Volume 15, Issue 1
January 2009

THE VALUATION LAW REVIEW

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.

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VALUATION — FAMILY LAW

By Terry Hainsworth

***Boniface* v. *Boniface* (2007), 164 A.C.W.S. (3d) 1014 (B.C.S.C.)**
The husband was an architect. In order to acquire a 25% interest in the partnership, he was obliged to contribute $306,000 to the capital of the partnership. The agreement further provided that he was restricted to a draw of $96,000, with any "excess income" to be applied to the capital account.

s. 12 of Schedule III of the Child Support Guidelines, dealing with amounts required for capitalization is limited in its scope to amounts required for the day to day operations of the proprietorship or partnership.

The wife argued that child support should be based on the husband's income of $262,800 without regard to the draw "cap". The husband argued that his income should be "capped" at $96,000, relying on s. 12 of Schedule III of the Child Support Guidelines, which provides:

> 12. Where the parent or spouse earns income through a partnership or sole proprietorship, deduct any amount included in income that is properly required by the partnership or sole proprietorship for purposes of capitalization.

The court held that his Guideline income was $262,800. Section 12 did not intend that deductions from income should be made for the acquisition of an asset, such as an interest in a partnership or shares in a corporation that is then used, in turn, to earn income. Capitalization in the sense used by the Guidelines is money necessarily paid out of pocket for day to day necessities to generate the gross income of the proprietor or partner.

***Hawbolt* v. *Hawbolt* (2007), 162 A.C.W.S. (3d) 790 (B.C.S.C.)**
The parties began to cohabit in 2000, when they were 36 and 31 years of age (the wife being the older of the two). The husband had been a long time employee of a construction company and the wife a long time employee of the Insurance Bureau of British Columbia. In passing, the court noted that the wife was an insurance adjuster involved in personal injury claims and that she was experienced in negotiations, attended mediations, and regularly instructed lawyers.

Shortly before their cohabitation, the husband had purchased the outstanding shares of his employer, Yellowridge Construction Ltd. for $400,000. The judge described it as a relatively small general building contractor operating throughout Western

Canada and the Yukon. It built new construction, additions and renovations and seismic upgrades for educational and health care facilities. It also built single and multi family residences. However, much of its work was done for governments and secured through competitive tenders.

Almost immediately after the husband's acquisitions of the shares of Yellowridge, he incorporated a holding company called Hawbolt Holdings Ltd. The Yellowridge shares were rolled into the holding company for $400,000. The husband took back 100 common shares. He was also issued and allotted 1000 class A special shares, while his parents received certain class C and D special shares. The special shares all had common attributes. They were non-voting. They would only receive dividends if declared by the directors. In the event of a winding up, liquidation or dissolution, the holders of the special shares would be entitled to an equal distribution of assets. The directors, however, could, by resolution, exclude the holders of one or more of those classes of shares from distribution.

A spousal guarantee of corporate liability will qualify the corporation as a "family asset" under s. 58 of British Columbia's *Family Relations Act*.

The parties married in 2001.

Shortly after the marriage, the husband paid $8,000 to purchase the shares of Skeena Contracting Ltd. It had minimal assets. The shares were placed in the wife's name for tax reasons. The husband, however, made all of Skeena's business decisions. It eventually borrowed funds and acquired a building which it renovated and leased to Yellowridge and other tenants.

Meanwhile, after the marriage, the parties decided to build their dream home. In 2003, they acquired a lot and construction began. They moved into the home in June, 2004 at a time when the basement was unfinished and the lot was not landscaped. They separated a month later. The property was appraised at $735,000. Construction costs amounted to $620,000 and a further $100,000 was required to complete construction. Both parties believed that the property could fetch $950,000 on completion. At the time the wife was pregnant. Their child was born 6 months after the separation.

A construction company was valued on a net asset value approach.

The husband's lawyer prepared a draft separation agreement. It provided for a release of spousal support and an equal division of the proceeds of sale of the matrimonial home upon completion. The wife was concerned about her liabilities for corporate debt and the absence of spousal support (as she planned a maternity leave). Ultimately, a written agreement was entered into which provided that the husband would buy out the wife's interest in the matrimonial home for $90,000 (with payment to be made within a year), that the wife would keep her pension and the husband would keep the business (including Skeena) without assessment or appraisal and that the wife released spousal support.

Following the execution of the agreement, the husband arranged for the removal of the wife from the corporate surety bonds and gratuitously bought the wife a $25,000 car.

Approximately a year later, the wife repudiated the agreement. In turn, the husband refused to pay the $90,000 and litigation ensued.

