THE VALUATION LAW REVIEW

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Family Law Decisions

The Valuation Law Review is a joint publication of The Canadian Institute of Chartered Business Valuators and McCarthy Tétrault and this issue summarizes family law decisions of interest to business valuators. The Valuation Law Review is not intended to provide legal advice and readers should not act on information in the publication without seeking particular advice on matters that are of concern to them. Readers are cautioned against relying upon the decision abstracts contained herein, which are edited and in outline form only, and are directed to the full report of the reasons of the Court.

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Aguanno v. Aguanno,
[2002] CarswellOnt 1251 (Ont.S.C.J.)

Whether depreciation should be considered as a real expense and at what rate depends upon the nature of the asset for which the capital cost allowance is claimed and the rate at which it is claimed. If the asset for which depreciation is claimed is one that does need to be replaced from time to time, it is appropriate to claim depreciation. However, the rate of depreciaion should directly relate to the projected useful life of the asset.

The petitioner sought to impute income to the respondent who owned a courier and delivery business. The main asset of the business were trucks. The company claimed the capital cost allowance against these assets. The petitioner argued that this was not a real expense as it does not represent a cash outlay in the year claimed. Madam Justice Sachs noted that this approach is consistent with the pre-*Guidelines* decision of Salhany J. in *Weiland v. Weiland*, [1995] O. J. No. 294 (Ont.Gen.Div.) at para. 13. Sachs J. also referred to the contrary view of Heeney J. in *Tidball v. Tidball*, [1999] O.J. No. 904 (Ont.Gen.Div.) at 4.

Sachs J. concluded that whether depreciation should be considered as a real expense depends on the nature of the asset for which depreciation is claimed and the rate at which it is claimed. If the asset for which depreciation is claimed is one that does need to be replaced from time to time, it is appropriate to claim a deduction. The rate claimed, however, should directly relate to the projected useful life of the asset.

In the case at bar, Sachs J. noted that the trucks in the respondent's business do need to be replaced from time to time. However, she concluded that the evidence before her was lacking to the question of whether the amortization rate used of 20% was an accurate reflection of the projected useful life of these vehicles.
After reviewing the evidence, Sachs J. found that the respondent had some discretion in deciding whether to replace a capital asset. The less money available, the longer the business will try to make the asset last. Sachs J. imputed income to the respondent based on the average of his last three years of income, pursuant to s. 17(1) of the *Guidelines*. She cited the capital cost allowance as a factor in her decision to impute income but did not ascribe a precise amount directly to that factor.

Bhandari v. Bhandari
[2002] CarswellOnt 502 (Ont.S.C.J.)

The characterization of trading losses as income losses by the Canada Customs and Revenue Agency is not determinative for calculating income for child support purposes. A court may impute income to a payor parent taking into account the investment loss, the payor's ability to pay support and the right of the children to enjoy a lifestyle that the parents can provide.

Madam Justice Walters considered the calculation of the Respondent's income for child support purposes pursuant to the Provincial *Child Support Guidelines*. The Respondent declared nil income on his year 2000 Income Tax Return. The Defendant practised dentistry. His practice had gross revenues of over $1.3 million in 2000 and net income before tax of $113,640 from that source. The Defendant admitted that he split income from his practice with a holding company, the shares of which are owned by his parents. He conceded that this income should be deemed to be his for the purpose of determining his income for child support. He

also agreed to adding back to his income certain declared expenses which had a personal component. However, in 2000, the Respondent suffered significant investment losses. Because the Respondent carried on a business trading in stocks and futures in addition to his dental practice, the Canada Customs and Revenue Agency taxed his investment gains and losses as income. As a result, his substantial investment losses in the year 2000 set off against his dental practice income and the deemed income paid to the holding company, these funds distributed to his parents from the holding company and his personal expenses still left him with a net loss.

The Plaintiff argued that the Respondent's investment losses in the year 2000 were non-recurring and should be added back to his income, which would result in a Child Support Guideline income of $538,392.

The case was argued on the basis of s. 17(1) of the Provincial *Child Support Guidelines* before the amendment to the pattern of income provisions which came into force on January 1, 2002. (Ont.Reg. 446/01). Madam Justice Walters found no basis in s. 17(1) to find the Defendant's income differed from that declared for tax purposes. However, she relied on s. 19 of the *Guidelines* to impute income to him. She noted that while s. 19 sets out a list of circumstances a court may consider in imputing income to a parent, the list is not exhaustive. She concluded that while the Defendant suffered a very significant loss, the loss is a decline in property value. The fact that the Canada Customs and Revenue Agency treated the loss as against income for tax purposes is not determinative. She did not, however, impute to him as income for child support purposes the full amount of the non-recurring trading losses he had suffered. Rather, she held that he must take into account the real loss he has suffered, his ability to pay support and the right of the children to enjoy the lifestyle both parents can provide. She concluded that support should continue based on an imputed income of $275,000/year. This was the income which the parties had agreed to fix in their original Minutes of Settlement. She imputed to the Defendant this income for both 2000 and 2001.

