

**When Legal Worlds Collide:
The Impact of Corporate Law on Family Law Rights
& Obligations Following a Relationship Breakdown**

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I. INTRODUCTION

Family law seeks to define the rights and obligations of individual family members based on societal interests at large. Similarly, an objective of corporate law is to reflect broad societal interests in the rights and obligations of the separate legal entity known as a corporation. Family law lawyers and corporate lawyers alike may wonder: what happens when the legal aim of the family law and corporate law worlds collide?

This paper considers the circumstances where family law and corporate law meet following the breakdown of a spousal relationship. While the “corporate veil” often protects individuals in liability and enforcement issues, our legal system recognizes that the corporate veil may be “pierced” where equity requires it. While veil “piercing” and “lifting” are often used interchangeably, the writer opines in Part V of this paper that the veil is “pierced” when only one spouse has a corporate interest and is “lifted” when both spouses have an interest in the same corporation. Unless otherwise indicated, this paper will focus on corporate veil “piercing.”

Family law procedure and/or substantive law operates to pierce the corporate veil in order to characterize and value property and income on relationship breakdown, force documentary disclosure so that the family law litigant may properly advance his/her claims, bring a claim against a corporation or corporate participant, and enforce orders that impact a corporation’s separate legal personality.

First, this paper provides the legal tests for piercing the corporate veil in the family law context. Next, the paper investigates the characterization and valuation of a spouse’s interests and when corporate disclosure is required for same. It then explores potential claims relating to family law and corporate interests, and how orders arising from those claims may be enforced. Finally, the paper provides recommendations for advisors who address corporate law issues that arise for family law litigants in Ontario.

II. LEGAL TESTS FOR PIERCING THE CORPORATE VEIL

Canadian jurisprudence has yet to establish a single test for determining when courts can pierce the corporate veil.¹ Instead, judges consider a combination of statutory provisions (where

¹ Thomas G. Heintzman and Brandon Kain, “Through the Looking Glass: Recent Developments in Piercing the Corporate Veil” (2013) 28 B.F.L.R. 525 [Heintzman]. See *Kosmopoulos v. Constitution Co of Canada*,

applicable) and common law factors in their determination.² In the family law context, the statutes and case law increasingly allow parties to access business assets to advance their claims.³

(i) Piercing the Corporate Veil in General

Canadian judges have offered a host of considerations when determining whether the corporate veil should be pierced. The “alter ego” test prohibits individuals from using the corporation for an “illegal, fraudulent or improper purpose.”⁴ Under this test, the corporate veil can only be pierced if the corporation’s separate legal personality is being used as a “conduit...to avoid liability.”⁵ The broader “flagrantly unjust” test allows judges to exercise their discretion if failing to pierce the corporate veil would be “flagrantly opposed to justice.”⁶ This test applies if those in control of the corporation “expressly direct a wrongful thing to be done.”⁷ In Canada, the “alter ego” test is the predominant one and some disagreement exists as to whether the “flagrantly unjust” test provides discretion that is too broad.⁸

The leading Ontario case applying the tests for piercing the corporate veil is *642947 Ontario Ltd. v. Fleischer*, which was decided by the Ontario Court of Appeal in 2001.⁹ Justice Laskin considers when the corporate veil ought to be pierced and found that the determination is largely fact-specific:

[1987] 1 SCR 2 (SCC) at 10 [*Kosmopoulos*], where Wilson J. observed that the law on piercing the corporate veil “follows no consistent principle.”

² Heintzman, *supra* note 1 at p. 539.

³ Statutory provisions that allow the corporate veil to be pierced are discussed below in the sections regarding disclosure, orders and enforcement.

⁴ *642947 Ontario Ltd. v. Fleischer* (2001), 56 OR (3d) 417 (ONCA) at para 68 [*Fleischer*]; *Transamerica Life Insurance Co. v. Canada Life Assurance Co.*, [1996] O.J. No. 1568, upheld in [1997] O.J. No. 3754 (ONCA) at para 434 [*Transamerica*].

⁵ *Gregorio v. Intrans-Corp.*, (1994) 18 OR (3d) 527 (ONCA) at p. 536.

⁶ *Kosmopoulos*, *supra* note 1 at para 12; *Elbow River Marketing Limited Partnership v. Canada Clean Fuels Inc.*, 2012 ABQB 277 at 176 [*Elbow River ABQB*].

⁷ *Clarkson Co. Ltd v Zhelka Et al.*, [1967] O.J. No. 1054 (ON H CJ) at 158.

⁸ Heintzman, *supra* note 1 at p. 539; Douglas T. Yoshida and Lyndsey S. Delamont, “Piercing the Corporate Veil: A Canadian Overview and Risk Assessment” *Annual Review of Civil Litigation* (Toronto: Thomson Carswell, 2014) at p. 413 [Yoshida & Delamont]; Howard J. Feldman, “Piercing the Corporate Veil in Family Law Cases,” unpublished manuscript (prepared for the Law Society of Upper Canada Continuing Legal Education Program, April 5, 2007) at p. 5 [Feldman].

⁹ *Fleischer*, *supra* note 4 at para 73. Recently, in *Shoppers Drug Mart Inc. v. 6470360 Canada Inc.*, 2014 ONCA 85, the Ontario Court of Appeal emphasized that the motions judge should have referred to the test in *Fleischer* to determine when to pierce the corporate veil in Ontario.

These authorities indicate that the decision to pierce the corporate veil will depend on the context. They also indicate that the separate legal personality of the corporation cannot be lightly set aside. Yet, however restrictive corporate law principles for piercing the corporate veil may be, in the context of an undertaking to the court, the trial judge's findings support going behind Sweet Dreams and imposing personal liability.¹⁰

In *Fleischer*, the Court found the trial judge made no error in piercing the corporate veil to hold shareholders personally liable for damages that flowed from the breach of an agreement.

More recently in 2012, the Alberta Court of Appeal in *Elbow River Marketing Limited Partnership v. Canada Clean Fuels Inc.* summarized the circumstances where courts and academics have found that the corporate veil may be pierced in a variety of legal contexts:

- where express and clear statutory provisions permit it;
- where a corporation is formed for the express purpose of doing a wrongful act;
- where once incorporated, those in control expressly direct a wrongful thing to be done (including criminal activity);
- where there is fraud or manifestly improper conduct akin to fraud;
- where one entity acts as an agent of another;
- where two seemingly separate entities are in fact one common enterprise (but the veil will be lifted only to benefit third parties);
- where the corporation is a mere agent, or "alter ego", of the controlling shareholder or other party (as noted above, control is not enough; requires wrongful, unlawful, fraudulent or improper conduct);
- where there is a trust relationship;
- where shareholders disregard the corporate form (especially in their dealings with others, as in when persons hold themselves out to the public without identifying their corporate status);
- sometimes, where it can be shown the corporation was too thinly capitalized to conduct the business for which it was formed (but this has been doubted);
- in certain family law cases to provide for child support, etc.;
- in certain tax cases; or
- in the interest of national security, such as in time of war, if the corporation is controlled by persons resident in the enemy territory.¹¹

¹⁰ *Fleischer*, *supra* note 4 at para 68.

¹¹ *Elbow River Marketing Limited Partnership v. Canada Clean Fuels Inc.*, 2012 ABCA 328 at para 182 [*Elbow River ABCA*].

