

CANADA / JUDGMENT

Bilin v. Bilin

2018 BCSC 804

COURT

Supreme Court of British Columbia

DECIDED

15 May 2018

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2018 BCSC 804 Bilin v. Bilin

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Bilin v. Bilin,

2018 BCSC 804

Date: 20180515

Docket: E41987

Registry: New Westminster

Between:

Komal Bilin

Claimant

And

Sukhvinder Singh Bilin and

Surjit Kaur Bilin and

Tarsem Singh Bilin

Respondents

Before: The Honourable Mr. Justice Harvey

Reasons for Judgment

Counsel for the Claimant:

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Counsel for the Respondents, Surjit Bilin and Tarsem Bilin:

K. Sukhija

Place and Dates of Trial:

New Westminster, B.C.

July 11-15, 18-21,

October 31, November 1-4, 2016

June 19-23 and 26

and August 14-15, 2017

Place and Date of Judgment:

New Westminster, B.C.

May 15, 2018

Introduction

- [1] This matrimonial proceeding involves not only the claimant wife, Komal Bilin ("Komal"), and her husband Sukhvinder Bilin ("Sukh"), but as well, the claimant's mother-in-law Surjit Kaur Bilin ("Surjit Kaur") and her brother-in-law Tarsem Bilin ("Tarsem").
- [2] The claimant asserts that each of the latter two hold real property in their name in trust for Sukh: Surjit Kaur a one-half interest in the matrimonial home located at 12159 - 77 Avenue, Surrey, B.C. ("77 Avenue"); and Tarsem a one-half interest in a warehouse located at 114-12414 82 Avenue, Surrey, B.C. (the "Warehouse").
- [3] In addition to the ownership of the two aforementioned properties, there are allegations and cross-allegations by Komal and Sukh respecting the disposition of assets including significant sums of cash totalling almost \$300,000, loan receivables owed by others to the respondent, Sukh, and third-party payments made by Sukh that are challenged by the claimant.
- [4] Tarsem, in his counterclaim, seeks a declaration that the one-half interest in 77 Avenue in the name of Surjit Kaur is beneficially his because of payments made since its acquisition to Sukh and Komal. Surjit Kaur, in pleadings filed on her behalf -- albeit by the same counsel as Tarsem -- does not dispute Tarsem's claim.

- [5] In addition to the complicated unraveling of the parties' property claims, there are also issues of parenting arrangements for the parties' two teenage sons, Harjeet and Gurjeet, and spousal and child support claimed by the claimant dating back from the parties' separation in 2011.
- [6] This litigation was commenced and has proceeded under the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.), and the Family Relations Act, R.S.B.C. 1996, c. 128 [FRA]. As such, the applicable legislation governing property division is the Family Relations Act, not the Family Law Act, S.B.C. 2011, c. 25 [FLA].
- [7] Credibility is a significant, if not the overarching feature that drives the outcome of this proceeding. Both ownership and possession of significant assets are in dispute.

Facts

Background

- [8] Komal is currently 41 years old; Sukh is 48.
- [9] Sukh came to Canada in the early 1990s together with his mother, Surjit Kaur, and his father Surjit Singh Bilin ("Surjit Singh"). All three were sponsored into Canada by Sukh's brother, Tarsem, who had come to Canada several years earlier and had obtained employment in Canada. Tarsem was married at the time to one Kulvinder, who sponsored Tarsem's immigration to Canada in the late eighties.
- [10] There is at least one other Bilin sibling, a sister who resides in New Zealand. On at least two occasions, the brothers travelled to New Zealand. Komal alleges that, while there, they incorporated an investment company and transferred funds from Canada to New Zealand that would otherwise be available for distribution as family assets in this proceeding. The brothers both deny any New Zealand business venture.
- [11] On Sukh's arrival in Canada, he began working in the same auto-trim business as Tarsem. They worked for the same employer while the brothers' parents worked seasonally in the farm industry. All lived together in the home of Tarsem, his wife, and two children.
- [12] In 1995, Tarsem and Sukh went into business with each other in the auto trim industry. The business was called S. & S. Auto Trim ("S. & S."). The business consisted of the sale and installation of after market accessories on cars and trucks. The installations were done on site at the various automobile dealerships they serviced.
- [13] Despite his apparent seniority, both in age and experience, Tarsem was the minority partner in the arrangement. He owned 30% of the venture while Sukh owned 70%. Komal alleges the disparate ownership has more to do with Tarsem's shaky marriage to his first wife than Sukh's abilities.

- [14] At or near the time S. & S. commenced operations, Tarsem began experiencing marital discord that ultimately ended with his divorce from Kulvinder. Throughout his divorce, Tarsem pleaded poverty and an inability to work -- a strategy Komal says Sukh is following in this proceeding.
- [15] In 1996, both Bilin parents gave up farm work and became employees of their sons' new enterprise, S. & S. According to both brothers, both parents actively worked in the business and earned salaries reflected in the annual T4s provided each parent. As will be seen, I have doubts such was the case.
- [16] As an example, in 1996, business records demonstrate Surjit Kaur reported income of \$18,000 from S. & S. However, she never received the payment. Instead, Tarsem and his wife withdrew \$50,000 from the business and deposited it into their account. Tarsem described this as a "loan" from his mother that he later repaid but provided no evidence of repayment.
- [17] The significance of the transaction is, counsel for Komal suggests, that both Bilin parents were conduits for income declared by them but received by either Sukh or Tarsem. The brothers, over the course of their time in Canada, shared joint accounts with each of their parents. Neither parent was/is literate in English nor able to manage their bank accounts independent of one or the other of their sons.
- [18] The turmoil in Tarsem's marriage caused S. & S. to dissolve. In affidavits sworn in Tarsem's matrimonial proceeding, letters from Sukh's legal counsel seeking dissolution of the partnership and premised on the proposition that Tarsem had become unreliable as a partner were appended to material placed before the Court.
- [19] In 1999, Sukh signed a letter that Tarsem appended to an affidavit Tarsem filed in his matrimonial proceeding which attested to the fact that Tarsem was a mere tenant in 77 Avenue who was four months in arrears of the rent -- \$700 monthly.
- [20] Tarsem, in his divorce proceeding from Kulvinder, swore under oath that the house he lived in belonged to his brother. No mention was made of his mother's interest or the source of the funds used to purchase the home.
- [21] Tarsem further swore that he was unsuccessfully operating a courier business. However, in this proceeding Tarsem says he was operating an auto trim business no different than Sukh's as early as 2001, when both brothers say they jointly bought the Warehouse.

Sukh and Komal's Marriage

- [22] In 1999, as part of an arranged marriage, Sukh travelled to India where he met, and then married, Komal. By then, Tarsem's divorce had been granted and he, too, travelled to India where he met and married his second wife, Kulwant.

- [23] Both wives remained in India following their marriage. They came to Canada in April 2000, after which they took up residence with their new husbands and in-laws in the home on 77 Avenue. Sukh and Komal lived upstairs, the other four in two separate suites downstairs.
- [24] Komal gave birth to Harjeet on November 25, 2000 and Gurjeet on June 15, 2002. The boys are now 17 and 15, respectively.
- [25] Since separation, Sukh's has had a strained relationship with his sons. Harjeet, the eldest, testified that Gurjeet and he resent their father for the treatment afforded their mother and them.

The Purchase of 77 Avenue

- [26] By June or July of 1997, Tarsem's marriage had deteriorated to the extent that Sukh and his parents began looking for other accommodation. In the summer of 1997, Sukh located and purchased 77 Avenue by way of a deposit of \$5,000. At closing, a further \$79,000 was required together with a mortgage of \$238,500.
- [27] The ownership of the additional \$79,000 is a matter of contention. Surjit Kaur and her sons claim she contributed \$79,000 from funds belonging to her and her husband, Surjit Singh. Komal argues the money was all Sukh's, noting that he withdrew substantial sums from S. & S. during the year 77 Avenue was acquired. She suggests the only reasonable inference is that the whole of the \$84,000 came from Sukh and the home was his alone. The \$79,000 needed to complete was paid by way of banker's draft to the purchasers' solicitors. Neither Sukh nor Surjit Kaur produced any records from a financial institution that would confirm from whose account the draft was drawn upon.
- [28] The home was registered in the names of Sukh and Surjit Kaur as joint tenants not on the basis that Sukh was making a gift to his mother, but based upon her financial contribution.
- [29] Neither Sukh nor his mother discussed how they were going address the financial imbalance created by the disparate contributions toward 77 Avenue's acquisition.
- [30] Surjit Kaur did not produce any records evidencing payment of the \$79,000. Her and her husband's tax returns from years prior to 77 Avenue's acquisition disclosed that no interest or investment income was declared and, despite assertions of ownership of rental property in India, neither declared ownership of foreign property which resulted in rental income.
- [31] From 2000 to 2008, Kulwant, Surjit Kaur, Surjit Singh and Tarsem combined to transfer \$299,000 into Sukh and Komal's account. The funds transferred, according to Tarsem, Kulwant and Surjit Kaur, were payment by Tarsem and Kulwant to acquire Surjit Kaur's one-half interest in 77 Avenue as well as for the Warehouse mortgage.

[32] Why the money was not paid to Surjit Kaur, the legal owner of the one-half interest Tarsem and Kulwant were purportedly purchasing was never explained. Nor was an explanation offered for why the Bilin parents continued to make payments to Sukh and Komal given the explanation regarding the buy-out of Surjit Kaur's interest in 77 Avenue.

S.B. Auto Trim Ltd.

[33] Following the demise of S. & S., Sukh opened up a separate auto trim business called S.B. Auto Trim Ltd ("SB"). He continued its successful operation until separation from the claimant in 2011. Thereafter -- for health reasons, Sukh alleges -- the business operation sank in a sea of red ink. Today, based on its most recent financial statements, SB is worth nothing.

[34] During the early 2000s, there is an issue as to who actually worked at SB. Kulwant and both Bilin parents received incomes from SB, but much of their income was deposited later into Sukh and Komal's joint account. Komal worked or was credited with an income after 2008 and likely before given she was a guarantor on several of the re-financings on 77 Avenue prior to 2008.

[35] Komal was involved with and employed by SB, although it is not clear when her involvement began. The degree of her involvement is in dispute. Komal testified that she rarely, if ever, attended at the auto dealerships to perform installations. She did, however, acknowledge washing wheel covers, taking courses on the application of trim decals, and attending the Warehouse. Customers of SB testified they saw Komal regularly at their dealerships and that she actively participated in SB's day-to-day operations.

[36] I conclude Komal was "receiving" income from SB as early as 2005 because in that year she co-signed a mortgage re-financing on 77 Avenue. Without employment income, her signature as a covenantor would have been pointless.

[37] Kulwant became an employee of SB from May 2000 to 2008. She says she worked full-time doing the mobile work at auto dealers. She did not receive regular pay cheques, but was paid intermittently: sometimes monthly; sometimes once every two months.

[38] Kulwant began employment at \$2,500 monthly despite having no experience. As time progressed, Kulwant's declared income from SB rose to over \$70,000 annually. The amount seems inordinately high given she was not the proprietor and was essentially performing manual labour.

[39] Kulwant took maternity leave in 2002 and 2006. She apparently took a full year on both occasions, yet she continued to receive -- or at least be credited with -- income from SB: \$26,000 in 2002; and \$21,000 in 2006.

[40] In 2008, Tarsem incorporated S. & K. Auto Trim; this is a business similar to S. & S. and SB. Kulwant began working with Tarsem in 2008 and the transfers of money from Kulwant and Tarsem to Sukh stopped.

- [41] Records disclose that both Bilin parents were paid as employees of SB in the late nineties and early years of the millennium. Salaries as high as \$30,000 annually were recorded for the parents. Komal and Kulvinder Bilin, Tarsem's first wife, deny that either parent actually worked at S. & S.; Komal denied they worked at SB. The salaries paid were, they testified, a form of income splitting for the Bilin family.
- [42] Following Kulwant's involvement with SB ending in 2008, only Komal and Sukh worked for SB.
- [43] Sukh's tax returns for the first decade of the millennium were not produced, making it difficult to know what he, as owner, was earning from SB. Kulwant performed no management function in SB; she did the mobile installations that Sukh described as his day-to-day routine.
- [44] The financial statements for 2009 and 2010 -- the first available in the proceeding -- show a healthy small business generating incomes in excess of \$80,000 for each of Sukh and Komal, together with modest net earnings that increased SB's retained earnings.

Purchase of the Warehouse

- [45] In 2001, the Sukh bought the Warehouse. He used equity from 77 Avenue through a re-financing, and mortgage funds for the remainder of the purchase price. He registered it solely in his name.
- [46] At trial, Tarsem testified he was operating T.B. Auto Trim, albeit unsuccessfully in the early 2000s, and that he and Sukh jointly acquired the Warehouse on 82 Avenue despite its registration in Sukh's name alone. Tarsem testified that he and Kulwant sought financing for the Warehouse, but did not qualify.
- [47] Tarsem in material filed in his previous divorce proceeding described his business in 2004 as a 'courier business'.
- [48] The Bilin brothers allege the true ownership of the Warehouse is set out in a trust deed executed by the brothers shortly prior to the closing on the Warehouse's acquisition in April 2001. The document was not drafted by a lawyer. It was witnessed by two acquaintances: Mr. Dhat and Mr. Dhak. Komal disputes the trust deed was prepared on the date indicated on the document's face, and testified the Warehouse is Sukh's, alone.

The Separation of Sukh and Komal

- [49] Komal worked as an employee of SB until she received a termination letter in 2012 from SB notifying her of her termination due to a lack of work. Both parties acknowledge they separated in April of 2011 after Sukh returned from a trip to New Zealand. Each offers a different explanation for the split.

