default income to be imputed in these situations troubles me, because there is no principled reason to adopt it as a judicial norm.** In fact, **there is ample reason to reject it and to use a more average or median earning capacity as the default**, in cases where the non-custodial parent has failed to make appropriate disclosure.
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> [11] **In a situation in which the court has little or no information about the earner's income and the earner has failed to comply with the legal disclosure rules, logic would dictate that the median income would capture a wider net of possible outcomes**, based on a balance of probabilities resembling the traditional bell curve. **The average hourly wage in Canada is about $30 per hour, or almost double the Ontario minimum wage**: Statistics Canada, Average Earnings 1998 to 2021, https://www150.statcan.gc.ca/n1/pub/14-28-0001/2020001/article/00006-eng.htm.
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> [13] **The judicial use of minimum wage as the default for imputing income therefore runs counter to the existence of generally available statistical data** showing that relatively few earners belong to that cohort. Use of the minimum wage as the default floor amount **encourages concealment of income among those who earn substantially more than minimum wage**. For example, a construction worker in a strong labour market might be encouraged to earn cash income, pay little or no tax, and defeat the child support regime, by defaulting to minimum wage even though the actual income might be more like a median income.
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> [15] **The use of minimum wage also appears to reveal an unconscious class bias toward assuming parents who neglect their family support obligations belong to a particular social stratum**. This approach only punishes the custodial spouses in working poor families, usually female, by applying downward pressure on child support and increasing the corresponding burden of raising the children on their own. **Until an appellate court states that the above reasoning is wrong, my view is that minimum wage should be reserved for cases where there is an actual employment history of minimum wage**. [**emphasis** added]

As a result, instead of ordering the father to pay child support based on minimum wage (as the mother had requested), Justice Akazaki imputed him with an income of $50,000 a year, which he determined was an "income close to the $30 per hour median but probably earned by a larger proportion of the wage-earning public than the proportion who earn more than $30 per hour." This resulted in child support of $755 a month, instead of the $491 a month requested by the mother. That is, his Honour awarded the mother more than she had requested. That, of course, is a problem.

The bigger problem, however, is the wholesale jettison of the idea of *stare decisis*. While a court is not strictly bound to follow the earlier decisions of the same court, generally, a court should follow a binding prior decision of the same court in the province (i.e. a court of co-ordinate jurisdiction) by the principles of judicial comity and horizontal *stare decisis*. And there is nothing in *Osanebi* to distinguish it on its facts such that *stare decisis* would not apply. See *R. v. Sullivan*, 2022 CarswellOnt 6590 (S.C.C.). A decision of a court of co-ordinate jurisdiction ought to be followed in the absence of strong reasons to the contrary or until the Court of Appeal deals with the matter. It is desirable that there be consistency of decisions among Ontario courts: *Horne v. Horne Estate* (1986), 1 R.F.L. (3d) 335 (Ont. H.C.), aff'd (1987), 8 R.F.L. (3d) 195 (Ont. C.A.); *Allergan Inc. v. Canada (Minister of Health)*, 2012 CarswellNat 5885 (F.C.A.); *Better Beef v. MacLean*, 2006 CarswellOnt 3260 (Div. Ct.).

While the mother in *Osanebi* was undoubtedly happy with this result, we have significant doubts about whether his Honour's approach was correct in law, or represented an appropriate way to address the longstanding problem of child support payors who refuse to comply with their disclosure obligations. While non-disclosure is undoubtedly a significant problem, we do not think the solution is to arbitrarily impute the payor with a level of income that is not supported or justified by the evidentiary record of what they are capable of earning based on their particular skills and abilities.

More on this below.

***de Pimentel v. Rodriguez* (2024), 2 R.F.L. (9th) 109 (Ont. S.C.J.) — Myers J.**

As in *Osanebi*, *de Pimentel v. Rodriguez* involved an uncontested trial where the support payor had left the jurisdiction, and left the mother solely responsible for supporting the parties' children.

The father was a self-employed electrician, with certifications from Humber College and DeVry. The mother did not work, and her sole source of income was the payments she received from the Ontario Disability Support Program. According to the mother, the father's declared income was approximately $50,000 a year, but she believed he also received additional cash income that he did not report on his tax returns.