Although the wife made multiple legal attacks on the validity of the agreement or whether it should be enforced, her main argument centered around s. 65 of British Columbia's *Family Relations Act*. That section permits the court to re-apportion the family assets contrary to the terms of a marriage contract (which includes a separation agreement) if the division in the agreement is "unfair". The court is directed to look to a list of circumstances set out in s. 65 to determine "unfairness".

The *Family Relations Act* has a broad and sweeping definition of "family assets". Property will be a family asset, under s. 58 if one or both spouses or a minor child of either of them "ordinarily used [the property] for a family purpose". An equally narrow and confined exception occurs, in s. 59 for excluded business assets, where it can be shown that the non-owing spouse "... made no direct or indirect contribution..."to the operation of the business.

First, the court concluded that the husband's business interests were family assets. The wife was required to join in the surety bonds of Yellowridge. By placing herself at risk and knowing that Yellowridge would have found it difficult, if not impossible, to conduct its business without the bonds, she made a meaningful and direct contribution to Yellowridge and its shareholding parent, the holding company. By agreeing to have Skeena's shares placed in her name, pursuant to tax advice and to reduce Yellowridge's and the husband's tax burdens she made direct contributions to its operations.

Having found the corporate assets to be family assets, the court had to value the assets, in order to assess the unfairness, if any, of the agreement.

The court readily found that Skeena had no value. It simply owned a building. The appraised value of the building was less than its liabilities (including an inter-corporate liability to the holding company of $160,000). Its value was negative $18,000.

The court then valued Yellowbridge. The wife's valuator argued that it was an operating company and should be valued on a multiple of earnings basis. The court disagreed, adopting the net asset value approach of the husband's valuator for several reasons. First, this was the valuation approach used when the husband acquired it and rolled it into the holding company. Second, most of its work required competitive bids. Thus, there was negligible goodwill. Third, the success of Yellowridge was a function of the husband's management of its affairs. The court found that the net asset value

of Yellowridge closest to trial was about $873,000, and that the net asset value of the holding company was $1,060,000 (the largest liability of the holding company being a shareholder's account in favour of the husband of $200,000).

In valuing the holding company, the court rejected any motion that the husband's interest should be reduced by any value ascribed to the special shares held by his parents. The parents had never received any dividends. The parents loaned him money to acquire Yellowridge and made no capital contribution to the holding company to acquire their shares. Due to the husband's complete control of the corporation, the court concluded that the issuance of the special shares to the parents was a mere "paper transaction".

The court concluded that the agreement was not "unfair". Absent the agreement the court opined that the apportionment of the business assets would have attracted an award of 10% or 15%. Thus, the wife may have received $100,000 to $150,000 more. However, she did not want the business or her pension valued, she wanted to be removed from the guarantees, she was assured a buyout of her interest in the matrimonial home. The negotiated resolution allowed both parties to determine the outcome without the risk and cost inherent in litigation.

Moreover, the marriage was of short duration. Each spouse was economically independent and self-sufficient before, during and after the marriage. Having regard to the wife's employment background it could not be said that there was a power imbalance between the parties. The husband was justified in withholding the $90,000 payment due to the wife's repudiation of the contract.

Finally, the court had to resolve the issue of child support. As the husband controlled all of the companies, s.18 of the *Child Support Guidelines* came into play. That provision enables the court to "pierce the corporate veil". The court can attribute all or a portion of the corporations' pre-tax profits to its shareholding spouse if the court is of the opinion that the spouse's income, as shown on his or her tax return does not fairly reflect all of the money available for the payment of child support.

The husband's income and Yellowbridge's income were as follows:

	2004	2005	2006
husband	$75,800	$127,442	$ 88,145
Yellowbridge	$383,099	$285,098	$2,583,319

The wife's expert expressed an opinion that the husband's income average, over the past 3 years could range within $400,000 to $1.3 million, noting that the husband had repaid his $200,000 shareholder's loan and caused the holding company to advance over $800,000 to the husband to engage in speculative ventures.

Although the husband argued that the Yellowbridge profits could not be fully-accessed due to its bonding requirements, the court noted that it paid an inter-corporate dividend of $1.2 million to the holding company in 2006.

The court attributed a portion of the corporate profits to the controlling shareholder under s. 18 of the Child Support Guidelines based on the history of the shareholder's deployment of corporate funds for his personal benefit.

Thus the court set the husband's income at $400,000 annually, requiring a monthly child support award of $2,679 monthly.

