MONEY & FAMILY LAW

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PROVIDING NEWS AND INSIGHT TO PROFESSIONALS IN FAMILY LAW, ESTATE AND TAX PLANNING SINCE 1986

March 2021 | Issue 36-3

ONTARIO'S ELECTRONIC COURT CERTIFICATES

By Barry S. Corbin*

Since October 6, 2020, it has been possible to submit an application for any type of certificate of appointment via e-mail. This has not obviated the need to submit original documents (such as a will or a court-certified copy of a foreign grant, where applicable) and estate administration tax payable, if any, by mail, courier or in person at the court office. However, if you do opt for this method of submitting your application, it will result in an electronic court certificate, rather than a paper one. The court's seal[1] and the registrar's signature will have been affixed digitally.

The date and time[2] that the registrar's signature was digitally affixed will appear beside the signature, as will his or her e-mail address. By hovering one's mouse over the digital signature, a series of left and right clicks will display, *inter alia*, information to assure the reader that the document has not been modified since the signature was applied. We were initially taken aback by the message "Signer's identity unknown" that appears when the mouse hovers over the registrar's signature. There is an "explanation" in one of the windows that opens with a further mouse-click: "The signer's identity is unknown because it has not been included in your list of trusted certificates and none of its parent certificates are trusted certificates."[3]

* Corbin Estates Law.

1 In contrast to the practice with a paper copy of the court certificate, the digital seal is applied only to the cover page of the electronic court certificate. Presumably, the need to apply the digital court seal to all of the pages of the certificate has been obviated by the ability of the recipient of the electronic court certificate to verify that the document has not be altered since the registrar's digital signature has been applied.

2 The time displayed will be the time according to the signer's computer.

3 This message is generated by Adobe, the software used to create the electronic court certificates, and is intended to assure the reader that nothing is amiss, but that assumes the reader has some idea what that

CONTENTS

17
ONTARIO'S ELECTRONIC COURT CERTIFICATES

18
NEW TRUST REPORTING RULES

19
WHAT "VALUE" NEEDS TO BE DETERMINED?

20
THE TIMES THEY ARE "A-CHANGIN'" - THE IMPACT OF ECONOMIC FACTORS ON POST-SEPARATION VALUES OF ASSETS FOR UNEQUAL DIVISION PURPOSES - PART III

22
WHY FAMILY SEPARATIONS CAN GET MESSY WHEN THE MAJOR ASSET IS A CORPORATION

23
MEDIATION CONFIDENTIALITY AND SETTLEMENT PRIVILEGE

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A further disconcerting message appears in the "Signature Panel" at the top of the electronic court certificate: "At least one signature has problems." One website we visited offered this somewhat soothing explanation: "This message does not indicate that the digital signature is invalid or corrupt. Instead, it's a poorly worded message from Adobe that causes unnecessary alarm."

We learned one other very interesting thing about electronic court certificates. One of the first ones we received showed the printed date of the certificate as January 18, 2021. However, the date on which the digital signature was affixed by the registrar showed as January 28, 2021, the later date being the date the electronic court certificate arrived in our in-box. We naturally assumed that the printed date was simply a typo and e-mailed the registrar to suggest that explanation and to ask that the electronic court certificate be corrected to show the later date.[4] Imagine our surprise when we received the registrar's response:

> There will be many instances when the certificate is signed on a different date than the date on the certificate. The date on the certificate reflects the date it was actually cleared; the date my signature was placed was the day I signed it and sent it off. Sometimes, a few days will pass because we send in an application for clearance and other duties arise and the certificate may not be signed for a day or two. . . . I have double checked and I can confirm the date the file was cleared was 18 January 2021. There is nothing in our [Estates Procedures] manual that suggests the certificate needs to be signed on the same day it was cleared but I understand your concern! I can assure you it is a valid certificate.

