Court File No.: CV-21-656040-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, C. c-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF LAURENTIAN UNIVERSITY OF SUDBURY

CASE CONFERENCE BOOK OF AUTHORITIES OF THORNELOE UNIVERSITY

(REQUESTING A DIRECTION FOR A MEDIATION AND TO SET A SCHEDULE, RETURNABLE OCTOBER 12, 2022)

October 10, 2022

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Passarello v. Passarello

1998 CarswellOnt 2983, [1998] O.J. No. 2792, 64 O.T.C. 118, 80 A.C.W.S. (3d) 1037

Christine Joan Passarello, Petitioner and Natale John Passarello, Respondent

Kiteley J.

Heard: February 16, 1998
Heard: February 17, 1998
Heard: February 18, 1998
Heard: February 19, 1998
Heard: February 20, 1998
Heard: February 24, 1998
Judgment: June 29, 1998
Docket: Toronto 95-MP-218509

Proceedings: additional reasons at (August 7, 1998), Doc. Toronto 95-MP-218509 (Ont. Gen. Div.)

Counsel: *David A. Jarvis*, on behalf of the Petitioner.
Daniel A. Barna, on behalf of the Respondent.

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Family law --- Custody and access — Factors to be considered in custody award — Conduct of parent — General

Parties separated after 23 years of marriage and had two children aged 20 and 15 — Wife was granted interim interim custody of children and exclusive possession of matrimonial home — Both parties brought application for custody — Husband withdrew both children from school without advance notice to take physical custody of them before his motion for interim interim custody — Husband used his motion papers to convince school that he had legal authority to take custody of youngest child although husband was aware that he did not have legal custody — Husband asked both children to sign motion papers in contravention of order that neither party talk to children about proceedings — Husband's actions were devious and subversive and he attempted to drag children into parental conflict — Husband displayed no insight into anxiety and stress he caused youngest child through his behaviour — Should husband gain custody, child would learn not to respect wife and that manipulation of others was basic problem solving strategy — Husband's priority was obsession with winning his conflict with wife and not best interests of child — Wife granted custody of child.

Family law --- Custody and access — Factors to be considered in custody award — Wishes of child

Parties separated after 23 years of marriage and had two children aged 20 and 15 — Wife was granted interim interim custody of children and exclusive possession of matrimonial home — Both parties brought application for custody — Youngest child was still residing with father despite order that husband return child to custody of wife — Evidence of witnesses was that child was ambivalent as to custody and his wishes changed — Husband only gave oldest child insurance monies he had been keeping for him after he moved in with husband — Husband's behaviour seriously undermined any significance to be placed on oldest child's preference in deciding what was appropriate for youngest child — It was possible that husband had also offered youngest child incentive for moving in with him — Wife granted custody of youngest child.

Family law --- Custody and access — Factors to be considered in custody award — Best interests of child generally

Parties separated after 23 years of marriage and had two children aged 20 and 15 — Wife was granted interim interim custody of children and exclusive possession of matrimonial home — Both parties brought application for custody — Husband withdrew both children from school without advance notice to take physical custody of them before his motion for interim interim custody — Husband was ordered to return youngest child to custody of wife — Child had been living with wife all his life and with her as custodial parent for past three years — It was in child's best interests to preserve status quo — Child required stability, structure and encouragement to maximize his learning potential in view of his learning disability — Husband's behaviour in taking child from school for three days shortly before examinations showed failure to appreciate importance of schooling to child's future — Wife was responsible for attending to child's educational needs and was in better position to help child — Child had been residing in same area all his life and move would be disruptive as would change of school — Wife granted custody of child.

Family law --- Custody and access — Factors to be considered in custody award — Miscellaneous factors

Parties separated after 23 years of marriage and had two children aged 20 and 15 — Wife was granted interim interim custody of children and exclusive possession of matrimonial home — Both parties brought application for custody — It was important for youngest child to maintain contact with both parents — Wife was more likely to facilitate access to husband — Access arrangements had worked for two years and there was no evidence that wife impeded husband's access during that time — Husband would not have positive influence on access between child and wife — Wife granted custody of child.

Family law --- Family property on marriage breakdown — Valuation of specific assets — Business — Miscellaneous issues

Parties separated after 23 years of marriage — Both parties brought application for equalization of net family property — Husband had been locksmith for 29 years and incorporated locksmith business — Wife worked for almost three years in husband's business — Wife's evidence was of large amounts of unrecorded cash income from business — Husband's financial statement initially disclosed only employment income of $41,000 — On cross-examination husband agreed to existence of undisclosed cash and that he had mislead his accountant and revenue Canada about his true income — Husband's total annual income assessed at $66,000 — Third party made offer to purchase business for $230,000 plus amount of any shareholder loan — Value of business at valuation date was $230,000 and shareholder loan was $91,080.

Family law --- Family property on marriage breakdown — Assets which may be excluded from property to be divided — Gifts and inheritances — Ontario

Parties separated after 23 years of marriage — Both parties brought application for equalization of net family property — Husband claimed that he had received gift of $100,000 from his brother after working for 20 years in his brother's locksmithing business — Husband alleged that $86,000 of that amount was reflected in his net family property as shareholder loan to company — Husband applied for exclusion of amount pursuant to s. 4(2) of Family Law Act — There was no documentary evidence to support alleged gift — Husband had failed to prove that alleged gift could be traced to shareholder's loan — Adverse inference was drawn from husband's failure to call brother as witness to corroborate gift — Monies were not gift but additional compensation for services rendered — Monies could not be excluded from property to be divided as husband failed to meet onus of establishing that funds constituted gift — Family Law Act, R.S.O. 1990, c. F.3, s. 4(2).

Family law --- Family property on marriage breakdown — Order for division of property — Factors to be considered in determining nature of order — Miscellaneous factors

Parties separated after 23 years of marriage — Both parties brought application for equalization of net family property — Husband's net family property was $332,595 and wife's was $86,804 — Husband owed wife equalization payment of $122,895 — Wife brought application for order transferring title of matrimonial home to her in consideration of part of equalization payment — Husband to transfer matrimonial home to wife and pay balance of equalization payment and other adjustments of $11,895.

Family law --- Support — Child support — Duty to contribute — Means of parents

Parties separated after 23 years of marriage and had two children aged 20 and 15 — Wife granted custody of youngest child — Wife brought application for child support — Husband was self-employed and had obligation to provide documentation which would enable court to establish his current income — Husband did not meet obligation and court was entitled to draw inferences against him — Husband's annual income assessed at $72,600 — Husband to pay monthly child support of $589 pursuant to Federal Child Support Guidelines — Claim for child support for oldest child dismissed as he was no longer child of marriage — There was no evidence as to oldest child's attendance at school, dependency or income — Child Support Guidelines Regulations, O. Reg. 391/97.

Table of Authorities

Cases considered by *Kiteley J.*:

Amaral v. Amaral (1993), 50 R.F.L. (3d) 364 (Ont. Gen. Div.) — applied

Statutes considered:

Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.)

s. 2(1) "child of the marriage" [rep. & sub. 1997, c. 1, s. 1(2)] — referred to

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s. 8

***Kiteley J.*:**

Reasons for Decision

Introduction

1 This is a petition for divorce and corollary relief by the wife and counter petition for the same by the husband. The wife is 46 years old. The husband, who is also 46 years old, goes by the name of "Chris". Christine and Chris were married on July 28, 1972. They have two children: Tim who was born November 3, 1977 and Steven who was born February 15, 1983. Christine attempted to initiate a divorce in 1992 but reconciled with Chris for reasons indicated below. The spouses separated permanently on May 10, 1995.

Issues

2 Several issues arise in this action. Both parties are seeking custody of the youngest son, Steven. This arose as an issue shortly before trial. Christine is claiming child support for Steven, arrears of child support for Steven and Tim, and spousal support. Chris is seeking child support for Tim, who has been living with him since January. Both spouses have asked for the equalization of net family property.

Divorce

3 This petition for divorce had been initiated on the grounds of adultery. At the opening of the trial both parties consented to amendment of the petition to include separation as a grounds for divorce. Divorce judgment is granted (on grounds of separation) and takes effect 30 days after release of these reasons.

Procedural Background

4 The Petition for Divorce was issued on April 25, 1995. Christine left the matrimonial home with both boys on May 10, 1995. Since that time, there has been a significant amount of court intervention as the following summary indicates.

1. On May 18, 1995 Smith A.C.J. made an order in favour of Christine for interim interim custody of both children, and exclusive possession of the matrimonial home. A schedule of access was specified and both parties were ordered not to discuss any details of the proceedings with the children.

2. On June 1, 1995 Smith A.C.J. ordered interim interim child support of $700.00 per month per child, to be paid through the Family Support Plan. Chris was ordered as well to maintain the mortgage payments of $275.00 per month, and to maintain the status quo arrangement whereby he provided Christine with a late model van through a lease with Chris' business. Imperial Lock Company.

3. On June 21, 1995, Smith A.C.J. ordered either of the parties to make the house insurance payment of $780.00, and that the party to make the payment be entitled to a $390.00 credit on equalization of net family property.

4. On July 7, 1995, Jennings J. heard a motion by Christine to have Chris provide funds for her to have his business appraised. This motion was adjourned *sine die*, and Chris was given 30 days to provide a business appraisal. Chris was ordered to provide particulars with respect to certain paragraphs of his counter petition. Costs of the motion were awarded to Christine in the cause.

5. On July 9, 1995, Chris was charged with forcible entry, uttering death threats against Christine, and assault of Christine, after he kicked in the door of the matrimonial home. He pleaded guilty to and was convicted on October 23, 1995 of forcible entry, and given a conditional discharge with probation for two years and 120 hours of community service work. The conditions placed on him were that he was not to go within 100 metres of the matrimonial home, and he was to attend for counselling programs, including counselling for violence against women.

6. On August 10, 1995, Walsh J. made a number of orders. The Children's Lawyer was appointed to act as legal representative for both children. A restraining order as well as a non-depletion order were made against Chris. Chris was ordered to pay $565.00 to Christine for repair and maintenance of the matrimonial home. Chris's consent was dispensed with in relation to certain home insurance matters, and Chris was ordered to submit Christine's and the children's claims through his employment health insurance coverage, and to remit monies received to Christine.

7. On September 21, 1995 Beaulieu J. found Chris to be in contempt of order dated May 18 1995 that Christine have exclusive possession of the matrimonial home, and that neither party talk to the children about the proceedings. Costs were ordered against Chris, fixed at $750.00 and payable forthwith.

8. As a result of the failure by Chris to comply with the July 7th order to provide a business appraisal, on February 13, 1996 Epstein J. ordered Chris to pay disbursements of $3,500.00 plus GST to Christine to enable her to have his business appraised. Costs were ordered against Chris in any event of the cause.

9. On May 1, 1996 Wilson J. granted Chris a further seven days to comply with Epstein J.'s February 13, 1996 order (to pay Christine to have the business appraised). In the event that he did not comply within the seven days, Christine was free to move without notice to strike his pleadings.

10. On December 18, 1996 Walsh J. ordered Chris to produce a number of financial documents, being the 1995 and 1996 income tax returns, financial statements and T4 / T5 statements.

11. On May 15, 1997 E. MacDonald J. adjourned an undertakings motion, peremptory to Chris, to give Chris an opportunity to retain new counsel.

12. On May 29, 1997 Ferrier J. ordered costs against Chris fixed at $500.00 with respect to a motion to compel answers to undertakings.

13. On January 27, 1998 O'Connell J. ordered Chris to return Steven to the custody of his mother, and to pay costs of $3,000.00.

Credibility

5 I agree with Mr. Jarvis that, before embarking upon an analysis of the legal and factual issues, it is important to address the significant contradictions in the evidence led on behalf of the petitioner and the respondent. These contradictions are material to issues of custody and various aspects of the financial matters in issue.

6 Sopinka J. & Lederman J., *The Law of Evidence in Canada*, 2d ed. (Toronto: Butterworths, 1979) provides an instructive analysis on the assessment of credibility at 528 - 535. Several criteria are relevant, including the reasonableness of the evidence, contradictions in the evidence (internal consistency), whether or not the witness' character has been impugned, personality and demeanour, corroboration (external consistency), self interest, powers of observation and recollection, and capacity of expression. Untruths which are brought out in examination-in-chief are not as damaging to credibility as untruths which are brought out in cross-examination or by other evidence. The court should attempt to reconcile direct contradictions between the evidence of the witnesses.

Evidence led on behalf of Christine:

7 I found Christine's own evidence to be forthright, and her evidence to be internally consistent. I consider that Christine was candid in important respects which did not advance her cause. For example, she admitted that Steven had recently expressed interest in living with his father. She admitted that Steven had a good relationship with his father and wanted to see him.

8 Counsel for the husband attempted to undermine Christine's credibility without success. The only area in which there was a minor discrepancy was between Christine and Michelle May in that Christine said that Tim had not paid rent and Michelle said that he did. Christine gave evidence about her own experience. Michelle's evidence was based on what Tim had told her. Tim could easily have led Michelle to believe that he was paying rent when he wasn't. I do not consider this discrepancy to be material to assessing Christine's credibility.

9 Michelle May was called as a witness for the wife. She is 18 years old and has lived with Christine for the past year and a half. She was the girlfriend of Tim Passarello until, just before the trial, they broke up as a result of her involvement in testifying at the trial. Her evidence corroborates other witnesses who testified with respect to the events at a restaurant on January 19, 1998 which will be described later. She was the only witness as to the events in the matrimonial home on the morning when Chris brought the boys to remove their things from the home.

10 I found the evidence of this witness to be forthright and straightforward as well. She was detailed and confident in her recollection of events. For example, she stated that she knew when the boys were trying to get into the safe because she could hear the clanking of tools by the safe, which was right outside her bedroom door. Her testimony regarding her conversation with Chris on the evening of the restaurant incident is consistent with his description of the conversation. She was frank in her

examination-in-chief in admitting that when she told Chris to stop "yelling" that she may have been over-reacting. Further, she admitted that the boys had positive relationships with Chris, and that she thought they did not see him enough.

11 In an attempt to undermine her credibility, counsel for the husband played a recording of a telephone message in court, which Michelle left on Tim's answering service on the morning that she gave evidence. In the message, Michelle sounded quite angry and vindictive, and made vague threats about getting him and his family into trouble if he did not withdraw accusations he had made against her. Her explanation of the message was that it had to do with personal problems between Tim and herself, and that she was furious because the night before Tim had accessed her personal messages and changed the access code so that she could not access them, and because he had unplugged her water bed. Michelle was candid about this message in her examination-in-chief as well as in cross-examination. While this message illustrated a less impressive demeanour than the witness was displaying on the stand, it does nothing to undermine her evidence. While she may have threatened to get his family into trouble, her evidence did not have this effect. The telephone message reflected on a dispute between Michelle and Tim and did not impair the reliability of her evidence.

12 Michelle was cross examined on her living arrangements with Christine. She does not pay rent or room and board to live there. This arrangement could be seen as providing motivation for Michelle to tailor her testimony to the credit of Christine. Michelle admitted in cross-examination to being more sympathetic towards Christine. However, to the extent that this evidence may have undermined Michelle's credibility, it is offset by the fact that her involvement in the trial has virtually destroyed her relationship with Tim. This was a relationship of 6 years. In light of this, I find that Michelle's self interest does not compromise the value of her testimony. In any event, Michelle planned to move out shortly after the trial and would not have any dependency on Christine which might have affected her evidence.

13 As indicated above, there was a direct contradiction between the evidence given by Christine and Michelle. Christine testified that Tim did not pay any rent or room and board. Michelle testified that Tim did pay rent, and that it varied between $200.00 and $100.00. There was a strong reaction to Michelle's testimony in the facial expressions of the wife and her counsel, such that they were cautioned about it after the witness finished her testimony. Counsel for the husband argues that this reaction exacerbates the effect of this contradiction on the credibility of the witness, and that it supports an inference that the witness was coached. I find the reaction equally consistent with surprise, in keeping with the witness being mistaken - even honestly so. If the witness had been coached to say that Tim did not pay rent, it is unlikely that she would have testified that he did. I decline to draw the inference suggested.

