AAML ANNUAL MEETING

CHICAGO, November 7, 2019

DISCOVERY BEYOND OUR BORDERS: GATHERING INFORMATION IN INTERNATIONAL CASES, ONTARIO, CANADA

SARAH BOULBY

TABLE OF CONTENTS

1. Overview

Canada is a federal state divided into ten provinces and three territories. The division of powers between the federal and provincial governments allocates some family law elements to the federal government, including divorce and rights for support and parenting corollary to divorce. Property claims are subject to provincial jurisdiction. Provincial legislation also covers support and parenting for unmarried spouses or parents and, in certain cases, for married spouses. Procedural issues for both federal and provincial family law, including disclosure, are subject to provincial rules. Ontario has a somewhat paternalistic approach to family law, imposing high demands for financial disclosure on spouses whether they engage in litigation or resolve their issues by agreement. In this paper I will provide an outline of financial rights and responsibilities for Ontario families and the disclosure obligations arising from those rights.

2. Financial Claims in Ontario Family Law

a. Property claims for married spouses

Marriages in Ontario are deemed to be economic partnerships. Each spouse has a right to share in the wealth generated during the marriage. An equalization payment, which is a simple debt, is calculated and payable from the spouse whose wealth has grown more during the relationship to the other spouse. The equalization payment is calculated according to a formula provided in the statute. The net family property is determined for each spouse. The spouse with the greater net family property pays one half the

difference to the spouse with the lower net family property. Net family property is calculated as the value of the spouse's net worth at the date of separation less his or her net worth at the date of marriage with exceptions related to certain categories of assets including the matrimonial home, gifted and inherited assets. Either spouse may apply for equalization of net family properties after separation. The surviving spouse may apply for equalization against the estate of the other spouse after death, even electing to take equalization over provision in the other's will.[1]

The equalization regime is sweeping. It covers all assets and all liabilities including contingent assets and contingent liabilities. The definition of property is broad. Although the equalization regime was enacted over 30 years ago, there remains an ongoing question as to whether the definition includes beneficial interests in discretionary trusts. The better view is that it does.[2] All these assets and liabilities need to be valued to complete the calculation.

b. Property claims for unmarried spouses

Unmarried spouses do not have rights to an equalization payment. The only property rights that they have are those related to ownership, whether legal ownership, or restitutionary claims. An unmarried spouse may establish that the parties have a joint family venture and seek a remedy of

[1] *Family Law Act* RSO 1990, c. F.3, as am., Part I

[2] See varying cases on the question: *Tremblay v. Tremblay* 2016 CarswellOnt 922 (Ont.S.C.), *Durakovic v. Durakovic* 2008 CarswellOnt 5329 (Ont.S.C.), *Mudronja v. Mudronja* 2014 CarswellOnt 15122 (Ont.S.C.)

either financial compensation or, in an appropriate case, a declaration of a beneficial interest in the other spouse's titled assets.[3]

c. Spousal support

The federal government has established spousal support advisory guidelines ("SSAG") for the quantum and duration of spousal support. These are used in Ontario for provincial spousal support determinations.[4] The SSAGs are separate formulas for spouses with children and those without. The formulas for the quantum of support utilize the parties' respective incomes, their ages, the length of the marriage, their child support obligations, their income tax and other tax liabilities and deductions. For higher income families, with payors' incomes of over $800,000/year, the support calculation may depart from the SSAG model but the SSAG ranges still must be calculated and considered in fixing the appropriate amount of support.

d. Child support

The federal government has established child support guidelines for the quantum of child support.[5] The same guidelines are used under provincial legislation. The guidelines provide for a fixed monthly support amount, based on a table derived from a percentage of the payor spouse's income. In addition, the parents are required to share special and

[3] *Kerr v. Baranow* 2011 CarswellBC 240 (S.C.C.)
[4] Carol Rogerson and Rollie Thompson "Spousal Support Advisory Guidelines – The Revised User's Guide" Thomson Reuters Canada Ltd, 2016
[5] *Federal Child Support Guidelines*, SOR/97-175, as am.

extraordinary expenses pro rata in accordance with their respective incomes. These include: child care, private school, health and medical expenses over $100/year, extraordinary extra-curricular expenses, and post-secondary expenses. For higher income families with payors' incomes of over $1,000,000/year or for adult children the support calculation may be reduced from the table amount but the support is still largely based on the parties' incomes rather than budgeted needs.

