

CANADA / JUDGMENT

Barnes-Morrison v. Kolas

2024 BCSC 1400

COURT

Supreme Court of British Columbia

DECIDED

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2024 BCSC 1400 Barnes-Morrison v. Kolas

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Barnes-Morrison v. Kolas,

2024 BCSC 1400

Date: 20240717

Docket: 48799

Registry: Penticton

Between:

Clair Anita Barnes-Morrison

Claimant

And

Evangelos Kolas

Respondent

Before: The Honourable Justice Kent

Oral Reasons for Judgment

Counsel for the Claimant:

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Place and Dates of Hearing:

Kelowna, B.C.

May 8-10, and July 16-17, 2024

Place and Date of Judgment:

Kelowna, B.C.

July 17, 2024

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Introduction and Overview

[1] The claimant, Ms. Morrison, issued a Notice of Family Claim ("NOFC") in this court on May 31, 2023. She pleads:

- she and the respondent Mr. Kalias began living together in a marriage-like relationship in spring 2011; and,
- the couple separated on April 16, 2023.

[2] The couple were never formally married. However, relying upon the provisions of the Family Law Act, S.B.C. 2011, c. 25 ("FLA"), Ms. Morrison claims an order for spousal support and also for equal division of family property and family debt.

[3] She also pleads the existence of a written agreement dated April 11, 2013 which relates to the claims she is making and seeks an order of this court setting that agreement aside pursuant to ss. 93 and 164 of the FLA.

[4] On June 22, 2023, Mr. Kolas filed a Jurisdictional Response pursuant to R. 21-1 of the Supreme Court Family Rules ("SCFR") disputing this court's jurisdiction over him and submitting in the alternative, that if such jurisdiction exists, the court should decline to exercise same.

[5] By filing such a Jurisdictional Response, Mr. Kolas was then able to file a Response to Family Claim ("RTFC") without submitting to the jurisdiction of the court. Such a Response was filed on August 18, 2023, pursuant to which he pleads:

- the parties did not cohabit in any marriage-like relationship and are therefore not spouses; and in any event,
- the written agreement dated April 11, 2013 is a full defence to all of the claims raised by Ms. Morrison.

[6] It turns out there are in fact two originally executed written agreements signed on different dates in the spring of 2013, although there is no clear explanation in the record how that came about. The documents are identical in content and include the following provisions:

- the named parties are Mr. Kolas, identified as a resident of Calgary, and Ms. Morrison, identified as a resident of Kelowna;
- it is entitled "cohabitation/relationship agreement";
- the recitals, which both parties expressly acknowledge are true and form part of the agreement, include statements that the parties have entered into a relationship, they intend that this agreement shall govern the division of all property owned by the parties now or in the future together with any entitlement to or obligation to pay support, and expressly acknowledge their intention to review and revise this agreement in the event that they cohabit or marry;
- each party agrees that they will retain their respective assets and liabilities (as listed in attached schedules) as their respective sole and separate property and waives any claims they have or may acquire in the future to the other party's property each party also states their intention to keep their property separate and that in the event of a relationship breakdown, neither shall under any circumstances acquire any interest in the property of the other;
- each party expressly waives any claim they have or may acquire for financial support, including spousal support, as a result of their relationship and expressly releases the other party from any such support obligation;
- each party specifically acknowledges that they have received independent legal advice, including advice regarding case law from the Supreme Court of Canada respecting support, and each specifically acknowledges there has been no imbalance of power between them or other form of pressure in the negotiation and execution of the agreement, an acknowledgement that is later reinforced by a separate "no undue influence" clause.

[7] Under the heading "governing law" the document contains the following clauses:

53. All property, wherever situated and owned by [Mr. Kolias] and [Ms. Morrison] or either of them, shall be governed by this agreement and the laws of the province of Alberta.
54. This agreement shall be governed by and interpreted in accordance with the laws of the province of Alberta.
55. In the event that either party seeks any relief against the other party as a result of the separation or death, in any jurisdiction other than Alberta or in any court other than the Court of Queen's bench of Alberta, this agreement may be pleaded as full estoppel and defence.
- [8] On August 24, 2023 Mr. Kolias issued an action against Ms. Morrison in the Calgary Judicial Centre of the Court of King's Bench of Alberta seeking various remedies including:
- a declaration that the two written agreements between the parties were valid;
 - a declaration that Alberta is the more appropriate forum for the dispute between the parties and that the Alberta court has presumptive jurisdiction; and,
 - an order stopping Ms. Morrison from proceeding with any claim for a division of Mr. Kolias' assets or any claim for spousal support.
- [9] I have been informed by counsel that the Alberta lawsuit is currently in abeyance pending the outcome of the proceedings in BC.
- [10] On March 21, 2024, Mr. Kolias filed a Notice of Application in this BC action seeking the following orders:
1. Pursuant to s. 106 and the FLA generally, that the court decline to exercise jurisdiction over the parties, the issue of the division of family property, and these proceedings in favour of the courts of the Province of Alberta by applying the factors set out in s. 106(5) including, but not limited to, the parties' written 2013 agreement which specifically identifies the law of Alberta as their choice of law and the Court of Queen's Bench of Alberta as their chosen forum;
 2. Pursuant to s. 11 of the Court Jurisdiction and Proceedings Transfer Act, S.B.C. 2003, c. 28 ("CJPTA") that the court decline to exercise jurisdiction over the parties, the issue of spousal support, and these proceedings in favour of the courts of the Province of Alberta applying the factors set out in s. 11 including, but not limited to, the parties' written 2013 agreement which specifically identifies the law of Alberta as their choice of law and the Court of Queen's Bench of Alberta as their chosen forum;
 3. A determination of the law which applies to the parties 2013 Agreement;
 4. A determination of the law which applies to the issue of property division;
 5. A determination of the law which applies to the issue of spousal support;

6. A determination of the proper forum in which issues relating to the 2013 agreement, property division, and spousal support ought to be heard; and,
 7. An order that this action be dismissed, or in the alternative, that this action be stayed.
- [11] Ms. Morrison filed her Application Response on April 3, 2024. She essentially takes the position that notwithstanding the written agreement between the parties, the Supreme Court of British Columbia has jurisdiction over this dispute and should not decline jurisdiction in deference to the Alberta proceedings.
- [12] And so it is that the parties came before me for a total of 5 Days in May and July 2024 for a hearing of this application.
- [13] The application materials are voluminous. They include some 17 affidavits from 9 different affiants in addition to two F8 Financial Statements sworn by the parties. Counsel had also conducted cross-examination of both Mr. Kolas and Ms. Morrison and transcripts of that questioning were also tendered as part of the Application Record. In many respects the Application Record bore a close similarity to an application for summary judgment.
- [14] For the reasons that follow, I find that this court has jurisdiction over both the parties and the subject matter of their dispute. I deny the request that this court decline to exercise that jurisdiction in favour of the Alberta proceedings. I also decline to determine at this time whether the written agreement(s) between the parties are enforceable according to their terms, whether under the law of Alberta or British Columbia, but instead leave those issues for later determination by this court, whether by way of a full trial in due course or otherwise.

Factual Background

- [15] Many of the critical factual issues are disputed. In their respective serial affidavits each of the parties disputes the content of the other party's affidavits as incorrect or false, whether they relate to the circumstances surrounding creation and execution of the written agreements, characterizations and understandings of their relationship, and the like.
- [16] For example, Mr. Kolas says he never considered himself to be in any marriage-like relationship with Ms. Morrison, that the relationship remained casual and tumultuous throughout the years, and that it was an "open" relationship where sex with other people occurred with the parties' knowledge and approval. He says he has always lived in Calgary and he files his tax returns in Alberta always identifying his marital status as "single". He has an Alberta drivers license.
- [17] Mr. Kolas was born in Calgary and has always maintained a residence in that city. He and his brother established a company, Boardwalk Properties Company LTD in 1984 to renovate a building in Calgary. Since that time the Boardwalk enterprise has grown substantially, ultimately owning numerous properties in Alberta, Saskatchewan, Ontario, Québec and, only very recently, in Victoria BC. Boardwalk went public on the Alberta stock exchange in

1994 and in 2006 was converted into a real estate investment trust (REIT). He appears to have become very wealthy, albeit indirectly through shareholdings, trusts, holding companies, and the like. His current position is Senior VP Quality Control with Boardwalk, which generally involves considerable travel and on-site supervision of the REIT building operations wherever they may be located. When not travelling on business, he frequently spent time in Kelowna, particularly after the start of his relationship with Ms. Morrison.