In the case of paper court certificates with a "wet" signature, the only date the observer sees is the date on which the application is cleared. The passage of one or more days until the registrar signs will be unknown and hence can cause no problems. However, for electronic court certificates, that gap between dates will be front and centre for the reader. A gap in time of as little as a single day between the two dates could cause concern for the recipient of the electronic court certificate — particularly one who has long been accustomed to receiving a notarial copy of the paper court certificate.[5]

It is reasonable to expect that this incident will become of purely historical interest because both the *Estates Act* and the *Rules of Civil Procedure* have been recently amended[6] to eliminate the role of the Estates Registrar for Ontario, to whom a request for clearance used to be sent, and to vest in the registrar who signs the court certificate (whether with a "wet" signature or a digital one) the responsibility for determining whether there is any reason that a court certificate should not be issued.

explanation means. No doubt an English translation of that explanation is available for anyone who cares to do research on the internet.

4 The date of the certificate is important, as it starts two clocks running: first, the 180-day period within which the estate trustee must submit the Estate Information Return to the Minister of Finance; and second, in appropriate situations, the six-month period within which a person must bring an application for dependant support under Part V of the *Succession Law Reform Act*, R.S.O. 1990, c. S.26.

5 Whenever an electronic court certificate is issued it is always possible, by payment of an additional fee, to request a court-certified copy of the certificate of appointment. However, that document will also display the date on which the the registrar affixed a digital signature, so it will offer no more comfort to the third party than did the electronic court certificate.

6 See s. 16 of the *Estates Act*, R.S.O 1990, c. E.21 and Rule 74.12(1) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

NEW TRUST REPORTING RULES

By Steve Z. Ranot,[*] edited by Anna M. Barrett[**]

Since 1997, section 233.3 of the *Income Tax Act*[1] required Canadians to report most types of foreign property on Form T1135 of their personal and corporate income tax returns. Family lawyers and valuators providing litigation support welcomed the advent of any measure that would help uncover assets hidden offshore. Sadly, in the 23 years since the introduction, we have seen far more well-meaning taxpayers charged penalties for omitting their Florida vacation properties or Apple shares (held at a Canadian institution) than tax evaders with foreign accounts, corporations and trusts.

Canadian trusts will soon have to face new reporting requirements with these new trust reporting rules applicable to fiscal years ending after December 31, 2021. That means we will not start seeing the impact, if any, until the 2022 fiscal year for trusts with a December 31 year-end. An affected trust will have to provide information pertaining to its beneficiaries, trustees, settlors and protectors on its income tax return.

A protector is a person who is given special rights and powers under a will or a trust instrument to participate in the administration of an estate or a trust. Protectors generally ensure that trustees are administering the trust in accordance with the settlor's intentions. The use of protectors was brought about by onshore settlors of trusts who did not want to transfer complete control over their assets to unknown offshore trustees while still pointing to the offshore trustees as evidence that mind and management of the trust resides outside of Canada.

Trusts that fail to report required information may face penalties of up to 5% of the value of its property. Canadian trusts operating outside Canada have always been required to report their income and foreign assets to the Canada Revenue Agency ("CRA"), so pardon us if we are a little cynical that a new penalty will scare those who have suc-

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This article originally appeared in the November/December 2020 *Marmer Penner Inc. Newsletter* (Vol. 23, No. 5), and is being re-printed here with permission.

1 R.S.C. 1985, c. 1 (5th Supp.).

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cessfully operated under CRA's radar until now. It appears that CRA hopes that "foreign" trusts with a Canadian protector will now reveal themselves.

Readers should temper their enthusiasm as we already noticed a particular large professional services firm making recommendations which included the following actions in 2021:

(1) Unwind trusts that are either unnecessary or no longer serve an intended purpose so that tax returns filings are no longer required or unwind trusts that create adverse tax consequences;
(2) Remove redundant corporate beneficiaries when setting up a new trust to reduce the reporting obligations;
(3) Review your organizational structure and trust deed to determine if a corporation in your structure is "beneficially interested" in the trust and therefore may have to be reported under the new trust reporting rules; and
(4) Consider which trust beneficiaries to include when setting up a new trust so that reporting requirements won't capture unintended parties as beneficiaries of the trust.

