THE VALUATION LAW REVIEW

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Family Law Decision

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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Page 3
Shannon v. Shannon
- The court stated its reasons for preferring a “going concern” rather than a “liquidation” approach.
- The appeal court dealt with the duty of a trial judge to give reasons for his or her decision.

Page 4
G. (R.E.) v. G. (T.W.J.)
- The definition of “benefit” under s. 18 of the *Federal Child Support Guidelines*.
- Salaries and benefits received by persons who do not deal with a corporation at arm’s length. s. 18(2).
- Treatment of principal payments and s. 18 of the *Federal Child Support Guidelines*.
- Income over $150,000. Factors governing the court’s discretion.
- Agreement calling for future review. Review date chosen as date the retroactive award commences.

Page 8
Golletz v. Nieradka
- CRA reassessment issued after valuation date for period before valuation date.
- Spouses intentionally established corporate structure – party cannot later say that corporate structure was a mere “sham”.
- Capital loss carry-forward is “property”.

Page 9
Cooke v. Cooke
- Franchisor had right to determine sale price of sale of franchise. Whether spouses bound in an interspousal transaction.
- Income attribution. evidence of prior practice before separation.
- “Double dipping” and compensatory support.

Page 11
Flieger v. Adams
- “Double dipping” and the rule in *Boston* v. *Boston*.
- Burden of proof in “double dipping” cases.
- “Double dipping” and the *Spousal Support Advisory Guidelines*.

Page 12
B. (P.M.) v. B. (M.L.)
- Corporate losses and personal income.
- “Double dipping” and income streams or capital.

Page 13
Vincent v. Vincent
- Disclosure in retroactive support cases.
- Disclosure required by shareholding spouse.
- Steps in income determination.
- Treatment of income not personally declared by shareholder but expensed by corporation.
- Attribution of corporate income.
- Shareholding by payor’s new spouse. No evidence as to how her shares were acquired.
- Wages paid to spouse.
- Proceeds of sale of corporate assets. Inclusion into corporate income and attribution under s. 18 of the Federal Child Support Guidelines.
- Capital dividends whether “income” of shareholder.
- Tax exempt income and imputing income.
- Retroactive support and s.18 attribution, hindsight evidence.

Page 15
Dunham v. Dunham
- “Book of business”. Income or capital.
- Definition of “property” in Ontario’s *Family Law Act*.

Page 17
Richards v. Richards
- Hardball tactics and deadlock between spouses over corporate issues.
- Child and spousal support contrasted.

Page 19
MacDonald v. Pink
- Imputing income in underemployment cases.
- Whether s. 7 expenses are “reasonable” and “necessary”.
- Meaning of “extraordinary” s. 7 expenses.

Page 22
Laurian v. Clarke
- Annuity payments. Distinction between income and capital.

Page 24
Firestone v. Pfaff
- Equalization payment. Advances before final determination.

Page 25

M. (E.M.) v. M. (J.I.)

- Spouse holds minority interest in corporation.
- Attribution of income under s. 18 of Federal Child Support Guidelines.

Page 25

Q. (G.V.) v. Q. (M.L.)

- Duty to disclose.
- Salary paid to spouse. Need to prove "reasonableness": Nature of evidence required.
- Court dismisses evidentiary value of critique report.

Page 27

Cherneski v. Rathwell

- Child support. consent orders. Changed circumstances.

Page 28

O. (S.W.) v. O. (R.C.)

- Undisclosed income and tales people tell.
- Timeliness of expert's reports.

Page 29

Naylor v. Naylor

- Child support. When does it end?

Page 31

Lightle v. Kotar

- Book of business. Not a "family asset" in British Columbia.
- Valuation. Pending litigation.

Page 32

Portelance v. Young

- Averaging or income in year of receipt in retroactive support claims.
- Retroactivity and commencement date of retroactive award.
- Part-time students.
- Child support. Children ceasing to be minors.

Page 34

Keeling v. Darrigo

- Piercing the corporate veil.
- Corporations and trusts used to frustrate collection of support arrears.

THE VALUATION LAW REVIEW — FAMILY LAW EDITION

By Terry Hainsworth

***Shannon* v. *Shannon*, 2011. BCCA 397 (B.C.C.A.)**
The wife appealed the decision of the trial judge who valued the family business at $500,000. She alleged that the trial judge failed to give adequate or sufficient reasons for how he arrived at his valuation of the asset.

The business in question was a B.C. hardwood sawmill. It was corporately-owned by the husband. He and three of their children of the marriage were employed in the business. The company owned the land from which it operated and most of its equipment. At the time of trial, the hardwood lumber industry was in a very depressed state. However, in the two years preceding the separation, the husband had made large capital investments in the company of $200,000 and $167,000 respectively.

The trial judge observed that "...[the company] has maintained its position in hard times due to the acumen of its principal, his investments and the support of the family's combined talents and hard work...[He] has created a niche in the hardwood business market and has been able to sustain it through a difficult period".

Each spouse retained a business valuator. The husband's valuator provided an "Estimate Valuation Report". The wife's valuator provided a "limited critique" report. The critique report was not an independent valuation of the shares. Rather, it challenged the approach employed by the husband's valuator and a number of the assumptions.

The underlying assets of the corporation were appraised. The real estate had a value of $773,000. The equipment had a liquidation value of $154,000, but a going-concern value of $505,000 according to the conflicting values of the appraisers hired by each party.

The husband's valuator used a liquidation approach, assuming a sale of the realty, equipment, and inventory. He concluded that this would notionally generate $744,000 in proceeds which, after tax and disposition costs, would leave $390,000. He relied on the fact that the industry was depressed, there were few, if any, buyers of the business and the company had lost money in 2 of its past 5 years.

The wife's valuator said a "going concern" approach was more appropriate. He pointed to the following factors:

1. The company's prospects were improving, despite prior losses;
2. A purchaser would look forward rather than backward;
3. The 2009 profit margin showed an increase;
4. The husband invested capital in 2007 and 2008 demonstrating an intention to continue operations; and
5. The land could be retained and leased (rather than sold).

Based on his approach, the wife's valuator concluded that the equipment should be appraised at "fair" value and the inventory valued at market (as opposed to liquidation).

Virtually all of the tax and disposition costs would be avoided. He suggested that this approach could result in a value as high as $862,000.

The trial judge specifically concluded that the business would not, on the facts, be sold. However, he specifically held that its “going concern” value was “limited to the Shannon family”, and not the marketplace in general.

a) The duty of a judge to give reasons:

1. A judge has a duty to give adequate or sufficient reasons for his or her decision. A failure to do so is an error of law.
2. The function of reasons for judgement is to explain what the trial judge decided and *why* he or she reached that decision:
   i) the “what” is the decision, itself; and
   ii) the “why” is the basis for the decision.
3. The reasons for the duty:
   i) to justify and explain the result;
   ii) to tell the losing party why he or she lost;
   iii) to provide the losing party with informed consideration of any potential grounds for appeal; and
   iv) to satisfy the public that justice was done.
4. What is “sufficient”? Reasons will be sufficient if they are responsive to the case’s live issues and the parties’ key arguments.
5. There is no “free standing” right of appeal on the adequacy or sufficiency of a judge’s reasons:
   i) the judge need not recite or survey all the evidence. The test is whether there is “reasoned belief that the judge forgot, ignored or misconceived the evidence in such a way that it affected his or her conclusion”; and
   ii) even if the reasons are inadequate, if the basis for the decision is obvious on the face of the record, appellate intervention is unwarranted.

b) The result

The trial judge’s reasons were adequate. Faced with a potential range of values for the shares, calculated by two different approaches, he made a decision. It was clear that he started from the husband’s valuator’s opinion as it was the only opinion provided. Thereafter, he preferred the critical analysis of the wife’s valuator that the evidence indicated that the business would not be sold and the proper approach would be as a going concern. At the same time, he accepted the unique features of this business but tempered it with the uncertainties that clouded the overall industry.

Thus, the reasons were sufficient and adequate within the overall context of the evidentiary record.

The appeal was dismissed.

G. *(R.E.)* v. G. (*T.W.J.*) (2012) 6 R.F.L. (7th) 400 (Sask. Q.B.)

The parties married in 1998. They had 3 children.

They separated in 2006, and entered into a separation agreement in 2007. It provided for a renegotiation of child support commencing in 2008, the original child support being established at $2,580 monthly based on the husband’s income of $150,000.

The husband owned all of the shares of GF Inc. It stored and transported petroleum products (largely to service stations and construction companies). GF Inc. owned all of the shares of TRP Inc. which bought and sold petroleum products. He also had a 50% interest in a numbered company with another investor. The numbered company owned the building that the companies used as their head offices.

The husband formed a common law relationship in 2008. In 2009 the company paid his co-vivante a salary of $78,000 (for 6 months employment). In 2010, she was paid $110,000. Otherwise, she was a student and also worked one or two nights a week as a waitress. The evidence was that she worked 5 to 10 hours weekly for the company doing clerical work or running errands. She drove a company vehicle.

The husband's line 150 income was:

2007	$415,000
2008	$320,000
2009	$215,000

The net profits of GF and TRP stated to be:

2007	$434,000
2008	$595,000
2009	$565,000

The court found that the companies purchased two vehicles for the husband's use – a BMW in 2008 for $85,000 and a Denali in 2009 for $33,000.

The wife called a Chartered Accountant to testify as to whether the companies had "discretionary" corporate pre-tax profits to fund support pursuant to s. 18 of the *Federal Child Support Guidelines.* The accountant assumed that all of the corporate expenses were proper and that all salaries were earned at fair market rates. His testimony was that after debt servicing and asset acquisitions, there was very little "discretionary" income in the active corporations. He concluded that there was $22,000 and $16,000 of "discretionary" income in the numbered company for 2008 and 2009 respectively. The husband's half would be $11,000 and $8,000 for those years.

The husband testified that the businesses needed to retain their profits for a number of reasons:

a) The business was very cyclical;

b) He needed cash reserves to purchase product as he had to grant credit terms to customers that exceeded the terms of the supplier;

c) He had working capital ratios and covenants with his bank that restricted him;

d) He had to finance the large debt obligations;

e) He had to finance inventories as they were penalized if they took too much or too little product in a given month;

f) He had to replace his trucks and equipment; and

g) He needed cash to expand.