- [18] Mr. Kolas purchased a condominium on Whitworth Rd., West Kelowna in 2002. He refers to this as his vacation property. Ms. Morrison moved into that condominium with him after their relationship began. He eventually sold that property in October 2015, whereupon he and Ms. Morrison occupied as their Kelowna residence another much more substantial home on Whitworth Road owned by his brother and used as a vacation property since 1999. His brother paid the property taxes and utilities for the property. However, Mr. Kolas also spent over half a million dollars on renovations to this Whitworth property, including storage space for various vehicles and the couple's "toys" such as boats, seadoos, quads and the like.
- [19] During their relationship, the couple vacationed frequently in places like Hawaii, Phoenix, or Mexico. He was very generous with funds for Ms. Morrison's use. He says he provided her with some \$10,000-\$18,000 each month "to support her expenses and to replace the income she would've been receiving if she continued to work as a realtor". He says he gave Ms. Morrison \$800,000 from the net proceeds of the sale of his Kelowna condominium.
- [20] In her various affidavits, Ms. Morrison provides a completely different description of the couples "close and loving marriage-like relationship of 12 years" asserting that Mr. Kolas' characterization "is not correct and does not accord with the facts". She describes her upbringing in British Columbia, her previous marriage which resulted in two children, now adults, her encounters with Mr. Kolas leading to a "fully committed relationship", the sale of her own home and the move into Mr. Kolas' condominium which was substantially renovated for that purpose.
- [21] Ms. Morrison also describes the circumstances leading to the signing of the 2013 cohabitation agreement, saying that its execution was "solely to provide his brother Sam with comfort" and that Mr. Kolas assured her, and she believed, that "he would always take care of me". She denies that the lawyer in Alberta gave her any meaningful advice on the agreement and implies the lawyer's certificate to the contrary is false.
- [22] One of her affidavits describes their residence during the relationship:

We always resided in Kelowna. We almost always returned to Kelowna on the weekends. In earlier years, I would join [Mr. Kolas] wherever he was on Wednesday and we would return home on Friday. During Covid 19 we stayed home in Kelowna and worked remotely together. After Covid 19, I started travelling with [Mr. Kolas] starting Mondays and we were home to Kelowna for Friday

[23] I will leave it up to the trial judge to resolve the numerous contradictions in the testimony of these two litigants and to determine whether the parties meet the definition of "spouses" as that term is defined in the FLA. For present purposes, however, suffice it to say the evidence satisfies me that the parties spent a considerable amount of time living together in Kelowna over the course of their 12 year relationship. It may well be that as a matter of law, Mr. Koliass might also be a habitual resident of Calgary, however I am completely satisfied that he was a habitual resident of Kelowna and shared a household with Ms. Morrison in that city for at least 12 years before their separation in April 2023.

Does this Court have Jurisdiction?

Applicable Legislation

[24] Part 5 of the FLA deals with "Property Division". Division 4 and Division 5 of Part 5 both address spousal agreements respecting property division. Division 6 of Part 5 addresses jurisdiction, proper law of the relationship between the spouses, and choice of law rules.

[25] Part 7 of the FLA addresses child and spousal support. Division 4 of Part 7 addresses agreements between spouses respecting spousal support and also the grounds on which all or part of such agreements can be set aside.

[26] Unlike the Part 5 provisions dealing with property division, the Part 7 provisions respecting spousal support do not specifically address the situation where a spousal support order may be made in more than one jurisdiction. If, as in this case, a challenge is raised to the existence or discretion to exercise jurisdiction over spousal support, the matter is governed by the CJPTA.

[27] I set out below the relevant provisions of each act:

Family Law Act

Part 5, Division 4 - Dividing Family Property and Family Debt

Agreements respecting property division

92 Despite any provision of this Part but subject to section 93 [setting aside agreements respecting property division], spouses may make agreements respecting the division of property and debt, including agreements to do one or more of the following:

- (a) divide family property or family debt, or both, and do so equally or unequally;
- (b) include as family property or family debt items of property or debt that would not otherwise be included;
- (c) exclude as family property or family debt items of property or debt that would otherwise be included;

- (d) value family property or family debt differently than it would be valued under section 87 [valuing family property and family debt];
- (e) jointly own a companion animal;
- (f) share possession of a companion animal;
- (g) give exclusive ownership or possession of a companion animal to one of the spouses.

Setting aside agreements respecting property division

93 (1) This section applies if spouses have a written agreement respecting division of property and debt, with the signature of each spouse witnessed by at least one other person.

- (2) For the purposes of subsection (1), the same person may witness each signature.
- (3) On application by a spouse, the Supreme Court may set aside or replace with an order made under this Part 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 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 spouse'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.
- (4) The Supreme Court may decline to act under subsection (3) if, on consideration of all of the evidence, the Supreme Court would not replace the agreement with an order that is substantially different from the terms set out in the agreement.
- (5) Despite subsection (3), the Supreme Court may set aside or replace with an order made under this Part 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) the intention of the spouses, in making the agreement, to achieve certainty;
 - (c) the degree to which the spouses relied on the terms of the agreement.
- (6) Despite subsection (1), the Supreme Court may apply this section to an unwitnessed written agreement if the court is satisfied it would be appropriate to do so in all of the circumstances.