We have always been reluctant to hope that the foreign asset reporting rules would impact most tax evaders and those hiding assets and income from a spouse. According to recent reports, no Canadians were criminally charged for holding foreign accounts such as those in the Cook Islands that came to CRA's attention in 2013 and the Panama Papers a few years later. In fact, in a report last year, it was revealed that CRA's Offshore Tax Informant Program, set up in 2014 to gather tips from the public about Canadians engaging in offshore tax avoidance and evasion, has collected only $19 million in unpaid taxes and penalties. Sadly, no criminal prosecution and a low risk of paying the actual taxes owed likely incentivizes tax cheats to continue their ways when the opportunity arises to reduce their payment and support obligations.

WHAT "VALUE" NEEDS TO BE DETERMINED?

By Wayne Rudson*

One of the first issues to consider in any valuation assignment is what "value" term is to be utilized. Some of the options include:

- Book Value;
- Depreciated Replacement Value;
- Fair Market Value;
- Fair Value;
- Going Concern Value;
- Liquidation Value (orderly or force);
- Net Book Value;
- Value in Use; and
- Value to Owner.

There are other value terms that have not been listed above.

Fair market value ("FMV") is possibly the most common value term that is utilized. It is found in number places in the *Income Tax Act*[1] (for example, to determine notional proceeds on deem disposition on death, to determine the value of preference shares in cases of estate freezes, etc.) and is generally applicable for the Ontario *Family Law Act*[2] (to determine the value of business interests in calculating a spouse's net family property in marriage dissolution), but not in all cases. The generally accepted definition of FMV is as follows:

> The highest price available in an open and unrestricted market between informed and prudent parties, acting at arm's length and under no compulsion to act.

The FMV definition above contemplates a theoretical price that could be obtained from a notional purchaser under certain assumptions, as follows:

- Transaction occurs in an open and unrestricted market;
- parties are under no compulsion to act;
- there is a willing and rational pool of potential purchasers; and
- all relevant information is available.

The FMV of non-controlling interests are generally less than the corresponding pro-rata share of "en bloc" FMV. In simple English, a 10% shareholding in a corporation with FMV of $100 is often less than $10. The appropriateness and quantification of such minority and liquidity discounts (or in some rare cases, a control premium or premium for forceable taking) is a complex and case-driven determination and would be the subject of a separate article.

In our experience in oppression and appraisal remedy cases, "fair value" is the appropriate value term, which is typically interpreted to mean the ratable portion of "en bloc" fair market value applicable to an individual shareholding (*i.e.*, without the application of any discounts or premiums).

Certain assets may have a FMV of $nil but still have value to their owner. Examples include discretionary trust interest (capital, income or both) and employee equity rewards (employee stock options, RSUs, PSUs, etc.; whether vested or not). In these examples, a particular asset may have a $nil FMV because these interests are not transferrable to any potential purchaser.

Unlike the *Income Tax Act*, which specifies FMV in numerous places, the *Family Law Act*, Ontario uses the term "value" in assessing a spouse's net family property. In our experience, where the FMV is $nil because of transferability issues,

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This article originally appeared in Rudson Valuation Group Ltd., "Quick Read" (August 12, 2020), and is being re-printed here with permission.

[1] R.S.C. 1985, c. 1 (5th Supp.).
[2] R.S.O. 1990, c. F.3.

"value to owner" can be an appropriate approach. Value to owner is generally determined to be the price an individual would pay not to be deprived of the ownership of an asset or assets.

Many years ago, a highly regarded family law lawyer analogized value to owner to the story of a goose that laid golden eggs. Imagine a farmer that had a goose that would lay golden eggs but only for that specific farmer. The FMV of the goose would be nominal but there would be significant value to the farmer (*i.e.*, value to owner).

Other value terms such as replacement value, depreciated replacement value and value in use generally fall into equipment appraisers or other appraisal expert's area of expertise. Business valuators generally deal with FMV, fair value and value to owner. Which value term is appropriate should be discussed at the onset of any valuation assignment along with other considerations such as the valuation date, type of report required and any restrictions or limitation on available information (*i.e.*, scope limitations).