The husband argued that such an amount was inappropriate having regard to the child's very young age. The court, referring to higher authority, rejected the husband's arguments, nothing that the table-based calculation carries a presumption of appropriateness. Such a presumption can only be rebutted by a clear and compelling reason. Thus, the court ordered payment of $2,679 monthly from the child's birth. Giving the husband credit for the amounts he had actually paid (based on his admitted income of $90,000 annually), the court ordered him to pay $73,655 in child support arrears.

***Miller* v. *Joynt* (2007), 160 A.C.W.S. (3d) 513 (Alta C.A.)**

In this case the Alberta Court of Appeal had to consider s. 18 of the *Federal Child Support Guidelines*. That section may apply if the proposed support payor is a shareholder, director or officer of a corporation. In such a case, the court can "pierce the corporate veil" if the court considers that the payor's income, as established by his or her TD-1, does not reflect all the money available to the spouse for child support. In such a case, the court can attribute all or a part of the corporate pre-tax income, for the most recent taxation year, to the payor.

The trial judge attributed 2/3rds of the change in the corporation's retained earnings to the husband — the payor. The wife appealed.

The husband's T-1 income was $60,000. He owned all of the shares in a corporation that retailed computer hardware and software and provided after-care service and repairs. The wife engaged a business valuator who made the following findings — namely, that sales had increased, pre-tax revenues had increased and the business' cash position had increased. There was no bank debt. The company was not capital-intensive, it had no third party loans, had good cash balances, and suffered no covenants that restricted its ability to make distributions.

The appeal court held that the chambers judge erred in using the increase in retained earnings as a measure. It is a post-tax figure. While the judge would have considerable discretion under s. 18, his failure to articulate a reason for not using the pre-tax figure, prescribed by the regulation, was a reversible error.

With respect to the percentage attribution of corporate income, the judge made a second error. The husband had not called evidence to contradict the report filed by the wife. The author of the report was not called for cross-examination. The court heard no evidence as to the cash needs of the corporation or its future plans. The

chamber's judge, in attributing 2/3 of the accumulated retained earnings simply noted that "...the company may need to call upon its retained earnings for some reason...an unknown reason at this point…"

The appeal court held that the trial judge erred in speculating about "an unknown reason". In so doing, his departure from the actual evidence tendered in the valuator's report constituted a failure to judicially exercise his discretion. Attributing all of the corporation's pre-tax profits to the husband, the court determined his income to be $166,000 and $174,000 for the years in question.

Bekkers v. Bekkers **(2008), 163 A.C.W.S. (3d) 427 (Ont. S.C.J.)**
The husband was an electrician. He carried on business through a numbered company which used a trade name. He drew a salary and bonus from the company of $77,000 which left the company with zero profits, on its gross revenues of $242,000.

The wife alleged that the company claimed expenses that were personal to the company, provided benefits to him (the personal use of a truck) and that the husband did "side jobs" for unreported income.

She relied on s. 18(2) and s. 19(1)(g) of the Federal *Child Support Guidelines*. Section 18 allows the court to attribute corporate pre-tax income to a shareholder. Section 18(2) provides that in determining the pre-tax income all amounts paid as income or "benefits" to or on behalf of persons with whom the corporation does not deal at arm's length must be added back into pre-tax income unless the shareholding spouse establishes that they were reasonable in the circumstances. Section 19(1)(g) allows the court to impute income to a spouse who unreasonably deducts expenses from income.

The court was faced with the onus of proof. Did the husband (who clearly did not deal with the company at arm's length) bear the onus of justifying each and every expense? Or did the wife, an outsider not privy to the operations of the company, bear the onus?

Neither party called any expert evidence. The wife had been provided with the general ledger and sub-ledgers of the company.

The wife's argument was simple. Although she could not find any evidence to demonstrate personal expenses to the company, she said that the onus was on him. She asked the court to simply attribute 50% of the gross sales of the company to the husband, being $121,000 rather than the income drawn by him of $77,000.

The court laid down the steps to be followed in such cases.

The first step is to determine the payor's income. The starting point is to look at his or her T1 General Tax Form.

Then the court turns to s. 18(1) to determine if the amount in the T1 General does not fairly reflect all the money available to the shareholding spouse for payment of child support.

In determining step 2, the court looks to payments made to or on behalf of persons not at arm's length to the corporation. The court may also have regard to s. 19(1)(g) in considering step 2 if there is an unreasonable deduction of expenses.

Dealing with s. 18(2), the court noted that only the husband dealt with the company on a non-arm's length basis. The wife had not identified any other person or corporation. Moreover, she had not identified any "benefit" to be added-back. Nor had she identified any expense that was unreasonably deducted.