- [50] Sukh testified that health reasons together with loss of clientele resulted in the decision to terminate Komal's services. He testified his ongoing back problems had caused significant reduction in SB's prosperity following 2010.
- [51] Sukh claims his worsening back condition precludes him from working at similar levels as before separation. The business of SB has fallen off dramatically and the retained earnings --, which were as high as \$273,000 in 2010, the last complete fiscal year prior to separation -- are now effectively zero. Further, Sukh claims in his Form 8 that he owes SB money.
- [52] Dr. Christopher Watt provided an opinion describing Sukh's medical condition and its impact on his employment as an installer of auto accessories. Sukh's medical records disclose back complaints dating back over the years.
- [53] By the time of her termination, Komal and Sukh had been "separated" for approximately a year. Following a trip to New Zealand in the early months of 2011, Sukh returned to Canada and took up residence in the basement of 77 Avenue. Komal and both boys remained upstairs in separate living quarters and, according to both, essentially, communications between them ended.
- [54] The reason offered by Sukh for the separation was that Komal allegedly took \$200,000 in cash from their home. Instead of depositing it in the Vancity account, as directed by Sukh, he alleges she took the money and refused to return it unless the family home was put into her joint name.
- [55] The \$200,000 cash resulted from an unorthodox business venture, later aborted, involving Sukh and a Mr. Kabani. I shall describe the events leading to the "misappropriation" of the \$200,000 later in these reasons. Komal denies taking the funds and alleges Sukh has them.
- [56] While Sukh lived in the bottom portion of the house from spring 2011 to summer 2012, he continued to make all payments respecting 77 Avenue and provide \$200 cash weekly to Komal by leaving a cheque on the stairs between the two living areas. The weekly stipend was for Komal's and the boys' living needs beyond accommodation.
- [57] Komal's salary, post separation, was deposited into the parties' joint Vancity account. Sukh, not Komal, was the person who regularly withdrew funds from the account.
- [58] Komal seemingly only accessed the bank account twice post separation: at the end of 2011 and early in 2012. The Vancity account was depleted from its high of over \$80,000 in late 2010 to almost nothing by the summer of 2012. A significant number of cash withdrawals, mainly taken by Sukh, regularly occurred during the approximately 18 months over which the account was drained.
- [59] In early July 2012, Komal commenced proceedings in Provincial Court seeking support and custody of the two boys.

- [60] Komal testified that following service of the proceedings on Sukh, he asked why she was taking him to court and advised their separation was not permanent. He then asked her to attend at the Khalsa Credit Union ("KCU"), where they maintained a joint account, to withdraw all the funds in cash, and then to give it to him.
- [61] Over a period of approximately one month covering June and July 2012, albeit predominantly over the course of 10 days in July, Komal removed approximately \$78,000 cash, which included the net payout of her RRSP. She said on each withdrawal, she met Sukh in the parking lot and provided the cash to him. Sukh denies any such discussion or receiving the cash.
- [62] At or near the time of the withdrawals, Komal opened a safety deposit box in her name alone at Canada Trust. She did not disclose the existence of it until it became known through court ordered production of her banking records.
- [63] Sukh ceased payment of the \$200 weekly at or about the time of the withdrawals.
- [64] In November 2011, at the urging of Tarsem, Sukh transferred the Warehouse into the joint names of him and Tarsem. Tarsem paid the associated costs of the transfer including property transfer tax. Tarsem testified that the state of Sukh's marriage caused him to worry about the title and preservation of his interest. Title to 77 Avenue was not transferred despite Tarsem's allegation that it, too, is beneficially owned by him or by him and Kulwant.

Re-Financing 77 Avenue

- [65] Sometime in the spring of 2011, following the accusation of theft and after separation, Sukh re-financed the 77 Avenue property with the stated goal of buying out his mother's interest in the property so he could transfer the property into Komal's and his name. According to Sukh, Komal had been demanding 77 Avenue go in joint names and was prepared to return the \$200,000 in exchange.
- [66] Sukh held Surjit Kaur's power of attorney and could have accomplished the transfer with the stroke of his pen.
- [67] Originally, Sukh deposited \$259,474.90 of the \$372,000 re-financing into a joint account in Tarsem and Surjit Kaur's name. The sum was to be the "buy-out" Surjit Kaur's interest in 77 Avenue to allow Sukh to place it into the joint names of him and Komal in exchange for the return of the \$200,000 Komal allegedly removed from the home.
- [68] There is no evidence Sukh ever discussed the withdrawal, or its purpose, with Komal, Surjit Kaur or Tarsem.

- [69] The transfer from mother to son never took place. There was no evidence from Sukh, Tarsem or Surjit Kaur as to what, if any, discussions took place and with whom respecting the transfer of title. Later in 2012, all the mortgage proceeds together with accumulated interest were returned to Sukh, approximately \$300,000 of which were used for purposes other than repaying the 2011 mortgage. The remainder he reapplied against the mortgage.
- [70] Despite the use of the most recent financing by Sukh, the current mortgage balance of approximately \$260,000 encumbers the whole of the equity in 77 Avenue -- not just Sukh's one-half interest. Surjit Kaur did not sign the 2011 mortgage; Sukh used the power of attorney.
- [71] The property assessment for 77 Avenue is \$526,000. The low assessment, by the standards of the lower mainland real estate values, is due at least in part to serious problems with the structure of the dwelling as described in a home inspection report commissioned by Sukh. The dwelling has a significant mold problem and the cost of remediation is unknown.

Additional Events Post-Separation

- [72] Following separation, Komal's father-in-law, Surjit Singh, advanced her funds to take a practical nursing/care course. Although she graduated, she has not yet used her credential; instead, she does part-time bookkeeping work for an acquaintance of Hardip Sidhu, a self-described former friend of the Bilin brothers.
- [73] Mr. Sidhu testified that he was privy to various schemes by the brothers aimed at cheating Komal out of her share of family property as, according to Mr. Sidhu, Tarsem had previously done in his divorce from Kulvinder.
- [74] Mr. Sidhu became Komal's ally in this litigation going so far as to advance \$15,000 towards her legal expenses without expectation of repayment. He also introduced her to a Mr. Nijjar who employs Komal as a bookkeeper. She earns about \$700 monthly working only some weekends.
- [75] Mr. Sidhu engaged the same counsel as Komal to defend the civil claim launched by Tarsem in respect of over \$370,000 Tarsem alleges is owing to him by Mr. Sidhu arising from separate business transactions in 2012. Mr. Sidhu acknowledged the loans, but says only \$60,000 remains owing; the remainder he says he repaid in cash as part of the scheme Mr. Sidhu says was intended to defraud Komal.
- [76] Mr. Sidhu also testified that he witnessed sizeable cash transfers from Sukh to Tarsem at the Warehouse following Sukh's separation. He further claims to have been present at financial institutions when the brothers transferred funds to New Zealand.

- [77] Sukh did loan Tarsem \$150,000 of the mortgage proceeds in 2012, and the \$150,000 formed part of the larger loan -- \$340,000 -- made by Tarsem to Mr. Sidhu. The note between Sukh and Tarsem provided for an annual rate of interest of 4%. Sukh borrowed the money against the equity in 77 Avenue at a rate of prime plus 10%.
- [78] Komal denied possession of any of the disputed funds and testified she has lived off borrowings from friends and her limited income after Sukh stopped providing her household money in the summer of 2012.
- [79] Despite her diploma from Kamayma College, Komal has not successfully obtained work as a care-aid. Such, according to Derek Nordin, a vocation specialist engaged by Sukh, would result in her earning income in the range of \$40,000+ annually.
- [80] Sukh argues that his ability to earn income is similar to or less than Komal's given business reverses and health concerns.

The Litigation History

- [81] Komal commenced the original litigation in Provincial Court in July 2012. There, she sought support for her and the children as well as custody of both boys.
- [82] She testified that Sukh was served with the Provincial Court proceedings in July and, thereafter, he asked to her to empty the KCU bank account and her RRSP of funds and provide the proceeds, in cash, to him.
- [83] This proceeding was brought in September 2012. Thereafter, various orders for production of documents followed.
- [84] In May 2013, the claimant was ordered to provide details of her efforts to find employment, of her educational history at Kamayma College, and to attend an examination for discovery. She did not. As matters evolved, it is clear her production of documents was selective.
- [85] Importantly, Sukh argues, Komal failed to produce banking information relating to the two safety deposit boxes she opened at KCU and CIBC.
- [86] In February 2014, the Provincial Court action this action were consolidated. Orders were made for temporary interim support with liberty to apply for variation. The original trial set for 2014 was adjourned at the request of the claimant so as to seek further documentation underlying the property claims.
- [87] I pause to note that Sukh's document production was similarly wanting. None of the historic banking documents that demonstrate the use of funds received in the joint account from his brother, sister-in-law, and parents were ever produced.
- [88] In January 2015, a master made an order allowing the claimant leave to serve an amended notice of family claim, adding Surjit Kaur Bilin as a respondent and seeking production of New Zealand records respecting Bilin Investment Ltd.

- [89] In December 2015, Komal successfully applied for an adjournment of the scheduled trial date of December 7, 2015 and an order adding Tarsem as a respondent. The trial was re-scheduled and made pre-emptory as against Komal.
- [90] Midway through the trial, I made an order for production by Sukh of cancelled cheques from SB relating to salaries paid to family members other than Komal, together with cheques to subcontractors from 2010.
- [91] There has never been a declaratory order under s. 57 of the FRA. Thus, the triggering event is the order for divorce that I pronounce as part of these reasons.

The Assets and Debts

77 Avenue

- [92] When acquired in 1997, 77 Avenue was registered in the joint names of Surjit Kaur and Sukh. Despite his stated joint ownership of the fund used for the down payment, Surjit Singh was not on the title. No one offered a reason for this omission.
- [93] All four family members lived in the home prior to the brothers' remarriages. Tarsem, according to Sukh and his mother, paid rent for his occupation of a suite in the basement. Tarsem lived in the basement with his parents but Sukh was his landlord, according to a letter written by Sukh for use in Tarsem's divorce proceeding.
- [94] Komal acknowledged on discovery that she had been told Sukh only owned one-half of 77 Avenue.
- [95] After the arrival of Komal and Kulwant in 2000, Tarsem and Kulwant say Surjit Kaur asked them to take care of her expenses related to her one-half ownership because she was retiring and would be unable to do so. Over the following years, Kulwant and Tarsem transferred over \$240,000 to Sukh and Komal's joint account.
- [96] Surjit Kaur and Surjit Singh transferred a further \$51,000.
- [97] Neither Tarsem, Kulwant nor Surjit Kaur provided details as to how, if at all, the imbalance in the equity as between she and Sukh was to be reconciled given the disparity in their stated contribution to the down payment.
- [98] In a similar vein, none of Sukh, Tarsem, Kulwant, or Surjit Kaur were able to explain the underlying theory of the transfer of \$378,000, which includes the \$79,000 down payment. The amount greatly exceeded one-half the total purchase price of both pieces of real estate, being 77 Avenue and the Warehouse.

- [99] Tarsem testified the total payment was in respect of both 77 Avenue and the Warehouse, but provided no mathematical basis on which the figure of \$378,000, or the lesser contribution from him and Kulwant, reconciled with the values of the two properties combined. He spoke of a consideration of interest payments but offered no explanation as to how he and Kulwant determined that they had paid "their share".
- [100] There is no argument but that Sukh's interest in 77 Avenue is a family asset through ordinary usage throughout cohabitation. Its value is unknown.
- [101] In 2011, following his separation from Komal, Sukh re-financed 77 Avenue and used the majority of the funds for his own purposes.

S.B. Auto Trim Ltd.

- [102] Sukh incorporated SB following the dissolution of the business arrangement between the two brothers in 1997. He is the company's sole shareholder.
- [103] According to Sukh, it had as many as four employees in the early part of the millennium: himself, Kulwant, Surjit Kaur and Surjit Singh. Given Komal signed as a guarantor on the various re-financings of 77 Avenue in 2005 and 2006, it is likely she too was credited with an income.
- [104] Kulwant, for reasons unexplained in the evidence, earned over \$70,000 in several years. Komal's income post 2008 is explained based on her relationship with Sukh, SB's owner. Paying Kulwant over \$70,000 makes little fiscal sense given her job description.
- [105] Almost all of the money Kulwant earned, net of tax, was repaid to Sukh.
- [106] The business prospered in the years prior to separation. At its year-end, October 31, 2010, SB had retained earnings of just under \$273,000 -- \$129,000 of it cash on deposit.
- [107] By trial, sales had dropped to 25% of the \$416,000 in 2009. Profit had fallen from its high of \$48,800 prior to separation to -\$122,600 in 2012; retained earnings went from a high of \$273,000 to -\$251.
- [108] Sukh attributed the radical change in SB's outlook to a reduction in clients and his poor health -- specifically, his back problems.
- [109] For the purposes of this litigation, Sukh says the business is worthless albeit he does not dispute it is a family asset given Komal's direct and indirect contribution over the course of the marriage.

The Warehouse

- [110] The 82nd Avenue Warehouse was purchased in Sukh's name alone in 2001 using a down payment raised by refinancing 77 Avenue and a mortgage for the balance registered against the Warehouse.

- [111] There is no suggestion that Sukh sought his mother's approval prior to re-financing 77 Avenue in 2001 to acquire the Warehouse. Surjit Kaur speaks little English and reads less, such that I am satisfied that throughout her time in Canada she has signed documents when requested by either of her two sons. She needed one or the other's assistance to deal with banking, taxes, and any matters involving the execution of legal documents.
- [112] Sukh testified the purchase was always for the joint benefit of him and Tarsem but, because Tarsem was not making much money, the bank advised Sukh that Tarsem's name not go on the credit application or title.
- [113] Tarsem testified that he and Kulwant sought financing but could not arrange it given his low income. Sukh said he and Tarsem went to the bank together.
- [114] It is unclear when Tarsem's usage of the Warehouse began given his changed narrative. In 2004, he swore he was in the courier business. Historical documents, notably bank records, make clear that by 2004 Tarsem was operating TB Auto Trim.
- [115] There is no doubt Tarsem and Sukh shared the use of the Warehouse. In 2008, Tarsem incorporated S & K Auto Trim. He and Kulwant operate that business.
- [116] The most likely explanation for the omission of Tarsem's name from title, if indeed the intention was joint ownership, was Tarsem's fear his former wife would learn of his prosperity. None of the witnesses testifying as to the Warehouse's origins of purchase offered Tarsem's divorce as the reason his name was not on title.
- [117] The Bilin brothers both testified that the trust declaration setting out Tarsem's interest in the Warehouse is genuine. Two friends, Mr. Dhat and Mr. Dhak, witnessed the brothers' signature on the trust declaration. Neither testified. The trust declaration was never registered. No similar document was ever prepared after Tarsem and Kulwant had apparently bought out Surjit Kaur's half interest in 77 Avenue.
- [118] Since acquisition, Sukh testified that Tarsem shared the mortgage and operational expenses. The former was through the lump sum payments made from 2000 to 2008; the later in annual payments.
- [119] The financial statements of S & K Auto Trim Ltd, describe the company's payment for its use of the Warehouse as "rent".
- [120] SB's obligation is described as rent, too, but Sukh declared the rent paid by SB on his personal tax and then deducted the allowable expenses, interest, taxes, etc. from the rental income declared on his personal tax filings. Tarsem did not follow a similar strategy. Nothing in his personal tax information suggests rental revenue from a half-interest in the Warehouse.

