THE VALUATION LAW REVIEW

Volume 14, Issue 1
January 2008

Family Law Decisions

The Valuation Law Review is a joint publication of The Canadian Institute of Chartered Business Valuators and Harrison Pensa LLP 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.

The primary contributors to this publication practice family law with the firm of Harrison Pensa LLP

Editors: Terry Hainsworth

For subscription information please contact:
The Canadian Institute of Chartered Business Valuators
277 Wellington Street West, 5th Floor
Toronto, Ontario M5V 3H2
Telephone: (416) 204-3396

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted, in any form or by any means, electronic, mechanical, photocopying, recording, or otherwise, without the prior written permission of the CICBV.

The Canadian Instituteof
Chartered Business Valuators
and Harrison Pensa LLP

page 4
Traversy v. Glover
Gifts or inheritances under Ontario's *Family Law Act* are excluded from net family property unless the gift is applied to a matrimonial home.
There is no presumption of gift between adult family members.
A loan requires a legal, as opposed to a moral, obligation to repay the amount advanced.
Inter-family loans may be discounted as liabilities depending on when, how, or whether they will be repaid.
In a two-person company, a "nuisance value" approach may be applied, in the absence of accurate appraisal and financial data.
The "nuisance value" is the value the acquisitor is prepared to pay to be rid of the other shareholder.
If the income tax consequences of a disposition can be deferred, the court should discount the tax liability.

page 6
Redpath v. Redpath
In cases where real estate is a large component of value, and the "highest and best use" of the realty is to change its use, valuation of the business as a "going concern" cannot be made.
Valuation must entail the unique situation of the family. The husband had a young family and long term support obligations. Thus, it was likely that he would not discontinue his business in the near future.
The court cannot attribute corporate profits to a shareholding spouse if it is clear that those profits are needed to maintain the viability of the business.
Where a business is valued on a "break-up" basis, tax and disposition costs should be taken into account.
If, on the facts, tax and disposition costs are likely to be deferred into the future, they should be discounted.

page 8
Beeching v. Beeching
There is an emerging trend, in family law cases, to "pierce the corporate veil".
In determining who stands at arm's length in s. 18 of the *Child Support Guidelines*, the court may refer to s.251 of the *Income Tax Act* which defines "related persons."
The court provided a non-exhaustive checklist of the factors it would consider in attributing corporate income to a shareholder.
In respect of professional service corporations, income will be attributed to the shareholder unless he or she calls evidence of a need to retain earnings specific to the corporation and evidence justifying that specific need.

page 9
Serra v. Serra
In valuing capital assets, the court will assume that the owner will engage in reasonable tax planning to achieve the highest after tax return.

page 10
O'Neill v O'Neill
Salaries paid to family members will be scrutinized in two distinct areas. First, they may require normalization in determining a business's maintainable earnings. Second, they may be adjusted in attributing corporate income to a shareholder under s.18 of the *Guidelines*.
A spouse's capital gains exemption may be taken into account for valuation purposes.
Tax and disposition costs will be discounted if there is a long deferral period. The deferral period can include consideration of the unique family situation.
S. 18(1) of the *Guidelines*, dealing with attribution of corporate income to a shareholding spouse is not to be interpreted narrowly.
"The most recent taxation year" rule in s. 18(1) of the *Guidelines* does not preclude the court from looking beyond the last year and averaging corporate income under s.17.

page 13
Poirier v. Alie
Semble, corporate profit attribution under s. 18 of the *Guidelines* is subject to a prior claim of the shareholding spouse to withdraw the funds in his shareholder's account.

page 13
Patterson v. Patterson
If the employee can defer the receipt of a bonus, declared in one taxation year, into the next taxation year, the bonus will be included in the year of declaration.
Despite the clear wording of s. 13 of Schedule III of the *Guidelines*, the court concluded that the value of stock options would be included in income on vesting and not on exercise, on a running account basis.