The court concluded that an initial onus lay with the wife. She must identify an expense paid by the company, benefitting the husband, and that it is likely unreasonable. Only then does the onus shift to the husband to demonstrate its reasonableness in all the circumstances.

In the absence of evidence of actual corporate need to retain earnings, the court may, under s. 18 of the Child Support Guidelines, attribute all of the corporate pre-tax profits to the shareholding spouse.

The court justified its "shifting onus" approach by reference to Ontario's *Family Law Rules*. Adoption of the wife's argument would mean that the position of the court would be to deny every business expense, unless the husband proved that each expense was reasonable. Carried to its extreme, every support hearing involving a shareholder (or for that matter a proprietor or partner) would become a detailed accounting exercise requiring the court to conduct an audit of all business expenses and to review every sub ledger and every receipt for each expense claimed.

The focus of the *Family Law Rules* is to deal with cases by ensuring that the procedure is fair and conducted in a manner that saves the parties expense and time. The approach suggested by the wife would also place an intolerable burden on valuable judicial resources.

Finally, the method proposed by the wife – attributing a notional percentage amount to expenses and the balance to income, flew in the face of the steps the court was required, by law, to take under s. 18.

No additional income was attributed or imputed to the husband.

***Jivor* v. *Jivor* (2007), 162 A.C.W.S. (3d) 1006 (Ont. S.C.J.)**
The case was at an early stage. The wife sought temporary child and spousal support pending trial and an order for interim disbursements to enable her to fund the cost of her legal expenses and the cost of forensic accounting. No valuation or income reports had been filed.

The wife deposed that she required $100,000 immediately and that the forensic accounting costs could climb as high as $1 million.

Her claim for interim disbursements was dismissed. The court held that she had not met the prescribed Ontario test – that an order was required to ..."level the playing field".

The court, however, authorized her to pledge certain assets to borrow the funds needed. The parties' Toronto matrimonial home, owned solely by the wife, had an equity of at least $2 million. The court authorized her to finance $600,000 from the home. The wife had equity in a Monaco-based corporation of $1.25 million. The court ordered the husband to permit the wife to finance $500,000 from that company. Both orders, of course, would require proof that the sums financed were, in fact, spent or to be spent on the lawsuit.

The court permitted a spouse to mortgage assets to raise funds to finance the litigation rather than order interim disbursements

The court also set long deadlines for the delivery of the experts' reports.

***Walsh* v. *Walsh* (2008), 163 A.C.W.S. (3d) 429 (Ont. S.C.J.)**

The parties, who had a ..."history of expensive and protracted litigation", were in court, again, over the issue of child support.

The husband, a senior executive with an insurance company, was terminated in early 2006. His 2005 income was $698,206. Over the years, the parties had adopted a policy whereby child support was based on the prior year's income. Child support for the current year would be retroactively varied as of January 1 in the current year once the prior year's income was established. The husband's 2006 income was $1.2 million. It represented salary and commission but $l million came from severance payments and the exercise of stock options. In 2007, he received deferred income of $1 million in deferred incentive plan proceeds.

Throughout 2007 he continued to pay $8,300 monthly based on his 2005 income. If the court held that his actual income was $1.2 million for 2007 (based on his 2006 income) his support obligation would be $14,000 monthly for 2007 and just somewhat less for 2008 based on an estimated $1 million for 2007. The court specifically noted that his income would certainly decrease in 2008 due to the absence of the "one time" income receipts attendant upon his severance and the fact that he would not likely obtain comparable re-employment due to his age and personal circumstances.

The husband argued that the payments in 2006 and 2007 are largely non-recurring. Thus, they should not be included at all. Secondly, he argued that historically, the parties based current support on the prior year's income because it represented a "reasonable proxy" for the current year's income. That principle, he argued, was no longer appropriate.

The wife argued that the continued use of the prior year's income should be continued as it would ultimately "even-out" over time. Secondly, she pointed out that the amounts received were compensation for past services or compensation for future lost income. They were not the realization of capital and did not form part of the property settlement.

Income will normally include all benefits received from an employer or former employer despite their non-recurring nature.

The court held that the husband's income would include all of the benefits received in 2006 and 2007, deferred, by their historical practice, to the next calendar year. The payments were a form of replacement income. Thus it was appropriate to base child support upon the income actually earned.