At trial, Justice Tillman referred to piercing the corporate veil as a “vivid but imprecise metaphor.”¹² The Court in *Elbow River* ultimately agreed with Justice Tillman that at trial it was too soon to determine whether the corporate veil should be pierced.¹³

While the legal tests for piercing the corporate veil have undergone significant developments in Canadian jurisprudence, the precise nature and scope of the doctrine remains unsettled.¹⁴ In each case, the corporation’s separate legal personality will be disregarded depending judge’s discretion and the facts of the case.

(ii) Piercing the Corporate Veil in Family Law

Family law jurisprudence has refined the Court’s approach for piercing the corporate veil to take into account specific obstacles of the family law litigant *vis a vis* the corporation. In 2006, the Ontario Court of Appeal released three family law decisions that consider piercing the corporate veil: *Wildman v. Wildman*, *Deborá v. Deborá* and *Lynch v. Segal*.¹⁵ Together, these cases have created a list of factors for courts to consider:

- the history of the spouse’s business affairs;
- the purpose and use of the corporation;
- whether third party interests will be affected;
- injustice in the context of family law; and
- consistency with family law and corporate law legislation.¹⁶

A court is likely to find that the corporate veil should be pierced if the spouse has control over a corporation that it uses to defend and/or avoid a legitimate family law entitlement.

In *Wildman v. Wildman*, the Ontario Court of Appeal upheld a trial judge’s order requiring all amounts owed to the wife to be secured and enforceable not only against the husband personally, but also against his businesses.¹⁷ In this case, the wife sought spousal and child support from her former husband, who owned several construction and landscaping companies and earned about \$700,000 annually. The Court found the corporate veil could be

¹² *Elbow River* ABQB, *supra* note 6 at para 184, citing *Re Polly Peck International plc*, [1996] B.C.C. 486 at 497 (Eng. Ch.).

¹³ *Elbow River* ABCA, *supra* note 11 at para 17.

¹⁴ *Yoshida & Delamont*, *supra* note 8 at p. 410. See also *Kosmopoulos*, *supra* note 1 at para 10, citing *Solomon v. Solomon & Co.*, [1897] A.C. 22 (H.L.).

¹⁵ *Wildman v. Wildman*, [2006] O.J. No. 3966 (ONCA) [*Wildman v. Wildman*]; *Deborá v. Deborá*, [2006] O.J. No. 4826 (ONCA) [*Deborá v. Deborá*]; *Lynch v. Segal*, [2006] O.J. No. 5014 (ONCA) [*Lynch v. Segal*].

¹⁶ *Deborá*, *supra* note 15 at para 22; *Lynch v. Segal*, *supra* note 15; *Wildman v. Wildman*, *supra* note 15 at para 49.

¹⁷ *Ibid* note 15 at para 14.

pierced because the husband was the sole owner and controller of the businesses and that he diverted assets through his businesses for his own personal use.¹⁸ Writing for a unanimous court, Justice MacPherson wrote that it would be “flagrantly opposed to justice to allow the appellant to hide behind a corporate veil that he does not himself respect.”¹⁹ Although the businesses themselves were not given notice of the litigation, the Court found the businesses were indirectly given notice by virtue of being the husband’s “alter ego”.²⁰

In *Debora v. Debora*, the Ontario Court of Appeal also upheld the trial decision, which allowed the corporate veil to be pierced. The husband was ordered to pay an equalization payment of \$3.3 million, as well as retroactive and ongoing support. The trial judge found that although the husband’s company purchased a cottage property, it was nevertheless a matrimonial home within the meaning of the *Family Law Act* (“FLA”) and subject to the net family property calculation.²¹ Relying on *Wildman v. Wildman*, Justice Weiler held that the company was the husband’s “alter ego,” especially given that the husband was the corporation’s sole shareholder and controlling mind.²²

The Ontario Court of Appeal’s decision *Lynch v. Segal* refers to both *Wildman v. Wildman* and *Debora v. Debora* when it finds that the husband was the beneficial owner of certain companies for the purpose of calculating the property and support claims.²³ The husband attempted to conceal his involvement with lucrative land development by requiring his lawyer to act as the sole shareholder, director and officer of certain corporations.²⁴ Justice Blair upheld the trial judge’s finding that the husband and the companies were “one and the same” and that it was an appropriate case to pierce the corporate veil.²⁵

Wildman v. Wildman, *Debora v. Debora* and *Lynch v. Segal* confirm that family law litigants will not be permitted to hide behind corporations in an attempt to avoid family law claims. Courts tend to inform themselves of the corporation’s underlying purpose and tend to consider the spouses’ actions throughout the litigation. In each of these cases, counsel and judges

¹⁸ *Wildman v. Wildman*, *supra* note 15 at para 43-44.

¹⁹ *Ibid* at para 46.

²⁰ *Ibid* at para 47 and 48.

²¹ *Family Law Act*, R.S.O. 1990, c F.3 [FLA].

²² *Wildman v. Wildman*, *supra* note 15 at para 28-29.

²³ *Lynch v. Segal*, *supra* note 15 at para 63.

²⁴ *Ibid* at para 11.

²⁵ *Ibid* at para 20 and 38.

were required to consider corporate law legal tests and apply them to address family law objectives.

III. CORPORATE INTEREST CHARACTERIZATION AND VALUATION FOR PROPERTY AND SUPPORT DETERMINATION PURPOSES

One of the first steps in addressing claims related to the breakdown of a spousal relationship is for the parties to characterize and value their interests. For equalization claims under Part I of the FLA, the parties establish which interests are considered “property” and the value of that property. For support claims under the *Divorce Act* or Part III of the FLA, the parties must establish what amounts to “income” in order to calculate their support rights and obligations.²⁶

(i) Characterizing Corporate Interests

(a) Characterizing Corporate Interests in Property Claims

“Property” for the purpose of equalization under Part I of the FLA is defined broadly and may include shares in a corporation, an interest in a partnership and commercial goodwill. Section 4(1) of the FLA defines “property” as “any interest, present or future, vested or contingent, in real or personal property.”²⁷ Since the FLA recognizes marriage as a form of partnership where each spouse holds an equal position, the equalization scheme views family property as assets that were accumulated during cohabitation and shared by the family unit.²⁸ In order to ensure an equitable settlement between spouses, the FLA gives the courts broad power to make decisions affecting the family business.²⁹

When corporate shares are characterized as property, the corporation is viewed as the “alter ego” of the owning spouse. As a result, the corporate veil is pierced despite the fact that the corporation has not been used for an improper or unjust purpose. Similarly, a spouse’s interest in a law practice, dental practice or medical practice will be deemed property for the purpose of Part I of the FLA, whether or not his interest therein is related to a corporation.

²⁶ *Divorce Act*, R.S.C., 1985, c. 3 (2nd Supp.) at s. 15.1 and s. 15.2 [*Divorce Act*].

²⁷ *Ibid* at s. 4(1).

²⁸ FLA, *supra* note 21 at “Preamble.”

²⁹ Robert M. Halpern, *Advising the Family-Owned Business*, loose-leaf (consulted on February 2, 2015), (Toronto: Carswell Canada Law Book, 1999) at A6.20 [Halpern 1999].