page 15
Green v. Green
In unique circumstances, a "market approach" to valuation may be employed by the court.
A "market approach" does not always require the identification of a specific special purchaser.
An expert must be impartial. The expert cannot take on the role of an advocate
"Rules of thumb" may be appropriate guides to value but may not, standing alone, be used to determine value.
Valuation is a matter of fact to be determined in each case. Thus, the court may reject an expert's opinion as to maintainable earnings or a price multiple, if evidence exists to warrant such rejection.

page 17
H. (C) v. H. (M.)
In the absence of any expert evidence of tax rates or evidence of future dispositions the court applied a "fair" rate of notional tax of 23% being the mid-point between zero tax and the highest marginal rate.

page 18
B. (P.S.O.) v. B. (L.M.)
Where the parties and their experts fail to express an opinion as to value of a particular asset, the court is left to its own determination of value.

VALUATION — FAMILY LAW

By Terry Hainsworth

Traversy v. _Glover_ (2007), 30 R.F.L. (6th) 372 (Ont. S.C.J.)

During the course of the marriage, the wife's sister and brother-in-law advanced $195,000 to the wife. Prior thereto, the parties had been struggling financially, resorting to RRSP collapses, credit cards, and a line of credit secured against the matrimonial home to support the family.

The wife used the funds advanced to discharge the secured credit line. The parties separated shortly thereafter.

The matrimonial home was registered solely in the wife's name. Thus, under Ontario's *Family Law Act*, its separation date value would be added to her net family property. An issue arose whether the advance was a loan or a gift. Under the statute, if a gift finds its way into the matrimonial home, it could not be excluded. If it was a loan, the liability could be used to reduce the wife's net family property. Under the statute, the onus of proof rests with the party who wishes to claim the deduction.

The court first noted that there is no presumption of gift where funds are advanced by family members to family members. Thus, the onus fell on the wife to establish that the advance was a loan.

Secondly, the court noted that in prior cases, other courts had exercised suspicion in dealing with transactions between family members that are raised to reduce the value of shareable property.

Third, there must be a legal obligation to repay for the transaction to be a loan. A moral obligation cannot create a legally enforceable obligation.

The court balanced the competing and conflicting facts. There was no loan document. The advance was between family members. No repayments had ever been made. The terms were imprecise (that the alleged loan would be repaid on the sale of the house by the wife — unless she needed

the funds for another house). All of these factors militated against the transaction being a loan.

In the end, it boiled down to an issue of credibility. The court accepted the wife's testimony and that of her brother-in-law that repayment was expected, that the wife would not encumber the home while the loan was outstanding, and that the husband was not to be involved in any way.

The matter did not end there, however. The wife was not entitled to deduct $195,000 from the value of her assets. The court "discounted" the loan to 75% of its face value, noting that the interest-free loan would not be repaid for 5 to 10 years due to the ongoing presence of children in the home.

An issue also arose over the value of the husband's holding company—746710 Ontario Limited. That company owned 50% equity interests in several other "investee" companies. Each "investee" company was set up to develop and construct a specific real estate project. A "partner", Mr. D., through his holding company, owned equal equity interests in each "investee" company. By the date of separation, the husband and Mr. D. were feuding with each other in and out of court. All of the developments were at various stages of completion leaving the business valuators without relevant financial and appraisal evidence. Thus, both agreed that the basis for valuation was to look at the negotiations that occurred between the husband and Mr. D. [note: in Ontario, assets are valued, generally, as of the date of separation. Thus, evidence of the negotiations occurring after that date and the ultimate "buy out price" were inadmissible due to the "hindsight evidence" rule].

It was clear that Mr. D. would be the acquisitor of the "investee" companies held by 746710 Ontario Limited. Up to the date of separation, he had made an offer of $147,000 cash and approximately 1.5 million shares in one of the "investee" companies. In his offer, Mr. D. assigned a value to the shares as being $0.20 per share. Rounded off, the offer was about $435,000.