14 Lynn Gorman testified for the wife. She is a single mother with two teenaged daughters. She was an employee of Alpha, a competing locksmithing company owned by Mark Fingarson. Gorman testified that she first met Chris in November of 1991 through his sports card business, and she subsequently developed a business relationship with him. Their relationship became intimate in March of 1992, and continued off and on until fall of 1994. Gorman was privy to negotiations between Chris and Mark Fingarson for the purchase of Imperial Lock by Alpha, and gave evidence as to the nature of the Imperial Lock business, contract negotiations, and alleged representations of undisclosed income made by Chris.

15 I will deal more closely with her evidence when I address the value of the business below. In summary, however, I found her evidence to be credible on the issue for which she was called namely to assist in establishing that Chris realized cash from sales and services which was unrecorded and was described as "under the table".

16 William Karam was called on behalf of the wife. I will deal with the specifics of his evidence shortly. However, I found him to be an excellent witness. He was forthright. He has had experience for many years with all members of the family and attempted to honestly respond to questions put to him.

Evidence led on behalf of Chris:

17 Robin Barker was called. He was the locksmith hired by Christine in January, 1998 to open the safe in the home. His evidence corroborated Christine's evidence about his services. His evidence did not contribute to the case advanced on behalf of Chris.

18 Mark Fingarson was called on behalf of Chris. His primary function was to explain the offer to purchase Chris business which Mark had made in 1993 and which the valuator on behalf of Christine had used as the basis upon which to value the business in May, 1995. His evidence was both interesting and helpful. Although he had reason to be aggrieved by the treatment he received from Chris and from Lynn Gorman, he delivered his evidence in a forthright manner. I accept much of his evidence.

19 Leaving aside the expert on the valuation of the shares of the business, Chris was the remaining witness. His evidence was incredible and untrustworthy. The examples which lead me to those conclusions are almost endless. The following is a sample.

20 Chris has little respect for court orders. He violated the order dated May 18, 1995 when he broke into the matrimonial home in the face of an order for exclusive possession; he violated the order of the same date when, in January, 1998, he showed both boys a motion record he had launched to change custody and had both boys initial his copy to establish that they had read it, all of that in the face of an order prohibiting either parent from discussing any details of the proceedings with the children; and he failed to comply with costs orders made by Beaulieu J. on September 21, 1995 ($750.00), by Ferrier J. in May, 1997 ($500.00) and by O'Connell J. in January, 1998 ($3,000.00).

21 The most egregious behaviour by Chris was manifested in the events on July 9, 1995. When he left the matrimonial home in May, he had removed only a few of his belongings. The correspondence makes it clear that considerable energy was devoted to retrieving more belongings and some furniture and furnishings. Those were packed by Christine and were picked up by Chris' representatives. He was enraged about the linens, the TV and the VCR. He literally broke into the home in a fit of anger. He was charged with forcible entry, uttering death threats and assault of Christine. He described the events in a matter of fact way when he gave his evidence-in-chief. He said he was angry so he "went over there and kicked the door in". He said that he knew he was wrong to have done that. However he insisted in cross-examination that he was provoked to do it by his wife's actions. He showed no insight into the effect of his actions on others. At no time did he apologize.

22 Chris' description must be contrasted with the events as described by Christine. It happened on Sunday. It isn't clear whether Steven was home. Tim was elsewhere. Christine received a phone call from Tim who said that his dad was on his way and he was furious because he didn't get a TV and VCR that he wanted. Tim phoned to warn his mother. Christine called the police. She was in the dining room calling the police when Chris broke in. He entered through the front door which was locked. He broke the frame by kicking where the lock was. The frame just ripped apart. He called Christine some "profound names". He threatened to kill her. Christine escaped by running to the neighbours. After the episode, she propped up 2 × 4's at the front door and back door. She installed a battery operated alarm system with a new access code to prevent Chris from gaining entry in the previous alarm system. She was and remains genuinely afraid of Chris.

23 Chris' propensity to over react with inappropriate anger was displayed on other occasions: at the baseball field in the summer of 1997 and at the restaurant on January 19, 1998. Indeed, there were flashes of barely controlled anger during the course of his evidence. This was most apparent when, on the morning of the second day of cross-examination, he took the initiative to ask the Court for permission to read in a statement which he had prepared over night. After many exchanges with counsel, I refused to permit him to do so. He was annoyed.

24 Chris also wielded his anger in non-physical ways. He clearly retaliated against Lynn Gorman after she signed an affidavit as requested by his wife's counsel. His action in telephoning Lynn Gorman's boss (Mark Fingarson) cost her her job. She was then a single mother with two teen age children. She remained unemployed for approximately 10 months. Similarly, after the restaurant episode in January with Bill Karam, Chris called Bill's estranged wife and stirred up their divorce proceedings by alleging that Bill and Christine had long been carrying on an affair.

25 When a spouse displays such unwarranted and inappropriate anger, and shows no real insight into the behaviour, this tends to undermine the value of his evidence. One must be cautious about the evidence of a person who tends to be motivated by uncontrollable anger and tends to lash out at others and to blame others.

26 Chris's evidence is also undermined by the fact that he appears to have no scruples. He admitted that he took advantage of Lynn Gorman by obtaining information from her about Mark Fingarson's business which he thought would help him in securing

the business of a client away from Fingarson. And he admitted that, in the same instance, he took advantage of Fingarson, a man whom he had known for over 15 years, with whom he had worked on many occasions, and who considered Chris not only a friend but almost a mentor in the industry. It was only after exploiting both of these "friends" that he turned Fingarson against Gorman, causing her to lose her job.

27 Some of Chris' evidence simply did not make sense. In cross-examination, Chris was asked about the furniture which had been purchased for the matrimonial home in the 12 to 18 months before the separation. Those expenditures were made during the time that Chris claimed he could not afford to properly value the shares of the business and consequently he was justified in relying on the offer to purchase by Mark Fingarson when making his capital gains election. As reflected in my notes, this exchange unfolded:

> Q. These house items were purchased at the very time you say you couldn't afford to have a valuation for capital gains purposes, you and your wife were able to afford $5,000.00 to $15,000.00 of furniture for the house?
>
> A. That was taken out of our shareholder's loan for the company.
>
> Q. You could have taken it from the shareholders' loan for the appraisal?
>
> A. I was trying to salvage what remained of our marriage.
>
> Q. You didn't say that yesterday.
>
> A. I wasn't asked.
>
> Q. And you were trying to salvage what remained of your relationship while you were seeing Gorman?
>
> A. I suppose.

28 As another example, he gave evidence trying to justify that an advance from his brother was a gift for which he was entitled to an exclusion:

> Q. Your worked for your brother's company?
>
> A. I worked for him for twenty and a half years.
>
> Q. You built it together?
>
> A. Yes
>
> Q. Do you have any note or letter from your brother that was made at the time you say these cash amounts were allegedly given confirming that they were a gift?
>
> A. There were no notes given. My brother is very thorough. He didn't give them to me, he had his wife give them to me.

29 Finally, as I will outline below, there were occasions when he admitted that he had mislead authorities, including the Bank, when he obtained financing. He mislead Revenue Canada with respect to the value of the shares in the capital gains election and with respect to cash which was not disclosed on the business financial statement or business tax return. He mislead the court in various respects affecting his financial circumstances not the least of which was the cash from the business which was not disclosed on the first of several court financial statements.

30 For the foregoing reasons, and considering the factors outlined in *The Law of Evidence, supra*, wherever there is a conflict in the evidence, I prefer the evidence led on behalf of Christine.

Custody of Steven

31 Since the separation, the wife has had custody of both boys. The order provided for access by Chris. A pattern had evolved whereby Steve's access times were Tuesday and Thursday evenings, and every second weekend. Before Tim moved to his dad's house in January, he had grown out of any pattern. Tim initially functioned as an intermediary because of the difficulty in Chris calling the house when he was on probation. On January 16, 1996 Cecilia Walker of the Office of the Children's Lawyer reported that Tim was not happy in this intermediary role and that he should be withdrawn. She recommended that the access be exercised on an ad hoc basis, as requested by the children and consented to by the parties. This ad hoc arrangement was then implemented with arrangements being made between Chris and the boys through the use of pagers. There was no evidence indicating any difficulty in the exercise of access once the arrangement was adjusted according to the Children's Lawyer's report, and the arrangement remained in place until the events of January 14, 1998 and the surfacing of custody as an issue in this trial.

Tim

32 While custody of Tim is not an issue in this trial, some background information about him is relevant to the issue of Steven's custody.

33 Tim is now twenty years old and taking a combination of grades 10, 11, and 12. He hopes to go to a community college to take an auto mechanic program. According to Christine's evidence. Tim has always had academic difficulty and his progress has been slow. Tim has been involved in Boy Scout activities from early in his childhood. He was a Cub Scout, then a Boy Scout, and is now a Rover, which is the Scouting group for young men between the ages of 18 and 26. He continues to be involved in Rover activities. Bill Karam is his Rover leader. Tim had been in a relationship with Michelle May until days before the trial began.

34 Tim has tried in various ways to keep himself from getting pulled into the conflict between his parents. He has indicated to the parties on a number of occasions that he does not want to take sides or be in the middle. One of the exhibits in this trial was a handwritten letter, dated July 8, 1995, in which Tim stated that he did not want to be mentioned in the court case, or be part of the court case, and that he wanted to be able to see his father when he wanted. Bill Karam, Tim's Rover leader, stated that Tim does not want to be in the middle, that he has complained about being forced to be in the middle and act as a go-between, and gets frustrated about the conflict.

Steven

35 Steven is now 15 years old and in grade 9. Like his brother Tim, Steven has had academic difficulties. He was diagnosed with a learning disability at the age of 8 and placed in special education programs through primary school, but was integrated into the regular classroom in grade 8. According to Christine, Steven can still have assistance from the school but he does not like to ask for it. He had difficulty with his last set of exams and was getting low marks. He continues to be involved in Boy Scouts. Chris testified that Steve wants to go into Rovers when he is older, that he respects and aspires his older brother when it comes to his dedication to Scouts and Rovers, and he wants to follow in his footsteps.

The Divorce Act

36 Section 16 of the *Divorce Act* sets out the factors to consider when making a determination of custody. The relevant provisions are:

> **s.16**
>
> (8) In making an order under this section, the court shall take into consideration only the best interests of the child of the marriage as determined by reference to the condition, means, needs and other circumstances of the child.
>
> (9) In making an order under this section, the court shall not take into consideration the past conduct of any person unless the conduct is relevant to the ability of that person to act as a parent of a child.

> (10) In making an order under this section, the court shall give effect to the principle that a child of the marriage should have as much contact with each spouse as is consistent with the best interests of the child and, for that purpose, shall take into consideration the willingness of the person for whom custody is sought to facilitate such contact.

Conduct of the Parties - s.16(9)

37 There was ample evidence in this case of conduct which is relevant to ability to parent. I will first deal with a series of events which occurred in January of this year. In brief, Chris withdrew Tim and Steven from school without advance notice on the morning of Wednesday, January 14, in order to take physical custody of them on the eve of Chris' motion for a change of interim interim custody. Chris and his brother brought the boys to the matrimonial home, where they packed up their belongings in garbage bags and tried to get into the safe while Chris waited in the van and his brother helped the boys carry their belongings. Steven was kept out of school on Thursday and Friday. On Monday, January 19, Christine and Bill Karam went to the school and picked Steven up at the end of the day. Christine, Bill Karam, Steven and Michelle went out for dinner together. During dinner, Steven received several pages from his father. After Steve responded to his father, Chris came and picked him up from the restaurant. Chris and Bill Karam had an altercation in the parking lot of the restaurant. Chris maintained custody of Steven until January 27, 1998, when O'Connell J. ordered that he be returned to his mother within six hours. Tim continues to reside with his father.

38 Chris testified that in order to get Steven out of school on the morning of January 14, he showed the school principal motion papers drawn up by Mr. Barna. These papers were intended to be used in Court proceedings to secure custody of Steven. Chris had had both boys sign the motion papers. (In his evidence, he explained this by saying that he did not want the boys to think he was doing anything behind their backs.) The principal got Steven from class and he left with his father. After picking Tim up from his school, they attended at the matrimonial home. Michelle was the only person home at the time. The evidence of Michelle and Chris about what occurred at the house that morning is substantially similar, except on the point of whether or not Chris's brother Sam went into the house and downstairs to the basement where the boys were attempting to get into the safe. I accept the evidence of Michelle when she testified that she clearly heard Sam in the basement of the house. Her bedroom is in the basement, and close to the safe which is under the stairs. The boys packed up clothes and personal items in garbage bags, as well as the collection of sports cards from the office in the basement, and brought them to the van. The boys returned a short time after leaving, having forgotten to pack dress clothes for an upcoming baptism.

39 On Monday January 19, Christine went with Bill Karam to the school to pick up Steven. Bill Karam testified that Christine asked him to attend for support because she was afraid that she would say something she should not say, in terms of being prohibited from talking to the boys about the case, and because she was afraid that Chris would be there and that he would be upset. They arrived at school at 2:50 pm.

40 Both Christine and Bill Karam testified that Steven appeared surprised but happy to see them at the school. Christine and Bill explained to Steven that Christine had lawful custody and what Chris did was wrong. Their testimony was that Steven appeared to be fine with leaving with them. Steven was dropped at his girlfriend's house for a pre-arranged visit. Later Bill and Christine came back to get him with Michelle May, and the four went out to dinner. Michelle also testified that Steven appeared to be fine, and that he was joking with her, as was his usual behaviour. Steven received a page from Tim while he was standing at the buffet with Michelle, and the two went to the phone together to call Tim. Michelle testified that she spoke to Tim on the phone, and that Tim had not told Chris about Steven being back with his mom because "he did not know how to do that". Michelle advised Tim to tell his father the truth. After that phone call, Michelle testified that "Steven was nervous ... he was trying to put a smile on his face ... he was anxious".

41 After sitting back down at the table with Bill Karam and Christine, Steven began getting pages from his father, with a "911" designation, signifying urgent. The evidence of Christine, Bill and Michelle was consistent in describing Steven as very upset and nervous. As reflected in my notes, Christine testified that:

> He has a nervous stomach. He gets agitated. He couldn't eat. He hadn't called his dad to tell him he wasn't going back to his dad's. He hadn't told his dad because he was afraid to and he wanted Tim to do that and Tim wouldn't. I told him to ignore it. He couldn't ... He was almost in tears.

Bill Karam testified that:

> As he got more and more pages, he got more and more quiet or nervous or agitated or upset ... Finally he said he was getting calls from his dad's store. He said he better call.

42 Michelle accompanied Steven to the phone to call his father. She testified that after speaking briefly with his father, Steven handed the phone to her and:

> He gave me the phone and was very upset and frustrated and confused and looked like he was going to cry. He told me to speak to his dad.

43 Michelle stated that she told Chris that Christine had custody of Steven, and she was told by Chris not to get involved. She stated that Chris wanted her to tell him where they were and she refused. She testified that Chris was raising his voice and she asked him not to yell at her. Then she handed the phone back to Steven. Steven asked Michelle to hand him one of the restaurant's business cards, which signalled to Michelle that he was telling Chris where they were.

44 According to my notes, Chris's testimony on this point was:

> He didn't want to tell me because he was afraid there would be a scene. I said that there wouldn't be a scene. I would just pick him up. This went back and forth about three times. Michelle got on the phone.... I spoke again to Steven. Steven gave me the address.

45 After the phone call, while the four were waiting for Chris to arrive at the restaurant, Michelle testified that:

> Steven was in a panic .... He was very very upset. He looked like he was going to cry. He wasn't his usual self.

Christine described that "he was pacing. He said I can't handle this." Bill Karam testified that:

> Steven came and said his dad was on his way. He left a full plate of food. He was told he didn't have to go. He said he better, that he didn't want his dad to cause a scene at the restaurant. Michelle said how about a walk. Steven said no I better be here when he gets there.