Moreover, the court concluded that the discretion accorded to the court by s. 17 of the *Child Support Guidelines* would be context specific. Where the court is seeking to predict future income from past events, unique and non-recurring events may be disregarded. However, where the court is seeking to establish actual income for the purpose of calculating pas or current income, the same logic will not apply.

\Section 17 of the Child Support Guidelines, dealing with non-recurring sources of income, will not normally be applied where the relief sought is retroactive support.

As the income analysis followed s. 16 of the Guidelines producing a "fair determination" of income, the non-recurring receipts would not engage the operation of s. 17.

***Howe* v. *Tremblay* (2008), 44 R.F.L. (6th) 140 (Ont. S.C.J.)**

The parties had a brief relationship that resulted in the birth of a child in 1993. They did not communicate with each other for a number of years during which time the mother cared for the child. In 2005, the mother learned that the father had developed and sold a successful electronic gaming company. She asked for child support. Though the parties had occasional contact in 2002 when the mother's lawyer made certain unspecified inquiries of the father, some e-mails in 2003 and 2004, and visits in late 2004 and mid-2005, the first formal demand for support was October 2005.

At issue was the husband's income and the commencement date for interim child support.

When the father sold his business in 2002, he was kept on as a key employee until January, 2007. His 2006 income consisted of $328,000 employment income and two "retention bonuses" of $405,000 and $53,000 respectively. The larger bonus was made available to key employees who remained on for 4 years after the sale. The smaller bonus represented 50% of the annual bonuses declared in 2003 to 2006 payable to employees who remained in service in mid-2006.

If a non-recurring payment must be included as income in the T-1, there is a "presumption of income". The onus would be on the income-earner to prove unfairness under s. 17 of the Child Support Guidelines.

The court started with a "presumption of income". As the bonuses formed part of the father's income at line 150 of his T1 General, the onus shifted to the father. It was necessary for the father to shoulder the burden that the inclusion of the 2006 bonuses "would not be the fairest determination of that income" under s. 17 of the Guidelines

due to the non-recurring bonuses. Simply put, the court concluded that the father had failed to prove any unfairness. The fact that his income would certainly drop, absent the non-recurring amounts was not, in isolation, "unfairness". If his income dropped, so would his child support obligation.

The order was made retroactive to October, 2005. That was when the father was "effectively" put on notice that child support was required and that the former regime was no longer satisfactory.

The effect of the order was to create child support arrears for 2005 of $10,000, for 2006 of $55,000 and for 2007, potential arrears of $40,000.

***Bravo* v. *Pohl* (2008), 167 A.C.W.S. (3d) 354 (Ont. S.C.J.)**
At issue was the husband's income. He was, effectively, the sole shareholder of D.T. Inc., a manufacturer of production equipment. The wife alleged that the corporate profits of 2006 should be attributed to him and that future support be based on that amount – namely, $1.6 million. The husband argued that his 2006 income, allowing for some attribution, was $500,000, that 2006 was on unusually good year, and that prospective child support should be based on his actual personal income as set out in Line 150 of his tax return subject to Schedule III adjustments. Both parties called chartered business valuators to provide opinion evidence as to the husband's income.

The evidence of the husband's expert was adopted by the court. In so doing, the court set out its reasons:

The court resolved the evidence of two competing chartered business valuators and articulated its reasons for so doing.

1. the report of the wife's expert contained a qualification that further information would be required to finalize their calculations. This was never done;
2. the wife's expert did not interview the husband (nor, apparently did he ask to do so due to other disputes over information between the parties or their lawyers),
3. after receiving the report of the husband's expert (which was highly critical of his own report), the wife's expert did not speak to the husband's expert nor ask to do so;
4. The wife's expert conceded that if he had additional information concerning 2007;
   a) he would have been aware that 2006 was an unusual year; and
   b) that he would have been less inclined to attribute all of the corporate profits to the husband;
5. the wife's expert conceded that to pay out all of the corporate profits would require the company to incur substantial debt; and

6. the wife's expert was unaware that a significant amount of the 2006 income came from a single customer who now spread its business around to the competitors.

In the end result, the court found that it could attribute income to the father in respect of its unusual year and set support for the forthcoming year based on an income of $500,000. Thereafter, having regard to the fact that the husband had always historically drawn compensation commensurate with that of an owner-manager (even in money-losing years), the court held that future support would be based on his T-1 General income for the immediately preceding year subject to Schedule III adjustments.

The court then went on to deal with possible attribution. It directed the husband, at two four year intervals to provide, in 2012 and 2016, a report similar to the one provided at trial, demonstrating what amount, if any, income should have been attributed to him under s. 18 in any of the preceding years. Impressed with the quality of the husband's report, the court directed that the expert, if available, and if not, someone from his firm, prepare the future reports.

