IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Hathaway v. Hathaway,*
2015 BCSC 1485

Date: 20150825
Docket: E111473
Registry: Vancouver

Between:

Joanne Elizabeth Hathaway

Claimant

And

Peter Leofric Hathaway

Respondent

Before: The Honourable Mr. Justice Abrioux

Reasons for Judgment

Counsel for Claimant:	J. Sheppard
Counsel for Respondent:	P. Daykin, Q.C.
Place and Date of Hearing:	Vancouver, B.C. June 29, 2015 & August 14, 2015
Supplementary Written Submissions:	July 1 and 24, 2015
Place and Date of Judgment:	Vancouver, B.C. August 25, 2015

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I: INTRODUCTION

[1] On March 18, 2014, the respondent filed this application in which he seeks an order that child and spousal support be varied pursuant to sections 17(4) and (4.1) of the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.).

[2] For a variety of reasons, the application, although initially set to be heard in the summer of 2014, did not proceed to a hearing until June 29, 2015. At that time the respondent stated that he was seeking variation as of January 1, 2015.

[3] After a trial in October and November 2012, I found the respondent's guideline income to be $1,000,000. I ordered him to pay child support of $12,814 per month and spousal support of $24,124 per month for a total $36,938 per month or $443,256 per year for a minimum of one year being 2013. Those amounts were based upon the *Federal Child Support Guidelines*, S.O.R./97-175 (the "*FCSG*") and applied the mid-range of the *Spousal Support Advisory Guidelines* (the "*SSAG*") for spousal support: *J.E.H v. P.L.H*, 2013 BCSC 752, aff'd 2014 BCCA 310, leave to appeal to the SCC refused 36101 (March 12, 2015)(the "Trial Judgment"). My reasons for judgment dismissing the respondent's application to re-open the trial to raise sections 11 and 12 of the *SSAG* are indexed at 2014 BCSC 125 (the "Supplementary Reasons").

[4] The trial order was entered on May 1, 2013 (the "Trial Order").

[5] The respondent's position is that there has been a material change of circumstances. He alleges that his professional earnings have been considerably below $1 million. They have been insufficient to meet his support obligations, let alone his personal expenses.

[6] As a result, the respondent says that he has had to liquidate a significant portion of his share of the family assets that he received at trial in order to satisfy his ongoing support obligations. He says the claimant's net worth now vastly exceeds his own, which is not what was contemplated by the Trial Order.

[7] The claimant's position is that the application should be dismissed. While she acknowledges that there have been some changes in the respondent's financial circumstances, primarily relating to the disposition of assets, she says that there has not been a significant, unforeseen, or continuing change in his income-earning capacity and potential such that a variation of the Trial Order is warranted. In fact, the respondent is engaged in the same "high risk, high reward" world of the junior mining industry as he was when the Trial Order was made with the same fluctuations in his income that were accounted for at trial.

[8] During the hearing of the application, the respondent submitted that the Trial Order did not necessarily require him to establish a material change of circumstances on this application and that it could be decided on the basis of the principles that relate to a review of support. He was confident, however, that he could establish a material change and was prepared to have the application proceed on that basis. Accordingly, the application proceeded pursuant to sections 17(4) and (4.1) of the *Divorce Act*.

II: BACKGROUND

A: Introduction

[9] The historical background to this proceeding is set out in the Trial Judgment and I will not repeat it in detail in these reasons for judgment.

[10] To place the issues on this application in some factual context, however, I provide the following summary.

[11] The respondent was 43 years old at the time of trial and is now 45. The claimant was 41 years old at the time of trial and is now 43.

[12] This was a relationship of about 20 years, from around 1990 to 2010. They were married in 2003. Both parties hold graduate degrees.

[13] In 2004, the parties relocated to Vancouver in order for the respondent to commence work in the junior mining industry. He became involved in Lumina Copper Corp. ("LCC").

[14] The parties then had two children B., now ten years old who has just finished grade 4, and L., now eight years old and who has completed grade 2. B is an autistic child with significant daily special needs.

[15] The parties adopted a "traditional" division of labour after B. was born.

[16] At a certain point, the respondent incorporated Hathaway Consulting Ltd. ("Hathaway Consulting") and began to provide his consulting services through this operating company. He also settled the Hathaway Family Trust.

[17] In 2009, while continuing to work for LCC, the respondent invested $300,000 into a new venture, Lumina Capital Limited Partnership ("LCLP"). He held his interest in LCLP via his holding company, Anchor Investments Ltd. ("Anchor"). In the following years, LCLP produced significant returns for Anchor.

B: The Trial Judgment

[18] The evidence at the trial was to the effect that the respondent's historical earnings consisted of consulting fees and significant additional income from what were termed "liquidity events", that is windfalls from various investment opportunities that were made available to him.

[19] The considerable income he earned over the years resulted largely from his association with colleagues who had been very successful, including a Mr. Ross Beatty with whom the respondent developed a close professional relationship, which apparently continues to the present time.

[20] At paragraph 173 of the Trial Judgment, I summarized the respondent's income from 2006 to 2011:

	2006	**2007**	**2008**	**2009**	**2010**	**2011**
Employment income	626,660	353,972	3,406,361	90,000	60,000	533,600
Taxable dividends			2,717	192	298,151	2,451,116
Interest/investment income	148	317	436	7,557	3,464	5,668
Rental income		-3,142				
Taxable capital gains	1,661	78,360	19,412		779	110,739
Business income						
Other income	105,504		200,000			
Total	733,973	429,507	3,628,926	97,749	362,394	$3,101,123

[21] I referred to the expert evidence with respect to the respondent's *FCSG* income at paragraph 175 of the Trial Judgment:

> [175] Expert evidence was led with respect to the respondent's Guideline income. It was calculated on a three-year average and includes L. Royalty stock option income, but excludes the L. Copper stock option income, which the parties agree will be apportioned equally. The calculations as set out in the claimant's written submissions are as follows:
>
> **L.H.'s 3-Year Average with L.R. income**

	2009	**2010**	**2011**	**3-year ave.**
Income	440,000	2,370,000	4,570,000	**2,460,000**
Child support	$4,588	$23,695	$57,796	**$31,210**

> **L.H.'s 3-Year Average excluding L.R. income**

	2009	**2010**	**2011**	**3-year ave.**
Income	440,000	2,370,000	4,080,000	**2,296,666**
Child support	$4,588	$23,695	$51,622	**$29,152**

[22] I will not repeat in these reasons for judgment the parties' positions at the trial regarding the respondent's *FCSG* income. See Trial Judgment at paras. 174, 176-189.

