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Crampton wants feds to diversify colours of court

CRISTIN SCHMITZ
OTTAWA

When he became head of the Federal Court, Chief Justice Paul Crampton vowed to work for diversity on a bench where only one of 35 full-time judges came from a minority group.

Since then he has sworn in 22 new members — all of them white — despite the chief justice reaching out over the past four and a half years to senior members of the bar from minority communities.

"The federal government, I think they need a strategy...that's something that I think that a lot of chiefs [justices] around the country feel," Chief Justice Crampton told *The Lawyers Weekly* during an exclusive interview about the national trial court's priorities.

He said so far as he knows, comparatively few minority jurists apply for the Federal Court. Why is a matter of speculation, especially given the opaque federal judicial appointment process. It could be that many minority jurists did not apply over the past decade because they lacked ties to the ruling party, or at least someone to go to bat for them within government — dimming their prospects for success in a process still rife with partisan politics (the new Liberal government has pledged change on that front).

"I've made it quite clear [to Ottawa] that I feel we need to be more reflective of Canadian society, but somebody needs to have a strategy for attracting highly qualified members of the bar who have ethnic backgrounds," the chief justice stressed. "It can't just be left to chance anymore."

Attaining a more representative bench and thus boosting public confidence in the judiciary is part of the chief justice's overarching goal to build the Federal Court into "a stronger national institution."

The Liberals say they share the chief justice's concern about the dearth of diversity on the superior courts, stating they want to ensure that "Canada's judiciary truly reflects the face of Canada." (Of the 15 judges the government has appointed so far, 10 are women, one is Ojibway, and one

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Federal Court Chief Justice Paul Crampton, seen above in his Ottawa office, wants to see changes to the bench selection process that would include more minority appointments and dropping the requirement that judges live in the Ottawa area. ROY GROGAN FOR THE LAWYERS WEEKLY

Israeli paper libel case to be tried in an Ontario court

JOHN SCHOFIELD

In a split decision, the Ontario Court of Appeal has ruled that an Internet libel case involving one of Canada's richest men should be tried in Ontario, even though the allegedly defamatory article was published by an Israeli newspaper and concerned an Israeli soccer team owned by the plaintiff.

The decision in *Goldhar v. Haaretz.com* 2016 ONCA 515, upholds a March 2015 motion by Ontario Superior Court Justice Mario D. Faieta that opened the way for the case to be tried in Ontario.

The article, published by the Israeli newspaper *Haaretz* in November 2011, criticized the management practices of Mitchell Goldhar, a Toronto-based real estate developer who bought one of Israel's most popular soccer clubs, Maccabi Tel Aviv F.C., in 2010.

Goldhar is the founder of SmartCentres, a big-box retail developer that was instrumental in bringing Wal-Mart stores to Canada. The company was sold for $1.16 billion earlier this year to Calloway REIT, a real estate investment trust now known as

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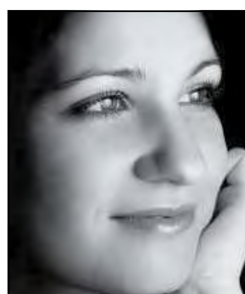

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Calculating execs' spousal support can be complex

Farley Cohen
Antonina Wasowska

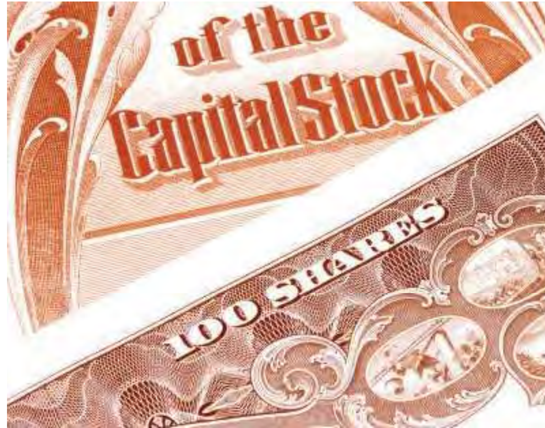
Executives at large corporations (private and public) often have compensation packages that pose challenges for determining net family property (NFP) and calculating income for child and spousal support purposes under the guidelines.

This article illustrates some of the issues that counsel and their business valuators need to consider.

Ms. Ex is a senior VP at Commco, a major public Canadian communications company. Her compensation includes stock options, a bonus plan and forgivable loans to purchase Commco shares. What valuation and income determination challenges does this package present?

Ms. Ex held 200,000 Commco shares, which closed trading at $5 per share on the separation date and stock options to purchase 100,000 shares at $3 each. While at first glance the fair market value of Ms. Ex's shares appears to be $1 million and the options $200,000, the correct valuations are not so straightforward.

Ms. Ex is subject to Commco's insider trading blackout periods, which preclude her from trading the company's shares for five months each year. Similarly, given her senior position, it is difficult for her to execute trades without attracting attention from the market, thereby impacting the share price. Therefore, in calculating the value of her holdings, adjustments may be required to reflect these trading restrictions, as well as the attributes of her options.



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While she had yet to exercise her stock options, they still need to be valued for NFP. Public company options are often valued using an option model such as Black-Scholes, which estimates value at a point in time based on the specific option attributes, market conditions and historical activity of the company's stock. The resulting value may also require an additional discount to reflect the risk that the options may not vest.