***Nielson* v. *Nielson* (2008), 47 R.F.L. (2008) (B.C.C.A)**

The husband was a financial advisor. At issue was his 2004 income. His 2004 Income Tax Return disclosed a Line 150 income of $278,700, consisting of $239,000 employment earnings, $38,000 in taxable capital gains and $1,700 RRSP income. He argued hat his income should be $276,000 alleging that a significant portion of the capital gain arose from the return on a tax-sheltered asset that artificially overstated the true value of the capital gain.

The trial judge included all of the capital gains, grossed up to actual, and determined his income to be $314,000. Support was assessed on this amount. The husband appealed.

The capital gain attendant on the termination of a tax shelter was included in income. No evidence was called to explain the nature of the gain.

The appeal was dismissed. In so doing, the Court of Appeal noted that no expert evidence was called explaining the overall income tax consequences of the flow-through investment. Moreover, the trial judge noted that the husband would have deducted the losses arising from the flow-through in prior years, thereby reducing his chid support (though there was no evidence that this actually occurred or whether the tax shelter was acquired before or after the separation). Thus, there was no reason to believe that the trial judge had committed a reversible error.

***Jarvis* v. *Parker* (2008), 51 R.F.L. (6th) 125 (Sask. Q.B.)**

This was another case that fell to be decided under s. 18(1) of the Federal *Child Support Guidelines*. That section allows the court to attribute all or part of the corporation's pre-tax income for the preceding year to a shareholding spouse. The court may do so if it concluded, after analysis of the spouse's personal tax return and the corporate financial statements that the spouse's Line 150 income "...does not fairly reflect all the money available for child support".

The husband controlled two companies – Alcove Security Inc. and Adobe Housing Inc. Alcove had pre-tax profits of $110,000 and Adobe had a net loss of $19,000. The husband's Line 150 income was $18,000.

First, the court noted that the onus will be on the shareholder to satisfy the court that there are valid business reasons to leave the profits in the company.

Having instructed himself accordingly, the court went on to analyse the operations of Alcove. It was, primarily, a provider of security services. Its largest expense was its payroll. The court concluded that it had little need to retain its earnings. The court did accept the husband's evidence that its last taxation year was extraordinary – its profits swelled by an unusual number of short term contracts.

Finally, the court concluded that s. 18 limited the court's inquiry to pre-tax "profits"'. Thus, it could not average Adobe's loss with Alcove's gain.

The court lacks jurisdiction to consider pre-tax losses in applying s. 18 of the Child Support Guidelines.

In the end, $70,000 of Alcove's profits was attributed to the husband.

***Turk* v. *Turk* (2008), 50 R.F.L (6th) 211 (Ont. S.C.J.)**
The husband, a lawyer and real estate developer, operated three real estate companies. On the wife's interim support application, an issue arose as to whether his income was $1 million or a half a million dollars. The difference was whether the pre-tax profits of the companies should be attributed to the husband. A second difference arose over a $400,000 bonus taken by the husband in 2005, but loaned back to the companies. Both parties had engaged senior and respected business valuators to provide expert evidence.

The 3 companies directed and distributed funds between themselves. They could achieve large losses as a result of amortization of their real estate holdings. If profitable, they would pay a management fee to G. Inc., the management company, operated solely by the husband (although the shares were beneficially owned by a trust). The husband treated himself as the *de facto* income beneficiary of the trust.
The husband argued that the bonus of $400,000 was merely a tax matter, to achieve tax savings. Moreover, by causing the realty companies to pay their profits out as management fees to G. Inc., passive income was converted to active income and thereby taxed at a lower rate. The bonus taken by the husband, he argued, was then loaned back to G. Inc. G. Inc., in turn, loaned the money back to the three companies. The husband argued that G. Inc's profits and the "loaned-back" bonus were necessary to sustain the business activities of the 3 companies.

The wife disagreed. Her valuator analyzed the use to which the profits were put. He noted that the funds loaned back to G. Inc. or G. Inc. to the 3 corporations was entirely at the husband's discretion. He could pay them out to himself at will. The funds loaned back to the 3 companies, he noted, were not used to "sustain" the

three companies. In part, they were deployed to acquire new realty holdings and a $250,000 Aston Martin automobile.

The courts are likely to attribute corporate income to a shareholder under s. 18 of the Child Support Guidelines where such profits are not necessary for the sustenance of the corporation.