- [121] Photocopies of cheques purporting to show Tarsem's contribution to the taxes and other operating expenses are alleged by the claimant to show that alterations were made to the "re line" of the cheque.
- [122] Both SB and S. & K. used the Warehouse for their businesses.
- [123] In November of 2011, following the commencement of this proceeding, Sukh transferred the Warehouse into the joint names of himself and Tarsem. Tarsem paid the associated legal costs and the property transfer tax associated with the transfer. No reliance was placed on the trust deed seeking an exemption from the payment of property transfer tax.
- [124] Komal was neither consulted nor advised of the transfer. While acknowledging both brothers used the Warehouse, Komal says that the Warehouse belonged exclusively to Sukh.
- [125] There is no mortgage currently on title. However, the Duplicate Certificate of Title was removed from the Land Title Office because, according to Sukh, "they can loan on it and I don't need approval." Who has the Duplicate Certificate of Title is unknown.
- [126] Sukh does not dispute Komal's claim that his interest in the Warehouse is a family asset.

The \$200,000 Cash

- [127] The etiology of the fund is unknown; perhaps the accumulation or residue of the \$300,000 transferred from Sukh's parents, brother and sister-in-law, perhaps not, but there is no doubt that as at September 2010, Sukh provided a draft for \$200,000 to one Mr. Kabani.
- [128] The reason Sukh offered for the transfer is that in 2009 and 2010 he was considering getting out of the auto trim business owing to health concerns. He spoke with an acquaintance and sometime customer, Naizer Kabani, about investing in Mr. Kabani's business: car sales.
- [129] In the fall of 2010, Sukh suggested that he advance \$200,000 to Kabani's business to acquire additional inventory, and that he, Sukh, would share in the profit from the sale of that product. No business plan was ever prepared. A promissory note was prepared similar to others put into evidence in the trial. The inevitable inference is that one of the Bilin brothers prepared the document.
- [130] Nothing in the note describes how the two of them would share profit or loss on the inventory acquired with the \$200,000.
- [131] Mr. Kabani testified that "although I didn't need the money", he received the \$200,000 with the expectation that Sukh would participate in the sales of the additional inventory to "earn" his profit.

- [132] Both Sukh and Mr. Kabani testified the arrangement was short-lived and Sukh backed out and asked for the return of the \$200,000. Instead of returning the funds to Sukh in a draft or money order, Mr. Kabani paid the funds back in cash installments of \$10,000 or \$20,000 for the next three-to-four months. The last cash payment was made in January 2011. The note provided for repayment in a lump sum.
- [133] For reasons unclear, Sukh asked for the money in cash installments and kept the ever-increasing fund at the matrimonial home. When cross-examined as to why he did not deposit the funds back into the bank as received, he testified his health was not good during that period, September through to January, so it accumulated at home where he kept it in a bedroom closet.
- [134] Neither Sukh nor Mr. Kabani testified as to the mechanics of the repayment, but it seems unlikely Mr. Kabani delivered cash to Sukh's home. Absent evidence as to the contrary, the most probable scenario is the payments were made when Sukh was working at Kabani's dealership.
- [135] Repayment began within a day or two of the signing of the promissory note and within ten days of the advance because, according to both, Sukh did not understand that he would have to contribute other than as a silent partner.
- [136] Later in January 2011, according to Sukh, Komal took the \$200,000 from its location in the bedroom of their home never to return it. Sukh testified he demanded its return and Komal replied such would only happen when he transferred one-half of 77 Avenue into her name.
- [137] Sukh went to New Zealand for an extended visit following the alleged discovery of the missing \$200,000 and upon his return in April 2011, moved into the downstairs of the home.
- [138] The location of the \$200,000 is in dispute. Each of Komal and Sukh says the other took the funds.
- [139] Komal opened a safety deposit box in January 2011 in her name alone at KCU that she did not originally disclose in her original Form 8. Sukh says argues the purpose of that box was to hold the \$200,000 taken from the home. Komal says the new box was opened to store her and the children's passports.

The Mortgage on 77 Avenue

- [140] In May of 2011, following his departure from the upstairs portion of the home, Sukh re-financed 77 Avenue with the stated purpose of "buying out his mother's interest in the home".
- [141] By 2011, according to the evidence of Sukh, Tarsem, Kulwant and Surjit Kaur, Sukh had received \$300,000 from the others, and his father, in respect of Tarsem and Kulwant taking over ownership of 77 Avenue. In addition, all testified Surjit Kaur paid the lion's share of the original down payment.

- [142] Komal was not a guarantor of the 2011 re-financing although she had guaranteed earlier re-financings in 2005, 2006 and 2008. It is also clear she did not know of the 2011 mortgage. Sukh provided no detail of the purpose of the 2005, 2006 or 2008 re-financings. Neither Tarsem nor Surjit Kaur were consulted about any of the re-financings.
- [143] Komal's lack of involvement in the 2011 re-financing leads to two distinct inferences: the re-financing occurred in secrecy; or, Komal would not cooperate in further encumbering the home. Sukh did not say why Komal did not guarantee the 2011 mortgage given her earlier involvement and, according to Sukh, her knowledge that either Surjit Kaur or Tarsem beneficially owned the other half of 77 Avenue.
- [144] The mortgage, according to its terms, was repayable at bank prime plus 10% interest.
- [145] The total proceeds advanced were \$362,000 of which Sukh deposited \$259,000 into an account in the name of Tarsem and Surjit Kaur. There is no indication from the evidence that Sukh's parents, brother or sister-in-law were aware of the mortgage when advanced the funds, or that it encumbered the entirety of the home rather than just Sukh's interest.
- [146] The money remained on deposit for almost one year while, according to Sukh, discussions took place regarding the transfer. Sukh provided no detail as to the content of the discussions or with whom he spoke.
- [147] Nor did Tarsem or Surjit Kaur testify as to the discussions underlying the proposed buy-out of the one-half interest in Surjit Kaur's name.
- [148] Tarsem and Surjit Kaur transferred Sukh's deposit into an interest bearing account until repaid to Sukh.
- [149] For reasons unexplained, the property was never put into Sukh's name or Komal's following the deposit. In January 2012, the entirety of the mortgage proceeds, plus some modest interest, were withdrawn from Tarsem and Surjit Kaur's account and, when coupled with the remainder of approximately \$104,000, used by Sukh as follows:
- Sukh loaned Tarsem \$150,000 who in turn, loaned \$150,000 to Mr. Sidhu;
 - He paid \$44,000 to Mr. Jagpal, the cousin of Pawandeep Rai who Sukh claimed loaned him the equivalent in rupees in 2010 while Sukh was in India. Sukh says he borrowed the funds to pay for "decompression treatments" for his back. The repayment was in cash installments paid to Mr. Jagpal. Other than his testimony, Sukh did not provide any corroborative evidence substantiating the treatments in India;
 - He repaid his father \$50,987.50 in respect of loans that Sukh said were outstanding, including, Sukh says, the advance Surjit Singh made to Komal to allow her to attend nursing college; and
 - The balance of \$56,000 (rounded) was applied against the mortgage.
- [150] The existing balance on the mortgage at trial was approximately \$260,000.

[151] The money Sukh loaned Tarsem was at an interest rate substantially lower than the rate charged by the financial institution that loaned Sukh the funds.

The Receivable from Mr. Reddy

[152] Kamal Reddy is the proprietor of Applewood Motors, a customer of SB and a friend of both Sukh and Komal. They saw each other socially when the parties were together.

[153] He testified that Komal attended his dealerships with Sukh and worked as an auto trim installer. He also testified that Sukh's father was with Sukh on occasion, but it did not appear the elder Bilin was active in the installations.

[154] He testified payment to Sukh was by cheque, not cash. He could offer no details about Sukh's stated health concerns.

[155] On the matter of property division, Mr. Reddy testified that he and Sukh loaned each other money from time to time over the course of their friendship. Specifically, Mr. Reddy testified that Sukh loaned him \$20,000 in 2003 when he purchased his business and the loan was repaid at \$1,000 a month.

[156] He, in turn, loaned Sukh money in or about 2012, post-separation, which Sukh later repaid in cash.

[157] Mr. Reddy, almost as an afterthought, testified that Sukh lent him \$100,000 in cash in 2008 so that Mr. Reddy could purchase his house. No promissory note was produced in respect of this transaction, but Mr. Reddy concluded by stating he believed he still owed Sukh on that loan -- perhaps \$15,500.

Bilin Investment Limited

[158] In 2005, Bilin Investment Limited was incorporated in New Zealand. The company was struck from the Registry of Companies in 2008 for failing to file annual reports.

[159] The brothers' sister and brother-in-law live in New Zealand and both brothers have visited.

[160] Hardip Sidhu testified that the brothers both told him they had transferred funds to New Zealand and, on occasion, he had been at a financial institution with them when they sent funds to New Zealand.

[161] Both the brothers denied sending money to New Zealand. Tarsem testified he considered moving to New Zealand in 2005 and his sister advised him it would be easier to immigrate if he had a company.

[162] The sister then sent him papers that he then signed resulting in the incorporation of Bilin Investment.

[163] Tarsem presented the papers to Sukh, and Sukh signed too. Sukh said he never read them and never had an intention to move to New Zealand.

[164] Other than Mr. Sidhu's evidence that he was present when money was sent to New Zealand, no evidence indicating the presence of assets owned by either brother was forthcoming.

Bank Accounts Controlled by Sukh

[165] In the late fall of 2010, the parties joint account at Vancity, had a positive balance in excess of \$83,000. By July 2012, the account was essentially empty.

[166] Sukh made the majority of the withdrawals -- all in cash -- save for two \$1,000 withdrawals by Komal. Sukh's withdrawals were generally in increments of \$3,000 or \$4,000. Sukh says he spent the funds on family expenses. He used cash because he did not have credit cards or a debit card.

Cash Advances from Sukh to Tarsem

[167] Hardip Sidhu testified that since their friendship began, the Bilin brothers shared intimate details of their lives with him and that he has observed transactions that are of significance in this proceeding.

[168] Mr. Sidhu testified he witnessed cash advances from Sukh to Tarsem at the Warehouse. He also testified that each of the two brothers acknowledged to him that they arranged their finances in order to shield their assets from wives, either Kulvinder or Komal and that he, Mr. Sidhu, witnessed the brothers make cash transfers from Canada to New Zealand.

[169] Finally, he testified that the two brothers admitted to him that they altered the income of the brother whose marriage was in trouble to artificially reduce support obligations.

[170] Specifically, he testified that he saw Sukh provide \$60,000 cash to Tarsem on one occasion and 17 packets of what appeared to be \$10,000 each on another.

[171] Mr. Sidhu borrowed \$371,000 from Tarsem, \$150,000 of which, at least, came from Sukh. He testified he repaid the majority of it in cash, as did Mr. Kabani, although the transaction is the subject matter of a lawsuit between him and Tarsem who testified the whole sum remains outstanding.

Khalsa Credit Union Account

[172] In addition to the joint account at Vancity, which I have already alluded to, Komal had an account at KCU in her name alone.

[173] In July 2012, following the commencement of the Provincial Court proceedings and service upon Sukh, Komal says that Sukh approached her telling her, in effect, that their separation was not permanent. She says he asked her to attend at KCU because he needed cash.

[174] KCU records disclose an RRSP in Komal's name worth approximately \$27,000, together a term deposit of close to \$42,000. When coupled with the funds on regular deposit, the amount held exceeded \$80,000.

- [175] Beginning on June 19, 2012, Komal began withdrawing funds from the account. From June 19 to 30, she withdrew \$10,800.
- [176] Komal apparently cashed the severance cheque she received from Sukh as well as the \$200 cheque she received weekly. On July 3, 2012, she took out another \$4,640.
- [177] After the commencement of the Provincial Court proceedings in early July 2012, from July 4 until July 16, Komal withdrew an additional \$61,500 from KCU via the term deposit and collapse of her RRSP. She withdrew the funds in cash and, according to Komal, gave them to Sukh who was waiting in the parking lot. Sukh denies receiving any of the funds.
- [178] In addition to the KCU account, Komal also had an account at CIBC Branch 3620. The records for this account indicate that on July 9, 2012 she made four separate deposits totaling \$4,000. She also opened a safety deposit box there in July 2011 after closing her accounts at KCU.
- [179] Sukh says the only reasonable inference to draw is that the cash withdrawn from KCU was placed in the new safety deposit box. Komal says it contains only the kids' and her passports that she transferred after closing the KCU accounts and safety deposit box that was in her name alone.
- [180] The safety deposit box at CIBC was not disclosed by Komal but came to light through court ordered production of her banking records.
- [181] Each acknowledges the funds, if in existence at the triggering event, would be a family asset subject to division.
- [182] The \$200 cheques left weekly on the stairs between the two floors of 77 Avenue stopped at or near the time of Komal's withdrawals.

Jewelry

- [183] Other than mention of jewelry by counsel during the claimant's opening, little was said until closing submissions about jewelry. Neither party identified nor valued the jewelry each claims the other of them has in their possession.
- [184] A handwritten sheet, in Punjabi, was presented in one of the document briefs but not explained.

RRSPs

- [185] Sukh's Form 8 references RRSPs in his name with a value of \$29,500 as of November 2015. Komal cashed in her RRSP in 2012.
- [186] Komal says that Sukh's was valued at \$70,000, but the only documents produced in respect of his Vancity RRSP conform to Sukh's evidence.

RESPs

[187] Sukh disclosed RESPs of \$24,400 in his Form 8. There is no suggestion of whether the amount either increased or decreased since separation. Documents provided by Komal -- statements from KCU for 2014 -- indicate the RESP's value as at December 31, 2014 was of \$39,331. Both agree the plan is for the future educational requirements of the boys.