3. Disclosure for Domestic Contracts formed before and during relationships

a. Domestic Contracts

Parties may agree to deviate from the legislated property and support rights in a domestic contract. Domestic contracts have formal statutory requirements applicable to marriage contracts, cohabitation agreements, and separation agreements. These contracts must be in writing, signed by both parties, and witnessed. Spouses may enter into a marriage contract before or during a marriage and may enter into a cohabitation agreement before or during their cohabitation. [6]

b. Financial Disclosure requirements

All domestic contracts, including marriage contracts and cohabitation agreements, are vulnerable to being set aside if there is inadequate disclosure of the financial circumstances of the parties at the time of the contract.[7] The

[6] *Family Law Act*, Part IV

[7] *Family Law Act,* s. 56(4)

standard for adequate financial disclosure is high. Each party to the agreement must provide detailed disclosure of his or her income, assets, and liabilities. The party must provide a value for each asset and liability although a formal appraisal or valuation report is not required.[8] Typically, each party provides an unsworn schedule of his or her net worth and with it substantial supporting documentation including personal tax returns and assessments, corporate financial statements and corporate tax returns for any private company holdings, bank and investment account statements, and trust deeds and trust financial statements and tax returns for trusts of which the party is either a trustee or beneficiary. The other party may have questions about the financial disclosure. The other party bears some responsibility to pursue any questions about values or the proper extent of financial disclosure at the time. If he or she does not do so, the court may later refuse to set aside the contract.[9]

4. Disclosure for Separated Spouses/Parents

After a relationship is over, or in the case of unmarried non – cohabiting parents, at the time that child support is determined, the parties may resolve property and support issues by a domestic contract, in this case a separation agreement, or by court order. In either case they are required to make onerous financial disclosure. It is not possible to contract out of the financial disclosure required under either the federal or provincial legislation. If the parties enter a separation agreement without

[8] *LeVan v. LeVan* 2008 O.J. No. 1905 (Ont.C.A.), leave to appeal to SCC refused, 2008 SCCA No. 331 (S.C.C.)
[9] *Quinn v. Keiper*2008 O.J. No. 3788 (Ont.C.A.)

the requisite disclosure it will be vulnerable to being set aside by a court at a later date. [10]

a. Sworn Financial Statements

The bare minimum of financial disclosure required by a court is that each party provide a sworn financial statement in the court form.[11] For married spouses the financial statement form requires disclosure of current income, the prior year's income, a current budget, a proposed budget, an itemized listing of special and extraordinary expenses for any children, and a list of all assets and liabilities, including contingent assets and liabilities, with their values as of the date of marriage, the valuation date, and the date the statement is sworn. The valuation date is the date of separation for separated spouses and the day before death if one spouse has died. The financial statement also must include a listing of any excluded assets, such as gifted or inherited assets. The financial statement is a sworn affidavit. The values should be precise and supported by appropriate evidence. In the case of shares in privately held corporations, stock options, phantom shares, real estate, or trust interests, the owning spouse is responsible to obtain and pay for the assets to be valued.[12] Parties routinely retain chartered business valuators and real estate appraisers for this purpose. For unmarried spouses or non-cohabiting parents, the financial statement form does not require disclosure as of the date of separation.

[10] *Rick v. Brandesma* 2009 CarswellBC 342 (S.C.C.)
[11] *Family Law Rules*, O.Reg. 114/99, as am., R.13
[12] *Clement v. Clement* 2012 CarswellOnt 16496 (Ont.S.C.)

