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Family Law Newsletters

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— **Franks & Zalev - This Week in Family Law**

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O What a Tangled Web We Weave (When We Try to Obfuscate Self-Employment Income)

Oshungbemi v. Taylor, 2025 CarswellOnt 15441 (C.J.) — Sherr J.

Determining income for support purposes for someone who is self-employed is rarely straightforward. Business structures, personal expenses paid by the business, and "selective disclosure" often turn what should be a simple calculation into a riddle wrapped in a mystery inside an enigma — as Winston Churchill described the Soviet Union's foreign policy in 1939.

In *Oshungbemi v. Taylor*, Justice Sherr offers some welcome clarity. His decision provides a practical checklist for imputing income under sections 18 and 19 of the *Child Support Guidelines*, ready for you to cut-and-paste into your next factum.

The parties shared a daughter who was not yet two. They never lived together. The child lived with the mother since birth. A March 2025 Consent Order gave the mother sole decision-making responsibility and primary residence, with the father exercising gradually expanding parenting time.

The father was the sole shareholder, director, and operator of a group-home corporation servicing persons with disabilities. He employed more than 20 people and operated multiple properties. When the child was born, he represented that he earned \$120,000 annually and paid \$1,100 a month for November and December 2023. In January 2024, he unilaterally reduced child support to \$600 a month based on a claimed income of \$60,000. He then stopped paying entirely until January 2025, when he began paying \$565 per month. Disclosure arrived late, incomplete, and raised more questions than it answered.

The mother asked for temporary child support. The father wanted more parenting time, but there was nothing surprising there. The interesting part of this case is the income issue.

As he so often does, Justice Sherr started with a comprehensive review of the governing principles. His complete analysis is found at paras. 55-65 of the decision, with citations supporting each line. We have removed those citations here, but you can consult the judgment for the full source list.

To summarize:

Section 18 Principles (Corporate-Controlled Income):

Section 18 of the *Guidelines* allows the court to adjust the income of a parent who controls a corporation when the income shown on their tax return does not fairly represent the funds available for child support, by including either some or all of the corporation's pre-tax income or an amount reflecting the value of the services the parent provides to the corporation.

In plain terms, here is what courts look at when section 18 is engaged:

1. **Control over compensation:** "When an individual solely owns a corporation, they control how much they are paid, whether through salary or dividends. They need to show what they pay themselves is a reliable indicator of what they are actually earning."
2. **Onus to show funds are unavailable:** ". . . the onus is on the shareholder, director or officer to show that corporate monies, whether retained earnings or pre-tax corporate income, are not available for support purposes."
3. **Add-backs first, attribution second:** ". . . the court should first consider whether expenses should be added back to the corporation's pre-tax income, and then whether all or part of the adjusted pre-tax income should be attributed to a parent's income for support purposes."
4. **Discretion in attribution:** "The court is not required to add any pre-corporate income to the payor's income. This is discretionary."
5. **Do not undermine legitimate business needs:** When considering whether to attribute corporate income to a shareholder-parent, courts should avoid disrupting legitimate business sustainability when deciding whether pre-tax earnings are available to pay support. Courts look to business nature, reasons and history for retained earnings, degree of shareholder control, existence of arm's-length shareholders, depreciation, economic risks, and return on invested capital.
6. **The "unlimited rule":** "Under the 'unlimited rule', the court is not limited to attributing only the corporate pre-tax income of the previous year. Rather, the court can combine sections 17 and 18 of the guidelines so as to consider a 'pattern', or average, of corporate pre-tax income."
7. **Burden to justify retained earnings:** ". . . the onus of proving the need for retaining earnings in a corporation is on the party trying to justify the reduction of income."