In arriving at value, the court concluded that the husband's shares should be valued at a "nuisance" value. Absent accurate appraisal and financial information, from which an actual opinion of value could be made, the "nuisance value" was what the acquisitor was prepared to pay—namely $435,000.

In valuing 746710 Ontario Limited, both valuators noted that the extraction of the proceeds would trigger a taxable dividend. The court reduced the tax consequences to 50% of that nominally calculated as of the valuation date. The husband could, on the evidence, delay the timing of the dividend and thereby defer the tax.

***Redpath* v. *Redpath* (2007), 33 R.F.L. (6th) 91 (B.C.C.A.)**

The husband, through his corporation known as GIB, carried on a bakery and delicatessen business in Vancouver. It operated out of a commercial building. The building was owned in a partnership fashion by both the husband personally and by GIB.

The real estate was appraised by an expert real estate appraiser. He concluded that the "highest and best use" of the realty was for "development in accordance with…[current] zoning when economically feasible". In other words, as described by the judge "…the highest and best use…was to bulldoze the company's operations and to sell the real estate for redevelopment". This value was for $2 million.

However, the parties had 5 children ranging in age from 8 to 18. The wife would, due to a need for retraining and the ages of the children, remain economically dependent on her husband for a considerable period into the future. Thus, the husband faced a long-term period in which he would be obliged to pay spousal and child support.

The situation was summed up neatly by the appeal justice:

> "This tension between valuation logic and the situation actually facing the parties informs virtually all of the grounds of appeal in this case".

Findings of fact are within the exclusive domain of the trial judge. Normally, the value of an asset or the income of a party are findings of fact. An appeal court may interfere with a trial judge's findings only if the trial judge made an error of law or if the facts found by the trial judge are based on a misapprehension of the evidence.

In valuing the realty, the trial judge found that substantial renovations and upgrades were necessary. These were estimated to have a future cost of $450,000. The trial judge deducted them in full from the commercial value of the real estate.

It appeared that the husband's personal income and the pre-tax profits of the corporation, if added together, would yield an income in excess of $300,000. The trial judge declined to add the pre-tax profits of the corporation to the husband's income. He concluded that the company would require the profits, in the future, to pay for the renovations and improvements.

The appeal court upheld the trial judge.

The wife argued the judge should not have permitted any allowance in respect of the renovations. She argued that it was already factored into the income analysis. The appeal court disagreed. Both business valuators had agreed that the uncertainty regarding the real estate precluded a valuation on a "going concern" basis. As the renovations had to be made, and there was no evidence that they would enhance the value of the property due to its ultimate demolition years hence, the trial judge was justified in allowing the deduction. The improvements and renovations entailed seismic improvements and renovations to bring the realty up to code. It was unlikely that the improvements or renovations would enhance the profitability of the realty when sold.

The appeal court also upheld the trial judge's decision not to attribute corporate income to the husband for the purposes of determining his income. The trial judge concluded that the profits were needed to finance the improvements and renovations…"to keep the business a going concern." His factual finding was supported by the evidence.

Finally, as the realty and business were valued on a "break up" basis, it was reasonable to take into account tax and disposition costs. Noting that the business would not likely be sold for at least 10 years, the trial judge's discounting of the tax by 50% was upheld.

As an aside, the British Columbia Court of Appeal has been a staunch supporter of the draft *Spousal Support Advisory Guidelines*. The trial judge awarded the wife spousal support of $3,500 monthly. The *Guidelines* called for a "range" of $4,542 to $5,510 per month based on the trial judge's determination that the husband's income was $260,000 annually. The appeal court increased the support award to $5,000. Though they conceded that the trial judge had appropriately considered the factors

and there was no misapprehension of the evidence, the appeal court ruled that an award substantially outside of the range could not stand.

