

CANADA / JUDGMENT

Barnes-Morrison v. Kolas

2024 BCSC 2033

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Supreme Court of British Columbia

DECIDED

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2024 BCSC 2033 Barnes-Morrison v. Kolas

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Barnes-Morrison v. Kolas,

2024 BCSC 2033

Date: 20241106

Docket: E48799

Registry: Penticton

Between:

Clair Anita Barnes-Morrison

Claimant

And

Evangelos Kolas

Respondent

Before: The Honourable Justice Hardwick

Reasons for Judgment

Counsel for the Claimant:

D.M. King

Counsel for the Respondent:

T.R. Bell

Place and Date of Hearing:

Kelowna, B.C.

September 24 and 25, 2024

Place and Date of Judgment:

Kelowna, B.C.

November 6, 2024

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Overview

- [1] This is an interim spousal support application brought by the claimant, Clair Anita Barnes-Morrison (the "claimant"). It is an atypical interim support application.
- [2] For context, the parties commenced a romantic relationship in 2011 and the relationship terminated on or about April 16, 2023.
- [3] As I will articulate in significantly more detail, entitlement to spousal support is highly contested based upon reliance of a written waiver of spousal support made by the claimant in 2013.

- [4] Even in the event entitlement is established, the quantum of interim support proposed versus interim support sought ranges from \$3,937 per month to \$73,209 per month (albeit with some alternative positions advanced by both counsel as to some middle ground, but on the face of the submissions those are the proverbial "goal posts").
- [5] Added into this already challenging factual matrix is an ongoing dispute regarding the choice of law as between the province of British Columbia and the province of Alberta arising from the order of Justice Kent made July 17, 2024 (the "Kent Order"), in this regard. The Kent Order is presently under appeal and, I am advised, the intention is to proceed with the appeal. I will thus simply state that Justice Kent in his reasons for judgment, indexed at 2024 BCSC 1400 (the "Kent Reasons"), did not determine whether Alberta or British Columbia law would apply, or whether the two written agreements between the parties (which I will detail) were valid or enforceable, but concluded that British Columbia had jurisdiction to hear the action and by default, all interim applications such as this.
- [6] There is presently an interim-interim order for spousal support in the amount of \$23,000 per month in favour of the claimant made by myself on August 28, 2024. That interim-interim order was made in the context of a request for an adjournment of the claimant's notice of application filed August 12, 2024 (the "Application") on behalf of counsel for the respondent and did not involve an in-depth consideration of the materials and fulsome submissions. I acknowledge it was genuine rough justice based on a balancing of relative prejudice(s) to each party.
- [7] Lastly, as is consistent with my description of this being an atypical interim support application, the application record is voluminous. I do, however, have the benefit of transcripts from the cross-examination, albeit limited in scope, of the parties on their supporting affidavits and extremely detailed written submissions from all counsel involved.

The parties and other key players

- [8] The claimant is 63 years of age.
- [9] The claimant previously worked as a licensed real estate agent. Although she has not officially worked in that capacity for a number of years, she has continued to maintain her license and pay her dues accordingly. The claimant is not disabled and has, according to the evidentiary record before me, no notable medical issues which impact her ability to obtain employment.
- [10] The claimant has two adult children who are economically self-sufficient and not dependent upon her. The claimant does reside with her elderly mother and provides care for her. This is not, as I will return to, a new situation.
- [11] The claimant acknowledges that her mother now provides some modest contribution to their shared household expenses from her government benefits and, more significantly, I accept that her mother advanced substantially all of the capital required to obtain a residence for herself and the claimant after the breakdown of the parties' relationship.

There arises from this purchase a possible, and I stress possible, debt owing by the claimant to her mother, but not one which she is required to service monthly at the present time due to her financial circumstances and her mother's dependence upon her. Accordingly, the obligation on the claimant for fulfilling her caregiving role to her mother is, I conclude, presently related to time and energy as opposed to financial.

- [12] The respondent, Evangelos (aka Van) Kolas (the "respondent"), is 58 years of age. The issue of the respondent's Guideline income is, as I will detail, very much in dispute. However, by any possible objective standard, the respondent can be described as a successful businessman. The respondent is not disabled and has no exceptional or notable health issues according to the evidentiary record before me.
- [13] Although the nature of the relationship is controversial, it is not disputed that it terminated on or about April 16, 2023.
- [14] The respondent has no biological children.
- [15] The respondent became involved in the claimant's children's lives when they were in their teenage years and appears to have established a generally good relationship with them, particularly the claimant's son, Johnathon ("Johnathon").
- [16] The respondent's good relationship with Johnathon, which included substantially funding his post-secondary education, continued even after separation. Unfortunately, that relationship has been somewhat strained by this litigation which has placed Johnathon in an unenviable position of divided loyalties. As evidence of this, Johnathon has sworn an affidavit (Affidavit #1 of Johnathon Morrison, sworn/affirmed September 16, 2024) in support of the Application. However, Johnathon's affidavit is drafted in a manner to generally avoid unnecessary rhetoric or make allegations of bad character regarding the respondent.
- [17] The relationship between the respondent and the claimant's daughter (and her spouse) became strained, I accept, as a result of an unsuccessful joint financial investment. This occurred prior to separation. The claimant's daughter has not provided an affidavit.
- [18] The other very relevant players in this litigation are Sam Kolas and Melissa Kolas. Sam Kolas is the respondent's brother and long-time business partner. They are very close. Melissa Kolas is Sam's long-time spouse and the respondent's sister-in-law.
- [19] Sam Kolas and Melissa Kolas have four children together. Their daughter, Samantha Kolas-Gunn, is significantly involved in the family business enterprise. This is acknowledged by the claimant and the respondent. Any role that the remaining three children of Sam Kolas and Melissa Kolas have in the family business enterprise beyond being trustees of the Sam and Van Kolas Family Trust is not articulated in the evidentiary record and, I conclude, is not of meaningful significance.