Position of the Parties

[188] The claimant submits that the following make up the family property:

- 100% of the matrimonial home;
- 100% of the Warehouse;
- cash (\$200,000 from Mr. Kabani and \$78,000 from the joint accounts at the Khalsa Credit Union) -- which cash each accuses the other of having in their possession;
- the shares of S.B. Auto Trim Ltd.;
- RRSPs in the name of Sukh;
- funds disposed of by Sukh from the Vancity account;
- the money owed Sukh by Mr. Reddy;
- money given by Sukh to Tarsem as per Mr. Sidhu; and
- jewelry

[189] She alleges the joint ownership of both 77 Avenue and the Warehouse are shams to prevent her from realizing her share of the family property, and seeks an unequal division of the property subject to Sukh assuming sole responsibility for repayment of the outstanding mortgage.

[190] The claimant further seeks a compensation order for the reduction of SB's value from separation to trial. She also alleges Sukh cashed in \$70,000 of RRSP, but according to the documents in evidence, Sukh's RRSP was approximately \$30,000 at separation and apparently remained so until trial.

[191] She seeks sole custody and guardianship of the parties' two children and that the respondent's parenting time with the boys be as per their wishes. She seeks both spousal and child support based upon an imputed income to Sukh commensurate with the financial performance of SB prior to the separation.

[192] Sukh, on the other hand, argues that the Warehouse and 77 Avenue are only one-half his, and that his one-half share in 77 Avenue is subsumed by the existing mortgage that, he says, charges only his one-half interest. He acknowledges the \$150,000 receivable owed him by Tarsem is a family asset.

- [193] There has been no triggering event such that the date for determining Komal's interest in the family assets is at trial. He notes the retained earnings in S.B. Auto Trim Ltd., as at 2015, is in the negative. His RRSP, as at November 5, 2015, was slightly below \$30,000.
- [194] Komal's interest in the Warehouse and his RRSP is offset, Sukh argues, by his one-half entitlement to monies he alleges Komal depleted from the family coffers in 2011 and 2012 -- \$200,000 and the \$78,000 removed from the bank.
- [195] Sukh denies there is any other family property other than his RRSP, RESP, and modest chattels. He makes no allowance for the value of S.B. Auto Trim based upon its negative retained earnings as at the company year-end for 2015.
- [196] Sukh made no mention of the receivable Mr. Reddy acknowledged was owing to Sukh.
- [197] He seeks joint custody of the children, although acknowledging they should primarily reside with Komal. He seeks restoration of reasonable access to them with orders that they attend counselling.
- [198] He suggests his income be set at \$30,594 resulting in a support payment for the children of \$472 monthly. He suggested an imputation of Guideline income to Komal at \$38,500 based on her capacity to earn as a licensed adult caregiver, and that the s. 7 expenses be shared in proportion to the incomes as set by the Court.
- [199] Tarsem and Surjit Kaur Bilin are both represented by the same counsel, Mr. Sukhija.
- [200] The position of both is at odds with the pleadings in that both submit Surjit Kaur Bilin should retain legal as well as beneficial ownership of one-half of 77 Avenue, and that Tarsem should retain legal and beneficial ownership as described on the title of the Warehouse on 82 Avenue.
- [201] Both seek removal of the certificates of pending litigation registered against the two properties and an order "that neither be sold as a result of the matrimonial proceedings".
- [202] Despite the pleadings, during submissions, counsel for Tarsem suggested he was content that title to 77 Avenue remain in his mother's name despite his evidence that he and Kulwant had purchased her interest through a series of payments made to Sukh and Komal from 2000 onward.

Credibility

- [203] Few outcomes in matrimonial proceedings rest so heavily on credibility findings as in this proceeding. All major assets are in dispute not only as to their ownership but, as well, who has them.
- [204] The ownership of both pieces of real estate -- 77 Avenue and the Warehouse -- is disputed, as is the location of almost \$300,000 in cash. Major assets, SB, Vancity accounts, and the equity in 77 Avenue have significantly eroded since separation or shortly before.

- [205] Both parties allege the other of them is under-employed and seek an imputation of income.
- [206] The proceeding does not engage complicated legal concepts. The FRA provides, initially, for an equal division of family assets. In the event an asset which was or would have been a family asset as at the triggering event is disposed of, the court may order compensation or adjust the division of remaining assets to afford a "fair" division of the assets having regard to the enumerated factors in s. 65 of the FRA.
- [207] Here the primary issue is the credibility of what I shall refer to as the major witnesses to the events that underpin the tension between the parties' divergent positions. Those witnesses include the claimant, all three respondents, and Mr. Hardip Sidhu.
- [208] I say at the onset that this is not a case where there is a bright line separating the honest reliable witnesses from those whose evidence is unreliable or, more particularly, deceitful.
- [209] Each of the witnesses I have identified above I have found, at times, to be dishonest and/or unreliable on material matters. In the result, I discount or ignore their evidence on some of those matters.
- [210] Given that conclusion, it follows that I cannot make a blanket statement that I prefer the evidence of one party over that of another. I view the evidence of each of the parties with scepticism given my conclusion on the issue of their overall honesty.
- [211] Throughout, I have kept in mind that this is a civil proceeding and the burden of proof rests on the party asserting a fact is true. The onus is to discharge the burden on a balance of probabilities, and based on the totality of the evidence.
- [212] Credibility is a question for the trier of fact. In assessing the credibility of each witness, I consider the following: the consistency of their evidence, its harmony with the totality of the evidence, their interest in the outcome of the litigation, and whether, during the course of their testimony, their previous statements are inconsistent with their evidence at trial.
- [213] As was stated in *Mac v. Mak*, 2016 BCSC 1140, at 127:
- [127] I must also consider the plausibility of the evidence, which includes a consideration of whether one party's version of events makes sense, or whether it is connected with the evidence as a whole. It is also important to consider the demeanor of the witnesses when giving evidence, but this is only considered in the context of the plausibility of their testimony and the evidentiary record.
- [128] In the often-cited *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.), the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole: *Faryna* at 357. The factors were also considered by Justice Dillon in *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186:

[186] Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)* (1919), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis* (1926), 31 O.W.N. 202 (Ont.H.C.); *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.) [Faryna]; *R. v. S.(R.D.)*, [1997] 3 S.C.R. 484 at para. 128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (*Faryna* at 357).

[214] Finally, I turned to the oft cited decision of the B.C. Court of Appeal *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.), wherein O'Halloran J.A. stated the following at 357:

The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

[215] With those principles in mind, all counsel suggest that 'their witnesses' truthfully provided evidence whilst the opposing witnesses lied.

[216] I conclude that each of the witnesses I will now refer to have actively attempted to mislead me on issues central to the trial; some, as it will be seen, more than others.

Witnesses

[217] I consider each of the material witnesses in turn to the extent necessary to comment on the issue of credibility. Economy of words precludes me from mentioning every instance where I have found one of the main participants in the trial to be unreliable or dishonest.

Surjit Kaur Bilin

[218] Firstly, and most simply, I deal with the respondent Surjit Kaur's evidence. Respectfully, she was by self-admission a poor witness. She described herself on several occasions in her testimony as "crazy" leaving the trier of fact with little confidence in the accuracy of her testimony.

- [2219] She is 78 years of age with numerous health issues, and stated more than once that she cannot remember things well.
- [2220] Nonetheless, she insisted that upon retirement she and her husband came to Canada after operating a taxi business in India where they owned their own home and some agricultural property. She stated they received rent from the agricultural property, and that they sold both the house and the taxis.
- [2221] She says when she and Surjit Singh came to Canada; they brought the money from the sale of those assets, as well as her husband's lump sum payment from the Army. How much money that was, she could not say. Her husband knew the details and he has passed away since the commencement of the trial.
- [2222] Surjit Kaur began working upon arrival in Canada as a berry picker, and began working for her sons when they opened up the first auto detailing business. She said she was receiving a salary, but that "my husband knows those things - he told me about those things".
- [2223] One of her sons took her to prepare her taxes. She apparently does not read or write English such that I should take for granted she had any understanding of what she was signing. I infer from her evidence that she never operated her own bank account save, perhaps, for one account in her name alone which is where her pension cheques are deposited. She denied any knowledge of the joint account in her and Tarsem's names; this was the same account into which Sukh placed a portion of the mortgage funds in 2011.
- [2224] As to the ownership of the 77 Avenue home, she said that it was "me and Sukh". She then stated that her and her husband were the owners of one-half of 77 Avenue and that the home was purchased about 2 to 3 years before Sukh and Komal got married.
- [2225] She was specific that she had paid \$79,000 from the monies brought from India. She testified Tarsem moved into the space occupied by her and her husband and that he sometimes paid rent to her of \$600 to \$650.
- [2226] Finally, in conformity with what was said by Tarsem in his evidence, Surjit Kaur said that when she and her husband retired they spoke to their sons and, ultimately, Tarsem, who said he would assist his parents and "pay your share of the mortgage".
- [2227] She also professed knowledge of the circumstances underlying the purchase of the Warehouse. She ended her testimony by saying I want to give my half of the house to Tarsem".
- [2228] The essence of her evidence, following cross-examination, is that she knew nothing of the particulars of the amount of money brought by her and her husband from India.
- [2229] She testified that she and Kulwant both worked for Sukh at the same time. She identified that she and Tarsem maintained a joint account but its purpose, at least to her, was unclear.

- [230] The details of that account were not produced despite the fact the mortgage proceeds from 2011 apparently were deposited into it. Surjit Kaur said "Tarsem helps me with it". She agreed she had no knowledge as to who paid her what over the course of time she was said to have been working for any of the enterprises run by her sons either individually or collectively.
- [231] Finally, she agreed she signed documents placed in front of her by either of her sons without question or any particular insight as to what she was signing.
- [232] She did not explain the payment scheme that saw Tarsem and Kulwant pay Sukh for what was her -- or hers and her husband's -- interest in 77 Avenue. Nor did she explain why she and Surjit Singh continued to make sizeable payments to Sukh and Komal after the arrangement with Tarsem and Kulwant that was to have them pay "her share" after retirement.
- [233] I note as an aside that, despite her insistence that she brought substantial funds from India, none of the income tax returns filed by Surjit Kaur or Surjit Singh demonstrated the receipt of any income from any interest or investment. Following a brief period of working as a berry picker, she earned income exclusively from one or the other of the auto trim businesses in which Sukh participated.
- [234] On at least one occasion, when she worked for S. & S., Tarsem got her salary of \$18,000.
- [235] Surjit Kaur provided no reasonable explanation for funds transferred from her account to that of Komal and Sukh from 1999 to 2002. These are years she was "employed" by SB. While she acknowledged the transfers, she offered no reason for them. Further, she testified they stopped in 2000 following her conversation with Tarsem and Kulwant. They did not; she, or someone on her behalf, made substantial transfers to Sukh and Komal in both 2001 and 2002.
- [236] Surjit Kaur did not testify as to the purported discussions between her and Sukh and Tarsem following the deposit of a portion of the mortgage proceeds into her and Tarsem's joint account in 2011.
- [237] Given the self-acknowledged memory issues and the inability to read and write English so she could manage her own financial affairs, I place little reliance on Surjit Kaur's evidence as it relates to either the acquisition of 77 Avenue or the Warehouse.
- [238] Her testimony that Tarsem paid her -- and not Sukh -- rent of \$600-\$650 each month conflicts with Tarsem's testimony (as to whom he paid) and the letter from Sukh produced in Tarsem's divorce proceedings.
- [239] The manner of her compensation from S. & S. and, later, SB, all in even amounts, coupled with the transfers from her to Tarsem and Sukh lead to my finding that payments by either company to the Bilin parents were in the nature of income splitting for tax purposes and treated as the money of the sons; not their parents.

Komal Bilin

- [240] Komal's evidence is fraught with significant inconsistencies and implausibility.
- [241] Early in the litigation, the Court ordered both parties to disclose all banking records dating back to 2009. Komal very clearly did not. She did not disclose the existence of safety deposit rentals or other banking documents of significance.
- [242] In the fall of 2013, Sukh obtained a third party order directing production of KCU and CIBC banking records of Komal dating back to January 2010 that, as Sukh's counsel Mr. Fairburn correctly points out, resulted in the production of a wealth of undisclosed documents of significant importance to the issues before me.
- [243] Of particular importance was the disclosure of the history of the opening of the safety deposit boxes at the CIBC and KCU.
- [244] Komal's evidence at trial was frequently at odds with answers given under oath at her three examinations for discovery. For example, she denied on discovery having ever met Tarsem's first wife Kulvinder Bilin, while at trial said she had met with her twice in the presence of her lawyer for two hours or so.
- [245] Additionally, she testified at trial that Sukh had told her since shortly after marriage that he owned the entire home, and that he discussed his ownership of the home with her during the marriage in front of all of her family members. In discovery when asked "has he ever told you that he owns the entire home", she responded "no".
- [246] In her discovery on March 21, 2014, she acknowledged she understood that he only owned "one-half of the family home - and that the other half of the home was owned apparently by other members of the family".
- [247] Komal gave contradictory answers as to how she came to learn of the \$200,000 kept in the home during the early months of 2011. She testified on one occasion that Sukh told her of the money and that she overheard Sukh and her father speaking of it. At her discovery, she clearly acknowledged that Sukh told her of the existence of the fund before the separation in April 2011.
- [248] In May of 2012, Komal was terminated from SB. Likely; this was the impetus causing the initiation of the Provincial Court proceedings in early July 2012.
- [249] She acknowledged that she and Sukh had little, if any, personal interaction from the time he moved downstairs until he was served with the Provincial Court proceeding but then, at his instance, undertook a number of transactions resulting in the cash withdrawal of almost \$79,000 from the KCU account including the redemption of her RRSP.