***Beeching* v. *Beeching* (2007), 34 R.F.L. (6th) 150 (Sask. Q.B.)**

Mr. Beeching was a consultant. He carried on business through a professional corporation called P. Ltd. The share structure was that his second wife owned all of the common shares in the company. He owned 187,000 special shares which were non-voting, non-participating and retractable. The special shares were the product of the property settlement with his first wife.

The case is not as important in its result, as it is for the observations of the judge.

First, the court observed that, effectively, any profits of the corporation would inure to the sole benefit of Mr. Beeching's second wife. They could be paid out as a dividend on her common shares or kept in the company as retained earnings. The court noted the recent trend in the case law to pierce or "see through" the corporate veil in family law cases. The court quoted from *Wildman* v. *Wildman* (2006), 33 R.F.L. (6th) 237 (Ont. C.A.):

> "In appropriate cases, piercing the corporate veil of one spouse's business enterprises may be an essential mechanism for ensuring that the other spouse and children of the marriage receive the financial support to which, by law, they are entitled…".

Second, the court noted that Mr. Beeching, his second wife, and P. Ltd. were all "related persons" as defined by s. 251 of the *Income Tax Act*. Thus, they did not deal with each other at arm's length. Accordingly, they were all exposed to s. 18(2) of the *Child Support Guidelines* which allowed a "clawback" into the corporation of payments to or benefits received by such persons. By s. 18(1), the profits of the corporation (including the "clawed back" amounts) could be attributed to Mr. Beeching in whole or in part.

Third, the court observed that s. 18(1) provided alternative remedies. Although attribution of the corporate pre-tax profits was the remedy commonly resorted to by the court, it could attribute an amount to Mr. Beeching commensurate with the services he provided to the corporation.

Fourth, the court noted that further remedies could be invoked to impute income under s. 19. These could include under s. 19(1)(d)—income diversion; s. 19(1)(e)—under-utilization of property; and 19(l)(h)—tax advantages.

Fifth, the court addressed the factors it would consider in terms of a corporation's need to retain its earnings. These would include:

1. the need to acquire or replace inventory;
2. debt-financing requirements;
3. carrying accounts receivable;
4. cyclical peaks and valleys in cash flow;
5. allowances for bad debt;
6. allowances for anticipated business losses or extraordinary expenditures; and
7. capital acquisitions.

Finally, the court outlined its evidentiary requirements in the case of professional service corporations. Information concerning the need for retention of earnings must be specific to the corporation with accompanying analysis. Vague assertions as to the general need for income retention will not suffice.

***Serra* v. *Serra* (2007), 36 R.F.L. (6th) 66 (Ont. S.C.J)**

The husband owned common shares having a value of $9.5 million and preference shares having a value of $8 million. Most of the preference shares had been gifted to him. Thus, under Ontario's *Family Law Act*, their value would not be included in the calculation of the husband's net family property.

The husband's $500,000 capital gains exemption was intact. The issue became how that exemption was to be applied against the shares.

The wife put forth a simple solution, namely, that the exemption be applied pro rata based on the value of the shares.

The husband argued that approximately $400,000 of the exemption should be applied to the preference shares and $100,000 to the common shares. His arguments were more legalistic. First, he argued that the

preference shares had attributes. They could be redeemed at any time and they ranked ahead of the common shares. Second, as a taxpayer, he submitted, it was his choice as to how to allocate the exemption.

The court agreed with the husband. In valuing tax liabilities, the court will assume that an owner of capital property will engage in reasonable tax planning which would result in that highest after-tax value to the owner. Thus, the allocation would not be imposed on him, merely because of fairness, but, rather, the issue would be determined objectively.

O'Neill v. _O'Neill_ (2007), 39 R.F.L. (6th) 72 (Ont. S.C.J.)

In O'Neill v. O'Neill, a trial judge was faced with the challenge of valuing an active business on a "going concern" basis. He had the benefit of expert evidence tendered on behalf of the husband and wife. Three significant issues, requiring judicial analysis arose in the court's determination.