46 There are two versions of what happened when Chris was leaving the restaurant - Chris Passarello's and Bill Karam's. Both agree there was an altercation between them in the parking lot outside the restaurant. Both agree that Chris told Bill to stay away from his son. Both agree that Chris threatened to call Bill's ex wife and tell her that Bill and Christine had been having an affair (a threat he followed through on). The stories differ in respect of the language used by Chris and who was the aggressor. In both versions, Chris used foul language.

47 The distinction is the context in which the word "fuck" was used. Chris insists that contrary to Bill Karam's version, he did not say "stay away from my fucking son", but rather "stay away from my son you short fat fuck". Chris seemed to be under the impression that as long as the word "fuck" did not modify "my son", there was no problem with its use.

48 The other distinction is as to who was the aggressor. Chris testified that Bill Karam was coming towards him and "trying to get confrontational". Bill Karam testified that Chris was "in his face", "wagging his finger" and yelling, and that Steven had tried to move between them and Chris pushed him out of the way. Both agree that Steven was present throughout the confrontation.

49 Steven was not returned to the custody of Christine until January 27, 1998, when O'Connell J. ordered that he be returned within 6 hours of the Order. Costs, however, remain outstanding against Chris for $3,000.00.

50 I find that there are several aspects of these events which give rise to concern about Chris' ability as a parent. He used his motion papers to convince the school that he had legal authority to seize custody of Steven, knowing full well he did not have legal custody at the time. He had both boys sign these papers, which is clearly in contravention of a Court Order - a Court Order which was made to protect the boys from this kind of behaviour. When Chris and his brother brought the boys to the matrimonial home to pick up their things, the boys were acting in furtherance of Chris's agenda when they confiscated the sports card collection and attempted to access the safe. I do not accept that it was the boys' idea, or their concern, to take possession of the cards or to get into the safe. These were Chris's concerns. At the very least, this illustrates devious and subversive behaviour, and a willingness to drag the boys into the parental conflict. It was bad enough that Chris pulled the boys out of school and had them sneak into their house while their mother was at work to remove their belongings. But, in addition, Chris made them responsible for further provoking his dispute with Christine by retrieving 30 binders of sports cards and trying to get into the safe.

51 I also find that the incident at the restaurant was relevant to the issue of Chris's ability to parent. This was a highly distressing event for Steven. He told his father where they were because his father insisted, despite Steven's obvious discomfort with having his father attend at the restaurant. I prefer the version of events given by Bill Karam as to what happened in the parking lot. Chris could be seen to be the more aggressive of the two, even on his own evidence. The distinction in the context of the use of language is insignificant. What is significant is that foul, aggressive language was so freely used in front of a 15 year old boy by his father and against his Scout leader and life-long friend.

52 Chris showed no compunction in destroying his son's dinner with his mother and friends. I find that his actions that night were designed to regain the winning position in the competition he had instigated over custody of Steven. Satisfying this self interest was more important to Chris than the intense anxiety and stress it caused his son. At trial, Chris demonstrated no insight into how this kind of behaviour could impact on a child who is stuck between battling parents.

53 In making a custody determination, this Court must be concerned about what kind of a message this behaviour would send to a child. If Chris were the custodial parent and thus a more constant role model, it is likely that Steven would learn not to respect his mother and not to respect the Courts. He would probably learn that manipulation of others is a basic problem solving strategy. The Court must be concerned about Chris's ability to give the best interests of Steven priority over his own obsession with winning this conflict with Christine. I find that Chris' priority is his obsession with winning the conflict. Steven's rights will not be equal, let alone paramount.

Preferences of the Boys

54 On the first day of the trial, Mr. Spong made a request that he be permitted to represent the interest of Tim and Steve on the issue of custody. Since Tim is now 20 years old, I ruled that I have no jurisdiction to make an order with respect to his custody and would not permit Mr. Spong to represent his interests. Mr. Barna supported Mr. Spong's request with respect to Steven who turned 15 years old the day before the trial started. Mr. Jarvis conceded that I have jurisdiction to agree to Mr. Spong's request, but he opposed it. I made a preliminary ruling on the first day that I would not permit representation at that point, but I held that as the evidence at the trial unfolded, it might become apparent that some form of representation was required and I would then consider the issue. However, I had been told that Mr. Barna had had an occasion to seek advice from Mr. Spong in a motion in this action. Although the connection between Mr. Spong and Chris was minimal, in these circumstances, I held that there should be no connection. Consequently, I ruled that if I later concluded that representation for Steve was necessary, I would renew the existing order in place appointing the Children's Lawyer for that purpose. I have concluded that representation for Steve was not necessary and not desirable. I have heard from many sources that both boys wanted to be removed from the conflict. To authorize representation at this stage would mean that Steve would be even more in the centre of controversy. I heard sufficient evidence about Steve from others that separate representation would not be helpful. It was for the same reasons that I did not permit Chris' counsel to call Steve as a witness.

55 A great deal of emphasis in this trial was placed on the preferences of both boys about where they wanted to live. In regard to Steven's preferences, most of the testimony suggests that Steven is ambivalent, and that his wishes change. Michelle May testified that Steven sometimes wants to live with mom, sometimes with dad, and more recently he does not want to live

with either. She described him as "wanting to remain neutral". Bill Karam testified that Steven "flip flops" and has wanted to live with both parents, and that he recently stated at school that he wanted to "stay with his dad for a while". Christine described Steven as "sitting on a fence". She also testified that Steven recently told her that he wants to live with his father. Chris testified that his recent actions in taking Steven to live with him were in response to Steven expressing in November that he wanted to live with his dad. I find that Steven has recently expressed wishes to stay with his father, as described by the witnesses. However, I do not find this a persuasive reason to change the custody arrangements.

56 Evidence of Tim's preference to remain with his father since January 14, 1998 has been adduced in this trial to support the proposition that Steven also choses freely to live with his father. In determining the best custody arrangements for Steven, I place little weight on the fact that Tim is now living with his father, for the following reason.

57 At some point in 1995 or 1996 Tim was robbed of his jewellery at school. A claim was made against the house insurance policy, and the insurance company covered the loss by cheque made out to Tim and his father for $5,000.00. Part of the money was used to have replacement jewellery manufactured by a friend of Chris' for approximately $2,000.00. Chris testified that he felt he had to hold the remaining funds in trust for Tim, and this caused considerable conflict. I heard testimony from Christine, Chris, and Bill Karam, all to the effect that Tim believed he was entitled to the insurance proceeds, and that his father should not have kept them. This caused a great deal of conflict between Tim and his father. In his examination-in-chief, Chris testified that he had given the full amount of the remaining proceeds - $2,400.00 - to Tim, who put the money into chequing and savings accounts. In cross-examination, Chris admitted that he had only given the money to Tim since he left his mother's home and moved in with Chris in January. After refusing to give this money to Tim for well over a year, this recent change of heart causes me concern. The fact that the $2,400 was only handed over after Tim moved out of his mother's home and in with Chris seriously undermines any significance I might place on Tim's preference in deciding what is appropriate for Steven. On the contrary, if anything, it undermines the weight I attach to Steven's expressed wishes, as they were described through the witnesses and outlined above. Given the level of manipulation this father is capable of, I am not satisfied that Chris has not offered some kind of incentive to Steven for moving in with him.

Best Interests of the Child **-** *s.16(8)*

58 Over and above concerns about Chris's ability to parent, and preferences of the children, there are sound reasons for not disrupting the status quo. Steven has been living with his mother all of his life, and with her as custodial parent since 1995. She has been the one to take him to appointments and to Scouting events and to address his schooling needs. In the circumstances of this case, it is in Steven's best interests to preserve the status quo, for the following reasons.

> First, academics have not come easy to either of these boys. Given Steven's learning disability, he will require stability, structure and encouragement if he is to maximize the learning potential he has. This is a need, or circumstance of this child, to be considered in accordance with s.16(8) in determining his best interests. Chris's behaviour surrounding the January 14 incident illustrates that he does not place a high priority on Steven's educational needs, nor does he appreciate the importance of schooling to Steven's future. Steven was taken from school for three days shortly before exams, and kept home in order to accommodate Chris's fears that Christine would "harass" him at school. This was poor judgment. And it was a sacrifice of Steven's best interests in a deliberate attempt to pull him into the parental conflict. Christine has historically been responsible for attending to Steven's educational needs. Christine is in a better position to help Steven to maximize his potential in the area of education.

> Second, Steven continues to be involved in Scouts and aspires to continue with Rovers. This is also a need, or circumstance to be considered pursuant to s.16(8). Continued involvement in this organization should be encouraged. Bill Karam will be the Rover leader. I find that Chris is unlikely to put aside the conflict that arose during these proceedings between himself and Bill Karam, in order to provide support for Steven's continued involvement in this program.

> Finally, Steven has been living in the same place for his whole life, and undoubtedly has friends in the area. A move from Scarborough to Ajax at this time could be very disruptive for him. His school is in Scarborough. If he lives with his father, he would have to rely on Chris to drive him into school from Ajax. The other option would be for Steve to change schools

which may cause undue disruption, given Steve's academic challenges. I am not persuaded that responding to Steve's needs would be a priority for Chris.

Maximum Contact with Both Parents - s.16(10)

59 Section 16 also requires the court to consider the willingness of the parent seeking custody to facilitate contact with the other parent. It is important for Steven to continue to have a relationship with *both* parents, to the extent that that is possible. Of the two parents I find that Christine is more likely to facilitate access to the other parent. The access arrangements have worked for two years. There was no evidence before this Court of Christine impeding Chris's access to the boys during that time. On Chris's own evidence, the arrangement worked "extremely well". In light of the behaviour of Chris that was put in evidence before this Court, I do not feel confident that Chris would be as likely to have a positive influence towards access between Steven and Christine. In coming to this conclusion I place particular significance on the fact that Chris planned surreptitiously with the boys to take custody of them, without informing Christine.

Conclusion

60 For these reasons, Christine shall have custody of Steven with liberal access by Chris. Christine testified that the current arrangement is that she has to approve plans for access visits. This is to ensure that the access plans do not conflict with other arrangements. This suggestion came from the January 17, 1996 report of the Children's Lawyer. The suggestion also related to the right of Christine to rely on the times when access is scheduled so that she can order her own life accordingly, without Steven coming and going as he pleases. This is a reasonable condition and should continue. Consequently access arrangements will continue to be arranged between Steven and his father, provided they are cleared with Christine first.

Equalization of Net Family Property

61 The valuation date is May 10, 1995.

Matrimonial Home:

62 The parties agree that the value of the jointly owned home is $210,000.00. The wife seeks to retain the home in consideration of the equalization payment. I will address that issue below.

Contents of the Home

63 The issue of the contents of the home arose at trial. Chris took possession of his clothing, personal items, a TV and VCR following separation. The sports card collection has been in Chris's possession since January 14, 1998. The rest of the contents have remained in the possession of Christine. Christine's net family property statement, dated February 23, 1998 indicates that the contents of the home are "to be divided between the parties". No value is estimated. Counsel for Chris attempted to undermine her credibility by pointing out that her previous NFP statements indicated that the contents had been divided, because the words "to be" were not used. I consider the distinction immaterial. Chris's NFP statement dated January 23, 1998 lists $15,000.00 worth of general household contents in the wife's column. Chris gave evidence in chief, in the form of a list he had compiled shortly before trial, that the contents retained by Christine were worth $40,000.00, based on his recollection of cost of original purchase. However, in cross-examination, Chris testified that those estimates were of *values* and not of what was paid for the items. Chris seeks to have the $40,000.00 included in Christine's net family property. In his NFP statement he ascribes a value of $15,000.00 to general household contents in the wife's column.

64 In his submissions Mr. Jarvis suggested that the household contents be appraised and divided on the basis of flipping a coin. He also suggested that if the parties cannot agree on the format the contents could be put up for auction and sale and the proceeds divided. Mr. Barna suggested selling the contents would be easier but stated that the division based on the flipping of a coin would not be unreasonable.

65 It is unfortunate that this issue could not have been resolved before trial. Given the significant discrepancy between the spouses as to the value, and the high degree of conflict, an expedient, reliable and inexpensive solution is required. Section 9(1)

of the Family Law Act gives the court broad discretion in implementing the equalization of net family property. Accordingly, the contents of the matrimonial home will be decided on the basis of the following protocol:

1. the furniture and furnishings (including athletic and other equipment) which belong to Tim are his property;

2. the furniture and furnishings (including athletic and other equipment) which belong to Steve are his property;

3. Christine shall prepare a list of all other remaining items in or at the matrimonial home (other than her personal belongings);

4. in a meeting with counsel, Chris shall flip a coin. Christine will call the toss. If she guesses correctly, she will make the first selection. If she guesses incorrectly, Chris will make the first selection. They will then alternate selections until the list is exhausted;

5. the items removed by Chris in 1995 shall not be included in this process;

6. once the selections are made and recorded at the meeting, Christine shall, simultaneously with the payment required by Chris in Schedule B to these reasons, make the items available to be picked up by an agent acceptable to Christine. Chris shall pay the cost, if any, of the pick up.

7. there shall be no value attributed to either spouse in the net family property calculation on the assumption that the foregoing will yield a relatively equal disposition of the contents.

Jewellery

66 Chris asserts that the majority of his jewellery was held in the safe at the matrimonial home, and that Christine is now in possession of $2,500.00 worth of his jewellery. According to Chris's testimony, he took $1,350.00 worth of his jewellery with him when he vacated the matrimonial home on May 18, 1995, pursuant to court order. In cross-examination he admitted that when he vacated the home that day he took the time to change the combination on the lock to the safe, but that he did not have time to take his belongings out of it.

67 Christine testified that she does not have any of Chris's jewellery. Her testimony was that she did not have the combination to the safe, and thus had no access to its contents until it was opened by locksmith Robin Barker on January 24, 1998. She testified that all that was in the safe was the coin collection.

68 The evidence lacks clarity on both sides. The only solution is to find that Chris and Christine each have the jewellery to which s/he is entitled and no values shall be attributed in the net family property calculation.

Coin Collection

69 The coins are currently in the possession of the wife in the matrimonial home. According to Chris's financial statement, dated January 23, 1998, as well as his NFP statement, dated January 23, 1998, the Coin collection is valued at $6,000.00. In that 1998 statement, Chris has indicated that the coins are to be held in trust for the boys by Chris and thus excluded from his NFP pursuant to s.4(2) of the *Family Law Act*. Chris's May 15, 1995 statement indicates that he holds a 50% interest in the coins, valued at $3,000.00 but there is no indication of a trust. His July 5, 1995 financial statement is the first indication of a trust Christine's NFP statement, dated January 22, 1998, shows the coin collection in the husband's column, valued at $3,000.00. Her February 23, 1998, NFP statement shows the value of the coin collection to be $6,000.00.

70 Both parties seem to agree that the value of the coin collection was $6,000.00 on valuation date. In cross-examination Chris testified that the coins were "obviously mine". Christine testified that there was never discussion that the coins would be passed on to the children, only that the boys would each get an Olympic coin. She stated that if the coins were in trust for the children, she would hold them until they were distributed to the children, and that she was concerned that if Chris held them he would sell them and keep the money. Chris has the burden of proving the existence of a trust with respect to the coins. I

find there is no corroboration in the evidence for the existence of a trust. While neither party is against the idea of the coins being held in trust for the boys, there is no evidence of an intention to form a trust. The trust merely showed up on Chris's financial statement. Consequently, the coins will form part of Chris's NFP, valued at $6,000.00. Christine will make the coins available to be picked up by an agent of Chris' acceptable to Christine. The pick up shall occur at the same time as Chris' share of the contents is retrieved.

Scarborough Sports Cards Inc.

71 Scarborough Sports Cards Inc. was a company that Chris started with his friend Eric Gustavson. The asset owned by that company is a large sporting card collection. In his May 15, 1995 financial statement, Chris estimated the value of his 50% interest in the company to be $3,000.00. Chris has had possession of the collection since January 14, 1998 when the boys removed more than 30 binders of cards. Chris indicates in his NFP and financial statement sworn January 23, 1998 that the card collection is worth $3,500.00 and is held by him in trust for the children. He estimates his 50% interest in the value of this company to be $1,500.00. Christine testified that she had no idea what the cards were worth, other than the value ascribed to them by Chris.