Concluding that the opinion of the wife's valuator "better explains the parties' lifestyle", the court found the husband's income to be $1,000,000.

***H.* (*P*) v. *H.* (*P.*) (2008), 49 R.F.L. (6th) 233 (N.B.C.A.)**

The family law legislation across Canada is not uniform. Some provinces, unlike Ontario, still classify assets as "family" assets and other assets as "commercial" or non-family assets. The approach to their division may allow for an apportionment other than equality based on "fairness" or "equity" as opposed to Ontario's standard of "unconscionability". Ontario's legislation fixes, for almost all purposes, other than death, the valuation date as being the date of separation. In other provinces, the valuation date may be the date of trial.

In New Brunswick, the valuation date for non-marital assets will normally be the date of separation.

This case arose in New Brunswick. The *New Brunswick Marital Property Act* distinguishes between marital and non-marital assets.

In separation, in 2000, the husband's business interests were valued at close to $1,000,000. At trial, they had a value of $350,000. The trial judge awarded the wife a 20% share in the non-marital assets but valued all of the marital and non-marital assets as of the trial.

The wife appealed. She did not quarrel with the 20% apportionment of the non-marital assets but argued that the valuation date, in the circumstances of the case, required a trial-date valuation.

In the circumstances of the case, and applying the customary law of New Brunswick, the Court of Appeal held that the valuation date of the non-marital assets should normally be the date of separation. This prevents the intentional wasting of assets post separation or permits the owner to reap the benefits of his or her post-separation business acumen.

Here, the former consideration applied. After the separation, the husband "unequivocally", in the words of the court, wasted the marital assets following the separation. He caused one of his companies to loan another company, then insolvent, $250,000. He disposed of corporate assets below fair market value. He provided trucking and construction services through his paving company to his girlfriend and others without compensation. He failed to account for $150,000 in insurance proceeds following the destruction of a watercraft in an accident. Finally, he appeared to expense or lost business opportunities due to his long winter vacations in Florida.

***Hannah* v. *Warner* (2008), 163 A.C.W.S. (3d) 607 (Sask. Q.B.)**

The parties had been involved in bitter and acrimonious litigation since 2000. In 2002, they settled certain property and spousal support issues whereby the husband was to transfer $250,000 in RRSP funds to the wife, pay lump sum support of $150,000 in 60 equal monthly instalments of $2,500 each and pay $250,000 in 5 annual instalments of $50,000. In the event of default of the monthly or annual instalments, the entire unpaid balance would fall due. Child support was litigated and the husband was ordered to pay based on an income of $156,000.

The husband appealed the child support award and the Saskatchewan Court of Appeal, in 2005, ordered a new hearing of the 2002 child support award. Also, in 2005, the husband applied to vary the 2002 child support award, *in futuro*, based on changes to his financial circumstances. Meanwhile, in 2003, the husband defaulted on the instalment payments. A court quantified his accelerated obligation of $353,000 and gave the wife personal judgment against the husband for that amount.

In 2008, the court made its decision on 3 matters before it.

a) What a proper quantum for child support, in 2002, should be (pursuant to the Court of Appeal's decision);

b) What amount of child support should be payable from 2005 forward (pursuant to the husband's variation application); and

c) Whether the wife could enforce the personal judgment against her husband for the $353,000 against the corporations that he controlled.

The court noted that the husband was the sole controlling will of the three companies that he owned or controlled. His second wife held non-voting special or preferred shares in the company.

In dealing with the 2002 income of the husband, the court noted that for any years prior to 2002 the practice of the husband was that he would have a fixed salary of around $60,000 per annum. If there were corporate profits, bonuses would be declared. The bonuses would repay shareholder advances and any balance would be loaned back to the company. The repaid shareholder advances covered personal and living expenses initially paid for with corporate funds but charged back, ultimately, to the husband. The combination of salary and shareholder advances amounted to about $150,000 in 2000 and 2001.

Semble, where a shareholder routinely finances his or her lifestyle with withdrawals from the shareholder's account, the court may impute such withdrawals to be income.

However, the husband's shareholder's account, by 2002, was overdrawn by $460,000. Thus, he argued, the addition of the shareholder advances to his income was unfair.

Meanwhile, the husband had inherited shares from his father. Their value was approximately $400,000. He sold those shares to his second wife who secured

the purchase price by a loan from a credit union, guaranteed by the husband. The husband used the funds to retire his overdrawn shareholder's account.