The first issue concerned the remuneration paid to the husband's family members — his parents and an aunt. All three were genuine employees of the company. It was important in two respects. First, if it could be shown that the salaries were excessive, the maintainable earnings would require adjustment. Thus, the salaries, measured as at the valuation date, required analysis. Second, if the ongoing salaries paid to the family members were similarly excessive, a portion of the salaries would be "clawed back" into the corporate pre-tax profits, and subject to potential attribution under s. 18 of the *Child Support Guidelines*.

The husband hired a "compensation" expert who ran a human resource company as his expert. The wife relied on testimony offered by the chartered business valuator she had retained for valuation and income purposes. There is no indication in the case that the husband's lawyer objected to the c.b.v.'s testimony on wages exceeding her area of expertise.

Effective cross-examination determined the result. The husband's mother was described as "Vice President, Chief Financial Officer, and Comptroller". She had never had such a title before. It first appeared in the compensation expert's report. She lacked the experience and training to be a comptroller. At various times, in the company's history, and while she was in its employ, the company had a comptroller. Although she did the bookkeeping, the accounting was done by external accountants. She prepared no forecasts. The court considered her to be an "office manager".

The husband's father was described, possibly for the first time, as "Vice President –Production" in the compensation expert's report. At trial, the compensation expert admitted that a more appropriate title might be "Production Manager". There was conflicting evidence as to whether he worked full days or merely half days, though the judge concluded he was a full-time employee.

The compensation expert's own testimony was flawed. He relied on a survey described as "confidential" and available to members of the trade organization that conducted the survey. He declined to produce the actual survey. He admitted that, historically, there had been no specific job descriptions. Thus, he relied upon what the husband and family members told him. (Actually, it appeared that job descriptions were prepared shortly before he was engaged).

The court noted that the family members had been involved in the business from its inception. Thus, they were trusted long-term employees. In some cases, persons who reported to the parents earned more than the parents. The court concluded that it would not adjust the salaries for valuation purposes. It did, however, "claw back" excessive post-separation salary increases for attribution purposes.

The second issue, dealing with valuation, concerned tax and disposition costs. The experts disagreed as to whether the company could be "cleansed" to enable the husband to qualify for the $500,000 capital gains exemption. It was clear that on the valuation date, its redundant assets disqualified it from being a small business corporation. The court concluded that any prudent vendor would "cleanse" the company to maximize his or her tax advantage. Thus, in calculating the notional taxes for equalization purposes, the $500,000 exemption would apply.

Subsidiary to the tax issue was the proper time discount to be applied. The husband's valuator used a 5 to 10 year period. The wife's valuator used a 25-year discount period. The judge accepted the longer period. Although the judge did not articulate his reasons, on the valuation date, the husband was young, his family was young (implying a lengthy period for support) and he had built the business from the ground up.

Finally, on the valuation date, the government had announced changes in future tax rates, but the budget provisions had not been implemented

into law. Noting that announcements regarding taxes are usually implemented, the court applied the "announced" rates and not the actual rate prevailing on the valuation date.

The court also had to determine whether corporate income should be attributed to the husband. As the wife claimed retroactive support dating back to their separation in 2001, the court had to make that determination on a year by year basis. The court's approach to the legal issues concerning s. 18 of the *Child Support Guidelines* was instructive. Section 18(1)(a) on its face appears to limit attribution "…for the most recent taxation year". Elsewhere, however, s. 18 appears to permit the court to consider "… the situations described in s. 17…([which deal with] patterns of income, fluctuating income, and non-recurring income events.)

First, the court noted that s. 18 was not to be interpreted narrowly. Persons who operate businesses and salaried persons should be treated equally. Quoting from an earlier case which he described as a "leading" case, the judge adopted this passage:

> "…pre-tax corporate income is likely to be attributed to the 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 court noted that the husband had, in the past, declared dividends to meet his own needs and that the company had lent money to relatives. Thus, the court concluded that there was no dispute that the husband controlled the corporate profits or that he was willing to withdraw funds from the business when he thought it was justified.