Background facts

- [20] As noted above, parties' relationship commenced in or about 2011.
- [21] At the time, the claimant was residing in Kelowna, and the respondent was primarily residing in Calgary. I use the word primarily as it relates to the respondent as the respondent did travel for work across Canada, maintained a vacation property in British Columbia and generally had a more flexible residency situation. The claimant, by contrast, worked as a licensed real estate agent situated in the Kelowna area and was the primary caregiver to two teenage children. The claimant thus had a fixed place of residence.
- [22] In early 2013, approximately two years into the relationship, the parties entered into two written agreements. For reasons which I think counsel both concede and Justice Kent noted are rather unusual, the parties signed two identical versions of the same written agreement approximately one month apart (collectively, the "Agreement").
- [23] Specifically, the evidence supports the conclusion that the claimant traveled to Calgary, Alberta, with the respondent and apparently received independent legal advice in respect to the Agreement on two occasions, the first in April 2013 resulting in the version of the Agreement dated April 11, 2013 and the second time in May 2013, resulting in the version of the Agreement dated May 9, 2013.
- [24] There are several very key terms in the Agreement. It is not controversial what these terms are; it is their enforceability which is in dispute. They are also summarized in the Kent Reasons. Accordingly, I am going to simply summarize them even more briefly than Justice Kent did with paragraph references for the benefit of the record:
- a) The claimant and the respondent have entered into a relationship (recital para. 1);
 - b) The claimant and the respondent agree the Agreement governs the division of all property now or in the future, together with entitlement or obligation to pay support but acknowledge their intention to review and revise the agreement in the event they cohabitate or marry (recital para. 2);
 - c) The respondent resides in his own homes in Calgary, Alberta and Kelowna, British Columbia (recital para. 6);
 - d) Each of the parties waives any right to claim an interest in property owned by the other (paras. 12-15);
 - e) Each of the parties waives any right to claim an interest in after acquired property (paras. 21-23);
 - f) The claimant and the respondent mutually waive any claim for support from each other regardless of any change in circumstances (paras. 32-42);
 - g) The parties mutually acknowledge they are not under any duress or undue influence (para. 52); and

- h) There are signed affidavits of execution and certificates of independent legal advice (pages 17 and 18).
- [25] Addressing subparagraph (h), the circumstances and the quality of independent legal advice received by the claimant is very live in this action. The evidence on this point absolutely must be flushed out for the purposes of trial, but I make certain observations on the evidentiary record as it presently stands:
- a) The Agreements were drafted on behalf of the respondent and pre-signed;
 - b) The lawyer who provided the independent legal advice was a referral from the respondent's family's solicitors;
 - c) It is a very grey area in the evidence as to whether the lawyer who provided the independent legal advice practiced family law. I do not accept the claimant's bald assertion that he was a personal injury lawyer. It is an entirely viable alternative explanation that he was a general practitioner who had a varied practice. The failure of the respondent to address this point though is somewhat notable. The respondent obtained the referral from his family's solicitors and if the respondent had any personal knowledge (including admissible hearsay given this is an interim application) that this lawyer did practice family law on a more than perfunctory level, it was open to him to provide that evidence. He did not;
 - d) The lawyer, I am advised, has since retired from the practice of law. This is not unexpected as I understand he was senior level counsel when the material events took place almost 12 years ago. Even if his health permits him to participate, but for the referral source and the somewhat unusual situation of having a client sign the same agreement twice on separate occasions there is a real risk he has no independent recollection of the consultations and the consultation notes, if any, may no longer exist;
 - e) There is no evidence that the lawyer was provided any financial disclosure in advance of providing legal advice to the claimant. This is consistent with the fact that the Agreement, at Schedule "A" contains the barest possible details of the respondent's assets. Balanced against this is the admission by the claimant that she had seen another lawyer previously who had directed her to obtain financial disclosure and she elected to sign the Agreement before the lawyer referred by the respondent's family solicitor;
 - f) The respondent attended at the lawyer's office with the claimant. I consider this the least significant portion of the evidence as the claimant has acknowledged under cross-examination that the respondent was not an aggressive or intimidating individual and he was not actually present in the lawyer's office or meeting room at the time of signing. However, it is not adequately explained, at least to date, why the respondent was present at the lawyer's office at all - especially when the claimant was there to sign an agreement which included a complete waiver of spousal support and property division. Ultimately, it is a possible red flag that could be proven to be a red herring.

- [26] The fact these observations are drawn in the context of an interim application make this case, at the present time at least, distinguishable from *Bradley v. Callahan*, 2024 BCSC 163. Bradley was a trial decision. The legal advice in question was from counsel who was acknowledged to have particular experience in family law at the material time and though retired, was healthy and available to be called as a witness. He was not and an inference was drawn accordingly. It very much remains to be seen here if that same inference of "sufficiently clear, convincing and cogent" evidence can be drawn: see paras. 194-198 of Bradley.
- [27] Interestingly Bradley was also a high net worth family law dispute where there was a written agreement in issue. That agreement did provide for spousal support but only approximately \$10,000 per month. Upon hearing a chambers application during the course of the litigation, Justice Jackson increased interim spousal support to \$60,000 per month (along with child support). Her decision does not appear to have been reported. Justice Jackson's order was appealed on a technical choice of law issue but because it was a limited appeal order and the deadline to file had been missed, the quantum of interim support was not addressed on its merits. Similarly, it was only indirectly addressed at trial because Ms. Bradley received \$8.6 million in lump sum spousal support less the \$60,000 per month she received in interim support (presumably discounted for the different tax treatment of periodic spousal support and lump sum support but that issue is not specifically discussed).
- [28] This case is also distinguishable from *K.M.W. v. L.J.W.*, 2010 BCCA 572, an authority provided by the respondent. *K.M.W.* was an appeal of a summary trial where the quality of the legal advice received by summary trial counsel was put in issue on appeal and the Court directed that a copy of the factum be provided to that counsel with leave to file a responsive affidavit to the allegations (see paras. 44-46).

Relief sought and summary of the issues

- [29] The relief sought in the notice of application filed by the claimant on August 12, 2024 (previously defined as the "Application") is as follows:
- a) A declaration that the respondent's Guideline income is \$3,804,076 for interim support purposes only with his true income to be determined at trial;
 - b) An order that the respondent pay interim mid-range spousal support to the claimant in the amount of \$73,904 per month commencing July 1, 2023, until further written agreement between the parties or court order, pursuant to the Family Law Act and the Spousal Support Advisory Guidelines;
 - c) Costs of this application summarily assessed and payable forthwith in any event of the cause; and
 - d) Such further and other relief as this Honourable Court may deem just.

- [30] Accordingly, the Court must address certain core issues to adjudicate upon the relief sought in the Application. As will be apparent from these reasons for judgment, I have elected to not address them in this specific order but collectively within my overall analysis. The issues I have identified are follows:
- a) Whether the law of British Columbia or Alberta must be applied in relation to the Application;
 - b) Were the parties in a marriage-like relationship;
 - c) Whether it is appropriate to award interim spousal support in the face of written agreements which do, on their face, contain a complete waiver of spousal support;
 - d) Based on this Court's conclusion's regarding issues (a), (b) and (c), can the claimant establish entitlement to interim spousal support having regard to the alleged potential inability to repay; and
 - e) If entitlement is established, determination of the quantum of interim spousal support based upon:
 - i. The respondent's Guideline income;
 - ii. The claimant's Guideline income;
 - iii. The means, needs and circumstances of both parties; and
 - iv. The application of the Spousal Support Advisory Guidelines ("SSAG").