72 As with the coins, there is no corroboration of this trust, and it is therefore reasonable that the card collection remain as part of the value of the company. I accept the values attributable by Chris. This leaves the total value of the company including the cards, at $5,000.00.

Wife's Account Receivable

73 Christine made a loan to Imperial Lock of $4,500.00 on October 6, 1994. She obtained the money to make the loan by cashing in an RRSP worth $5,000.00, from which $500.00 was withheld for income tax. She testified that she understood that she would receive $5,000.00 in repayment, because Imperial usually paid her taxes. Christine testified that she understood that this loan was to pay creditors of the business, but she found out later it was to pay back a loan to Lynn Gorman. Lynn Gorman testified that she had loaned $6,000.00 to Chris to open his Queen Street location, and that she called in the loan when she found out that he had gone to Atlantic City with Christine Lang. He repaid about $4,300.00 or $4,400.00 of the loan. This is reflected on Christine's financial and NFP statements as a $5,000.00 debt under accounts receivable. It is not reflected on Chris's NFP or financial statements, nor is it recognized in the business financial statement. Both counsel agreed in submissions to delete this item from the wife's accounts receivable. It shall be deleted and will not form part of the NFP calculations.

Account Receivable owed to Husband From Company

74 On December 14, 1990, Christine and Chris executed a mortgage in favour of the Royal Bank for $30,000.00, for which the matrimonial home was security. Chris testified that half of the money went into the business and half was spent on family debts and expenditures. Christine testified that the entire amount went to "pay bills at Imperial". The financial statements of Imperial Lock from 1992 through to 1996 have reflected this as a long term note payable to Chris under liabilities of the company. Christine testified that the mortgage payments are paid by Imperial. The tax returns indicate that Imperial Lock provides the funds to Chris who in turn pays the mortgage. The net effect is that vis a vis the Bank, Chris and Christine are both responsible for this obligation, yet Chris alone holds entitlement to recover the entire amount from the company. For *Family Law Act* purposes, the entire amount should be reflected in the husband's NFP as an account receivable, and as a liability.

Value of Imperial Lock Company

i) Undisclosed Income

75 It is the issue of the value of Imperial Lock on which the parties are the farthest apart. Central to the dispute is whether Chris realizes significant unrecorded cash income from the business. If so, it would have an impact on the value of Chris' shares for purposes of calculating his net family property. The resolution of that issue also has an impact on establishing Chris' income for purposes of applying the Child Support Guidelines.

76 Chris has been a locksmith for approximately 29 years. Before opening the Imperial Lock Company, he worked in his brother Leonard's locksmith company for 20 years. He has taken correspondence courses in locksmithing and also specialized training in opening safes. He has been an instructor in the area of opening safes for 18 years. He testified that there may be a dozen or so people in the province with his level of expertise in opening safes. He was instrumental in creating a professional organization.

77 Imperial Lock was incorporated in 1989 by Chris and partner Carmine Panaro. Christine worked at Imperial Lock in 1989, 1990 and part of 1991. She testified that during 1989 she worked two full time jobs, one with Imperial Lock and one with the Ontario Government. From April 1990 to September 1991, she worked full time at Imperial Lock. She returned to work with the Ontario Government in October, 1991, after finding that she and Chris simply could not work together. Chris purchased Mr. Panaro's shares in 1990, and Chris was the sole shareholder on valuation date, May 10, 1995. In mid 1994, Imperial Lock purchased a second location. On valuation date, Imperial Lock was operating at both locations - one at 2693 Eglinton Ave. East and one at 1616 Queen Street West - and had 7 employees and 4 repair trucks.

78 Imperial Lock is in the business of servicing, selling and opening safes and locks as well as retail sales out of both store locations. Additional services include the sale, installation and repair of doors, door handles and door closers. Chris asserts that his brother Leonard advanced money when the business started. I will deal with that issue below. The personal tax returns filed by Chris, and where available and reflecting income from Imperial Lock, also from Christine, indicated the following employment income:

Year	**Chris**	**Christine**	**Total**
1989	$12,721	unavailable	
1990	$25,400	unavailable	
1991	$39,039	unavailable	
1992	$40,565	$30,960	$71,525
1993	$39,077	nil	
1994	$41,738	nil	
1995	$39,187	nil	
1996	$39,244	nil	

79 Although T-4"s were required by law within a week of Chris' evidence, Chris did not produce a T4 for 1997. Mr. Barna did provide a photocopy of Chris' final pay cheque stub in 1997 which indicated gross income of $39,879.00. I was not given tax returns for Christine for 1989, 1990 and 1991, during parts of which years her only source of income was Imperial Lock. The only year in which Imperial Lock income is provided for Christine is a year in which she was working full time at her job with the Government of Ontario. In the one year in which both show income, the total employment income drawn for both of them was $71,525.00.

80 In addition to income reflected on a T4, Christine outlined the sources of unrecorded income as follows: some cash car calls when it was decided not to put the money through the till; sale of used safes; service calls on holidays where payment was substantially increased and was in cash. She also outlined the purchases or expenses made with such cash as follows: living room furniture; the dining room furniture and the washer and dryer were mostly cash; china dishes; Tim's trip to Washington; her own income tax owing at the time of filing the return. When she was employed by Imperial Lock. Christine's duties included maintaining the bookkeeping system and as a result, she had first hand knowledge of the opportunities for unrecorded cash. Christine made summaries of her estimate of expenses made by such cash. In 1992, the total was $8,674.00; in 1993, the total was $11,900.00; and in 1994, the total was $7,000.00. The 1992 total included $6,000.00 paid on account of her income tax. In that year, the tax return indicates that the balance due on filing was $6,079.00. The total for 1993 included $220.00 for income tax while the return indicates a refund of $54.00. The 1994 total includes payment of income tax of $1,879.00 while the return indicates a balance owing of $1,783.00. Two of the three years are accurate and the 1993 estimate is not significantly in error. The point is that a major portion of the unrecorded cash is corroborated.

81 Lynn Gorman's relationship started in the spring of 1992. Shortly after it began, Christine began divorce proceedings. Chris was upset by this. Lynn was very concerned by his threats and his behaviour. He told her he had bought a gun and he was going to say goodbye to his children. She understood that he was going to shoot himself. Two weeks later, he called her from hospital after having taken an overdose of Tylenol. She broke off the relationship. The affair resumed in the fall of 1992 and was intermittent until the fall of 1994. Christine said she stopped the divorce proceedings because of her concern about Chris' hysterical reaction.

82 Lynn's knowledge about Chris' financial affairs came from two circumstances. The first was what he told her when only the two of them were discussing matters. The second is when she was part of the many meetings between her boss and Chris when sale of Chris' business was discussed. The latter were protected by a confidentiality agreement signed at the time of the negotiations.

83 In their personal discussions, Lynn heard from Chris that his company was worth $1.5 million. Chris and her boss were customers of each other. On one occasion when Chris and Lynn were going away for the weekend, Lynn brought cash which her boss owed Chris and that was used as part of the expense for their hotel room. On one New Year's Eve, Chris made a service call to open a safe. He charged $500.00 for a job which took him 5 minutes.

84 Chris purchased used safes and sold them for cash without recording the purchase or the sale. Chris spoke about cash under the table numerous times and said it was as much as $50,000.00 in a year. In April, 1994, Lynn advanced a loan to Chris of $6,000.00 to help him to buy the Queen St. store. She called in the loan the day she found out that Chris was in Atlantic City with Christine Lang, the person with whom Chris now lives. The loan was paid in about November, 1994.

85 As indicated above, Lynn collaborated with Chris to provide information which may have assisted Chris in wrestling a security contract away from Lynn's boss. She contacted Christine to tell Christine what was going on between Lynn and Chris only after she discovered that Chris had developed a relationship with Christine Lang.

86 Lynn signed an affidavit for Christine as soon as the divorce proceedings began in 1995. As a result of Chris' call to Lynn's boss after that affidavit, Lynn lost her job and was unemployed for 10 months. While there is certainly an element of retaliation in Lynn's actions, I accept her evidence to the extent that it corroborates Christine's evidence of the accessibility to unrecorded cash.

87 I turn then to Chris' evidence. His first financial statement in the divorce proceedings was sworn on May 15, 1995. It disclosed only employment income of $41,000.00. He received Lynn Gorman's affidavit sworn May 17, 1995. He filed a financial statement dated July 5, 1995 in which he included $6,000.00 as "sporadic cash income for small jobs". In his financial statement sworn January 24, 1997, he showed income based on 1996 as employment income of $750.00 per week and $2,000.00 for the year for "purchases and sales of used safes". In the financial statement sworn January 23, 1998, he included "purchases and sales of used safes" at $750.00 for the year.

88 In response to an undertaking at discovery, he produced a list of the legal expenses he had paid since separation. In 1995 alone, he paid $22,126.80 of which $16,000.00 was paid by Imperial Lock and $6,126.80 was paid by him personally. As the summary of the procedural background at the outset indicates, there was considerable activity in 1995. While the specifics in the year of separation are less relevant than those before valuation date, evidence of unrecorded payments to Chris after valuation date would serve to corroborate a trend before valuation date.

89 In his examination-in-chief, Chris produced invoices designed to show that purchases and sales of used safes were recorded. Mr. Jarvis protested. Chris' explanation for the belated production of such business records was that no one had ever asked for documentation about whether the revenue from the sale of used safes was put through the company. I allowed the documents to be filed. Whether those specific invoices were ever requested, the issue of unrecorded income has been on the table for over 2.5 years. The explanation, which again seeks to blame others, was not credible.

90 In cross-examination, Chris agreed that there was undisclosed cash. He knew he was breaking the law by not reporting it to Revenue Canada. He agreed that unrecorded sales was a pattern which had been going on before separation. He agrees that he didn't disclose his true income to his accountant, but volunteered, again, that neither did his wife. He agreed that over 5 years, he had consistently mislead his accountant and Revenue Canada about his true income. On the subject of the loan from the Royal Bank, he agreed that he had mislead the bank in obtaining the loan by not disclosing a loan with his father. He denied ever telling Lynn Gorman that he made $50,000.00 under the table. But moments later he acknowledged that he had told Fingarson that "cash transactions could be had in the business. What she heard was my effort to make the business more attractive." He said that his talk to Fingarson about cash was a "sales tactic". He admitted that he had not told his business valuator about any cash transactions. Aside from the cash transactions, Chris admitted to using Imperial Lock funds for personal travel and automobile expenses. Chris seeks to minimize the available unrecorded cash. He says that business is poor and opportunities to take cash are few.

91 I will deal more fully later with the evidence of Mark Fingarson as it relates to the purchase price of Chris' business. On the subject of unrecorded cash, Mark gave this evidence. In response to the question as to whether Chris had made any representations to him about undisclosed cash, Mark said that in any business there is a certain amount of cash. He understood that cash went through the till or was brought in by the servicemen. He suggested however, that if you hide your cash, the bank will want to know what's going on. He didn't believe that Chris had ever mentioned a specific amount of cash as having been taken by Chris.

92 The business valuator engaged on behalf of Christine did not do a comprehensive analysis of unrecorded cash or payment for personal expenses for reasons to which I will refer below. The business valuator engaged by Chris had no knowledge of unrecorded cash and expenses paid by the company.

93 Mr. Jarvis has made submissions that Chris' real income is about $75,000.00 per year which is almost twice the income disclosed on his tax returns.

94 The burden of proof is on Chris to prove his income both for purposes of establishing value of his net family property and for purposes of establishing income for the child support calculation. I find that wherever an inference is to be drawn on this subject, it should be drawn against Chris since it was his legal responsibility to advance reliable evidence. Based on Chris' admission that there is unrecorded cash, the only issue is how much. For the year of separation, I find that Chris' total income is calculated as follows:

employment income as in T4	$39,187.20	
legal fees paid	$16,000.00	
car expenses, credit cards, miscellaneous income at 20% of employment income		$10,000.00
total		$65,187.20
rounded to		$66,000.00

95 I therefor attribute $26,000.00 as undisclosed income or expenses paid on his behalf. While the legal fees paid in that year were higher because of the separation, in view of the evidence of Christine and Lynn Gorman, and the admissions by Chris indicated above, I find that a pattern of income at that level should be attributed at least beginning in 1992, the year when the total income from Imperial Lock paid to Chris and Christine was $71,525.00 - in a year when Christine was not actively engaged in the company. If the business could support that level of income on T-4's for Chris and Christine and the $8,674.55 itemized by Christine, attributing $66,000.00 to Chris on a regular basis before separation might even be considered to be conservative.

ii) Value of the Shares

96 I turn then to the value of the shares of the business at valuation date. In his financial statement sworn in May 1995, Chris valued his shares at $190,000.00 without reference to a shareholder's loan. In his financial statement sworn July 5, 1995, the shares were "to be valued". In the financial statements sworn January 24, 1997 and January 23, 1998, Chris reflects the

value of the shares and of the shareholders advance at $131,966.00. In contrast, Mr. Jarvis asserts that the value of the shares including the loans is $350,000.00.

97 Glenn Bowman is an experienced chartered business valuator. He was retained by Mr. Jarvis after Chris failed to obtain his own appraisal of the business as anticipated by Jennings J. on July 7, 1995. The order of Epstein J. required Chris to pay $3,500.00 to enable Christine to engage her own appraisal. Mr. Bowman was given the unaudited financial statements for the period ended March 17, 1990, February 28, 1991 and the years ended February 28, 1992 to 1994. He also reviewed documents related to the offer to purchase by Fingarson and the capital gains election documents as well as Chris' tax returns for 1989 to 1994 and miscellaneous other documents. He had no source documents from the accountant such as working papers. He had no access to Chris. There were limitations on his engagement which included the documentation available to him and the cost. He pointed out that he had not sought external verification of the information provided. Nor had he investigated the extent to which Imperial Lock had unrecorded cash sales or paid for personal expenses of Chris and Christine.

98 Mr. Bowman relied on the offer to purchase made by Mark Fingarson. After the confidentiality agreement was made in April, 1993, negotiations began in earnest. The November 12, 1993 offer was for $270,000.00 plus the amount of any shareholder loan payable to Chris not yet repaid as at the date of closing. Once the written offer was made, Fingarson had an opportunity to do due diligence. His mother is a financial advisor. He and his mother spent time at the business observing and investigating. An agreement of purchase was never reached. Negotiations were halted about one year after they began.

99 Even though that deal never materialized, Chris used it as the basis for a capital gain election. In documents dated in February, 1994, Chris' accountant asked Chris' lawyer to document the reorganization to achieve the crystallization of the capital gains exemption using Section 85 of the *Income Tax Act*. Chris sold his common shares back to the corporation. The proceeds of sale were a new special class of preference shares and new common shares. The common shares were surrendered to the company at fair market value established at $350,000.00. The accountant established that value based on the Fingarson offer at $270,000.00 plus the shareholder advances at $61,996.00 and shareholder note payable at $29,084.00. The process was accelerated to take place prior to the introduction of the federal budget in which it was anticipated that the capital gains exemption would be modified or eliminated. Chris and Imperial Lock signed the share exchange agreement. Chris signed the special resolution of the shareholders, the resolutions of the board of directors and the subscription for shares. The articles of incorporation were amended. All of the foregoing was done in February, 1994.

100 By letter dated January 23, 1995. Chris' solicitors reported on the transaction including the basis upon which the fair market value of the common shares had been determined in consultation with the accountant, "which took into account, among other things, an offer in such amount received and rejected by the shareholder from a party dealing at arm's length from the parties". In April, 1995, Chris filed a personal tax return reporting the gain of $262,492.50.