The court refused to limit attribution to only one year. The last year had been the company's worst year since the separation. It arose, in part, due to the wilful act of the husband himself (allowing his driver's licence to be suspended for non-support). The court cited prior court decisions where other courts had averaged prior years of corporate income. Moreover, the court noted that a literal and restrictive interpretation of "the most recent taxation year" would create an incentive to manipulate corporate income. Finally, and rhetorically, the court questioned why income averaging for individuals under s. 17 could make sense, but not for corporations.

In the end, the court concluded that 75% of the corporate pre-tax profits, averaged over 3 years, would be attributed to the husband on a “go-forward” basis. On a retroactive basis, 75% of the corporate pre-tax income for that year would be added to the husband’s personal income. In each case, adjustments were to be made for overpayment of family member salaries. The corporate loss in 2005 (occasioned by the husband’s conduct) was to be ignored.

***Poirier* v. *Alie* (2007), 39 R.F.L. (6th) 193 (Ont. S.C.J.)**

This brief case raises the issue of business prudence versus availability of corporate profits to fund child support obligations.

The facts are only briefly stated. The father carried on business via a corporation. Although it was, historically, unsuccessful, in 2005 it had profits of $60,000 after payment of a management salary of $46,000 to the father. The mother argued that the corporate income should be attributed to the father to bring his income up to $106,000 for child support purposes.

The father’s business valuator noted that the father had a positive shareholder’s account standing in the approximate amount of $43,000. Thus, the valuator stated, the attributable income should only be $16,000. The valuator testified that any prudent shareholder would pay out his shareholder’s account first, before taking any profits out as income.

In the end, the court attributed only $16,000 of corporate income. The court concluded that the father’s shareholder’s account should be maintained as a hedge against volatility in corporate profits and to foster the business’s expansion plans.

The case raises, but does not deal with many important family law issues. First, it can hardly stand as authority for the proposition that the attribution of corporate profits will be reduced by any funds owing to the shareholding spouse. Second, should the shareholding spouse be granted a priority to the profits if he or she has a positive shareholder’s account? After all, the shareholding spouse is merely a creditor of the corporation. Usually, support obligations rank ahead of the obligations to satisfy creditors. On the other hand, if the mother was entitled to all of the corporate profits, the father’s capital investment in the company would, as long as he had a child support obligation, be valueless.

***Patterson* v. *Patterson* (2007), 36 R.F.L. (6th) 268 (Ont.S.C.J.)**

In *Patterson v. Patterson*, the husband was a senior executive with a bank. He consistently received an annual bonus, shares in the bank’s stock under a “restricted stock plan” and options to purchase shares of the bank.

Due to the consistency of such awards, there was no real argument that they constituted “property” rather than income or that they should be ignored as non-recurring Income items. The issue, rather, was the “timing” or “receipt” of the income for child support purposes.

The husband's bonus was somewhat non-traditional. The bonus would be declared in September of each year. The husband could elect to receive it currently or defer its receipt until January of the next year. The husband argued that traditionally, bonuses were considered to be income to the recipient only when actually received. As he regularly deferred receipt until January, he argued that the "declared" bonus should be disregarded — only the "paid" bonus should be brought into income. The wife argued that as the bonus was "earned" in the year of declaration, it should be included in the current year's income.

The court concluded that 4/12ths of the bonus declared in the year of separation should be included in that year's income. Thereafter, the "declared" bonus would be brought into income annually. The court noted that the husband had discretion to delay the receipt of the bonus income. In so doing, a large sum of money would be unavailable to the children in the year that support ended for each of them.

The *Patterson* case has attracted some considerable academic debate, some arguing that economic fairness for children should be the court's primary concern while others argue that it is an unwarranted intrusion into the personal and reasonable investment, tax and estate decisions of the support payor. The case is worth watching over the year to come. Counsel have advised that no appeal was taken from the trial decision.