Walters J. commented that had she determined the proceeding under the amended s. 17(1) in force since January 1, 2002, her reasoning would still apply and that an imputed income of $275,000 is fair and reasonable.

Under Manitoba's family property legislation, the court held it must determine the fair market value of an asset. The Master found he must assume a willing seller who will take the steps necessary to achieve maximum value. Evidence that the actual vendor would not agree to take such steps is not sufficient to rebut that assumption.

Bogoch v. Bogoch Estate

[2002] CarswellMan 52 (Man.Master)

The Master heard a reference as to the value of the respondent's interest in a closely-held family company operating an outdoor supply and apparel store. The company had four shareholders with equal interests. They entered into a Shareholders' Agreement which recognized that they composed two shareholder groups. The respondent had purchased the interest of one of the original shareholders. The Shareholders' Agreement contained survivorship arrangements to continue the two shareholder groups on the death of any of the shareholders. The Agreement further provided a method for determining the purchase price by arbitration in the event of a dispute. The Shareholder's Agreement provided that the value of the shares should be determined by dividing the fair market value of all the issued and outstanding shares in the capital of the corporation.

The petitioner's business valuator estimated the value of the respondent's interest by estimating the *en bloc* value of the business and attributing to the respondent 25% of that value for his interest. The respondent challenged the en bloc valuation advanced by the petitioner. The respondent raised a number of issues.

1. That the petitioner's business valuator erred in taking into account five years of earnings in determining the maintainable operating cash flow and did not properly account for slightly lower gross profit margins in two of those years. The Master rejectd this assessment, finding that the calculations were weighted accurately.

2. That the petitioner's business valuator erred in concluding that $175,000 of the retained earnings in the company were redundant assets and assuming that on a sale, these would be distributed. The respondent argued that these assets were necessary to finance the inventory. The Master also rejected this criticism.

3. That the petitioner's business valuator had selected a multiple of 3.5 - 6.5. The respondent questioned the choice of multiple but, in large part because the respondent did not call a business valuator to lead evidence on an alternative appropriate multiple, the Master rejected the critique.

4. That the petitioner's business valuator assumed that the vendor would sign a non-competition agreement. The respondent led evidence that the owner of the shares would not agree to sign such an agreement. The Master rejected that evidence, finding that as his task under the legislation is to determine the fair market value of the shares he must assume a willing seller and, in this case, a willing seller would sign a non-competition agreement in order to obtain the best price for the asset.

In conclusion, the Master noted that while he need not accept a business valuation report simply because the other party has not led any expert evidence to counter it, having weighed the evidence that was led, he preferred the valuation proposed by the petitioner's expert.

The Master applied no minority discount to the shares as the Shareholders' Agreement did not.

Brophy v. Brophy
[2002] O.J. No. 3658 (Ont. S.C.J.)

In this case the parties contested all the financial issues between them including a trust claim, valuation issues arising from equalization and spousal support. The applicant husband operated an investment company, Brophy Financial, which the parties owned wholly: the husband with title to 75% of the shares and the wife with title to 25%. The trial judge dismissed the wife's trust claim for a greater interest in the business, accepting the husband's evidence of her minimal involvement. The trial judge accepted the evidence of value of the business prepared by an expert witness on his behalf. The wife had also called a business valuator who prepared a critique of the valuation report. The trial judge noted that she only had before her one fair market valuation report and disregarded the critique report. The husband's valuator set a range of values which the trial judge found had been confirmed by a proposal to purchase the company shortly before the trial (but four years after the separation date).

The trial judge did not discount the value of the company for contingent taxes, observing that each party still had available the lifetime $500,000 capital gains exemption which exceeded the value of the shares, as found by the court. While the trial judge acknowledged that taxes would be incurred if the company were sold by sale of assets rather than shares, she held that was an unlikely result. Further, the parties failed to lead evidence as to the amount of taxes payable in the event of an asset sale.

