

**Equalization Payments During COVID-19: Defer your Mortgage Payments? Why not your Property Division, too?**

*By Ken Nathens and Denniel Duong\**

As the GTA begins its entry into Phase 3 of the ongoing COVID-19 pandemic, many people are wondering how long it will take for the economy to recover. Jobs have been lost and assets have lost value; unfortunately, bills remain due, and in some cases, equalization payments (the one-time money payment that is owed by one spouse to another to equalize respective property values which is calculated as of the date of separation) remain unpaid.

In [\*Serra v Serra, 2009 ONCA 105\*](#), the Ontario Court of Appeal held that a court at trial may consider post-separation changes in the value of a spouse's assets when determining whether or not the value of the equalization payment would be unconscionable. The Court determined that in limited circumstances it could reduce the amount of an equalization payment determined at trial. But what happens if you and your former spouse already have a binding document – a court order, arbitral award, or separation agreement – that provides for a specific equalization payment? For example, \$500,000 is owed by you to your former spouse, and now you are unable to pay this amount due to a decline in the value of assets post-separation; if the applicable appeal period has passed, or an Agreement has been signed, *Serra* no longer applies – unfortunately, the full equalization payment is still required to be paid.

Pre-pandemic, when the equalization payment of \$500,000 was determined, you could have made payment by selling your shares of a lucrative business, for instance, Air Canada. At the time, the shares were worth \$2 million, but you decided to wait for a greater return before you cashed out. Now, because of COVID-19, your shares are worth only a fraction of what they were formerly worth, and you cannot possibly come up with the payment of \$500,000 for the equalization payment.

***So, what do you do now that the value of your only major asset has plummeted due to COVID-19?***

One option of course if personal bankruptcy, however, for good reason, many individuals are reluctant to take this drastic step.

You may find some relief through section 9(3) of Ontario's [\*Family Law Act \(FLA\)\*](#), which provides as follows:

If the court is satisfied that there has been a material change in 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.

Arguably, the impact of COVID-19 on your financial situation would be a material change. However, the *FLA* makes it abundantly clear that a court “shall not vary the amount” of the equalization payment. As the court in [\*Taylor v Taylor, 2005 CanLII 63820 \(ONSC\)\*](#) put it, a claim to vary the value of an equalization payment ordered “is untenable.” So, material change or not, you still owe your former spouse \$500,000. However, in appropriate circumstances, section 9(3) of the *FLA* permits an extension of time for payment, up to ten years.

Section 9(3) of the *FLA* is similar to deferring payments on your equalization, much like many of the Canadian banks have offered for mortgage payments during the pandemic – you still owe the principal amount, but you are given some more time to assist with your cash flow. However, like these mortgage deferrals, be wary of interest, as an extension of time for the payment of an equalization payment will attract interest. To date, the motion to extend the time period for an equalization payment has seldom been used. Post-pandemic this is likely to change.

*\*Ken Nathens is a partner, and Denniel Duong is an associate, at the law firm of Nathens, Siegel LLP, a Toronto law firm dedicated to the practice of family law, including mediation, arbitration, and collaborative law.*