Instead of leading evidence to show that the father had historically not reported all of his income for tax purposes (e.g. by conducting a lifestyle analysis showing how much money the family spent each year, and comparing that amount to the father's disclosed income to establish an unexplained shortfall that would support an inference that the father must have been earning additional income), the mother tried to rely on several publicly available job postings with salaries for electrical engineers in Toronto. And, based on the average of three of these postings, the mother argued that the father should be imputed with an income of $90,000 (rounded) a year.

Justice Myers was not persuaded. He quickly recognized that:

(a) the ads the mother was trying to rely on were obviously hearsay, and although the provisions of the *Family Law Rules* that deal with evidence on motions (Rules 14(17) and 14(18)) allow the court to admit hearsay evidence if the source of the information is identified by name and the affidavit states that the person signing it believes the information is true, the mother had not complied with those requirements; and

(b) even if the court could rely on the ads to prove what an electrical engineer is capable of earning, there was, in fact, no evidence before the court that the father was an electrical engineer.

> [15] **Without evidence from an expert witness, there is no way to take a seemingly cherry-picked small number of hearsay ads to make any form of generalization to enable me to infer an industry average.** Moreover, **I am told**

> **nothing of the [father's] actual skillset or prior job** duties apart from the names of businesses for whom he worked. I do not know if an "Industrial Electrician" is a very specific and highly lucrative job description or if it encompasses a broad group of tradespeople with various forms of certification and experience. **I have no way to know if the jobs in the proffered ads are of any relevancy to the [father] by training or experience.** [**emphasis** added]

It is worth repeating what we say above: in cases of intentional unemployment, under-employment or non-disclosure, the court will help you; but you must help the court help you by marshaling the necessary evidence. The onus rests on the recipient to offer a rational and evidentiary basis for the level of income to be imputed: *Homsi v. Zaya* (2009), 65 R.F.L. (6th) 17 (Ont. C.A.); *Drygala v. Pauli* (2002), 29 R.F.L. (5th) 293 (Ont. C.A.); *Tarapaski v. Tarapaski* (2009), 77 R.F.L. (6th) 67 (Alta. C.A.); *Morrissey v. Morrissey* (2015), 69 R.F.L. (7th) 277 (P.E.I. C.A.); *Nielsen v. Nielsen* (2007), 47 R.F.L. (6th) 26 (B.C. C.A.); *C.L.E. v. B.M.R.* (2010), 86 R.F.L. (6th) 26 (Alta. C.A.); *Berta v. Berta* (2015), 75 R.F.L. (7th) 299 (Ont. C.A.); *D.(D.) v. H.(D.)* (2015), 62 R.F.L. (7th) 261 (Ont. C.A.).

The mother in *de Pimentel* also tried to rely on Justice Akazaki's theory from *Osanebi* that payors who do not provide disclosure should be imputed with income based on Ontario's median wage of $30 an hour instead of minimum wage — and his reasoning that "the court should not infer that a party earns only minimum wage in the absence of evidence of what he or she actually earns", as "using minimum wage as a default encourages spouses to hide higher incomes." While Justice Myers agreed that the court should not *automatically* default to imputing minimum wage in all cases of non-disclosure, he was of the view that the approach the court took in *Osanebi* was inappropriate as it was both arbitrary and offside with the rules of evidence:

> [18] **Income imputation must not be arbitrary. It is an inference that must be grounded in admissible evidence adduced in the proceeding.** Minimum wage is set by law. It is admissible in evidence because the court is required to take judicial notice of the law. **Imputing minimum wage then is not a factual assumption based on misunderstanding or bias.** Rather, when there is no other evidence of a respondent's income, minimum wage is often the only imputation available on the evidentiary record.
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> [19] **Plucking from a universe of government data a single average hourly rate for all employees ages across all industries is arbitrary.** It ignores the [father's] age, education, experience, skills, and health. Making just gross classifications, like a worker's industry, the statistics show a wide range of average hourly rates from about $17 per hour for food service workers to more than $45 per hour for utilities workers. **The undifferentiated average is a meaningless number to assess the earnings of an individual who is in a specific trade, with a specific skillset, specific education, a specific experience base, his or her own subjective job desires, a unique employment history, age, health etc.**
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> [20] While I appreciate the desire to draw every adverse inference against a party who withholds legally required disclosure, **I cannot draw from *Drygala* a license to be arbitrary or to impute income without evidence.** [**emphasis** added]

Justice Myers was also highly critical of relying on median hourly wages from Statistics Canada as a basis for imputing income:

> [23] **As I recall my high school math, a median is a number found in a list with an equal number of entries above it and below it**. In some cases, a median is used as an average. In other cases, a mean or a mode may be used. The [mother] herself used a mean in calculating the average income from her employment ads.
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> [24] Assuming that the official government statistics are admissible under s. 25 of the *Evidence Act*, RSO 1990, c E.23 as applicable in this divorce proceeding under s. 40 of the *Canada Evidence Act*, in my view, **the fact that half a group of 93.7 people made more than $83,000 and the other half made less, tells me nothing from which I can draw a meaningful inference about the [father's] earnings.** When he worked for many years for $50,000 I suppose he would have been situated in the bottom cohort. But **I do not know the definitions of who was counted or how they might be relevant to the [father] if at all. This chart tells me nothing that I can use to draw an inference as to a reasonable income to impute to the [father]**. [**emphasis** added]

Justice Myers ultimately imputed the father with an income of $50,000, as there was some evidence that he earned at least that income. Absent evidence of increases over time, his Honour was not prepared to impute a higher income to the father.

CCB = TCC [not=] BCSC

***Algie v. Ross* (2024), 99 R.F.L. (8th) 393 (B.C. S.C.) — Maisonville J.**

Issues: British Columbia — Canada Child Benefit

What is a declaration?

As recently explained by the Supreme Court of Canada in *Ontario (Attorney General) v. Restoule* (2024), 2024 CarswellOnt 11020 (S.C.C.), a declaration is "a judicial statement confirming or denying a legal right of the applicant. Unlike most rulings, the declaratory judgment merely declares and goes no further in providing relief to the applicant than stating his [or her] rights[.]" The Supreme Court further explains that declaratory relief is discretionary, and should only be granted if "(a) the court has jurisdiction to hear the issue, (b) the dispute is real and not theoretical, (c) the party raising the issue has a genuine interest in its resolution, and (d) the responding party has an interest in opposing the declaration being sought[.]"

Algie v. Ross considers whether a provincial Superior Court can grant declaratory relief for the purposes of resolving a dispute over eligibility for the Canada Child Benefit (the "CCB"), which is a tax-free monthly payment that the Federal Government makes to eligible families to help cover the cost of raising a child. It is a "means tested" benefit that is currently worth up to $7,787 (net) a year per child for each child under six, and $6,570 (net) a year per child from ages 6 to 17. However, the amount that a particular claimant receives depends on the claimant's household income, the number of children in the claimant's care, and the parenting arrangements.

While eligibility for the CCB is usually straightforward in cases where parents live together or where the child clearly resides in one parent's primary care, quite the opposite when dealing with what the Canada Revenue Agency (the "CRA") still refers to on its website as "shared custody". [Apparently the Federal Government forgot to update the *Income Tax Act*, R.S.C. 1985, c. 1 (5 th Supp) when it amended the *Divorce Act* to replace references to custody and access with decision making and parenting time].

The determination of whether parties have "shared custody" for the purposes of the CCB can have a significant financial impact on separated families, particularly those with limited financial means who rely on the CCB to cover basic necessities. While a parent with primary care will receive the whole benefit, a parent in a shared custody arrangement can only receive 50% of what they would have received if they had "full custody" of the child. For those parents whose household income is low enough to entitle them to the maximum amount of the benefit, the difference between the full amount of the benefit and 50% can be very significant.

As we discussed in "CCB? Ugh . . . " in the November 7, 2022 (2022-41) edition of *TWFL*, trying to determine whether parties have a "shared custody" arrangement for the purposes of the CCB brings with it all of the same problems that arise when trying to figure out if the 40% threshold has been met for the purposes of s. 9 of the *Child Support Guidelines*. This is because s. 122.6 of the *Income Tax Act*, which is the definition section of the part of *Income Tax Act* that deals with the CCB, defines a "shared-custody parent" as a parent who (a) the child resides with at least 40% of the time in the month in which the particular time occurs or an approximately equal basis; and (b) primarily fulfils the responsibility for the care and upbringing when the child resides with them as determined based on certain prescribed factors.

If there was a contest to try to design a definition for "shared parenting" that would most invite arguments between separated parents — the current wording of s. 122.6 of the *Income Tax Act* would unquestionably win. We can only imagine the type of evidence separated parents would marshal if the outcome of a particular issue in a family law case turned on proving (or disproving) a claim that a parent primarily fulfils the responsibility for care and upbringing during the 40% or more of the time that the child resides with them: "Sure Jimmy might have been with you during those hours, but I bought the toothpaste he brought with him and the socks and shoes he was wearing, and I called him to make sure his homework was done . . . " and so on, and so on . . . and . . .