The wife contested the applicant husband's declared income and asked that the court impute income to him for spousal support purposes from corporate profits. The trial judge reviewed the extensive jurisprudence on imputing income to a self-employed spouse. She held that the discretion a court has in an appropriate case pursuant to s. 18 of the *Child Support Guidelines* also applies to spousal support cases. The trial judge outlined some key considerations for a court in determining whether or not to exercise its discretion on the issue:

1. Because of the separate legal entity of the corporation, should there be a general reluctance by the court automatically to attribute corporate income to the shareholder?

2. Is there a business reason for retaining earnings in the company?

3. Is there one principal shareholder or are there other *bona fides* arm's length shareholders involved?

4. What is the historical practice of the corporation for retaining earnings?

5. What degree of control is exercised by the spouse over the corporation?

The trial judge concluded that not only including corporate profits in the income of a support payor but also the extent of the inclusion is a matter of judicial discretion.

Although the husband was not the only shareholder, he had control over declaring dividends and retained earnings. The trial judge accepted as reasonable the husband's explanation of business reasons to maintain retained earnings. She also accepted expert evidence on the husband's behalf of salaries paid to individuals in comparable employment. The trial judge did, however, impute to the husband the income the company paid to the wife on an income split.

F. v. V.
[2002] O.J. No. 3900 (S.C.J.)

Date of Marriage Valuation

Among the many issues litigated by the parties at the trial of this action was the value of the applicant's interest in a holding company which held a minority interest in an operating mining company at the date of marriage and passive investments by the date of separation. The parties contested the appropriate method of the en bloc valuation, whether a liquidity discount should be taken and the proper tax discount.

The wife had received the shares of the holding company, G.W.F. Ltd. ("GWF") from her father before the marriage. GWF owned a profitable operating mining company and related administrative companies. The applicant held 20% of the common shares. Her four siblings held the remaining common shares. Her father and mother held voting preferred shares which controlled the corporation. The parties married in 1977. In the year before marriage, the operating mining company had signed a significant contract for the James Bay Hydro Dam project.

Both parties called business valuators. The wife's valuator used an earnings approach. She applied a multiplier of between 7-8 to one year's earnings only, 1977. The valuator did so on the basis that any prospective purchaser in 1977 would have known of the signed James Bay Hydro Dam contract in which work had already started. Although the 1977 company financial statements would not have been available by the date that the applicant married, her valuator assumed that the purchaser would have known the details of the James Bay contract through due diligence at the time. By contrast, the applicant's valuator had available the 1977 financial statements but did not have the details of the James Bay contract which would have been available at the time. The applicant's valuator also considered the tangible assets held by the operating mining company. The company had a substantial investment in equipment. At the time the Income Tax Act permitted the rapid depreciation of such equipment. At trial, the wife called an employee of the operating company who had later participated in a group of managers who purchased the company. He relied on his own memory and an

inventory taken in 1984 to testify as to the nature and value of the company's tangible assets in 1977. His testimony supported a much higher fair market value for the assets than shown on the company's financial statements at the time.

The wife's valuator tested her conclusions against two business valuation reports one prepared in 1971 for tax purposes and one in 1984 for the sale of the company. She found the conclusions consistent with her own, after allowing for a growth rate based on the earnings multiple she had selected.

The husband's valuator agreed to the use of a "going concern" approach for the valuation but used a weighted average of earnings over a 3-5 year period because of the great fluctuation of earnings in the company. The husband's's valuator criticized the applicant's valuator for relying on the full 1977 financial year including thereby a number of months after the marriage. The respondent's valuator also used a lesser multiple of 4-5, after taking into account the risk inherent in the mining industry. He also rejected the applicant's evidence of the fair market value of the tangible assets of the operating company and refused to rely on the 1984 inventory. Given the absence of a contemporaneous inventory to the separation date he relied on the book value of the assets.

The trial judge accepted the approach of the wife's valuator. She found the evidence of the former company manager credible, albeit imperfect, and concluded that use of the book value for the tangible assets was a fundamental error by the husband's valuator. As the fair market value of the business could not be less than the tangible asset value, the trial judge rejected the respondent's valuator's "going concern" value. The trial judge noted that the wife's valuator's analysis better reflected the underlying tangible asset value of the business. Further, the trial judge accepted that the James Bay Hydro dam contract was of such significance in the circumstances that reliance on only one year's earnings for the valuation was appropriate.

Date of Separation Valuation

The operating mining company was sold in 1984. The applicant's father re-organized the holdings by a series of transactions by which GWF was left 75.6% of non-voting preferred shares in a numbered company, 136401 Canada Inc. ("136401") which the applicant's father controlled. This numbered company had as its major assets loan receivables from two other numbered companies ("120999 and 136400") in which GWF had no direct interest. 120999 and 136400 also held shares in 136401 which the applicant's father controlled. The wife's father retained

all control in his hands. He provided in his estate that this control pass on a spousal trust to his wife, with the assets passing to his children only at his wife's death. The wife's father died in 1997, after the separation.