Indicia of marriage-like relationship

- [31] Of all the issues to determine in relation to the Application, the most straightforward is whether the relationship between the claimant and the respondent was "marriage like".
- [32] This issue has been judicially considered on many occasions, both in family law disputes and estate disputes. I prefer to rely on the decision of Justice Dardi in *H.S.S. v. S.H.D.*, 2016 BCSC 1300 at para. 49, rev'd on other grounds, 2018 BCCA 199, where Justice Dardi outlined the following factors which informed her analysis of whether the parties were living as spouses at para. 49:
- Whether the parties vacationed together;
 - Presence or absence of marital relations;
 - How the parties conducted their financial affairs, including any financial planning they undertook as a couple and how they filed their tax returns . . . ;
 - Estate planning;
 - Making shared plans for the future; and

· Participation in joint social activities and the manner in which the spouses presented themselves to others.

[33] Coincidentally, H.S.S. involved litigation over a marriage agreement with a waiver of spousal support.

[34] Turning to facts in this case, the parties were in a committed relationship at the time the Agreements were drafted and signed. The Agreement, signed in 2013, expressly contemplates the parties cohabitating.

[35] They did, in fact, commence cohabitating in a marriage-like relationship. The evidence of this is quite compelling even on an interim application. Without being exhaustive:

- a) The claimant sold her home and moved into a property owned by the respondent. She later moved into a property owned by Sam Koliass and Melissa Koliass. Until the separation and with the financial assistance of her mother, the claimant did not own real property or maintain another primary residence;
- b) The respondent had a parental-type relationship with the claimant's children. According to Johnathon, he referred to the respondent as "pops" and the respondent would refer to Johnathon as his son;
- c) The parties travelled extensively together both for personal purposes and for business purposes;
- d) The claimant's parents lived with the parties for many years when in Kelowna and the respondent had a good relationship with them; and
- e) The respondent voluntarily provided significant financial support to the claimant. I will address this point further below.

[36] In contrast, the four primary arguments advanced by the respondent do not satisfy me that it was not a marriage-like relationship. Given quantum of support in issue, I am going to address each one separately:

- a) I accept the parties never filed a joint tax return. The law is clear on this. Whether parties file tax returns with the "common law" status box checked is not determinative of whether the parties are in fact in a marriage-like relationship. It is relevant, but not determinative: see H.S.S. and also *Lariviere v. Coad*, 2019 BCSC 1691 at para. 191. In this case, the decision to not file as "common law" must further be put into context that from 2019 through 2022, the respondent filed T-1 Personal Income Tax Returns claiming a Line 150/Line 15000 income of between \$2,116,616 and \$13,758,890 per annum. Whilst I do not have the benefit of an income tax summary for the claimant for the same period, based on my review of the evidentiary record, the claimant declared nil or very nominal income in the years prior to separation. It thus may or may not be revealed that the decision to not file tax returns indicating "common law" status was based on accounting advice. That is, in my view, an issue to be canvassed at trial;

- b) The parties did not ever have a joint bank account. In lieu thereof, the respondent regularly provided significant sums of money to the claimant on a monthly (or at least reasonably close to monthly basis) which the claimant deposited to her personal account and had the discretion to spend at her choosing. The amounts provided were not insignificant but there is no evidence in the record which suggests that the respondent was not fully aware the claimant was using these funds to support herself and, at times, pay for expenses which had a mutual benefit to the parties. If the claimant had been required to specifically account for the funds provided by the respondent, the lack of a joint account might have some greater significance. As it stands based on the record before me, I accept that the financial arrangements between the parties made practical sense in their circumstances and are not supportive of the submission that the parties were not in a marriage-like relationship;
- c) The parties did not own any real property together. Again, this is a situation specific consideration. The respondent has not held real property in his personal name since on or about October 30, 2015. The claimant did own real estate in her name when the parties first started their relationship and used a portion of the eventual proceeds from the sale of that property to make upgrades to a residence owned by Sam Kolas and Melissa Kolas in West Kelowna where the parties were residing. Again, I accept the arrangements between the parties made practical sense and are not supportive of the submission that the parties were not in a marriage-like relationship; and
- d) The respondent has maintained an Alberta driver's license and filed his T-1 Personal Income Tax returns on the basis of being an Alberta resident. In my view, this was squarely before Justice Kent on the basis of the jurisdictional response filed on behalf of the respondent. Moreover, parties can habitually occupy more than one residence concurrently: See: *Broad v. Pavlis*, 2015 BCCA 20. Whilst that may raise important jurisdictional issues, as occurred here, that does not mean the parties were not in a marriage-like relationship. Moreover, periods of geographical separation do not undermine or negate the other indicia of a marriage-like relationship.
- [37] Lastly, one particularly creative argument advanced by the respondent is that he occasionally engaged in intimate relations with women other than the claimant and that this should be considered in determining whether it was a marriage-like relationship. While demarcation of when a relationship became monogamous can be relevant in determining whether shorter relationships meet the benchmark for marriage-like status and the entry into a new monogamous relationship can be relevant in determining the date of separation, I am aware of and was referred to no case authority that would support the proposition that occasional infidelity by one partner (or even both partners) in an otherwise outwardly monogamous long-term relationship negates its marriage-like characteristics.
- [38] On the flip side of this, I do not find the claimant's evidence that she referred to herself publicly as the respondent's wife as persuasive. The parties entered into their relationship as mature individuals. Referring to each other as "girlfriend" and "boyfriend" may not have been something either was understandably not entirely comfortable with. Similarly, while

an acceptable alternative to many, the use of the word "partner" can be somewhat ambiguous. Such a term can equally apply to a business partner, law partner and so forth. Ultimately, I find the claimant's decision to refer to herself as the respondent's wife and the respondent's generally tacit cooperation with same is not material to determination of whether the relationship was marriage-like. What is far more significant is the fact that the relationship, as I have detailed, extended for more than a decade with regular cohabitation, significant voluntary financial support provided by the respondent to the claimant, considerable involvement of their respective families/extended families and no identified periods of actual separation, save for geographical separation at times, prior to the breakdown of the relationship.