Moreover, commercial goodwill will be characterized as a family asset if the business can be transferred with relative ease without requiring important employees to leave the company.³⁰

(b) Characterizing Corporate Income in Support Claims

Corporate interests are involved in support claims to the extent that a spouse's income is at issue. The Federal Child Support Guidelines ("FCSG") and the Spousal Support Advisory Guidelines ("SSAG") set out what is to be included in and excluded from a spouse's annual income for support purposes.³¹ While the FCSG are binding legislation, the SSAG are advisory and not binding. However, in *Fisher v. Fisher* the Ontario Court of Appeal endorsed SSAG and found that it was a reversible error on the part of the trial judge not to consider SSAG.³² In practice, both the FCSG and SSAG are consistently used to characterize corporate income in child and spousal support claims.

While a spouse's taxable income (listed at Line 150 of their tax return) is the starting point for the determination of income available for support, corporate income not included on a spouse's tax form may also be taken into account in the calculation of their income available for support purposes.³³ Sections 16 to 18 of the FCSG set out the initial calculation of income and adjustments to that amount:

Calculation of annual income

16. Subject to sections 17 to 20, a spouse's annual income is determined using the sources of income set out under the heading "Total income" in the T1 General form issued by the Canada Revenue Agency and is adjusted in accordance with Schedule III.

Pattern of income

17. (1) If the court is of the opinion that the determination of a spouse's annual income under section 16 would not be the fairest determination of that income, the court may have regard to the spouse's income over the last three years and determine an amount that is fair and reasonable in light of any pattern of income, fluctuation in income or receipt of a non-recurring amount during those years.

³⁰ *Walters v. Walters*, [1997] O.J. No. 872 (Ont Gen Div); *McLean v. McLean*, [2004] O.J. No. 4261 (SCJ) at para 42 and 46.

³¹ *Federal Child Support Guidelines*, SOR/97-175 [FCSG]; "Spousal Support Advisory Guidelines", Department of Justice (2015) online: < <http://www.justice.gc.ca/eng/fl-df/spousal-epoux/ssag-ldfpae.html> > [SSAG].

³² 2008 ONCA 11 at para 113.

³³ FCSG, *supra* note 31 at s. 16; SSAG, *supra* note 16 at s. 6.1, which states that the starting point for the determination of income under SSAG is the definition of income under the FCSG.

Non-recurring losses

(2) Where a spouse has incurred a non-recurring capital or business investment loss, the court may, if it is of the opinion that the determination of the spouse's annual income under section 16 would not provide the fairest determination of the annual income, choose not to apply sections 6 and 7 of Schedule III, and adjust the amount of the loss, including related expenses and carrying charges and interest expenses, to arrive at such amount as the court considers appropriate.

Shareholder, director or officer

18. (1) Where a spouse is a shareholder, director or officer of a corporation and the court is of the opinion that the amount of the spouse's annual income as determined under section 16 does not fairly reflect all the money available to the spouse for the payment of child support, the court may consider the situations described in section 17 and determine the spouse's annual income to include

(a) all or part of the pre-tax income of the corporation, and of any corporation that is related to that corporation, for the most recent taxation year; or

(b) an amount commensurate with the services that the spouse provides to the corporation, provided that the amount does not exceed the corporation's pre-tax income.

Adjustment to corporation's pre-tax income

(2) In determining the pre-tax income of a corporation for the purposes of subsection (1), all amounts paid by the corporation as salaries, wages or management fees, or other payments or benefits, to or on behalf of persons with whom the corporation does not deal at arm's length must be added to the pre-tax income, unless the spouse establishes that the payments were reasonable in the circumstances.³⁴

Income may be adjusted based on a pattern of income if the spouse's income fluctuates greatly from year to year and an average of those years is a more accurate and reasonable representation of income.³⁵ Moreover, income available for support purposes may be reduced if the spouse owns a business that has incurred a non-recurring capital or investment loss.³⁶

In addition to income adjustments, income may be imputed in a variety of ways relating to a corporation.³⁷ Section 19 of the FCSG provides a list of circumstances where income may be imputed:

³⁴ FCSG, *supra* note 31 at s. 16-18. Note that s. 15(2) of the FCSG states that "Where both spouses agree in writing on the annual income of a spouse, the court may consider that amount to be the spouse's income for the purposes of these Guidelines if the court thinks that the amount is reasonable having regard to the income information provided under section 21."

³⁵ *Ibid* at s. 17(1); see also *Dickson v. Dickson*, 2009 MBQB 273.

³⁶ FCSG, *supra* note 31 at s. 17(2).

³⁷ *Ibid* at s. 19(a)-(i); Lorne H. Wolfson and Sara Mintz, "Piercing the Corporate Veil in Family Law" in Barry Lipson (Ed.), *The Controlling Mind: Exercising legal Control* (Toronto: Carswell, 2012) at p.15 [Wolfson].

19. (1) The court may impute such amount of income to a spouse as it considers appropriate in the circumstances, which circumstances include the following:
- (a) the spouse is intentionally under-employed or unemployed, other than where the under-employment or unemployment is required by the needs of a child of the marriage or any child under the age of majority or by the reasonable educational or health needs of the spouse;
 - (b) the spouse is exempt from paying federal or provincial income tax;
 - (c) the spouse lives in a country that has effective rates of income tax that are significantly lower than those in Canada;
 - (d) it appears that income has been diverted which would affect the level of child support to be determined under these Guidelines;
 - (e) the spouse's property is not reasonably utilized to generate income;
 - (f) the spouse has failed to provide income information when under a legal obligation to do so;
 - (g) the spouse unreasonably deducts expenses from income;
 - (h) the spouse derives a significant portion of income from dividends, capital gains or other sources that are taxed at a lower rate than employment or business income or that are exempt from tax; and
 - (i) the spouse is a beneficiary under a trust and is or will be in receipt of income or other benefits from the trust.³⁸

The SSAG explain how income can be imputed in the context of spousal support using section 19 of the FCSG:

The income imputing provisions of section 19 are, if anything, even more important than in child support cases. In every spousal support case, two incomes are in issue. Income may need to be imputed to a payor spouse, but in addition a spousal support case may also require that an income be imputed to the recipient spouse, because of self-sufficiency issues. In these cases, income is imputed to the recipient under s. 19(1)(a), for under/unemployment.³⁹

The SSAG discuss imputing issues in detail in a section regarding “self-sufficiency” as well as distinctive income issues in the spousal support context, such as tax credits and non-taxable incomes.⁴⁰

According to the Ontario Court of Appeal in *Brophy v. Brophy*, courts have “discretion to include corporate profits in the income of the paying spouse for support purposes.”⁴¹ Courts may choose to exercise that discretion where no business reason exists for retaining the earnings in the company and spouse had substantial control over the corporation.⁴² A spouse's income may

³⁸ FCSG, *supra* note 31 at s. 19.

³⁹ SSAG, *supra* note 31 at s. 6.1.

⁴⁰ *Ibid* at s. 6.3, s. 6.4, s. 6.6 and Chapter 13.

⁴¹ [2002] O.J. No. 3658 at para 37 (ONCA).