- [250] Komal explained the withdrawals as being on the instructions of Sukh. She said that he went with her to the credit union and waited in the parking lot outside while she withdrew the funds. She gave him the cash she withdrew because he told her their separation was not permanent and that he needed the funds.
- [251] Her evidence is hard to reconcile with the following facts: (1) the parties had barely spoken in the course of a year and were living in separate portions of the home, (2) she had just been fired from her employment and had written angrily to the Canada Revenue Agency protesting Sukh's treatment of her, and (3) she was worried sufficiently about her and her sons' financial future to commence proceedings for support.
- [252] In her initial affidavit sworn in this Court proceeding, Komal sought a restraining order against Sukh preventing the disposition of assets but made no mention of the very substantial monies withdrawn from KCU during the months of June and July 2012.
- [253] Nowhere in her financial statement sworn May 28, 2013 are those transactions noted. In response to queries on this omission, she blamed her lawyer.
- [254] Sukh, of course, denied ever receiving any of the disputed funds.
- [255] Sukh stopped the weekly payments he had earlier been making to Komal at or around the time of the withdrawals but Komal did not press on for a court date to obtain a support order.
- [256] Komal testified she drove her sister's car, a 2010 Corolla. Only on cross-examination did it emerge that she has the exclusive use of the vehicle and her sister none. More likely, in my view, Komal bought the car and registered it in her sister's name so that she would not have to explain as to where she got the money.
- [257] Komal was untruthful or, at best, evasive about the circumstances of her involvement with Mr. Sidhu -- specifically about how they met and his assistance in getting her employment. Her evidence in chief leads to the conclusion he appeared out of the blue to lend her money to pay for her legal fees, and to assist her in getting a job for which she is paid \$700 a month for perhaps 10-12 hours of work per month. Mr. Sidhu said he had no expectation of repayment.
- [258] Komal's explanation as to the opening of the second safety deposit box at CIBC is implausible. She says the box was used only for passports -- hers and the boys' -- when there is no reason she would need a safety deposit box for that limited purpose.
- [259] Komal testified that the withdrawals from joint funds began after the conversation following service by her on Sukh of the Provincial Court documents. The affidavit of service notes that occurred July 6, 2012, but the significant withdrawals began July 4, 2012. They began in June.

- [260] Komal acknowledged that gold was kept in the safety deposit box, but denies she removed the gold in January 2011 when the records indicate she accessed it; that was the same month she rented another safety deposit box, ostensibly to store passports.
- [261] Neither of the safety deposit boxes Komal rented in 2011 were listed on her original Form 8 sworn in this proceeding. When that omission was drawn to her attention, she blamed her lawyer.
- [262] She testified she knew nothing of Sukh's back complaints despite the fact his family doctor's records make clear the complaints were long-standing. It is hard to think, given the history of his attendances upon his general practitioner, that she would not be aware he had back pain.
- [263] She said she was to Hardip Sidhu by her late father-in-law in her discovery but later acknowledged it was through her family that she met him.

Sukh Bilin

- [264] Much of Sukh's evidence is contradicted by documentary evidence. Some of it simply defies common sense.
- [265] As to the acquisition of 77 Avenue, the financial statements of S. & S. for December 31, 1997 disclose withdrawals over the course of the year from the partnership account of \$136,687 in favour of Sukh.
- [266] Sukh testified that he paid the \$5,000 down payment for the 77 Avenue property, but that his mother and/or his mother and father supplied the balance of the non-mortgage funds. He offered no reasonable explanation as to what became of the remaining funds he withdrew, save for the purchase of furniture.
- [267] Given the parties' modest living expense; they were living in Tarsem's home, absent independent or corroborative evidence about the parents' contribution of the \$79,000 needed to complete the purchase of 77 Avenue, I conclude, most probably, the draft came from Sukh's funds.
- [268] At a point in time following its purchase, Sukh obtained a power of attorney allowing him to sign freely wherever Surjit Kaur's name was needed. This allowed him to purchase the Warehouse using equity from 77 Avenue without Surjit Kaur's involvement. He similarly re-financed the 77 Avenue home in 2005 and 2006. In neither instance did he seemingly consult either of the parties staking a claim to the other half of 77 Avenue -- Surjit Kaur or Tarsem.
- [269] Komal co-signed as a covenantor leading to the conclusion that she was earning, or at least being credited with, income from SB.

- [270] As to the purchase of the Warehouse, Sukh's income tax returns for the relevant years were not in evidence. However, based on his 1997 income of \$81,000, it is reasonable -- absent evidence to the contrary -- that Sukh and the business were doing well. In support of that conclusion, I note that Kulwant, Surjit Kaur and Surjit Singh were all employees earning in excess of \$21,000 annually.
- [271] Tarsem and Kulwant's combined income of approximately \$45,000 in 2000 was in excess of Surjit Kaur's stated income in 1997 when she co-signed on the mortgage for 77 Avenue; a mortgage in an amount exceeding that required for the Warehouse.
- [272] Sukh testified he and Tarsem approached the bank, but that Tarsem did not qualify because of his low income. As against that, Tarsem and Kulwant testified that the two of them attended the bank together and were declined. That evidence is tough to reconcile.
- [273] The stated reason for Tarsem's absence on the title -- his inability to satisfy the lender's requirements -- does not ring true. Sukh qualified for the mortgage on his own. The addition of Tarsem on title, regardless of how modest his income was, could not have, as a matter of common sense, reduced the creditworthiness of the joint application for financing.
- [274] Sukh testified that he had no funds to invest in New Zealand in Bilin Investment in 2005, but he never explained the purpose to which the substantial transfer from his family members into his and Komal's account was used. Family members transferred close to \$230,000 into Sukh and Komal's account from 2000 to 2005.
- [275] Further, Sukh's explanation of his signature on Bilin Investment documents -- that he signed without reading at Tarsem's insistence -- is unbelievable. He offered a similar and equally implausible explanation for the appearance of his signature on the "eviction letter" Tarsem appended to an affidavit in 1999.
- [276] Absent some evidence as to discussions about the manner of payment and the amount, the transfer of just shy of \$300,000 from his parents, and Tarsem and Kulwant into the account of Sukh and Komal is implausible, on its face, as it relates to the family home and the Warehouse. Further, none of the respondents, Sukh, Tarsem or Surjit Kaur, could explain why the parents were transferring funds rather than receiving them for the assumption of their financial responsibilities by Tarsem and Kulwant.
- [277] Absent evidence between the parties, I am asked to conclude Tarsem and Kulwant continued paying until they decided they had paid enough.
- [278] After the transfers stopped in 2007, there is no evidence but that Sukh paid the property taxes, utility accounts, and other expenses associated with the ownership of 77 Avenue.

- [279] Sukh actively participated in Tarsem's divorce in two respects. He provided information used by Tarsem attributing the dissolution of their partnership to Tarsem's lack of work, and the letter subsequently attached by Tarsem in his legal proceedings indicating he was four months behind on his rent.
- [280] According to Surjit Kaur, she, not Sukh, received the rent and it was not \$700 but either \$600 or \$650.
- [281] The 'eviction' letter in 1999 was, I find, a contrivance designed to assist Tarsem paint a bleak financial picture in his divorce. The same applies to the break up of their partnership.
- [282] As to Sukh's stated health concerns, while I do not discount them given the clinical records noting the attendances and complaints of back pain and the opinion of Dr. Watt, they are in the main, self-reported as to the limitations such placed on his work.
- [283] Sukh claims to have gone to India for two or three months in 2010 for treatments -- specifically back decompression -- that he alleged resulted in the debt of something in the order of \$44,900 to Mr. Rai, an Indian resident.
- [284] The money was purportedly repaid in 2012 to Bajinder Jagpal, a resident of New Westminster. The repayment occurred two years following the advance, not upon Sukh's return from India. No explanation was offered for the delay. Sukh clearly had the funds on hand given he advanced \$200,000 to Mr. Kabani, immediately upon his return to Canada.
- [285] Sukh produced no evidence underlying the medical payments in India. Sukh says he left those documents downstairs in 2011 but, nonetheless, he was able to produce the promissory note ostensibly executed when he was in India in 2010.
- [286] Consistent with Komal's theory of the depletion of all of Sukh's assets similar to that which appeared to occur with Tarsem the late 1990s, is the significant deterioration in SB's accounts as described above. Not until ordered to produce such during trial, did Sukh provide records clarifying the amount that SB paid to subcontractors ostensibly because he could no longer do the work owing to medical issues. Komal was fired ostensibly owing to a lack of work and not the breakdown of the parties' marriage. Why then the extensive use of sub-contractors?
- [287] Nor did Sukh satisfactorily explain the significant drain on the Vancity account in the months preceding and following separation. He took out in excess of \$80,000 in cash withdrawals.
- [288] As to the repayment of over \$50,000 to Surjit Singh from the mortgage proceeds, I note again the availability of the funds transferred to Mr. Kabani in 2010 that were available to repay Sukh's father if money was truly owing to him.

- [289] Although Surjit Singh died whilst the proceedings were underway, he was never scheduled to give evidence as part of Sukh's case to confirm the debt Sukh alleged or the origin of the funds for the down payment on 77 Avenue.
- [290] Given the curious exchange of funds from the parents to the brothers, I do not accept Sukh's evidence that he had no beneficial interest in the account jointly in the name of his father.
- [291] It is more probable that both brothers used the accounts of their parents as their own, firstly when they were partners in S. & S. and then later when Sukh operated SB. Both parents were 'paid' incomes that reverted to the brothers or brother. Such more satisfactorily explains Tarsem's receipt of \$18,000 and the payments from his parents to Sukh after the creation of SB.
- [292] The use of a portion of the funds from the 2011 re-financing to loan to Tarsem, who in turn loaned over \$300,000 to Mr. Sidhu, is contrary to common sense. The arrangement, as documented between Sukh and Tarsem, provides for interest of 3% annually. According to the mortgage documents, Sukh was paying prime plus 10% to the bank on the 2011 re-finance.
- [293] The more plausible explanation for the transaction was to put the funds beyond the reach of Komal. Mr. Sidhu, rightly or wrongly, was viewed as a safe haven for the transfer of the funds.
- [294] All mortgage payments for 77 Avenue came out of Sukh's account. He paid \$200 a month according to his Form 8 for property tax. Neither Tarsem nor Surjit Kaur ever made a mortgage payment nor can either evidence a payment made in respect of the operating expenses.
- [295] As to the joint accounts, while Komal's name was on the joint account at Vancity, it is clear that Sukh oversaw and was the person responsible for most of the withdrawals. To demonstrate Komal was inaccurate in her assertion that she did not access the account, Sukh produced account statements indicating two instances demonstrating Komal signed withdrawal slips in the late part of 2011 and early 2012.
- [296] However, a history of the account reveals that Sukh, not Komal was responsible for the depletion of the account commencing in February 2011 and ending in May 2012.
- [297] Sukh's explanation that he paid family expenses by cash may or may not be true. However, the history of the Vancity account makes clear it was Sukh; not Komal, who ran the finances of the family.

- [298] As to the \$200,000 business venture involving Mr. Kabani, it is my conclusion that the singular purpose behind the transaction was to convert assets in the bank to cash. I find the note evidencing the exchange was a contrivance, at least on Sukh's part, to create what he perceived was a logical explanation leading to the ultimate conversion of the \$200,000 into cash.
- [299] That conversion, in turn, allowed Sukh to allege Komal had taken in and set in motion the chain of events that followed: the separation; Komal's dismissal; the re-financing of 77 Avenue; and the transfer of the Warehouse.
- [300] I say this for the following reasons.
- [301] The paperwork relating to the Kabani transaction describes it more as a loan than an investment. There are no terms contained that describe the arrangement Sukh and Mr. Kabani testified to.
- [302] They signed the document the day before the repayment in cash installments began. Despite the note indicating the whole of the \$200,000 was to be repaid as a lump sum, Sukh sought repayment in cash installments.
- [303] Once repaid in full, or as Mr. Kabani made installment payments, instead of returning it to the bank, Sukh says he stored it in the house, explaining in part that he was not well enough to attend the bank. Such is clearly untrue given production of SB's bank deposit slips signed by Sukh indicating he regularly attended Vancity from September until the middle of January 2011.
- [304] Sukh says he directed Komal to take the money and deposit it at Vancity, but instead she put in "the locker". Sukh learned of this when he checked the accounts online, yet he never attended Vancity to check the "locker" or to remove it. Instead, he left on his travels and, on his return, moved to the basement.
- [305] Despite the conflict that Sukh says arose over the missing \$200,000, they apparently continued working together until April 2012.
- [306] No other family member seemed aware of the 'theft'.
- [307] To be clear, I find that the note respecting the \$200,000 "loan/investment" was a contrivance -- similar to the eviction notice or Sukh's correspondence through counsel in 1997 demanding dissolution of the partnership. These documents and others I shall come to were not reflective of the transaction facially depicted, but rather were created to portray a set of circumstances that advanced the needs of one or the other of the Bilin brothers.

Tarsem Bilin

- [308] Tarsem, like his brother, lied on material matters in this proceeding. I base this finding on a combination of the wealth of sworn material from his divorce from Kulvinder, other material dating back to the time of the brothers' marriages and his testimony at trial.
- [309] Tarsem's evidence in his earlier divorce proceeding, while not directly relevant to the issues before me, make clear that Tarsem says what is necessary, when necessary, to achieve his ends.
- [310] In his divorce proceeding, he unequivocally described the 77 Avenue property as his brother's house in sworn material put before the Court. No mention was made of Surjit Kaur.
- [311] In the same year he swore an affidavit attesting to his desperate financial circumstances -- 2004 -- he also transferred \$35,000 to Sukh and Komal.
- [312] In that affidavit, he swore that he ran a courier business and that his wife did not work, but only assisted him in the courier operation. Specifically, he deposed: "My wife does not really work; she only helps me out in my courier business".
- [313] The statement regarding his wife, Kulwant, is blatantly untrue given the evidence in this proceeding coupled with her tax returns that disclosed she declared income from SB of \$45,000 in 2003 and \$73,192 in 2004. Tarsem attempted to explain the 'courier business' was in fact the auto-accessorizing business because both required on site work.
- [314] Kulwant was unaware that Tarsem had ever operated a courier business, let alone that she had assisted him in it. Tarsem also omitted material facts from the material put before the Court in 2004; specifically, he omitted his now alleged half ownership in the Warehouse and the payments he now says he made or on his behalf to acquire an interest in the 77 Avenue home.
- [315] Tarsem appended the letter signed by Sukh in 1999 that threatened him with eviction for non-payment of four months of rent. As earlier noted, I find that was a contrivance designed by both brothers to insulate Tarsem from the full financial consequences of his divorce.
- [316] Tarsem acknowledged receipt of the \$18,000 salary credited his mother in the year of dissolution and then listed her as a creditor in his divorce proceeding. He testified he repaid her, but provided no supporting documentation. Surjit Kaur did not testify about the transaction.

