



# Family Law News

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## *The Creativity of Our Bench and Bar*

This issue's article brings you two cases which, I think, are good examples of the creativity of our bench and bar. The first involves some resourceful judicial thinking in an attempt to resolve what are often difficult issues surrounding the determination of income for the child support obligations of a shareholder payor. In the second case, a very creative lawyer considers the legal principles of mistake of fact and rectification in his attempt to help a client who appears to have changed his mind about the reasonableness of an agreement that he entered into. It's not often that you get a case that considers *Lloyd's Bank v. Bundy* – it brings you back to first year law school, which, for many of us, can seem like a lifetime ago!

The first case is *Bravo (Pohl) v. Pohl*, a decision of Madam Justice McLaren dated April 28, 2008. This case involved a motion to change a final order dated February 14, 2002 with respect to child support. The parties separated in 1992 after a four-year marriage and two children. They signed a Separation Agreement in 1992 and were divorced in 1993. They had a third child after a brief reconciliation attempt in 1997. At the time of the hearing of the motion, the children were 18 (lived with father

since separation and attends first year college), 17 (lives with father) and 10 years of age (lives with mother).

The motion to change brought by the father was returnable April 10, 2003 (almost 5 years prior to the hearing of the motion in January 2008, but that issue is the subject matter for another article!) The essential issue was the quantification of the father's income for the purposes of both retroactive and ongoing support.

Although the father was a minority shareholder of a tool and die company, he had control over the operation of the business. His income at the time of the original order was \$237,000. The order provided for an annual adjustment of child support on June 1 every year. Both parties had expert income reports prepared and the father called his accountant to testify. Each of the parties' experts provided their analysis regarding the father's income and how much of the retained earnings of the father's company should be attributed to him as income under s.18 of the *Child Support Guidelines*.

The main difference in each expert's analysis was due to the unusually large corporate income for 2006. The company had over \$5,000,000 in gross revenue, which amount was exceptional due to one particular customer. The issue of how much of the

company's retained earnings should be imputed to the father was considered by Justice McLaren. She preferred the evidence of the father's expert over the mother's as he provided a more realistic view of the activities of the company. The mother's expert was found to have been lacking necessary information to provide an accurate analysis. The mother's expert relied on preliminary calculations that were not updated, and he simply attributed all of the company's retained earnings to the father without consideration of the impact that this would have on the financial viability of the company.

Justice McLaren considered a number of cases regarding retained earnings and their impact on income for support. She reviewed the case of *Brophy v. Brophy*, (upheld by the Ontario Court of Appeal) where Justice Linhares de Sousa set out five criteria to determine whether or not to include corporate pre-tax income in a payor's income. They are as follows:

1. Because of the separate legal entity of the corporation, should there be a general reluctance by the court to automatically attribute corporate income to the shareholder?
2. Is there a business reason for retaining earnings in the company?
3. Is there one principal shareholder or are there other bona fide arm's length shareholders involved?
4. What is the historical practice of the corporation for retaining earnings?
5. What degree of control is exercised by the spouse over the corporation?

Justice McLaren found that there must be an analysis of the company

and its history before a consideration can be made whether to attribute any of a company's pre-tax corporate income to a shareholder. She was prepared to impute income to the father based on the fact that his reported income did not fairly reflect all income available to him for the purposes of determining support. However, she accepted the opinion of the father's expert regarding the amount to be attributed.

The difficulty with a case such as this is the enormity of the work that needs to be done by the accountants in reviewing a company's finances and activities each year to determine how much, if any, of its retained earnings should be attributed to a shareholder for the purposes of support. This is no small task. The financial and emotional investment for the parties can be enormous. In this particular case, the father had waited for almost 5 years to have the issue of his support liability determined. Justice McLaren does not provide any explanation for the delay. She does, however, attempt to provide some relief for the parties from the necessity of such a task on an annual basis. In her decision, Justice McLaren included a provision that attempts to give the mother some assurances that the father will continue to pay himself a reasonable salary and one that allows for the fairest determination of income for child support. She ordered that the father request an updated report from his expert in 4 years' time and then in another in 4 years until support terminates. Justice McLaren indicated that although she was reluctant to "open up the floodgates" in 4 years' time, she was mindful of the need to satisfy the mother that the father's income tax returns show a fair and reasonable income given his child support obligation. Although the expert will still need to consider the company's activ-

ities on a year by year basis, at least this can be done once every 4 years rather than annually.

There really is no easy and inexpensive way of dealing with the issue of income determination for a shareholder who derives his income from a company he/she controls. Annual review and readjustment is the norm for child support, and I applaud Justice McLaren for her mindfulness in considering the potentially huge financial and emotional consequences on parties due to the necessity of annually reviewing income as provided for in the *Child Support Guidelines*.