⁴² *Ibid* at para 36; See also *Arsenault v. Arsenault*, [1998] O.J. No. 1423 (ONSC), where the corporate veil was pierced to impute income to the husband after he redirected his salary to a numbered company.

include income from dividends, capital gains or other sources if a significant amount is derived from those sources.⁴³

Double recovery or “double dipping” occurs when property included in the equalization payment is also characterized as income for spousal support purposes. The two regimes of equalization and spousal support can result in one spouse giving up a portion of the same asset twice. Generally, double recovery is not permitted because each spouse should only be expected to give up an asset once.⁴⁴ Exceptions to this rule exist, but are beyond the scope of this paper.⁴⁵

(ii) Approaches to Valuation

(a) Approaches to Valuation of Property

The FLA does not identify a set approach to value and the courts generally use the property’s “fair value”, “fair market value” or “exchange value”.⁴⁶ The onus of establishing a value relies with the party who has asserted that value.⁴⁷ Such party should adduce the “best evidence” in order to establish a reasonable and realistic valuation of assets, or run the risk of an adverse inference being drawn.⁴⁸ The evidence may be oral, documentary or come from experts.

Many family law litigants choose to retain a professional business valuator to provide an expert opinion. An ideal business valuator would be accredited with the Chartered Business Valuator (CBV)⁴⁹ designation, have testified before courts or tribunal and gained a reputation for independence and acceptance, and possess experience with the type of property being valued

⁴³ *Kowalewich v. Kowalewich*, [2001] BCJ No. 1406 (BCCA).

⁴⁴ The leading case on double recovery is *Boston v. Boston*, 2001 S.C.R. 43 (SCC) [*Boston*], where the Supreme Court of Canada found that pension funds equalized as property could not also be considered income for spousal support. However, the pension funds that were generated after the equalization payment were considered income for spousal support since those funds were not previously provided to the payee spouse.

⁴⁵ *Ibid* at para 65, where Justice Major wrote: “Double recovery may be permitted where the payor spouse has the ability to pay, where the payee spouse has made a reasonable effort to use the equalized asset in an income-producing way and, despite this, an economic hardship from the marriage or its breakdown persists. Double recovery may also be permitted in spousal support orders/agreements based mainly on need as opposed to compensation, which is not the case in this appeal.”

⁴⁶ Halpern 1999, *supra* note 29 at A6.30(b); *Kimpton v. Kimpton*, [2003] O.J. No. 2626 (SCJ); *Beaumont v. Beaumont*, [2004] O.J. No. 3713 (ONCA).

⁴⁷ Robert M. Halpern, *Property Rights and Obligations Under Ontario Family law* (Toronto: Carswell Canada Law Book, 2012) at 209 [Halpern 2012]. See also *Homs v. Zaya*, [2009] O.J. No. 155 (ONCA).

⁴⁸ Halpern 2012, *supra* note 47 at 210.

⁴⁹ Chartered Business Valuator (“CBV”) is the most recognized accreditation for professional business valuers in Canada. CBVs generally have a professional accounting designation in addition to the specialized training they receive in business valuation.

and/or the business interest.⁵⁰ Once retained, the business valuator may consider one or more of the following three valuation methods:

1. the “cost method” examines the costs invested in a particular asset or business to determine its value;
2. the “income method” estimates the future cash flow of an asset or business where that prediction can be made with some reasonable degree of certainty; and
3. the “market method” values a particular asset or business by examining transactions and public trading information for similar assets.⁵¹

Often a valuator will examine all three methods, but adopt one primary method that is supported by a secondary method. The valuator will rely on the primary method to form his or her opinion and then assess the reasonableness of that opinion with the secondary method.⁵²

Even producing a “somewhat inaccurate business valuation” may be the better than no valuation at all.⁵³ In *Murray v. Murray*, the husband failed to provide a valuation with respect to one of his two businesses, despite an order made at the trial management conference requiring both parties to provide valuation reports of all of their businesses within 30 days.⁵⁴ Justice Milanetti drew an adverse inference based on the husband’s non-compliance:

In a choice between utilizing an adverse inference to punish a litigant for his failure to have his business valued, albeit at the risk of a somewhat inaccurate business valuation, and allowing such a litigant to directly profit from his disobedience of a direct court order through the filing of an incomplete financial statement that will lead to him receiving a larger equalization payment than to which he should be entitled, the Court is obligated to select the former.⁵⁵

In his decision, Justice Milanetti found he had no choice but to assigned his own value to one of the businesses in question.

⁵⁰ Halpern 2012, *supra* note 47 at 213-214; James G. McLeod and Alfred A. Mamo, *Annual Review of Family Law* (Toronto: Carswell, 2011) at 691.

⁵¹ *Ibid* at 216-217.

⁵² *Ibid* at 217.

⁵³ *Murray v. Murray*, [2010] O.J. No. 3276 (SCJ) at para 55 [*Murray*]. See also *Conway v. Conway*, [2005] O.J. No. 1698 (SCJ) at para 14, where Justice Gordon writes “The onus is on the party asserting a value for an asset under his or her control to provide credible evidence in support... A party must provide a realistic value and, if such cannot be readily ascertained, an independent valuation must be obtained... Failure to provide such credible evidence may, therefore, result in the court assigning a value less advantageous to that party.”

⁵⁴ *Murray v. Murray*, *supra* note 53 at para 2.

⁵⁵ *Ibid* at para 55.

The case law also deals with how to value property for equalization purposes where a post-separation change has occurred that dramatically alters the value of a spouse's property, when compared to its valuation date value. In *Serra v. Serra*, the Ontario Court of Appeal held that a market-driven post-separation decline in the value of the husband's shares in his textile business could reduce the husband's equalization payment.⁵⁶ The Court relied on section 5(6) of the FLA, which permits an unequal division of net family property where it would be unconscionable to divide equally.⁵⁷ The value of the husband's business decreased by roughly \$2 million and at trial the equalization payment owed to the wife was more than the husband's net worth.⁵⁸

(b) Approaches to Valuation of Income

The value of a spouse's income for the purpose of the *Divorce Act* or Part III of the FLA is determined using his or her taxable income subject to any adjustments under the FCSG and SSAG. In addition to valuing property for the purpose of Part I of the FLA, CBVs are often retained to determine income for support purposes. After, the valuation will focus on what business expenses and earnings have a legitimate business purpose, versus what amounts should be imputed to the income of the payor spouse.

Income may be imputed to a payor despite a post-separation decline in the payor spouse's value. In *Serra v. Serra*, the husband argued that the trial judge erred in imputing an income of \$250,000 given the post-separation decline in the value of his business.⁵⁹ The Ontario Court of Appeal upheld the trial judge's decision on this issue, finding that the husband continued to receive income and bonuses from the business justifying this quantum despite the business's decline. In *Goett v. Goett*, the Alberta Court of Appeal found that pre-tax corporate earnings should be imputed to the father's income for child support purposes.⁶⁰ The father was the controlling mind of the corporation and transferred shares to a third party to avoid paying child

⁵⁶ 2009 ONCA 105 at para 93.

⁵⁷ *Ibid* at para 36.

⁵⁸ *Ibid* at para 4.

⁵⁹ *Ibid* at para 23.

⁶⁰ 2013 ABCA 216 at para 7 [*Goett v. Goett*].

support.⁶¹ The Court relied on section 18 of the FCSG and imputed an annual income of \$150,000 to the father.⁶²

IV. DISCLOSURE INSTRUMENTAL IN CHARACTERIZING AND VALUING PROPERTY AND INCOME

Disclosure of financial documents and information is a core principle of Ontario's family law regime.⁶³ Increasingly, parties are required to provide business information as part of their family law disclosure obligations.