- [317] What is apparent is that the Bilin brothers have had joint accounts with their parents and used the "income" of each for their own purposes on more than one occasion. Surjit Kaur maintained a separate account for the deposit of her pension income, but operated a joint account with Tarsem that holds other funds. In 2011, that account received the deposit from Sukh.
- [318] Neither Tarsem nor Sukh properly explained the discussions that followed the deposit of the \$257,000 or those leading to its return to Sukh in 2012.
- [319] The \$300,000 transferred from Tarsem, his parents, and Kulwant into Sukh and Komal's account was never logically explained as to the mathematics underlying the payments or the effect of what was said to have been the \$79,000 down payment from his parents.
- [320] The explanation given by Tarsem was that the house was originally worth \$325,000 and the Warehouse \$185,000. Half of that amount was \$257,000, coincidentally the same amount Sukh deposited into the joint account in spring 2011.
- [321] Tarsem and Kulwant, collectively, transferred \$248,000. The parents, collectively, another \$51,000.
- [322] Neither Tarsem nor Sukh presented a believable rationale as to: (1) why Sukh got all the funds rather than Surjit Kaur; (2) why the parents were contributing to the "buy-out" at all; and (3) what became of what both brothers testified was Surjit Kaur's \$79,000 down payment and how was it accounted for in the transaction.
- [323] Tarsem's evidence surrounding the Warehouse acquisition defies common sense for the same reasons I enunciated when commenting on Sukh's evidence.
- [324] The trust document said to evidence the shared entitlement of the brothers purports to have been executed prior to the closing. The witnesses, who could have vouchsafed the accuracy of the April 2001 date of execution, did not testify although the issue of the legitimacy of the transfer was front and centre in the litigation.
- [325] Tarsem never testified he and Sukh went together for financing, but rather stated he and Kulwant were declined financing based on their combined incomes.
- [326] I agree with counsel for the claimant that on one of the cheques purporting to pay Tarsem's one-half share in the Warehouse -- that dated November 15, 2011 -- it appears that a post-it note or something akin to that was pasted over the "re line" of the cheque. Writing is slightly visible to the sides of the notation "50% share of S & K Auto". While ensuring the original bank copies were before the Court would have been helpful, in my view there is good reason to conclude that specific document was altered in some measure in an attempt to obliterate that which was written before. It is in keeping with my other conclusion about the Bilin brothers and their propensity for creating documents to suit the occasion.

- [327] SB deducted rent of \$12,000 annually and then Sukh declared a like amount as income on his personal return, less what appears to be all the Warehouse expenses, thereby reducing his net rental income to just under \$1,000. Tarsem claimed no similar personal revenue, despite his professed joint ownership; the financial statements of S & K describe the payments as rent.
- [328] The amounts specified as rent on S & K's financials do not correspond to the cheques written to Sukh.
- [329] Tarsem's explanation that "Kulwant could not be put on title to the Warehouse in 2011 because the notary handling the transfer said she was not a part of the original agreement" does not ring true. The trust agreement played no part in the transfer, given Tarsem paid property transfer tax on one-half the assessed value of the Warehouse at the time of transfer.
- [330] Tarsem stated that he began "paying the mortgage" on 77 Avenue in 2000 after Surjit Kaur advised him in 1999 of her and Surjit Singh's impending retirement. Documents filed on Tarsem's behalf make clear his first transfer to Sukh and Komal did not occur until 2004.
- [331] Following completion of the "mortgage payments" said by all the Bilin family, save Komal, to reflect purchase of Surjit Kaur's interest in 77 Avenue and one-half the Warehouse, the properties were not immediately transferred in fulfilment of the agreement. None of Sukh, Tarsem, or Surjit Kaur explained why. The Warehouse was not transferred until following separation
- [332] Even when the warehouse was transferred in 2011, no similar transfer occurred with 77 Avenue. Neither brother explained the different treatment of the two properties.
- [333] Tarsem's evidence regarding Bilin Investment rings hollow, as well. He testified he travelled to New Zealand to visit his sister who told him "if you open a company it will be easier to immigrate" with the result that "she faxed me a letter and I signed and got Sukh to sign".
- [334] Tarsem did not explain why Sukh's involvement was necessary. There was no suggestion Sukh contemplated immigrating to Australia such that ownership of a company would benefit him.
- [335] According to Tarsem, Sukh had no idea what he was signing and did not have any notion to move to New Zealand. Tarsem said he never discussed the document with Sukh.
- [336] In short, I find Tarsem's evidence on the matters of the ownership of 77 Avenue and the Warehouse to be unhelpful.

Hardip Sidhu

- [337] I begin by noting that Mr. Sidhu and Tarsem are in litigation over an advance of \$370,000 by Tarsem to Mr. Sidhu. Mr. Sidhu acknowledges the advance but says most of the advance was repaid.
- [338] Nothing I say in respect of the credibility of either Tarsem or Mr. Sidhu should affect the outcome of their separate litigation over the loans. They present different versions of the aftermath of the advances and I am not deciding, as between them, which is the more likely.
- [339] With that said, in this proceeding, I have little confidence in Mr. Sidhu's veracity or reliability.
- [340] Mr. Sidhu's credibility is undermined, in part, by the painstaking detail he offered up as to transactions involving Sukh and Tarsem at the Warehouse. He testified that he was able to recall, in 2011, seeing Sukh present Tarsem with 17 bundles of cash -- each of which contained \$10,000 -- together with a further \$60,000 in cash Sukh gave Tarsem several weeks later.
- [341] He testified that Tarsem told him that Sukh had repaid him (Tarsem) the money Tarsem put forward for the purchase of his mother's interest in the home.
- [342] I agree with Mr. Fairburn the purpose of that testimony was to persuade me that Sukh wholly owns both the Warehouse and the 77 Avenue property.
- [343] Mr. Sidhu testified that of the initial \$31,000 loaned to him by Tarsem, it was repaid in cash because "they were wanting cash but did not offer up a receipt to him". He claimed each brother told him they planned to divorce their wives and the purpose of the loan transaction was to hide money from them. He said he was told that a receipt showing repayment 'could be a problem for them'.
- [344] Mr. Sidhu testified that only after speaking to Surjit Singh at the temple did Mr. Sidhu come to learn that the brothers were "not really good guys" and that he should not go out of his way to help them.
- [345] Seemingly, Mr. Sidhu having heard directly from both brothers that they intended to defraud their wives -- or at the very least, Komal -- out of their interest in assets, needed an explanation, much later in time, from Surjit Singh to cause him to think ill of the brothers.
- [346] He acknowledged on cross-examination that his initial understanding of the loan transactions involving himself and Tarsem was a scheme to deceive the brothers' wives using false documents, and that he signed those documents knowing that he was assisting the brothers in perpetrating a fraud.

- [347] In respect of the second, larger loan transaction for \$340,000 that is part of the outstanding civil claim against Mr. Sidhu, he acknowledged telling Tarsem that the purpose was to allow his wife to buy a house.
- [348] He denied in cross examination that he actually needed the money advanced as the larger loan of \$340,000 until it was demonstrated through documents introduced at trial that the money advanced by Tarsem to Mr. Sidhu was actually applied -- or a significant portion of it -- towards the purchase of a home which completed in April 2012.
- [349] The home is registered in the name of Mr. Sidhu's wife and father, not Mr. Sidhu.
- [350] Instead of admitting the obvious, Mr. Sidhu acknowledged the possibility that the paper trail showed the money he borrowed went directly into the purchase of the house. His reply was that "[i]t is possible, but I did not issue any cheque. Neither is it (the house) in my name" is, at best, disingenuous.
- [351] The detail of the evidence given by Mr. Sidhu at trial far exceeded the detail in the will say statement provided by counsel per directions at a trial management conference. The enhancement of his oral evidence was material.
- [352] In particular, there was nothing in Mr. Sidhu's will say statement concerning cash payments that Mr. Sidhu alleges he witnessed between the brothers. Such is highly material to the claims of Komal made at trial, if believed. It is a significant omission. Mr. Sidhu blamed the omission on the lawyer preparing the will say statement.
- [353] Additionally, contrary to the documentary evidence that shows the whole of the \$341,000 came from a variety of bank loans, Mr. Sidhu testified the monies lent to him by Tarsem included \$60,000 in cash --the inference I am to draw, no doubt, is that such was the same \$60,000 handed over by Sukh to Tarsem. The banking documents in support of the loan(s) make clear there was no cash component.
- [354] Sukh denied any degree of friendship with Mr. Sidhu or any disclosures as suggested by Mr. Sidhu in his evidence. Sukh was not cross-examined on his relationship with Hardip Sidhu.
- [355] Mr. Sidhu testified he helped Komal with her legal fees by paying her lawyer, who is also his lawyer in the action involving Tarsem, \$15,000. He did not characterize the payment as a loan to her, but rather as assisting her because of the wrongs done to her by the Bilin brothers.
- [356] That assertion seems disingenuous given Mr. Sidhu was actively participating in the alleged fraud -- he says he paid the loans back in cash, save for \$60,000, so that it could later be alleged the money was unavailable to one or the other of the Bilin wives.

- [357] In short, I place no more reliance on the testimony of Mr. Sidhu than I do on Tarsem, Sukh or Komal. Likely, some of what he said is true. However, I do not rely upon his evidence to determine the ownership of either piece of property, nor do I rely on it in respect of the cash payments or money transfer he says that he witnessed.
- [358] Neither Tarsem nor Sukh had it suggested to them that Mr. Sidhu was with them at the bank when they transferred funds to New Zealand. While possibly not unlikely one or the other Bilin brother might have spoken to a friend such as Mr. Sidhu about business dealings in a foreign country, the chance that he would be present in a financial institution with one or the other of them as such a transfer was being made seems highly improbable.

Kulwant Bilin

- [359] Kulwant testified a meeting took place involving Surjit Kaur, Tarsem and herself following her arrival in Canada and prior to the "retirement" of Surjit Kaur and her husband from SB. By then, she was working for SB. When asked why she was not working for Tarsem, she testified he did not have the business.
- [360] The discussion, according to Kulwant, focused on Surjit Kaur's interest in 77 Avenue. Kulwant did not testify as to any discussions with Sukh regarding payments they were to make regarding the Warehouse ownership, but did testify that she and Tarsem approached different banks seeking a loan prior to the Warehouse's purchase and did not qualify.
- [361] Kulwant said she and later Tarsem began paying Sukh his mother's share, yet said they still paid "\$600 or \$650 rent" to Sukh. Later in her evidence, referring to rent, she said "Sam paid - he'd hand to his mom and what she did - I have no idea".
- [362] As to the Warehouse purchase, she testified that she was a "new arrival" and that she was not making much. The combined income for the two of them was \$45,000 making it difficult to accept her and Tarsem's evidence the bank(s) simply turned them down.
- [363] She did not know the amount borrowed on 77 Avenue and used as a down payment on the Warehouse, despite testifying she and Tarsem -- independent of Sukh -- were trying to get bank financing for the remainder needed to close.
- [364] Once she and Tarsem had paid their share, she said he paid for utilities and taxes only. Kulwant seemed oblivious to the fact 77 Avenue was the subject of various re-financings after 2001 and the impact such might have on their equity.
- [365] When asked why the properties were not both transferred in 2007 after full payment, Kulwant answered, "they were fine with the Warehouse in his name and the house in mum's name". She did not explain the transfer of the warehouse; not the house, into Tarsem's name in 2011.
- [366] Kulwant was unable to articulate what criteria they used to know that she and Tarsem had "paid their share" in respect of the properties, but said they "calculated it".

- [367] Sukh did not discuss the 2011 financing with either Tarsem or Kulwant before depositing the money into Tarsem and Surjit Kaur's account, but later in cross-examination, Kulwant recalled saying to Sukh he could only mortgage his half of the house because they owned the other half.
- [368] Kulwant testified that the money transferred from her account to Sukh and Komal's was "for the mortgage".
- [369] She testified that she and Tarsem began paying one-half of the property taxes "for our mum" and they paid the utilities, although no records were produced showing that was the case.
- [370] Nor could Kulwant explain how the amount paid by her and Tarsem equated to the value of the two properties, the impact on the price of Surjit Kaur's down payment, or the money advanced by her in-laws after 2000.
- [371] She testified that in 2011 Sukh tried to buy the house, but that the discussions "didn't work out" so Tarsem and his mother returned the funds to Sukh. She, like the others, provided no detail of the discussions surrounding Sukh's proposed buy-out. She had no idea he had mortgaged the whole of the home to come up with the proposed purchase price.
- [372] Neither she nor Tarsem testified that they were made aware of the underlying reason for the proposed 'buy back'; specifically that Komal had take \$200,000 in cash from Sukh and insisted on her name on title of 77 Avenue before she would pay it back.
- [373] She denied there were funds in New Zealand, but acknowledged Tarsem thought of moving there.
- [374] She acknowledged Tarsem never worked as a courier at any time since her arrival. She said she did not work with him because he did not have the business.
- [375] Although she described the history of her income from SB, she offered no rationale as to why she received bonuses which brought her income from a starting wage she said was \$2500 a month (which it was not) to over \$70,000 in some years.
- [376] Almost everything she earned eventually was returned to Sukh.
- [377] Despite originally testifying she knew nothing of the 2011 mortgage, she testified in cross-examination that she remembered, over a break, speaking to Sukh about the mortgage and telling him he could only use his half because the other half was "theirs".
- [378] Kulwant's evidence suffers from the same want of detail about the two properties, as does that of the brothers.
- [379] She cannot plausibly explain the absence of Tarsem's name on the title of the Warehouse, or the absence of any underlying formula for the buyout of Surjit Kaur's interest in 77 Avenue or the Warehouse.

[380] Her evidence that the buy back by Sukh of 77 Avenue "didn't work out" is indicative; in my view, it is bereft of the detail one expects of an event such as Sukh approaching Tarsem and his mother wanting to buy out their interest. So is her recall in cross-examination of her statement to Sukh that he could only mortgage his one-half of 77 Avenue.

Property Division

- [381] Part V of the FRA governs the division of property. The FRA provides for the prima facie equal division of family assets subject to the provisions of s. 65 of that Act, which provides for the unequal division of family assets if an equal division would result in unfairness. The FRA also provides for compensation to a party whose potential entitlement to share in what would have been a family asset is undermined by the actions of the other party in disposing or dissipating the asset prior to the crystallization of the claiming party's entitlement: s. 66.
- [382] Unfairness is determined based on the statutory criteria set out in s. 65(1).
- [383] The onus of proof rests with the party opposing a claim by the other that property was not ordinarily used for family purposes.
- [384] Family assets are determined as at the triggering event: either a declaration that the parties' marriage has irretrievably broken down, a separation agreement, or the pronouncement of an order for divorce. None of those has occurred to date.
- [385] Property becomes a family assets subject to division when, as here, it is owned in the name of one party, but ordinarily used throughout the marriage by the parties; such would include 77 Avenue, the parties' personal accounts, joint or otherwise, and, as a result of direct or indirect contribution to the asset, a business asset such as SB or the Warehouse. An indirect contribution includes child rearing and household management. Here, all the assets discussed are admittedly family assets.
- [386] In respect of many of the admitted family assets -- the house, the cash, the Warehouse -- the issue is not whether the property is a family asset but (1) what share is a family asset and (2) where is it?.