The wife's valuator wrote down the loans receivable held by 136401 to the liquid value of the 120999 and 136400 that had taken the loans. She did not include the value of the shares in 136401 held by 120999 and 136400 on the basis that GWF did not have an interest in these companies and there was no evidence that the wfie's father would have relinquished control of these companies. The husband's valuator disagreed. In her opinion, 120999 and 136400 would have had to realize on their interest in 136401 in order to repay in full the loans owing to 136401. Accordingly, the husband's valuator did not write down the loans but included their full value. He also assumed that the applicant could have redeemed her shares in GWF or brought an action to wind up the company.

The trial judge accepted the wife's valuator's approach and rejected that of the respondent's valuator. The trial judge accepted the evidence of the corporate solicitor for GWF, called by the wife, that shares of GWF could not be transferred without board approval and that the board's refusal to approve such a transfer would not amount to oppression. The trial judge also relied on the fact that GWF had no voting rights in 136401 nor any control over that company.

The proper treatment of the refundable dividend tax on hand ("RDTOH") account also generated a discrepancy between the two expert's reports. Again, the trial judge preferred the opinion of the wife's valuator who added value to GWF only to the extent that the RDTOH could be used by the corporation at the relevant date.

Liquidity and Minority Discount

The wife's valuator proposed a 40% liquidity and minority discount on the basis that there was no available market for the shares at either valuation date and the applicant had no control over the company nor any influence or direction over it. The husband's valuator did not calculate a discount in her report. She acknowledged that a discount is commonly taken when valuing a company on a going concern basis (as at the date of marriage). However, the respondent's valuator gave her opinion that a discount should not be taken from a liquidation value (as at the date of separation), especially given that liquidity and a notional purchaser are assumed by the methodology. The respondent's valuator also relied

on the Canada Customs and Revenue Agency ("CCRA") policy against accepting a discount for a family-controlled private company. The trial judge rejected the husband's valuator's evidence on this issue. Noting that the applicant's GWF shares are not redeemable, that she cannot transfer them without board approval, is neither on nor controls the board and is not an executor or trustee of the spousal trust established by her father's will, the trial judge found a suitable evidentiary basis for taking a liquidity discount. Further, the trial judge concluded that the CCRA policy was not relevant to these facts in which the wife's father (and subsequently the testamentary trust) held absolute control over the corporate interests, with there being no evidence of the family acting in concert.

Contingent Income Tax

Relying on *Sengmueller v. Sengmueller* (1994), 17 O.R. (3d) 208 (Ont.C.A.), the trial judge held that no notional tax discount should be taken against the value of the applicant's interest at the date of marriage. The trial judge reached this decision on the basis that the expected disposition date of the applicant's shares was then far away. Her father was alive and actively pursuing the operating business. Also, the applicant was unemployed at the time and her own rate of income tax would have been low, if any. By the date of separation, the trial judge found that circumstances had changed. The applicant's father had disposed of the operating company. Dividends had begun to be paid out of the company, and the applicant had other income. While the date of disposition was still unknown, the trial judge noted that it is closer than at the date of marriage. The trial judge applied a discount of 15.86%, assuming a dividend rate applicable to taxable income of $30,000.

Goodwin v. Goodwin

[2002] CarswellSask 45 (Sask. Q. B.)

The court held that the farther a member spouse is from retirement at the date of separation, the more appropriate it is to apply the termination method to value the spouse's interest in a defined benefit plan.

In this decision, Mr. Justice Kovach considered the proper method for valuing a Canadian Pacific Railway ("CPR") pension held by the husband. The CPR Pension Plan is a defined benefit pension regulated by the Federal *Pension Benefit Standards Act*, R.S.C. 1985, c. 32 (2nd Supp.). The wife argued that the proper approach to valuing pensions for the purposes of calculating matrimonial property is the retirement method. The husband advocated using the termination method. Kovach J. concluded that there is no "hard and fast rule" as to which method to use. However, he concluded that the weight of recent jurisprudence suggests that the farther the pension plan member spouse is away from retirement, the more likely that the best approach is to use the termination method. He noted that the longer

an individual is away from retirement, the greater the likelihood that the variables used in calculating the value on the retirement method will be inaccurate and the greater the likelihood that unforeseen circumstances will intervene. He chose to apply the termination method in this finding that the fact that the pension plan member spouse's earliest possible retirement date at age 55 was ten years after separation.