Orders respecting property division

94 (1) The Supreme Court may make an order under this Division on application by a spouse.

- (2) The Supreme Court may not make an order respecting the division of property and family debt that is the subject of an agreement described in section 93 (1) [setting aside agreements respecting property division], unless all or part of the agreement is set aside under that section.

Unequal division by order

95 (1) The Supreme Court may order an unequal division of family property or family debt, or both, if it would be significantly unfair to

- (a) equally divide family property or family debt, or both, or
 - (b) divide family property as required under Part 6 [Pension Division].
- (2) For the purposes of subsection (1), the Supreme Court may consider one or more of the following:
- (a) the duration of the relationship between the spouses;
 - (b) the terms of any agreement between the spouses, other than an agreement described in section 93 (1) [setting aside agreements respecting property division];
 - (c) a spouse's contribution to the career or career potential of the other spouse;
 - (d) whether family debt was incurred in the normal course of the relationship between the spouses;
 - (e) if the amount of family debt exceeds the value of family property, the ability of each spouse to pay a share of the family debt;
 - (f) whether a spouse, after the date of separation, caused a significant decrease or increase in the value of family property or family debt beyond market trends;
 - (g) the fact that a spouse, other than a spouse acting in good faith,
 - (i) substantially reduced the value of family property, or
 - (ii) disposed of, transferred or converted property that is or would have been family property, or exchanged property that is or would have been family property into another form, causing the other spouse's interest in the property or family property to be defeated or adversely affected;
 - (h) a tax liability that may be incurred by a spouse as a result of a transfer or sale of property or as a result of an order;
 - (i) any other factor, other than the consideration referred to in subsection (3), that may lead to significant unfairness.

- (3) The Supreme Court may consider also the extent to which the financial means and earning capacity of a spouse have been affected by the responsibilities and other circumstances of the relationship between the spouses if, on making a determination respecting spousal support, the objectives of spousal support under section 161 [objectives of spousal support] have not been met.

Division 6 - Jurisdiction and Choice of Law Rules

Definitions and interpretation

105 (1) In this Division:

"proper law of the relationship" means the proper law of the relationship as determined under section 107 [proper law of relationship].

Determining whether to act under this Part

106 (1) This section applies if an order respecting property division, respecting the same spouses, may be made in more than one jurisdiction.

- (2) Despite any other provision of this Part, the Supreme Court has authority to make an order under this Part only if one of the following conditions is met:
- (a) a spouse has started another proceeding in the Supreme Court, to which a proceeding under this Part is a counterclaim;
 - (b) both spouses submit, either in an agreement or during the proceeding, to the Supreme Court's jurisdiction under this Part;
 - (c) either spouse is habitually resident in British Columbia at the time a proceeding under this Part is started;
 - (d) there is a real and substantial connection between British Columbia and the facts on which the proceeding under this Part is based.
- (3) For the purposes of subsection (2) (d), a real and substantial connection is presumed to exist if one or more of the following apply:
- (a) property that is the subject of the proceeding is located in British Columbia;
 - (b) the most recent common habitual residence of the spouses was in British Columbia;
 - (c) a notice of family claim with respect to the spouses has been issued under the Divorce Act (Canada) in British Columbia.
- (4) Despite subsection (2), a court may decline to make an order under this Part if the court, having regard to the interests of the spouses and the ends of justice, considers that it is more appropriate for jurisdiction to be exercised outside British Columbia.

- (5) In determining whether to decline jurisdiction under subsection (4), the court must consider all of the following:
- (a) REPEALED: SBC 2014-9-15(b) effective May 26, 2014 (B.C. Reg. 96/2014).
 - (b) the relative convenience and expense for the spouses and their witnesses;
 - (c) if section 108 [choice of law rules] applies, the law to be applied to issues in the proceeding;
 - (d) the desirability of avoiding multiple proceedings or conflicting decisions in different courts or tribunals;
 - (e) the extent to which an order respecting property or debt
 - (i) made in another jurisdiction would be enforceable in British Columbia, and
 - (ii) made in British Columbia would be enforceable in another jurisdiction;
 - (f) the fair and efficient working of the Canadian legal system as a whole;
 - (g) any other circumstances the court considers relevant.
- (6) A determination of authority under subsection (2) or of whether to decline jurisdiction under subsection (4) is to be made solely by reference to this section.