He also testified that he could not remove the profits from the numbered company because his co-shareholder insisted that the mortgage on the building was to be paid down from any profits.

The court rejected not only the husband's position, but also the position of the accountant. It "added back" into corporate profits a portion of the co-vivant's wages and a portion of the cost of acquiring the BMW and the Denali. It then attributed all of the corporate profits to the husband, concluding that his s. 18 income was:

2007	$810,000
2008	$863,000
2009	$734,000

a) Attribution of corporate profits under s. 18(1)

1. S. 18 applies to any corporation in which a spouse is a shareholder, director or officer;
2. It can cover a wide range of corporate structures from small, closely-held corporations to public companies;
3. Attribution of corporate profits does not require any finding of wrongdoing or blameworthy conduct;
4. The test is one of "fairness"; and
5. The test will require the court to review the structure of the corporation and its operations.

b) "Benefits" and s. 18(2)

1. S. 18(2) requires that "benefits" paid to or on behalf of persons with whom the corporation does not deal at arm's length be added back into the pre-tax profit, unless the spouse establishes that they were reasonable in the circumstances;
2. "Arm's length" is not defined in the *Guidelines*. Section 1(2) of the *Guidelines* provides, however, that expressions employed in ss. 15-21 should have the meaning assigned to them in the *Income Tax Act*;
3. S. 251(1) and (2) of the *Income Tax Act* catch the husband as he controls the two operating companies and his co-vivante (by definition).

c) The automobiles were "benefits"

The court concluded that the BMW and the Denali were purchased for the use of the husband. About 1/3 of their use was for business. The court added 2/3rd of the purchase price to the corporate profits in the year of acquisition.

> *[Ed. Note: the benefit was a benefit to the husband. A more appropriate proxy for the value of the benefit might be a "standby charge".]*

d) The co-vivante's salary was not "reasonable"

The $78,000 salary in 2009 was unreasonable. The court revised it to $10.50 hourly or $7,980 for her services in that year. $70,020 was added back to the corporate profits in 2009.

e) All corporate income was attributed

The court rejected the "discretionary income" analysis as it included principal payments. In essence, the court noted that the "discretionary income" approach allowed the "exemption" of payments not available to proprietors operating similar businesses. A sole proprietor has no ability to "exempt" income to pay down debt or expand his or her asset base.

"Fairness" and the objectives of the *Guidelines* require the assessment of income apart from the corporate structure.

The attribution of income does not "strip" the corporation of any of its income. It does not require the corporation to pay any of its income out. It is, rather, only the "fair measure" of the shareholder's income for support purposes.

The corporation has a full range of deductions in computing its income. Interest can be expensed. Asset acquisition is accounted for in capital cost allowance.

Bad debts can be written off.

Finally, the husband should not be permitted to expand his business and thereby increase his net worth at the expense of the children.

f) Income over $150,000

Because the husband's annual income exceeded $150,000, the court had a discretion to order an amount different from the table amount in respect of the excess amount by virtue of s. 4 of the *Guidelines*.

The court reviewed the principles that governed the discretion as enunciated in the Supreme Court of Canada decision in *Francis* v. *Baker* [1999] 3 S.C.R.:

(i) In enacting s. 3 of the *Guidelines*, Parliament intended that there would be a presumption in favour of the Table amount of child support;

(ii) Table support will apply on the first $150,000 of income;

(iii) The Table amount of child support over and above $150,000 can be increased or decreased under s. 4 of the *Guidelines* if the party seeking such a deviation rebuts the presumption that the Table amount is "appropriate";

(iv) "Inappropriate" in the context of s. 4 of the *Guidelines* means "unsuitable";

(v) There must be clear and convincing evidence for departing from the Table amount;

(vi) The relevant factors with respect to determining the appropriate Table support are specified in s. 4(b)(ii), *i.e.* the condition, needs, means and other circumstances of the children and the financial abilities of both spouses to contribute to the support of the children;

(vii) The child support payments may result in a transfer of "wealth" to the children that indirectly benefits a non-paying parent, the objectives of child support must be kept in mind. The *Guidelines* have not displaced the *Divorce Act* which has as its objective the maintenance of children rather than the equalization of household incomes or spousal support;

(viii) A proper construction of s. 4 of the *Guidelines* requires that the objectives of predictability, consistency and efficiency on the one hand be balanced with those of fairness, flexibility and recognition of the actual condition, needs, means and other circumstance of the children on the other hand; and

(ix) The closer the paying parent's income is to the $150,000 threshold the more likely it is that the Table amount of child support will be awarded.

The court analyzed the wife's budget (no separate children's budget having been filed). It concluded that a table-based award of $12,751 monthly was excessive.

The court awarded $7,000 monthly which covered their current needs "plus some additional monies to improve their standard of living".

g) Retroactivity
The parties had agreed to review child support in 2008. Thus, the award was retroactive. Arrears for 2008-11 were fixed at $131,000.

***Golletz* v. *Nieradka* (2012), 8 R.F.L. (7th) 248 (Man. Q.B.)**
Manitoba's *Family Property Act* is an "equalization" statute. By s. 13, separated spouses and common law partners may apply to have an accounting and equalization of assets. The accounting is frequently conducted in a court hearing before a court officer known as a "Master". The Master prepares a report which must be confirmed by a Justice of the Court.

The Master found that:

1. The wife was the owner of an operating company and, consequently, added its value to her inventory of assets; and
2. The husband could deduct a CRA reassessment that was issued after the valuation date.

The wife contested both findings. In addition she challenged:

1. Whether there should be an unequal division of the sale proceeds of the matrimonial home;
2. Whether a capital loss carry-forward of the husband should be accounted for in his inventory of assets;
3. The treatment of capital gains exemptions; and
4. The failure of the Master to value a holding company.

a) The Operating Company
The husband, together with his brother, started his career in his father's company. On the advice of their accountants, the business was incorporated. The brothers managed the businesses receiving salaries while their respective wives became the shareholders/owners. The Master concluded that the corporate structure was intentionally established, amongst other reasons, to minimize income taxes. Over the years, through their personal and corporate returns, they represented to Canada Revenue Agency that the husbands were employees and the wives were the owner/shareholders. Thus, the wife could not now argue that the structure was a mere "sham", in light of those representations.

Moreover, after the separation, she had exercised her power as the shareholder/owner. She removed the husband as an officer and employee, terminated his salary, and wound up the company.

b) The CRA Reassessment
Three years after the separation, the husband was reassessed by CRA. This resulted in his becoming liable for $173,000 in taxes, liabilities, interest and penalties. The breakdown was a tax liability of $72,000 unpaid taxes, with the balance being interest and penalties. The Master included the *entire* liability in the husband's accounting.

The Master was correct in including the liability for unpaid taxes. Even though the Notices of Reassessment post-dated the valuation date, contingent, inchoate, or unvested assets must be included as assets in the owner/spouse's inventory. The principle of fairness dictates that liabilities be dealt with in the same fashion. Thus, a "contingent debt" will be included in the ultimate accounting.

Moreover, the Master was correct in allowing the *entire* debt — inclusive of post separation interest and penalties. When the reassessment occurs, such additional liabilities are a *fait accompli.* Thus, the husband was powerless to reduce the interest and penalty figures. Put another way, the moment the husband knew of the newly assessed tax liability, the penalties and interest had already accrued.

c) The capital/loss carry-forward
The court concluded that it was a contingent asset with a contingent value. As it could only be applied against subsequent capital gains post-separation, its value would be difficult to determine.

By the time of the confirmation hearing, seven years had elapsed from the date of separation. No evidence was led indicating that he had ever taken advantage of the loss carry-forward and no evidence had been led as to its "contingent value".

It was valued at $0.00.

d) Capital gains exemptions
The parties had sold shares in a business. The husband escaped tax because he could apply his capital gains exemption to his share of the proceeds. The wife could not, and paid taxes on her gain.

She was entitled to deduct the tax payable. The matter was remitted to the Master to determine the value of the liability.

e) The unequal division of the sale proceeds of the matrimonial home

The parties had instructed the lawyers to pay the wife approximately $4,000 more as her share of the proceeds of sale of the matrimonial home. The husband argued that this amount should be included in the wife's inventory.

The court disagreed. It was clear that the parties had resolved this single issue outside of the general inventory of assets. Thus the overpayment was not included in the wife's inventory.

f) The value of the holding company
The husband and his brother speculated in real estate through the holding company. Its shares were owned by their wives.

After the separation, certain properties were sold and the proceeds split four ways. Certain properties were still held in the holding company.

As the wife was a 50% owner of the company (with her sister-in-law), their value was to be included in the wife's inventory *[Ed note: under the legislation, the valuation date is the date that the spouses agree upon or, in default of agreement, the date of separation]*.

***Cooke* v. *Cooke*, 2011 BCCA 444**
The parties separated in 2005. They equally owned two Tim Hortons franchises — one in Richmond and one in Tsawwassen. Although it was their intention that the husband would acquire one of the franchises and the wife the other, for the first two years of their separation, the husband ran both. The trial judge found that in so doing, the wife was disadvantaged as her transition to a sole owner/manager was impaired. In essence, the trial judge ordered the husband to pay both retroactive and prospective spousal support for the period from 2008 to 2012.

The parties had hired a business valuator to value the franchises. He used a multiple of approximately four times discretionary cash flow. On that basis, he valued the Richmond operation at $850,000 and Tsawwassen at $295,000. He was unaware of a term in the franchise agreement that empowered the franchisor to set the sale price of a franchise. In fact, Tim Hortons did just that — imposing a value of $440,000 for the Richmond operation and $285,000 for Tsawwassen. In due course the wife took over the Tsawwassen operation and the husband took over Richmond.

In reapportioning the assets, the trial judge noted that the husband was acquiring an asset worth $850,000 and the wife an asset worth $285,000. Concluding that the Tim Horton's imposed valuation was unfair, the trial judge awarded 100% of the value of the family home to the wife. This achieved a rough equality of value.