Section 19 Principles (General Imputation Tools):

Section 19 of the *Guidelines* gives the court discretion to impute income in appropriate circumstances, including where a parent is intentionally under-employed, diverts or shelters income, fails to disclose financial information, claims unreasonable deductions, does not reasonably use assets to generate income, benefits from low-tax or tax-exempt income streams, or otherwise structures their affairs in a way that reduces their apparent ability to pay support. When section 19 applies, courts consider the following principles:

8. **Parents should earn to their capacity:** "Imputing income is one method by which the court gives effect to the joint and ongoing obligation of parents to support their children. In order to meet this obligation, the parties must earn what they are capable of earning."
9. **Disclosure failures reduce recipient's onus:** "The person requesting an imputation of income must establish an evidentiary basis upon which this finding can be made", but "the failure of the payor to properly disclose would mitigate the obligation of the recipient to provide an evidentiary basis to impute income."
10. **Onus shifts once a prima facie case exists:** "Once a party seeking the imputation of income presents the evidentiary basis suggesting a prima facie case, the onus shifts to the individual seeking to defend the income position they are taking."

To this we offer the following note: not all courts agree with the idea of a shifting onus. Rather, some courts suggest there is an automatic income inclusion in such circumstances and that the evidentiary and persuasive onus rests on the self-employed (or corporate) parent throughout. See, for example: *Cunningham v. Seveny* (2017), 88 R.F.L. (7th) 1 (Alta. C.A.); *Roseberry v. Roseberry* (2015), 57 R.F.L. (7th) 162 (Alta. Q.B.); *Zdyb v. Zdyb* (2017), 98 R.F.L. (7th) 414 (Alta. Q.B.). We tend to think it is bit of a distinction without much difference.

11. **Income reduction cannot be self-engineered:** "... separated parents have an obligation to financially support their children and they cannot avoid that obligation by a self-induced reduction of income."

12. **Must justify business deductions:** "A self-employed person has the onus of clearly demonstrating the basis of his or her net income. This includes demonstrating that the deductions from gross income should be taken into account in the calculation of income for support purposes."

13. **Corporate control [not=] income immunity:** The obligation to justify deductions "also applies where the person's employment income is derived from a corporation that he or she fully controls."

14. **Cash income and concealment count:** "The court may impute income where it finds that a party has hidden or misrepresented relevant information respecting their income to the other party or to the authorities. This includes cases where the evidence indicates that a party earns cash income that they do not declare for income tax purposes."

15. **Non-credible income evidence fails:** "The court can also impute income where the evidence respecting income is not credible for any other reason."

16. **Adverse inferences for nondisclosure:** "Where a party fails to provide full financial disclosure relating to their income, the court is entitled to draw an adverse inference and to impute income to them."

17. **Lifestyle is evidence too:** "A person's lifestyle can provide the basis for imputing income."

In *Oshungbemi*, the mother argued that the father's true income exceeded \$230,000 annually, relying on substantial corporate growth, unexplained fluctuations in expenses, and sharply rising shareholder loan balances. The father claimed he earned only \$60,000, which resulted in Table support of \$554 a month, but his evidence fell well short of supporting his position. Justice Sherr also had a number of problems with his disclosure, including:

- The father did not file an updated sworn financial statement as required;
- His financial records were incomplete and confusing;
- He had no corroborating evidence from his accountant despite obvious questions; and
- His explanations for dramatic changes in revenue, payroll, rent, and shareholder loans were absent.

In these circumstances, the court rejected the \$60,000 income figure as incredible — not the good kind of "incredible" but the bad kind of "incredible."

While the mother argued that the father's income should be set at \$230,000, resulting in Table support of \$1,935 per month, it is not apparent from the decision how she arrived at that figure. She ran into the problem that many claimants face in these cases: she successfully demonstrated why the father's reported income was unreliable, but she could not provide a compelling evidentiary basis for the higher figure she sought — and there must be a basis for the amount to be imputed grounded in the evidence: *Drygala v. Pauli* (2002), 29 R.F.L. (5th) 293 (Ont. C.A.); *Homsy v. Zaya* (2009), 65 R.F.L. (6th) 17 (Ont. C.A.); *Korwin v. Potworowski* (2007), 43 R.F.L. (6th) 1 (Ont. C.A.); *Chiasson v. Doucet*, 2014 CarswellNB 367 (C.A.); *Marquez v. Zapiola* (2013), 36 R.F.L. (7th) 22 (B.C. C.A.); *Jendruck v. Jendruck* (2014), 50 R.F.L. (7th) 23 (B.C. C.A.); *Mason v. Mason* (2014), 47 R.F.L. (7th) 173 (Ont. S.C.J.), rev'd (2016), 83 R.F.L. (7th) 1 (Ont. C.A.); *Arlt v. Arlt*, 2003 CarswellSask 751 (Q.B.) at para. 11.