Income disclosure creates particular challenges as income for support purposes is not the same as income for tax purposes.[13] What a party's income is for support purposes is often a matter of serious dispute as it is possible for a court to impute income by piercing the corporate veil and including corporate income, by taking into account regular gifts from family members or trust disbursements, or by adjusting for a party paying foreign tax rates, or living in a jurisdiction with significantly different living costs.[14] Parties may have legitimate disputes about whether funds that are taxed as income should be included for support purposes where, for example, there is a double dip between an asset that has been equalized and then is subsequently liquidated and taxed, such as stock options. Disclosing the underlying documents about a disputed class of income may not be sufficient. The party may have to identify the item on the face of the sworn financial statement and explain the legal grounds for excluding it. Failing to do so could result in any agreement or court order being set aside later even if the other party was provided full information.[15]

To initiate or respond to a court proceeding raising property or support claims each party must serve and file a sworn financial statement and a certificate of financial disclosure identifying the relevant documents provided to the other side. Neither party can initiate a claim without disclosing their immediate prior three years of Canadian tax returns and notices of assessment, barring a court order. This forces any party who is not a Canadian taxpayer to

[13] *Dahlgren v. Hodgson* 1998 A.J. No. 1501 (Alta.C.A.)
[14] *Federal Child Support Guidelines,* s. 19
[15] *Smith v. Arsenault-Smith* 2019 ONSC 3600 (Ont.S.C.)

seek and obtain dispensation at the outset of the case. Each party must update his or her financial statement and certificate of financial disclosure at each step in the proceeding and whenever any significant change in financial circumstances has occurred.[16]

During the course of a court proceeding either party may seek further information or documentary disclosure. This may be by serving a Request for Information or, where that is ignored or disputed, by seeking disclosure orders from the court on a case conference or motion. Affidavits of documents are not always prepared in family law proceedings. Either party, however, must produce one if requested by the other party or ordered by the court.[17]

b. Questioning

In Ontario family law cases depositions under oath are called questioning. Questioning is not as of right, although courts routinely grant orders permitting questioning in cases of any complexity. The court may restrict the length of questioning where necessary to preserve proportionality. [18]

c. Third Party Disclosure

Third party disclosure may become relevant in a family law proceeding. There is no automatic right to seek third party disclosure at an interim stage in a proceeding, although either party may subpoena any witness to a trial. At the interim stage

[16] *Family Law Rules,* R.13
[17] *Family Law Rules*, R. 13 and 19
[18] *Family Law Rules,* R. 20

absent cooperation from the third party, a litigant must obtain a court order for third party disclosure on notice to that party.[19] The party seeking the disclosure must show that the requested disclosure is not protected by privilege and it would be unfair to that party to proceed to trial without it. In deciding what is unfair a court considers:

i. The importance of the documents to the litigation;
ii. Whether production at an interim stage rather than at trial is necessary to avoid unfairness;
iii. Whether discovery of the parties to the litigation is adequate on the issue;
iv. Whether the information can be obtained from other sources;
v. Whether the third parties are true strangers to the litigation or have an interest in the subject matter. [20]

Questioning under oath of a third party may only proceed if there is a court order on notice.[21]

5. **Requests for Disclosure from outside Ontario**

[19] *Family Law Rules,* R. 19(11)
[20] *Godwin v. Bryceland* 2008 O.J. No. 4039 (Ont.C.A.)
[21] *Family Law Rules,* R. 20(5)

Canada is not a signatory to the *Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters*.[22] Further, the *Business Records Protection Act*, prohibits the disclosure of corporate records or documents in response to an order or request by a legislative, administrative, or judicial authority outside Ontario. This legislation was enacted to protect Ontario companies from American anti – trust legislation.[23] It is not possible to compel disclosure against an Ontario person or entity pursuant to a foreign authority without obtaining an Ontario court order, absent consent of the party. To obtain a disclosure order from an Ontario court, those conducting litigation outside the jurisdiction must obtain letters of request, or letters rogatory, from their court requesting the disclosure and commence a court proceeding in Ontario. The process is to apply to the Ontario Superior Court of Justice to enforce the request. The foreign litigant must satisfy four preconditions to obtain an order from the Ontario Superior Court, which are:

(i) That a foreign court desires to obtain the evidence or that obtaining evidence is authorized by commission, order, or other process of the foreign court.

(ii) The witness whose evidence is sought must be within the jurisdiction of the court.

(iii) The evidence sought must be in relation to a civil, commercial or criminal matter pending before the foreign court.