Although the husband's T-4 showed an income from his employment at the coffee shops of $86,000, the court concluded that the discretionary cash flow or pre-tax corporate profits would otherwise be close to $300,000. The trial judge fixed the husband's income at $250,000, employing s. 18 of the *Child Support Guidelines*.

a) The asset valuations

The trial judge properly valued the businesses. The parties themselves, had agreed that the businesses were not to be sold to third parties. Thus, the imposed "sale price" fixed by Tim Horton's was both unfair and inappropriate. By allocating all of the value of the home to the wife, equality was achieved.

b) Income attribution

The trial judge appropriately determined the husband's income to be $250,000 despite the fact that he only drew $86,000 employment income.

The evidence indicated that from 2005 to 2007, the parties drew approximately $250,000 per year from the businesses. Thus, there was evidence that the business could sustain such removal of its profits.

In not attributing the entire profits to the husband, the company would still be growing its balance sheet creating a reserve for anticipated demands on its profits — in this case a renovation that could cost between $250,000 to $325,000.

c) Spousal support

The concept of "double dipping" is not confined to pensions. If businesses are divided as assets, the business income should not be counted again for the purposes of spousal support.

However, in this case, there was not a true "double dip" as the wife was awarded compensatory support. Compensatory support is awarded to redress the economic disadvantage that a spouse suffers from a marriage or its breakdown.

As the husband had run both businesses in the two years following the marriage breakdown, the wife's transition to financial independence was impaired. Thus, the support award did not duplicate the asset division which was premised on both businesses carrying on as going concerns.

d) Child support

The husband calculated his time with the children as being 41.5%. Thus, he felt that the trial judge erred in assessing a full table-based amount for child support.

The Court of Appeal noted that the trial judge had specifically directed her mind to s. 9 of the *Guidelines* as she had stated that "there is a tendency for [the husband] to count the time that the children are with him with exact precision in order to demonstrate that he has the children more than 40% of the time...".

The Court of Appeal concluded that s. 9 is not simply an accounting exercise. The trial judge considered the economic needs of the children and the dynamics of the family relationship in a lengthy trial that probed the financial and non-financial circumstances.

Thus, there was no reason to disturb the exercise of discretion by the trial judge.

Flieger v. _Adams_, 2012 NBCA 39

The parties separated in 2005 after 35 years of marriage. In 2006, they entered into a consent order that divided their property and debts and provided for spousal support. In 2008, they divorced. The husband agreed, in the divorce order, to pay $1,750.00 monthly spousal support. At that time, he was earning $53,000 annually. The wife was not employed.

In 2010, the husband retired, and his income was cut in half.

He applied to the court to reduce support.

The court ordered him to continue to pay $405.00 bi-weekly. It was common ground that:

a) The ongoing amount was clearly "double dipping" (the spousal support was being paid, in whole or in part from pension assets already divided); and
b) The amount exceeded the Spousal Support Advisory Guidelines (by approximately $118 monthly).

The husband appealed.

a) The "Boston" rule

The rule in Boston v. Boston creates a presumption against double recovery. It occurs where a pension is divided as capital and later, the income stream produced therefrom is included as income in the calculation of spousal support.

b) Burden of proof

The burden rests on the party claiming double recovery to prove the specifics of the pension division and to demonstrate what portion of the divided pension forms part of the payor's income.

Once shown, the burden shifts to the recipient to demonstrate why an exception should apply.

c) Exceptions and judicial discretion

The rule against double recovery is not mandatory. The court has a discretion to permit double recovery. Usually, the following factors are necessary:

1. Proof that the payor has a continuing ability to pay;
2. Proof that the recipient has made a reasonable effort to use equalized assets in an income-producing way;
3. Proof that hardship from the marriage or its breakdown still persists (ie. foregone opportunities or duration); and/or
4. Continuing need for support.

d) The decision on double recovery
The husband showed that some portion of his pension had been divided (he had "bought" about 3 years of credited service and worked 5 years after separation). Thus, there would be some double recovery and some portion of the pension that was not divided.

However, it was clear that the objectives of s. 17 of the Divorce Act could only be met by "double dipping".

e) The Spousal Support Advisory Guidelines
Normally, the "double dipping" issue should be addressed by movement within the Guideline ranges. Here the judge was justified in awarding an amount beyond the high end of the range because:

1. The husband could increase his income by applying for Canada Pension Plan benefits; and
2. He had re-partnered and could share expenses.

***B. (P.M.)* v. *B. (M.L.)* 2012 NBCA 11**
The parties separated in March of 2001. They had been married for almost 20 years. There were two children. Shortly after their separation, the husband's employment was terminated and he received severance benefits that amounted to $338,000. Those benefits were paid, apparently, over the course of a year. It also appears that he paid some of those severance benefits into an RRSP, probably as a "retiring allowance".

He set up his own business. The business was, apparently, profitable in 2003 and 2004. It was unprofitable in 2005, 2006 and 2007. Because of this, he cashed out in each of those three years, RRSP funds.

In an application to vary, the trial judge added the corporate profits to the husband's income in determining his income for 2004. The trial judge, however, declined to reduce the husband's income by the corporate losses of 2005, 2006 and 2007. The trial judge also declined to take into income the husband's RRSP withdrawals for 2005, 2006 and 2007.

1. Corporate losses
There is considerable jurisprudence which supports the notion that the corporate veil may be pierced for the purposes of determining marital property and support issues. Thus, income left within a corporation can be attributed to the shareholding spouse. Thus, it was appropriate for the motions court judge to attribute the corporate profits to the husband.

The motions judge was also correct in not attributing the corporate losses to the husband. There was no evidence that the husband used his personal resources to maintain the corporation's liquidity in the hope of restoring it to profitability to meet his spousal and child support obligations. In the absence of such evidence, the New Brunswick Court of Appeal considered that there was no error on the part of the motions judge.

2. The RRSP withdrawals
The husband and wife had divided the RRSPs (although not necessarily equally) at the time of the divorce. Thus, to include them later in income would be "double recovery" or "double counting". He simply cashed in the capital that he retained in the marital property settlement.

In passing, the New Brunswick Court of Appeal distinguished the Supreme Court of Canada decision in *Boston* v. *Boston*, [2001] 2 S.C.R. 413. That case held that "double recovery" might be permitted where a pension is divided as capital and a dependent spouse seeks to access the income stream when the pension is in pay. In the case at hand, the New Brunswick Court of Appeal held that there was no income stream whatsoever. The capital had been divided and the wife was now trying to access the same capital a second time. On that basis, whether the division was equal or unequal was irrelevant.

Vincent v. _Vincent_, 2012 BCCA 186

The parties were married for 5 years and had one child. Following their separation, in 1999, they entered into a consent child support order by which the father agreed to pay $311.00 monthly based on an income of $36,000.

In 2006, the mother requested disclosure based on certain observations she had made of the father — namely, the acquisition of a million dollar home, a vacation property, an expensive car and an airplane. The father made desultory disclosure which was slow and incomplete.

The father had various business interests which included developing commercial and residential real estate and a franchise real estate sales agency. During the period 2006 through 2010, his businesses prospered and suffered through the turbulent economic times. The court dealt with both those years *seriatim*.

a) Disclosure where a retroactive award is sought

If a claim is made for a retroactive award, the payor must normally disclose for each of the relevant years. Without such disclosure, the court cannot determine whether a retroactive award is merited.

b) Disclosure by a shareholding spouse

Where disclosure is required, the shareholding spouse must disclose:

1. A copy of each income tax return filed by that spouse for the 3 most recent taxation years;
2. A copy of each notice of assessment and reassessment for each of the 3 most recent taxation years;
3. If employed by the corporation, a cumulative paystub or an employer's letter setting out information of year to date earnings and rate of remuneration; and
4. If the spouse controls the corporation:
    i) the financial statements of the corporation and its subsidiaries for the 3 most recent taxation years; and
    ii) a statement showing the breakdown of salaries, wages, fees and benefits paid to or on behalf of persons or corporations with whom the corporation and every related corporation does not deal at arm's length.

c) The legislative scheme to determine income

The court set out the steps to be followed in an income determination:

1. Determine the line 150 income from the T-1 General;
2. Make any adjustments to income required by Schedule III;
3. Deal with income fluctuations or non-recurring income of losses under s. 17;

4. Consider the attribution of corporate income if the payor is a shareholder under s. 18; and
5. Consider the imputation of income under s. 19.

d) Income not personally declared but corporately expensed
In certain years, management fees were corporately expensed and dividends declared. They did not appear as income declared on the husband's personal tax returns.

The court held that the court would not include them as income in the s. 16 computation but would take them into account in the discretionary adjustments permitted by ss. 17-19.

Later, the court imputed the management fees and dividend income to the husband under s. 19(1)(f) — failure to disclose income information.

e) Attribution of corporate income

1. The father asserted that he and his new wife were equal owners of R. Ltd. He did not provide any evidence of how or when his new wife acquired her corporate interest or proof of an equity investment by her. The court treated all of the corporate income as the father's.
2. The onus is squarely on the shareholding spouse to establish evidence to convince the court that there are valid reasons for retaining the corporate earnings.
3. The corporate income is a "measuring rod" for child support purposes. The fact that it is a "measuring rod" does not mean that the profits are not available for investment purposes. It is available for *both* investment and child support.

f) Wages paid to spouse
The father provided no evidence that the wages paid to his new wife were necessary and reasonable. Thus, by s. 18(2) of the *Guidelines*, they were clawed back into the corporate profits.

g) Proceeds of sale of corporate capital assets
One of the companies controlled by the father sold its business premises at a large gain. The gain was deployed by paying off the father's shareholder's loan, redeeming certain shares, and by a dividend to the father. In the next taxation year, all of the funds received by the father were loaned by him back to the company. As a result, the father argued that the proceeds were merely a return of capital that he re-invested with a view to future income. Thus, he argued, they should not be included in income.

The court rejected his argument. The gain represented the increased value of the building that accrued over the years. As there was no evidence to indicate that the company required the "gain" for corporate purposes, it was properly attributable to the father under s. 18(1) of the *Guidelines*.

h) Capital dividends
The father argued that the capital dividend paid to him was not income, or alternatively, that it should be disregarded under s. 17 as a non-recurring income source.