- [39] I ultimately conclude that this was a marriage-like relationship regardless of whether British Columbia or Alberta law applies. In saying this, I expressly acknowledge that the legislation in issue is not identical. Based upon the strength of my findings of fact regarding the indicia of a marriage-like relationship, they are distinctions without difference in this case. Marriage-like was marriage-like whether in British Columbia and Alberta.
- [40] In order to make any possible support order, however, I must specify the legislation which I am applying. In this case, that obviously is a choice between British Columbia and Alberta law given the choice of law issue arising from the term in the Agreement. Is it the British Columbia Family Law Act, S.B.C. 2011, c. 25 ("FLA") or the Alberta Family Law Act, SA 2003, c F-4.5 ("Alberta FLA") that applies?
- [41] The respondent provided lengthy written submissions on this point due to its significance to the future property issues, including the law on setting aside the Agreement and to the claimant's potential entitlement if the Agreement is set aside. I am going to only summarize them:
- a) There are differences between the law regarding interim and permanent support between British Columbia and Alberta;
 - b) The differences are most starkly evident on consideration of the spousal support waivers in agreements. Specifically:
 - i. In British Columbia there are effectively two statutory bases to set aside an agreement relating to spousal support. Those are procedural irregularities such as lack of disclosure, lack of understanding, vulnerability and so forth, and even if no procedural irregularities, on the basis of significant unfairness; and
 - ii. In Alberta, the statute provides that the court may not make an order regarding spousal support which differs from the support provisions unless the agreement is both inequitable and the challenging spouse did not receive independent legal advice. Inequitable does not, according to respondent's counsel, appear to have been judicially interpreted by the Alberta courts but suggests it is likely a substantive unfairness analysis;

- c) The general rule is that the courts will respect the parties' choice of law provided it is (a) bona fide; (2) legal; and (3) there are no public policy grounds for which the chosen law should not be applied.
- [42] The submissions are quite persuasive, but they miss a very key point. The respondent appealed the Kent Order and that appeal is still ongoing. The Kent Order also has not been stayed.
- [43] Importantly, the notice of application filed by the respondent on March 21, 2024, gave rise to the hearing before Justice Kent sought, inter alia, the following relief:
- a) a determination of the law which applies to the parties' 2013 Agreement;
 - b) a determination of the law which applies to the issue of property division; and
 - c) a determination of the law which applies to the issue of spousal support.
- [44] The choice of law issue thus has already been before this Court on an interim basis and was left for trial by Justice Kent. The evidentiary record on this issue is effectively identical to that which was before Justice Kent. In all the new affidavits sworn for this Application none of the facts regarding choice of law have changed. On what legal basis would I now decide the choice of law issue on a final basis in the context of an interim application? The answer to that is none that I could locate.
- [45] Stated plainly, choice of law remains an issue for trial. Whether that trial is in British Columbia or Alberta.
- [46] Having reached that conclusion, I still have to apply either the FLA or the Alberta FLA for the purposes of the Application as the appeal cannot deprive the claimant of her right to pursue interim support.
- [47] In the circumstances, I have decided that the FLA should govern for the purposes of the Application.
- [48] I reach my conclusion on the choice of law for the purposes of this Application on the basis that there are not spurious claims to set aside the Agreement in proceedings commenced in British Columbia. At least at present, British Columbia has jurisdiction to hear those claims. I am not going to weigh into the legal analysis on choice of law further as I do not wish to make any findings or draw any conclusions that would tie the hands of the trial judge.
- [49] I will note that, having reached this conclusion on what I think is a very solid evidentiary basis that the parties were in a marriage-like relationship, I conclude the law regarding interim spousal support is not materially different between both jurisdictions despite the respondent's arguments to the contrary.

- [50] Specifically, I recognize the respondent's point about the Alberta FLA mandatory language regarding lack of independent legal advice in setting aside an agreement with a waiver of support as articulated above. As I already identified, however, whether the claimant actually received independent legal advice, received cursory and unsatisfactory legal advice, or simply signed a written agreement before a lawyer that contained a term saying independent legal advice had been received is a very live issue for trial.
- [51] Accordingly, beyond entitlement, I principally have to conduct a Guideline income determination for both parties, something guided strongly by the Federal Child Support Guidelines income determination provisions which are the law in both provinces and then apply the SSAG, which are not the law but extensively relied on by courts in both provinces.

Interim support principles generally

- [52] The principles applicable on an application for interim spousal support are well established. As set out in the often-cited case of *Robles v. Kuhn*, 2009 BCSC 1163 at para. 12 (citations omitted) are as follows:
- (1) The applicant's needs and the respondent's ability to pay assume greater significance;
 - (2) An interim support order should be sufficient to allow the applicant to continue living at the same standard of living enjoyed prior to separation if the payor's ability to pay warrants it;
 - (3) On interim support applications the court does not embark on an in-depth analysis of the parties' circumstances which is best left for trial. The court achieves rough justice at best;
 - (4) The courts should not unduly emphasize any one of the statutory considerations set out in the FLA;
 - (5) On interim orders the need to achieve self-sufficiency is often of less significance;
 - (6) Interim support should be ordered within the range suggested by the SS Advisory guidelines unless exceptional circumstances indicate otherwise;
 - (7) Interim support should only be ordered where it can be said a *prima facie* case for entitlement has been made out; and
 - (8) Where there is a need to resolve contested issues of fact, especially those connected with a threshold issue, such as entitlement, it becomes less advisable to order interim support.
- [53] See also *I.F. v. R.J.R.*, 2015 BCSC 793, at paras. 122 to 126 which are very instructive:
- [122] The main purpose of an interim order for spousal support is to bridge the period between when the action is commenced and the trial at which time the court will be in a position to make a decision on the merits: *D.R.M. v. R. B.M.*, 2006 BCSC 1921; *Goriuk v Turton*, 2011 BCSC 652.

- [123] Because interim orders are summary in nature and temporary, they provide a rough justice at best: *Newson v. Newson*, 65 B.C.L.R. (3rd) 22 (C.A.) at para. 11. The "rough justice" approach underlying the temporary order implicitly recognizes that the evidence before the chambers judge on the interim application is often insufficient to permit an in-depth analysis of the wide array of factors relevant to entitlement and quantum of support: *R.C.G. v. C.L.G.*, 2010 BCSC 1596, para. 11; *Johnson v Johnson*, [1993] B.C.J. No. 2140 at 16.
- [124] The legal test governing interim support is not necessarily the same as the test applicable in reaching the final order: *Goriuk*. This is because the full picture of many of the considerations under the applicable legislation will not be known until a fulsome inquiry on the merits is embarked upon a trial.
- [125] Relying on *Newson*, *Goriuk* confirmed that where the marriage is admitted and need is proved interim support should be ordered without adjudicating the issues, unless the action is frivolous or vexatious.
- [126] While the other relevant factors that inform the issue of spousal support are to be considered to the extent possible, the respective needs and means of the parties are ordinarily the central factors, if not the most prominent, on an interim application. The corollary is that considerations such as compensatory factors and the need to achieve self-sufficiency often hold less significance: *R.C.J. v. C.L.G.*, 2010 BCSC 1596 at para. 11; *Goriuk* at para. 33.