[23] I did not accept either the claimant's position that a three-year averaging was appropriate or the respondent's position that support should be based on consulting income alone:

> [190] I am of the view that both the claimant's and the respondent's positions as to the respondent's Guideline income of approximately $2.3 million on the one hand and $688,000 on the other are unrealistic and inappropriate.
>
> [191] I have reached this conclusion for the following reasons:
>
> - the income available to the respondent in 2010 and 2011 included certain "windfalls" or "liquidity events". Both parties have benefited significantly from these funds in that they were used to reduce liabilities on the West 5th Avenue property, make extensive renovations to that property and to the Whistler property, and to acquire the West 3rd Avenue property;
> - the parties and the children also benefited from these funds. This is demonstrated by their privileged lifestyle;
> - there was insufficient evidence from which I could conclude that windfalls in relation to future liquidity events would be in the range of those that occurred in 2010 and 2011. It would be unfair to determine the respondent's guideline income for prospective support based on what occurred in those years, although I accept that one of the principal reasons for L. Capital's existence is to identify certain projects which it is hoped will lead to future liquidity events;
> - it would be equally unfair to determine the respondent's Guideline income on the basis of what occurred in 2012. Although income of $688,000 (which includes a $100,000 bonus) is the "most current information", there is a body of evidence from which I can conclude that the respondent's income fluctuates greatly from year to year. The 2012 income is at the low end of the range, although I do recognize it was $440,000 in 2009. In 2012, for example, there were no share options exercised nor were there any liquidity events;
> - it is also clear the respondent has sources of income and revenue in addition to those generated by his management and professional services.
>
> [192] Under the circumstances and considering all of the evidence on this issue and the legal principles to which I referred, I have concluded that the respondent's annual Guideline income for support purposes as of January 1, 2013, should be $1 million. I accept the claimant's submission that her income for support purposes is $22,000. I find that both spousal and child support commencing January 1, 2003, should be based on the mid range of the Table amount for a minimum of one year, being the 2013 calendar year. The calculation is to take into account the funds received by the claimant to which I have referred in paragraph 187 above. This will include section 7 expenses.

[24] The orders I made following the trial included:

- establishing a parenting schedule whereby the respondent would have one week per month with the children, including bookending weekends, thus ten consecutive days per month;
- apportioning family assets in such shares that the overall division approximated $5 million for the claimant (approximately 55%) and $4 million for the respondent (approximately 45%);
- determining the respondent's income to be $1 million per year;
- imputing the claimant's annual income at $22,000; and
- setting child support and spousal support to be paid pursuant to the *FCSG* and the mid-range of the *SSAG* for a minimum of one year, being the 2013 calendar year.

C: The Events Post-Trial

(i) The Respondent's Position

[25] For this application, the respondent commissioned a report from Mr. Ronald J. Tidball, CA, CBV, dated May 25, 2015, with a correction letter issued June 23, 2015, the purpose being, according to the respondent's submission, to parcel out the portion of the respondent's 2013 and 2014 line 150 income attributable to income earned from business activities, as opposed to the portion attributable to disposal of assets (the "Tidball Report").

[26] A summary of the respondent's income in 2013 and 2014 is set out in the amended Schedule 2 of the Tidball Report:

	2013 $	**2014** $
Employment income from Hathaway Consulting Ltd.	120,000	30,000
Stock option benefits from Lumina Copper Corp.	668,000	1,442,551
Termination benefit from Lumina Copper Corp.	-	350,000

Deferred stock option benefit from sale of Lumina Copper Corp. shares	72,781	54,682
Taxable dividends	1,235,555	731,259
Taxable capital gains from sale of Lumina Copper New shares	113,217	211,147
Interest income	305	106
Line 150 income per T1 personal income tax return	**2,209,858**	**2,819,745**
Income from the disposal of assets received in the 2013 family asset division		
Stock option benefit from Lumina Copper Corp.	668,000	1,113,051
Deferred stock option benefit from sale of Lumina Copper Corp. shares	72,781	54,682
Dividends from the Hathaway Family Trust	1,234,865	305,190
First Quantum dividends	-	3,376
Taxable capital gains from sale of Lumina Copper New shares	113,217	211,147
	2,088,863	**1,687,446**
Income earned from business activities subsequent to asset division		
Consulting in Hathaway Consulting	589,440	147,360
Consulting in Anchor	-	342,242
Assumed consulting expenses	(30,720)	(30,000)
Income from exercise of December, 2012 Lumina Copper Corp. stock options	-	106,000
Income from exercise of December, 2013 Lumina Copper Corp. stock options	-	223,500
	558,720	**789,102**
Not allocated		
Termination benefit from Lumina Copper Corp.	-	350,000
Interest income	305	106
Dividends from Scotia Capital, source unknown	690	-
	995	**350,106**

[27] The respondent's line 150 income was $2.21 million for 2013 and $2.82 million for 2014. Significant portions of these amounts represent the taxable consequence to the respondent of his liquidation of family assets divided at trial. He says that there are three kinds of taxable consequences that have arisen upon his liquidation of family assets:

- taxable dividends, from moving the proceeds of the disposition of assets in Hathaway Consulting and Anchor to the respondent;
- option income from the exercise of options; and
- taxable gains on the disposition of personally-held investments.

[28] In his written submissions on June 29, 2015, the respondent summarized certain aspects of his evidence. He stated that:

- in 2013, he earned net consulting revenue of about $637,000 and had no liquidity events;
- In 2014, he earned net consulting revenue of approximately $460,000. There was one liquidity event of about $680,000, which marked the end of LCC, which had been his primary source of employment for ten years;
- in 2015, he expected to earn net consulting revenue of about $420,000. No liquidity events were anticipated.