The court rejected his argument. The capital dividend could be "imputed income" under s. 19(1)(h) of the *Guidelines*. The issue was not the purposes to which funds were put after their receipt (the father having re-invested them) but whether they were available for child support. The court concluded that in the year of the sale of the building, namely 2007, the company did not need the funds for reinvestment.

i) Proceeds of sale of principal residence
Even though the gain on the sale of one's principal residence is tax exempt, the gain can be characterized as tax exempt income and imputed as income under s. 19(1)(h). However, from a pragmatic point of view, one rarely keeps records of capital costs associated with a principal residence and, therefore, the calculation of the "gain" would be difficult. Moreover, the "gain" was invested in another home.

Thus, while the court considered that the gain on the sale of one's principal residence can theoretically, be imputed income, it refused to do so.

j) Retroactivity and business reversals
The court tended to apply the "hindsight evidence rule" to the year-by-year attribution of corporate income under s. 18 (i.e. was the corporate pre-tax profit available in that year). However, in assessing retroactive support, the court may exercise its discretion based on the four D.B.S. factors — delay, blameworthiness, benefit to the child, and hardship to the payor.

Applying those factors:

1. Delay: the mother gave notice in 2006 and the father failed to respond in a timely fashion. Delay was not a factor as he was, at all times, aware that the mother was seeking to review child support;
2. Blameworthiness: the tremendous increase in the husband's income — even if isolated to one year — was blameworthy;
3. The child's circumstances: the child was only 13 years of age. The retroactive award would afford her the opportunity to achieve her potential as a student and in respect of extra-curricular activities;
4. Hardship: Although the father had suffered severe business reversals due to the recession, there was no evidence of his capital base. Thus, he failed to demonstrate that a lump sum payment would create hardship.

k) Income over $150,000
In certain years, the father's income exceeded $150,000. Thus, the court had to consider s. 4 of the *Guidelines* in respect of those years.

The court concluded that the father had not rebutted the presumption of "appropriateness" in those years.

***Dunham* v. *Dunham*, 2012 ONSC 2338**
For a number of years before their marriage, and for a few years after their marriage, the wife worked as a financial adviser selling insurance products for Clarica. During their marriage, she left Clarica and she and her husband, who was an investment adviser, carried on business together in the financial services field.

As a result of the wife's employment with Clarica, she became eligible for Clarica's "commissions on release" program known as "CORe". Under Clarica's compensation scheme, an agent would receive commissions upon the sale of a policy but would also receive ongoing commissions from renewals and annual premiums on the policies that she had written. On termination, under the CORe program, Clarica capitalized her rights to future commissions and, under the terms of CORe, agreed to pay her out the capitalized amount in 120 equal monthly instalments spread over 10 years.

Clarica explained its CORe program in a brochure in the following terms:

- The program is to compensate agents for future commissions
- The CORe value for each contract is approximately 60% to 75% of the value of future commissions;
- When the agent retires or terminates, the total years of service will be a factor in the calculation which the agent should receive for his or her book of business;
- That the CORe is a commission from prior employment. Thus, income tax is paid on the amount received;
- The tax is paid over time as the payments are over time;
- The payments are not an asset. Therefore, they are not subject to creditor claims or part of the family assets in the event of marital breakup;
- CORe is not pension income. It is commission. Thus, it is not eligible for transfer into an annuity, an RRIF, or other registered products; and
- It is not eligible for the $1,000 pension income deduction.

Sun Life, a successor to Clarica, published an addendum to the CORe program which provided:

- The present value of CORe cannot be viewed as a lump sum or an asset; and
- Sun Life will not pay a lump sum.

The wife argued that her future payments (which were $4,000 monthly and which would continue for a further 6 years) were simply income. Thus, they would not be included in her net family property.

Her husband argued that the capitalized income stream was "property". Thus, the value of the wife's future post-separation payments would have to be added to the wife's net family property.

a) "Property" under the Family Law Act
The court noted that the definition of "property" contained in the *Family Law Act* is couched in exceedingly broad terms: *McLean* v. *McLean*, 2004 CanLII 34800.

b) "Property" and the objectives of the statute
In *Pallister* v. *Pallister* (1990), 29 R.F.L. (3d) 395, the court noted the broad definition of "property" within the *Act*. As a result, the court concluded that the confines would be found by a consideration of two criteria:

a) the scope of the legislation; and
b) the objects that the legislation seeks to accomplish.

If the definition of the right under consideration is consistent with the scheme of the legislation and advances its objects, then it should be property. If either of these attributes is absent, the right under consideration will not be property unless it has been previously legally recognized as property.

c) Property and Capability of Valuation
The court analyzed earlier cases in which certain categories of "property" fell outside the definition of "property" as defined by the *Act*. The court noted that professional licences and disability benefits had been singled out from the definition of "property". The court noted that both had a similar linkage or thread — the income stream

generated from the entitlement flowed from personal service to be provided (or not provided) in the future. Thus, the "property" was incapable of valuation. The value of the future personal services in connection with the licence (or the replacement of income due to the inability to provide personal services) would be unknown. The value would be of an entirely personal nature.

Here, the CORe program was formula-based. The future income stream was capable of precise valuation. Thus, despite the characteristics that it bore to "income", it was capable of valuation on a proprietary basis.

d) Income characteristics

The court noted that the payments had numerous income characteristics. The income stream was paid periodically and in fixed amounts. It was taxed at income rates. It represented an income stream that would otherwise be paid into the future based on commission income that would accrue due upon payment of the premium or renewal into the future. The payments would cease to be paid on the death of or the violation by the outgoing employee (such as a violation of non-competition provisions).

The fact that the income stream is payable through the medium of recurring income, rather than a single capitalized amount, is not fatal to the "property" characterization. The insurance policies were sold by the wife and, consequently, could be characterized as the "economic product" that had been created during the marriage. Thus, the future entitlements were accumulated during the period of the marriage.

e) Distinctions from other forms of property

The fact that the entitlement to CORe benefits were, by virtue of the contract, unassignable or incapable of being commuted to a lump sum and did not alter its characteristics as being "property". The "forced-assignment" characteristic — that all the policies remained the property of Clarica upon retirement simply distinguished it from a "book of business". Likewise, the fact that it was incapable of being "rolled into" registered investments simply distinguished it from a pension or an RRIF.

These features, however, merely distinguished the CORe entitlements from different forms of property. They did not cause the CORe entitlements to lose their characteristics as property under the two-pronged analysis of "property" under the statute.

f) Non-transferability

The non-transferability of an asset does not, in and of itself, preclude the asset from consideration as being "property" within the meaning of the *Act*. Pensions in pay, for example, are property. Rights under a non-competition agreement have been held to be property: *Clegg* v. *Clegg* (2000), 188 D.L.R. (4th) 365.

g) Third party characterizations

The characterization, in the Clarica material, that the CORe payments would not be "family assets" was not material to the court's determination.

On a simple jurisprudential level, it is for the courts to interpret legislation. On an evidentiary level, the author of the Clarica brochure who expressed the opinion was neither called as a witness nor qualified as an expert at the trial.

***Richards* v. *Richards*, 2012, NSCA 7**

The husband and wife were shareholders in a corporation. They each held preference shares. The common shares were held by a family trust. They were the sole directors of the corporation. The husband was its president.

The profits of the corporation would be paid into the family trust by way of a dividend on the common shares. The trust would then make distributions to the husband and wife.

Upon their separation, deadlock occurred. The husband wished to buy the wife out and settle the litigation. He made numerous offers which the motions court judge considered to be "reasonable". When the wife refused to accept any of the offers, the husband simply stopped drawing a salary. At the same time, dividends ceased to be paid into the family trust. The motions court described the husband as simply "turning off the tap".

Upon that happening, the wife applied for interim support. The motions judge denied her claim. He considered her to be the author of her own misfortune by refusing reasonable offers to settle the entire action. He held that as neither party had an income, her claim for interim support must be dismissed.

The parties had a shareholders' agreement. There was nothing in the shareholders' agreement that would preclude the husband from drawing a salary or charging consulting fees to the corporation. The shareholders' agreement required the unanimous consent of the board of directors before any dividends could be paid. The husband and wife were the only directors of the corporation.

The wife appealed the dismissal of her interim support claim to the Court of Appeal.

The Court of Appeal took a very different view of matters. They characterized the situation in the following terms:

a) The wife had no money because the husband changed the financial *status quo*;
b) The wife would have had money if she agreed to settle all issues — not just the issue of interim support; and
c) The husband had made offers that were no longer available at the time of hearing.

1. The test
At an interim hearing, the emphasis is on the means and needs of the parties rather than ultimate entitlement. The order ought to permit a reasonable standard of living for the dependent spouse relative to that of the contributing spouse. It ought to permit the preservation of matrimonial assets. It ought to preserve the *status quo* insofar as possible. It ought to encourage the dependent spouse to consider, in realistic terms, how best to manage her affairs to achieve economic self-sufficiency upon the final settlement. The interim order will not become the model for a final order.

2. The failure to accept offers
The wife had a clear need. Her failure to accept the husband's offers to settle the lawsuit did not relieve her need. Her need was not mitigated or diminished because the negotiations between the parties were unsuccessful. Thus, the motions judge erred in law.

Moreover, it is not appropriate for courts to determine the reasonableness of final offers on interim support hearings. The motions judge is not well-placed to decide whether offers are reasonable or not. In any event, reasonableness is better determined at the end of the day when the matter can be viewed globally and intransigent parties can be penalized in costs — not through support entitlement.

3. The husband's "means"
The court noted that the husband had the ability to pay himself a salary or consulting fees. Second, the wife had no objection to the payment of dividends. Therefore, the husband, by his own conduct, was limiting his "means".

In the circumstances, the Court of Appeal held that it could "impute" income to the husband pursuant to s. 15.2(4) of the *Divorce Act*. The court held that the word "means" is a very broad term and should be generously interpreted to give effect to the statutory purposes of spousal support. "Means" would include all of the financial resources, capital and income, as well as the earning capacity of the party to whom income is to be imputed.