(i) Disclosure under the *Family Law Rules*

The *Family Law Rules* are the primary source of disclosure obligations for family law litigants. Rule 13 requires parties to a property or support claim to provide a financial statement that makes "full and frank disclosure" of the party's financial situation and attach documents as required.⁶⁴ Rule 19(1)-(5) sets out rules regarding documentary disclosure, including rules regarding affidavits of documents and privilege:

Affidavit Listing Documents

19. (1) Subject to subrule (1.1), every party shall, within 10 days after another party's request, give the other party an affidavit listing every document that is,

- (a) relevant to any issue in the case; and
- (b) in the party's control, or available to the party on request.

(1.1) Subrule (1) does not apply to the Office of the Children's Lawyer or to children's aid societies.

Access to Listed Documents

(2) The other party is entitled, on request,

- (a) to examine any document listed in the affidavit, unless it is protected by a legal privilege; and
- (b) to receive, at the party's own expense at the legal aid rate, a copy of any document that the party is entitled to examine under clause (a).

Access to Documents Mentioned in Court Papers

(3) Subrule (2) also applies, with necessary changes, to a document mentioned in a party's application, answer, reply, notice of motion, affidavit, financial statement or net family property statement.

⁶¹ *Goett v. Goett*, *supra* note 60 at para 20.

⁶² *Ibid* at para 25.

⁶³ *Boyd v. Fields*, [2006] O.J. No. 5762 (SCJ); Halpern 2012, *supra* note 47 at 190; Wolfson, *supra* note 37 at 1.

⁶⁴ O Reg 114/99 at s. 13(1) and 13(6) [*Family Law Rules*].

Documents Protected by Legal Privilege

(4) If a party claims that a document is protected by a legal privilege, the court may, on motion, examine it and decide the issue.

Use of Privileged Documents

(5) A party who claims that a document is protected by a legal privilege may use it at trial only,

(a) if the other party has been allowed to examine the document and been supplied with a copy, free of charge, at least 30 days before the settlement conference; or

(b) on the conditions the trial judge considers appropriate, including an adjournment if necessary.⁶⁵

Although the *Family Law Rules* generally mirror documentary production under the *Rules of Civil Procedure*, Rule 19(1) is not mandatory because documents may not be required in every family law case.⁶⁶ Consistent with the *Family Law Rules*, the FLA gives the court jurisdiction to consider a statement of each party's property and to consider each party's incomes for support purposes.⁶⁷

The case of *Chernyakhovsky v. Chernyakhovsky* was decided shortly after the coming into force of the *Family Law Rules* in 2004, which mandated a new disclosure regime in family law proceedings in Ontario.⁶⁸ In that case, Justice Rogers discusses criteria the Court should examine when considering the scope of disclosure:

Is the probative value of the sought-after disclosure so great in relation to the difficulty of obtaining the disclosure that said disclosure would be ordered and sanctions imposed for failure to comply? How does the disclosure request fit into the overall context of the case? Is the issue for which disclosure is requested a central issue in the case? Or is it peripheral? Does the cost of obtaining the disclosure outweigh the value of the issue in the case? Is there a more expeditious and cheaper way of getting the same information? As the case develops, is the disclosure still related to an important issue in the case? As always, the court must balance these competing interests to ensure fairness.⁶⁹

⁶⁵ *Family Law Rules*, *supra* note 64 at s. 19(1)-(5). See also s. 19(8)-(9) of the *Family Law Rules*, which requires parties to disclose information they omitted or found later.

⁶⁶ *Rules of Civil Procedure*, RRO 1990, Reg 194; Halpern 2012, *supra* note 47 at 193.

⁶⁷ FLA, *supra* note 21 at s. 8 and s. 33(9).

⁶⁸ [2005] O.J. No. 944 (SCJ) [*Chernyakhovsky*].

⁶⁹ *Ibid* at para 8.

Justice Rogers also recognizes that the scope of disclosure may be adjusted as the case develops. Once information “begins to flow,” more disclosure may be required to gain an accurate and complete picture of the parties’ financial situation.⁷⁰

More recently in *Loeb v. Loeb*, the Court found that the mother was not responsible for seeking or assembling information from her former spouse’s business.⁷¹ The father was required to disclose information regarding his real estate business, including any increased work and expense created by the structure of the corporations.⁷² Since the father’s financial matters were complex and involved many corporations, joint ventures and trusts, he had a heightened duty to assemble and disclose the information to the mother and her business valuator.⁷³

(ii) Disclosure by Non-Parties

Where the family law litigation involves business interests, the Court or party may seek disclosure of information that is in the possession of non-parties.⁷⁴ Rule 19(6) of the *Family Law Rules* allows courts to order disclosure of relevant documents from a subsidiary or affiliates corporation:

19. (6) The court may, on motion, order a party to give another party an affidavit listing the documents that are,
- (a) relevant to any issue in the case; and
 - (b) in the control of, or available on request to a corporation that is controlled, directly or indirectly, by the party or by another corporation that the party controls directly or indirectly.⁷⁵

Rule 19(11) allows the court to order a non-party to produce documents in a family law proceeding:

19. (11) If a document is in a non-party’s control, or is available only to the non-party, and is not protected by a legal privilege, and it would be unfair to a party to go on with the case without the document, the court may, on motion with notice served on every party and served on the non-party by special service,
- (a) order the non-party to let the party examine the document and to supply the party with a copy at the legal aid rate; and

⁷⁰ *Chernyakhovsky*, *supra* note 68 at para 14.

⁷¹ 2013 ONSC 1730.

⁷² *Ibid* at para 44.

⁷³ *Ibid* at 48.

⁷⁴ Harold Niman and Sandra Jackson, “What Works in Corporate/Commercial Law May Not Work in Family Law,” unpublished manuscript (paper presented at the Osgoode Hall Law School of York University Professional Development Programme on legal Issues for the Family Owned Business, June 5, 2013) at p. 3.

⁷⁵ *Family Law Rules*, *supra* note 64 at s. 19(6).

(b) order that a copy be prepared and used for all purposes of the case instead of the original.⁷⁶

Obtaining information from a party's financial institution is generally straightforward; however, compelling disclosure may be more difficult where the non-party is a closely-held corporation.⁷⁷ In a case regarding disclosure under Rule 19(11), Ontario Court of Appeal emphasized that each case requires an independent determination as to whether the non-party information is relevant to the family law action.⁷⁸

A non-party is expected to "entertain a reasonable request with knowledge of the law"; however, in many cases parties are forced bring a motion to compel disclosure.⁷⁹ In *Di Luca v. Di Luca*, the wife failed to disclose the nature and extent of her interest in corporate entities and a family trust.⁸⁰ The court found the husband should not be required to bring a third party motion because the wife already had the disclosure obligation pursuant to the *Family Law Rules*.⁸¹ Accordingly, the wife was given an opportunity to comply with her own disclosure obligations and to pursue the corporation and trust for the documentary production. If the non-parties refused to provide the information, the wife was required to bring a motion for an order to compel production.⁸²

In *Boisvert v. Boisvert*, the husband was ordered to disclose corporate information.⁸³ When the husband argued that the information was too confidential and sensitive to be disclosed, Justice Whitten found it adequate to limited the disclosure to counsel, the parties and experts.⁸⁴ When the husband argued that producing the documents would be inconvenient, Justice Whitten wrote:

⁷⁶ *Family Law Rules*, *supra* note 64 at s. 19(11).