The Assets

- [387] Rarely does the determination of family assets pose such a daunting task for the trier of fact. Rarer still is the task of deciding which of the parties has appropriated the cash sums acknowledged to have existed.
- [388] I begin with following observation of Madam Justice Southin in *Le v. Milburn*, [1987] B.C.J. No. 2690 (S.C.), where she said at para. 2:

When a litigant practises to deceive, whether by deliberate falsehood or gross exaggeration, the court has much difficulty in disentangling the truth from the web of deceit and exaggeration. If, in the course of the disentangling of the web, the court casts aside as untrue something that was indeed true, the litigant has only himself or herself to blame. In this case there has been some deliberate falsehood and some exaggeration.

[389] That statement has application to the matters before me.

[390] With the principles from *Faryna* in mind, I have attempted to resolve the conflicts in the evidence based upon the "preponderance of the probabilities" affecting the case as a whole.

[391] To be clear, I find the evidence of all major participants to the trial to be lacking veracity.

[392] To the extent I err, the parties, in my view, have themselves to blame for the confusion caused by their deceit, obfuscation, or inadequate production of historical records.

[393] The evidence, as presented, does not allow me to untangle the web of transactions so as to explain with precision Surjit Kaur's original placement on title of 77 Avenue, the ultimate disposition of funds admittedly transferred from Tarsem, Kulwant, Surjit Kaur and Surjit Singh's accounts into Sukh and Komal's account, or the effect of those transfers on the title of 77 Avenue and the Warehouse.

[394] I view with scepticism those documents prepared by the parties given the ulterior motives of those with a financial stake in the outcome.

[395] Where evidence from a witness I consider to be dishonest conflicts with common sense, I have opted to accept that the parties to this proceeding have acted rationally, objectively, and protective of their self-interest.

The \$200,000

[396] I begin with the \$200,000 that I know to have existed given the documentary record leading to the transfer of a draft to Mr. Kabani in 2010 and receipts that evidence repayment over the course of September 2010 through to January 2011.

[397] To be blunt, one of the parties, either Komal or Sukh, is lying as to who has the \$200,000. There is no polite way to explain the dichotomy in their respective versions.

[398] Given my earlier finding that both Komal and Sukh have intentionally misled me on matters throughout their evidence, and in keeping with the earlier referenced passage from *Faryna*, I must determine which version of events stands in harmony with the whole of the evidence.

[399] I begin with a review of the transaction that gave rise to the receipt of \$200,000 cash by Mr. Kabani.

- [400] The starting point is the funds safely invested in Vancity that were readily available for distribution or to satisfy family debt Sukh says he owed his father and Mr. Rai.
- [401] Instead, he provided a draft to Mr. Kabani in September 2011 in support of an ill-defined business venture supported by what appears to be a promissory note.
- [402] I disbelieve both Sukh and Mr. Kabani as to the vague reasons given for the advance, and Sukh's subsequent decision to back out of the "venture" and ask for the return of the funds in cash rather than a return via a draft so he could re-deposit them into the financial institution from which they were withdrawn.
- [403] I need not conclude Mr. Kabani, unlike Mr. Sidhu who acknowledged he was party to a fraud, understood the intention behind Sukh's conversion of the \$200,000 on deposit to cash, but I do not accept Sukh's evidence as to the business purpose behind it.
- [404] Sukh's change of heart and request for a return of the funds came within a day of the promissory note's execution by Mr. Kabani and a week after the advance of the funds. Mr. Kabani had made no inventory purchase and had the funds available to repay Sukh. Sukh requested repayment in cash installments rather than a draft. The only purpose behind the transaction was it provided an opportunity for the funds to disappear.
- [405] Sukh's explanation that he could not deposit them into the bank himself because of back pain is unbelievable on its own. More particularly, his denial is in direct contrast to the banking documents, produced late in the trial, which demonstrate Sukh regularly attended Vancity to make SB's deposits from September through to January 2011.
- [406] Moreover, the amount of the deposits belie his assertion that he was not working owing to back problems. The deposit records show substantial deposits that, in turn, equate to substantial income being earned over the three plus months from loan to repayment.
- [407] While I disbelieve Komal when she says that she did not know from Sukh of the money being in the house, I do not believe she took it as suggested by Sukh. This, despite the opening of the safety deposit box at KCU in January 2011.
- [408] Following Komal's termination from SB, Sukh provided her with money weekly to buy groceries for herself and the two boys. If Komal had the \$200,000 as alleged, why would Sukh pay her anything? He says he learned of the fact she had not deposited the \$200,000, but "put it in the locker".
- [409] The only "locker" he knew of was a joint safety deposit box that he could access. He did not. Logically, he did not because he knew the funds were not there.
- [410] Instead, he went to New Zealand. No other family member seems to know anything of the stolen money. Sensibly, I find the theft of such a sum would have been a topic of conversation between Sukh and others in the family.

- [411] The "missing" \$200,000 was the impetus for all that followed. The parties' marriage broke down. Sukh re-financed 77 Avenue home without Komal's knowledge, he transferred one-half of the Warehouse to Tarsem, and "debts were repaid" with the mortgage proceeds.
- [412] I conclude Sukh created a plan to 'explain' the disappearance of the \$200,000 formerly on deposit via its conversion to cash. I conclude he, not Komal, took it from the house.
- [413] Accordingly, Sukh must account to Komal for the \$200,000 by way of a compensation order for one-half the sum taken: \$100,000.

The \$78,760 Withdrawals in July 2012

- [414] Komal acknowledged she withdrew \$78,760 from her and Sukh's joint accounts. The records indicate the withdrawals began June 19, 2012 and concluded July 16, 2012. Her testimony that she did so at Sukh's request following service upon him of the Provincial Court proceedings does not ring true.
- [415] Komal acknowledged she and Sukh rarely spoke following his move to the basement in April 2011. She commenced the Provincial Court proceedings with a view to getting support for herself and the children.
- [416] After serving him with proceedings, he is said to have asked her to cash the term deposit at KCU and provide him with the cash. She went to the credit union on a number of days in July and, on each attendance, made a sizeable cash withdrawal. She said she gave it to Sukh. He drove her to the institution, waited for her, and then received the cash.
- [417] The total of the withdrawals was \$78,760, including redemption of her RRSP. Sukh denied any knowledge of the withdrawals at the time.
- [418] The banking records make it clear, and Komal admits, that it was she who took the funds from KCU.
- [419] In argument, Mr. Fairburn on behalf of Sukh noted the opening of a new safety deposit box at CIBC by Komal in close proximity to the time the funds were withdrawn. Its existence was revealed after a third party production order of Komal's banking records.
- [420] Mr. Fairburn argues, and I agree, the only logical inference is that she took the funds and put them into the safety deposit box.
- [421] Again, keeping in mind the harmony of all of the evidence surrounding this event, I find it more likely that Komal, not Sukh, has the funds in question.
- [422] I say so for the following reasons:

- [423] There is no independent corroboration of Komal's version of the money's transfer to Sukh. For reasons earlier given, I have concluded that Komal's evidence is untrustworthy. I conclude this based on the many instances of inconsistencies, not an isolated departure from the facts sworn to at discovery and its variance from her evidence at trial.
- [424] Timing is important in considering the plausibility of Komal's evidence regarding the exchange. She commenced the Provincial Court proceedings seeking funds after her termination from SB. She had reported Sukh's actions to the Canada Revenue Agency that, in essence, accused Sukh of fraudulently providing tax information slips that overstated Komal's income.
- [425] It is impossible to fathom how she would then accede to Sukh's purported request to strip the joint accounts and provide him with the proceeds in cash. All the more so when he could access the account without her.
- [426] She and Sukh had lived separate from one another for a period in excess of a year. She acknowledges that they had little to do with one another over that period. He left money for her on the stairs to meet her cash needs while continuing to pay the mortgage and costs associated with the house.
- [427] The *raison d'être* for the resumption of dialogue, and the request for her to remove funds, was that she served him with proceedings in Provincial Court thus initiating, she says, his comment that the split was not final. However, the withdrawals began before the date she served him.
- [428] While I have found Sukh devious enough to embark upon a scheme for the conversion of \$200,000 into cash he could later claim disappeared, that plan was executed without any active participation from Komal. Here, Komal took the funds out, quickly rented a new safety deposit box, and shortly thereafter gained 100% access to "her sister's car".
- [429] Further, shortly following the withdrawal of the funds from the CIBC and KCU, Sukh stopped paying the cash payments that he had previously been making to Komal for her expenses.
- [430] Given I am dealing with the balance of probabilities as to which, on the totality of the evidence, seems the more likely scenario, I conclude that it is more likely than not that Komal withdrew the funds and subsequently deposited them into the newly opened safety deposit box.
- [431] It is further more likely than not that the Corolla automobile she later came into possession of, but which is registered in the name of her sister, was purchased using some of those funds.
- [432] In conclusion, Komal needs to account to Sukh for the funds removed by her from the accounts in their joint names. I make a compensation order in favour of Sukh for one-half the sum taken: \$39,380.

The Receivable from Mr. Reddy

- [433] Mr. Reddy's testimony that he still owed Sukh funds from the \$100,000 loan seemed to surprise Sukh, who called Mr. Reddy for another purpose: to demonstrate Komal's participation in the business of SB.
- [434] Nonetheless, Mr. Reddy testified he believed that he still owed Sukh "perhaps \$15,500". The receivable is a family asset divisible between the parties.
- [435] Given I am sceptical as to whether the funds are recoverable, I leave it to the parties to either agree or make further submissions as to how the receivable should be treated in terms of realizing on each party's interest.

Debt

- [436] The FRA, unlike its successor, the FLA, makes no provision for the sharing of debt. Case law, however, makes clear that debt can be considered as to the issue of reapportionment where debt in the name of one of the spouses was incurred to acquire, maintain or preserve family assets: *Mallen v. Mallen* (1992), 65 B.C.L.R. (2d) 241 (C.A.).
- [437] Here, the debts claimed by Komal, for the most part, arose following separation in 2011. Given the approach I have taken as to the identification and valuation of assets, other than the real estate interests, it would not be appropriate in my view to saddle Sukh with Komal's credit card expense incurred following separation.
- [438] That same logic applies to Sukh. Debts arising post-separation are, unless incurred to preserve an existing asset, unlikely to warrant reapportionment of those assets found to be family assets.
- [439] Sukh provided no evidence of how any of his current debts, whether to Mr. Dhak, Mr. Naiker, or others either preserved or enhanced the assets that are the subject of division. The same applies to the credit card debt in Sukh's name.
- [440] Accordingly, the parties shall each retain responsibility for the debt in their respective names.
- [441] As for the debts alleged to Sukh's father and to repay Mr. Rai (via payment to his cousin, Mr. Jagpal), I find, for reasons referenced later on, they were contrivances by Sukh to diminish the funds otherwise divisible as family assets.
- [442] Specifically, I conclude that the portion of the mortgage proceeds Sukh used to repay his father and Mr. Jagpal are fictions created by him to lessen the equity in the family home.

Jewelry

- [443] Jewelry was mentioned by counsel during the claimant's opening, but little was said by her during her testimony regarding what jewelry exactly, or what it was worth. She testified "they took it from me after one month in Canada".
- [444] Absent cogent evidence as to the scope of what is said to be Komal's wedding jewelry, I am unable to make any order regarding it.

Sukh's RRSP

- [445] By definition, an RRSP is family property. Upon the pronouncement of a triggering event, the asset is to be divided equally unless there are factors making an equal division unfair.
- [446] Here, given no apparent growth in Sukh's RRSP from separation until trial, his RRSP of approximately \$30,000 will be divided equally by way of a spousal roll-over pursuant to the provisions of the Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.).
- [447] If the claimant can draw my attention to documentary evidence indicating a withdrawal or diminishment in Sukh's RRSP from the period shortly prior to separation or post-separation, I shall revisit my conclusion. Absent such evidence, the division will be in respect of the RRSP as stated in Sukh's Form 8.

The RESP

- [448] The RESP is in the name of both parties and was created with the purpose of assisting the boys, or one of them, with post-secondary education expense.
- [449] It should remain in joint names until used for its intended purpose. If neither boy avails himself of the fund, then the remainder in the fund is to be split between the parties equally. There will be liberty to apply if disagreement arises as to its application.

S.B. Auto Trim Ltd.

- [450] According to Sukh and the most recent financial statements, SB is of little if any value currently. There is no argument but that the shares are family assets "earned" by Komal because of her direct and indirect contributions. However, division of SB shares would ignore their underlying value as at the date of separation.
- [451] Normally, family assets are valued as at the date of trial: *Blackett v. Blackett* (1989), 40 B.C.L.R. (2d) 99 (C.A.).
- [452] Redress for unfairness created by the diminution in the value of a potential family asset between separation and trial can occur in one of two ways. First, it is open to me to unequally divide other family assets to account for any unfairness that arises. Second, I can make a compensation order under s. 66 of the FRA which reads as follows:

66 (1) In proceedings under this Part or Part 6 or on application, the Supreme Court may determine any matter respecting the ownership, right of possession or division of property under this Part, including the vesting of property under section 65, or under Part 6 and may make orders that are necessary, reasonable or ancillary to give effect to the determination.

(2) Without limiting subsection (1), the court may do one or more of the following in an order under this section:

(c) order a spouse to pay compensation to the other spouse if property has been disposed of, or for the purpose of adjusting the division;

[453] Here, I conclude the reduction of value in SB's shares was not a result of market forces or Sukh's illness. I reject his evidence regarding the extent to which his back complaints impair his ability to perform the duties he historically undertook on SB's behalf.

[454] I agree with counsel for Komal that it is more likely that the reduction of SB's profitability is explained by the corresponding rise in the fortunes of S & K Auto Trim Ltd. The shoe is now on the other foot; Sukh, not Tarsem, is the one who needs protection from a departing wife. The greater Bilin family, save possibly Surjit Singh, have gathered again to protect one of the sons from the financial consequences of marriage breakdown following a lengthy marriage.