The husband, in his capacity as the president of the corporation, controlled the company coffers. Thus, he could draw a salary as the company's pre-tax profits were available to him.

4. The order
In the preceding year, the parties had received distributions from the family trust of approximately $78,000 each. The court held that the husband was capable of drawing a salary of $157,000 from the corporation. As a consequence, the court held that the wife should be entitled to an amount equal to one-half of that amount. It ordered interim support of $6,000 monthly.

5. Spousal and child support
It was clear that the Court of Appeal attributed some of the corporate profits to the husband employing the methodology established by s. 18(1) of the *Federal Child Support Guidelines*. However, the court held that the imputation of income for spousal support may, in some circumstances, be different than the imputation of income for child support. This is because the purposes are quite different.

The underlying rationale for a child support order is that the children should be no worse off as a result of the marriage breakdown of their parents. In this respect, entitlement to support is automatic. The quantum is determined by the mathematical formulae established by the *Guidelines*. Each spouse is required to maintain their children in accordance with their relative abilities to do so. Thus, the court will be more ready to impute income in cases involving child support.

By contrast, spousal support is fashioned by the objectives of section 15.2(6) — the recognition of economic advantages and disadvantages; the apportionment of the financial consequences arising from the care of any child; the relief of any economic hardship arising from the marital breakdown; and the qualified promotion of economic self-sufficiency.

***MacDonald* v. *Pink*, 2011 NSSC 421**
In 2001, Mr. Pink was ordered to pay child support to Ms. MacDonald of $127.00 monthly. It was based on his income of approximately $15,000. The child was, at that time, a newborn.

He paid his support with regularity but otherwise absented himself from the child's life.

Eight years later, in 2009, Ms. MacDonald filed a variation application. In it, she sought retroactive and prospective support.

There were a number of adjournments which appeared to occur through misadventure regarding service, Mr. Pink's failure to file responding and disclosure material, and other matters. Some of the costs of these interlocutory proceedings were assessed against him.

Ultimately, the matter came on for hearing. Ms. MacDonald sought to impute income to him, both retroactively and prospectively.

By this time, Mr. Pink was an articling student-at-law.

Imputing income

The court reviewed the general principles with respect to imputing income:

a) the imputation of income under s. 19 of the *Guidelines* is discretionary;

b) the discretion cannot be exercised arbitrarily. Thus, a rational and solid evidentiary foundation must be shown which enables the court to impute income;

c) the goal of imputation is to arrive at a fair estimate of the party's income capacity. It is not to punish the prospective payor;

d) there is a shifting burden. In the first instance, the burden of establishing that income should be imputed rests on the party making the claim. If that burden is met, the onus then shifts to the payor to establish a reasonable excuse as to why he or she is not earning to capacity;

e) In determining whether income should be imputed, the court looks to the particular party's income earning capacity. The court will have regard to subjective factors such as the payor's age, health, education, skills, employment history, and other relevant factors;

f) a party's decision to remain in unremunerative employment may entitle the court to impute income if the party has a greater income earning capacity. In other words, one may not reduce his or her support obligation through a self-induced reduction in income; and

g) the payor's limited work experience or job skills is not a justification to fail or pursue employment that does not require significant skills. In other words, it is no excuse that the parent cannot obtain interesting or highly-paid employment.

Generally, in Nova Scotia and in most courts throughout Canada, the test to be applied in determining whether a party is under-employed or unemployed is one of "reasonableness". This does not require proof of a specific intention to undermine or avoid a child support obligation.

The application of the principles to the facts

The court followed a three-step process.

a) Step 1 — Is there underemployment?

The court found that Mr. Pink was underemployed. The court made the following findings of fact:

- he was articulate and intelligent;
- he had good problem-solving skills;
- he had substantial social and communication skills; and
- he had a wealth of job experiences including working in a call centre, in landscaping, teaching and in other labour intensive fields.

Hence, the court held that Mrs. MacDonald had proven the first step in the section 19 process. Thus, the onus shifted to Mr. Pink.

b) Step 2 — Reasonable education or health needs

- The court rejected Mr. Pink's "reasonable education needs" defence. The child support award of $127.00 monthly, was merely nominal. It hardly met the child's most basic needs;
- Mr. Pink absented himself from the child's life. Thus, by default, Ms. MacDonald bore all of the direct and indirect costs of child rearing;
- Mr. Pink was 23 years of age when the child was born. There was no evidence that he could not have taken his education on a part-time basis while concurrently earning an income to pay adequate child support;
- Mr. Pink knew that his income earning capacity would be diminished by attending school. He made no attempt at saving money to ensure that support would be paid during his hiatus from the labour force;

Thus, it was not reasonable for him to attend law school when he did and in the manner in which he did (as a full-time student).

c) Step 3 — Determination of income earning capacity
The court determined that he had an income earning capacity of $25,000 annually on a retrospective basis. Amongst other considerations, his income increased to $18,350 in the year in which the original support order was made.

The court determined that such an increase in income (23%) would likely track him through later years.

Section 7 expenses
The Court's analysis of section 7 expenses is not set out in full. The court did however, borrow substantially from the decision of the Nova Scotia Supreme Court in *T.* (*D.M.C.*) v. *S.* (*L.K.*), 2008 NSCA.

However, the court did notice that the case law was not consistent in its interpretation of "necessary" in the context of section 7(1) of the *Guidelines*. Some cases espouse a restrictive reading. Those cases equate "necessary" as being "something more than desirable", something that is "absolutely essential" or "needed in order to obtain the desired result".

The court, however, accepted a softer interpretation. It equated "necessary" with the concept of "things suitable or proper for the child's station in life bearing in mind his or her requirements at the time".

The court adopted a three-step analysis in its determination of "necessary".

Necessary and reasonableness
The court enumerated the s. 7 expenses which included dance, sewing and an uninsured podiatrist expense. The factors the court considered under the category of "necessary and reasonable" were as follows:

- the child was intelligent and creative. They fostered the child's talents and abilities;
- Mr. Pink took no activity in the child's life. Thus, the activities would fill the void; and
- Mr. Pink admitted on cross-examination that the activities were beneficial for the child.

Was the expense "extraordinary"?
The court could not apply the primary test found in s. 7.(1.1)(a) of the *Guidelines* as it was not provided with Ms. MacDonald's budget. Thus, it could not determine whether Ms. MacDonald could "reasonably cover the activity expenses". Left without that evidence, the court turned to the secondary test of clause (b).

The overall activity expenses amounted to less than 2% of her income for the years 2007 to 2010. These percentages were too low to be considered "extraordinary" under the circumstances.

The cost of the podiatrist, however, fell into a different category. There was no necessity to show that the health-related expense was "extraordinary". The limiting factor, in such a situation, is only that the totality of the health-related expenses exceeds insurance reimbursement of $100.00.

Retroactivity
The court ultimately determined that a retroactive award was appropriate, having regard to the factors in the *DBS* case.

***Laurian* v. *Clarke*, 2011 ONSC 7195**
In proceedings for spousal and child support, the court was required to determine whether annuity payments received by the respondent were "income" or part of his "means". He received $1,750.00 monthly which would continue to do so until 2014. Years earlier, his father was killed in an automobile accident. His mother recovered damages for wrongful death which she converted into a structured settlement. The structured settlement provided her with tax-free annuity payments. They had a guaranteed term. On her death, the annuity had not run to its guaranteed term. Thus, the right to receive the annuity payments devolved onto the respondent (and his siblings).

Annuity payments under a structured settlement are tax-free. Thus, the respondent was not required to report the payments in his tax return.

The applicant argued that the annuity payments were in the nature of an "income stream" and should be included in the respondent's income. The respondent argued that the payments were simply a capital payment paid to him in instalments. Thus, he argued, they were not "income". Moreover, he argued that they were "inherited" and therefore exempt from income sharing.

The court listed seven distinct factors which would help to distinguish between income and capital. The court then considered each factor individually.

1. Must the receipt be reported for income?
Section 16 of the *Federal Child Support Guidelines* provides, in the first instance, that a spouse's annual income is determined using the sources of income set out under the heading "total income" in the T1 General form, as adjusted in accordance with *Schedule* III of the *Guidelines*.

The annuity payments from the structured settlement are, due to provisions in the *Income Tax Act*, exempt from taxation.

2. Are the payments a capital amount that generate income?
The court characterized the payments received by the respondent as a lump sum payable in periodic instalments. They were not income generated by the settlement amount.

The court noted that capital amounts have, traditionally, been viewed as a part of a party's "means": *Leskun* v. *Leskun* (2006), 34 R.F.L. (6th) 1 (S.C.C.). However, the courts have traditionally treated capital assets as a source of generating income.

As a consequence, the court concluded that the capital asset, itself, was not income. However, it could serve as a source to generate income and also, could stand as security for the support.

3. Do the payments replace income or compensate for the loss of income?
This may be properly regarded as an exception to the "capital is not income rule". Where the capital is compensation for loss of income, the income lost will, itself, be the basis for calculating support and a source from which the support can be paid. Because they take the place of income or income-earning capacity, they may be treated as income. In such a case, the court must determine that portion of the structured settlement which relates to lost income and that portion of the settlement which relates to other heads of damages.

In the particular case at hand, the payments did not represent any loss of income or compensation for loss of income in the hands of the respondent. Thus, the payments did not fall within the exception to the "capital is not income rule".

4. Exemption from equalization
Assets which have been equalized or otherwise exempt from equalization may still be a source capable of generating income. The income so-generated can be the basis upon which support could be properly calculated.

5. Funds used by the recipient for his or her lifestyle
The court reviewed a number of cases in which the court appeared to treat capital receipts as income where such capital receipts were used to fund the parties' lifestyle.

However, the court disagreed with that approach. The court noted a number of cases which held that parties should not be required to pay support out of capital nor should a party be required to deplete his or her capital in self-support.

The court concluded that the proper rationalization of the conflicting authorities was to look at the payor's capital drawdown. If the spouse was capable of earning the amount by which he or she was drawing down capital, the support obligation could be based on that "capacity".