Applicable internal law

107 The proper law of the relationship between the spouses for the purposes of section 108 [choice of law rules] is

- (a) the internal law of the jurisdiction in which the spouses had their most recent common habitual residence,
- (b) if the jurisdiction under paragraph (a) is outside Canada and is not the jurisdiction most closely associated with the relationship between the spouses, the internal law of the jurisdiction that is most closely associated with the relationship between the spouses, or
- (c) if the spouses did not have a common habitual residence, the internal law of the jurisdiction in which the spouse making an application for an order under this Part was most recently habitually resident.

Choice of law rules

108 (1) In this section, "regime of community of property" means a system of law, including a regime of partnership of acquests, in which property owned or acquired and debt owing or acquired during the relationship between the spouses

- (a) are deemed to be owned or owing by both spouses, and
- (b) are divided, on separation of the spouses, as if both spouses equally owned the property or owed the debt,

but does not include a regime of separate property or a system of law under which a spouse's interest is deferred until or after the occurrence of an event that signifies the end of the relationship between the spouses.

- (2) If the Supreme Court takes jurisdiction under this Division, the Supreme Court must act in accordance with the rules set out in this section.
- (3) Subject to subsection (4), if spouses make an agreement respecting the division of property or debt, the substantive rights of the spouses in a proceeding under this Part are determined by the agreement.
- (4) The enforcement of an agreement under subsection (3) is subject to any restriction that the proper law of the relationship places on the ability of spouses to determine the division of property or debt by agreement.
- (5) Subject to subsection (3), if the spouses' first common habitual residence during the relationship between the spouses was in a jurisdiction in which a regime of community of property applies, property owned or acquired and debt owing or acquired during the relationship between the spouses that is property or debt to which the regime of community of property applies must be divided at the end of the relationship between the spouses according to that regime of community of property.
- (6) If neither subsection (3) nor (5) applies, the substantive rights of spouses in a proceeding under this Part must be determined according to the proper law of the relationship.

Court Jurisdiction and Proceedings Transfer Act

Part 2 - Territorial Competence of Courts of British Columbia

Application of this Part

- 2 (1) In this Part, "court" means a court of British Columbia.
- (2) The territorial competence of a court is to be determined solely by reference to this Part.

Proceedings in a person

3 A court has territorial competence in a proceeding that is brought against a person only if

- (a) that person is the plaintiff in another proceeding in the court to which the proceeding in question is a counterclaim,
- (b) during the course of the proceeding that person submits to the court's jurisdiction,
- (c) there is an agreement between the plaintiff and that person to the effect that the court has jurisdiction in the proceeding,
- (d) that person is ordinarily resident in British Columbia at the time of the commencement of the proceeding, or

- (e) there is a real and substantial connection between British Columbia and the facts on which the proceeding against that person is based.

Real and substantial connection

10 Without limiting the right of the plaintiff to prove other circumstances that constitute a real and substantial connection between British Columbia and the facts on which a proceeding is based, a real and substantial connection between British Columbia and those facts is presumed to exist if the proceeding

- (a) is brought to enforce, assert, declare or determine proprietary or possessory rights or a security interest in property in British Columbia that is immovable or movable property,
- (c) is brought to interpret, rectify, set aside or enforce any deed, will, contract or other instrument in relation to
- (i) property in British Columbia that is immovable or movable property,

Discretion as to the exercise of territorial competence

11 (1) After considering the interests of the parties to a proceeding and the ends of justice, a court may decline to exercise its territorial competence in the proceeding on the ground that a court of another state is a more appropriate forum in which to hear the proceeding.

- (2) A court, in deciding the question of whether it or a court outside British Columbia is the more appropriate forum in which to hear a proceeding, must consider the circumstances relevant to the proceeding, including
 - (a) the comparative convenience and expense for the parties to the proceeding and for their witnesses, in litigating in the court or in any alternative forum,
 - (b) the law to be applied to issues in the proceeding,
 - (c) the desirability of avoiding multiplicity of legal proceedings,
 - (d) the desirability of avoiding conflicting decisions in different courts,
 - (e) the enforcement of an eventual judgment, and
 - (f) the fair and efficient working of the Canadian legal system as a whole.

Conflicts or inconsistencies with other Acts

12 If there is a conflict or inconsistency between this Part and another Act of British Columbia or of Canada that expressly

- (a) confers jurisdiction or territorial competence on a court, or
- (b) denies jurisdiction or territorial competence to a court,

that other Act prevails.