Here, as often happens, the payor's disclosure failures left the claimant unable to marshal the evidence necessary to prove the true number. This is somewhat unfair, but it judicially is what it judicially is. One practical point: counsel handling cases like this should consider proactive steps early in the litigation to avoid exactly this problem. Because the father was self-employed and was refusing to provide full disclosure, the mother could have sought interim disbursements, targeted disclosure orders, and questioning at the initial Case Conference. If granted, these would have allowed her to retain a business valuator to put a

proper income analysis before the court. And remember — the court just needs some reasonably compelling basis to impute income. Get creative.

Even if those requests had been denied at the Conference, renewing them on the motion — after continued failures to disclose, comply, or cooperate — would have been well-justified. An order requiring the father to advance funds so the mother could meet her evidentiary onus might have prompted more reasonable engagement. At minimum, it would have ensured that she could put the necessary evidence before the court without having to absorb the costs herself.

In any event, as this was a temporary motion on affidavit evidence without cross-examination or expert evidence, Justice Sherr recognized that the corporation may have legitimate business reasons to retain funds, and that this issue would need to await trial for determination. As a result, he anchored the calculation of temporary support in the father's own prior assertion: an income of \$120,000, which yields Table child support of \$1,091 a month.

Support was ordered retroactive to January 1, 2024, with updated Table amounts applying as of October 2025. Comparing what was owed with what was actually paid, the father had to pay just over \$10,000 as lump-sum arrears, in addition to ongoing support of \$1,091 a month.

To ensure momentum, Justice Sherr scheduled a Settlement Conference and directed that if a resolution is not reached, the matter would proceed to the next available trial sittings.

Finally, he invited cost submissions. Given the father's conduct, and unless a very generous Offer to Settle was on the table before the motion, one would reasonably expect a significant costs award in the mother's favour. She should not be left out of pocket for needing a court order to secure reasonable child support that the father could — and should — have agreed to pay voluntarily.

Here is the practical lesson. When a parent is self-employed and playing games with disclosure, you cannot win an income motion on "trust me, they make more than that." As the court put it in *Arlt v. Arlt*, 2003 CarswellSask 751 (Q.B.) at para. 11, "there must be an evidentiary basis for [imputing income]. A figure cannot simply be plucked from the air."

Counsel should not wait until a temporary support motion to say they cannot prove the real number. Again, if the payor is dodging disclosure, ask at the initial Case Conference for interim disbursements, targeted financial disclosure orders, and questioning. While some judges may be hesitant to make these orders at the initial Case Conference, the *Family Law Rules*, O.Reg. 114/99 expressly authorize them to do so: Rule 17(8)(a) permits orders for disclosure or questioning, Rule 17(8)(a.0.1) permits orders relating to expert opinion evidence, and Rule 17(8)(b.1) permits any temporary or final order, provided appropriate notice has been served. There is no downside to asking. As Mr. Gretzky said, you miss 100% of the shots you don't take. Given the payor's obligation to provide full and frank disclosure, it is difficult to see how they can reasonably object if they show up at a Case Conference without having complied with their obligations.

Had those steps been taken here, the mother would likely have had a stronger evidentiary foundation. The father might also have realized that refusing to disclose would cost him — literally.

There is also a strategic point here to be considered. If the mother had secured a higher interim support amount (based on a higher income), she would have been in the driver's seat. The *father* would then have had incentive to push the case toward trial. Instead, with temporary support set at \$1,091 per month, the burden is now on the mother to move the case forward to try to increase support to what she says he should properly be paying.