6. Funds used to finance the parties' lifestyle during cohabitation
Once again, the court went through a number of cases where non-traditional receipts were not considered to be income. One such category was "gifts" made by related parties: *Bak* v. *Dobell* (2007), 38 R.F.L. (6th) 7 (C.A.). Inheritances are not generally treated as income. Only the income generated by the capital sum is so-treated. In some unusual cases, RRSP income is not treated as income.

Consequently, the court concluded, once again, that the capital would not itself, be income. Rather, it could take the form of security for support but would not be available to directly fund the support obligation (except, possibly, in emergency situations).

Based on its review of the law, the court came to the following conclusions:

a) Capital, being paid periodically, should generally not be included in income for the purposes of calculating support;
b) The income generated by capital or which is capable of being generated from such capital, should be included in income; and

c) There are two exceptions to the general rules above. They are:
   i. withdrawals of capital will be taken into account as a basis for calculating support if the payor was capable of earning the capital draw down but did not, because he or she chose to live off capital instead; and
   ii. where it was unfair, in circumstances of temporary economic necessity, to require the support recipient to make a sudden adjustment to a significantly lower standard of living upon separation where the capital receipts had generally been regarded as income.

Based on the above analysis, the annuity payments received by the respondent were not treated as income for the purposes of calculating his support payments. They were mere payments of capital. They were not income generated by capital. There was no evidence that the respondent voluntarily chose to eschew meaningful employment and chose to deplete capital instead. There was no evidence of a sudden and temporary reduction in lifestyle by the support recipient that required the payor to deplete capital. The payments did not compensate the respondent for the loss of his *income or income-earning capacity*. Rather, they were an inheritance which is a form of capital normally excluded from equalization between spouses.

***Firestone* v. *Pfaff*, 2012 ONSC 4909**

The wife brought a motion for an order that required the husband to advance to her, on account of his equalization obligations, the sum of $2.1 million.

On the husband's net family property statement, prepared by him, his obligation was at least $2.7 million.

In his affidavit material, the husband put forth two separate options by which he would make large advance payments to the wife. Both options were "conditional" upon the parties moving forward to a settlement conference together with disclosure of all expert reports and comprehensive offers and an early trial date if the action did not settle.

By this time, the action had been pending in the courts for 6 years. The wife alleged that she had been distracted, in part, by the death of her step-father *pendente lite* and acrimonious estate litigation that followed his death. She admitted that she had made some improvident investments *pendente lite* and needed funds to extricate herself from those investments or to carry them pending disposition.

The matrimonial home was subject to an agreement of purchase and sale that would net each spouse about $700,000. Their cottage was up for sale and could produce a further $900,000 for them if it sold.

a) Offers in affidavits

The court did not decide the appropriateness of putting offers, terms, or conditions in affidavits. The court noted, as suggested by the wife's counsel, that it indicated what the husband could do.

b) Application of appropriate legal principles

The court accepted that the proper factors for a court to consider in a motion for an advance of an equalization payment were set out in *Zagdanski* v. *Zagdanski* (2001), 19 R.F.L. (5th) 459 (Ont. S.C.J.).

1. There was little or no realistic chance that the contemplated advance would exceed the ultimate equalization amount;

2. There was considerable certainty regarding the claimant's entitlement to and the minimum amount of an equalization payment;
3. The claimant had "need", not necessarily in the sense of poverty, but a reasonable requirement for the early receipt of funds; and
4. There might be other factors that require relief to the applicant such as delay by the respondent (thereby running up costs or prejudicing the applicant).

The husband's lawyer argued that factor number 4, which normally was viewed from a "fairness to the applicant" perspective, should also take into account a "fairness to the respondent" perspective. With that, the court agreed.

c) Balancing "fairness to both"
The case turned on "fairness". There was little doubt that the wife would ultimately recover an award of $2 million. The delay could not be laid at either party's doorstep. Moreover, it could be remedied by the trial judge by the mechanism of granting or denying pre-judgment interest. Finally, there was no evidence to suggest that the husband lacked the resources to make the payment (as evidenced, in part, by the options he had put forth in his affidavit).

Moreover, the wife had some "need" for funds whether her post-separation investments were foolish or proper. It appeared she also needed funds to finance the estate litigation resulting from her father's death.

***M.* (*E.M.*) v. *M.* (*J.I.*) 2012 BCSC 372**
The respondent was a radiologist. He and two others each owned 1/3 of a company known as Vernon Radiological Associates Corp. (VRAC). His financial expert testified that his annual income was $578,000. The wife's expert testified that his annual income available for child support was $697,000. The entire difference was that the wife's expert added $120,000 in pre-tax corporate profits to the respondent's corporate drawings.

The respondent and the two other shareholders testified that they restricted the distribution of profits. All had agreed to limit their dividends because they wanted to pay down debt and maintain a reserve for anticipated capital purchases. To this, the wife's expert noted that the repayments of principal on the loans were accelerated compared to the useful life of the equipment.

The court concluded that it could not add the respondent's share of the corporate pre-tax profits to his income for child support purposes. Section 18 of the *Child Support Guidelines* requires that it be "available" for the purposes of child support. The respondent was a minority shareholder. There was no evidence that he had greater influence over the other shareholders. While the *Guidelines* may apply to minority shareholders, those cases involved situations where the minority shareholder exercised great influence or the other shareholders were family members.

The court grudgingly noted that the respondent was "…diverting income to the accumulation of capital wealth and is not paying child support at the *Guideline* level that he would otherwise pay…".

***Q.* (*G. V.*) v. *Q.* (*M.L.*), 2012 ONSC 4250**
In divorce proceedings the court characterized the case in the following terms:

> Unfortunately, this is yet another case where a self-employed individual who controls several corporations…fails to recognize their obligations and

> that they have the onus to establish to the court's satisfaction their income for support by the *Child Support Guidelines* and *Spousal Support Advisory Guidelines*.
>
> It is not appropriate to make the other spouse seek disclosure for their expert retained to do an income analysis that is then critiqued by the spouse whose responsibility it was all along to make the relevant and necessary disclosure. It puts the wrong person to the expense and allows for delay.

The former wife engaged an experienced CBV to analyze and opine to the husband's income. She did so and expressed an opinion that the husband had diverted income to his current wife (income splitting); had expensed an apartment in Toronto (he carried on business in Toronto and California); and caused his company to pay many personal expenses (golf club and fitness club dues, travel and meals).

The husband hired a CA to "critique" the CBV's report. The CBV was vigorously cross-examined by the husband.

a) "Income splitting"
The husband asserted that he and his second wife (who was paid $100,000) replaced two long-time experienced salespersons. The CBV reported that the external accountant "admitted" that there was income splitting. The husband's expert reported that the external accountant denied making such a statement. The external accountant was not called as a witness. Neither of the former employees was called.

The court noted that the husband did not call any witnesses to challenge the evidence of the wife's CBV's assumptions or support the husband's contention that his new wife's income accorded with industry standards.

The evidence of the husband's expert was discounted as he conceded that he had requested documentation as to how the second wife's salary was calculated but none was provided to him. The court specifically noted that any such documentary evidence, if it existed at all, was under the complete control of the husband.

b) The apartment
The court appeared to conclude that this was in the nature of a personal expense. Factually, the husband had ceased to use the apartment and would require accommodation to accommodate his parenting time with their child.

c) The "critique" report
The court placed no stock in the critique report. The accountant retained by the husband was limited by what he was told to do — namely to provide calculations directed by the husband. He conceded that he did not look at the company expenses. He conceded that his engagement was limited and that he was not instructed to challenge the wife's expert with a full analysis. The court stated that "...[the husband] should have hired his own expert to do the income analysis and provide [his] expert full access to his [external] accountant...[and other employees]".

d) The income resolution
The wife's CBV opined that the husband's income was $368,000. The husband's c.a. suggested that the husband's income should be re-calculated to $247,000 if his proposed adjustments were applied to the CBV's opinion.

The court ultimately determined that the husband's income was $338,000. The court decided to add back 33% of the income of the second wife and determined the husband's income to be:

a)	adjusted income of husband's expert	$276,000
b)	add 1/3 of 2nd wife's income of $100,000 grossed up	42,000
c)	personal expense previously paid by corporation	20,000
	Total	$338,000

***Cherneski* v. *Rathwell*, June 8, 2012. Whitmore J. (Sask. Q.B.)**
In mid-2008, the parties entered into a consent order that provided that:

a) Father would pay mother $2,000 monthly child support;
b) If father's obligation in the future exceeded $2,000 monthly, the excess amount would be paid into a trust fund for the child to be used for the child's education;
c) If the trust was not completely used up when the child turned 25, the trust funds would default to mother; and
d) The father's obligation would be determined by the federal *Child Support Guidelines*.

When the consent order was entered into, the husband's income was $168,073 annually. However, when his 2008 income was finally determined, it was over $900,000.

It appeared that his income was considerably above $168,000 thereafter, though the amounts were not specified in the judgment. His 2011 income was $311,000.

From 2008 to 2012, the husband paid the mother $2,000 monthly and paid the "excess" into the trust. By trial, the capital of the trust was over $87,000.

The mother applied to the court to vary the consent order so that all of the child support should be paid to her. The father took the position that "a deal is a deal".

a) Variation
By s. 17 of the *Divorce Act*, a prior support order may be varied if a material change of circumstances has occurred since the making of the prior order. Normally, however, the change of circumstances must be changes that are unforeseen in the sense that they were not in the reasonable contemplation of the parties. Therefore, argued the father, the establishment of the trust clearly demonstrated that the parties contemplated his income increasing.

The mother argued that the rise in income was so dramatic that it was entirely uncontemplated. Moreover, as the trust fund was so well-funded, it was beyond the parties' contemplation that it would exceed any reasonable future educational needs of their child.

The court accepted the mother's argument.

b) Did the consent order create a "special provision"
Section 17(6.2) of the *Divorce Act* enables the court to depart from making a *Guidelines*-based order if the prior order contains special provisions that benefit a child, and a *Guidelines*-based order would be "inequitable" due to those special provisions.

