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Family Law Newsletters
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— Franks & Zalev - This Week in Family Law

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As Sure as Tulips Come in the Spring . . .

Chase v. Chase (2020), 2020 ONSC 5083, 2020 CarswellOnt 12173 (Ont. S.C.J.) - Himel J.; and

Wilson v. Wilson, 2020 ONSC 5236 (S.C.J.) - Boucher J.

Well, it's August. And August can mean only one thing for family lawyers: last minute "emergency" motions about where a child should go to school. As Justice Pazaratz recently noted in *A.T.W. v. K.A.W.* (2020), 2020 ONSC 4894, 2020 CarswellOnt 11625 (Ont. S.C.J.), this "has become somewhat of an unwanted annual tradition in family court."

But this year, things are a bit different. Instead of - or perhaps in addition to - the usual, "pre-Labour-Day 'Let's Change Johnny's School' urgent motion" (to again quote Justice Pazaratz), it was inevitable this year that the courts would be deluged with motions about whether a child should engage in "in person" or online learning.

In *Chase v. Chase* (2020), 2020 ONSC 5083, 2020 CarswellOnt 12173 (Ont. S.C.J.), and *Wilson v. Wilson*, 2020 ONSC 5236 (S.C.J.), Justice Himel and Justice Boucher released the first two decisions that we have come across about whether a child should attend school in September in person or online. Interestingly, Justices Himel and Boucher approached the issue quite differently.

In *Chase*, the parties could not agree whether to send their nine-year-old son to school, or to keep him at home for online learning. Justice Himel found that the Ontario government's decision to re-open schools weighed in favour of sending the child to school in person. She also declined to consider the parties' arguments about why the Toronto Hospital for Sick Children's July 29, 2020 report about reopening schools, which was clearly hearsay, supported their respective positions (the report is available at <http://www.sickkids.ca/PDFs/About-SickKids/81407-COVID19-Recommendations-for-School-Reopening-SickKids.pdf>):

[42] I adopt the reasoning set out in *Droit de la famille - 20641*, 2020 QCCS 1462 (CanLII). **The Ontario government is in a better position than the courts to assess and address school attendance risks.** The decision to re-open the schools was made with the benefit of medical expert advisers and in consultation with Ontario school boards. The teachers' unions and others have provided their input as well as their concerns. **While the parties spent considerable time addressing a recently released report by the Toronto Hospital for Sick Children, I decline to consider same. There are experts on all sides of the Covid-19 debate, however, the decision to re-open schools and the steps being taken to protect children and staff fall within the purview of the Ontario government.**

.....

[45] There is a consensus between the Ontario government and medical experts that, at this juncture, it is not 100 percent safe for children to return to school. However, **the risks of catching Covid-19 (and the typical effects of the illness) for children are being balanced against their mental health, psychological, academic and social interests, as well as many parents' need for childcare.** There is no end in sight to the pandemic and, as such, no evidence as to when it will be 100 percent safe for children to return to school. **The Ontario government has determined that September 2020 is an appropriate time to move on to a "new normal" which includes a return to school.**

[46] I note that the Ontario government did not hesitate to shut down all schools in March 2020 and has declined to reopen them until now. **The Ontario government has articulated in the media that they will not hesitate to shut down schools again if the number of Covid-19 cases increases materially.** [emphasis added]

That being said, Justice Himel also found that, notwithstanding the Ontario government's decision to reopen schools, courts should still consider whether "[i]f [the child] returns to school will [s/he], or anyone in either parent's home, be at an unacceptable risk of harm?"

Despite the litany of concerns the father raised about sending the child to school, Justice Himel was satisfied that the risk of doing so was not unacceptable on the particular facts of this case:

[49] For the following reasons, neither [the child] nor anyone in either of the parents' household will be at an unacceptable risk of harm:

- (a) None of the adults nor [the child] have any underlying medical conditions that make any of them particularly susceptible to adverse effects of Covid-19;
- (b) While [the Father's wife] is scheduled to have ankle surgery at some unknown date in the future, her medical vulnerability will be relatively short-lived and can be addressed by a temporary change or suspension of the Father's in-person parenting time (and/or a change to socially distanced time in the community), with the addition of virtual access. [The child] can undergo Covid-19 testing to ensure that he is healthy prior to the return to the usual schedule;
- (c) The likelihood that [the Father's wife] may need to travel to Ohio to visit her elderly mother who is in chronic poor health, and possibly return with her to Ontario, is not quantifiable. Such a plan may not be feasible given the current status of the border, the two-week quarantine and other obstacles. It is unreasonable to withhold [the child] from school, "just in case", and the paternal step-grandmother's potential needs should not trump the child's;
- (d) [The Father's wife] continues to work outside of the home providing an essential service. While the Father works from home, when he is out in the community and in an indoor space, he always encounters at least one person who is non-compliant with the mandatory mask and social distancing rules. Therefore, any and all members of the Father's household could be exposed to Covid-19 in their daily lives;
- (e) The Father is worried about the impact of wearing a mask at school as it may affect his son's education. A mask makes it harder to communicate clearly and read facial cues which may impede the development of W.C.s oral skills in French. However, this is not a risk that warrants online learning;
- (f) The guilt [the child] may feel if he believes he has infected a family member with Covid-19 (which is another of the Father's concerns), can be addressed by the Mother, the Father and [the Father's wife] assuring him that people catch viruses from many places, and that he is not responsible; and
- (g) The fear expressed by [the child] about returning to school until it is safe can be minimized through messages that support the Court's decision, coupled with reassurances that the Ontario government will continue to monitor risk and take appropriate steps to protect children.

Justice Himel also had concerns about online schooling because the mother, who had the child 50 percent of the time, would not have been able to work if the child was not in school during the day.

As a result, Justice Himel ordered that the child would attend school in person unless the parties agreed or the court ordered otherwise.

In contrast to *Chase*, in *Wilson* Justice Boucher found that it was in the children's best interests to stay home and attend school online. These different outcomes appear to have turned on the important factual differences between the two cases. In particular, while the child in *Chase* was healthy and the mother had to work during the day, one of the children in *Wilson* had asthma, and both parents were able to manage having the child attend school online from home during the day.

That being said, Justice Boucher also approached the issue of in-person vs. online schooling quite differently than did Justice Himel. Recall that Justice Himel deferred to the Ontario government's decision to re-open schools for in-person learning, and declined to consider the Toronto Hospital for Sick Children's report. Justice Boucher, however, expressed concerns about whether the government's plan included the necessary safeguards based on that exact same report:

There is insufficient information before the court to establish that in-person schooling would be safe enough for the children, particularly given the medical condition of one of the children. The situation is evolving almost daily with respect to the pandemic itself, and the school board's plans for both educational formats. Although the Sick Kids report referenced by the father recommends in person attendance, it is unclear whether the in-person plan actually conforms with expert reports and appears to lack some of the recommended safeguards. It would appear that **the online option provides a better physical health safety plan for the children**, which suggests that online would be in their best interests given the health concerns of the child with asthma. [emphasis added]

We share Justice Boucher's concerns about whether public schools are taking all necessary precautions to minimize the risks that teachers, students, and their family members will contract COVID-19. However, we also worry about the potential implications of requiring the courts to have to wade into these types of complex public policy issues, particularly since the record in almost all of these cases is comprised entirely of untested affidavits, and reports and newspaper articles that are clearly hearsay. Short of a constitutional challenge, it is not for the courts to question the government decision to reopen schools.

It is already going to be difficult enough for judges to decide whether in-person schooling will put a child or anyone in his or her home at "unacceptable risk of harm" based on that type of evidence. There is no need to make things even more difficult by encouraging family law litigants to try to adduce evidence, which will presumably almost all be hearsay, about whether a particular school or school board has put all of the necessary safeguards in place.

Piercing the Corporate Veil (or Why You Should Invest in Bonds)

Aubin v. Petrone (2020), 40 R.F.L. (8th) 26 (Alta. C.A.) - Martin, Antonio, and Feehan JJ.A.

In *Aubin v. Petrone*, the Alberta Court of Appeal considered whether and when a court can pierce the corporate veil to secure an equalization payment.