Heathcote v. Heathcote
[2002] CarswellBC 230 (B.C.S.C.)

In valuing a partnership based on a predicted income stream to the partner's retirement age, the court accepted a higher discount rate to reflect uncertainties in predicting an income stream over a lengthy period and the impact of government restraint policies which could potentially have a detrimental impact in the business sector but which had not yet done so.

The court considered the valuation of the plaintiff's interest in a partnership with a firm of pathologists and a related biomedical laboratories company providing diagnostic laboratory services. While the plaintiff had been terminated from the partnership, Smith J. found that he would reapply and be readmitted after the conclusion of the proceeding. The plaintiff testified that if reinstated, he would remain with the partnership until his retirement at age 65. Both parties had prepared valuations of the plaintiff's interest in the partnership based on a notional retirement value. These valuations differed in their assumptions but both represented the present value of the future stream of income that the plaintiff may expect.

The plaintiff's valuator assumed a future bonus entitlement based on the average of the bonuses that the plaintiff had received over the last five year. He also assumed a discount rate of 20% as a fair reflection of the degree of risk concerning the partnership's future profitability. This reflected the plaintiff's evidence that the provincial government's policy of restraint and pressures on health care funding will have a negative impact on the business.

The defendant's valuator assumed a future bonus entitlement based on the plaintiff's own estimate for the year 2000 rather than on average. He also assumed a discount rate of 10% in the absence of any hard evidence of anticipated changes in the funding formula for laboratory services in British Columbia. The defendant's valuator concluded that it is too speculative to assume a negative impact on the business.

Smith J. preferred the analysis of the plaintiff's valuator, concluding that it would be wilfully blind to ignore the reality of British Columbia's political and economic circumstances. Smith J. also noted the degree of uncertainty arising in predicting an income stream over a period of 18 years to the plaintiff's retirement and also the fact that his bonuses have fluctuated in the past as reasons to prefer a higher discount rate.

Hillhorst v. Hillhorst
[2002] M.J. No. 458 (Q.B.)

The court upheld the master's finding that the dairy quota was not a gift but rather an asset to be valued. The master had rejected the evidence of both parties' valuators on the basis that each lacked the requisite expertise. Both parties had called real estate appraisers who purported to value the parties' dairy farm on a "going concern" basis. The court agreed that the witness called by the husband was not qualified to give an expert opinion on the issue. Further, the court noted that his attempts to value the dairy farm on a going concern basis were inadequate as he had made no analysis of the income, expenses or profitability of the enterprise. Further, the fact that dairy farms could be sold for a greater value on a liquidation basis demonstrated that a going concern valuation could not be fair market value for the asset.

The court did accept, however, that the master had erred in one respect in valuing the dairy farm on a liquidation basis. He incorrectly had relied on real estate appraisals for the land and buildings which had been prepared on the assumption that the dairy farm was to be sold as a "going concern". If, to the contrary, the underlying assets were disposed of separately, the dairy barn and related equipment would have only salvage value. The court adjusted the report for this error and varied the report accordingly.

The court heard a motion by the husband opposing confirmation of a master's report on a reference for an accounting and valuation of assets under the *Marital Property Act*. The husband opposed confirmation on the basis of four errors, including the allegation that the master erred in failing to exclude his dairy quota from valuation on the basis that it was a gift and an allegation that the master erred in rejecting the husband's expert's evidence on the value of the dairy farm enterprise.

Kennedy-Dowell v. Dowell
[2002], CarswellNS 111 (N.S.S.C.)

The petitioner was the beneficiary of a two substantial testamentary trusts through the will of her great-grandfather who died years before the marriage. The corpus of the trusts varied substantially over the course of the marriage as a result of fluctuations in investments and in the Canadian dollar as the bulk of the trust was invested throughout in U.S. securities. Under the terms of the trust, the petitioner received discretionary distributions. A lump sum distribution was also available to her at the age of 18 years, as well as an entitlement to receive quarterly distributions. Finally, the trust provided that the petitioner receive 50% of the corpus of the trust at the age of 30 and the balance at 35. The petitioner turned 30 years of age after the parties separated and she had not as yet reached the age of 35 years a the time of trial. During the marriage, the trust distributions to the petitioner provided a major source

A Nova Scotia trial court held that a beneficial interest in a trust holding investments is an equitable interest in personal property. It is "acquired" within the meaning of s. 4 of the Nova Scotia *Matrimonial Property Act* when the corpus is disbursed to the beneficiary not when the beneficial interest in the trust vests. Further, this interest has no real value for the purposes of matrimonial division as it is subject to certain contingencies and cannot be assigned.

of income for the couple's personal living expenses and the respondent's business ventures.