The husband was a member of a restricted stock plan. Annually, shares of the bank would be placed in a trust in favour of the husband. One third of the shares would vest, annually, in the husband. Once vested, the husband had the option of calling for the shares or deferring the call. He could defer the call for up to 3 years. Upon taking the shares, he would have to bring their value into income as a taxable benefit. As there was no benefit in keeping the shares in the trust, most employees called for the shares immediately upon vesting. Any gain thereafter would be taxed at capital gains rates.

The court held that whether the husband called for the shares or not, for child support purposes, they would be brought into income immediately upon vesting. To delay the call would, in the court's view, be an underutilization of income as it could enable the husband to delay calling for the shares.

Finally, the court had to deal with the husband's stock options. They were granted annually. Twenty-five per cent of the options would vest on each anniversary from the time of the grant. The options would expire after 10 years, if unexercised.

The husband argued that s.13 of Schedule III of the *Guidelines* established the treatment for their inclusion — namely, that they would be brought into income only when exercised.

The court disagreed. The court noted that Schedule III was still subject to the income analysis of ss. 15 through 20 of the *Guidelines* themselves. To allow the husband to defer the exercise of the options could constitute an under-utilization of property within the meaning of s.19(1)(e). Again, the husband could defer their exercise to a date after child support ended, effectively depriving the children of their entitlement by his own inaction. Thus, the court ruled that the options, for child support purposes, were to be included in income upon vesting.

The court rejected the husband's argument that inclusion of the shares or options into income prior to an actual disposition would require extensive record-keeping, the keeping of a running account, and possible expert analysis on an annual basis. The wife offered to share in the expense, and, the court accepted her offer as reasonable.

***Green* v. *Green* (2007), 38 R.F.L. (6th) 378 (Ont. S.C.J.)**

The husband was an insurance broker. In his personal capacity, he was an agent for a specific insurance company. He carried on related business activities (pensions, group insurance, segregated funds) through a corporation. The valuators called on behalf of the respective parties agreed that the "business" to be valued was the composite of the husband's personal and corporate activities. It was referred to as R.B.I. in the judgment.

Both valuators testified that there were different approaches to value. They conceded that the court should, as a matter of fact, determine the most appropriate approach to value. The competing approaches should be tested by comparing the results with other approaches.

The wife's valuator chose to use a "market approach". He noted that there was substantial consolidation in the insurance brokerage industry at the time. Larger agencies were buying out smaller agencies. He opined that the focus should be on the industry's dynamics and trends with reference to actual transactions. He referred to "synergies" existing within the market (factors making smaller brokers attractive to larger brokers) and noted that these larger brokers were recognizing these "synergies" and prepared to pay for them. He gave two examples of synergies. The first was revenue enhancement by widening product lines over the newly-captured customer base. The second was the elimination of duplicative overhead costs.

Statistically, he relied on U.S.-based information due to the wider sample of information. He testified, however, that he had consulted with Canadian market participants and confirmed that the U.S. results were applicable to Canada.

He concluded that a multiple of 1 to 1.4 times revenues (of $555,000) was reasonable, yielding a range of values between $590,000 to $810,000 (which sum included $34,000 of net tangible assets.)

He admitted, in cross-examination that a market-based approach was not generally accepted primary valuation technique. However, he justified its application in this particular case due to the large sample of mergers and acquisitions.

The husband's valuator took a more traditional approach. He first determined the maintainable earnings of R.B.I. on a 3 year weighted average basis. He then determined what, in his opinion, was an appropriate multiple of earnings, adjusting the risk factors against a risk-free investment (a ten year government bond). Noting that most of the business written was with the one specified company, that the agreement with that company could be terminated on short notice, and the fact that the husband was the sole "producer" of revenues, the valuator concluded that a purchaser would demand a very large rate of return of about 25% or more. Thus he selected a multiple of between 3.5 to 4 times maintainable after tax earnings. Concluding that the net maintainable earnings were between $26,730 to $37,260, and applying his multiples he concluded that the value of the business — at a mid point of values — was $120,000.