In 2002, the husband's second wife bought a building for $250,000. The purchase price was secured by a credit union loan. About $625,000 was used to renovate the building, again secured by credit union financing. She nominally sold the building to one of the husband's companies for $1.15 million. The company, in turn, sold it for $1.6 million in a long term agreement of purchase and sale. By trial, the company, due to the long term agreement of purchase and sale, still owed the credit union $650,000. In 2004, when the company renewed its credit lines with the credit union, there were new covenants in the financing agreement – first, that shareholder's equity not fall below $1 million and that no controlling principal take remuneration from the company that exceeded $60,000 per annum.

Where "salary caps" or other covenants in a corporation's credit facilities are overlooked by both the shareholder and the creditor, the court may also overlook such covenants.

With respect to the 2005 application to vary, the court noted the "remuneration cap" was in place. Moreover, the court noted that the husband's second wife was drawing a $46,000 dividend from the corporation to cover her loans which, in the court's opinion, were solely for his benefit. Thus money was, in the court's opinion, being removed to service which is, in substance, his loan. Thus, it could impute that income to him. Finally, the court noted that in 2005, the husband exceeded the $60,000 "remuneration cap" and concluded that the credit union would not likely hold him to it.

Where dividends from a company are the primary or major source of income of the shareholder, the application of s. 5 of Schedule III of the Child Support Guidelines may be disregarded. The courts may "gross up" the dividend income to equate it to employment income.

Finally, in dealing with the $46,000 dividend, the court refused to apply s. 5 of Schedule III of the Child Support Guidelines (which directs the court to "gross down" dividend income from tax reporting amounts to actual amounts). Rather, the court held that where a very large proportion of income is received in dividends from a company controlled by the shareholding spouse, such dividends may be "grossed up" and s. 19(1)(h) to equate them to ordinary or salary income. The court "grossed up" the dividend by 25% to $57,000.

In the end, the court found that the husband's application to vary support should be dismissed.

The court then turned its attention to the wife's motion to enforce the prior $353,000 judgment (and, presumably the large child support arrears).The court noted that the several judgments of the Ontario Court of Appeal had pierced the corporate veil. In this case the court was satisfied that the husband exercised complete control over the companies. The court noted the difficulties inherent in seizure of shares held in privately-held companies. Finally, the court noted that the husband was using the corporations' separate legal identity to shield his "misconduct" in unjustly depriving the wife of the benefits of her judgment. Thus, the court permitted the order to be enforceable and secured against the corporations.

(*B.J.*) v. *A.* (*W.A.*). July 4, 2008. Holmes, J. (B.C.S.C.)
The parties married in 1991. That same year, the husband's mother sold her shares in the family business, a company which sold psychological and vocational testing materials, to them. The wife worked part-time in the business for 2-3 days weekly. The husband worked in the business except for a period of several months while he gained control of a gambling problem. During this time the wife "excluded" him from the business.

The parties equally owned a holding company which owned and rented out space. Their operating company was one of the tenants. While the action was pending, their jointly-owned matrimonial home was sold realizing $350,000 net proceeds of sale.

At issue was the value of the two companies. A business valuator testified on behalf of the wife.

He concluded that the operating company had a value of $180,000. He based his valuation on the company's earnings history, adjusting rental expense and management salaries to fair market values. He concluded that the company had a goodwill value of $50,000. The husband argued that the valuator overvalued the company, failing to take into account a steady and severe decline in the company's business. Noting that the valuator had relied on "detailed information given to him by the parties and others with knowledge about the company's operations and earnings history" the court rejected the husband's argument.

The court reduced the value to $155,000 however, as the valuator had mistakenly believed that the wife played no role in the business. Thus, a wage expense should be deducted from earnings. Secondly, the company had "cash on hand of $42,000. To purify the company for capital gains exception, this cash would nominally be paid out at a 30% rate. Thus, a $14,000 reduction in value was warranted.

In closely-held family corporations, the court will not apply a substantial minority discount.

With respect to the holding company, the court found that its net value was $145,000 based on the value of its assets and liabilities, less a discount for foregone capital cost deductibility. The court concluded that the proper approach to value was a share sale. The husband argued that a "minority discount" should apply. The court rejected the argument. The court held that such discounts do not normally apply in family situations where co-owners are presumed to act in their joint business interests. Historically, the parties had dealt fairly with each other. The fact that the wife had "excluded" him from the business, while he dealt with his gambling addiction was a step ultimately taken in his own interest as well as those of the family.

In the end, after payment of debt, and a small adjustment, in favour of the husband from the proceeds of sale, the court ordered that the wife receive most of the cash and transfer her interests in the companies to the husband.