

# Calculating Income

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# Starting Point:

## *The Federal Child Support Guidelines*

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- Analysis under the guidelines applies to spousal support as well (see *Walker v Walker*, 2014 SKQB 270, 454 Sask R 10)
- Section 15 empowers the court to make a determination of the parties' incomes. Sections 16 to 20 set out ground rules for doing so.

### Determination of annual income

**15 (1)** Subject to subsection (2), a spouse's annual income is determined by the court in accordance with sections 16 to 20.

### Agreement

**(2)** Where both spouses agree in writing on the annual income of a spouse, the court may consider that amount to be the spouse's income for the purposes of these Guidelines **if the court thinks that the amount is reasonable** having regard to the income information provided under section 21.



# Disclosure Obligations

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Section 21 of the *Guidelines* requires the parties to disclose their income information (section 25 confirm ongoing).

Section 22 and 24 of the *Guidelines* provides options for when a party fails to comply and section 23 speaks to adverse interests.

QB Rules Part 15 Division 3 speak to financial disclosure – when and what is required.

QB Rules 15-33 (notice to disclose) and 15-34 (notice to reply to written questions) give us more tools to get the information we need.



# Section 16 & Schedule III

## Calculation of annual 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.

Section 1 – employee employment expenses

Section 2 – child support received

Section 3 – spousal support and child benefit

Section 3.1 – extraordinary expenses

Section 4 – social assistance

Section 5 – actual dividends

Section 6 – actual capital gain

Section 7 – business investment loss

Section 8 – interest

**Section 9 – non-arm's length wages**

Section 10 – prior period

**Section 11 – CCA real property**

Section 12 – partnership capital

Section 13 – employee stock option

Section 14 – split-pension



# Onus and Presumption

Where section 16 is not the fairest method, the **onus is on the party wishing to deviate from the presumption of line 15000 income.**

In *Gould v Gould*, 2013 SKCA 34, adopting *Francis v Baker*, [1999] 3 S.C.R. 250 and *Ewing v Ewing*, 2009 ABCA 227, the Court held:

*“Francis is clear that the onus of showing inappropriateness is on the payor. As explained in Ewing, once the issue is raised the “evidence of inappropriateness” in its entirety must be sufficient to raise a concern and it must be clear and compelling.”*



# Section 17(1) - Pattern of income

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## Pattern of Income

**17 (1)** If the court is of the opinion that the determination of a spouse's annual income under section 16 would not be the fairest determination of that income, the court may have regard to the spouse's income over the last three years and determine an amount that is fair and reasonable in light of any pattern of income, fluctuation in income or receipt of a non-recurring amount during those years.

*Olchowecki v Olchowecki*, 2005 SKQB 144

*Kardash v Kardash*, 2008 SKQB 338

- Fairness
- Reasonable inferences
- Discretion where fluctuations



## Section 17(2) - Non-recurring losses

### Non-recurring losses

(2) Where a spouse has incurred a non-recurring capital or business investment loss, the court may, if it is of the opinion that the determination of the spouse'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, 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.

*Ewing v Ewing*, 2009 ABCA 227 at paras 31 to 34:

- Non-recurring losses should be looked at carefully, as a sale of assets could, for example, be “the basis of a payor’s retirement fund” and necessary to provide future income – context is therefore important



# Section 18 - Shareholder, Director, or Officer

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Based on pre-tax corporate income or services provided

Factors to consider from *Stetler v Stetler*, 2012 SKCA 117:

- nature of company's business
- legitimate calls on corporate income
- money needed to maintain operations
- need for reserve for depreciation
- business expansion plans
- need for working capital

## Other cases to consider

- *Kardash v. Kardash*, 2008 SKQB 338
- *More v. Shurygalo*, 2010 SKQB 203
- *Dengler v. Dengler*, 2012 SKQB 110
- *Labrecque v. Labrecque*, 2014 SKQB 50



## Section 18 - Retained Earnings

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*Kosior v Kosior*, 2013 SKQB 42:

- Retained earnings not relevant
- Blameworthy conduct not a prerequisite
- Need solid evidence of company's legitimate business needs
- Economic volatility relevant
- Use of pre-tax income irrelevant

Cap and Averaging:

*Bear v Thompsons*, 2014 SKCA 111 at para 74:

- Averaging is meant to establish personal income and then consider portion of corporate income that can be attributed to the personal, not to allow for an average of the corporation's pre-tax income be attributed to the payor.



## Section 18 – Other Considerations

### Shareholder loans

- *Rudachyk v Rudachyk*, [1999] 180 Sask R 73 (SK CA):
  - Not income / is money available to support imputing additional income?
  - Could be considered a deliberately unproductive asset in some cases, or lead to imputing income – very fact dependent

### Pattern of losses

- *Huber v Yaroshko*, 2000 SKQB 114
  - If a business is more akin to a hobby and consumes income that otherwise could be available for support, the court may consider its losses to be income available as support (paras 34 to 37)





# Section 19 – Imputing Income

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## Statutory Factors

- (a) under-employed
- (b) exempt from paying tax
- (c) resident country low tax rate
- (d) income diverted
- (e) property not utilized to generate income
- (f) failure to disclose
- (g) unreasonable deductions
- (h) dividends or capital gains
- (i) beneficiary under a trust



# Section 19(1)(a) – Intentionally Unemployed

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Test set out in *Beisel v Henderson*, 2004 SKQB 280

1. The court must determine whether the party is intentionally unemployed or under-employed
2. If so, the court must determine whether any of the exceptions set out in section 19(1) apply:
  - (1) Needs of a child under age of majority
  - (2) Needs of a child over age of majority
  - (3) Reasonable education needs of payor
  - (4) Reasonable health needs of the payor
3. The court must then decide whether to exercise its discretion

See *Hinds v Jacob*, 2018 SKQB 51 at para 66

# Section 19(1)(g) – Unreasonable Deductions

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## Sufficiency of evidence

- *Kardash v Kardash*, 2008 SKQB 338

## Onus is on the party claiming they are unreasonable

- *More v Shurygalo*, 2010 SKQB 203



# Capital Cost Allowance

Real and required – vs – book entry and artificial reduction

Real property:  
Schedule III, section 11

Personal property:  
*Tamke v Tamke*, 2001 SKQB  
528

Onus:  
*Woodward v Woodward*,  
2016 SKQB 301

- Payor must establish reasonableness of CCA deductions

Where CCA claimed by corporation:  
*More v Shurygalo*, 2010 SKQB 203

- Does the rate reasonably reflect the actual decrease over time?



# Optional inventory adjustment (OIA)

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## Method of averaging income for tax purposes

- Add to income the OIA claimed in prior year and deduct the OIA claimed in the present year

## *Poff v Fenell* (1998), 173 Sask. R. 275 (Sask. Q.B.) at para 17

- “The optional inventory adjustments employed in the cash method of accounting distort the true picture.... I consider it appropriate to exclude the optional inventory adjustments.”

## See examples in:

- *Tamke v Tamke*, 2001 SKQB 528 (approving *Poff v Fenell*)
- *Woodward v Woodward*, 2016 SKQB 301



# CHECKLIST



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