101 In Mr. Bowman's report and in his evidence, he outlined the typical approaches for valuation of a business - either asset based or earnings/cash flow based. The limitations on his engagement precluded him from undertaking the detailed earnings/cash flow analysis he would have done. He prepared an analysis of the estimated goodwill implied by the purchase transaction. He concluded that the offer by Fingarson appeared to be "unusually high" but he considered it to be consistent with the existence of unreported income and personal expenses included in Imperial Lock's accounts. Based on the information available to Mr. Bowman, he understood that in addition to cash sales, personal expenses paid for by Imperial Lock included: travel; cellular phone calls; automobile expenses; legal fees relating to the matrimonial action; personal income taxes; home furnishings; and personal credit card charges. He concluded as follows:

> It is our view that the unreported income and personal expenses items paid by the company, would form part of the income stream that a purchaser would be willing to pay for, and that the existence of these items was considered by Mr. Fingarson in his determination of an approximate purchase price to offer for Imperial.
>
> Keeping in mind the concept of fair market value, we consider that the en bloc value implied by the contemplated purchase transaction by Mr. Fingarson of the shares of Imperial and the implied goodwill represents an open market transaction between informed, prudent and knowledgeable parties, acting at arm's length. The price offered by Mr. Fingarson reflected

> his assessment of Imperial, based on information provided by and discussions with Mr. Passarello, and, was based on the future expectations for Imperial at that point in time. The price offered by Mr. Fingarson in turn formed the basis of his valuation of Imperial for the purposes of a share capital reorganization, and in turn formed the basis of Mr. Passarello's valuation of Imperial for the purposes of calculating the capital gain reported on his 1994 personal income tax return.
>
> We requested, but have not been provided with financial statements for the fiscal years subsequent to 1994. We have not been provided with any information suggesting that the nature of Imperial's business operations, reported revenues, client base, operating expenses, and the apparent personal lifestyle continued to be enjoyed by Mr. Passarello, has changed significantly since February 28, 1994. Thus it would appear, that the estimated fair market value of Imperial on or about February 28, 1994 likely provides a reasonable approximation of the fair market value of the company on or about May 10, 1995.

102 Mr. W.A.D. Selby is also an experienced chartered business valuator. He was retained by Chris and prepared a report in December, 1996. He had access to the financial statements for the years ended February 1995 and 1996 and the election documents. He also had reviewed Mr. Bowman's report before he wrote his own. He concluded that the Fingarson offer did not reflect an indication of share value for a number of reasons. He ignored the Fingarson offer for purposes of valuing the shares. He reviewed the financial statements, made adjustments to determine maintainable earnings, arrived at an earnings multiple (3 times maintainable earnings) and concluded that:

> The value of the corporate shares would be no more than the shareholder's equity of $20,000.00 plus a nominal $30,000.00 amount to reflect Imperial's going concern nature. We set the value of the corporate shares at $50,000.00.

103 In addition, he pointed out that the debt to Chris in the amount of $81,966.00 would have to be addressed when "considering the overall investment in Imperial". In essence, he valued the shares at approximately $130,000.00.

104 I am compelled to disregard Mr. Selby's report for two reasons. He said in evidence that he did not consider the share reorganization and crystallization to reflect fair market value. He considered it unremarkable that Chris had represented to his lawyer, his accountant and Revenue Canada that it reflected fair market value. Consequently, he had no hesitation in disregarding it. I accept Mr. Bowman's evidence that that election for capital gains purposes must be at fair market value. The rejection of the transaction as at least an indicator of value was unreasonable. Secondly, Chris admitted that he did not tell Mr. Selby about unrecorded cash.

105 Chris has the burden of proof on this issue. In the absence of credible expert evidence, Chris' assertion that the shares were valued at approximately $130,000.00 has no basis and accordingly. Chris' evidence on that point must also be rejected.

106 Without any basis for Chris' valuation, the conclusion reached by Mr. Bowman is attractive. Chris can hardly complain that Mr. Bowman did not do a comprehensive earnings/cash flow analysis when the documents and information needed to conduct the analysis were not produced. The conclusion reached by Mr. Bowman is logical and well-reasoned.

107 However, I must consider the evidence of the arm's length purchaser. Mark Fingarson gave evidence with respect to the background and the negotiations. He agreed with Chris' evidence that the purchase price of $270,000.00 was Chris' number. He said that "until we arbitrarily pulled a number from the air, I wasn't going to get access" to Chris's records. He did due diligence with the assistance of his mother. He said that he felt it was worth "a lot less than the original asking price". Although the documentation was not produced, he said that he brought an offer back at $230,000.00. Together with the shareholder's loan, that would constitute an offer of $312,000.00.

108 Mr. Bowman's evidence that the Fingarson offer reflected fair market value was justified until the potential purchaser indicated that it was designed only to open the books and that in reality, the price was less. While I was inclined to rely on the Fingarson offer, particularly because of the representations to the accountant, lawyer and Revenue Canada which was explicit in the capital gains election process, I find that I am not at liberty to adopt that approach on the basis of Fingarson's evidence.

109 Fingarson would not have paid $270,000.00 plus the shareholder's loans. He offered $230,000.00 plus the shareholder's loans. The evidence of Mark Fingarson is compelling. It is reinforced by three further factors. The first is that I have found the income attributable to the business to be a healthy $66,000. Secondly, the current assets are valued at $186,021.00 and the capital assets valued before depreciation at $145,563.00 for a total of $331,584.00. The liabilities (current and long term) totalled $206,723.00, leaving a net of $124,861 - again, a healthy picture. Lastly, the burden of proof is on Chris to establish value. He cannot be seen to complain when I adopt the evidence of the witness whom he called. I therefore assess value at valuation date based on negotiations which concluded early in 1994. I find that the value of the shares at valuation date was $230,000.00 together with the shareholder's loans established by the accountant in the capital gains election valuation of $29,084.00 plus $61,996.00 for a total of $91,080.00.

Exclusion of Gift From Leonard

110 Section 4(2)1. of the *Family Law Act* allows the exclusion of

> *property*, other than the matrimonial home, that was *acquired* by gift or inheritance from a third person after the date of the marriage (emphasis mine)

111 Chris asserts that in 1989, he received a gift of $100,000.00 from his brother Leonard after working for 20 years in Leonard's locksmithing company. Chris asserts that $86,000.00 of that amount is reflected in his NFP as a shareholder loan to Imperial Lock. Thus, he is claiming an $86,000.00 exclusion pursuant to s.4(2) of the *Family Law Act*. There is no documentary evidence to support this alleged gift. The exclusion was not claimed until Chris' third financial statement sworn January 24, 1997. Leonard was not called as a witness despite the fact that he apparently lives in Toronto and could have been called.

112 The husband claimed in cross-examination that he had documentation in the form of a note from his brother verifying the gift, but that he left it at home because he did not know he would have to prove the gift. When pressed on the point - to the effect that it was incredulous that his lawyers told him about the exclusion but not that he had to prove it - he stated that he had also given a copy of the note to his previous lawyer. The opening balance statements of Imperial Lock were not produced in evidence to provide evidence of the initial infusion of capital. There is no corroboration provided by Chris that the source of the Shareholder's advance shown in the corporate financial statement was a gift from his brother.

113 The wife, in cross-examination admitted that the money to start the Imperial Lock business came from brother Leonard, in the amount of $110,000.00. She stated that it was not a gift though, but that it was "payment for services over the years". The husband also testified that the money had been advanced "in appreciation of looking after this company while he [Leonard] was away doing his wheeling and dealing". Both indicated the money was not advanced in a lump sum, but in periodic payments over the course of a year.

114 Section 4(3) of the *Family Law Act* places the onus of proving an exclusion on the party claiming it. Blacks Law Dictionary defines a "gift" as:

> A voluntary transfer of property to another made gratuitously and *without consideration*. ...Essential requisites of "gift" are capacity of donor, intention of donor to make gift, completed delivery to or for donee, and acceptance of gift by donee. (emphasis mine)

115 The problem with this exclusion lies in whether the husband has established that this $86,000.00 shareholders loan came from a gift from the brother. Section 4(2) allows exclusion of *property* that was *acquired* by gift or inheritance. Hence, it is not enough merely to show that Leonard advanced the money as a gift. The husband must prove that the property he seeks to exclude - the shareholder's loan - was acquired by the gift. Hence, while Christine corroborates that Leonard gave money to Chris, Chris has not produced any evidence to corroborate that it can be traced into the shareholder's loan. The opening balance sheets of the company were not introduced into evidence. The note from Leonard was not introduced into evidence. Leonard was not called as a witness.

116 *Amaral v. Amaral* (1993), 50 R.F.L. (3d) 364 (Ont. Gen. Div.) supports the propositions that where a transaction between family members is raised to reduce net family property the claimant should provide documentary corroboration. *Amaral*also supports the proposition that where evidence can be called to support the claim and is not, an adverse inference can be drawn against the claimant. Counsel for the wife invites me to draw an adverse inference against the husband for failing to call his brother as a witness to corroborate the gift. I agree. I also agree with Mr. Jarvis that the advance by Leonard could be characterized as a payment for past services rather than a gift. Chris was paid for his 20 years' service. But when Leonard sold the business, he was in the position to be generous and to recognize Chris for the many years of service. It was not a gift. It was additional compensation for services rendered and, in that sense, was an advance based on consideration. I conclude that while some monies were advanced by Leonard at that time, Chris has not met the onus of establishing that the funds constitute a gift as defined above or that the funds are traceable to the $86,000.00 shareholder's loan. This amount will not be excluded from the husband's NFP.

Liabilities

117 I received no evidence with respect to the $1,000.00 debt claimed by Christine. Mr. Jarvis conceded the absence of proof. That claim will be disregarded.

118 Chris has claimed a liability of $9,155.00 being the amount of income tax owed as of April 30, 1995 for the taxation year 1994. Mr. Jarvis opposes that deduction because historically Chris' income tax had been paid by the company and because the amount was never paid because it was offset by a 1995 tax refund of about $10,000.00. As the 1994 Income Tax return and Exhibit 28 indicate, tax was owing and unpaid at valuation date. The source of the funds or a post valuation date setoff are irrelevant. The deduction is allowed.

119 The debt owed to Chris' father predated the start of Imperial. A debt then outstanding was discharged as a result of an advance by Chris' father. Chris admitted that that debt was rearranged deliberately to enable Chris to apply for Bank financing for Imperial Lock without disclosing the debt. Christine and Chris and Gaspare Passarello signed a letter agreement dated March 1, 1989 in which they confirmed the loan of $60,000.00 to be paid in monthly installments at 10.5% interest and due in 5 years. The informal note specifies that "in the event of a marriage dispute or separation or death, it is agreed that both parties will be responsible for payment."

120 The debt was not discharged in 1994 at maturity. Shortly after the separation, a lawyer for the creditor wrote to both Chris and Christine demanding payment. Apparently, the note was converted to a mortgage registered December 22, 1995 in the principal amount of $54,784.97. Since the mortgage is a joint obligation, the current principal is relevant. Given the 1989 note and the 1995 mortgage, this liability should be attributed equally to the net family properties of Chris and Christine.

121 The Royal Bank debt was arranged in 1990. A mortgage in the amount of $30,000.00 was registered against title to the matrimonial home. Chris and Christine both signed as mortgagors. As of December 1997, the principal was $26,900.00. It was renewed for 6 months to July 1, 1998. Chris and Christine both signed the renewal. For reasons indicated above, the principal outstanding on this debt should be applied to the husband's net family property in order to mirror the shareholder's note payable.

122 The Royal Bank line of credit is another matter. Other than assertions that the financial statement and net family property statements were accurate, I can find no confirmation as to the amount of indebtedness at valuation date. In Chris' first financial statement, the line of credit is not mentioned. In subsequent financial statements, it is shown as a debt of the business for which Chris is the guarantor. I can find no justification for including $40,000.00 on Chris' personal financial statement or net family property statement. However in the net family property statement submitted on behalf of the wife, Mr. Jarvis has reflected the line of credit at $40,000.00 in the husband's NFP. On that basis. I allow a deduction for $40,000.00. This debt is secured by a collateral mortgage secured against the house. Given the disposition of property outlined in Schedule B at the end of these reasons, by September 1, 1998 Chris will use his best efforts to have this mortgage discharged, and report in detail in writing as to these efforts to the wife. If the Bank will not discharge this mortgage, Chris will indemnify Christine if the creditor ever seeks to realize on the security.

Conclusions on Equalization of Net Family Property

123 There are a number of items which I have not mentioned. Silence indicates that there is no dispute. The net family property calculation is attached as Schedule A. Order to issue that the husband owes to wife an equalization payment of $122,895.00.

Adjustments

Costs

124 There are outstanding costs orders against the husband as follows:

1)	September 21, 1995 Order of Beaulieu J. -	$ 750
2)	May 29, 1997 Order of Ferrier J. -	$ 500
3)	January 27, 1998 Order of O'Connell J. -	$3,000
Total -		$4,250

125 These orders were all outstanding at the date of the trial. The husband shall comply with those orders in the manner reflected in Schedule B.

Arrears of Support

126 The order dated June 1, 1995, awarded interim interim child support in the amount of $700.00 per month for each child. Paragraph 1 of the Order indicates that support is payable on the first of the month. Although it is arguable that Chris is liable for support for Tim for the whole month, Mr. Jarvis has asked for only $350.00 representing payment for half of the month. Arrears are owing for Steven for January and February. The total arrears owing at the time of the trial were $1,750.00. This amount is payable to the wife together with any other arrears accrued while the decision was under reserve. Payment shall be made in the manner reflected in Schedule B.

Van

127 On June 1, 1995 Smith A.C.J. ordered that:

> This Court Orders that on an interim / interim basis the respondent, through his company, shall maintain the status quo with respect to the Voyageur Van currently in the petitioner's possession.

128 The Voyageur Van was provided through a lease with Imperial Lock Company. The lease ended March 31, 1997. When the lease ended the monthly payments were between $460.00 and $500.00 per month. Chris did not renew the lease nor purchase the van for Christine. He offered Christine the use of a 1986 mini van. She declined the offer because it was not roadworthy, it was always in the shop for repairs, it only had two seats and the floor boards had given way.

129 Christine testified that she had to take public transportation between April and July of 1997. She purchased a car in July 1997 from the proceeds of RRSP savings.

130 Christine asserts that she incurred the following expenses as a direct result of Chris's failure to maintain the van for her use: $945.65 for injections to her knees, which deteriorated due to increased walking; $627.11 in lost wages as a result of a knee operation; $10,384.44 worth of RRSP's that she cashed in to use as a deposit on a car lease; $747.18 in car insurance; and $90.00 for the car licence.

131 Mr. Jarvis asserts that because Chris was under court order to continue to maintain the arrangement with the van, he is liable for all of these costs. I do not agree.

132 It is true that Chris did not seek to have the order amended to clarify that the replacement of the van was not his obligation. However it was an interim interim order made almost three years ago. Orders on that basis do not usually require the payor to make a capital acquisition when the lease runs out. It is not a reasonable interpretation of that order that Chris should be accountable for the replacement of the vehicle.

133 Consequently, Chris is not liable to Christine for the cost of purchasing (leasing) a new car. However, Christine's claim for the cost of insurance and licence is a reasonable one since payments for such expenses are in the nature of support, as anticipated by Smith A.C.J.. Order to go that Chris pay to Christine the amount of $837.00 for insurance and licence for 1 year in the manner reflected in Schedule B.

134 In any event, the medical reports of Dr. Sue-A-Quan and Dr. Gawel do not support a finding that there is a causal relationship between Christine's use of Public transit for a 4 month period and the medical expenses claimed. The claim for damages for expenses for knee injections and lost wages is dismissed.

House Insurance

135 On June 21, 1995, Smith A.C.J. ordered that one of the parties was to make the house insurance payment of $780.00, and that which ever party made the payment would be entitled to a $390.00 credit on equalization of net family property. It is not disputed that Christine made the payment. She will therefore receive the $390.00 credit in the manner set out in Schedule B.

Summary of Adjustments

136 Order to go that the husband shall pay to the wife $7,227.00 summarized as follows:

outstanding costs orders payable to Christine		$4,250.00
arrears of child support payable to Christine		$1,750.00
insurance premiums payable to Christine		$ 837.00
credit for Christine pursuant to order of June 21, 1995		$ 390.00
	TOTAL	$7,227.00

Matrimonial Home

137 Christine has asked for transfer of title from Chris to her in consideration of at least part of the equalization payment. She is prepared to assume responsibility for the Royal Bank first mortgage but resists responsibility for either the Gasper Passarello mortgage or the Royal Bank line of credit. Section 4 gives the court broad discretion in making orders to accomplish the equalization payment. Chris has shown no respect for Christine's rights. There is no reason to expect that that attitude will change. This is an appropriate case for such a transfer. Order to go vesting title of the home to Christine as of the last day evidence was heard, namely February 24, 1998.