*Liberale v. Spadafora*, a decision of Mr. Justice Mazza of June 4, 2008, involves a motion to set aside a final order dated January 30, 2007 granted pursuant to an agreement entered into on the eve of trial. The Applicant took the position that he made a unilateral mistake with respect to the categorization of certain funds received prior to the settlement agreement and that this mistake was known to the Respondent. As part of the Minutes of Settlement, the Applicant agreed to pay to the Respondent the amount of \$64,000 as full and final settlement for equalization and a further \$60,000 as payment of lump sum child support. Prior to the agreement, in November of 2006, the Respondent's former counsel advanced to both the Applicant and Respondent, \$25,000 each, which represented a partial equalization payment.

The Applicant's position on the motion before Justice Mazza was that the \$25,000 advanced should be taken into account in the final settlement and deducted from the \$124,000. The Respondent takes the position that she was well aware of the \$25,000 advance to each party but does not

admit that amount was to be credited to the Respondent for any settlement.

Counsel for the Applicant argued that as there was no agreement between the parties as to the designation of the \$25,000 advanced in November of 2006, that the money was paid under a mistake and, therefore, the Respondent was unjustly enriched and the Applicant is entitled to be compensated for the unjust enrichment. He further submitted that as there was no expressed discussion about the prior payment at the time the Minutes of Settlement were signed, the result was a unilateral mistake by the Applicant which was known to the Respondent. As such, although the contract may be valid in law, the Applicant is entitled to an equitable remedy on the basis that the Respondent should have known of the mistake and had the obligation of informing the Applicant. He submitted that the Applicant is entitled to rectification on the basis that it would be unconscionable to permit the non-mistaken party, that is, the Respondent, to benefit from the agreement.

The Applicant further argued that the settlement was unconscionable and improvident and based on *Lloyd's Bank v. Bundy*, the Applicant had been subject to an inequality of bargaining power. The Applicant asked the court to grant an order for \$25,000 and alternatively, that the court exercise its discretion in determining that a mistake was made by the Applicant with the Respondent's knowledge and therefore, in accordance with Rule 15(14) of the *Family Law Rules*, set aside the order and restore the matter to the trial list. He asks for costs on a substantial indemnity basis, of course!

Needless to say, counsel for the

Respondent viewed things somewhat differently. He submitted that there was never any misunderstanding between the parties; that there was nothing equivocal in the Minutes of Settlement; that there was a substantial attempt to negotiate and that there was never a misunderstanding as to how the \$25,000 was to be viewed within the context of final settlement. He alternatively submitted that Rule 15(14) does not apply in these particular circumstances in that it is intended to deal with omissions and matters which the court or parties have overlooked. There was no evidence to that effect. He further submitted that there were no facts which supported the principle of rectification or unilateral mistake, that the Applicant had not proven that the minutes did not reflect the true actual agreement, and that the parties did not share a common continuing intention up to the time of signature. Further, on the issue of unilateral mistake, he argued that there was no evidence to conclude that the parties were operating under a misapprehension. He further submitted that the principle of rectification did not apply in the circumstances, in view of the fact that the Respondent claimed much more than what she had ultimately settled upon in the minutes and that the Respondent's compromise to settle all disputed issues was based on a balancing of a number of considerations.

Justice Mazza considered the test found in *Nigris v. Nigris* 1999 CarswellOnt 700, 44 R.F.L.(4<sup>th</sup>) 269, 91 O.T.C. 321 and found that the terms of the agreement were sufficiently clear, the agreement encompassed all of the issues in dispute, the parties were physically present at the negotiations, there was a fairly lengthy period of time between the agreement and when the Applicant

decided to resile from the agreement, negotiations took place immediately prior to trial which is common, and finally, that there was no direct evidence that the \$25,000 was to be credited to the final equalization payment.

To make matters worse for the Applicant, he sent the Respondent an email the day after the agreement was signed confirming the amount she was to receive was \$124,000! His motion was dismissed as Justice Mazza found that he was fully aware of the amount that he had to pay to the Respondent and that there was no evidence of a mistake. At best, the Applicant had a change of heart with respect to the settlement.

Clearly, the Applicant was very fortunate to have had a very creative lawyer who was able to craft an argument based on unusual legal principles. It was unfortunate that he wasn't able to supply his lawyer with sufficient facts to support the creative legal argument. I guess there aren't too many Peter Bundy's left in the world!

#### ***Addendum:***

It has come to my attention that my article in the December 2008 issue of the *HLA Journal* caused some concern with the CCAS, and they believe that I did not provide a balanced review of the decision. As I indicated in the article, I do not practise in the child welfare area and my comments were as a parent and lawyer. However, my comments were as a result of a thorough review of Justice Pazaratz's 61-page decision wherein he clearly outlined the evidence of all the witnesses, not only of the CCAS workers but also fully considered the opinions of the various medical experts including the Psychiatric Assessment and the Parenting

Capacity Assessment. I am in complete agreement with the CCAS that these are extraordinarily complex cases. Also, I am sure that the CCAS understands that this article expresses my opinion alone and does not necessarily reflect the opinion of others. ■

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