Entitlement to spousal support

- [54] But for the Agreement, the claimant's prima facie entitlement to spousal support on a compensatory and non-compensatory basis is obvious: see *Chutter v. Chutter*, 2008 BCCA 57 at paras. 49-62.
- [55] Specifically, I find as follows:
- a) The claimant did not work outside of the home for an extended period of time with the consent and cooperation of the respondent;
 - b) The claimant travelled extensively with the respondent while he attended to his work obligations, providing companionship and, given the nature of his role with Boardwalk, some limited assistance to him from time to time;
 - c) The claimant gave up her career during the course of the relationship. A career which had allowed her to be economically self-sufficient;
 - d) The claimant relied on the voluntary financial support of the respondent after leaving that career; and
 - e) Even without conducting a detailed Guideline income analysis, there is a disparity in the incomes of the parties given the claimant's present income is nil.

- [56] In the face of this is the Agreement. It is very clear in its terms that there is a complete mutual waiver of spousal support. That waiver, however, was provided 12 years ago. It was provided before the claimant left her employment and became dependent on the voluntary support of the respondent.
- [57] A court has discretion to order interim spousal support ". . . despite the existence of a marriage agreement that purports to disentitle the applicant from support, provided the applicant is seeking to have the agreement set aside at trial." Beyond the applicant's financial need and the payor's financial means and ability to pay, the court must consider the strength of the applicant's case to set aside the agreement and his or her capacity to repay the amount awarded on an interim basis: See *I.F. v. R.J.R.*, 2015 BCSC 793, at para. 170.
- [58] *I.F. v. R.J.R.*, at para. 172, the Court concluded that the spouse seeking interim spousal support need not demonstrate a strong prima facie case or a likelihood or probability of success of impeaching the marriage agreement. Instead, the evidence must sufficiently raise a "substantial question" about the enforceability of the impugned agreement. In other words, the claimant must show there is a "reasonable prospect of success" in setting aside the marriage agreement at trial.
- [59] Having concluded that I will apply BC law for the purposes of the Application, ss. 164(3) and (5) of the BC FLA are relevant as they underpin the claimant's claim to set aside the agreement. Those sections provide as follows:

Setting aside agreements respecting spousal support

164 (3) On application by a spouse, the court may set aside or replace with an order made under this Division all or part of an agreement described in subsection (1) only if satisfied that one or more of the following circumstances existed when the parties entered into the agreement:

- (a) a spouse failed to disclose income, significant property or debts, or other information relevant to the negotiation of the agreement;
 - (b) a spouse took improper advantage of the other spouse's vulnerability, including the other party's ignorance, need or distress;
 - (c) a spouse did not understand the nature or consequences of the agreement;
 - (d) other circumstances that would under the common law cause all or part of a contract to be voidable.
- (5) Despite subsection (3), the court may set aside or replace with an order made under this Division all or part of an agreement if satisfied that none of the circumstances described in that subsection existed when the parties entered into the agreement but that the agreement is significantly unfair on consideration of the following:
- (a) the length of time that has passed since the agreement was made;

- (b) any changes, since the agreement was made, in the condition, means, needs or other circumstances of a spouse;
- (c) the intention of the spouses, in making the agreement, to achieve certainty;
- (d) the degree to which the spouses relied on the terms of the agreement;
- (e) the degree to which the agreement meets the objectives set out in section 161 [objectives of spousal support].

[60] In this case, the claimant primarily relies on s. 164(3) of the FLA, namely that the Agreement was negotiated without full disclosure and without proper independent legal advice being provided to the claimant.

[61] The alternative argument is that the Agreement is significantly unfair because, considered collectively, it does not conform with the objectives of s. 161 of the FLA on the basis that it fails to recognize the economic advantages to the respondent and disadvantages to the claimant arising from the relationship and its breakdown and relieve any economic hardship arising from the breakdown of the relationship. The issue of any changes in circumstances since the Agreement was signed also falls under the significant fairness analysis.

[62] In addition, the Agreement was drafted on the basis that the parties were still living separately but that they intended to cohabitate. Given this, it contains the somewhat peculiar clause (recital para. 2) that sets out an intention to review and revise this Agreement in the event that they cohabit or marry. Balanced against this is the fact that over the course of the next 10 years, no review was ever initiated.

[63] Having considered my findings of fact and applying the above, I have concluded that the claimant has a reasonable prospect of success in her claims to set aside the Agreement waiving any right to spousal support and thus, for the purposes of interim spousal support as sought in the Application the claimant has proven entitlement. In the event that the respondent is entirely successful in enforcing the Agreement at trial, the treatment of the interim support paid will have to be dealt with in that forum.

Corporate overview

[64] The respondent is associated with a complex commercial enterprise which I am going to very broadly define as "Boardwalk". I use the term associated on purpose as the respondent's involvement with Boardwalk goes to the very core of the issue of Guideline income determination.