[29] Insofar as his 2015 income is concerned, the respondent's evidence as of June 29, 2015 was that in April 2014 he wound up Hathaway Consulting and the Hathaway Family Trust. All his consulting income is now derived through Anchor. As of June 29, 2015, Anchor's monthly gross consulting revenue was $38,000 per month, from a combination of services provided to three entities being Odin Mining and Exploration Ltd. ("Odin Mining") ($15,000/m), Miedzi Copper ($15,000/m), and Lumina Capital Ltd. ($3,000/m) (a separate entity from the now-defunct LCLP).

[30] The respondent states he incurs certain expenses in order to run his consulting business. In Hathaway Consulting's last full year of business these expenses totalled $33,686, excluding management salaries paid to the respondent. In Anchor's partial year of business these expenses totalled $33,631. The respondent in his evidence has estimated these expenses at $3,000 per month, or $36,000 per year.

[31] The respondent says that other than Miedzi Copper and Odin Mining options that are "out of the money", he holds no equity stake in any of these entities. There is no short-term prospect of a liquidity event from these entities.

[32] He also asserts that he has no short-term prospect of a liquidity event from other investments. That is in part due to his inability to invest in new ventures since the trial due to "the drain of the court-ordered support payments on his capital base". He describes in one of his affidavits how he lost ten million shares of Odin Mining because he was unable to repay the debt financing he had used to acquire the shares.

[33] Accordingly, the respondent says that he has been liquidating his share of the family assets he received at trial to keep up with his support payments. The claimant's net worth now vastly exceeds his own, in the order of $5.4 million to $1.2 million, after the division of assets just over two years ago, which provided for a modest reapportionment of assets in the claimant's favour.

[34] The respondent has also provided details of other missed opportunities including the opportunity to invest in a gold exploration company, a private investment fund, a property development opportunity, and certain other resource industry investments.

[35] There is also evidence before me as to the current state of the junior mining industry. This was summarized by Mr. John Murphy, co-head of Mining and Metals Investment Banking for Raymond James Ltd.:

> In summary, the current state of junior mining markets is very challenging, with many companies struggling to survive. Accordingly, employment / income opportunities have been materially reduced for employees, consultants and directors active in the sector.

[36] The respondent's position is that since the trial his professional earnings have been considerably below $1 million and in 2015 have been insufficient to meet even his support obligations, let alone pay his own expenses.

[37] For all of these reasons, the respondent opposes a three-year averaging of his income as a basis for establishing his income for support purposes going forward.

[38] When this application was heard on June 29, 2015, the respondent's evidence was that he anticipated his consulting income for 2015 to be $420,000. This included the $15,000 from Odin Mining.

[39] I granted leave to the parties to file supplementary written submissions and heard further oral submissions on August 14, 2015. On August 13, 2015, the respondent filed a supplementary affidavit that was to the effect that the monthly consulting income from Odin Mining had been reduced by 50% to $7500. Accordingly, his anticipated annualized net income from consulting for 2015 was now estimated to be $330,000. I shall comment further on this evidence below.

(ii) The Claimant's Position

[40] The claimant points to what she alleges are several additional factual matters relevant to the respondent's income and the issues on this application. She says that these also place certain of the respondent's evidence pertaining to his income in its proper context.

[41] According to the claimant, the starting point of the analysis is that, by the time of trial in October and November 2012, the respondent's sources of income included consulting fees, management fees, taxable dividends, non-taxable capital dividends, bonuses, capital gains, and employment income derived from the exercise of stock options.

[42] The principal issue regarding the support issue at the trial was arriving at a fair guideline income for the respondent based on his historical earnings, what he had earned for the ten months leading to the trial and what he expected to earn going forward. The respondent was very pessimistic about his future earnings based on the poor state of the mining industry. He also explained away his past multi-

million dollar income years as due to non-recurring or "once in a lifetime" liquidity events that were unlikely to be repeated.

[43] The claimant says that the income declared in the respondent's tax returns over the years bore little resemblance to the income that was available to him, which included substantial non-taxable capital dividends. The respondent's available income for support purposes in 2012 was in fact $1.7 million. This is confirmed in the report of Kiu Ghanavizchian dated June 6, 2014, and Schedule I of the Tidball Report.

[44] In 2013, the claimant says that the respondent's available income was $2.2 million as calculated in the Tidball Report.

[45] Accordingly, the claimant submits that the position she took at trial – being that the respondent's income for support purposes should be set at $2.3 million – was entirely appropriate. The imputation of $1 million to the respondent in the Trial Judgment was significantly lower than what should have occurred.

[46] In addition to the parties' family assets that were divisible at trial, the claimant says that the respondent retained additional stock options acquired post-triggering event, which were not family assets, being:

Company	**Options**	**Grant Date**	**Exercise Price**	**Expiry Date**
Lumina Copper	50,000	Nov. 30, 2011	$10.37	Nov. 30, 2016
Miedzi Copper	750,000	Mar. 19, 2012	$0.19	Mar. 19, 2019
	800,000			

[47] In November and December 2012, after the trial, the respondent was issued an additional 90,000 options by Anfield Nickel and LCC respectively, bringing his total to the end of the year as follows:

Company	**Options**	Grant Date	**Exercise Price**	**Expiry Date**
Lumina Copper	50,000	Nov. 30, 2011	$10.37	Nov. 30, 2016
Miedzi Copper	750,000	Mar. 19, 2012	$0.19	Mar. 19, 2019
Anfield Nickel	**40,000**	**Nov. 20, 2012**	**$3.65**	**Nov. 20, 2017**
Lumina Copper	**50,000**	**Dec. 11, 2012**	**$7.88**	**Dec. 11, 2017**
	890,000			

[48] The claimant also notes the following:

- in 2012, Anchor received dividends of $1.56 million, $1.03 million of which was non-taxable income;

- in 2013, the respondent generated a line 150 income of $2.2 million primarily through consulting income, the exercise of stock options and the sale of his LCC units. Even if taxable dividends of approximately $1.23 million were deducted, his employment income, interest and other investment income was approximately $974,000, that is an amount very close to the imputed income of $1 million in the Trial Judgment;

- in June 2013, the respondent, through Anchor, requested the redemption of its units in LCC and received a cheque for $1.3 million;

- in December 2013, the respondent was granted an additional 90,000 stock options by Anfield Nickel and LCC thus bringing his total of non-shareable options to 980,000 plus 48,000 shareable options 50% of which he holds in trust for the claimant;

- also in December 2013, the respondent exercised 150,000 of the shareable LCC stock options. He sold the resulting shares receiving $807,869. After the cost of exercising the options and paying the tax,

the net proceeds totalled $452,789. He paid one-half of the net proceeds of $226,394 to the claimant and retained $226,394 himself;

- in January 2014, the respondent exercised 50,000 shareable LCC options at a price of $1.30, resulting in net sale proceeds of $185,890. He paid the claimant her 50% share of $92,945.28 in September 2014 only after being served with a contempt application.