Property Division Jurisdiction Analysis

- [28] At all material times Ms. Morrison has been habitually resident in Kelowna, including at the time that she filed this family law case in the Penticton Registry. Section 106(2)(c) of the FLA therefore bestows jurisdiction on the Supreme Court of British Columbia to make an order respecting property division between the two spouses.
- [29] While Mr. Koliass is not conceding Ms. Morrison's status as a "spouse" for the purpose of any trial on the merits in this case, he does concede that point for the limited purpose of this jurisdiction application. Accordingly, I find that this court has jurisdiction to determine the property division issues between these parties.
- [30] Whether it is appropriate to decline that jurisdiction in deference to the Alberta proceedings is a different question which I will address later in these reasons.
- [31] However, at this juncture it is appropriate to also determine the proper law of the relationship between Mr. Koliass and Ms. Morrison, again on the assumption for that purpose that they are indeed "spouses". I have already found on the evidence adduced that both parties were habitually resident in Kelowna. Indeed, both were in Kelowna on the date of separation when Mr. Koliass departed the couple's residence in that city.
- [32] In the circumstances, s. 107(a) of the FLA provides that the law of British Columbia is the law of the relationship for the purposes of the choice of law rules set out in s. 108 of the Act.
- [33] Section 108(2) provides that if this court takes jurisdiction with respect to property division matters between spouses, then it must act in accordance with the rules set out in section 108.
- [34] Section 108(3) requires the court to determine the substantive rights of the spouses in accordance with any agreement that they may have made respecting the division of property or debt. However, that requirement is subject to subsection (4) which imposes "any restriction that [the law of British Columbia] places on the ability of spouses to determine such division by agreement".
- [35] Ms. Morrison submits, and I am inclined to agree, this subsection imports, as a restriction to the enforcement of the parties' agreement, the ability of the court as provided in s. 93 of the FLA to set all or part of the agreement aside if any of the prescribed circumstances exist.
- [36] The circumstances that the court is required to consider under s. 93(3) include any grounds that would render the agreement voidable, such as nondisclosure of material information, taking advantage of a party's vulnerability, failure to understand the nature of consequences of the agreement, and the like.

- [37] Under s. 93(5), the court is required to consider factors which might lead to "significant unfairness", including such things as passage of time, the intentions of the parties, and the degree to which they actually relied on the terms of the agreement.
- [38] The interpretation of the legislation and the existence of any prescribed circumstances are all matters that should be determined by the trial judge on the evidence adduced at trial. It is entirely possible that the trial judge may conclude Ms. Morrison knew full well the nature of the document she was signing in 2013, that appropriate independent legal advice was given to her at the time, and that the document should be enforceable in accordance with its terms, including the provision that such determination is to be made in accordance with the law of Alberta.
- [39] Counsel for Mr. Kolas submits that the language of s. 108(4) of the FLA is "very awkward" and "untenably vague" and points out there is no caselaw in BC which has addressed its interpretation.
- [40] He points to similar legislation in Ontario, PEI and Newfoundland which expressly refers to and applies to "foreign" agreements the provisions permitting the court to set them aside. He suggests the "restriction" referred to in s. 108(4) is meant to apply only to "matters which the parties cannot contract for in the first place".
- [41] With great respect, I am not inclined to agree. While I acknowledge the language is awkward, both sections 93(1) and 108(3) and (4) refer to the same subject in almost identical terms i.e. "an agreement respecting division of property or debt". Section 93 clearly limits the ability of the parties to enforce any such agreement in certain specified circumstances. It is, in my opinion, precisely the sort of "restriction" to which s. 108(4) refers.
- [42] I might add that in *El-Jaroudi v. El-Mikati*, 2020 BCSC 868, this court held at para. 44 "notwithstanding s. 108(3) of the FLA", it would have been "unfair to enforce" a certain marriage contract made in Lebanon and declined to do so. It is one example of fairness trumping a domestic contract made in another jurisdiction.
- [43] But for the time being, all I can say is that the evidence before me raises numerous triable issues on the enforceability of the 2013 agreement and a summary determination of those issues is not appropriate at this time.

Spousal Support Jurisdiction Analysis

- [44] Much the same enforceability analysis applies to the spousal support waiver set out in the 2013 agreement. Section 164(3) of the FLA provides for essentially the same grounds for setting aside all or part of the agreement if one or more of certain circumstances existed at the time that the agreement was made.