- [65] It is not disputed that the respondent's primary involvement on a day-to-day basis with Boardwalk generally consists of travelling to communities in Alberta, Saskatchewan, Ontario, Quebec and most recently Victoria, British Columbia to maintain the upkeep of various real properties, visit with on-site management and relevant service providers, generate necessary reports, and oversee landscaping. The respondent may render other services but this, I conclude, is a fair overview.
- [66] Sam Kalias is in charge of the business side of Boardwalk - accounting, legal, acquisitions/dispositions, financing, and other similar tasks associated with being the Chairman and CEO of an operation of this nature.
- [67] Going back in the chronology, Boardwalk was established by the respondent and Sam Kalias in 1984 and subsequently went public in 1994.
- [68] In 2006, Boardwalk converted to a Real Estate Investment Trust ("Boardwalk REIT") which it continues to be today.
- [69] The Boardwalk REIT is a publicly traded entity currently listed on the Toronto Stock Exchange. Units of a publicly traded investment trust are functionally the equivalent of the shares of a publicly traded corporation.
- [70] The Affidavit #1 of Monis Uddin affirmed September 11, 2024, details the history of Boardwalk. Monis Uddin is the vice president of corporate development at "Boardwalk Properties". I understand this to likely refer the later defined term in said affidavit as the "Boardwalk Properties Group". Regardless of what specific entity might formally employ Monis Uddin, I accept that they have personal knowledge of the corporate structure of the Broadway Properties Group.
- [71] After material reorganizations in May 2018 and May 2020, appropriately referred to as estate freezes, the corporate structure of Broadway Properties Group at the date of separation can be summarized as follows:
- a) The Boardwalk Group of Companies includes various entities included but not limited to:
 - i. Park Place Holdings ("PPHL");
 - ii. Boardwalk Properties Company Limited ("BPCL");
 - iii. BPCL Holdings Limited ("BPCL Holdings"); and
 - iv. 1103891 AB Ltd. ("1103").
 - b) PPHL, BPCL, BPCL Holdings and 1103 are privately held companies.
 - c) BPCL and 1103, in turn, own units in Boardwalk REIT. Specifically, BPCL owns 8,675,000 class A units of Boardwalk REIT and 1103 owns 4,475,000 class B units. The value of the class A and class B units are the same;

- d) The Boardwalk Properties Group are ultimately owned by two entities - PPHL and Boardwalk Investment Ltd. ("BIL");
 - e) Each the respondent and Sam Kolias presently hold an equal number of preferred shares in their respective companies, PPHL and BIL. Their respective 103,563 shares have a redemption value of \$1,000 per share. Thus, the respondent and Sam Kolias are each the registered owners of preferred shares worth \$103,563,000 for a total of \$261,126,000.00. Interestingly, at the time of the second estate freeze in May 2020 the combined value of the respondent and Sam Kolias' preferred shares was \$480,000,000 but they were re-frozen at a lower value due to a drop in the share price was significantly depressed due to the onset of the COVID-19 pandemic.
 - f) What the "agreements" there are between the respondent and Sam Kolias regarding the preferred shares is murky at best. What is documented is that the respondent and Sam Kolias have each redeemed 31,438 preferred shares since the May 2020 estate freeze. With a fixed value of \$1,000 per share that amounts to a total preferred share redemption of \$62,876,000 with \$31,438,000 allocated to each the respondent and Sam via their respective shareholder loan accounts;
 - g) On May 15, 2020 a Trust Deed was executed establishing the Sam and Van Kolias 2020 Family Trust. The settlor is a third party and the trustees and beneficiaries are the respondent, Sam Kolias, Melissa Kolias, Samantha and the remaining three children of Sam Kolias and Melissa Kolias (the "Trust"); and
 - h) Excluding the preferred shares, the remaining value is in the common shares of PPHL and BIL. These common shares are owned by the Trust.
- [72] The corporate structure can be best understood visually through the "Combined and Detail Organization Structure" as at May 15, 2020 chart included in Monis Uddin's affidavit.
- [73] I was also provided with a "Combined and Detail Organization Structure" as at December 31, 2023 chart. The changes in the corporate structure were made post-separation and said to reflect a long-standing agreement which saw the transfer of a single voting share from the respondent's holding corporation to Sam Kolias' holding corporation which, it was submitted, gave Sam Kolias what he always had: de facto control and power.
- [74] Beyond detailing the corporate structure, the Affidavit of Monis Uddin provides evidence as to the relationship between the respondent and Sam Kolias which goes to the issue of the determination of the respondent's Guideline income. I will quote the following paragraphs:
- a) "Prior to May 2, 2018 While the brothers each owned half the company on paper, Sam exercised control of the Boardwalk Properties Group" (para. 6);
 - b) "I am advised by Sam and Van, and I believe them, that they have a verbal agreement Van will not call for any redemption of his preferred shares in PPHL or ask for any of the proceeds of the redemption to be paid to him in cash, without Sam's approval" (para. 30);

- c) "If Van were to call for the redemption of he would not be able to receive any significant funds without Sam's cooperation or approval" (para. 31); and
 - d) "The ownership structure and corporate documents relating to the control of Boardwalk Properties Group reflects the longstanding pattern of behaviour that I have witnessed in my time at Boardwalk; namely, that Sam controls all the corporate-decision making and Van does not interfere" (para. 38).
- [75] This is entirely consistent with the overall theme throughout the affidavits, including that Sam Kolias, assumed control of the business side of the Boardwalk Properties Group from the outset. He has obviously done a good job. In return, the respondent trusted Sam Kolias and deferred to his acumen. They are and remain very close. It is extremely difficult to reconcile this with the evidence that Sam Kolias is effectively going to turn off the tap (which has been running for years) to the respondent, his brother and long-term business partner. It seems extremely convenient.

Overview of financial disclosure issues

- [76] Although I have attempted to summarize them above as concisely as possible for the benefit of these reasons, to say that the corporate structure and related dealings between the parties are complicated to dissect is a gross understatement. That, even for a member of this Court that has prior experience dealing with complicated financial arrangements in family law disputes.
- [77] Adding to this complicated factual matrix is the piecemeal disclosure that has been provided by the respondent to date. To put that statement into context, I acknowledge that the respondent was entitled to file a jurisdictional response in accordance with the Rules and argue the jurisdictional issue before Justice Kent before attorning to the jurisdiction. Justice Kent's order regarding costs confirms a similar view.
- [78] That being said, Justice Kent's order was made July 17, 2024. Between that date and the hearing of the Application, the respondent still had not provided a list of documents in accordance with the Rules within this proceeding.
- [79] The respondent did, pursuant to my August 28, 2024 order, file an updated Form 8 Financial Statement on September 11, 2024 (the "September F8"). I will address this in detail as it has genuine significance to consideration of the remaining issues to be determined. However, the submission on behalf of the claimant's counsel (acknowledged to be paraphrased by this Court) that the September F8 raises more questions than it provides answers is very on point.

Determination of the respondent's Guideline income

- [80] In the respondent's original Form F8 Financial Statement, sworn August 18, 2023 (the "August F8"), he deposed to having a Guideline income of \$3,804,076.