[49] The claimant also points to what she says is a history of the respondent providing pessimistic forecasts of his income, which are not borne out by subsequent events. Examples include:

- when the 2014 year started, the respondent had only three clients who paid him a total of approximately $50,0000 monthly for his services of which $36,000 related to Lumina Asset Management;

- the Lumina Asset Management work came to an end in March 2014 when the company was wound up thereby reducing the respondent's monthly consulting income to $13,000 a month; and

- he swore in his March 14, 2014 Financial Statement that his expected 2014 income would be $259,000, comprised of $120,000 employment income, $108,360 other employment income (which would end March 31, 2014), and $31,300 in dividends from the Hathaway Family Trust. The income for the year was in fact $2.8 million although the claimant acknowledges that significant assets were liquidated that year;

[50] The claimant refers to the numerous investment opportunities made available to the respondent including:

- paying $555,000 in 2014 to acquire preferred shares in Global Navigation Marketing, a private mining company;

- being granted stock options and acquiring ten million shares in Odin Mining and Exploration in July 2014;

- acquiring 58,300 shares of LCC as part of a "private investment post-separation";

- First Quantum Minerals purchased LCC for a combination of cash and conversion of shares. The result was a forced conversion of both the 100,000 shareable LCC options and the 150,000 non-shareable options retained by the respondent. The 100,000 shareable options were converted with the claimant and respondent each receiving $335,000. 50,000 non-shareable options were not "in the money" and terminated. 100,000 non-shareable options that were "in the money" were converted into cash, which was received by the respondent;

- the 58,300 LCC shares, which the respondent had acquired just shortly before the First Quantum purchase, were converted to $217,774 cash; and

- there was also the $350,000 termination payment granted to all employees, officers and directors of LCC.

[51] The claimant says that the respondent's estimates as to his 2014 consulting income were unduly pessimistic and turned out to be understated. That is because:

- he swore in his March 14, 2014 Financial Statement that his expected 2014 income would be $259,000, comprised of $228,360 employment income and $31,300 in dividends from the Family Trust;

- in 2014 he sold 10,000 of the First Quantum shares for $238,000;

- this application was originally scheduled to be heard in mid-June 2014. At that time it appeared the respondent might gross $216,000 and net $183,000 in consulting income for that year;

- by August 2014, the respondent's annualized consulting income had increased to $277,500; and

- despite his pessimistic evidence about his financial circumstances, at various points during the 2014 year, the respondent's available income as calculated by Mr. Tidball was $2.8 million. However, Mr. Tidball used taxable capital gains whereas the *FCSG* require actual capital gains, which increases the amount to $3 million.

III: THE LEGAL FRAMEWORK

A: Introduction

[52] Section 17 of the *Divorce Act* provides, in part:

> **17.** (1) A court of competent jurisdiction may make an order varying, rescinding or suspending, prospectively or retroactively,
>
> (*a*) a support order or any provision thereof on application by either or both former spouses; or
>
> (*b*) a custody order or any provision thereof on application by either or both former spouses or by any other person.
>
> …
>
> (4) Before the court makes a variation order in respect of a child support order, the court shall satisfy itself that a change of circumstances as provided for in the applicable guidelines has occurred since the making of the child support order or the last variation order made in respect of that order.
>
> (4.1) Before the court makes a variation order in respect of a spousal support order, the court shall satisfy itself that a change in the condition, means, needs or other circumstances of either former spouse has occurred since the making of the spousal support order or the last variation order made in respect of that order, and, in making the variation order, the court shall take that change into consideration.

[53] Claimant's counsel provided me with a comprehensive summary of the principles and factors that apply to the legal issues raised on this application both generally and with respect to high-income earners. My edited and abridged version of counsel's summary is included in my outline of the applicable principles which is set out in this section of these reasons.

B: Variation of Child Support

[54] Insofar as variation in child support is concerned, the applicable principles and factors include:

(a) section 14 of the *FCSG* provides that, where the child support order sought to be varied was made in accordance with the guidelines, a change in circumstances is any change that would result in a different child support order;

(b) section 14 of the *FCSG* did not replace the "material change of circumstances" test established by the Supreme Court of Canada in *Willick v. Willick*, [1994] 3 S.C.R. 670. See *Bockhold v. Bockhold*, 2006 BCCA 472 at paras. 32-34;

(c) the *Willick* principles include:

(i) the original order is deemed to be reasonable and to have accurately provided for the needs of the children having regard to the means of the parents. It will not be departed from lightly;

(ii) before varying the amount of child support, the court must be satisfied that there has been a change in the condition, means, needs, or other circumstances of either spouse or of any child;

(iii) a change of circumstances is one that, "if known at the time, would likely have resulted in different terms". A matter known at the time of the original order cannot be relied upon as a basis for variation;

(iv) the change must be material and not trivial or insignificant;

(v) not every change will be sufficient. The purpose of the threshold is to provide certainty and stability so that child support orders are not re-assessed by courts any time a change, however minimal, occurs in the circumstances of the parties or their children; and

(vi) the applicant bears the burden of establishing a material change justifying a variation of the order;

(d) a material change must be one that is significant and long lasting: *Earle v. Earle*, 1999 BCSC 283 at para. 19; *Martin v. Ahrens*, 2011 BCCA 57 at para. 12;

(e) the general principle that child support must be based on what a parent can earn, not just what they do earn, also applies to the material change inquiry: *P.L. v. J.D.L.*, 2013 BCSC 1492 at para. 45; and

(f) if a change in circumstances is found, then the new child support order must be made in accordance with the *FCSG* and section 17(6.1) of the *Divorce Act*.