⁷⁷ Wolfson, *supra* note 36 at p. 2; see also *Noik v. Noik*, [2001] O.J. No. 372 (SCJ), where Justice Nelson converted a motion by the wife to add the husband's family and the Noik group of companies as parties to the action into a motion for non-party disclosure.

⁷⁸ *Marcoccia v. Marcoccia*, [2009] OJ No. 729 (ONCA) at para 4.

⁷⁹ *Weldon v. Weldon*, [2000] OJ No. 3229 (SCJ); *Di Luca v. Di Luca*, [2004] O.J. No. 711 (SCJ) [*Di Luca*]; *Boisvert v. Boisvert*, [2006] O.J. No. 2760 (SCJ) [*Boisvert*]; *Matthys v. Foody*, [2009] O.J. No. 2732 (SCJ); *Chapman v. Chapman*, [2009] O.J. No. 2405 (SCJ) [*Chapman*].

⁸⁰ *Di Luca*, *supra* note 79.

⁸¹ *Ibid* at para 12.

⁸² *Ibid* at para 15.

⁸³ *Boisvert*, *supra* note 79 at para 62.

⁸⁴ *Ibid* at para 36.

Document production naturally involves some effort, and that would always be the case. This is not a task of such a magnitude that production would not be justified. There is no amplification of the difficulty in producing the documents in question.⁸⁵

Following *Di Luca* and *Boisvert*, the court in *Chapman v. Chapman* ordered the husband to disclose documents in possession of third parties because the documents were necessary to establish the value of the husband's property and the disclosure request was fair and proportionate to the issues in question.⁸⁶

(iii) Barriers to Disclosure by Non-Parties

Even where a non-party is obligated to disclose information, he or she may not have access to the appropriate documents and records. In situations where the family law litigant cannot access to the information, courts have made orders for disclosure against the corporations themselves.

In Benjamin Zarnett's recent paper he noted that shareholders "do not have statutory right of access (beyond annual financial statements) to many of the types of records a valuator usually requires – detailed financial breakdowns, contracts, projects or forecasts, budgets, internal or prior valuations, offers, business plans, etc."⁸⁷ Ontario's *Business Corporations Act* ("OBCA") and the *Canada Business Corporations Act* ("CBCA") each provide that shareholders can access the corporation's articles and bylaws, shareholder agreements and resolutions, meeting minutes, and annual financial statements.⁸⁸ Where the opposing party is not only a shareholder but also a director, he or she has broader rights of access to corporate records; however, the director may be restricted from disclosure by a confidentiality agreement or the duty to act in the best interest of the corporation.⁸⁹

In *Himel v. Greenberg*, Justice Spies held that the husband had a duty produce all documents available to him as a shareholder, but did not have to produce documents available to

⁸⁵ *Boisvert*, *supra* note 79 at para 70; Wolfson, *supra* note 36 at p. 5.

⁸⁶ *Chapman*, *supra* note 79 at para 12.

⁸⁷ Benjamin Zarnett and Jonathan Edge, "Oppression and Disclosure in Closely-Held Family Corporations," (paper presented at the Osgoode Hall Law School of York University Professional Development Programme on legal Issues for the Family Owned Business, June 5, 2013) at p. 13 [Zarnett].

⁸⁸ *Business Corporations Act*, RSO 1990, c B.16 at s. 153(1) [OBCA]; *Canada Business Corporations Act*, R.S.C., 1985, c. C-44 at s. 20, 21(1) and s. 155 [CBCA].

⁸⁹ Zarnett, *supra* note 87 at p. 12 and 14.

him as a director.⁹⁰ The husband could not obtain company documents in his capacity as a party to personal litigation because he owed a duty of loyalty and confidentiality to the corporation.⁹¹ Instead, Justice Spies ordered the corporation itself to produce the requested documents under s. 19(11) of the *Family Law Rules*.⁹² The documents were “very important” to the wife’s case and “substantial amount of money” was at stake.⁹³

V. CLAIMS RELATING TO PIERCING THE CORPORATE VEIL

When family law cases involve the spouses’ business interests, a party may consider using traditional corporate law claims to address the fallout from the breakdown of their spousal relationship. The oppression remedy is arguably the broadest corporate law claim that is easily applied to family law cases. Other claims that pierce the corporate veil, such as claims for breach of fiduciary duty, constructive trusts and breach of contract could also apply to family law actions. When both spouses have interests in the same corporation, the veil is not as much “pierced” to reveal a spouse’s “alter ego,” but is “lifted” in order to allow for an orderly finalization of the parties’ financial rights and obligations arising from the relationship breakdown.

(i) The Oppression Remedy in Family Law

The oppression remedy allows a “complainant” to seek relief under the section 248(1) of the OBCA or section 241(1) of the CBCA against actions that oppress, unfairly prejudice or unfairly disregard the interests of any security holder, creditor, director or officer of the corporation.⁹⁴ A “complainant” is defined broadly in both the OBCA and CBCA and includes shareholders, creditors, directors, officers and former directors and officers.⁹⁵ The oppression remedy has proven to be a very effective device for anyone with an interest in a Canadian company that has been negatively affected by corporate conduct.

⁹⁰ 2010 ONSC 2325 at para 74 [*Himel*].

⁹¹ *Ibid* at paras 16 and 17.

⁹² *Himel*, *supra* note 88 at para 23; See also *Bailey v. Bailey*, 2012 ONSC 2486, where Justice Mulligan relied on *Himel* and relied on s. 19(11) of the *Family Law Rules* to order the corporation to produce the requested documents on the condition that the wife sign a confidentiality agreement.

⁹³ *Ibid* at paras 30 and 31.

⁹⁴ OBCA, *supra* note 86 at s. 248(1); CBCA, *supra* note 86 at s. 241(1).

⁹⁵ OBCA, *supra* note 86 at s. 245; CBCA, *supra* note 86 at s. 238.

In *BCE Inc. v. 1976 Debentureholders*, the Supreme Court of Canada finds that courts applying the oppression remedy should consider:

1. the principles underlying the oppression remedy and the reasonable expectations of the parties; and
2. whether the conduct complained of amounts to “oppression”, “unfair prejudice” or “unfair disregard”.⁹⁶

Importantly, in discussing the factors relevant for determining the parties’ reasonable expectations, the Court wrote that “relationships based on ties of family or friendship may be governed by different standards than relationships between arm’s length shareholders in a widely-held corporation.”⁹⁷ Many authors have noted that family businesses seem particularly susceptible to oppression claims because they involve personal relationships and a high degree of trust and loyalty.⁹⁸

When applied in the family law context, the oppression remedy is able to address disputes related to the breakdown of spousal relationships that are not expressly contemplated under family law legislation.⁹⁹ In *Baxter v. Baxter*, Justice Wood used the oppression remedy to order the wife to purchase the husband’s shares at fair market value.¹⁰⁰ As the director and majority shareholder, the wife had prohibited the husband from accessing corporate records and carrying on the business that employed the husband.¹⁰¹ In addition to his divorce action, the husband brought an action for oppression.¹⁰² The wife’s oppressive conduct meant that only one of the spouses could remain involved with the corporation. Similarly, in *Proulx v. 2006550 Ontario Inc.*, the husband was ordered to purchase the wife’s shares following his oppressive conduct.¹⁰³ Although the wife received a salary and bonuses from the corporation during the marriage, the husband stopped paying the wife upon separation.¹⁰⁴ Justice Walters found that the

⁹⁶ 2008 SCC 69 at para 56.