The point is simple: in self-employment cases, disclosure strategy is important. When the payor is recalcitrant, move quickly to get the tools you need. Otherwise, you risk ending up right where the mother did here: with a temporary number based on the only credible evidence available at the time, and the real upside for your client reserved for trial.

As If We Didn't Have Enough To Worry About

Ballantyne v. The King, 2025 CarswellNat 3828 (T.C.C. [Informal Procedure]) — Spiro J.

Section 160 of the *Income Tax Act* is a long, thick, dense, piece of legislative sticky rice pudding. Buried within it is a trap for the unwary.

In *The King v. Csak*, 2025 CarswellNat 794 (F.C.A.), the Federal Court of Appeal succinctly summarized the main features of subsection 160(1) of the *Act*:

[4] . . . Under subsection 160(1), when a person transfers property to a non-arm's length person for less than fair market value consideration, the transferee becomes jointly and severally liable for the tax debts of the transferor for the year of transfer and prior years. The liability is limited to the excess of the fair market value of the transferred property over the fair market value of the consideration given.

This is clearly a concern — or should clearly be a concern — to family counsel when settling cases.

A recent example of the application of s.160 was offered in *Ballantyne v. The King*.

The Appellant, Ms. Ballantyne, had been assessed \$30,000 (under s.160) which was (as claimed by the Crown) the amount of debt owing under the *Income Tax Act* by Mr. Ballantyne, her husband. This was on account of taxes owing by Mr. Ballantyne for the 2007-2010 and 2012 taxation years.

The Crown argued that Mr. Ballantyne had provided nearly \$500,000 toward the purchase of a new home in the name of Ms. Ballantyne (on Salt Spring Island, British Columbia — a lovely place) — but at a time when Mr. Ballantyne's debt under the *Act* amounted to nearly \$30,000.

Ms. Ballantyne raised two arguments. **First**, she suggested that her husband did not provide the funds for the purchase of the home. **Second**, she argued that the amount of her husband's tax debts as computed by the Minister was wrong.

Ms. Ballantyne's first argument did not go anywhere — primarily because in her evidence she testified that Mr. Ballantyne had used a portion of a sum he had inherited to buy the home. She candidly admitted that it was his money that was used to buy the home. Just for good measure, Mr. Ballantyne offered the same admission.

Nor was there any suggestion that Ms. Ballantyne gave any consideration for the funds provided by Mr. Ballantyne.

As for the argument that the Minister's assessment was wrong, Ms. Ballantyne did not fare much better. Both Mr. and Ms. Ballantyne suggested that the Minister was "biased" and that the CRA officers were dishonest.

Mr. Ballantyne offered his own calculations, which the court labelled "incomprehensible." We quote them in full.

All debts in this instance of CRA accounts will be settled by the following Biblical formula, damages for the vicarious actions of CRA employees of which there are many; will be formulated separately. This document relates only to false penalties tax years 2006 to 2009.

KJV 1611 Bible; Exodus 22.1 Steel my Ox and one be returned plus four in compensation. \$18527.60 x 5 = \$92638.00 less \$3296.12 owed for 2007 to 2009 = \$89341.88.

Relating to above: Re: Coronation Oaths Elizabeth 11 and Charles 11 represents an ideal by their Coronation Oaths to maintain the Laws of God and the respective laws and customs of all Realms and Territories.

Both the Canadian Bill of Rights and the Charter of Rights and Freedoms both refer to the Supremacy of God and the rule of law in their opening sentences. No further comment will be made on both Acts. [emphasis in original]

Ah.

This argument obviously did not go anywhere, having found to have fallen short of the "standard of reliability required" to persuade the court that the assessed amount of the debt was incorrect.

As a result, the appeal was dismissed and the \$30,000 owed.

Although this summary is short, and the facts somewhat humorous, there is a serious message here. Large payments from a tax-owing spouse to the other spouse, whether separated or not, are subject to attack. And although satisfaction of an equalization payment, property division or spousal support may amount to consideration, it is best to keep King Charles — and your own deductible — in mind.

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