C: Variation of Spousal Support

[55] The principles and factors that apply to variation of spousal support include:

(a) the *Willick* test applies to the variation of spousal support: *L.G. v. G.B.*, [1995] 3 S.C.R. 370 at 394-395;

(b) the court is to take the amount of maintenance originally ordered as the correct amount at the time the order was made and then to consider to what extent the circumstances of the parties have altered or changed since the order was made. The onus lies on the applicant: *Oakley v. Oakley* (1985), [1985] B.C.J. No. 2464 at para. 16, 48 R.F.L. (2d) 307 (C.A.);

(c) the test for variation is a strict one. A change in circumstances must be substantial, unforeseen and of a continuing nature. Otherwise, parties cannot properly organize their financial affairs and plan for the future: *Carter v. Carter* (1991), 58 B.C.L.R. (2d) 45 (C.A.); *Tyler v. Tyler* (1996), 26 BCLR (3d) 319 at 333 (C.A.); *Murphy v. Murphy*, 2000 BCSC 974 at para. 19;

(d) a material change must have some degree of continuity and not merely be a temporary set of circumstances: *L.M.P. v. L.S.*, 2011 SCC 64 at para. 35;

(e) full and forthright financial disclosure is required as a pre-requisite before the court can determine whether there has been a material change of circumstances or make the determination of a different amount of support: *Kurvers v. Kurvers*, 2002 BCSC 2 at paras. 26, 28;

(f) the applicant must also provide the court with a sufficient "evidentiary basis" to vary the amount of spousal support. There must be reliable information before the court about the respective income and expenses of the parties: *Kurvers v. Kurvers* at para. 28; *Walters v. Walters*, 2011 BCCA 331 at para. 49, 51, 54; and

(g) the court is entitled to look at the subsequent conduct of the parties which may provide indications as to whether they consider a particular change to be material: *L.M.P. v. L.S.* at para. 35.

D: Determining Income for Child and Spousal Support

[56] If the material change threshold is met, the court must determine what variation to the order needs to be made in light of the changed circumstances. It should take into account the nature of the material change and should limit itself to making only the variation justified by that change. As Madam Justice L'Heureux-Dubé stated, "a variation under the *Act* is neither an appeal of the original order nor a *de novo* hearing": *Willick* at 739.

[57] Section 17(7) of the *Divorce Act* provides:

> (7) A variation order varying a spousal support order should
>
> (a) recognize any economic advantages or disadvantages to the former spouses arising from the marriage or its breakdown;
>
> (b) apportion between the former spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;
>
> (c) relieve any economic hardship of the former spouses arising from the breakdown of the marriage; and

> (d) in so far as practicable, promote the economic self-sufficiency of each former spouse within a reasonable period of time.

[58] I summarized certain of the principles as they apply to the circumstances of this case including those relating to high-income earning spouses in the Trial Judgment at paras. 164-172 and will not repeat them in these reasons for judgment.

[59] I would add the following:

> (a) the court is not limited to a consideration of income alone when determining child and spousal support. It may also consider financial means. The reference in section 1 of the *FCSG* to the parents' "means" expands the calculation of income beyond income. The word "means" has been liberally interpreted to include all pecuniary resources, capital assets, income from employment or earning capacity, and any other source from which gains or benefits are received, together with, in certain circumstances, money that a person does not have in possession but that is available to such person: *Leskun v. Leskun*, 2006 SCC 25 at para. 29; *Griffiths v. Griffiths*, 2006 BCSC 1077 at para. 25; *C.A.B. v. M.S.C.S.*, 2006 BCSC 1393 at para. 11; *S.M. v. V.V.*, 2014 BCSC 565 at para. 118;
>
> (b) there is a broad judicial discretion to impute income for both child and spousal support purposes, despite the fact that the legal foundation for spousal support is different from that of child support: *Marquez v. Zapiola*, 2013 BCCA 433 at paras. 36-38;
>
> (c) the test for imputing income for the purpose of fixing the quantum of support is similar in both child and spousal support situations. It is one of reasonableness; however, the concept of "needs" for non-compensatory spousal support also includes a consideration of the marital standard of living: *Myers v. Myers* (1995), 17 R.F.L. (4th) 298 (B.C.C.A.);
>
> (d) the principles that apply to section 4 of the *FCSG* established by the Supreme Court of Canada in *Francis v. Baker*, [1999] 3 S.C.R. 250, were summarized in *Metzner v. Metzner*, 2000 BCCA 474 at para. 30, as follows:

- there is a presumption in favour of the table amount of support under the *FCSG* in all cases;
- the table amount of support can only be increased or decreased under s. 4 if the party seeking the increase or decrease has rebutted the presumption in favour of the table amount of support;
- there must be clear and compelling evidence for departing from the table amount of support;
- the court should examine all the circumstances, including those set out in s. 4(b)(ii), before determining the table amount of support is inappropriate;
- the actual circumstances of the children are as important as any other element of the *FCSG* and the objectives of predictability, consistency and efficiency must be balanced with fairness, flexibility and recognition of the actual circumstances of the children;
- the *FCSG* may result in some transfer of wealth to the children and indirectly benefit the recipient parent. However, the objective of child support, being the maintenance of the children, must be kept in mind;
- the court must have all necessary information and, if the evidence is a child expense budget, the court must consider the unique economic situation of high-income earners; and
- the payor parent must prove that the budgeted expenses are so high that they exceed the generous ambit within which reasonable disagreement is possible to demonstrate the unreasonableness of an expense;

(e) a wealthy parent faces a "formidable onus" at the threshold stage of showing that the table amount is inappropriate. It is not for the recipient to justify the table amount. One of the objectives of the *FCSG* is to ensure consistent treatment of spouses and children in similar circumstances, which requires that regard be had to the standard of living of other children of very wealthy parents: *Hollenbach v. Hollenbach*, 2000 BCCA 620 at paras. 45-46;