The husband and wife were married in 1993 and separated in 2014. They had three adult children together. During the marriage, the husband started a research company, Quantiam, that was worth more than \$15,000,000 when the parties separated. The husband owned 84.66% of Quantiam, the wife owned 3.99%, and 20 third-party investors owned the remaining 11.37%.

After determining the value of all of the parties' assets and their respective incomes, the trial judge, Justice Khullar, ordered the husband to pay the wife an equalization payment of \$5,570,394, and indefinite spousal support of \$7,200 a month. As the husband did not have sufficient liquidity to satisfy the significant judgment against him, the trial judge also reserved jurisdiction to deal with potential remedies under s. 9 of the *Matrimonial Property Act*, which provides, among other things, that to give effect to an equalization payment, the court can:

- (b) order a spouse to give security for all or part of any payment;
- (c) charge property with all or part of a payment to be made under the order and provide for the enforcement of that charge;
-
- (j) make any other order that in the opinion of the Court is necessary.

As the husband and wife were unable to agree on how the husband was to satisfy the equalization payment he owed, the parties and Quantiam made further submissions to Justice Khullar. Justice Khullar determined that the equalization payment should be secured against the husband's shares in Quantiam. Additionally, based on the following conduct by the husband, her Honour concluded that it would also be appropriate to pierce the corporate veil and secure the husband's personal obligations to the wife against a multi-million dollar building that Quantiam owned in Edmonton:

- The husband had failed to make arrangements to pay the wife the money that he owed her voluntarily.
- He had caused Quantiam to call a loan on a property in which the wife had an interest "in retaliation for [the wife] commencing matrimonial litigation". He also threatened to foreclose on the property if the wife did not consider his settlement proposal.
- He had terminated the wife's employment by Quantiam and removed her as a director of the company.
- He had sought legal advice about establishing a new company to avoid his obligations to the wife.
- He had a history of being "irrational" when it came to the wife.

Justice Khullar also enjoined the husband from seeking relief under the *Bankruptcy and Insolvency Act* until he had executed a security agreement in favour of the wife for his shares in Quantiam and the company's building in Edmonton.

The husband appealed almost every aspect of Justice Khullar's decision to the Alberta Court of Appeal (the decision indicates that the husband raised 23 separate grounds of appeal).

The Court of Appeal had no difficulty upholding Justice Khullar's decisions on both spousal support and the amount of the equalization payment as the husband had failed to establish any errors that warranted appellate intervention.

However, the husband did raise three grounds of appeal that required consideration by the Court:

- (a) that Justice Khullar had erred by ordering the husband to pay the equalization payment in cash instead of by transferring shares in Quantiam to the wife;
- (b) that she had erred in piercing the corporate veil in order to secure the equalization payment that the husband owed the wife against Quantiam's building; and
- (c) that she had erred in prohibiting the husband from seeking relief under the *Bankruptcy and Insolvency Act*.

(a) *In Specie* Divisions In Alberta

The husband argued that Justice Khullar had erred by not allowing him to satisfy the equalization payment by transferring some of his shares in Quantiam to the wife. Justice Khullar rejected this request, and ordered the husband to make the equalization payment in cash, because a share transfer:

- was prohibited by the terms of Quantiam's Unanimous Shareholder's Agreement;
- would have had to be approved by Quantiam's directors, and the evidence showed that they would not have done so; and

- most importantly, would have left the wife in the highly vulnerable position of being a minority shareholder in a private company that was completely controlled by the husband.

In dismissing this aspect of the appeal, the Court of Appeal confirmed that a monetary judgment is typically how matrimonial property disputes in Alberta are resolved:

[161] **There is nothing incorrect at law in ordering a money judgment. That is the usual method of resolving a matrimonial property dispute.** In this case, the trial judge exercised her discretion to utilize this usual method of relief rather than an *in specie* transfer of shares. **A high degree of deference is given to a trial judge's findings in family law cases, and her decision was not clearly wrong, nor does it disclose error in principle or amount to an injustice.** Her decision to provide a money judgment as opposed to an *in specie* transfer of shares is therefore upheld. [emphasis added]

That being said, the Court also indicated that it did not necessarily agree with Justice Khullar's conclusion that she could not have ordered an *in specie* division of the husband's shares because that would have been contrary to the terms of the shareholder's agreement. However, it ultimately declined to decide the issue one way or the other for now because it was not necessary to do so to resolve the case at hand:

[153] For a thorough review of the nature and effect of a Unanimous Shareholder Agreement, see *Duha Printers (Western) Ltd. v. R.*, [1998] 1 S.C.R. 795 (S.C.C.), paras 42, 61, 66-68, (1998), 159 D.L.R. (4th) 457 (S.C.C.); *Sumner v. PCL Constructors Inc.*, 2011 ABCA 326 (Alta. C.A.), paras 39-43, (2011), 51 Alta. L.R. (5th) 266 (Alta. C.A.), leave to appeal refused, 34630 (June 28, 2012) [2012 CarswellAlta 1115 (S.C.C.)]. **I have found no express legislative provisions nor binding authorities preventing a court from overriding the provisions of a Unanimous Shareholder Agreement in ordering a share transfer.** While courts have been reluctant to do so (see *C. (D.B.) v. W. (R.M.)*, 2004 ABQB 954 (Alta. Q.B.), para 71, (2004), 12 R.F.L. (6th) 14 (Alta. Q.B.); *Peregrym v. Peregrym*, 2015 ABQB 176 (Alta. Q.B.), para 359, (2015), 608 A.R. 340 (Alta. Q.B.); *Phillips v. La Paloma Sweets Ltd.* (1921), 51 O.L.R. 125 (Ont. H.C.)), **there may be some legislative authority for the courts having discretion to override constating documents** (see *Business Corporations Act*, RSA 2000, c B-9, s 242 on oppression or unfairness and s 248 on compliance or restraining orders).

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[155] Given my decision below, **I need not resolve this issue, but only point out that although a corporation's constating documents should not be lightly overridden, it is left for another day, whether, with appropriate facts, this may be an appropriate remedy.** [emphasis added]

(b) Piercing The Corporate Veil

The husband also argued that Justice Khullar erred by securing the significant equalization payment against the building owned by Quantiam.

In deciding this issue, the Court of Appeal engaged in a thorough review of the law on piercing the corporate veil, starting with the Supreme Court of Canada's 1987 decision in *Kosmopoulos v. Constitution Insurance Co. of Canada*, 1987 CarswellOnt 132 (S.C.C.). In *Kosmopoulos*, Justice Wilson confirmed that a corporation is a separate legal entity from its shareholder(s), but that a court can lift the corporate veil in order to prevent an injustice between the parties. However, the Supreme Court did not establish a test to help the lower courts determine whether to lift the corporate veil in a particular case. Instead, it simply noted that the law on this issue "follows no consistent principle", and that "[t]he best that can be said is that the 'separate entities' principle is not enforced when it would yield a result 'too flagrantly opposed to justice, convenience or the interests of the Revenue[.]'"

Nine years later, in the seminal case of *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.*, 1996 CarswellOnt 1699 (Gen. Div.) at paras. 22-23, aff'd 1987 CarswellOnt 132 (S.C.C.), Justice Sharpe (as he then was) established the following two part test to help guide a court when determining whether to exercise its very narrow discretion to pierce the corporate veil:

- "The first element, 'complete control', requires more than ownership. It must be shown that there is complete domination and that the subsidiary company does not, in fact, function independently[.]"
- "The second element relates to the nature of the conduct: is there 'conduct akin to fraud that would otherwise unjustly deprive claimants of their rights?'"

See also *Yaiguaje v. Chevron Corporation*, 2018 CarswellOnt 7942 (Ont. C.A.), where the Ontario Court of Appeal recently reaffirmed the *Transamerica* test, and reiterated that while "corporate separateness is the rule", it is also "important that courts be rigorous in their application of the *Transamerica* test because the rule is provided for in statute and stakeholders of corporations have a right to believe that, absent extraordinary circumstances, they may deal with the corporation as a natural person." The same court confirmed that the corporate veil cannot be pierced simply because it may be "just and equitable" to do so.