The respondent argued that the petitioner's trust interest was a matrimonial asset which should be divided or, in the alternative, a non-matrimonial asset which should be divided pursuant to s. 13 of the *Matrimonial Property Act*, S.N.S. 1980, c. 9.

Campbell J. considered the definition of matrimonial assets in s. 4(1)(g) of the *Matrimonial Property Act* which states:

4(1) In this Act "matrimonial assets" means the matrimonial home or homes and all other real and personal property acquired by either or both spouses before or during their marriage, with the exception of…

(g) real and personal property acquired after separation…

Campbell J. noted that the petitioner at the relevant time had an equitable interest in personal property and that she acquired her equitable interest in the trust before the marriage. Campbell J. also noted, however, that the gifts, inheritances and trusts are a listed exception to matrimonial assets and are not presumptively shareable as they do not represent the spoils of the joint venture of the couple. Campbell J. concluded that by s. 4(1) the legislature intended to exempt from presumptive division such equitable interests and that they are only "acquired" during the marriage within the meaning of the Act if the beneficiary receives a distribution of the corpus of the trust before separation.

Campbell J. further opined that as no portion of the total value of the corpus of the trust fund could be assigned to the beneficiary in these circumstances and is subject to certain contingencies, the interest has no real value.

Campbell J. noted that had he not reached this conclusion he would have made an unequal division of the asset, probably 100% in favour of the petitioner because of the short length of the marriage (six years) and the fact that virtually the entire net worth of the marriage and the parties' living expenses were met by the trust and the generosity of the petitioner's family.

MacDonald v. MacDonald

[2002] B.C.J. No. 2320 (S.C.)

The trial judge resolved a dispute about the valuation of the wife's interest in a family trust ("the MacDonald Family Trust") as a discretionary income beneficiary and her holding of 25% of the non-voting common shares in a family company ("Holdings"). While the trial judge dismissed the husband's claims that these interests were family assets subject to division, the court held that the values were relevant to the determination of spousal support.

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Holdings had a 1/3 interest in another family company which had diverse underlying assets including a marina, a golf course, a dairy farm, and other real estate and businesses. The MacDonald Family Trust held a fifty percent interest in Holdings. The remaining 25% interest in Holdings was held by the plaintiff's brother. Her mother was the controlling shareholder of Holdings. Including redemptions of certain preferred shares, the plaintiff had received $900,000 from her interests in Indian River Holdings and as discretionary beneficiary of the MacDonald Family Trust during the period from 1990 to 2001.

The husband called a business valuator who concluded that he could not provide an opinion of the fair market value of the plaintiff's interest in Holdings because the wife's interest could not be sold to an arm's length third party for any value approaching the underlying value of the assets. On the other hand, the interests had a significant value to the owner. The defendant's valuator presented a "pro rata valuation" taking the wife's interest as a straight percentage of the underlying asset value of $54 million, based on the number of her shares in Holdings. On this basis, he held that her interest had a value of $3,091,498. He did not value her interest in the MacDonald Family Trust. On cross-examination, the defendant's valuator conceded that the plaintiff had no control over the trust or any of the corporate assets and that she cannot control dividends from any source or the sale of the assets. He admitted that there was no organized market for the sale of her interest in Holdings and that a bank would not lend her money based on these interests.

The trial judge accepted that although the plaintiff's interests in Holdings and the MacDonald Family Trust had no fair market value, that they do have a significant value to her. He accepted the value propounded by the defendant's valuator for her interest in Holdings. The trial judge attributed no value to the plaintiff's interest as a beneficiary of the trust. None had been calculated by the defendant's expert.

Marchese Estate v. Marchese,
[2002] O.J. No. 3867 (Ont.C.A.)

The Court of Appeal heard this appeal on a number of valuation issues including the value of a commercial development property and the propriety of allowing a contingent tax discount arising from a deemed disposition on death of certain shares held by the husband.

The Court of Appeal upheld the trial judge's finding that the property in question had a value of $10.25 million at the date of separation as stated by the wife's appraiser. In reaching this conclusion the wife's appraiser relied on an agreement for sale of that property to a developer, Bayview Landmark, for $10.5 million after the valuation date. The husband conceded that it was appropriate for the wife's appraiser to take this sale into account. His appraiser acknowledged that on valuation principles, he would have also considered this transaction, but, he received express instructions from this client to ignore it. The husband argued, however, that the error lay in giving weight to the sale price as the development proposal ultimately failed. Bayview Landmark paid $4.5 million on closing and provided a vendor take back mortgage for the balance of $10.5 million. When the development proposal failed, the vendors foreclosed on the mortgage, also retaining the $4.5 million cash payment. The Court of Appeal concluded that as Bayview Landmark was an informed arm's length purchaser and the vendor ultimately received value for the transaction (by the cash payment and foreclosure on the mortgage) the trial judge did not err the finding the sale price relevant.