- [45] Similarly, s. 164(5) permits the court to set aside the spousal support waiver if it is "significantly unfair" on consideration of various circumstances including passage of time, changes in the means, needs or other circumstances of the spouse, the degree to which the spouses actually relied on the terms of the agreement, and the like.
- [46] Again, these are all matters that will have to be addressed by the trial judge in due course. The immediate question, however, is whether the court has jurisdiction over the matter since Mr. Kolas is no longer a resident of British Columbia and, in fact, he had left British Columbia for good by the time Ms. Morrison filed her NOFC.
- [47] Section 3 of the CJPTA prescribes the conditions for "territorial competence" in the proceeding brought against Mr. Kolas. There are at least two of those conditions that either currently or will shortly apply to Mr. Kolas, namely if:
- during the course of this action he submits to the court's jurisdiction; and/or
 - there is a real and substantial connection between British Columbia and the facts on which Ms. Morrison's lawsuit against him is based.
- [48] While Mr. Kolas has not yet formally submitted to the court's jurisdiction and, indeed, is challenging that jurisdiction, the court has now found that it has jurisdiction to decide the property division dispute between the parties. If, as seems likely, Mr. Kolas now chooses to dispute Ms. Morrison's claim through trial, he will obviously be submitting to the jurisdiction of the court.
- [49] Furthermore and in any event, the facts on which Ms. Morrison's lawsuit is based is the 12 year relationship between the parties here in British Columbia (and elsewhere). That is more than sufficient to satisfy the "real and substantial connection" requirement.
- [50] I conclude that the court has jurisdiction to determine Ms. Morrison's spousal support claim. As with the division of property claim, however, the next question is whether it is appropriate for the court to decline jurisdiction in favour of the proceedings filed by Mr. Kolas in the Alberta court. I turn to that issue now.

Should the BC Court Decline Jurisdiction?

- [51] Both s. 106(5) of the FLA and s. 11(2) of the CJPTA prescribe mandatory considerations that must be applied in the exercise of this court's discretion to decline jurisdiction. They include:
1. the relative/comparative convenience and expense for the parties and their witnesses in litigating in BC or Alberta;
 2. the law to be applied to the issues in the proceeding;
 3. the desirability of avoiding multiple proceedings or conflicting decisions in different courts;
 4. the extent to which any eventual judgment in BC can be enforced in Alberta, and vice versa;

5. the fair and efficient working of the Canadian legal system as a whole;
6. any other circumstances the court considers relevant.

[52] Ms. Morrison submits that, once jurisdiction of this court has been established, as has been done here, the burden is on Mr. Kolas as the party seeking a stay of proceedings to show that the Alberta court is the clearly more appropriate forum for the litigation. As noted in *Club Resorts Ltd v. Van Breda*, 2012 SCC 17 at para. 109, this is a high burden.

[53] Each party provided evidence designed to establish the various witnesses and the nature of the evidence that they will be calling in support of respective cases at trial. Each party then claimed that the comparative convenience and expense factor militated in favour of their preferred jurisdiction, namely the Alberta court in the case of Mr. Kolas, and this court in the case of Ms. Morrison.

[54] The issues in dispute and which will have to be determined at trial include:

- whether or not the relationship between the parties constituted them as "spouses" as defined in the FLA;
- whether, having regard to the law of the relationship and the circumstances both at the time the written agreement was made and in the years thereafter, the agreement is enforceable according to its terms;
- if the enforceability and interpretation of the agreement is determined according to the law of British Columbia, what might that law be (an issue which in the Alberta court would have to be determined with reference to appropriate expert evidence likely from BC);
- if the matter is to be determined according to the law of Alberta, what might that law be (an issue which in the British Columbia court would have to be determined with reference to appropriate expert evidence likely from Alberta)
- if the written agreement is found to be unenforceable, whether orders for the division of property and spousal support are appropriate and, if so, how is the appropriate quantum to be determined.

[55] Because the written agreement was drafted and executed in Alberta using Alberta lawyers and witnesses, and because the corporate and financial/accounting head office of the Boardwalk empire is primarily based in that province, it is likely that the number of trial witnesses from Alberta will exceed the number of trial witnesses from British Columbia. On its face, the convenience and expense factor would appear to favour a trial in Alberta.

[56] However, Ms. Morrison points to the huge disparity in the wealth of the parties. She claims that Mr. Kolas can easily afford the expense of producing the Alberta witnesses for trial in British Columbia, whereas she has extremely limited resources and it will be a financial hardship for her to litigate in Alberta.