THE TIMES THEY ARE "A-CHANGIN'" - THE IMPACT OF ECONOMIC FACTORS ON POST-SEPARATION VALUES OF ASSETS FOR UNEQUAL DIVISION PURPOSES - PART III

By Cheryl Suann Williams*

REMEDIES WHEN AN UNEQUAL DIVISION HAS BEEN ORDERED

The facts of the *Serra*[1] case were unique and we rarely see cases where courts order an unequal division of marital property. As discussed in Part II of this article, the power of the court to divide property unequally is used rarely and in exceptional circumstances as it is a very fact-specific exercise. Even if section 5(6) applies,[2] the remedy is not just to re-calculate the equalization payment based on the current value of diminished asset. Rather, once the "threshold [of unconscionability] has been crossed and the rare judicial discretion under the *Family Law Act* ("FLA") is in play, the court should exercise its discretion as it normally does: by doing what is just, fair and equitable in the circumstances." The court can make an appropriate award, adjusting the equalization payment in an amount not to exceed the payor's net family property.[3]

In *Borutski v. Borutski*,[4] the husband solely owned the matrimonial home which was his main asset. It was destroyed by fire after the valuation date and after he had moved out of the matrimonial home and unilaterally and without notice to the wife cancelled the insurance policy. He also resisted all of the wife's attempts to move back into and protect the premises.

The husband relied on *Serra* and argued that it would be unconscionable to equalize the parties' net family properties in light of the drastic decline in the matrimonial home's value. Justice Leroy declined to grant the husband's claim and noted significant distinguishing facts compared to the *Serra* case. Unlike the husband, Mr. Serra had done everything he could possibly do to make his business survive in the circumstances.

The husband's request for an adjustment also failed in *Sfeir v. Sfeir*,[5] when his stock options depreciated significantly after the valuation date. The husband had stock options, valued at $89,877 (USD) at the time of separation. He cashed in $29,818.00 (USD) of the options in 2007 to pay support. The remaining unexercised stock options depreciated in value to $7,618 (USD) by the time of trial. He states that on the advice of lawyers, and a motion judge's recommendation that he not make major transactions until trial, and because there had been negotiations between the parties for a transfer of the stocks, he did not sell the rest of the options earlier.

The court again distinguished the *Serra* case by noting that the husband sold some of his stock options to pay spousal support so that it was "clear that he knew he could sell them if he so wanted" and that the wife never claimed a constructive trust or acted to restrict his activities relating to them or had occurred in *Serra*. The court ordered the husband to include the entire $89,877 (USD) in his net family property.

One of the limited cases post-*Serra* in which an equal sharing of family property was found to be unconscionable as a result of a decline in value of property after the valuation date is *Kean v. Clausi*.[6] The husband was an investment banker who advised his wife to create a portfolio that was valued at $228,168 on the valuation date. After the parties separated, the husband continued to make the investment decisions relating to this portfolio. There was no suggestion that either party recklessly depleted the value of the account. At the time of commencing the wife's Application, the account had a value of $145,158. By the time of trial, there had been a modest increase to a value of $157,000. The wife claimed an unequal division of the parties' net family property on the basis of a significant drop in the value of the account.

The husband argued that *Serra* should not apply. However, the court stated that Blair J.A.'s reasons are not limited to extreme cases involving only the very wealthy or those cases in which the actual equalization payment would re-

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This article was originally presented at an Ontario Bar Association Continuing Legal Education program, "Unique Property Challenges that Arise from Separating During Economic Uncertainty" (August 26, 2020), and is being re-printed here with permission.

[1] *Serra v. Serra*, 2009 CarswellOnt 513, 2009 ONCA 105 (Ont. C.A.).
[2] *Family Law Act*, R.S.O. 1990, c. F.3.
[3] *von Czieslik v. Ayuso* (2007), 86 O.R. (3d) 88, 2007 CarswellOnt 2422, 2007 ONCA 305 (Ont. C.A.), at para. 58; *Honorat v. Jean-Paul*, 2014 CarswellOnt 16822 (Ont. S.C.J.), at para. 23.
[4] 2011 CarswellOnt 14477 (Ont. S.C.J.).
[5] 2010 CarswellOnt 922, 2010 ONSC 1163 (Ont. S.C.J.).
[6] 2010 CarswellOnt 4946, 2010 ONSC 2583 (Ont. S.C.J.).