The court held that the provisions did not "benefit the child". Normally, a child has a right to enjoy the standard of living afforded by its parents' incomes. Payment into the trust for amounts in excess of $2,000 monthly precluded the child from such

enjoyment. Second, the trust was creating a fund, on a current basis, which reduced the father's future obligations to ultimately pay for the child's education needs.

c) Income over $150,000
The father argued that the court should employ s. 4 of the *Guidelines* to reduce the *Guideline*-based amount. The court has power to do so if a *Guideline* amount is "inappropriate".

The court declined to do so. There is a presumption of appropriateness to the Guideline amount. Here, the father simply failed to rebut the presumption.

d) The appropriate Guideline
The agreement was made in Saskatchewan, but the father lived in Alberta. He made his payments pursuant to the Saskatchewan tables. If he had paid according to the Alberta tables, he would have been required to pay $12,000 more.

The court refused to order the "arrears" to be paid. Both parties had operated on a mutual mistake.

e) Annual income
The mother argued that the husband based his support obligation on an income of $168,000 when it was later showed to be $900,000 for that year. She asserted that the child support should be "re-adjusted" annually. His shortfall for that year would be $73,000.

The court disagreed. The husband's income would not normally be known until after any given year end. Moreover, the mother delayed in making the claim.

f) S. 7 expenses
The court declined to make any order for s. 7 expenses. The magnitude of the table-based order would cover any s. 7 expenses.

_O._ (_S.W._) v. _O._ (_R.C._), 2012 BCSC 1132 (BCSC)
The respondent husband was a 67 year old medical doctor who carried on business through a professional corporation. The applicant was his wife and former bookkeeper and nurse. *[Ed note: neither the applicant nor the respondent appeared to have any concern for the need for accuracy in their allegations about each other].*

The applicant hired an expert and told the expert that certain entries in their personal joint account were unrecorded income receipts of her husband for services to pharmaceutical companies on advisory boards, endorsements, meetings and speaking engagements. On that basis, the expert concluded that the husband had undisclosed income of at least $150,000 annually.

Thereupon the husband noted that some of the deposits were rent receipts (the wife having told her expert that all rent receipts went into a segregated account for rent) and that some deposits related to an inheritance. He admitted to undisclosed income from pharmaceutical companies but declined specifics.

As a result, the expert issued a second report which still opined that the husband had substantial undisclosed income.

The husband then, and only after the second report was issued, stated that he knew precisely what he received from the pharmaceutical companies. He said he kept a separate ledger on his palm recorder because the pharmaceutical companies would often "forget to pay" so he followed it "religiously".

The expert issued a third report. Her reports, with the unreported income "grossed up" were as follows:

1st report	$467,000
2nd report	$401,000
3rd report	$315,910

a) The ever-changing information
The court noted that this case illustrated the inherent frailties of attempting to determine income prior to the completion of the production and discovery process. While the court acknowledged that the effect of the expert's reports "had the effect of shaking the trees for more disclosure", fault also lay with the wife. She had provided the expert with certain assumptions that she likely knew were inaccurate.

b) The income determination
The expert used the typical approach of analyzing the sources of income but adjusting the corporate pre-tax profits to attribute them according to s. 18. The steps were as follows:

1. Adjustments to line 150 income under *Sch*. III:
   - dividends were adjusted to actual;
   - dividends from the personal corporation were deducted; and
   - carrying costs were deducted.
2. S. 18 adjustments:
   - add back wife's salary;
   - deduct a notional salary for the nurse and bookkeeper to replace the wife;
   - add back home office expense; and
   - add back personal use of automobile.

Ultimately, and based on the imperfect evidence, the court concluded that the husband's income was $225,000. The court noted that the husband alleged that certain of the pharmaceutical income was, in fact, reported corporately and personally under "other income". The court specifically noted that this evidence was yet to be challenged after the conclusion of pre-trial examinations.

***Naylor* v. *Naylor,* 2012 BCSC 1450**
The father sought an order declaring that his daughter was not a "child of the marriage". He was already paying $978.00 monthly for the support of a younger child. He earned about $100,000.

The daughter was 23. She had completed an undergraduate degree and nearing completion of her first year in the Faculty of Medicine. She was an excellent student. She had borrowed $22,000 pursuing her bachelor's degree. She arranged a $200,000 loan for medical school and had drawn it down by about $38,000. She estimated her expenses to be about $39,000 annually — about 75% of which were for tuition, housing and a meal plan. She had a $3,000 scholarship.

a) The law and subsequent degrees
There is no automatic rule that a child ceases to be a child of the marriage once a first university degree is completed: *Beninger* v. *Beninger*, 2010 B.C.S.C. 1509.

There is no arbitrary cut-off point based on the number of degrees: *Neufeld* v. *Neufeld*, 2005 BCCA 7.

b) Determining entitlement for graduate students
The same set of basic criteria is applied to all post-secondary students, whether they are graduate or post-graduate students. The factors have been collectively gathered and enumerated in cases such as *Farden* v. *Farden* (1993), 48 R.F.L. (3d) 60 (B.C.S.C.).

The "Farden factors" may be slightly modified where the child is a graduate student by an additional factor: the ability of the parent to continue to support the child beyond the first degree.

c) The significance of student loans
The availability of student loans is merely one of the factors to be considered in determining ongoing child support entitlement. It is not necessary that the child exhaust every source of funding.

d) Parental education
In this case, neither parent had a degree, although both had taken some post-secondary training. While parental expectations are one of the "Farden factors", no single factor is determinative.

e) Application of the Farden Factors
The court concluded that the daughter remained "a child of the marriage" within the meaning of s. 2 of the *Divorce Act:*

- she was enrolled in a full-time course of studies;
- she had a long term career plan that involved continued study;
- her studies have been continuous since high school, uninterrupted by employment or travel;
- her plans have been long-held as opposed to someone returning to school to change careers;
- her academic performance is exemplary;
- available funds have been largely depleted; and
- the father has an ability, though limited, to contribute.

f) Quantification of support
As the child was over the age of majority, lived away from home, and had access to funding, table-based support was inappropriate.

The court, without articulating why, ordered $400.00 monthly.

APPENDIX

The Farden Factors

(1) whether the child is in fact enrolled in a course of studies and whether it is a full time or part time course of studies;

(2) whether or not the child has applied for, or is eligible for, student loans or other financial assistance;

(3) the career plans of the child, i.e., whether the child has some reasonable and appropriate plan or is simply going to college because there is nothing better to do;

(4) the ability of the child to contribute to his own support through part-time employment;

(5) the age of the child;

(6) the child's past academic performance, whether the child is demonstrating success in the chosen course of studies;
(7) what plans the parents made for the education of their children, particularly where those plans were made during cohabitation; and
(8) at least in the case of a mature child who has reached the age of majority, whether or not the child has unilaterally terminated a relationship from the parent from whom support is sought.

***Lightle* v. *Kotar,* 2012 BCSC 1363**

The husband was an investment advisor. He began his career with Scotia McLeod. While with Scotia McLeod, he purchased a "book of business" from a retiring advisor for $175,000. The assets under administration at the time were $20 million.

Four years later, he left Scotia McLeod to join Canaccord, his present employer. He was advanced $175,000, forgivable over a 3 year period. The loan forgiveness was taxable income to him. At the time, his own assets under administration were $34 million.

The assets under administration waxed and waned according to market conditions with a low in 2008 of 29 million. It was $31 million at the time of trial.

At the time of trial, the husband was being sued for $400,000 by an investor. Both he and Canaccord testified that any damage award will be personally borne by him. He also testified that there were other problems relating to his assets under administration.

a) The book of business

The court concluded that the book of business was not a "family asset" under B.C.'s *Family Relations Act* for several reasons:

- The assets under management belong to the client. They can be removed at any time by the client.
- The "book of business" is in reality, a "connection with the client".
- An investment adviser will not likely purchase a "book of business" from anyone who intends to remain in the business. The husband does not intend to leave the business. Therefore, he would not be in a position to assure a buyer that he would assist in the transfer of client accounts.
- The lawsuit militates against anyone wanting to buy the book.
- The book of business merely provides the husband with the means to earn an income.

b) The lawsuit

The contingent liability is a responsibility of both parties. The husband's employment sustained their standard of living and will, in the future, likely continue to sustain it. Both parties enjoyed the benefits of the husband's employment, but must take responsibility for the financial risk associated with it.

The court concluded that an equal sharing, however, would be unfair due to the husband's greater earning capacity. It was apportioned 2/3 to the husband and 1/3 to the wife.

Each party was left with a right to reapply for further adjustment if significant changes resulting in unfairness occurred.

***Portelance* v. *Young*, 2012 ONSC 2930**
The father was ordered to pay child support fixed in the amount of $946.00 monthly in 2001. Of this amount, $117.00 was attributed to s. 7 expenses. The award was based on the husband's income of $60,500. In 2006, he was injured in an industrial accident. He received short-term and long-term disability benefits from an insurance company, Manulife, in 2006 and 2007. These amounted to approximately $54,000. He successfully appealed his original denial of WSIB benefits. In 2008 and 2009, he received approximately $134,000 in retroactive and current WSIB benefits. Of this amount, $20,000 represented non-economic loss benefits while the remainder represented economic loss benefits (called LOE benefits). Because the appeal represented retroactive payments, he was required to repay Manulife the amounts paid to him out of the WSIB award. He did not repay Manulife in full. He failed to repay $4,000 in benefits. It appeared that Manulife did not pursue this amount.

With the conclusion of the successful appeal, his LOE benefits were fixed at $775.00 weekly. He received this amount during 2010.

In late 2010, he was advised by WSIB that he was required to complete a labour market entry program to assist him in returning to the workforce. He completed that program in April of 2011. As a result of his completion of the program, his benefits were reduced to $476.00 weekly. However, he did not find employment despite completion of the program.

He applied for a reduction of his child support obligation retroactive to the date of his accident in 2006. However, his application was only commenced in 2009. He was dilatory in providing financial information which, in turn, resulted in his variation application being further delayed. Meanwhile, the two children that he was supporting — twins, had both turned 18 and were both pursuing post-secondary education. One of the children, however, took only one course for one of his semesters. The father argued that the child was not a full-time student for that period of time.