> "Assets such as pensions, stock portfolio gains and other deferred compensation plans can likewise lead to double-dip situations.
>
> **Farley Cohen and Antonina Wasowska**
> Cohen Hamilton Steger & Co.

Lastly, certain shares that Ms. Ex purchased with forgivable loans had yet to vest and therefore could not be sold at the separation date. The value of these shares will need to be further discounted to account for the risk that the shares may not vest, and the volatility of the share price between the valuation date and the vesting date.

Ms. Ex's NFP should also reflect contingent disposition costs on her shares and options, based on the likely timing of disposition, giving consideration to overall property settlement, her history of share sales and retirement plans.

Shortly before the separation date, Ms. Ex was granted a two-year forgivable loan to purchase Commco shares. Under Canadian tax provisions, the full amount of the loan will be included in Ms. Ex's income for the year that it is forgiven. Accordingly, the tax owing at that time represents a contingent tax liability to be reflected in NFP at the separation date, discounted for future payment timing.

However, the loan will only be forgiven if Ms. Ex remains employed with Commco on the forgiveness date; otherwise, the loan must be repaid. Therefore, if it appears unlikely that Ms. Ex will be employed by Commco at the forgiveness date, then the loan amount owing (appropriately discounted), rather than tax owing on the income inclusion, should be reflected as a liability in NFP.

Ms. Ex's separation date fell between Commco's fiscal year end, and her bonus payout. Accordingly, a bonus receivable was included as an asset in NFP *and* her bonus was included in her Line 150 income upon receipt. This results in a "double-dip" situation whereby an asset equalized between Ms. Ex and her former spouse also forms part of income for support. Assets such as pensions, stock portfolio gains and other deferred compensation plans can likewise lead to double-dip situations.

In cases with double-dip it is now common for the valuator to calculate income under several scenarios for the court's consideration (with and without double-dip income, for example). Depending on the number of factors involved, and the interplay among the various scenarios, these calculations can become quite complex.

When dealing with executive-level spouses, it is important to understand the executive's compensation package — particularly the terms of any stock-based compensation and incentive plans. At minimum, counsel should request the employment contract, incentive plan agreements, statements showing balances of stock based compensation and pension plans at the valuation dates, and a breakdown of T4 employment income by source for all years under review. A business valuator can then work with counsel to identify and value compensation related assets and liabilities for inclusion in NFP, as well as calculate the spouse's income for support purposes. Executive life can be complicated.

Farley Cohen and Antonina Wasowska specialize in business valuation and damages quantification with Cohen Hamilton Steger & Co. in Toronto.

Neighbourhood: Vigilantism could result in criminal or civil liability

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Jane Doe, Mahaffey, French and Tammy Homolka revealed an extensive level of participation by Homolka. The videotapes were disclosed subsequent to the Crown entering into the "Deal with the Devil," as it is known, where Homolka testified against Bernardo and pleaded guilty to two counts of manslaughter. In exchange, the Crown jointly recommended a sentence of 12 years. Arguments have been made that a miscarriage of justice occurred when the judge did not jump the joint submission.

Res judicata is the principal that a matter may not be relitigated once it has been judged on its merits. Homolka has completed all disposition terms and is not a registered sex offender. Nonsensical articles call for retroactively "adding time." The main purpose of a criminal trial is not to unveil truth but rather to administer justice pursuant to our constitutionally enshrined rights, guided by the rules of evidence and criminal procedure, despite what many in the media clumsily reported throughout the *Ghomeshi* proceeding.

An appellate court has not found that Homolka's sentence was demonstrably unfit due to error of law or improper use of judicial discretion pursuant to s.785(b) of the *Criminal Code of Canada,* R.S.C., 1985 c. C-46. Within the confines of our Canadian legal system, justice has been administered.

Recidivism is a logical concern. The risk of reoffending will be reduced by appealing to Homolka's self-interest. Homolka has been described as a "diagnostic mystery."

Media reports opine, without qualification, that Homolka is a hebephile. According to psychiatrist Dr. Hubert Van Gijseghem and profiler, Candice Skrapec, Homolka occupies a narcissistic personality disorder and sexual sadism disorder, a division of paraphilic disorders found in the DSM-5. A similarly notorious, albeit fictional mother, Cersei Lannister of *Game of Thrones* once stated "love is weakness; love no one but your children."

Homolka likely values her children. Any risk of declension will be minimized by her desire to remain free and with her children, converting to a lower risk to schoolchildren in the future.

When asked about the community's reaction, Homolka's husband responded that "they can move." Freedom of expression is guaranteed at s.2(b) of the *Charter*. The neighbourhood can express their concern; however, vigilantism could manifest criminal or civil liability.

Homolka has the right to reside in any province as guaranteed by s.6 *Charter* mobility rights. There is little doubt that she is manipulative and resourceful. An inference can be made that she carefully chose to return to Canada. Her children should not but likely will end up paying for their mother's crimes. Would it be easier for her to attempt a "normal" life in another country? Not necessarily. Homolka pursued this in Guadeloupe and was identified. Whatever the reason, she has returned, and people either accept her presence in Chateauguay or they do not and move on themselves.

Laurelly Dale is a sole practitioner and practises criminal law and litigation. She is also the director of content development at LexisNexis Canada.

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