(f) section 19 of the *FCSG*, particularly section 19(1)(a), empowers the court to impute income based on a parent's means. This includes a wide variety of factors, the following being germane in this case:

- a payor's capital and assets, includes assets obtained through the division of property: *Bullock v. Bullock*, 2007 BCSC 318 at para. 25;
- a parent's lifestyle, monthly living expenses, assets and investments, and the range of income earned during the marriage: *Motyka v. Motyka*, 2001 BCCA 18 at paras. 6, 16;
- the age, education, experience, skills and health of the parent: *Watts v. Willie*, 2004 BCCA 600 at para. 16;
- a parent's experience, business acumen, and business contacts: *Braich v. Braich*, [1997] B.C.J. No. 1764 at para. 68 (S.C.);
- deferring or receiving a reduced income for future benefits: *Motyka v. Motyka* at para. 18; *Nielsen v. Nielsen*, 2007 BCSC 306 at paras. 29-31, varied 2007 BCCA 604;
- business expertise and contacts: *Akkor v. Roulston*, 2009 BCSC 1584 at paras. 74, 79; and
- historic earnings: *Nielsen v. Nielsen* (S.C.) at paras. 29-31; *Nielsen v. Nielsen* (C.A.) at para. 46; *Akkor v. Roulston*at at paras. 74, 76;

(g) *Leskun v. Leskun* is authority for the principle that the court may take into consideration assets acquired after the division of marital property as no issue of double dipping arises. Failing to do so could allow wealthy and sophisticated spouses to structure their affairs to reduce their income for support purposes while increasing their net worth;

(h) imputing income can and should be employed to prevent sophisticated payor spouses from reducing their support obligations by using deferred

forms of compensation such as shares and stock options. *Motyka v. Motyka*; *Nielsen v. Nielsen* (S.C.) at para. 31;

(i) in *Brown v. Brown*, 2014 BCCA 152 at para. 23, the Court of Appeal noted that sections 17-20 of the *FCSG* allow courts a degree of flexibility in specific circumstances where parties have unusual forms or patterns of income, or where they are able to manipulate their income for tax purposes in a manner that might frustrate the goals of the *FCSG*;

(j) where a support payor's income fluctuates widely, there is an obligation to create a buffer by budgeting appropriately in order to maintain consistency in support payments: see *Lucia v. Martin*, [1998] B.C.J. No. 1799 at para. 9 (S.C.); *Ferster v. Ferster*, 2002 BCSC 62 at para. 27;

(k) in *Francis v. Baker* at 270-272, 275-276, the Supreme Court of Canada cautioned against placing too much reliance on budgets when dealing with high-income payors;

(l) section 11 of the *SSAG*, which applies to incomes over $350,000, is an exception to the application of the formulas provided for under the *SSAG*. It describes a "ceiling" and a "floor", which is an "attempt to define the upper and lower bounds of the typical case, for which guideline formulas can generate acceptable results": *Hathaway v. Hathaway*, 2014 BCCA 310 at para. 45;

(m) the formulas are not to be applied automatically above the ceiling, although they may provide an appropriate method of determining spousal support in an individual case, depending on the facts. Above the ceiling, spousal support cases require an individualized, fact-specific analysis; *Hathaway v. Hathaway* at para. 48;

(n) accordingly, $350,000 is neither an "absolute" ceiling nor a cap: *Smith v. Smith*, 2008 BCCA 245 at para. 31; *Hathaway v. Hathaway* at para. 45;

(o) the court does not have to depart from the *SSAG* formulas once the $350,000 ceiling is met. Spousal support may be awarded based on the tables on incomes over $350,000: *Hathaway v. Hathaway* at paras. 30-32, 34; *Williams v. Williams*, 2015 BCSC 112 at para. 20;

(p) section 12 of the *SSAG* provides that in some circumstances the ranges themselves and the ability to restructure the award may not produce a fair result. However, the section is applied "[o]nly if neither of these steps can accommodate the unusual facts of a specific case should it become necessary to resort to these exceptions": *Hathaway v. Hathaway* at para. 59;

(q) the *SSAG* can be cautiously applied to variation applications in the determination of the quantum and duration of spousal support following a fact-specific inquiry. That is particularly the case where the circumstances that gave rise to the initial entitlement to support remain essentially the same on the variation application, or if there is an absence of the complications not considered in the *SSAG*, such as remarriage, second families, retirement, and the like. Even if some of the complicating factors are present at the time of the variation, the *SSAG* can still be used as a guide: *Beninger v. Beninger*, 2007 BCCA 619 at paras. 52-54; *Jens v. Jens*, 2008 BCCA 392 at paras. 45-48; *Powell v. Levesque*, 2014 BCCA 33 at para. 42;

(r) it may be an error of law to substantially depart from the *SSAG* in the absence of exceptional circumstances or a reasonable explanation: *Redpath v. Redpath*, 2006 BCCA 338 at para. 42; *Ragan v. Ragan*, 2011 BCSC 766 at para. 18; and

(s) the respondent, for his part, notes that it is open to the court in the case of a high-income earning spouse not to utilize the *SSAG*. This could occur where even the low range table amount would produce an award that is unfair to the payor parent. In such cases, the "pure discretion approach" can be used: *S.G. v. K.G.*, 2012 BCSC 1937 at para. 160; *Hathaway v. Hathaway* at para. 47.

IV: THE PARTIES' POSITIONS

A: The Respondent's Position

[60] The respondent says that the effect of the Trial Order has been that he has been obliged to liquidate family assets in order to make his support payments. He argues the court must have anticipated in the Trial Judgment that he pay support from his income as opposed to from depleting his assets.

[61] It is the respondent's position that this case is even more "pernicious" than the standard "double dipping" case in that the respondent would not only be forced to share the liquidated value of his share of the family assets but his income for support purposes would be based on taxable income that, by its nature, cannot and will not be repeated.

