

## VACATION PAY AS A “FAMILY ASSET”

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Paid vacation is a right given to employees by the Employment Standards Act. The Act provides (in Part VIII, Section 28 to 31) that an employee must be given a vacation with pay upon completion of each twelve-month period of employment. It also provides that if employment ceases before the completion of a twelve-month period, the employer is required to pay the employee 4 percent of the wages earned in that part year.

It is sometimes argued that vacation entitlement accrued to the date of separation is just a part of the income package and represents time that can be taken away from work (not cash payable) and therefore it is not subject to equalization on marriage breakdown. These arguments are not valid.

E. Diane Pask and Cheryl A. Hass, in their book *Division of Pensions* have this to say,

Entitlement to vacation pay earned during the marriage has been held to be a matrimonial asset. In *Yaschuk v. Logan*<sup>1</sup> the Nova Scotia Court of Appeal affirmed the decision of the trial judge who concluded the husband's accumulated vacation leave had been converted into an asset subject to division, notwithstanding that it was paid out in the form of income over time following the husband's departure from the Navy and after he took other employment. The husband could have taken annual leave; instead, he chose to save it with the result that “at the end of each year it was just as much a form of savings as if he had taken the money and put it in the bank. Chipman J.A. drew an analogy between the savings account character of pensions and the banking or saving of vacation leave, but he notes that each case turns on its facts. In this case, the stream of payments constituted a matrimonial asset. It did not lose this character because it was paid out over a period of time following the husband's release, rather than in one lump sum. Chipman J.A. noted that a similar approach to accumulated vacation pay was taken by the courts in the Ontario decisions of *Hodgins v. Hodgins*<sup>2</sup>, *Savard v. Savard*<sup>3</sup>. Van Camp J. in *Hodgins* held that the value of the service vacation and unused regular vacation accumulated by the husband to the date of separation was to be included in the calculation of net

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<sup>1</sup> *Yaschuk v. Logan* (1991) (C.A. 1992) 33 R.F.L. (3d) 316 (N.S.S.C.). 39 R.F.L. (3d) 417 (N.S.S.C. Appeal Div.)

<sup>2</sup> *Hodgins v. Hodgins* (1989) 23 R.F.L. (3d) 302 (Ont. H.C.J.), 24 R.F.L. (3d) 23 (Ont. C.J.)

<sup>3</sup> *Savard v. Savard* (1991) Doc. 11371/90, Clarke J. (Ont. Gen. Div.)

family property. In *Kearley v. Kearley*<sup>4</sup> (No. 1)<sup>4</sup> Noonan J. divided the after-tax value of the husband and wife's vacation pay to the date of separation equally between the husband and the wife.

Melvin J. in *Cameron v. Cameron*<sup>5</sup> considered whether holiday pay and severance pay constituted family assets within the meaning of s. 45 of the Family Relations Act. At 108, the judge said the focus today is on the impact of separation on the economic aspects of the partnership of marriage. Melvin J. referred to the principled approach in *Moge v. Moge*<sup>6</sup> and the jurisprudence which expanded the definition of family asset to include items such as holiday pay and severance pay earned and acquired during the marriage as a result of efforts of the family unit, the receipt of which may have been postponed. Vickers J. in *Stewart v. Stewart*<sup>7</sup> held that holiday pay earned before separation was a family asset. In *Lenning v. Lenning*<sup>8</sup> Gow L.J.S.C. said that the holiday was not a family asset but a matter of income. However, it is mentionable that the holiday pay in question was used to acquire an R.R.S.P., which Gow L.J.S.C. held to be a family asset.

From the above it can clearly be seen that accrued vacation entitlement should be valued and included in the Statement of Affairs. This asset can sometimes have a value of several thousand dollars.

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<sup>4</sup> *Kearley v. Kearley* (1991) 94 N.F.L.D. & P.E.I.R. 158, 298, A.P.R. 158 (Nfld. U.F.C.) at 168-169 (Nfld. & P.E.I.R.)

<sup>5</sup> *Cameron v. Cameron* (1994) 100 B.C.L.R. 9 (2d) 104 (S.C.), 9 R.F.L. (4<sup>th</sup>) 358

<sup>6</sup> *Moge v. Moge* 43, R.F.L. (3d) 345 (1992) 3 S.C.R. 813 (1995) W.W.R. 481, 145 N.R. 1, 81 Man. R. (2s) 161, 99 D.L.R. (45<sup>th</sup>) 456 (S.C.C.).

<sup>7</sup> *Stewart v. Stewart* (1993) 50 R.F.L. (3d) 294 (B.C.S.C.).

<sup>8</sup> *Lenning v. Lenning* (1987) B.C.J. No. 351, Gow L.J.S.C. (B.C.S.C.).