The Court of Appeal also considered by cross-appeal whether the husband could claim a deduction from his net family property for the income tax which will ignore the deemed disposition of shares he holds at his own death. The wife argued that these taxes were "so speculative" that they could be safely ignored, following *Sengmueller v. Sengmuelleri* (1994), 17 O.R. (3d) 208 (C.A.). The Court of Appeal noted that it may have been open for the trial judge to consider contingencies such as: (i) that the husband had a longer life expectancy than used to calculate the notional income tax on a deemed disposition on death, (ii) the likelihood that the husband would take advantage of a tax sheltering mechanism for the shares before his death, and (iii) the likelihood that these or other possibilities rendered the taxes on disposition too uncertain to take into account. However, given the husband's age at the time of hearing his marital status and the evidence of his life expectancy, the Court of Appeal found no basis to interfere with the trial judge's disposition.

Merali v. Merali

[2002] CarswellBC 989 (B.C.S.C.)

The court considered the value, if any, to be attributed to goodwill of a medical practice owned by the defendant. The plaintiff's business valuator accepted that the practice had little tangible assets but attributed value to the goodwill. The valuator testified that the most common method to value a medical practice is to take 50-60% of the gross annual billings. This approach generated a value of $145,000 for the defendant's practice. The plaintiff's valuator also observed that at the time of incorporation of the defendant's professional corporation in 1999, a value of $122,000 was placed on goodwill. This amount was not written down as the CICA handbook requires in the event of a permanent impairment in the value of unamortized goodwill. The plaintiff's valuator concluded that $145,000 was an appropriate value for the practice.

The court accepted a valuation of a medical practice with no or negligible allowance for goodwill on evidence that no purchaser would pay for goodwill in the current market.

The defendant argued that his practice has no goodwill based on regulatory changes in the province of British Columbia since he established his practice. The defendant led evidence that billing numbers for physicians are now readily available and that a qualified practitioner could quickly develop a full practice and generate higher billings than the defendant. He argued that the fair market value of his practice is no greater than the value of the tangible assets as no physician would purchase a practice and pay anything at all for goodwill. Despite this argument, the defendant proposed a value for his practice that somewhat exceeded the value of the tangible assets.

Brooke J. held that the plaintiff's valuator had failed to address adequately the market factors influencing the value of medical practices and accepted the defendant's valuation.

Rush v. Rush

[2002] P.E.I.J. No. 20 (P.E.I.S.C.-T.D.)

The petitioner asked the court to impute income to the respondent father for child support purposes. The respondent had submitted evidence to support his claimed income from his trucking business and residential rentals. The court determined as a preliminary matter that the respondent having led evidence to support his declared income, the petitioner had the onus of adducing evidence to prove her assertion that the more income should be imputed. The petitioner made a number of allegations, including that the respondent had some personal

When determining whether to impute income to a party claiming a capital cost allowance for personal property a court must consider the likelihood of a piece of equipment being replaced, the cost of the replacement and the continued need for the equipment for the production of income.

benefit from certain claimed business expenses. Jenkins J. found the respondent has some marginal benefit from cash transactions in his business. As this benefit is incapable of precise calculation, Jenkins J. imputed back as income some 8% of the discretionary expenses, or 10% of net profit.

The petitioner also asked the court to impute income equal to the capital cost allowance charged against the respondent's rig. At twelve years old the rig had a life expectancy of eight years and was due to be replaced within one to two years. Jenkins J. observed that Schedule III of the *Federal Child Support Guideline* directs that capital cost allowance with respect to real property be added back to income. It does not provide for the add back of the capital cost allowance on personal property. Jenkins J. held that it would be unfair to do so in the absence of evidence that brings the reasonableness of the expense into question.

Jenkins J. reviewed the jurisprudence on this issue. He adopted the analysis of the Saskatchewan Court of Appeal in *Rudachyk v. Rudachyk*, [1999] S.J. No. 312 (Sask.C.A.), para. 19 and 22. In determining a challenge to the reasonableness of a capital cost allowance with respect to personal property, the court must consider the likelihood of a piece of equipment being replaced, the cost of that replacement and the continued need for such equipment for the production of income. The object of the inquiry is to determine if the allowance is real or is a book entry that artificially reduces income.

