

Marmer Penner Inc. Newsletter

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Fielding Decision

The Honourable Justice Monahan released his decision in *Fielding* on September 28, 2018. The major issue in this case was Dr. Craig Fielding's ("Craig") income and whether there had been a material increase. The court concluded that there had not been. The decision contains lessons for both family law counsel and expert witnesses. This article will deal with the latter only. The biggest lesson for expert witnesses was to remember that their duty is to the court. The decision also opined on two particular technical matters in income determination as follows:

- a) The quantum of investment income which exceeds the minimum required such that "*the spouse derives a significant portion of income from dividends, capital gains or other sources that are taxed at a lower rate than employment or business income*" in paragraph 19(1)(h) of the *Federal Child Support Guidelines* ("the *Guidelines*");
- b) Deductibility of matrimonial legal fees in calculating *Guidelines* income; and
- c) Whether non-deductible life insurance premiums paid by the support-payer's corporation for the benefit of the support-payer are subject to an income tax gross-up.

Volume 37, issue number 2 of *Canadian Family Law Quarterly*, published this author's paper entitled *Income Determination for Family Law Purposes*. One of the issues covered in that article arose during the trial. It centred on the meaning of the word "significant". Capital gains and Canadian-source dividends are taxed at lower rates than interest and employment income. Accordingly, paragraph 19(1)(h) of the *Guidelines* permits a court to gross-up

this lower-taxed income to determine child support based on a support-payer's after-tax income where the spouse derives a significant portion of income from these sources. The article noted that the *Guidelines* do not define "significant" and the Merriam-Webster definition "large enough to be noticed or have an effect" was not terribly useful. However, the word "significant" was used a number of times in *The Income Tax Act*, where it ranged from 10% to 25% of the total. Accordingly, we concluded that lower-taxed capital gains and Canadian-source dividends that comprised less than 10% of a support-payer's income might not be subject to this income tax gross-up. In *Fielding*, Craig earned such investment income that amounted to the following percentages of his income:

2014	2015	2016	2017
25.8%	14.2%	22.9%	6.3%

The court added an income tax gross-up on his lower-taxed investment income for each of these four years confirming that the "significant" threshold is at least as low as 6%.

Paragraph 8 of Schedule III of the *Guidelines* allows a spouse's income to be reduced by carrying charges and interest expenses deductible under *The Income Tax Act*. Back in 1996, when the *Guidelines* came into force, carrying charges on a personal income tax return included only expenses incurred to earn investment income such as investment counsel fees and interest expense. If a spouse was entitled to deduct matrimonial legal fees, this was claimed elsewhere on the tax return under "Other deductions". Fast forward to 2014 and onward and Canada Revenue Agency has moved the legal fee deduction to the carrying charges section of the personal income tax return, perhaps enticing spouses who claim the legal fee deduction for income tax purposes to do so for *Guidelines* purposes, too. Victoria Fielding paid over \$1 million in matrimonial legal fees from 2014 to 2017 and sought to deduct these from her *Guidelines* income. Justice Monahan denied this deduction on the basis that "the *Guidelines* make no provision for the deduction of legal fees". He then added "Nor do I believe it is consistent with the policy of the *Guidelines* to permit parties to materially reduce or even eliminate their obligation to provide support for their children through the pursuit of expensive family law litigation."

Courts generally add an income tax gross-up when a support-payer deducts personal expenses as business expenses either on a personal income tax return or in a controlled corporation. Craig caused his professional corporation to pay his life insurance premiums. There was no business purpose for this life insurance. Accordingly, one might think that this expense should be treated the same as personal automobile expenses charged as business expenses. However, there are differences. *The Income Tax Act* permits a shareholder to do exactly what Craig did as long as the corporation does not deduct the life insurance premiums from its taxable income. That still allows Craig's insurance to be paid with corporate funds upon which personal tax has not been paid. So, even without the corporate tax deduction, there are personal tax savings. Income tax gross-ups on personal expenses are generally added when a spouse breaches tax rules and claims personal expenses as business expenses. In this case, Craig broke no rules and his tax savings were diminished because no corporate tax deduction was allowed. For those reasons, Craig's valuator did not include any gross-up on this expense. The valuator engaged by Craig's former spouse included the full gross-up. Justice Monahan agreed that this expense should not be subject to any income tax gross-up.

Speaking of expert testimony in family law matters, if you enjoyed this newsletter, Steve will be presenting on "Qualifying and Challenging an Expert" at Osgoode Professional Development's 3rd Annual *Evidence in Family Law Proceedings* on January 23, 2019.

This newsletter is not intended to substitute for proper professional planning. It is intended to highlight areas where professional assistance may be required or enough to discuss at the next hoedown. The professionals at Marmer Penner Inc. will be pleased to assist you with any matters that arise. Please feel free to visit our website at www.marmerpenner.com.