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sult in a figure greater than a party's net worth as was the case for Mr. Serra. Further, the post-separation decline in value was entirely market driven and was out of the control of both the husband and wife and the trades or transactions in the account were suggested by the husband. The court concluded that the equalization sum should be adjusted so that the greater of the asset's value as of the trial date or within 15 days prior the date that the payment is made rather than its value at the valuation date was equally shared.

At issue in *Lo v. Lo*[7] was the husband's Hong Kong pension. It had decreased significantly in between the valuation date and the date he received it because of the declining Hong Kong dollar. At separation, the pension had a value of almost $280,000 (CDN). Seven years later, when the husband actually began to collect it, it was valued at approximately $185,000 (CDN), in a reduction in value between those two dates of just over $94,000 (CDN). The husband relied heavily on the decision in *Kean v. Clausi* to support his argument that the equalization sum should be adjusted. In that case, a drop in value of just over $83,000 of an account with a valuation day value of $228,168 was held to be an unconscionable result resulting in an unequal division.

Justice McDermot refused to vary the husband's equalization payment of $173,530, stating that "in light of the quantum of the decrease in value", the situation had not "reached the threshold of unconscionability". He distinguished *Serra* by noting that, unlike the situation in that case, the equalization sum did not exceed the value of the husband's assets and the wife did have substantial assets of her own. He next distinguished *Kean v. Clausi* by suggesting that it was the circumstances surrounding how the parties managed their financial affairs in that case rather than the amount of the equalization sum that caused equalization of net family properties to be unconscionable.

Although Justice McDermot refused to vary the equalization amount, he did decline to order the husband to pay prejudgment interest on it, largely because of the decline in the value of his pension.

POST-SEPARATION INCREASES IN VALUE

We have all heard about the limited number of companies and services that have had a surge in business as a result of COVID-19 (*consider Netflix, Zoom, food delivery services, masks, hand sanitizers, Lysol wipes and home renovation services that we cannot get enough of*). What happens if the parties separate in the midst of COVID-19 and the value of a party's assets increases significantly by the time of trial?

In *Cerenzia v. Cerenzia*,[8] the court considered the *Serra* case to determine whether a post-separation increase in value of the matrimonial home held by the wife was unconscionable as follows:

> I do not find that the discretion of the court under s. 5(6) is engaged by this provision. The significant post-separation increases in the value of the home are troubling for Mr. Cerenzia and may in fact work an unfairness, but they are not unconscionable. There was no explanation for the delay in resolution which permitted the significant increase in the value of the home over the past six years. Mr. Cerenzia was not the person who brought these proceedings. Had he wished to resolve the property issues early on, he could have sought the court's assistance well before 2012.
>
> The delays in this matter are properly satisfied by an award of pre-judgment interest on the equalization payment: *Novakovic v. Kapusniak*, 2008 ONCA 381, 52 R.F.L. (6th) 9 (Ont. C.A.). As well, as noted above, Ms. Colasanti will be left with at least a portion of the debt on the home. To provide Mr. Cerenzia with an interest in the home would not be fair, considering her obligation to her father's estate. It is not "shocking" to the court that the applicant be given the benefit of the post-separation increases in value of the home under the circumstances.