Other cases, such as *Arsenault v. Arsenault* (1998), 38 R.F.L. (4th) 175 (Gen. Div.), have also clarified that the test for piercing the corporate veil should also require the claimant to establish that the misuse of the corporation must have actually caused the claimant a loss:

[24] In the area of corporate and commercial law, the Courts are generally reluctant to look behind the corporate veil unless there are circumstances in which it is appropriate that this be done. In general, the following circumstances must be present:

1. The individual exercise complete control of finances, policy, and business practices of the company.
2. That control must have been used by the individual to commit a fraud or wrong that would unjustly deprive a claimant of his or her rights.
3. The misconduct must be the reason for the third party's injury or loss.

In 2006, the Ontario Court of Appeal was called upon to decide whether the *Transamerica* test applied in the family law context in *Wildman v. Wildman* (2006), 33 R.F.L. (6th) 237 (Ont. C.A.). In answering this question *resoundingly* in the affirmative, Justice MacPherson, for a unanimous Court, determined that if the *Transamerica* test is met, the corporate veil can unquestionably be pierced in family law cases:

[25] The crucial question in this appeal is whether the exception to the principle of separate legal personality for corporations set out in *642947 Ontario Ltd. v. Fleischer and Transamerica Life Insurance* should be injected into family law. **Should the courts in appropriate family law cases disregard the separate legal personality of a corporate entity where, in the words of Sharpe J. in the latter case, "it is completely dominated and controlled and being used as a shield for fraudulent or improper conduct"? In my view, the answer to this question is a resounding 'Yes'**

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[49] In the end, although a business person is entitled to create corporate structures and relationships for valid business, tax and other reasons, the law must be vigilant to ensure that permissible corporate arrangements do not work an injustice in the realm of family law. In appropriate cases, **piercing the corporate veil of one spouse's business enterprises may be an essential mechanism for ensuring that the other spouse and children of the marriage receive the financial support to which, by law, they are entitled.** The trial judge was correct to recognize that this was such a case. [emphasis added]

In *Aubin*, there was no dispute that the husband exercised complete control over Quantiam. The question, however, was whether he had engaged in conduct akin to fraud that would otherwise unjustly deprive the wife of her rights.

In a 2-1 split decision, Justice Antonio and Justice Martin upheld Justice Khullar's decision to use Quantiam's building to secure the significant equalization payment that the husband owed the wife - even though the husband was not the sole owner of Quantiam. Although Justice Khullar had not made a specific finding of fraud or conduct akin to fraud, she had made a number

of serious findings about the husband's misconduct that, taken together, warranted piercing the corporate veil in this case. Furthermore, the husband's failure to pay the wife the money she was entitled to was a clear deprivation of the wife's rights:

[52] The trial judge recited a non-exhaustive list of wrongs committed by [the husband] as the controlling mind of Quantiam. Quantiam quarrels with the characterization of these actions as "wrongs", and submits that none of them, taken alone, resulted in a loss to [the wife].

[53] I decline to interfere with the trial judge's interpretation of the evidence and findings of fact. Her findings are not undermined because she intentionally refrained from casting those findings in legal terms - for example, whether [the wife's] termination and removal as a director were improper: Merits Decision at para 126. This was appropriate judicial restraint in the face of the extant oppression and foreclosure actions and the potential for other litigation. In any event, **it would have been neither correct nor sufficient to examine each wrongful action to determine whether it, alone, occasioned a loss. The trial judge correctly assessed the whole of the circumstances to determine whether it revealed flagrant injustice.**

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[69] . . . [the wife] has been unjustly deprived of her rights and an inequity has resulted. The point of the equalization payment is not to enrich [the wife] with [the husband's] money. It is to ensure that she regains what is already hers. [The husband] and [the wife] were equal partners in their marriage and are equal owners of the wealth accumulated during its course. The trial judge correctly started from this frame of reference, applied the law correctly, and made orders for spousal support and property division. This court has unanimously upheld those orders. **[The wife] was and is the owner of 50% of the family's property. That equates to \$7,459,088.00, of which \$5,570,394.00 remains outstanding. [The husband] has the ability to return it to her but has chosen not to. He is withholding over \$5 million of [the wife]'s money. That is an unjust deprivation, and it is the very basis for exceptions to corporate separateness.** [emphasis added]

The fact that Quantiam had other minority shareholders did not dissuade the majority from using corporate assets to secure an equalization payment. Justice Khullar's decision to use Quantiam's building as security achieved an appropriate balance between the need to protect the wife and the rights of Quantiam's other shareholders:

[58] I do not accept Quantiam's suggestion that the presence of shareholders prohibits the lifting of the corporate veil in the family law context. **Such a rule would invite abuse, in that the owner of a company could avoid his or her legal obligations merely by issuing one share to a third-party shareholder, whether or not in exchange for bona fide value.**

[59] At risk of oversimplification, protection of shareholders is the reason for the corporate veil. It is therefore obvious that **the presence of other shareholders is an important factor to be considered in deciding whether to lift it. It will also be relevant to consider the nature of the company (for example, family business versus publicly traded corporation), the reasonable expectations of the shareholders about how the company will be used by its principals, whether the shareholders were *bona fide* purchasers for value, and any other relevant factors.**

[60] In this case, **the trial judge was alive to the interests of the minority shareholders**, as shown at para 26 of the Remedy Decision:

Quantiam is a private company with minority shareholders. This is certainly a complicating factual distinction; **the court must be cognizant of the rights of minority shareholders if a remedy is to be fashioned. But, again, the factual distinction is not a principled basis for not following the general approach in *Wildman*.**

I agree. This conclusion finds further support in s 8(b) of the *Matrimonial Property Act*, which instructs that a spouse's contributions to a business "owned or operated by one or both spouses or by one or both spouses *and any other person*" are to be considered when effecting a distribution of property. [emphasis added]

[61] Unlike other cases, the **trial judge did not transfer assets out of Quantiam** (as in *Lynch v. Segal* (2006), 219 O.A.C. 1, 82 O.R. (3d) 641 (Ont. C.A.)) **and did not secure the matrimonial debt against all of Quantiam's assets** (as in *Wildman*). **Rather, "to recognize and protect the interest of the minority shareholders", she chose the more moderate remedy of using Quantiam's building as security for [the husband's] debt.** Remedy Decision at para 31.

[62] If [the husband] satisfies the debt, Quantiam's building will not be affected. Meanwhile, the charge acts as a brake on any attempt by [the husband] to void Quantiam of its assets, to the advantage of all Quantiam's shareholders. The trial judge's sense of balance in crafting this remedy should be respected. [emphasis added]

Justice Feehan, on the other hand, in dissent, would have set aside the security orders as he was not satisfied that the husband's conduct rose to the level of fraud or "conduct akin to fraud" that is required before the corporate veil can be pierced, and he was concerned that the Justice Khullar's order could have an adverse impact on the rights of the 20 innocent minority shareholders:

[192] **This is a corporation with 20 minority shareholders, approximately 30 employees and significant contractual obligations to arm's length third parties. It is subject to restrictive articles of association and a Unanimous Shareholders Agreement, and there has been no allegation of fraud or actions akin to fraud.** The wrongdoings alleged include Quantiam calling its demand loan on 159 and threatening to foreclose on the Nixon Road property in Summerland, BC, terminating [the wife's] employment, removing her as a director of Quantiam, and seeking legal advice as to the establishment of a subsidiary corporation to acquire BASF Qtech for the purpose of raising equity financing and offloading from BASF all residual obligations to stakeholders. **The cases clearly say that the wrongdoing involved must be "akin to fraud" or "grave misconduct employed to cause harm"** (*Yaiguaje v. Chevron Corp.*, 2017 ONSC 135 (Ont. S.C.J. [Commercial List]), paras 64-66, (2017), 410 D.L.R. (4th) 409 (Ont. S.C.J. [Commercial List]); *UBG Builders Inc (Re)*, 2017 ABQB 401 (Alta. Q.B.), para 71, (2017), 59 Alta. L.R. (6th) 255 (Alta. Q.B.)). **None of the wrongs alleged amount to fraud, behaviour akin to fraud or grave misconduct employed to cause harm.**

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[197] **[The wife] does not present a rare and exceptional circumstance where a claimant has been unjustly deprived of her rights so as to create an inequity and justify piercing of the corporate veil, particularly when statutory and corporate remedies are available to her.** Instances in which piercing the corporate veil has been acceptable in family law are cases aligned with the "agent" or "puppet" situations. **I would not expand the remedy of piercing more broadly simply because this is a family law case.** Drawing a line as to how many other shareholders, directors, creditors or employees of the company might be sufficient to take the equities of the case away from piercing the corporate identity merely because the case involves family law is not a manageable standard.