[62] He submits that his income for support purposes as of January 1, 2015 should be $330,000 per annum. He notes also that the children reside with him approximately 40% of the time. He submits the court should exercise the pure discretion approach such that the net disposable income of each household be approximately the same.

[63] The respondent says the claimant should rent or sell the Whistler property in order to maintain a more reasonable budget.

[64] He also says the claimant should repay $192,000 in order to adjust for the overpayment of support from January to June 2015. In addition, the respondent should keep the proceeds of any future liquidity events for a period of time in order to provide him with the opportunity to recoup the unintended depletion of his assets to maintain excessive support payments arising from the Trial Order.

B: The Claimant's Position

[65] The claimant argues that the respondent has not demonstrated a "material change in circumstances" that is significant, unforeseen and continuing so as to justify a change to the trial support orders. She says that, while there have been some changes in the respondent's financial circumstances, primarily relating to the

disposition of assets, the respondent is engaged in the same "high risk, high reward" world of the junior mining industry as he did when the Trial Order was made with the same fluctuations, at times significant, in his income that were accounted for at the trial.

[66] In particular, she says he operates within the same business circles as before and his insider status continues to generate business opportunities for future liquidity events on a consistent basis. The respondent continues to utilize the skills and experience accumulated during the marriage and he continues to earn a substantial income from multiple sources as was the case at the time of the Trial Order.

[67] The claimant does not dispute that any gains or income derived by the respondent from the conversion of his share of the family assets that form part of his income for tax purposes should not be taken into account for spousal support purposes if an averaging of income is adopted. However, she submits that gains from the disposition of assets that were divided as family property can and should be included when calculating guideline income for child support.

[68] It is the claimant's position that the respondent's income should remain imputed at $1 million. In the alternative, if the court accepts that a material change of circumstances has been established, then she submits his income should be imputed at $750,000.

[69] The claimant is very concerned that the respondent, unhappy with the support provisions in the Trial Order, will remain underemployed, earning a reduced income while accumulating assets and other deferred forms of compensation and maintain his lifestyle either with debt or liquidating assets.

[70] She submits a three-year averaging of the respondent's income would be appropriate. There would have to be an adjustment with respect to spousal support to take into account the "double dipping" aspect of income earned on the sale of shares that were family assets and shared between the parties on disposition.

V: DISCUSSION

A: Has the Respondent Established a Material Change of Circumstances?

[71] A significant part of the written and oral submissions on the application canvassed:

- the effect on the respondent, after the trial, disposing of his personal assets or his share of the family assets, which entailed significant tax consequences, in order to maintain his support payments;
- whether amounts of income earned by the respondent were one time or recurring events; and
- whether the issue of "double dipping" applied.

[72] This was said to be relevant with respect to certain issues including whether the respondent had established a material change of circumstances and, if so, what was the appropriate way for the court to impute his income. It was also said to be material if a three-year averaging of income was found to be appropriate.

[73] When I apply the principles to which I have referred to the circumstances of this case, I conclude that the respondent has established a material change of circumstances.

[74] In my view, this issue should be approached from the perspective of comparing the potential range of the respondent's income as alleged at the trial and what it realistically could be as of January 2015.

[75] At the trial, the range submitted by the parties was between $688,000 and $2.3 million. At that time, the respondent, in addition to his consulting income, was an integral member of the LCCP with, amongst others, Mr. Beatty. This provided the vehicle for several of the prior liquidity events that resulted in significant income for the respondent. There were others.

[76] The significant income from all sources received by the respondent since the trial must also be placed in its proper context.

[77] LCLP no longer exists. Although the respondent provides consulting services to Mr. Beatty's company, Lumina Capital Ltd., he has no equity stake in that company.

[78] While the claimant is correct that the respondent is still involved in essentially the same business ventures with many of the same associates as at the time of trial, he has, nonetheless, liquidated significant assets.

[79] While he has acquired certain stocks and options, many are in ventures that do not appear, on the evidence, to have similar prospects for fruition as was the case in the past. He has surrendered his ten million shares in Odin Mining since he was unable to repay the financing loan for which the shares were held as security.

[80] It should also be noted that a significant portion of the respondent's non-consulting income arose from the acquisition of LCC by First Quantum. There is no evidence to suggest a similar event will occur in the foreseeable future.

[81] There is also the fact that the respondent's consulting income has greatly decreased since the trial. The question is whether the anticipated amount for 2015 is $420,000, which was the case at the hearing of the application in late June 2015, or whether it is $330,000, being the amount anticipated as at the time of the supplementary submissions in August 2015.

[82] Accordingly, I am of the view that the *Willick* criteria have been satisfied.

B: Determination of Income and the Amount of Support

[83] Section 1 of the *FCSG* sets out the objectives of the guidelines. These include:

> (*a*) to establish a fair standard of support for children that ensures that they continue to benefit from the financial means of both spouses after separation;
>
> …
>
> (*d*) to ensure consistent treatment of spouses and children who are in similar circumstances.

[84] It is not possible to apply a formula or to be mathematically precise in setting the respondent's income. In the Trial Judgment, I concluded that $1 million was a fair amount to attribute to the respondent for support purposes.

[85] I am now of the view that amount should be $650,000, that is a reduction of approximately one third for 2015 onwards unless and until there is a review of support. This amount is based on what I consider to be a reasonable estimate of consulting income of $400,000-$500,000 and additional income from other opportunities of approximately $200,000.