It is important to consider when a claim should be made for a constructive trust and/or an unequal division but the facts must support the claims. In *T.C.M.W. v. R.K.W.*,[9] the wife incorrectly brought a claim for a constructive trust of the matrimonial home which was solely registered to the husband so as to benefit from its post-separation increase in value. The trial was held in July 2019. McSweeney J. stated that this claim may be considered in light of s. 5(6) as follows:

> [312] In reaching this conclusion I observe that first, the Applicant will share in the increased value of the home up to the date of separation. Second, a post-separation increase in the value of a spouse's assets may be considered under s. 5(6) as a reason for granting an unequal division of property. *Thus, unjust enrichment flowing from a post-separation increase in value, which is not ordinarily caught by the equalization regime, can be considered under s. 5(6). In other words, the FLA has a means of addressing this sort of unjust enrichment.*
>
> [313] The threshold requirement for such a constructive trust remedy is a finding of an "unconscionable" deprivation of one party to the benefit of the other. This is an "exceptionally high" evidentiary threshold: see *Serra*, at paras. 46-47.
>
> [314] *Framed either as a claim for a constructive trust or an unequal division of property, the Applicant's claim must fail for the following reasons.* First, her argument that she should be treated as if she were on title to the home because she really thought she was, cannot assist her. The Applicant filed no authorities in support of this proposition.
>
> [315] Second, the Applicant substantially agrees with the equalization calculation. By statute, she will share equally in the increase in the parties' net worth over the course of their marriage, including the increase in value of their matrimonial home, up to the date of separation, which is the valuation date chosen by Parliament.

[7] 2011 CarswellOnt 15332, 2011 ONSC 7663 (Ont. S.C.J.).

[8] 2015 CarswellOnt 19193, 2015 ONSC 7305 (Ont. S.C.J.), at paras. 89 and 90.

[9] 2020 CarswellOnt 7924, 2020 ONSC 3554 (Ont. S.C.J.).

[316] Third, the Applicant's contributions to the property were all completed prior to separation. She conceded that she has contributed nothing to the cost or maintenance of the home since separation. A constructive trust is only available where the claimant can demonstrate a substantial and direct link between her or his contributions and the acquisition, preservation, maintenance or improvement of the property: *Kerr*, at para. 50.

[317] Further, none of the Applicant's contributions to the matrimonial home were beyond the type and nature of maintenance and modest improvement that a couple raising a family together in a home frequently make. These circumstances do not rise to the level of unconscionability required to depart from the regime of equal division under the *FLA*.

[318] *My conclusion is consistent with the Court of Appeal's observation in Serra that the FLA equalization regime recognizes the equal contributions parties make to a marriage. What happens to the value of an asset after separation is no longer related to the parties' contributions to the marriage: Serra, at para. 77.*

[319] *While in the current real estate market the Applicant is the one arguing for a share in a post-separation increase in value, in a different market one could envision a responding party arguing that a post-separation decrease should reduce his or her equalization obligation. The reasoning in Serra, applied in such a case, would benefit the Applicant party by preserving the separation date value.* [Emphasis added]

WHY FAMILY SEPARATIONS CAN GET MESSY WHEN THE MAJOR ASSET IS A CORPORATION

By Laurie H. Pawlitza [*]

It is trite to say that in law, a corporation has its own rights and liabilities, and that the assets of the shareholder are not the assets of the corporation, nor are the corporation's assets the shareholder's assets. Among other things, of course, the existence of a corporation prevents a shareholder's personal creditors from being able to realize their claims against the corporation's assets.

What happens, then, when a couple separates and the reluctant payor spouse has one major asset: a corporation?

Earlier this year, the Alberta Court of Appeal wrestled with this issue in *Aubin v. Petrone*.[1]

In 2018, the trial judge decided that Sabino Petrone owed Renee Aubin an equalization payment of $5.6 million. Petrone had no cash in his own name, and claimed he could not access any cash from Quantiam, the company in which he was the majority shareholder.

The facts of *Aubin v. Petrone* made this a difficult case. Quantiam was not owned by Petrone alone: He owned 84.7% and Aubin owned 4%, while 19 family members, friends and employees bought in as minority shareholders and held the remaining 11.3%. A unanimous shareholder agreement governed the shareholders.

The relationship between Aubin and Petrone was quite traditional: Aubin looked after all matters of household management and childcare; Petrone made all the corporate decisions. Aubin left her outside employment and worked for the company, with her title, hours, salary and bonuses determined by Petrone. It appeared that, in part, Aubin's employment was an income-splitting technique.