He rejected the market-based approach. He said that no particular "synergy" had been identified for R.B.I. Likewise, no "special purchaser", willing to pay such a premium, had been identified. He argued that the statistics were foreign and the evidence that they were applicable to Canada was hearsay. He disagreed with the sample noting that many of the transactions were much larger and with multiple agents. In R.B.I.'s case, the agent was only the owner. Thus, he opined, goodwill would have a greater personal component.

The court preferred the evidence of the wife's valuator. The court felt that the husband's valuator lacked the impartiality required of an expert

witness and had taken on the role of an advocate. The court rejected the approach to maintainable earnings taken by the husband's valuator in this case. Over the last 3 years, they had dropped from $83,000 to $47,000 to a mere $7,000. Thus, a 3 year weighting drove them much lower than historical earnings. The court felt the husband's valuator overemphasized the risk factors and ignored countervailing factors such as potential synergies. Unlike the wife's valuator, he had made only limited inquiries concerning actual sales. He insisted on identifying a special purchaser despite market evidence that there was active consolidation in the industry. This led to a logical conclusion that premiums were being paid, generally, for perceived synergies. The court noted that the husband's valuator did not contact the Canadians who were contacted by the wife's valuator and who had concluded that the U.S. data was applicable in Canada. In any event, the court noted that experts may, in expressing their opinions, rely on hearsay. He was forced to concede, in cross-examination, that "rules of thumb" such as a multiple of revenues are often used to value businesses (although all parties agreed that rule of thumb valuation, standing alone, is inappropriate).

The court rejected many of the negative factors pointed out by the husband's valuator. While the husband was the sole "producer", he had built up strong relationships with his customers. Thus, there was little likelihood that a customer would appoint a different agent of record. While tied to one large specified company for product, this was not a disadvantage to the husband. Rather, the large company was dependent on the husband for a continued flow of business due to his strong ties with his customers.

Finally, as the court concluded that the husband's valuator had chosen a capitalization rate that overemphasized the negatives, the court adopted a rate of 5 to 6%. Employing the rate to a non-weighted average of earnings, the court came up with a value closer to that of the wife's valuator.

***B. (P.S.O.)* v. *B. (L.M.)* July 30, 2007, Cole J. (B.C.S.C.)**

The Plaintiff was a lawyer. He brought action in the B.C. courts for a reapportionment of the parties' family assets. One of the issues was the value of his work in progress. His docketed, but unbilled work in progress was $78,000.

The Plaintiff argued that the docketed time was a poor indicator of the value of the work in progress. He testified that much of his work was on a flat-fee basis and, often, he was required to discount his billable time. He testified that he had no knowledge of its actual value.

His accountant testified that work-in-progress is not normally carried on the balance sheet because of the difficulty in valuing it.

Left with no testimony regarding its value, the court concluded that the only objective evidence of value were the dockets themselves. Arbitrarily reducing the dockets by about 10% for contingencies and a further 40% for notional taxes, the court concluded that their value was $28,000.

***H. (C.)* v. *H. (M.)*, September 26, 2007, Czutrin J. (Ont.S.C.J.)**

The husband was an employee of a large corporation. He had a pension plan, stock options, and a long-term incentive plan. Both parties had R.R.S.P.'s.

The trial judge noted that no expert evidence had been led respecting what, if any, account should be taken with respect to notional future taxes. The judge was provided with no evidence as to the likely disposition dates or the present value of any possible disposition.

The court noted that different cases have applied different notional tax rates. In an attempt to be fair to the parties, the court applied a notional tax rate of 23% being the mid-point between the lowest rate of nil and the highest marginal rate in Ontario of 46%.