⁹⁷ *Ibid* at paras 71 to 75.

⁹⁸ Halpern 1999, *supra* note 29 at C1.40(b); Q.C. Murphy and J.C. Tory, “Family Disputes and the Oppression Remedy” (paper presented at the Osgoode Hall Law School of York University Professional Development Programme on legal Issues for the Family Owned Business, November 2 and 3, 1998).

⁹⁹ Zarnett, *supra* note 85 at p. 7.

¹⁰⁰ [2000] O.J. No. 1172 (ONSC) at para 26.

¹⁰¹ *Ibid* at para 11.

¹⁰² *Ibid* at para 1.

¹⁰³ [2005] O.J. No. 5150 (ONSC) [*Proulx*].

¹⁰⁴ *Ibid* at para 34.

wife had a reasonable expectation that if the marriage broke down she would continue to be paid or that her shares would be purchased.¹⁰⁵

(ii) Other Claims Related to Piercing the Corporate Veil

Various other claims exist for family law litigants that relate to piercing the corporate veil. In *De Mornay v. De Mornay*, the Court ruled that the husband breached the fiduciary duty he owed to his co-shareholder by excluding the wife from their dental business after their marriage began to fail.¹⁰⁶ The wife was granted a dollar amount for her share in the business and the corporation was wound up. In *Tracey v. Tracey*, the court granted a constructive trust in favour of the wife and ordered the corporation to transfer to her 25% of the common shares.¹⁰⁷ When one of the spouses is involved in a closely-held corporation, claims such as breach of fiduciary duty, claims for constructive trust or breach of contract may provide effective remedies.

Although a family law action may involve corporate law issues, at least one judge has held that the Commercial List is the improper forum for family claims. In *Linett v. Linett*, Justice Greer did not permit a matrimonial dispute to be heard by the Commercial List because the corporate issues were not overly complex and were inseparable from the family law litigation.¹⁰⁸ Justice Greer did, however, allow the wife to add three corporations and a family trust as parties to the litigation because they were controlled, directly or indirectly, by the husband.¹⁰⁹

VI. ORDERS THAT PIERCE THE CORPORATE VEIL AND ENFORCEMENT

Canadian Courts have the discretion to make orders that pierce the corporate veil in the context of almost many areas of law. In employment law, directors may be held liable for unpaid wages.¹¹⁰ In environmental law, officers and directors may be held liable for discharging a

¹⁰⁵ *Proulx, supra* note 103 at para 28; However, see *Godinek v. Godinek*, [1992] O.J. No. 726 (SCJ), affirmed [1995] O.J. No. 1642 (ONCA), where the court refused to order the husband to purchase the wife's shares based on her oppression claim because it would result in financial hardship to the husband and family business.

¹⁰⁶ [1991] O.J. No. 1317 (SCJ).

¹⁰⁷ [1998] O.J. No. 3494 at para 19.

¹⁰⁸ 2012 ONSC 6894 at para 32.

¹⁰⁹ *Ibid* at para 39.

¹¹⁰ *Employment Standards Act*, S.O. 2000, c 41 at Part XX.

contaminant.¹¹¹ In corporate law, the oppression remedy allows Courts to make any of the following interim or final orders:

- (a) an order restraining the conduct complained of;
- (b) an order appointing a receiver or receiver-manager;
- (c) an order to regulate a corporation's affairs by amending the articles or by-laws or creating or amending a unanimous shareholder agreement;
- (d) an order directing an issue or exchange of securities;
- (e) an order appointing directors in place of or in addition to all or any of the directors then in office;
- (f) an order directing a corporation, subject to subsection (6), or any other person, to purchase securities of a security holder;
- (g) an order directing a corporation, subject to subsection (6), or any other person, to pay to a security holder any part of the money paid by the security holder for securities;
- (h) an order varying or setting aside a transaction or contract to which a corporation is a party and compensating the corporation or any other party to the transaction or contract;
- (i) an order requiring a corporation, within a time specified by the court, to produce to the court or an interested person financial statements in the form required by section 154 or an accounting in such other form as the court may determine;
- (j) an order compensating an aggrieved person;
- (k) an order directing rectification of the registers or other records of a corporation under section 250;
- (l) an order winding up the corporation under section 207;
- (m) an order directing an investigation under Part XIII be made; and
- (n) an order requiring the trial of any issue.¹¹²

In addition to the orders arising from statute listed above, Courts in Canada may also rely on the common law tests justify an order that requires the corporate veil to be pierced.

In the family law context, this paper has touched on several court orders that, if enforced, would pierce the corporate veil, including:

- orders requiring a business interests to be included as property for equalization purposes;
- orders making corporate income available in the determination of income for spousal support purposes;
- orders requiring a third party to disclose corporate or partnership information;
- orders under the oppression remedy, which have almost indefinite possibilities, such as directing the corporation or any other person to purchase or exchange shares; restraining certain conduct or setting side a transaction; winding up a corporation; and compensating an aggrieved person; and
- orders related to a breach of fiduciary duty, constructive trust and breach of contract.¹¹³

¹¹¹ *Environmental Protection Act*, R.S.O. 1990, c E.19 at s. 194.

¹¹² CBCA, *supra* note 86 at s. 241(2); OBCA, *supra* note 86 at s. 248(3).

¹¹³ OBCA, *supra* note 86 at s. 248(3).

As such, family law allows the corporate veil to be pierced even where no “fraudulent or improper conduct” has occurred and instead has refined corporate law rules to fit the family law context.¹¹⁴

In addition to the orders listed above, courts may make a number of orders under the FLA that can effect business interests. Sections 9 and 10 allow the court to make orders with respect to property:

Powers of court

9. (1) In an application under section 7, the court may order,
- (a) that one spouse pay to the other spouse the amount to which the court finds that spouse to be entitled under this Part;
 - (b) that security, including a charge on property, be given for the performance of an obligation imposed by the order;
 - (c) that, if necessary to avoid hardship, an amount referred to in clause (a) be paid in instalments during a period not exceeding ten years or that payment of all or part of the amount be delayed for a period not exceeding ten years; and
 - (d) that, if appropriate to satisfy an obligation imposed by the order,
 - (i) property be transferred to or in trust for or vested in a spouse, whether absolutely, for life or for a term of years, or
 - (ii) any property be partitioned or sold.

Financial information, inspections

- (2) The court may, at the time of making an order for instalment or delayed payments or on motion at a later time, order that the spouse who has the obligation to make payments shall,
- (a) furnish the other spouse with specified financial information, which may include periodic financial statements; and
 - (b) permit inspections of specified property of the spouse by or on behalf of the other spouse, as the court directs. R.S.O. 1990, c. F.3, s. 9 (2).

Variation

- (3) If the court is satisfied that there has been a material change in the circumstances of the spouse who has the obligation to make instalment or delayed payments, the court may, on motion, vary the order, but shall not vary the amount to which the court found the spouse to be entitled under this Part.

Determination of questions of title between spouses

10. (1) A person may apply to the court for the determination of a question between that person and his or her spouse or former spouse as to the ownership or right to possession of particular property, other than a question arising out of an equalization of net family properties under section 5, and the court may,
- (a) declare the ownership or right to possession;

¹¹⁴ *Transamerica*, *supra* note 4 at para 434.