During the marriage, the couple bought a home in British Columbia, which was purchased by another company in which each held equal shares. Quantiam advanced the funds for the purchase and registered a mortgage on the property for the loan it made.

Both prior to and after separation, Petrone threatened that Aubin "would never see a single share from the company or a single dollar." He also threatened to walk away from the company, liquidate it all and leave them both with nothing.

Shortly after separation, Petrone instructed Quantiam to demand payment of the loan against the B.C property, and then start foreclosure proceedings against it, in retaliation for Aubin starting her family law proceedings. Petrone also wrote to Quantiam's corporate counsel to inquire about incorporating a new company to hold some of Quantiam's assets in order to avoid matrimonial property division.

Petrone did not stop there. He terminated Aubin's employment with Quantiam and removed her as a director of the company, replacing her with his best friend.

The trial judge found that when it came to Aubin, Petrone was "incapable of thinking clearly", and that he was irrational to a troubling degree.

In dealing with the issue of security for the $5.6-million equalization payment, Petrone took the position that Quantiam needed to use all its assets as it saw fit. He also said that if there was an attempt to execute against Quantium on the property judgment, the company would be liquidated.

As a result, the trial judge decided to secure the money judgment against Petrone's shares and ordered a charge against the building owned by Quantiam, in effect making Aubin a secured creditor of Quantiam.

In hearing Petrone's appeal, the central issue for Alberta's Court of Appeal was whether the trial judge had erred in law in piercing the corporate veil — especially given the 19 other shareholders of Quantiam.

On this issue, the court split, with Justices Peter Martin and Jolaine Antonio finding that the trial judge had not

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This article was originally published in the *National Post* (November 23, 2020), and is being re-printed here with permission.

[1] 2020 CarswellAlta 55, 2020 ABCA 13 (Alta. C.A.).

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erred by piercing the corporate veil, and Justice Kevin Feehan dissenting on this issue.

The court first considered whether there was a separate, more relaxed threshold test for family law matters. It did not find a lower one, but indicated there may be an "added factor" to consider, that being the recognition that "obligations imposed by family law are on equal footing with other legal obligations and deserve fair balancing where interests compete."

In addition, the appellate court affirmed the trial judge's observation that "in the family law context . . . the assets of the family unit are tied to the corporation." The Court of Appeal also observed that in support matters, *Child Support Guidelines*[2] specifically state the court may pierce the corporate veil when determining the income of a spouse who controls a corporation.

The corporate veil may be pierced if the claimant can meet a three-part test: the individual must exercise complete control of finances, policy and business practices; the control must have been used by him to commit a fraud or wrong that would unjustly deprive the other of a claim; and, the misconduct must be the reason for the claimant's injury or loss.

What made this case particularly difficult was that Petrone was not the sole shareholder of the company. The majority of the court decided that while this was an important factor, it was not the only consideration in deciding whether to pierce the veil.

In addition to considering the other shareholders, the majority stated consideration had to be given to the nature of the company (private versus public), the reasonable expectations of the shareholders about how the company would be used by its principals, and whether the shareholders were *bona fide* purchasers for value.

Petrone argued, among other things, that he had not deprived Aubin of her rights (as he had not yet defaulted on the payment ordered). He also argued that ordering security was akin to transferring his shares to her. His final argument was that the trial judge erred by restraining him from taking any steps in bankruptcy until the security agreements were executed and registered.

The majority of the Court of Appeal made short work of Petrone's arguments. In responding to his argument that a wrongdoing had not yet occurred since there had not yet been a default, the court said, "the point of the equalization payment is not to enrich Ms Aubin with Mr. Petrone's money. It is to ensure that she regains what is already hers" . . . and, as such, this was "an unjust deprivation."

The court also held that a charge on property does not depend on a transfer of ownership. Rather, a charge is "merely an incumbrance, a weight hanging on the asset which travels with it into the hands of third parties."

2 *Federal Child Support Guidelines*, SOR/97-175.