138 Chris owes to Christine an equalization payment of $122,895.00 and adjustments of $7,227.00. Schedule B to the judgment summarizes the adjustments made as a result of the transfer which are reflected as follows:

1. Chris shall forthwith transfer all right, title and interest in the matrimonial home to Christine. If he fails to do so within 30 days of release of these reasons, Christine may apply ex parte for a vesting order;

2. the balance owed by Chris is $25,122.00

3. within 30 days of release of these reasons for decision, Chris shall cause the mortgage in favour of Gasper Passarello to be discharged;

4. if Chris is unable to fulfill paragraph 3, the mortgage shall remain on title until maturity provided that Chris indemnify Christine from any liability associated with that mortgage;

5. commencing July 1, 1998, Chris is responsible for making all payments (including periodic and at maturity) on the Gasper Passarello mortgage;

6. Chris and Christine shall forthwith take steps to renew the first mortgage to Royal Bank which is due July 1, 1998;

7. commencing on the first of the month after title is changed in accordance with paragraph 1, Christine shall assume all liability for the Royal Bank first mortgage (including periodic and at maturity) and, assuming Chris complies with paragraphs 3 or 4, she shall indemnify Chris from all liability associated with the Royal Bank first mortgage. Until such title change. Chris (or Imperial Lock) shall be responsible for making all payments on the Royal Bank first mortgage; and

8. Chris (or Imperial Lock) shall continue to be responsible for all payments associated with the Royal Bank line of credit (including periodic and when the debt is called).

Spousal Support

139 Christine is not seeking spousal support at this time. However she seeks an Order that the option of pursuing spousal support be left open to her should she experience a material change in circumstances.

140 Christine has a grade 8 education. At the age of 16, she left grade 9 to care for her parents. She worked for the next 9 years as a waitress, during which time she met Chris. Christine then worked for the Ontario Government in a variety of capacities from 1974 until the present time, with the exception of the period when she worked for Imperial Lock between 1989 and 1991. Her current income, according to her 1996 income tax return, which is the latest return filed with this Court, is $37,429.21. Counsel for the husband, in submissions stated her income to be $39,000.00. Counsel for the wife, in reply submissions, corrected this figure and stated it was $35,000.00. Christine did not testify as to her current salary. I find her salary at the date of the trial to be $37,429.21. Given the length of the marriage and the discrepancy in earnings, Christine is a dependent. Chris has the ability to pay spousal support. Christine is entitled to support. Mr. Jarvis has not asked that an order for periodic support be made. He has asked only that health benefits be continued. Order to go that husband maintain all coverage for the wife for as long as she is entitled to support.

141 Christine asserts that her loss of employment is imminent. She testified that she is on a contract position and that her contract expires March 31, 1998. She stated that her contract will not be renewed. Counsel for the husband elicited evidence in cross examination that Christine's one year contract positions have been consistently renewed since 1991, and there has always been a certain amount of uncertainty in the job. However Christine indicated that this time is different because when her job contract came up for renewal it was internally posted, and Christine applied for it, was interviewed and ***did not get the job***. Her evidence was that the job was given to someone with more seniority. She testified that she hopes to find employment elsewhere, but that she will apply for the Ontario Government temporary employment service if she cannot find anything else. I find that her apprehension that she will be unemployed at the expiry of her contract at the end of March is a reasonable one. In view of my finding of entitlement, if, while waiting these reasons, Christine has become unemployed, she is entitled to apply immediately under s.17 of the *Divorce Act* to obtain an order for periodic support.

Child Support

i) Support for Steve

142 I turn to establishing Chris' income currently. I earlier held that his income was $66,000.00 in 1995. I have earlier listed his income as reflected on his tax returns. The financial statements for Imperial Lock for the years 1992 through 1996 indicate a steady increase in gross annual income as follows:

February 1992	$369,027
February 1993	$379,292
February 1994	$398,238

February 1995	$455,675
February 1996	$420,726

143 The company has experienced steady and sustained growth. In the absence of a financial statement for the year ended February 1997 and any preliminary information with respect to income/expenses/profit for the year ended February 1998 (which ended the week following the trial), I infer that that information would have shown even greater revenue and profitability. When self-employed, the Guidelines impose an obligation on the payor to provide documentation which would enable the court to establish current income. Chris had not done so. I am entitled to draw inferences against him. The company is now 9 years old. Chris is the sole proprietor. In the absence of a reliable calculation, it is reasonable to assume that Chris earns at least 10% more than in 1995. I find Chris' income is $72,600.00. According to the Child Support Guidelines, Chris shall pay child support in the amount of $589.00 per month commencing March 1, 1998. A support deduction order shall issue on request of Mr. Jarvis.

144 If Chris has paid no child support since the trial, the arrears shall be adjusted as in Schedule B. Chris shall provide health coverage as long as he is required to pay child support.

ii) Support for Tim

145 Chris also claims child support for Tim. Section 3(2) of the Guidelines states:

> s. 3(2) Unless otherwise provided under these Guidelines, where a ***child to whom a child support order*** relates is ***the age of majority or over***, the amount of the child support order is
>
> > (a) the amount determined by applying these Guidelines as if the child were under the age of majority; or
> >
> > (b) ***if the court considers that approach to be inappropriate, the amount that it considers appropriate, having regard to the conditions, means, needs and other circumstances of the child and the financial ability of each spouse to contribute to the support of the child***, (emphasis added)

146 At Christine's salary of $37,429.21 the Guideline amount owing for support of Tim would be $324. Section 8 of the Guidelines provides for a set off of support amounts where the spouses have split custody (each spouse has custody of one child). In this case the amount would be the difference between the Guideline amount of support owing to Christine for Steve's support ($589) and the Guideline amount owing to Chris for Tim's support ($324). The difference is $265, which would be the amount owing to Christine for Steve's support.

147 However, I find that it is inappropriate to apply the Guidelines in this case and I dismiss the claim for child support for Tim for two reasons. The first relates to Tim's status as a "child of the marriage" pursuant to the *Divorce Act*, and the second relates to Tim's needs and the financial ability of the parties to contribute to Tim's support.

148 Tim's entitlement to support depends on his status as a "child of the marriage" pursuant to the *Divorce Act*. Tim is over the age of majority. He is 20 years old, and will be 21 in November. His mother testified that Tim is taking a combination of grades 10, 11 and 12 and hopes to complete high school and then take an auto mechanics course in community college. He has had academic difficulties all through his life.

149 To qualify as an adult "child of the marriage" Chris must establish that Tim is unable to withdraw from the charge of his parents or to obtain the necessaries for life (section 2). I am not satisfied that Tim's situation is enough to bring him within the meaning of "child of the marriage" for three reasons. Firstly, there was no evidence as to whether Tim is currently attending school full or part time, and what the projected time for completion of his studies will be. Secondly, it has not been established that Tim is in a position of dependancy. There was no evidence about what Tim's needs are or his ability to contribute to his own support. While there were indications during the trial that Tim has worked and earned income in the past there was no specific evidence about Tim's current income. This information is relevant to the "condition, means and needs" of the child. It is particularly significant when the issue involves child support for a 20 year old man who has not yet completed grades 10,

11 & 12. Thirdly, Tim has had at least one period of absence from school, during which he probably lost his dependant status as a "child of the marriage". Chris said Tim was out of school and working between February and September 1997. Christine testified in cross examination that for a period of time while Tim was living with her he was out of school and working. It is questionable whether an adult child may regain their status as a "child of the marriage" after ceasing to qualify.

150 For a Court to impose an obligation on a parent to continue supporting an adult child there must be sufficient evidence to establish that the claim is justified. There was no such evidence presented in relation to Tim. Consequently Chris has failed to establish that Tim is entitled to support. In the absence of entitlement, it is inappropriate to apply the Guidelines.

151 The second reason for dismissing Chris's claim for child support is that there is little evidence of Chris's needs with respect to Tim's support and his financial ability to support Tim. Because Tim is over the age of majority, a budget should have been provided. Chris's current living arrangements with his common law partner, Christine Lang, are relevant to Chris's financial ability to provide support for Tim. The only evidence about this arrangement was the evidence given by Chris. He testified that he "makes available to her" (Christine Lang) $700 per month, and that the $700 covers his visa, amex, credit line and any outstanding bills he or Christine Lang may have. Christine Lang pays the mortgage and "virtually anything that my $700 will not cover", such as groceries. In other words, his arrangement with Christine Lang enables him to pay all of his expenses with a $700 monthly payment, or $8,400 per year. This is a very small portion of the $72,600 in income I have found to be available to Chris. Chris's company has shown steady growth in the past 10 years, and it is likely he will continue to have such generous resources at his disposal. Christine Passarello, on the other hand, has a tenuous grasp on a $37,000 per year job that she is likely to lose in the near future.

152 In light of these circumstances, I dismiss the claim for support for Tim.

153 While this decision is based on the two reasons expressed above, I note that a further consideration for this Court is the circumstances under which Tim left his mother's home and went to live with his father. I expressed concern earlier in these reasons about the possibility that money was offered by Chris to Tim as an incentive to move in with him. If Chris used money which arguably already belonged to Tim, to lure him away from his mother's home, on the eve of the trial after the status quo arrangement of almost three years, it would lead to an inference that the mother ought not to remain liable for Tim's support. At minimum, it indicates that Tim has deliberately withdrawn from his mother's care in circumstances indicating that Christine's support obligation should cease.

Security

154 Mr. Jarvis made tentative submissions with respect to security for Chris' obligation to make an equalization payment. Given the disposition with respect to the matrimonial home, I need not make any order. Security for the support obligations is not required in the circumstances of this case. Chris has an income source and I have made a support deduction order. The obligation will be enforced through the Family Responsibility Office if requested by Christine.

Conclusion

155 Mr. Jarvis will secure from Mr. Passarello's new counsel dates in the week of July 20, 1998 when I will hear submissions as to costs and pre-judgment interest. Mr. Jarvis will arrange a conference call in advance to arrive at an agreed upon timetable for making brief written submissions.

Schedule A

Net Family Property

	Husband	**Wife**
Value of Property at Valuation Date		
Matrimonial Home	$ 105,000.00	$ 105,000.00
Contents	--	--
Jewellery	--	--

Savings/RRSP	1,317.00		21,528.00			
Coin Collection	6,000.00		--			
Insurance	12,386.00		3,249.00			
Sports Cards/ Scarborough		5,000.00		--		
Account Receivable - Loan to Imperial		29,084.00		--		
Shares	230,000.00		--			
Shareholders Advance	61,996.00		--			
A.		$450,783.00		$129,777.00		
Less Liabilities at Valuation Date						
Royal Bank - as of Dec. 94		28,765.00		--		
G. Passarello -	29,250.00		29,250.00			
Tax at 25% RRSP					5,337.00	
Income Tax for 1994	9,155.00					
Credit Cards					3,892.00	
						1,705.00
		2,789.00		2,789.00		
		582.00				
		1,960.00				
		1,870.00				
		3,817.00				
Royal Bank Line of Credit		40,000.00				
B.		$118,188.00		$42,973.00		
Net Family Property (A.Minus B.)		332,595.00		86,804.00		
Total Net Family Property				419,399.00		
Entitlement of Each (/2)						209,699.50 (209,700.00)
Equalization Owed by Husband		(122,895.00)		+ 122,895.00		
		$ 209,700.00		$ 209,700.00		

Schedule B

Summary of Payments Owed

Judgment Against Natale John Passarello:	
Equalization Payment	$ 122,895.00
Plus other adjustments	{*} +7,227.00
Balance owed to Christine Passarello	$ 130,122.00
Less Transfer of 50% interest in matrimonial home	-105.000.00
Balance owed to Christine Passarello	$ 25,122.00
Less Assumption of 50% of Royal Bank mortgage attributable to Natale John Passarello as July 1, 1998	{**} -$ 13,227.00
Balance owed to Christine Passarello and payable within 30 days of release of these reasons	$11,895.00

Notes: * increased to include arrears for child support since March 1, 1998, if any** assuming mortgage payments are current as required by the order of Smith A.C.J.

Order accordingly.

TAB 2

CITATION: Nortel Networks Corporation (Re), 2011 ONSC 3805
COURT FILE NO.: 09-CL-7950
DATE: 20110617

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF NORTEL NETWORKS CORPORATION, NORTEL NETWORKS LIMITED, NORTEL NETWORKS GLOBAL CORPORATION, NORTEL NETWORKS INTERNATIONAL CORPORATION AND NORTEL NETWORKS TECHNOLOGY CORPORATION, Applicants

BEFORE: MORAWETZ J.

COUNSEL: Alan Mark, Derrick Tay, Alan Merskey and Jennifer Stam, for Nortel Networks Corporation et al

F. Myers, J. Pasquariello and C. Armstrong, for the Monitor, Ernst & Young Inc.

Mark Zigler, Andrea McKinnon, for the Former & Disabled Employees

G. Finlayson, R. Orzy and R. Swan, for the Noteholder Group

Lily Harmer and Max Starnino, for the Superintendent

S. Seigel, for the Bank of New York Mellon

Alex MacFarlane and Abid Quereshi, for the Official Committee of Unsecured Creditors

R. Paul Steep and Elder C. Marques, for Morneau Shepell

Barry Wadsworth, for CAW-Canada

M. P. Gottlieb, R. Schwill and S. Campbell, for the Joint Administrators

Bill Burden, for the U.K. Pension Trustee

Lyndon Barnes, for the Board of Directors of Nortel

Andrew Gray and Scott Bomhof, for the U.S. Debtors

Arthur O. Jacques, for Nortel NCCE

HEARD: June 7, 2011

ENDORSEMENT

[1] On June 7, 2011, Nortel Networks Corporation ("NNC"), Nortel Networks Limited ("NNL"), Nortel Networks Technology Corporation, Nortel Networks International Corporation and Nortel Networks Global Corporation (collectively, the "Canadian Debtors") brought a motion requesting approval of an allocation protocol (the "Allocation Protocol").

[2] A similar motion was also brought at the same time by Nortel Networks Inc. ("NNI") and certain of its U.S. affiliates (the "U.S. Debtors") in the Chapter 11 Proceedings before the United States Bankruptcy Court for the District of Delaware (the "U.S. Court") (the "Chapter 11 Proceedings").

[3] The hearing was conducted by video conference with the companion motion being heard in the U.S. Court before His Honor Judge Gross. This joint hearing was conducted in accordance with the provisions of the Cross-Border Protocol which was previously approved by both the U.S. Court and by this Court.

[4] Both motions had the support of all parties appearing, save for the Joint Administrators of Nortel Networks (U.K.) Limited ("NNUK") and certain of its subsidiaries and affiliates located in the EMEA (collectively, the "EMEA Debtors").

[5] Decisions in respect of both motions are currently under reserve.

[6] On June 13, 2011, at the request of both Judge Gross and me, a case conference was conducted by telephone. It was reported to the participants that our respective decisions relating to the aforementioned motions would be under reserve for a considerable period of time.

[7] Certain of the issues raised in the motions have been the subject of two mediation sessions. These mediation sessions were not successful. It is my understanding that, in addition to the allocation issue, issues of validity of quantification of certain claims and inter-company claims were discussed.

[8] Allocation issues have arisen out of the Interim Funding and Settlement Agreement ("IFSA"), which was entered into in June 2009, between the Canadian Debtors, certain of the U.S. Debtors and certain of the EMEA Debtors. The IFSA provides amongst other things, for the parties cooperation in the global sales of Nortel's business units as well as for the parties to attempt to negotiate the terms of an Interim Sales Protocol ("Protocol").

[9] The parties entered into negotiations for approximately one year with respect to the terms of a Protocol. After a year of negotiations, the parties were still unable to agree on certain

fundamental terms of the Protocol, including, for example, the scope of the issues to be determined under the Protocol.

[10] As a result, according to the Canadian Debtors, the Protocol negotiations were suspended and the parties agreed to reach a consensual resolution through mediation. After the mediation was declared unsuccessful, the U.S. Debtors and the Canadian Debtors, developed the proposed Allocation Protocol.