- [57] This is a family law case, not commercial litigation, and I am inclined to agree this "affordability" factor is rightly taken into account in the exercise of the court's discretion. In the result, I consider the relative convenience/expense factor to be at best neutral, but it more likely militates in favour of the British Columbia court exercising jurisdiction.
- [58] The next factor, perhaps the most important one in this case, is the question of applicable law.
- [59] Much case law was cited to me regarding legal principles applicable to the enforcement of "domestic agreements" generally, and, in particular, choice of forum and choice of law provisions in such contracts. These included many of the leading Supreme Court of Canada cases on the subjects such as *Hartshorne v. Hartshorne*, 2002 SCC 17, *Anderson v. Anderson*, 2023 SCC 13, *Douez v. Facebook, Inc.*, 2017 SCC 33, and the like. Mr. Kolas submits that until the written agreement is actually set aside, it should be considered as binding and the choice of forum and governing law provisions should militate very strongly in favour of this court declining jurisdiction in favour of litigation in Alberta.
- [60] As well, Mr. Kolas has adduced expert evidence on this application from a senior lawyer in Alberta emphasizing the complexity of the applicable Alberta law and which demonstrates that:
- the law in that province is markedly different from that of British Columbia in several key respects;
 - indeed, there was no legislation in Alberta which governed property division between common-law spouses in 2013; and,
 - the legislation which now applies came into force in 2020 and contains ambiguities (eg. the operation of the transition provisions and how the timing of agreements might affect their validity) which have not yet been interpreted by the Alberta courts and which ought not be determined at first instance by a British Columbia court.
- [61] I do not find these submissions to be particularly persuasive.
- [62] First, there is legislation in this province which mandates the methodology and the factors to be considered by the court in determining whether the written agreement between the parties should be set aside in part or in full. These factors closely mirror those applicable in the common law, including the common law of Alberta, regarding the enforceability of contracts generally i.e. unconscionability, undue influence, and the like. If, having regard to these factors, this Court concludes that the written agreement must be set aside in full, then the choice of forum and the governing law provisions necessarily fall away.
- [63] Second, it is not at all uncommon for the courts in British Columbia to be called upon to apply the law of other jurisdictions to determine the outcome in a British Columbia trial, whether in whole or in part. With all due respect to the alleged complexity of the Alberta law on the question of property division and spousal support as between common-law

spouses, this is not a task beyond the competence of the Superior Court judges in this province. Nor, I hasten to add, would it be beyond the competence of the Superior Court judges in Alberta to apply the law of British Columbia to this litigation should the matter be litigated in that province and it was determined such law was indeed applicable.

- [64] In my view, the applicable law is also a neutral factor at best. Indeed, my finding that the law of the relationship for property division purposes is that of BC, likely militates in favour of this court retaining jurisdiction to decide that issue and, for the sake of convenience if nothing else, the issue of spousal support as well.
- [65] I agree it is desirable to avoid multiple proceedings and the possibility of conflicting decisions in different courts. But this too is a matter of general principle that applies equally to both provinces involved in this case. The litigation in Alberta has already been paused pending the outcome of the jurisdiction determination in the BC litigation. It is reasonable to assume that, if the BC court decides to retain and exercise its jurisdiction, the case will in fact proceed to a trial in this province and the pursuit of further litigation in Alberta will not occur.
- [66] There are no objections raised by the parties that any eventual judgment in British Columbia cannot be enforced in Alberta and vice versa. This too is a neutral factor.
- [67] Similarly, there are few if any concerns in this case regarding the fair and efficient working of the Canadian legal system as a whole. I do agree that it might be preferable for the Superior Court in Alberta to be the first to resolve the so-called ambiguities said to exist in that province's recent legislation regarding division of property between common-law spouses. Experience tells us, however, that any such ruling by the Superior Court, whether in British Columbia or Alberta, will likely be short-lived and, if the issue is truly important as alleged, it will be the Court of Appeal of Alberta who will eventually resolve the matter in any event.
- [68] Ms. Morrison acknowledges and understands that Mr. Kolas is only seeking to enforce his interests based on the contract signed between the parties. However, she takes the position that only enforceable contractual interests are entitled to consideration in the *forum non conveniens* analysis. She notes that the FLA was amended to explicitly provide that the determination of enforceability is to be made according to the proper law of the relationship, which in this case is British Columbia, the province in which the parties were habitually resident and in which she continues to reside. She points out that if the contract was fairly reached and is fair in its application in the circumstances, this court will provide Mr. Kolas with the outcome he seeks. Who, she argues, can reasonably object to the matter being decided on the basis of fairness? I am inclined to agree with these submissions.

- [69] In the result, I conclude that Mr. Koliass has failed to meet the burden of demonstrating that the Alberta court is the clearly more appropriate forum for determining the litigation between the parties. I therefore reject Mr. Koliass' request that the court decline to exercise its jurisdiction in this case and his application must be dismissed.
- [70] I do not fault Mr. Koliass for starting parallel litigation in Alberta in reliance upon the terms of the contract signed by the parties. It was not unreasonable for him to invoke that contract and seek to have this court decline jurisdiction over the litigation. At the end of the day he may or may not succeed in enforcing the contract as a defence to Ms. Morrison's claims. As such, it is appropriate that the costs of this application should reflect the ultimate outcome of the litigation and accordingly are awarded in the cause.

"Kent J."

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