Jenkins J. concluded that absent evidence raising a *prima facie* question of the reasonableness of the expense, the court has no general authority to disallow it, or to place an onus on the party claiming the expense to prove it.

Russell v. Russell
[2002] B.C.J. No. 1983 (S.C.)

Among other issues determined in this case, the court considered whether or not to discount the value of the husband's corporate interests for notional taxes The husband operated a dental laboratory business. The parties agreed that the pre-tax value of his corporate assets was $3,095,000. The husband sought a

The trial judge considered the decision of the British Columbia Court of Appeal in *Dowling v. Dowling* (1997), 43 B.C.L.R. (3d) 59 in which the Court of Appeal refused to permit the consideration of latent or notional taxes in the absence of evidence projecting if and when the properties might be sold.

The trial judge noted that although the husband had presented some evidence of his potential tax liability, he had not led evidence of an immediate sale or even the contemplation of one in the "near distant future." Noting that the husband

was a relatively young man (in his early 40s at the time of trial), in a flourishing business with good prospects, the trial jude concluded that the plaintiff would be in a position to engage in tax planning to minimize or eliminate any present latent tax consequences that could arise from the disposition of his interests. On this basis, the trial judge refused to permit any discount for taxes. Although the trial judge recognized that at some distant point in time the plaintiff might incur some tax liability, the court concluded that to value this event as to amount or timing would be to engage in speculation and anaylsis of hypothetical facts, contrary to the Court of Appeal's direction in *Dowling*.
amount would be over $19,000/month, which the mother had conceded was excessive.

discount of the full amount of personal taxes payable on the future disposition of his corporate interests or deemed disposition at his death or, in the alternative, one half of that amount.

(2) Pre-tax corporate income: The Court held that pre-tax corporate income is likely to be attributed to a child support payor if it can be taken without seriously undermining the finances of the corporation, and if it is available to the payor, or could be made available. The father held an interest in a company with retained earnings of $237,000. The company was financially sound with a debt ratio of 1 to 1. The Court expressed concern that these funds might represent part of the $3,000,000 proceeds of the share purchase of the other company. No clear evidence was led on that point. However, on the basis that the father had the onus of showing whether or not the retained earnings were in fact related to the $3,000,000 proceeds already taken into account, the Court included the $237,000 into the father's income.

The Court held that the father had failed to meet the onus of showing that the *Guideline* amount payable was inappropriate but also refused a claim for section 7 expenses in addition to the base amount.

Wandich v. Viele
[2002] CarswellOnt 6 (Ont.S.C.)

In determining the appropriate recovery of a plaintiff on a quantum meruit claim, the court gave its best estimate of what is fair and acknowledged the practical difficulty of calculating the value of contributions to family property with precision.

The parties cohabited as spouses. During their cohabitation the Defendant, Viele, worked in the Plaintiff, Wandich's business. After the relationship ended, Wandich began an action against Viele to recover possession of his apartment and chattels. Viele counterclaimed against Wandich and certain companies in which he had an interest for, *inter alia*, spousal support and a $3.8 million unjust enrichment claim for her professional and domestic contribution. Viele initially became involved in Wandich's company to perform an internal audit of funds, she re-negotiated management contracts and acted as counsel on litigation matters including collection problems. Viele led expert testimony on the value of her services. Her expert witness assessed her services as having a total value of between $1 million and $3.2 million based on replacement expenses that Wandich's company would have otherwise incurred for the services rendered. The low end of the range represented the expert's assessment of the salary cost of hiring an employee to perform the services that Viele undertook. The high end of the range represented the costs of contracting out such services to legal, accounting or collection firms.
Paisley J. held that her services should be valued on a "value-received basis." He accepted that Viele had made a valuable contribution to Wandich's company but concluded that, absent Viele's contribution, Wandich would have employed someone else in-house to perform the services she had rendered and, based on the salaries paid to other non-family employees of the same company, Paisley J. held that her salary would have been substantially less than the range given in evidence by Viele's expert. He also rejected the expert's evidence that Viele would have received a substantial bonus for her efforts, again with reference to the lack of evidence that any other employee of Wandich's company had received a bonus.

Paisley J. set off against the quantum meruit award he had calculated, the value of certain benefits that Viele received from Wandich and the company. Paisley J. acknowledged that the set off amount was not exact, commenting that: "it is the Court's function to arrive at a best estimate of what is fair having regard to the claimant's services, bearing in mind the practical difficulty of calculating with mathematical precision the value of particular contributions to the family property." (at para. 64).