[22] HCCH 20: *Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters*, Status Table

[23] *Business Records Protection Act,* RSO 1990, c. B 19

(iv) The foreign court must be a court of competent jurisdiction, capable of granting the relief sought in its own jurisdiction. [24]

Even if these preconditions are met an order compelling the disclosure against an Ontario person or entity is not mandatory. The court has the discretion ot decide as to whether or not to enforce the letters of request. In exercising that discretion the court will consider the following factors:

i. Whether the evidence sought is relevant. The request must identify the facts that establish the relevance of the evidence to the action.
ii. The evidence is necessary for trial and admissible at trial.
iii. The evidence is not otherwise obtainable.
iv. The order sought is not contrary to Canadian public policy.
v. The documents are identified with reasonable specificity; and,
vi. The order sought is not unduly burdensome, considering the scope of the request against what the witness would be obligated to do, and produce if the action were litigated in Ontario.[25]

On the whole, the Ontario courts treat letters rogatory from American courts with comity and respect as our systems and procedural protections for litigants are similar. However, proceeding with disclosure in Ontario is not as straightforward as

[24] *Canada Evidence Act*, RSC 1985, c. C-5, s. 46; *Ontario Evidence Act*, RSO 1990, c. E.23, s. 60(1)
[25] *OPSEU Pension Trust Fund (Trustees of) v. Clark* 2005 CarswellOnt 4658 (Ont.S.C.)

between American states. Ontario legal culture takes a much more restrictive approach to disclosure than many American states. It will be necessary to retain local counsel to bring the application in the Ontario Superior Court and prudent to seek local counsel at an early stage before letters rogatory are drafted to ensure that they will have the best chance of finding favour with the Ontario court.

Bibliography

Legislation

Business Records Protection Act RSO 1990, c. B 19

Canada Evidence Act RSC 1985, c. C-5

Family Law Act RSO 1990, c. F. 3, as am

Family Law Rules, O.Reg.114/99, as am.

Federal Child Support Guidelines, SOR/97-175, as am.

Ontario Evidence Act RSO 1990, c. E 23

Jurisprudence

Clement v. Clement 2012 CarswellOnt 16496 (Ont.S.C.)

Dahlgren v. Hodgson 1998 A.J. No. 1501 (Alta.C.A.)

Durakovic v. Durakovic 2008 CarswellOnt 5329 (Ont.S.C.)

Godwin v. Bryceland 2008 O.J. No. 4039 (Ont.C.A.)

Kerr v. Baranow 2011 CarswellBC 240 (S.C.C.)

LeVan v. LeVan 2008 O.J. No. 1905 (Ont.C.A.), leave to appeal to SCC refused, 2008 SCCA No. 331 (S.C.C.)

Mudronja v. Mudronja 2014 CarswellOnt 15122 (Ont.S.C.)

OPSEU Pension Trust Fund (Trustees of) v. Clark 2005 CarswellOnt 4658 (Ont.S.C.)

Quinn v. Keiper 2008 O.J. No. 3788 (Ont.C.A.)

Rick v. Brandesma 2009 CarswellBC 342 (S.C.C.)

Smith v. Arsenault-Smith 2019 ONSC 3600 (Ont.S.C.)

Tremblay v. Tremblay 2016 CarswellOnt 922 (Ont. S.C.)

Other sources

HCCH 20: *Convention of 18 March 1970 on the Taking of Evidence Abroad in Civil or Commercial Matters*, Status Table

Rogerson, Carol and Thompson, Rollie "Spousal Support Advisory Guidelines – The Revised User's Guide" Thomson Reuters Canada Ltd, 2016

Sarah Boulby

Boulby Weinberg LLP

Curriculum Vitae

Called to the Ontario Bar, 1993

Education

Queen's University, B.A. Hons., 1986

Queen's University, M.A., 1990

University of Toronto, LL.B., 1991

Professional Experience

Boulby Weinberg LLP, Partner, since 2015

Basman Smith LLP, Partner, 2004 – 2015

McCarthy Tetrault LLP, Counsel, 2000-2004

Gowlings LLP, Associate Lawyer, 1993 – 1999

Ontario Law Reform Commission, Counsel, 1993

Law Clerk to Mr. Justice Cory, 1991-1992

Associations

Fellow and Canadian Chapter President of the International Academy of Family Lawyers

Director of the Toronto Lawyers Association

Member of the Law Alumni Association Council of the University of Toronto Faculty of Law