- [81] In the September F8, the respondent now deposes to having a Guideline income of \$304,078. This is consistent with his Line 15000 income as declared on his 2023 T1 Personal Income Tax Return.
- [82] This rather astounding change in circumstances is somewhat explained in the evidentiary record on the basis that the respondent historically did not receive compensation for his work for Boardwalk and is now, since separation, receiving a salary of \$200,000 per year. When I say somewhat explained, I acknowledge that it is asserted that the money reported in the respondent's income tax returns was never paid to him directly and that, as explained above, the monies received from the redemption of the preferred shares went to his shareholder loan account (beneficial ownership of which is disputed).
- [83] I simply do not accept, for the purposes of the Application, that the respondent has a Guideline income of \$304,078. I reach this conclusion for the following reasons:
- a) First and foremost, as set out above, the respondent himself deposed to having a Guideline income of \$3,804,076 in his August F8. The respondent deposed to the truth of this information while having legal counsel - who had already filed a jurisdictional response approximately two months prior and thus, I conclude, a more than perfunctory understanding of the file. I do acknowledge that there are some notes in the preamble portion of the August F8 which are somewhat consistent with the respondent's current position, they are broad and conclusory. I have highlighted two verbatim quotes for context in making this observation:
 - i. "Going forward, any income that I receive will continue to be discretionary and based on tax and estate planning"; and
 - ii. "In addition, the income I receive at the end of the year is discretionary, and distributed to me in an amount decided by my brother Sam Kolas, whose holding company is the majority shareholder of BCPL".
 - b) Save and except for 2021, the August F8 is not inconsistent with the respondent's income on his T1 personal income tax returns, which were professionally prepared, and reported a Line 150/150000 as follows:
 - i. 2017 - \$4,997,993;
 - ii. 2018 - \$1,459,515;
 - iii. 2019 - \$2,116,616;
 - iv. 2020 - \$3,737,450; and
 - v. 2021 - \$3,804,076.(5 year average of \$3,223,130 - 4 year average of \$3,664,033 if 2018 is excluded)

- c) In 2022, the respondent declared a Line 15000 income on his T-1 Personal Income Tax return of \$13,753,890.75. Even the claimant is not suggesting that this be used as his Guideline income or even that it be included as part of a patterning or averaging of income. But it underscores the Court's concerns about the extent of the financial disclosure made in a case involving income of this reported magnitude;
 - d) The respondent is, according to the present evidence before the Court, performing the same functions for Boardwalk that he did prior to separation;
 - e) On April 18, 2024, the respondent's accountants sent him correspondence instructing him to pay installment payments to the Canada Revenue Agency in the amount of \$1,445,156 for the 2024 taxation year. I recognize this factors in the 2022 T-1 Personal Income Tax return which is acknowledged to be anomalous (and resulted in a reported income tax refund of \$2,889,816.46) but the respondent's accountants have to realistically expect these installment payments to be funded from the Kolias family enterprise. One does not pay \$1,445,156 in tax on an income of \$304,708 per annum; and
 - f) The respondent, I find, has the assistance of Sam Kolias in controlling the "proverbial tap" arising from the Kolias family enterprise whilst his income is under scrutiny in these proceedings. He actually specifically deposes to this as I have highlighted above. The Court is very cognizant of this reality in considering the appropriate determination of Guideline income: See *Quinton v. Kehler*, 2020 BCCA 254 at para. 65.
 - g) This Court has previously drawn similar skepticism about the income available to a recipient of discretionary trust: see *Younger v. Younger*, 2017 BCSC 363. The problems with disclosure were more significant, but the skepticism is heightened where there is such a dramatic post-separation decrease in Guideline income.
- [84] I clearly recognize that I could utilize the methodology contemplated under s. 18 or s. 19 of the Federal Child Support Guidelines (routinely applied in spousal support cases) to either attribute corporate income to the respondent or simply impute income to the respondent.
- [85] In this regard, and before turning to my analysis, I was referred by counsel to the quite recent decision in *Zhang v. Chen*, 2023 BCSC 2206, which addresses imputation of income in the context of an interim support application which contains the following summary commencing at para. 64 which I consider very apt:

64 The court's discretion to impute income is broad and not subject to the restrictions in ss. 16 through 18 of the Guidelines: *Ouellette v. Ouellette*, 2012 BCCA 145, at para. 66. In doing so, the court may "employ common sense": *Riemersma v. Riermersma*, 2013 BCSC 474 at para. 39.

65 As noted in *Tang v. Cheng*, 2020 BCSC 1341, as a general rule, income should not be imputed to a spouse on an interim application unless the evidence is properly developed or there are appropriate circumstances. The court in *Tang* referenced *I.F. v. R.J.R.*, 2015 BCSC 793 for that proposition although, the court in *I.F.* was not that definitive, but rather acknowledged that there was authority against doing so, but in that case still imputed income finding that that payor was "playing fast and loose in representing income" (at para. 135)

66 In *P.W. v. G.Z.*, 2021 BCSC 467, the court found it was appropriate to do so where the evidence as to income was so conflicting, and the assertions as to earning only a modest income of \$36,000 was substantially incongruous with the parties' lifestyle prior to separation.

67 The respondent referred to the court to *Kouznetsova v. Kouznetsova*, 2014 BCCA 160, where the court noted as follows:

[44] This Court has said the primary purpose of interim orders in family matters is to maintain the status quo between the parties: *Johnson v. Jessel*, 2012 BCCA 393 at para. 48, citing *Leung v. Leung* (1998), 1998 CanLII 4652 (BC CA), 44 R.F.L. (4th) 121 (B.C.C.A.) at para. 10; *Eaton v. Eaton* (1987), 1987 CanLII 2950 (BC CA), 11 R.F.L. (3d) 92 (B.C.C.A.); and *Prost v. Prost* (1990), 1990 CanLII 907 (BC CA), 30 R.F.L. (3d) 80 (B.C.C.A.) (in Chambers).

68 The respondent has also raised as a consideration on this application his concern that the claimant is forum shopping. Specifically, he argues, that by commencing proceedings in both British Columbia and China, and then by permitting some of the property issues to be dealt with in China, she is picking the more favourable court by issue. Although, I note that it was not the claimant, but SSPSE that commenced the trust claims in China.

69 In addition, while the court on this application has not been asked to consider choice of law, the respondent says that there are live issues in that respect.

70 The various issues raised by the respondent show a number of triable issues. However, in so far as they have been raised on this application, they do not establish that the claimant is bound to fail on her claims for spousal support, such that I remain of the view that there is a *prima facie* case as to entitlement.

71 As has often been noted, on interim applications such as this the courts seek to achieve rough justice because live issues that may be determinative as to the final resolution are better left for trial when credibility can be assessed.

72 The overall purpose of interim support orders is to serve the interests of the parties in a way that is consistent with the status quo until they can have the issues resolved on that full evidentiary record, while balancing the prejudice of each party should they ultimately be successful by giving full consideration of their respective means and needs.