Finally, the court held that the trial judge's order temporarily enjoining bankruptcy was a "textbook" clause, as it mirrored the wording of a template order charging property, as set out in a well-known textbook on bankruptcy and family law.

Justice Feehan wrote a lengthy dissent on the issues, focusing on Quantiam's other shareholders and that Petrone's actions, while "aggressive and mean-spirited," had not yet caused Aubin "to lose any part of the matrimonial property to which she was entitled."

Unsurprisingly, Petrone sought leave to appeal to the Supreme Court of Canada. His application was dismissed.[3]

The divided court in *Aubin v. Petrone* confirms that even in family litigation, there is no sure path to enforce a personal debt against a corporation.

3 *Aubin v. Petrone*, 2020 CarswellAlta 1184 (S.C.C.).

MEDIATION CONFIDENTIALITY AND SETTLEMENT PRIVILEGE

By Kimberly A. Whaley*

Confidentiality and settlement privilege remain the most common reasons for choosing mediation.

The application of settlement privilege applies as a rule of evidence that protects communications exchanged by the parties as attempts are made to settle a dispute.[1] The Supreme Court of Canada observed, "[t]he privilege wraps a protective veil around the efforts parties' make to settle their disputes by ensuring that communications made in the course of these negotiations are inadmissible."[2]

The purpose of settlement privilege is to encourage and promote settlement by allowing full and frank discussions between the parties. There is a *prima facie* presumption that any communication made in furtherance of settlement is inadmissible. However, this presumption of course can be displaced. The trigger for settlement privilege is the intent to settle (not simply adding the words "without prejudice"). Settlement privilege applies regardless of whether a settlement is ultimately reached.[3] Settlement privilege applies even in the absence of contractual provisions providing for confidentiality.

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This article was originally published on WEL Blog (December 29, 2020) and is being re-printed here with permission.

1 *Bombardier inc. v. Union Carbide Canada inc.*, 2014 CarswellQue 3600, 2014 SCC 35 (S.C.C.), at para. 31.

2 *Sable Offshore Energy Inc. v. Ameron International Corp.*, 2013 CarswellNS 428, 2013 SCC 37 (S.C.C.), at para. 2.

3 *Sable*, *supra* note 2, at para. 17.

Notably, there is an exception to the common law settlement privilege, which permits parties to produce evidence of confidential communications in order to prove the existence or the scope of a settlement agreement.

Confidentiality

The *Rules of Civil Procedure* stipulate, "all communications at a mediation session and the mediator's notes and records shall be deemed to be without prejudice settlement discussions."[4] While mediation is intrinsically confidential, care should be taken to specify the confidentiality of the process by considering the inclusion of a confidentiality clause in the agreement to mediate. Often these clauses require the parties to keep anything that transpires at the mediation confidential. A confidentiality clause in an agreement to mediate differs from settlement privilege since the former is not a rule of evidence, but rather, a matter of contract. Notably, if such a clause is placed in a settlement agreement, take care to consider whether it is appropriate to the circumstances, for example, court approval is required under Rule 7 for settlements concerning persons under disability, and as such a confidentiality clause may not be appropriate.

In 2014, the Supreme Court of Canada ("SCC") weighed in on the interaction between settlement privilege and confidentiality clauses in mediation in the case of *Bombardier inc. v. Union Carbide Canada inc.*[5] The SCC considered whether an absolute confidentiality clause in a mediation contract trumped the exception to settlement privilege, allowing disclosure of confidential communications to prove the existence or scope of an agreement. The SCC held that it is open to parties to contract for greater confidentiality than that provided by settlement privilege, but that doing so requires a clear and unequivocal statement of the parties' intention to oust the common law.[6] A standard mediation confidentiality clause would not have this effect. A contract purporting to oust the law of settlement privilege must be clear and unequivocal. If parties desire absolute confidentiality in the mediation process, they can contract to override the common law in an express provision to this effect. Whether or not to do so will be a strategic decision based on the specific facts of your case.

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[4] *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, Rule 75.1.11.
[5] *Supra* note 1.
[6] *Union Carbide*, *supra* note 1, at para. 51.

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