The parties in *Algie* lived together from 2013 to 2015 and had a child together. After they separated, the mother claimed and received the CCB for the child for many years without issue. However, in February 2022, she received a letter from the CRA advising that the father had applied for the CCB for the child going all the way back to 2015, and requesting proof that the child had, in fact, lived with the mother since that time, and that she had been primarily responsible for the child's care and upbringing. Although Justice Maisonville's reasons do not indicate how much money was potentially in issue, we suspect it was a significant amount given the number of years in issue.

The mother provided the CRA with various documents that she believed showed that the child had lived primarily with her during the time in question. However, as it is want to do, the CRA responded requesting additional documentation, including a written agreement or court order substantiating her position.

Since the mother and father had never signed a written agreement or obtained a court order dealing with the residential arrangements, the mother asked the father if he would be willing to sign a letter confirming that the child had resided primarily with her since separation; nope.

Instead of dealing with the situation with the assistance of tax counsel and/or in the Tax Court of Canada, the mother brought an interim Application against the father in the context of their ongoing family law case in the British Columbia Supreme Court. However, unlike *Cook v. Ballantyne* (2022), 78 R.F.L. (8th) 249 (Sask. Q.B.), which was one of the two cases we discussed in "CCB? Ugh . . . " in the November 7, 2022 (2022-41) edition of *TWFL* and which dealt with a motion by the father against the CRA in family court to compel it to pay him the CCB, the mother in *Algie* merely asked the family court for a declaration that the child had been in her primary care during the relevant period (2015 to 2022). A bit different; very clever.

Although the father acknowledged that the B.C. Supreme Court could grant declaratory relief in appropriate circumstances, he opposed the relief sought by the mother on two grounds. **First**, procedurally, he argued that a provincial Superior Court lacked jurisdiction to deal with the mother's claims, and that she should be dealing with the matter in the Tax Court of Canada. **Second**, substantively, he claimed that he had been substantially more involved in the child's life than the mother was claiming, and challenged her assertions that the child had resided primarily with her during the relevant period, and that she had been primarily responsible for the child's care and upbringing.

After considering the parties' arguments, Justice Maisonville dismissed the mother's Application. She concluded that entitlement to the CCB should be dealt with in the Tax Court of Canada, which is a statutory court with exclusive jurisdiction to hear cases involving matters under a number of federal statutes, including the *Income Tax Act* (see s. 12(1) of the *Tax Court of Canada Act*, R.S.C. 1985, c. T-2). Even though the requested declarations did not *expressly* refer to the *Income Tax Act*, it was obvious that the mother was trying to obtain the requested declarations to use for the collateral purpose of bolstering her position in her ongoing fight with the father and the CRA over entitlement to the CCB for the period in question:

> [41] **While the claimant does not seek for this court to make declarations that would explicitly implicate the *ITA*, it is also clear that the declarations sought are not meant to exist 'in the air'.** Rather, as in [*Scotia Mortgage Corporation v. Gladu*, 2017 BCSC 1182], "[i]f the requested declarations are to have any practical effect, the [claimant intends] that they would bind the Minister of National Revenue in her administration and enforcement of the *ITA*": at para. 9.
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> [42] While the declarations sought by the claimant do not explicitly refer to the *ITA*, it is clear that they are being sought as having arisen from matters pertaining to the CCB, and by extension, the *ITA*. **Even if this court retained some degree of jurisdiction over the declarations sought, in the circumstances and owing to the authorities set out above, it would not be proper to exercise it**. [**emphasis** added]

Not clever enough, it would seem.

Furthermore, even if the court had jurisdiction to grant the declaratory relief requested by the mother, Justice Maisonville would not have been willing to make the declaration sought as the record before her was highly conflicted and had not yet been tested by cross-examination. It is, of course, a well settled principle that judges should generally not make findings of fact that turn

on credibility based on conflicting affidavits and in the absence of cross-examination: *Ierullo v. Ierullo* (2006), 32 R.F.L. (6th) 246 (Ont. C.A.) at para. 18 and *Campbell v. Hine* (2014), 53 R.F.L. (7th) 62 (Sask. C.A.) at para. 21.

Accordingly, Justice Maisonville dismissed the wife's application "as both premature and outside of the jurisdiction of this court to grant."

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