[11] The Allocation Protocol establishes procedures and an expedited schedule for the cross-border resolution by the U.S. Court and this Court of the allocation of the proceeds from the Sale Transactions pursuant to the IFSA.

[12] The Allocation Protocol proposes that all hearings in respect of the Allocation Protocol proceed by way of joint hearings between the U.S. Court and this Court pursuant to the cross-border protocol.

[13] The position of the EMEA Debtors is that issues arising out of the IFSA are to be determined by a dispute resolver, in this case, an arbitrator.

[14] In my view, pending the release of a decision on the motion, the parties could benefit from the appointment of a mediator so that they can continue to make progress towards the ultimate resolution of Nortel matters. The parties have exhibited an ability to cooperate and have been extremely successful in realizing significant proceeds from the sale of Nortel assets globally. However, the creation of an asset pool is not ultimate resolution of Nortel matters. These proceedings can only be concluded with a distribution of proceeds to the various creditors of Nortel globally. These proceedings were commenced on January 14, 2009. Creditors have been waiting nearly two and one-half years for a meaningful distribution. A mediation will require that the parties continue a dialogue. It is possible that tangible, positive results will flow from such mediation.

[15] In order to assist the parties with their deliberations, I am directing that the parties engage in mediation pending my ruling. I understand that Judge Gross will be issuing a similar direction in the Chapter 11 Proceedings.

[16] I recognize that the parties may have difficulty in reaching a consensus on a mediator. In the case conference on June 13, 2011, we asked that the parties consult with each other and provide the name of an acceptable mediator. No individual has been identified. It, therefore, falls to both Judge Gross and to me to appoint a mediator.

[17] The mandate of the mediator is to address issues raised in the motion. It is recognized that the boundary of this mandate is not clearly defined. It seems to me that defining a precise boundary, in these circumstances, may be better left to the mediator, as it may not be possible to address the issues affecting allocation without taking into consideration issues relating to the validity and quantification of claims.

[18] The mediator shall have the right to file periodic reports with the court detailing progress, or lack thereof, recognizing that the sessions are on a without prejudice basis.

[19] It is my understanding that, at the mediation sessions, there were a large number of parties that participated. While I do not take issue with the right of any party to participate in the mediation, I did observe that at the hearing of the within motion, the primary submissions were made by the Canadian Debtors, the EMEA Debtors and the Monitor. It was also my observation that the primary submissions of parties in the Chapter 11 Proceedings were likewise concentrated among a relatively small group of counsel. The mediation will, in all likelihood, be more effective if the number of participants is significantly reduced from the number that attended the previous sessions. It is hoped that the parties will be able to work out the details respecting participation of the mediation.

[20] The identity of the mediator will be provided by way of Supplementary Endorsement early next week. The mediator shall have the ability to retain advisors and counsel as he or she deems appropriate in the circumstances and to have the expenses of such advisors and counsel paid out of the assets of Nortel.

[21] In addition, consistent with the conclusion of the U.S. Court, the mediator is to have expanded authority, if the parties agree, to conduct a mediation/arbitration or an arbitration in respect of this matter.

[22] To the extent that further directions are required in respect of this directed mediation, the parties can contact the Commercial List Office in order to set up a case conference.

MORAWETZ J.

Date: June 17, 2011

TAB 3

Credibility under scrutiny: A study of the weight placed on expert valuation and damages evidence in Canadian court judgments

PREM M. LOBO AND PETER J. HENEIN

A good name is more desirable than great riches; to be esteemed is better than silver or gold.

~ Proverbs 22:1

Expert witnesses and the need for credibility

Expert witnesses are frequently retained in commercial and family law litigation matters to assist the court in understanding specialized subject matter. For example, loss quantification experts are retained in cases when the quantification of loss is not readily apparent to the court and requires specialized accounting or financial analyses to assist the court in determining the amount of damages to award.

For litigation counsel, it is important that the expert witnesses they retain or seek to retain prepare their expert reports (and hence, their opinions) on the basis of objective analyses, credible facts and, where necessary, reasonable assumptions. Expert reports prepared in this manner will be established on a solid foundation; they will be able to withstand the proverbial firestorm of cross-examination and are more likely to be accepted as reliable and useful by the court. On the other hand, expert reports based on incomplete facts or improper analyses, or on unreasonable assumptions, will have shaky foundations; they are more likely to collapse on scrutiny and be dismissed by the court as unreliable and unhelpful.

What makes a good, credible expert report and expert witness? Is it the strength of the facts or assumptions used to arrive at an opinion? Is it the personality of the witness? Is it the level of detail employed in the analyses used to arrive at an opinion? Is it an expert's demeanour in court? How important is experience?

To answer some of these compelling questions, we were commissioned by the Canadian Institute of Chartered Business Valuators ("CICBV") in 2011 to prepare a research study analyzing the weight placed on expert valuation and damage evidence in Canadian court judgments ("the research study"). The findings were most illuminating. In this article we summarize the methodology employed and the findings arising from the research study.

Prem M. Lobo (left) is a principal of *Cohen Hamilton Steger & Co. Inc.* in Toronto. Peter J. Henein (right) is a partner at *Cassels Brock & Blackwell LLP* in Toronto. This article is an adaptation of the research paper "Credibility Under Scrutiny" (October 31, 2011), prepared by the authors for the Canadian Institute of Chartered Business Valuators' 2011 Research Initiative.

Overview

Purpose of the research study and research methodology

The research study focused on loss quantification and business valuation experts and evidence (collectively, "valuation experts" and "valuation evidence").

The purpose of the research study was twofold:

1. To analyze the relevance and need for expert valuation evidence in Canadian legal proceedings. The aim was to form *overall* conclusions on the relevance of and need for expert valuation evidence and to identify any trends in the demand for such evidence.
2. Where possible, to "deconstruct" reported Canadian legal judgments to identify what factors resulted in expert valuation evidence being successful and reliable and, ultimately, accepted by the courts. Our aim was to form *specific* conclusions on the factors (on the part of the valuation expert, and external and contextual factors) that are instrumental in ensuring the success and acceptance or the lack of expert valuation evidence by the court.

We used reported judgments from Canadian court or other adjudicative proceedings as the source of data. Specifically, the research study focused on Canadian judgments

- released over a 15-year period, from approximately 1996 to 2011. These spanned all levels of provincial courts, federal courts, municipal tribunals (such as the Ontario Municipal Board), the Tax Court of Canada and the Supreme Court of Canada; and
- involving valuation experts who provided loss quantification evidence in commercial disputes or business valuation evidence where the valuation of shares or intangible assets was required. We did not review judgments involving real estate, equipment, art or other appraisers, forensic accounting evidence or personal injury claims.

Our 15-year period allowed us to obtain a sufficient number of judgments from which to formulate meaningful findings while avoiding "information overload" by reviewing too many judgments if we had chosen a longer period.

We were mindful that Canada (except for the province of Quebec) is a common law country, and judges are largely bound in their decision making by *stare decisis*. Therefore, we viewed an analysis starting with the most recent cases and working backward to find the seminal legal principles on which current decisions were based and on which future decisions will potentially be based as a useful approach. A 15-year window of decisions provided a good breadth while at the same time allowing a focus on actual principles and approaches being applied by judges today.

That said, we did not obtain and analyze every case from this time period dealing with business valuations.

Our review of judgments focused on those that contained detailed (and, as such, more valuable) comments on the quality of valuation evidence presented in court, or discussions of the criteria by which the judge evaluated the valuation evidence, or comments regarding attributes and qualities that distinguished a particular valuation expert from another.

Discussion of findings

The relevance of expert valuation evidence

Our review of legal judgments makes it manifestly clear that expert valuation evidence is valued by courts (subject to such evidence being independent and credible). In cases where the amount of financial loss or business value is complex, involves a significant dollar amount or is disputed between the parties involved, courts tend to welcome the insights, analyses and evidence provided by valuation experts.

This view is echoed in many legal judgments, including *Alfano v. Piersanti*,[1] in which the court notes that "the fundamental principle in cases involving qualifications of experts is that the expert, although retained by the clients, assists the Court." In *Alfano*, the court goes on to quote *Eastern Power Ltd. v. Ontario Electricity Financial Corp.*[2] as follows:

> [T]he purpose of expert evidence is to assist the trier of fact to understand evidence outside of his or her range of experience so that a correct conclusion can be reached …

In *de Gobeo v. de Gobeo*,[3] the court stated that it "wishe[d] to emphasize its dependence upon the work of experts."

A number of legal judgments acknowledged the usefulness of valuation evidence provided. For example, in *1230995 Ontario Inc v. Badger Daylighting Inc.*, the court noted that both valuation experts who testified at trial "testified in a straight forward manner and did their best to assist the Court."[4] Meanwhile, in *Adams v. Amex Bank of Canada*,[5] the court noted that both valuation experts used the best available information and recognized data to quantify financial losses, and that the resulting approaches followed by both experts were, in each case, reasonable and reliable.

In cases where courts find the valuation evidence to be lacking, the courts are not averse to choosing a value of a party's financial loss or a business value other than those suggested by the valuation experts involved. Similarly, courts in these situations do not necessarily limit the financial loss or business valuation to the midpoint between the differing experts' calculations.

Courts require independence

Courts repeatedly stress the fact that the foremost duty of the expert is to assist the court, and this overrides any obligation to the party from whom the expert has received instructions or a payment. An expert who appears as an advocate at trial, who refuses to acknowledge weaknesses in his or her analyses or who refuses to examine alternate points of view or assumptions will not ultimately be of much assistance to the court. In contrast, an expert who, given a suggestion on cross-examination that another reasonable view of a certain fact or assumption might lead to a different conclusion, agrees with the suggestion and is willing to assist the court with the implications arising from an alternate view will be of more value to the court.

The importance of independence is demonstrated in *Love v. Acuity Investment Management Inc.*[6] In this case, the court took exception to a number of aspects of the plaintiff's expert report. The court was "concerned and disappointed" to learn that the plaintiff's expert took a model of damages that the plaintiff had created and simply "put it forward unchanged in any material respect conceptually and un-audited for accuracy of the facts assumed within the model." The court noted that the plaintiff's model and analysis was "simplistic, aggressive and over-reaching." In adopting the plaintiff's model, the plaintiff's expert quantified damages for a number of theoretical scenarios that did not have a factual foundation, and not just for those scenarios that were reasonable. Overall, the court took objection to the plaintiff's expert's approach that the model prepared by the plaintiff was "one we could work with," rather than preparing an independent analysis.

The court also noted that the plaintiff's report was co-signed by a second principal but that this principal had played such a limited role in preparing the report that he did not understand the content of the report and could not speak to the report if required. The court took a dim view of an expert signing or co-signing an opinion report without being intimately aware of the content of the report and opinion, and noted that it expected "more of expert witnesses than that."

In *de Gobeo*, the court appeared to be so troubled at the lack of impartiality demonstrated by one of the experts involved that it devoted an entire section of the judgment to dealing with "the Role of Experts." In this section the court stated that the expert in question was an advocate whose evidence was "lacking in objectivity in the face of existing and valid evidence and therefore it cannot be considered by this Court as expert testimony."[7] The court went so far as to suggest "perhaps it is time for our Court rules to be amended to provide for an absolute clear standard of impartiality on the part of experts."[8]

Procedural rules governing the use of experts' evidence in court proceedings have now changed, and continue to change, with a view to establishing a clear standard of impartiality on behalf of experts. For example, in Ontario, the *Rules of Civil Procedure*, R.R.O. 1990, Regulation 194, were amended, effective January 1, 2010, to include a number of changes specifically regarding experts, including establishing, among other things, that it is the duty of every expert to provide

- opinion evidence that is fair, objective and non-partisan;
- opinion evidence that is related only to matters that are within the expert's area of expertise; and
- such additional assistance as the court may reasonably require to determine a matter in issue.

Increasingly, courts are going to greater lengths to scrutinize the independence of expert witnesses. We note from judgments that the increased scrutiny is manifesting itself in *voir dire* examinations of the independence of experts at trial and the production of experts' working papers and e-mails, among other things.

Proper use of assumptions

Making assumptions is an important element in the quantification of financial loss and business valuation. It is commonly accepted among valuation experts that key assumptions need to be set out in a written expert report such that the basis of conclusions reached can be clearly understood and assumptions need to be tested and to be realistic in order for expert reports to be viewed as being credible.

Generally, assumptions on overall legal theories to be proven in court are appropriate. For instance, in a breach of contract case, a valuation expert may assume that the contract in question was indeed breached and may quantify loss arising from the breach. The proving of the breach is a matter to be determined by the court, and the expert does not have to weigh in on this.

Valuation experts sometimes make assumptions where facts are not available, are unclear or are contradictory. Care must be taken to ensure that facts are indeed not available in these cases and that reasonable attempts have been made by valuation experts to obtain further information but to no avail. Insufficient attempts by valuation experts to obtain factual information where information was indeed available are not viewed favourably by the courts.

For instance, in a matrimonial case, *DeBora v. DeBora*, the husband declined to produce many documents and did not answer many questions on financial matters. The husband's expert accepted the lack of disclosure and prepared his analyses without this information, making assumptions where information was missing. The wife's expert meanwhile undertook a forensic analysis and was able to obtain some of the missing information, or was able to arrive at a coherent picture of the financial facts by putting together "bits and pieces of often contradictory disclosure made over a prolonged time period."[9] The court found that the "husband's deliberate obfuscation and failure to disclose infected [his expert's] work" and therefore preferred the wife's expert's evidence in most instances.[10]

If assumptions are used, judgments are clear in requiring that valuation experts test significant assumptions for reasonability and to establish that they are grounded in "common sense and commercial reality."[11]

In *Fulmer v. Peter D. Fulmer Holdings Inc.*,[12] the court noted that the respondent's expert made two important but erroneous assumptions in arriving at the fair market value of certain shares. Essentially, the valuation expert made assumptions regarding the priority of the respondent as the holder of certain shares and the repayment of certain debt obligations. The court reviewed the shareholder's agreement, articles of amendment and security agreement and found the assumptions used to be invalid. Partly because of this, the court accepted the applicant's expert's valuation.

The amount of "reasonability testing" depends on the significance of the assumptions to the overall analysis. In this example, assumptions used had a material impact on the financial calculations and the threshold for due diligence should have been correspondingly higher.

Sometimes, valuation experts may be requested by counsel or clients to run financial calculations based on certain hypothetical scenarios and assumptions without opining on which scenario is the "reasonable" or "most likely" one, on the understanding that the court will decide which scenario to choose. Our review of legal judgments indicates that courts generally take a dim view of valuation experts who present hypothetical scenarios of financial loss or business value that are based on speculation rather than verifiable facts.

For example, in *Independent Multi-Funds Inc v. Bank of Nova Scotia*,[13] the valuation expert for the plaintiff prepared five scenarios of financial loss, each calculating financial losses given different sets of facts. On cross-examination, the expert could not say that one of his five assumptions was any more reasonable than any other, and he could not provide a "bottom line" on the amount of damages.[14] The defendant's expert criticized this expert for "accepting uncritically the assumptions of" the plaintiff and suggested that "one of the duties of the author of an expert report is to identify the relevant assumptions underlying the conclusions and deal with the reasonableness and appropriateness of those assumptions."[15] The court found that the lack of evidence at trial to support the assumptions on which the plaintiff's expert's report was based "seriously undermine[d] the usefulness of that document." The court noted, regarding one significant assumption, that it was "founded on bare hope and not on reality."[16]

Explaining complex concepts logically and clearly

The judgments we analyzed make it clear that courts appreciate and tend to be better disposed toward valuation experts who are able to articulate complex calculations and concepts logically and clearly. While articulating concepts in written reports is important, the ability to articulate clearly during oral testimony appears to truly distinguish one expert from another.