- (b) if the property has been disposed of, order payment in compensation for the interest of either party;
- (c) order that the property be partitioned or sold for the purpose of realizing the interests in it; and
- (d) order that either or both spouses give security, including a charge on property, for the performance of an obligation imposed by the order, and may make ancillary orders or give ancillary directions.¹¹⁵

Section 11 offers direction in respect of how a court may make an order under sections 9 or 10, such as to maintain the integrity of the business where possible:

Operating business or farm

11. (1) An order made under section 9 or 10 shall not be made so as to require or result in the sale of an operating business or farm or so as to seriously impair its operation, unless there is no reasonable alternative method of satisfying the award.

Idem

- (2) To comply with subsection (1), the court may,
 - (a) order that one spouse pay to the other a share of the profits from the business or farm; and
 - (b) if the business or farm is incorporated, order that one spouse transfer or have the corporation issue to the other shares in the corporation.¹¹⁶

Sections 9, 10 and 11 provide Courts with broad discretion to solve property-related disputes between spouses and provide practical solutions. Section 34 of the FLA lists several orders Courts can make with respect to providing support to dependants:

Powers of court

34. (1) In an application under section 33, the court may make an interim or final order,
- (a) requiring that an amount be paid periodically, whether annually or otherwise and whether for an indefinite or limited period, or until the happening of a specified event;
 - (b) requiring that a lump sum be paid or held in trust;
 - (c) requiring that property be transferred to or in trust for or vested in the dependant, whether absolutely, for life or for a term of years;
 - (d) respecting any matter authorized to be ordered under clause 24 (1) (a), (b), (c), (d) or (e) (matrimonial home);
 - (e) requiring that some or all of the money payable under the order be paid into court or to another appropriate person or agency for the dependant's benefit;
 - (f) requiring that support be paid in respect of any period before the date of the order;
 - (g) requiring payment to an agency referred to in subsection 33 (3) of an amount in reimbursement for a benefit or assistance referred to in that subsection, including a benefit or assistance provided before the date of the order;
 - (h) requiring payment of expenses in respect of a child's prenatal care and birth;
 - (i) requiring that a spouse who has a policy of life insurance as defined under the Insurance Act designate the other spouse or a child as the beneficiary irrevocably;

¹¹⁵ FLA, *supra* note 21 at s. 9(1)-(3) and s. 10(1).

¹¹⁶ *Ibid* at s. 11(1)-(2).

- (j) requiring that a spouse who has an interest in a pension plan or other benefit plan designate the other spouse or a child as beneficiary under the plan and not change that designation; and
- (k) requiring the securing of payment under the order, by a charge on property or otherwise.¹¹⁷

Each of these orders can be viewed in the context of a spousal dispute that involves business interests.

VII. RECOMMENDATIONS FOR ADVISORS

By considering issues that arise when businesses interests are involved in family law litigation, family and corporate lawyers will be better equipped to deal with the circumstances where family law and corporate law abut. The following recommendations may assist advisors of family law and corporate clients.

(i) Consider Corporate Law Issues When Drafting Domestic Agreements

In order to minimize or eliminate disputes, cohabitation agreements and marriage contracts should stipulate how the parties' property will be dealt with in the event of the breakdown of the relationship or the death of a spouse. The parties should consider including provisions in cohabitation agreements and marriage contracts that:

- exclude or include business interests from the parties' property for the purpose of equalization under Part I of the FLA;
- exclude or include business interests from the parties' incomes for the purpose of support under Part III of the FLA;
- waive a spouse's rights to business interests by way of constructive or resulting trust;
- require the parties to sell back to the company any shares or business assets acquired through equalization under Part I of the FLA;
- prohibit one party from forcing an asset sale or share transfer to satisfy a judgement;
- provide a mechanism for valuing business interests and assets upon relationship breakdown;
- stipulate how the value of the business interests will be assessed, *e.g.* a formula; and

¹¹⁷ FLA, *supra* note 21 at s. 34.

- require an alternative mechanism if a dispute arises over the interpretation and implementation of the agreement, such as mediation or arbitration.¹¹⁸

Where an agreement refers to business interests, it should refer to specific assets while accounting for business growth. For example, the agreement should include a broad definition of “share” and consider whether share transfers should be traced back to the business.¹¹⁹

Cohabitation agreements, marriage contracts and separation agreements may provide that business assets be transferred in satisfaction of a family law claim. The spouse receiving the assets should sign a release stating that he or she assumes all personal and corporate liability associated with those assets as of the date of the separation or assign another date that makes sense in the context of the parties’ facts. The parties may wish to attach corporate documents as appendices to the agreement, such as indemnity and share transfer documents. If the agreement involves one or both spouses resigning as a director or officer of the business, the resignation documents should also be attached to the agreement.

(ii) Consider Family Law Issues When Drafting Business Agreements

Business Agreements should contemplate the potential impact of the FLA on the businesses’ shares and shareholders.¹²⁰ The parties should consider including provisions in shareholder agreements that:

- require a shareholder spouse to notify other shareholders if a proceeding is brought against him or her under the FLA;
- contain a buyout clause that creates a way for the business to purchase a spouse’s interest should he or she become subject to either an equalization application or support order, or upon the death of the spouse;
- provide all shareholders a right of first refusal to purchase the shares of a shareholder spouse at fair market value; and
- stipulate how the value of the business interests will be assessed where a buyout clause or right of first refusal is triggered.¹²¹

¹¹⁸ Halpern 1999, *supra* note 29 at A6.70(a). The advisor should ensure that the any domestic contract is written, signed by the parties to the contract and witnessed. The other party to the contract should be properly advised as to the nature and consequences of the contract, that he or she provided sufficient financial disclosure and that there was independent written acknowledgement that the contract was entered into voluntarily. It is strongly recommended that the parties to a domestic contract obtain independent legal advice.

¹¹⁹ Halpern 1999, *supra* note 29 at A6.70(a).

¹²⁰ *Ibid* at C1.40(b) and C6.20.

In order to bind all shareholders and both spouses, the shareholders agreement should be unanimous and the non-shareholder spouse should sign an adoption agreement.¹²² A shareholder's spouse could also be asked to waive his or her right to shares in the business upon a breakdown of the relationship. The parties should also consider including provisions in articles of incorporation that:

- require all shareholders to be a party to the shareholder agreement;
- create a non-voting class of shares for one spouse where both spouses are shareholders in the same business;
- restrict the issuance, transfer and encumbrances and reclassification of shares; and
- regulate pre-emptive rights and the redemption and conversion of shares.

If one of more spouses in an employee of a family-owned business, the employment contract may contemplate confidentiality and disclosure issues that arise in family law litigation.

VIII. CONCLUSION

When family law and corporate law worlds collide, the parties must contemplate basic corporate law principles in the context of often emotional family break ups that give to rise family law rights and obligations. Ontario's evolving case law offers a refined approach to piercing (or lifting) the corporate veil in the family law context. Advisors of family law litigants may continue to find themselves turning to corporate law principles and remedies in an effort to advance their family law claims or in establishing protection techniques to minimize the effect of corporate law on relationship breakdown.

¹²¹ Halpern 1999, *supra* note 29 at A6.70(b).

¹²² *Ibid* at A6.70(b)(i).

WORKS CITED

Legislation

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- Employment Standards Act*, S.O. 2000, c 41.
- Environmental Protection Act*, R.S.O. 1990, c E.19.
- Family Law Act*, RSO 1990, c F.3.
- Federal Child Support Guidelines*, SOR/97-175.
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