[86] My reasons include:

> (a) in the Trial Judgment at paragraph 177, I did not accept the claimant's submission that a three-year averaging of the respondent's income would fairly represent his income-earning ability;
>
> (b) the fact the respondent did earn significant amounts in 2013 and 2014 must be placed in the context to which I have referred;
>
> (c) and yet, as the claimant submits, the respondent is engaged in the same type of "high risk and high reward" world of junior mining exploration ventures in which he has operated for many years. This provides him with opportunities to earn significant amounts in addition to his consulting fees;
>
> (d) the respondent is also still a member of the same business group of associates including Mr. Beatty and continues to work primarily or exclusively for his companies;
>
> (e) the respondent's evidence on this application is to the effect that he has been presented with opportunities to earn an income in addition to his

consulting fees. While he explains that he has not been able to avail himself of all these opportunities or that others such as Odin Mining have been lost, the fact remains that these opportunities have continued to present themselves;

(f) the respondent's consulting income does not provide an adequate measure of his means and his ability to pay support;

(g) the evidence at the trial was that the amount of the respondent's consulting fees factors into the opportunities to have high reward in the future. That does not appear to have changed. Rather, his evidence on this application is apparently to the effect that at the present time no such opportunities are foreseen. That was also his evidence at the trial and subsequent events showed otherwise;

(h) the respondent's history contains many examples of business opportunities and new income sources materializing on a consistent basis. I accept the claimant's submission that although the respondent attempts to characterize these events as non-recurring, they occur with sufficient regularity such that they should be seen as part and parcel of his income-earning ability;

(i) the respondent says no liquidity events are forecast for 2015, but that is what his position was at the trial and this turned out to be incorrect. He has purchased shares and options since that date. The fact that not all have materialized does not mean other opportunities will not provide a future return;

(j) while the respondent points to the current depressed state of the mining industry, this was also the evidence at the trial. Notwithstanding this state of affairs, considerable income was earned by the sale of shares in mining companies thereafter;

(k) the respondent's affidavit of August 13, 2015 attaches a letter dated August 11, 2015 from Mr. Martin Rip, Odin Mining's Chief Financial Officer. It refers to a decision of Odin Mining's Board of Directors on August 6, 2015 to reduce the fees of "various service providers including Anchor" by 50%. Mr. Rip testified on the respondent's behalf at the trial. I referred to his evidence at paragraph 183 of the Trial Judgment. While the timing of this letter may be coincidental, it does not satisfy me that the respondent's net income will be as low as $330,000 for 2015.

(l) I accept the claimant's submission that the respondent's pessimistic predictions about his future consulting fees are not reliable given the fallibility of his past predictions and the frequently changing nature and sources of his income. Fees that end for one project have a pattern of being replaced by fees on another. He continues to search for new projects. This is the nature of his career;

(m) in fact if I were to accept the respondent's submission that his income for 2015 should be based on consulting fees of $330,000 alone, this would mean ignoring any ability to earn additional income based on what is apparently a close relationship he has with Mr. Beatty and his other business associates;

(n) in prior years when the respondent's income has been low (such as 2009 and 2010) that has been followed by years in which significant incomes were earned;

(o) in fixing additional imputed income of $200,000, I have utilized the discretionary approach, which arises when there are inherent difficulties in valuing unexercised options or uncertain business opportunities. In the Trial Judgment I chose not to have additional income imputed on a case by case basis. The respondent has not satisfied me that this approach should now commence;

> (p) the respondent's submission that there is now a significant difference between the value of the parties' assets post-trial does not take into account the position he advanced unsuccessfully on his application to adduce fresh evidence in the late fall of 2013 and which resulted in the Supplementary Reasons. At that time he estimated that the value of his investments had "declined dramatically", that is by about 40%, due to market forces;
>
> (q) in many ways the respondent's income has been and still remains a "moving target".

[87] I impute the claimant's income at $35,000, being the $22,000 referred to in the Trial Judgment together with a modest amount for investment income.

[88] I do not accept the respondent's submission that the claimant should rent the Whistler property for $7,000 per month. I accept the claimant's evidence that renting would be problematic due to the property's location. Far more significant, however, is the undisputed evidence as to the importance of this property to the children, particularly for B.'s emotional and physical development.

[89] It may be that the claimant will have to re-evaluate whether she should keep this particular property, which had a value at trial in excess of $1 million, or find a more modest replacement.

[90] The issue then becomes what the amount of support should be.

[91] The respondent urges me to adopt the pure discretion approach to which I referred above and to fix support such that the net disposable income of both parties be approximately the same.

[92] At paragraph 192 of the Trial Judgment, I fixed support at the mid-table amount. This approach was upheld on appeal.

[93] I will make the same order on this application. I do not consider the net disposable income approach suggested by the respondent to be appropriate in this

case. That is because the respondent's income both from consulting and other sources has a history of significant fluctuations.

[94] The claimant also seeks an amount for section 7 or extraordinary expenses.

[95] In the Trial Judgment, I made no separate award for section 7 expenses being of the view that no additional contribution was justified in light of the quantum of support ordered.

[96] The claimant asks me to reconsider this issue. This is on the basis that her extraordinary expenses total approximately $16,000 per year, a significant portion relating to B.'s special needs.

[97] The claimant receives government funding of $6,000 on account of B.'s autism therapies, which was added to her imputed income at trial since she is responsible for these expenses.

[98] In the exercise of the broad discretion that I have with fixing a fair amount for child support generally, I follow the same approach on this application as I did in the Trial Judgment, being not to make a separate award for section 7 expenses.

[99] The amount of support to be paid by the respondent, which I have now varied, shall be retroactive to January 1, 2015.

[100] I leave it to the parties to calculate the revised amounts. The overpayment by the respondent to date in 2015 shall be offset against support payments as of September 2015. No interest is payable by the claimant on the overpayment.

[101] The parties will continue to exchange financial information as provided for in the Trial Order.

[102] The respondent's historical income earnings demonstrate genuine and material uncertainties that are inherent in his income for support purposes from year to year. Accordingly, I am of the view that this proceeding meets the test for the limited use of reviews set out in *Leskun v. Leskun* at paras. 36-37.

VI: CONCLUSIONS

[103] The application is granted as follows:

> (a) the Trial Order is varied to the extent that, as of January 1, 2015, the respondent's income for support purposes is $650,000;
>
> (b) spousal support is to be based on the claimant having an imputed income of $35,000 per year and is to be paid at the mid-table amount;
>
> (c) the overpayment by the respondent for both child and spousal support from January to August 2015 is to be offset against support payments as of September 2015;
>
> (d) no interest is payable by the claimant on the overpayment; and
>
> (e) following the annual production of financial information in accordance with the Trial Order, either party has leave to apply for a review of child and spousal support.

[104] I summarized the principles relating to costs in the Supplementary Reasons at paras. 100-104.

[105] There has been divided success on this application. Each party will bear its respective costs.

"Abrioux J."