The importance of logical and clear articulation can be found in numerous judgments. For example, in *Deer Creek Energy Ltd. v. Paulson*,[17] one of the valuation experts went to great lengths to explain complex valuation concepts clearly. These included explaining the concept of discount rates, the choice between various valuation methods and comparable company data. In contrast, the court felt that the other valuation expert was not able to logically explain certain aspects of his methodology and certain choices he made with respect to obtaining data. Some explanations were "obscure." This, in part, led the court to comment that the latter expert's evidence was "not credible or persuasive."[18]

Demeanour

Closely related to the topic of "explaining concepts logically and clearly" is that of the ideal or preferred demeanour of the valuation expert in court. Demeanour refers to the manner in which an expert witness carries himself or herself, the air with which an expert asserts himself or herself and the overall physical appearance and bearing of the valuation expert in court.

In our experience, different valuation experts have different "styles" of oral communication. Some valuation experts are more reserved and cautious, others are rather more energetic and flamboyant and yet others may have a completely different style of their own.

We found that judgments don't often comment on the demeanour of valuation experts. One judgment that did have comments on expert demeanour was *Baxter v. The Queen*, wherein the court noted that it was "persuaded by the demeanour, substance, presentation and *modest certainty*" of one of the valuation experts involved.[19] Similarly, in *1230995 Ontario Inc. v. Badger Daylighting Inc.*, the court noted that both valuation experts that testified at trial did so in a "straightforward manner and did their best to assist the Court."[20]

The cases we reviewed also suggest that experts are better able to maintain an earnest and sincere demeanour in court if they are flexible on cross-examinations and open to accepting alternative suggested facts from opposing counsel and running through the implications of such alternative facts for the benefit of the court. This is opposed to rigidly sticking to a pre-existing position and risking appearing as an advocate. For instance, in *de Gobeo*, the court found that one of the valuation experts on cross-examination continued to "buttress an unsupportable position" on behalf of his client in an attempt to "support his retainer."[21] As a result, this expert's position was "shaken on cross-examination," during which opposing counsel was successful in a "complete knock down" of all the expert's valuation theories. Rather than maintaining a sincere and calm demeanour, this expert's testimony "degenerated."[22]

The judgments suggest that the courts prefer valuation experts who are modest, respectful and almost "academic" or "professorial" in their demeanour. Unfortunately, we cannot extrapolate this across all courts, given the limited number of cases that explicitly make reference to demeanour.

Asking for relevant information

A potential distinguishing factor between some valuation experts at trial is the extent to which particular experts made good-faith attempts to obtain information required for their analyses.

What is clear from the case law reviewed is that it is not sufficient for valuation experts just to disclose in their written reports that they were unable to obtain certain documents or pieces of information. Where information exists but was not provided by one of the parties, the onus appears to be on the expert to try to obtain the information from other sources or to arrive at the information using alternate means.

For example, in *Shamber v. Shamber*,[23] a matrimonial case, the court found it "concerning" that although one of the valuation experts complained of not having received additional information or full access to interview the husband, there was no evidence of efforts made to access this through the courts nor any acknowledgement that the absence of this information could have had an impact on his conclusions. The requirement that experts ask for information or try to obtain it is repeated in numerous judgments.

A number of judgments we examined also suggested that where valuation experts are provided with financial models prepared by clients, experts should check the assumptions in these models as well as check for technical accuracy and errors before relying on the models for valuation calculations. To be comfortable with the financial models, valuation experts should ask sufficient questions and obtain sufficient backup for such models.

Professional qualifications

Many judgments list valuation experts' professional qualifications when describing why particular individuals were accepted as experts. Courts don't spend much time discussing the qualifications. However, the listing of professional designations and academic degrees suggests that courts consider qualifications to be important.

Our analysis reveals that the number of qualifications does not determine whether a particular valuation expert is going to be more or less effective in court. Courts certainly look for an expert to have relevant qualifications for the subject matter at hand (for example, a chartered business valuator ["CBV"] for business valuations or loss quantification). More important than the number of qualifications is the determination of which expert provided a more thorough analysis, made better assumptions and was more independent.

Our review suggests that at least in commercial litigation and tax court cases:

- The majority of valuation experts tend to possess at least a chartered accounting ("CA") designation, or a CA together with a CBV. In larger and more complex litigations it appears possessing a CA and CBV combination is the norm.
- In cases where one valuation expert possesses a CBV designation and another expert does not, the expert with a CBV designation appears to have his or her valuation evidence accepted by the court more often. This is certainly not a "given" in all situations and, as always, depends on the quality of the analyses conducted of each respective expert.

Experience

Another important question that arises with respect to valuation experts is the extent to which the experience of a business valuator impacts his or her ability to have evidence accepted by a court. It may initially seem obvious that the more experience the better. Our review reveals that this is not necessarily true.

To begin with, courts do value experience on the part of valuation experts. A number of judgments make reference to the number of years a valuation expert has practised. Presumably, the greater the level of experience, the greater the body of knowledge that a valuator can draw on in arriving at valuation opinions and the more comprehensive the resulting analysis. In particular, courts value relevant experience. For example, when valuing an oil and gas company, courts may look for prior oil and gas experience on the part of the valuator. This is perhaps best echoed in *Deer Creek Energy*, in which the court stated that "the knowledge and experience of the valuator in a specialized industry is a factor that must be considered in evaluating the expert opinions tendered."[24]

Having said this, it is certainly not a given that the more experienced expert will have his or her evidence accepted in preference to a less experienced expert. For example, in *Alfano*, the court acknowledged that one of the valuation experts was "very experienced" and that his "qualifications to give opinions in matters such as those that are in issue in this case were not challenged."[25] Nevertheless, the court disqualified the expert because of his lack of independence. Similarly, in *DeBora*, one of the valuation experts had given evidence approximately 30 times and had a longer career than the other, who had given evidence only twice. Nevertheless, the court preferred the evidence of the latter expert because the latter was more independent and undertook a more thorough analysis.[26]

Being organized

A number of judgments make it clear that valuation evidence (oral or written) that is well organized and presented in a methodical fashion tends to be viewed favourably by the court. For instance, the courts liked the succinct, methodical and focused manner in which valuation evidence was presented by one of the valuation experts in *Baxter*,[27] *Deer Creek Energy Ltd.*[28] and *Love v. Acuity*,[29] among others.

Level of detail involved

A question that valuation experts often consider is the level of detail to delve into while preparing the financial analyses underlying their opinions. Some courts have characterized valuation as an "inherently uncertain process," given the many facts, projections, assumptions and judgment calls that are required.[30] Considering this, does it make more sense for a valuation expert to prepare a more "conceptual" analysis, which captures the significant financial details but perhaps not every immaterial nuance, or is it more prudent to adopt an almost "forensic" approach, which takes into account significant financial details but also valuation adjustments of a smaller dollar value? The former approach may be easier for courts to grasp and understand, especially where a case has a lot of technical details. The latter may be seen as more thorough and researched. In our experience, valuation experts tend either to adopt one of these approaches or to fall somewhere in between.

On the one hand, some judgments favour valuation experts who are more detailed and undertake a more comprehensive scope of review, so long as the work undertaken is relevant and meaningful. On the other hand, despite the level of detail, what becomes clear from the comments of the courts is that what is far more important is that the overall analysis and opinion accords with "common sense and commercial reality."[31] If the "big picture" result runs contrary to key facts, if significant assumptions are unrealistic and if conclusions don't make commercial sense, then the valuation evidence may be accorded less weight or be dismissed by the courts. Moreover, the importance of an "articulate, succinct and clear" presentation of analyses in written reports and oral testimony cannot be too strongly underscored.[32]

Remaining within one's area of expertise

Valuation experts may sometimes be asked by their retaining counsel for comments on topics that are not within their area of expertise. Judgments indicate that valuation experts need to exercise care to avoid straying from their "core" expertise of loss quantification, business valuation and financial matters, at which courts look unfavourably.

For instance, in *CanBev Sales & Marketing Inc. v. Natco Trading Co.*,[33] a valuation expert was retained to comment on the reasonableness of an assumption that a particular dollar figure relevant to the facts of the case was a "net" figure. However, the court felt that the expert's retainer had "nothing to do with the area of [the expert's] expertise" and that the expert's findings "did not have a reliable basis in the knowledge and experience of the expert's discipline and on this basis such evidence is not admissible." The question was, in fact, a legal/factual question "for the Court to decide on the totality of the evidence."[34]

Conclusion

Ultimately, litigation counsel and adjudicators would like to deal with valuation experts whose reports and testimony are founded on "solid rock" rather than "shifting sand." Although there is no magic formula in all situations for an effective expert witness, our research underscores a number of important points. Using assumptions only where appropriate, and testing assumptions for reasonableness; going the extra mile to ask for relevant information and explaining concepts logically and clearly are all to be communicated to experts who want their expertise accepted. In addition, our research suggests that "more" – more experience, or more qualifications or more detail – is not always better. The overriding factors are relevant experience/qualifications/details and, ultimately, good old-fashioned logic, due diligence and independence.

We hope that our research findings may be useful in terms of furthering the quality, independence and effectiveness of expert loss quantification and valuation evidence in Canada. We end this article with a quotation that, in our view, underscores the point that reputation and integrity are a valuation expert's greatest assets:

> *The purest treasure mortal times afford*
> *Is spotless reputation; that away,*
> *Men are but gilded loam, or painted clay.*
> – William Shakespeare, *King Richard II*, Act I, scene 1

Notes

1. 2009 CanLII 12799 at para 6 (Ont SCJ) [*Alfano*].
2. [2008] OJ No 3722 at para 292 (SCJ), rev'd on other grounds 2010 ONCA 467, 101 OR (3d) 81.
3. 2003 MBQB 274, 179 Man R (2d) 200 at para 44 [*de Gobeo*].
4. 2010 ONSC 1587, [2010] OJ No 2166 at para 194.
5. 2009 QCCS, [2009] QJ No 5769 at para 399.
6. (2009), 74 CCEL (3d) 272 at paras 138, 140, 141 (Ont SCJ), var'd 2011 ONCA 130, [2011] OJ No 771 [*Love v Acuity*].
7. *Supra* note 3 at para 45.
8. *Ibid.*
9. (2004), 8 RFL (6th) 32 at para 345 (Ont SCJ) [*DeBora*].
10. *Ibid* at para 350.
11. *Hallatt v Canada*, [2001] 1 CTC 2626 at para 30.
12. (1997), 36 BLR (2d) 257 at paras 47–50.
13. [2004] OJ No 340 (SCJ).
14. *Ibid* at para 129.
15. *Ibid* at para 128.
16. *Ibid* at para 131.
17. 2008 ABQB 326, 49 BLR (4th) 1 [*Deer Creek Energy*].
18. *Ibid* at para 452.
19. 2006 TCC 230 at para 97 [emphasis added] [*Baxter*].
20. *Supra* note 4.
21. *Supra* note 3 at para 44.
22. *Ibid* at para 43.
23. 2004 MBQB 183, 14 RFL (6th) 444 at para 45.
24. *Supra* note 17 at 556.
25. *Supra* note 1 at para 5.
26. *Supra* note 9.
27. *Supra* note 19.
28. *Supra* note 17.
29. *Supra* note 6.
30. *RBC Dominion Securities Inc v Merrill Lynch Canada Inc*, 2006 TCC 230 at para 94, rev'd on other grounds 2007 FCA 172, [2007] 3 CTC 211.
31. *Hallatt v Canada*, *supra* note 11 at para 30.
32. *Baxter*, *supra* note 19 at para 96.
33. (1996), 30 OR (3d) 778 at para 58 (Gen Div).
34. *Ibid.*

TAB 4

Mediation offers creative bankruptcy solutions Alternatives to litigation available for surplus income determination, discharges

The Lawyers Weekly

By Stanley J. Kershman

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Special Section: Focus on Insolvency Law

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Bill C-5, which contains proposed changes to the Bankruptcy and Insolvency Act, is the first legislative effort in Canada to include mediation as an alternative to litigation in the personal bankruptcy battlefield.

Mediation is fast becoming the tool of choice for efficient, effective dispute resolution.

An obvious advantage to incorporating mediation into the bankruptcy process is saving time and money used to prepare for court appearances.

But the move away from litigation and towards mediation also signals a shift in attitudes of dealing with conflict resolution in this area.

Mediation will become standard procedure in the key areas of surplus income determination and bankruptcy discharge under the bill.

Surplus income -- Mediation will be used in a situation where the trustee and the bankrupt cannot agree on how much of the bankrupt's income is surplus -- that amount exceeding what was necessary to maintain a reasonable standard of living in various parts of Canada, as determined by Parliament.

The bill allows the trustee to ask the Official Receiver for mediation to resolve the quantum of surplus payments.

The bill also allows creditors who disagree with the calculation of surplus income to request mediation.

When the bankrupt's personal or family circumstances have changed, the trustee or creditors can ask for mediation to change the amount of surplus payments.

Bankrupt can't request

It should be noted that Bill C-5 does not permit the bankrupt to request mediation for surplus income payment purposes.

In the case of creditors requesting mediation, they have 30 days after either the date of bankruptcy or the date of a payment amount modification to send the mediation request to the trustee.

The trustee then sends the request to the Official Receiver.

The mediation will take place 30 days after the Official Receiver receives the mediation request.

If the Official Receiver believes that the surplus payment amount agreed on between the trustee and the bankrupt is not appropriate under the circumstances and the parties do not agree to amend it, the matter will by-pass the mediation process and proceed to court for resolution.

Bankruptcy discharge -- In recommending whether or not a bankrupt should receive a discharge, and whether the discharge should be subject to conditions, the trustee takes into account the bankrupt's conduct and the ability to make payments.

Recommendations

Under the proposed amendments, the bankrupt can request mediation if he or she does not agree with the trustee's recommendations.

Where a request for mediation is received, the trustee would forward a request to the Official Receiver for mediation.

The trustee would also request mediation where either a creditor or the trustee opposes a discharge on the grounds that: the bankrupt chose bankruptcy rather than filing a proposal to creditors as a means to resolve his or her indebtedness; or the bankrupt has failed to comply with the requirement to make surplus payments as required under the Act.

In addition, the trustee can apply for mediation if he or she proposes a conditional discharge on other grounds.

The federal government has developed models for the mediation of surplus income and bankruptcy discharge which are contained in the bill.

The mediation itself is likely to take approximately 90 minutes and will be done in batches to make use of all of the parties' time.

Specific procedures have yet to be announced.

It is proposed that the mediators will be representatives from the Office of the Superintendent of Bankruptcy.

Win-win solutions -- Mediation's less adversarial atmosphere allows each party to the dispute to be part of the solution, resulting in settlement options that can be very creative.

Take, for example, the case of a commissioned salesperson. This person's income will vary according to the amount of goods sold in each month.

Where a court-ordered surplus income payment might be set at a regular payment of $500 a month -- an amount that might be difficult to pay in months where sales commissions are low -- a mediated solution might tailor the surplus income payment to the value of the estimated monthly commissions.

Surplus income

Whether mediation is used for surplus income or bankruptcy discharge disputes, it can resolve these disputes more quickly and less expensively than traditional litigation while achieving solutions more acceptable and more likely to succeed than court ordered decisions.

In addition to the time and money saved by the parties involved the mediation process will also relieve pressure on the court system as a whole.

In Toronto, the bankruptcy discharge process can take an additional 18 months to work its way through the system.

As well as quantifying many of the benefits, mediation also provides savings that can not be easily measured in tangible terms.

The emotional wear and tear on the parties will be reduced.

Mediation's non-combative approach to problem solving often eases the stress associated with the preparation for and anticipation of a court appearance which accompanies the stress of actually appearing in court.

By recognizing the success of mediation, the proposed changes to the Bankruptcy and Insolvency Act have the potential to obtain faster, more appropriate and less expensive solutions to bankruptcy proceedings.

The bill's passage will signal a better system for those involved in bankruptcy and insolvency practice and for all those who use, or pay taxes in support of, our court system.

Stanley J. Kershman is a lawyer with the Ottawa law firm of Kershman & Warren. He concentrates his practice in the areas of bankruptcy/insolvency, creditor/debtor law, mediation, wills and estates.

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED
AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF LAURENTIAN UNIVERSITY OF SUDBURY

Applicant

Court File No.: CV-21-656040-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE - COMMERCIAL LIST

Proceeding commenced at Toronto

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