73 While I do not agree with the respondent that income is not to be imputed on interim applications, I do agree that if the court does so, it should exercise considerable caution and be satisfied that there is sufficient evidence to support the imputation or, to paraphrase the court in I.F. and P.W., be satisfied that the evidence as to the payor's lifestyle is so incongruous with the payor's claimed income that the payor's evidence is objectively questionable.

74 Further, as noted in I.F. at para. 15, in making interim orders, the court should not be so cautious so as to be timid.

75 However, the court must have some evidentiary basis for any imputation of income that is made: *MacCarthy v. MacCarthy*, 2015 BCCA 496 at para. 35.

76 Orders imputing income should not be made on pure speculation although, by its very nature, rough justice will inherently require that the presider make some reasonable assumptions.

[86] For the reasons I have outlined, I did not accept that the respondent's income is \$304,708. It is also very likely not \$3,804,076 as the respondent has tendered evidence of the surrounding circumstances giving rise to the filing of his 2022 T-1 Personal Income Tax Return. This Court has previously recognized in a not entirely dissimilar case that a potential payor's Line 15000 (then Line 150) income did not accurately reflect the monies available to pay support: *Stober v. Stober*, 2015 BCSC 743, specifically paras. 71-80.

[87] The difficulty that I have is that, even when taking the direction to "not be so cautious as to be timid", I cannot, based on the fragmented documentation, even properly impute him an income under s. 19 of the Guidelines. I must, as articulated above, have some evidentiary basis and not purely speculate.

[88] The level of speculation required here is akin to trying to play the judicial version of pin the tail on the donkey at this particular point of this particular case. The difference in the parties' positions on Guideline income is approximately \$3,400,000.

The claimant's Guideline income

[89] Having regard to my conclusion regarding the inability to determine the respondent's Guideline income on the present evidentiary record and my ultimate order set out below, the determination of the claimant's Guideline income is an issue of less significance and, quite apparently, less contention between the parties.

[90] It is conceded that the claimant has not worked outside of the home for a number of years as she was comfortably financially supported by the respondent and her employment, I conclude, would have interfered with their joint travel.

- [91] The claimant also has the obligation to assist in providing care for her elderly mother, something which the respondent was fully aware of at the time of the separation. It is not an obligation the claimant has taken on post-separation to avoid returning to the work force and one that I accept that the claimant cannot now morally divest herself of so long as her mother is capable of living outside of an assisted living facility.
- [92] That said, the claimant has a legal obligation to make reasonable efforts to be self sufficient following the breakdown of the relationship. She had a meaningful career previously and is, as noted, in good health. On the basis of the principles set forth in s. 19 of the Federal Child Support Guidelines and the extensive caselaw interpreting same, I consider it appropriate to impute the claimant an interim interim Guideline income of \$40,000 per annum.
- [93] This amount is above minimum wage to reflect the fact that the claimant has a skillset, but also takes into consideration her age and other circumstances which impact on her employability/self-employability. It is also slightly higher than the amount submitted by the respondent, albeit in the context of his Guideline income being determined to be \$304,078 per annum.

Conclusion

- [94] In conclusion, I am not satisfied for the reasons identified that the Court is in a position to make a proper and considered determination of the respondent's Guideline income at this juncture.
- [95] The Application is thus adjourned generally subject to the below terms.
- [96] Having regard to the fact that I am the interim case management justice, this conclusion does not toss the parties into the judicial ether to start afresh. The matter, with a revised evidentiary record containing more fulsome disclosure, including perhaps third-party documentation and possibly an expertly prepared Guideline income report, can come back before me at a date approved by Supreme Court Scheduling and necessary procedural orders can be made at the upcoming judicial case management conference.
- [97] The issues at the rescheduled hearing will be focused on the respondent's Guideline income and the resulting quantum of support upon an application of the SSAG and a consideration of the means, needs and circumstances of the parties. I have been able to find the necessary facts to decide the other issues outlined at para. 30 of these reasons for judgment.
- [98] In the meantime, the interim-interim order I made on August 28, 2024, for payment of spousal support to the claimant in the amount of \$23,000 per month shall continue pending further court order or, of course, written agreement.

- [99] I do recognize that if one runs reverse support calculations under the SSAG based on a Guideline income of \$40,000 per annum for the claimant, the respondent would need to have a Guideline income of approximately \$1,200,000 per annum to justify interim spousal support of \$23,000 per month. And that is based on a strict application of the Guidelines in a high-income scenario.
- [100] However, in the oral reasons for judgment which I gave on August 28, 2024, I made clear that I determined the interim-interim support amount on the basis of a general averaging of the amounts that I accept the respondent was regularly voluntarily paying to the claimant over an extended period of time. Given my inability to determine the respondent's Guideline income even after hearing the able submissions of his counsel due to the fragmented disclosure, I am not prepared to tinker with that order to his benefit on a further interim basis.
- [101] Similarly, I am not satisfied in the circumstances that there is merit to the argument that the claimant should be disentitled to spousal support on the basis of a future inability to repay: see *Baillargeon v. Baillargeon*, 2010 BCSC 1522 at para. 41. In the event that the respondent is successful in enforcing the Agreement, the respondent has access to all collection remedies available at law for any overpayment of support to the claimant. While the support in *Baillargeon* was significantly lower, they were not parties of significant means so put in context, the principle is the same.

Costs

- [102] Rule 16-1 and Appendix B of the Family Rules govern costs in family law cases. The general rule is that costs should follow the event; that is, they are awarded to the successful party unless the court otherwise orders (R. 16-1(7)).
- [103] In the event a party is not successful on all issues, the court may still award costs on the party's substantial success (*Marquez v. Zapiola*, 2014 BCCA 35 at para. 16). Substantive success is an objective measure of the parties' relative success or failure on the issues.
- [104] The claimant was not substantially successful on a pure monetary analysis. I have not determined the respondent's Guideline income is \$3,804,076 per annum and as a result the amount of interim-interim support I have ordered be continued temporarily is substantially less than that sought in the Application. However, the reason for the continuation of the interim-interim support is outside of the control of the claimant. She cannot produce documents she does not possess or control and she cannot tender, what I consider close to necessary, expert evidence to the Court without those documents.
- [105] The claimant is, however, receiving interim support in the face of a waiver of a right to same in the Agreement. Accordingly, I conclude that the proper exercise of my discretion is to award the claimant costs of the Application to date as costs in the cause. Costs for the hearing of the adjourned portion of the Application shall be dealt with in the context of that hearing as determination of substantial success will depend on determination of the

respondent's income and the quantum of support appropriate upon a considered application of the Spousal Support Advisory Guidelines.

"Hardwick J."

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