[198] I find there are no grounds sufficient to disregard the separate legal personality of Quantiam and to pierce the corporate veil for the collateral purpose of granting [the wife] a security interest or security agreement with respect to the Quantiam building, an asset of Quantiam and not [the husband]. I would have allowed the appeal on this issue. [emphasis added]

Justice Feehan makes a fair point. Can you imagine being a shareholder in a closely held company, only to find out that a major corporate asset has been placed at risk because the majority shareholder owes his former spouse a significant equalization payment? By all accounts, Quantiam was a *bona fide* company, doing *bona fide* business, and with *bona fide* arm's length, innocent, third-party investors. This was not the case of the husband giving a few close friends a few shares in an attempt to thwart his equalization obligation. And then adding to this the majority's "musings" about overriding Unanimous Shareholder's Agreements and corporate constating documents? It was the husband that owed the wife money and it was the husband's conduct that was being impugned - not that of innocent minority shareholders. That is not a risk they bargained for. This is only going to make it more difficult and/or expensive for small companies to raise capital.

As for other provinces, the question remains unsettled. For example, in British Columbia, there seem to be competing principles. Some cases suggest that the court cannot tie up corporate assets because those assets are not owned by the shareholder: *Kirk*

v. *Kirk* (2006), 25 R.F.L. (6th) 161 (B.C. S.C.); *Davidson v. Davidson* (March 17, 1983), Doc. Vancouver CA000253, [1983] B.C.J. No. 646 (B.C. C.A.); and *Rohani v. Rohani* (2004), 8 R.F.L. (6th) 179 (B.C. C.A.).

In *Rohani*, the British Columbia Court of Appeal suggested that as the wife enjoyed the benefits of incorporation during the marriage, she could not, on separation, escape the burden of its existence. Other cases, allow it: *Wu v. Sun* (2011), 97 R.F.L. (6th) 104 (B.C. C.A.).

(c) The Bankruptcy Injunction

The husband claimed that Justice Khullar had erred by enjoining him from seeking relief under the *Bankruptcy and Insolvency Act* until he had signed security agreements in the wife's favour.

Although Justice Khullar had not given reasons or cited any authority for granting this relief, the majority nevertheless upheld the decision as it "was literally 'textbook', as it mirrors the wording of a template Order Charging Property and Requiring the Execution of Security set out in Robert A. Klotz, *Bankruptcy, Insolvency and Family Law*, 2nd ed. (Toronto: Thomson Carswell, 2001) (loose-leaf updated 2001) at 22-18 to 22-19." Furthermore, given the husband's financial position, it was unlikely that he was going to go bankrupt in any event.

Justice Feehan, however, would have allowed the appeal and overturned the injunction, as the husband's conduct did not warrant such extraordinary relief, and this was an issue that could be dealt with later if need be on the basis of a fully matured matrix of evidence."

Unfortunately, neither the majority nor the dissent addressed the question of whether a court can actually prohibit someone from seeking relief under the *Bankruptcy and Insolvency Act* and, if so, when it might be appropriate to make such an order. It seems to us that a court cannot prohibit someone from availing of remedial legislation such as the *Bankruptcy and Insolvency Act*. And in the event of abuse, bankruptcies can be contested and annulled.

Conclusion

The Supreme Court of Canada rejected the husband and Quantiam's request for leave to appeal on June 25, 2020, so it looks like the majority's decision will remain good law (at least in Alberta) for the foreseeable future. However, we will have to wait and see whether the decision to uphold the trial judge's decision will ultimately incentivize the husband to find a way to pay the wife the money he owes her voluntarily, or whether it is just going to lead to further litigation as the wife tries to enforce her security, and as Quantiam's minority shareholders and other creditors start to realize that their rights vis-à-vis the company may have been severely prejudiced by the family court's decision.

Announcement!

Note from Thomson Reuters: It is rare that a week goes by without a fresh edition of *This Week in Family Law*. However, next week will be such a week and no new edition will be published. We will return the following week, that is certain, so look for volume 2020-35 on Monday morning September 14.