The court, being faced with multiple issues, defined the issues and dealt with them *serriatum:*

1. Were there changed circumstances?
Section 14(1) of the *Guidelines* provides that where an order is based on a table amount, any change to the table amount constitutes "changed circumstances". Thus, the threshold test was met as the father no longer earned $60,500 annually.

2. Should s. 17, dealing with income "averaging" be applied?
The father argued that his tax returns did not accurately reflect his income. There were two reasons for this. First, he was obliged to repay Manulife the amounts paid to him in 2006 and 2007. Second, the amounts paid to him by WSIB in 2008 and 2009 represented a retroactive award. Thus, he argued, the lump sum WSIB retroactive benefits paid to him in 2008 and 2009 should be averaged over the entire period from 2006 to 2009.

The mother's argument, it appeared, was that as the father had the use of the funds, his income should be determined upon his tax returns without regard to averaging. In any event, she argued that averaging was unnecessary as the father should not be allowed a retroactive variation.

The court concluded that the father's tax returns would not reflect the fairest determination of his income. His income was subject to fluctuations by virtue of the lump sum retroactive payments and his obligation to repay Manulife.

Thus, the father's LOE benefits were included in income for the year in which his entitlement to such benefits accrued as opposed to the year in which he received them.

3. Inclusion in income and gross up
Only the LOE benefits were included in the father's income. The $20,000 payment for non-economic loss was not a wage replacement benefit.

Both parties agreed that the WSIB payments should be grossed up by a factor of 30%. The court accepted the "gross up" as being "reasonable".

4. The reduction of LOE benefits
The legislation allowed WSIB to attribute an income of $400.00 weekly to the father as a result of his completion of the labour market re-entry program. However, this did not bind the court's hands. The court concluded that additional income should not be imputed to him under s. 19. Thus, his ongoing support obligation was based on his current LOE benefit of $476.00 weekly.

5. Retroactivity
The mother argued that as the father did not bring his motion to change until 2009, the court should deny relief for any period prior to that date.

The court disagreed. The father's changed circumstances related to the change in his income in 2006. Thus, the appropriate date of measurement is the date of the "change" and not the date of the commencement of the application.

With respect to the father's failure to make timely disclosure, the court concluded that that would not impact upon the "changed circumstances". It would, however, be relevant to the issue of costs.

6. The contingent liability
As mentioned above, the father failed to repay Manulife approximately $4,000. He also received certain welfare benefits that should have been repaid. Neither of these amounts was repaid in full. These amounts were included in the husband's income as it appeared that he had effectively escaped his obligation to repay the amounts in full.

7. Full-time attendance
During one semester, one of the children took only one course. The father argued that he should not be responsible to pay support as the child was not in "full-time attendance" at school. The mother argued that the reason that the child took only one course was that this was the sole requirement for entry into the son's chosen program. Thus, it was more reasonable for him to pay for one course (rather than a full course load) and pursue simultaneous part-time employment.

The court agreed. Although the son was taking only one course, it was part of a continuing program of education and was reasonable in the circumstances. Moreover, it was reasonable for the child to pursue employment because the child was obliged to contribute to his own education by virtue of the assessment of support being undertaken under s. 3(2)(b) or, alternatively, by virtue of the fact that he child's educational expenses were an s. 7 expense.

8. The assessment
Both children had attained the age of 18 years. The retroactive assessment, while they were minors, had to follow the tables. However, upon their attaining the age of majority, the assessment was properly made under s. 3(2)(b). The children attended school out of town, had employment earnings, and had access to student loans. The court determined that the children should contribute 50% of the income and loan sources to their education and budgetary needs. The father was required to contribute the remaining 50%. During the summer months, he was to pay the mother full table-based support.

***Keeling* v. *Darrigo,* 2011 ONSC 7560**
In 2001 Ms. Keeling obtained judgment against Mr. Darrigo for retroactive and future child support. Later, she was also awarded costs. In the years that followed, there were several court proceedings over child support and visitation that resulted in several further costs awards against Mr. Darrigo.

By 2011, Mr. Darrigo was in arrears of child support amounting to $65,000 and had unpaid costs and interest of another $67,000.

Ms. Keating sought to enforce the unpaid support arrears and costs against certain corporations that Mr. Darrigo incorporated after the 2001 judgment and against a trust that Mr. Darrigo had also established after the 2001 judgment.

Mr. Darrigo purchased the shares of Coventry General Contracting Inc. in 2004 from a relative and friends for $1.00. At the time it was not an active business. In 2007, it began to carry on its business as a general contractor. It was initially very profitable but fell into decline with the recession in or about 2008 and 2009. In 2010, Ms. Keeling obtained court orders seizing $150,000 from the company bank account.

The $150,000 had to be held in trust by Mr. Darrigo's lawyer pending the outcome of the action.

In 2008, Mr. Darrigo started MotoCorp. Its shares were fully owned by Coventry. Mr. Darrigo was and is its sole director, president, secretary and treasurer. It was initially incorporated to acquire a motorcycle franchise but never did so. Its revenues were generated through the sale of motorcycle parts on eBay and other websites. It had $40,000 in revenues in 2008, no revenues in 2009 or 2010, and $26,000 in 2011. Its net earnings in 2011 were $11,000.

In 2008, 2159913 Ontario Inc. was incorporated by Mr. Darrigo. It purchased all of the shares of Coventry from Mr. Darrigo for $50,000, by way of providing him with a promissory note for that amount. No payments had ever been made on the note. Mr. Darrigo was its president. It had 3 directors — Mr. Darrigo, Mr. Hyatt, and a lawyer.

The trust was created in 2008. Mr. Darrigo and his issue were the beneficiaries. Mr. Hyatt was the settlor. According to the Trust Agreement, he settled $1,500 by cheque to the Trustees. He could not locate the cheque. The Trust, coincidentally, never had a bank account. It has never received any money and never paid out any money. It owns, however, all of the shares of 2159913 Ontario Inc. (which of course, owns everything). Its trustees are Mr. Darrigo, Mr. Hyatt, and a lawyer.

The lawyer did not testify. Mr. Hyatt testified that he would speak actively to Mr. Darrigo about the affairs of Coventry and Moto — about 3 to 4 times a week. He conceded in cross-examination that he had never seen any banking records or financial statements

of the corporations and was unsure of his role in 2159913.

Mr. Darrigo's personal finances were interesting. Each month he would transfer precisely the amount to cover the Family Responsibility Office obligation and $8.95 for the monthly bank service fee. With limited exceptions, there was never any more or any less than that amount deposited or taken from the account for years. He used company credit cards to pay for all of his expenses whether they were corporate or personal. The personal expenses, he testified, would be attributed to him. The court detailed many of the expenses and Mr. Darrigo's explanation:

- storage fees: motorcycle parts for Moto;
- Starbuck's: corporate entertainment and promotion;
- Rogers wireless: corporate communications;
- telephone: corporate communication;
- hotels: corporate travel, but some personal travel;
- restaurants: travel, corporate entertainment and promotion;
- parking tickets: personal;
- clothing stores: corporate promotion, gift cards for customers or prospective customers;
- electronics: corporate;
- LCBO: corporate promotion; and
- The Beer Store: corporate promotion.

In March, 2009, Mr. Darrigo prepared a net worth statement for a marriage contract with his second wife. It was attached as a Schedule to the contract. He stated that he had $700,000 in personal assets, $650,000 as his interest in the trust and $500,000 in personal debt to his mother and friends and $65,000 indebtedness to the Family Responsibility Office.

Finally, Mr. Darrigo was cross-examined about motorcycles, the storage lockers, and the motorcycle race track. In the marriage contract net worth statement he stated that the motorcycles and parts (which were stored in 5 separate lockers) had a value of $150,000 and that they were owned by Coventry. He had testified at trial that they were sold for $10,000 because he needed the money. His website, however, still listed the motorcycles for sale. As for the money spent at the motorcycle racetrack — he testified that that was where he entertained his clients.

a) The test to pierce the corporate veil

1. There is no single all-encompassing rule as to when the court will pierce the corporate veil;
2. A contextual approach is required;
3. The court will not enforce a "separate entitles" rule if it would yield a result too flagrantly opposed to justice, convenience, or defeat the desired effect of legislation;
4. Whether third parties would be affected by the piercing;
5. The individual must have complete control of the finances, policy and business practices of the corporation;
6. That complete control has, in fact, been used by the individual that unjustly deprives a claimant of his or her rights; and
7. The misconduct was the reason for the claimant's injury or loss

b) The test is relaxed in family law cases

The court noted that various appeal court judges had taken a more relaxed approach in family law cases. For example, in *Wildman* v. *Wildman*, 2006 CanLII 33540, 33 R.F.L. (6th) 237, the court noted that it was not necessary to show that the corporation was created to defeat a former spouse's claim — merely that it wound up being used for that purpose. In *Lynch* v. *Segal*, 2006 CanLII 42240, 33 R.F.L. (6th)(279), the court expressly stated that, "A more flexible approach is appropriate in a family law context..."

c) The trial judge's analysis

1. While Coventry was an active operating business and Mr. Darrigo had legitimate business reasons for its incorporation, this is but a factor to consider. The focus is on the use to which the corporation was eventually put.
2. Mr. Darrigo was in sole control of Coventry. He made all of its business decisions. He used it to pay all of his personal expenses including his FRO payments. The court specifically noted that Coventry paid *all* of his expenses, not merely some of them.
3. The trust was a mere sham. There was no legitimate business or other purpose for its creation or share ownership. It had no bank account. The Trustees did not seem to care that the corporations paid Mr. Darrigo's personal expenses. The court concluded that it was created solely to further insulate Mr. Darrigo from the claims of Ms. Keeling.
4. The corporations and the trust were merely Mr. Darrigo's *alter egos*. Nothing changed when the trust took over 2159913 Ontario Inc. Their sole purpose was to ensure that there were no funds or assets in Mr. Darrigo's name.
5. Although third parties such as Mr. Darrigo's child with Ms. Keeling and a child with his second wife would be affected, there was no evidence that any payments were made or would be paid from the trust.