[455] In *Newson v. Newson* (1986), 2 R.F.L. (3d) 137 (B.C.C.A.) it was held that redress is available, whether under s. 65 or 66(2)(c) the FRA, where a spouse has disposed of "potential" family assets prior to or after separation, but before the triggering event provided the disposition, and where the result is unfairness to the non-owning spouse.

[456] Unfairness does not arise where market forces cause a reduction in value in a potential family asset or its disposition is required to maintain or preserve other family property. That is not the case here.

[457] Here, I conclude the reduction in SB's value was part of a plan by Sukh to diminish the family assets.

[458] As at the October 31, 2010 year-end for SB, it had retained earnings of \$273,000. Its two employees, Sukh and Komal, earned incomes of \$88,000 each in 2010. The company had modest net profit of \$6,500.

[459] In the year-end statements for October 31, 2011, six months following separation, the retained earnings had dropped to \$172,000 after a loss of \$100,000 after salaries and wages of \$107,000.

[460] The retained earnings represent, for the most part, the book value of SB -- cash, receivables, and inventory offset by liabilities. The goodwill, if any, is or was personal to Sukh.

- [461] Fairness dictates Komal be compensated for the loss of value of her interest in the shares of SB given my conclusion that Sukh actively sought to prevent Komal from realizing her share.
- [462] Fairness, does not necessarily result in equal division of the company at the zenith of its value, but nor does it militate in favour of ignoring SB as Sukh suggests. I note here that Sukh owned SB prior to marriage. Under current legislation, its value at marriage would be excluded property beyond Komal's reach.
- [463] Rough justice requires me to reduce the value of receivables and the inventory as at the 2011 year-end, but not the cash. I also consider the potential distributive taxes on the assets of SB, albeit I acknowledge no evidence was led as to what taxes, if any, would result from liquidation and distribution of the assets.
- [464] In the result, doing the best I can without valuation evidence regarding SB's shares closer in time to the separation, I set the fair market value of the shares, as at the year-end following separation at \$100,000.
- [465] Komal is entitled to a compensation order of \$50,000 in respect of the diminution of SB's shares post-separation.

77 Avenue and the Warehouse

- [466] In view of the evidence of all of the respondents as to the purpose underlying the transfer of funds from Kulwant, Tarsem, and both parents into Sukh and Komal's account, it is convenient to deal with the two properties together. Much of what follows has application to both.
- [467] As noted, I reject the evidence off all those who testified that Surjit Kaur and/or Surjit Singh provided the down payment for 77 Avenue. All of the money needed to acquire 77 Avenue in 1997 belonged to Sukh. I conclude he withdrew the needed funds from S. & S. as indicated from that company's records.
- [468] Komal's evidence that she was told Sukh only owned half the residence does not make that factually true. Surjit Kaur's ownership of one-half of 77 Avenue is predicated on the accuracy of the origins of the down payment and purpose of the payments that followed from 2000 to 2007.
- [469] Given the evidence of all three Bilin respondents as to the origins of the \$79,000, which they offered as the reason underlying Surjit Kaur's name on title, it is not open to Sukh to suggest the placement of 77 Avenue into joint names was a gift to Surjit Kaur, nor can Surjit Kaur rebut the presumption of resulting trust that she holds her interest in trust for Sukh.

- [470] To the extent either parent contributed to the ongoing expense of maintaining 77 Avenue, I conclude that any money "earned" by either parent was treated as funds of either Sukh or Tarsem. Support for that conclusion is the \$18,000 in wages taken by Tarsem from his mother's "earnings" from S & S and the transfers of lump sums from both parents into Sukh and Komal's joint account after the acquisition of 77 Avenue.
- [471] I reject Tarsem's evidence as to the manner in which he paid rent. Tarsem, it is to be recalled, swore in his divorce proceeding that 77 Avenue belonged to Sukh.
- [472] I conclude that throughout the ownership of 77 Avenue, only Sukh has paid the mortgage(s), the taxes and household utility accounts.
- [473] Further evidence of Sukh's singular ownership of 77 Avenue is the fact he, alone, negotiated the mortgages without consultation with either Surjit Kaur or Tarsem. He used the funds received for his own purposes -- most recently, the payment of debt he suggested was to his father and Mr. Rai.
- [474] Were the house beneficially owned by another as suggested by the three Bilin respondents and Kulwant, Sukh would have consulted with them as he eroded the house equity for his singular purposes. Some arrangement would have been in place to provide for a proper accounting between them of the effect on their interest in the home equity.
- [475] Similarly, I conclude the reduction in home equity resulting from the 2011 mortgage was, as suggested by Komal, a mechanism to reduce the funds available in this litigation.
- [476] Sukh's evidence that he borrowed the funds first and then engaged in efforts to "buy" the other half defies common sense. Any borrowing, particularly at the interest rate he negotiated, would surely have followed an agreement with whomever actually was beneficially entitled to the other half: Tarsem or his mother.
- [477] I conclude the 2011 re-financing of 77 Avenue was but another attempt by Sukh to reduce the family fortunes with the hope Komal would settle for a portion of what remained.
- [478] Neither Tarsem nor Surjit Kaur produced any evidence indicating that either of them reimbursed Sukh for the taxes, utilities, etc. on 77 Avenue either prior to the completion of the transfer of funds or after.
- [479] Sukh's counsel notes the presumption in s. 23 of the Land Title Act, R.S.B.C. 1996, c. 250, that the names on title accurately reflects the ownership of property.
- [480] However, that presumption is rebuttable. In *Lindquist v. Waring*, 2007 BCSC 205, Bruce J. stated the following commencing at para. 48:

- [48] Addressing the first issue, the parties were registered owners as joint tenants in the Kilpatrick Property. The Torrens land registration system in this province creates a statutory presumption of indefeasible title in a registered owner of property and places the onus on the party seeking to rebut this presumption to provide evidence that the registered owner holds their interest in trust for that party or another. This presumption is codified in s. 23(2) of the Land Title Act as follows:
- s. 23(2) An indefeasible title, as long as it remains in force and uncanceled, is conclusive evidence at law and in equity, as against the Crown and all other persons, that the person named in the title as registered owner is indefeasibly entitled to an estate in fee simple to the land described in the indefeasible title
- [49] The presumption of indefeasible title may be displaced by evidence that it is contrary to the parties' agreement, or to the intention of the parties, and that to uphold the title will result in an unjust enrichment: *Bajwa* at paras. 13 and 14.
- [50] The defendant also relies upon the presumption of advancement. When one person transfers title to property to another without consideration, the law of equity presumes a resulting trust or, in other words, that a gift was not intended. Where, however, the parties are husband and wife, it is presumed that a gift was intended: *McDonald* at para. 33. This is the presumption of advancement.
- [481] The presumption of advancement does not apply as between Sukh and Surjit Kaur with the result that the presumption of resulting trust governs ownership of 77 Avenue.
- [482] As to a contrary intention, the intention as to the ownership is best evidenced by actions, not words. Sukh throughout treated 77 Avenue as his own. He used the power of attorney provided by Surjit Kaur to effectively deal with the property as his singular property. He did not seek approval of either Tarsem or Kulwant to re-finance in 2011.
- [483] As to the impact of the funds transferred from the parents, Tarsem and Kulwant, I refer back to Justice Southin's caution in *Le*. If those funds were meant to acquire an interest in 77 Avenue for Tarsem and Kulwant, then title would have been transferred upon completion.
- [484] As earlier noted, I reject the math offered in support of this outcome and question why, if Tarsem and Kulwant were buying Surjit Kaur's interest, both parents were contributing to the supposed buyout of their interest to Sukh. This, too, defies common sense.
- [485] There are other explanations for the transfer of funds from 2000 to 2008.
- [486] Kulwant, the largest contributor, returned substantially all of her salary to Sukh. Her salary, at least in later years, was far out of proportion to the value of the work she performed.

- [487] Both parents contributed after having received salaries from SB for a number of years. Likely, they did nothing to earn them. Since 2008, the business operated with only Sukh and Komal who, at best, worked part time on the road and received goods at the Warehouse.
- [488] Why four employees were necessary; perhaps five -- Sukh, Kulwant, both parents, and Komal --was unexplained.
- [489] It is likely, in my view, that the payment of salaries by SB was a form of income splitting to reduce tax payable by Sukh.
- [490] Another equally probable outcome is that the money transferred into Sukh and Komal's account was used for an entirely different purpose unrelated to 77 Avenue. It is conceivable, although not proven, the money was transferred to another country as alleged by Komal. Absent the historical bank records, it is impossible to tell what use was made of the significant funds transferred.
- [491] Finally, I note the history of loans/ventures where either Sukh or Tarsem have loaned sizeable sums to others, notably, Mr. Sidhu, Mr. Reddy and Mr. Kabani. Those are the loans which came to light during the trial. Others may well exist which remain outstanding and which relate to the funds advanced by Tarsem, Kulwant and the parents.
- [492] Sukh, in my view, had the ability and the onus to demonstrate the use of the transferred funds. He did not.
- [493] In short, I do not have faith that Sukh or Tarsem have fully disclosed their business dealings with others.
- [494] In the result, I conclude that Sukh is the beneficial owner of the whole of 77 Avenue, and make such declaration as necessary to attend to the alteration to the title certificate to reflect my finding.
- [495] Further, for the purpose of dividing the house, the amount outstanding on the 2011 mortgage is chargeable only as against Sukh's interest given he alone received the benefit of the funds not reapplied against the mortgage in 2012.
- [496] As to the warehouse, I place no reliance on the Trust Agreement said to explain the 2011 transfer.
- [497] I repeat my scepticism as to the reasons advanced why Tarsem was not originally on title.
- [498] While Tarsem no doubt occupied the warehouse from early on, occupation does not give rise to ownership. It is a factor in assessing the overall plausibility of the assertion of the Bilin brothers that they jointly owned the warehouse from its date of purchase. (The same applies to 77 Avenue. Sukh and his lived with Tarsem in his home for a number of years following their arrival in Canada. Their residency did not give rise to claims of ownership.)

- [499] As against that is the failure of Sukh to transfer the warehouse into joint names once the mortgage was paid off or once the transfer of funds from Tarsem and Kulwant were complete. Instead, it was transferred to Tarsem as a tenant in common in November of 2011 when Tarsem became worried about Sukh's failing marriage.
- [500] Tarsem, albeit never obliged to disclose post divorce assets in the ongoing litigation with his first wife, made very clear his lack of resources in an effort to minimize his post divorce support obligations. The assertions made in that proceeding are very much at odds with those he makes now.
- [501] I agree with counsel for Komal it looks more likely than not that cheques said to reflect Tarsem's ownership in the warehouse were altered to change the 're line' as to the cheque's purpose.
- [502] Sukh testified that the Duplicate Certificate of Title respecting the warehouse is not on deposit with the Land Title Office. He explained the removal as follows: "they can loan on it and I don't need approval" (emphasis added).
- [503] The Duplicate Certificate of Title had to have been on deposit with the Land Title Office to affect the change in title in 2011. Sukh did not say who withdrew it or where it was. Tarsem did not mention the Duplicate Certificate of Title.
- [504] In my view, the reference to "I", not "we" is telling as to Sukh's view of the ownership.
- [505] Having rejected the rationale offered by the respondents and Kulwant as to the purpose underlying the cash transfers and having noted earlier what I consider equally probable scenarios underlying those transfers, I am unable to conclude the transfer in 2011 was bona fide for value.
- [506] Accordingly, I order the 2011 transfer be set aside and title of the warehouse be restored to Sukh's name alone.
- [507] Thereafter, I find it to be a family asset based upon Komal's indirect contribution and subject to equal division.

Bilin Investment

- [508] Other than the formation of Bilin Investment in 2005, there is no evidence on which I can conclude there are funds within the company such as to declare the funds or the shares family assets in which the claimant has an interest.
- [509] I reject the evidence of Mr. Sidhu as it relates to cash transfers.
- [510] The company was struck from the Registry of Companies in 2008.
- [511] I find it has no present value and does not form part of the family assets.

The Other Assets

- [512] In addition to the real property and the business of SK Auto Trim, there are significant cash assets that Komal alleges Sukh disposed of as the marriage was disassembling. In particular, she notes the joint account and the cash withdrawals that Sukh made. She asks for a compensation order for the loss of funds, which, by definition, would have been a family asset if available as at trial.
- [513] In Newson, the court made clear that s. 66 of the FRA did not mandate a roving inquiry into the legitimacy of every pre-separation expense.
- [514] Sukh testified that the withdrawals he made from the joint account were for family purposes.
- [515] While not satisfied such is case in all respects, I am not satisfied that fairness requires Sukh to account to Komal or compensate her for the reduction in its value over the months leading up to and immediately after separation.
- [516] I make no order in respect of the joint account.

Unfairness under s. 65(1)

- [517] Sukh owned 77 Avenue and SB prior to his marriage to Komal in 1999. Under current legislation, the FLA, Sukh's equity in 77 Avenue would be excluded property and only the value of that property in excess of what it was at marriage would be equally divided.
- [518] Pursuant to s. 65(1) of the FRA, I may adjust the otherwise equal division of family assets to redress unfairness.
- [519] Although neither party addressed the issue of an unequal division in depth, Komal raised the issue of unfairness in her notice of family claim thus putting it squarely in issue.
- [520] The relevant portions of s. 65(1) read as follows:

65 (1) If the provisions for division of property between spouses under section 56, Part 6 or their marriage agreement, as the case may be, would be unfair having regard to

- (a) the duration of the marriage,
- (c) the date when property was acquired or disposed of,
- (d) the extent to which property was acquired by one spouse through inheritance or gift,
- (f) any other circumstances relating to the acquisition, preservation, maintenance, improvement or use of property or the capacity or liabilities of a spouse,

the Supreme Court, on application, may order that the property covered by section 56, Part 6 or the marriage agreement, as the case may be, be divided into shares fixed by the court.

- [521] While I recognize marriages of the duration of this marriage -- almost 12 years -- are not short marriages that generally warrant a significant re-apportionment based on s. 65(1)(a) and(c), here I conclude an equal division of 77 Avenue would be unfair.
- [522] I conclude such because of my conclusion Sukh provided the whole of the approximately \$84,000 deposit/down payment and paid all expenses on the home for approximately 2 years prior to his marriage to Komal.
- [523] Further, I conclude that Sukh was aided in paying down the mortgage on 77 Avenue by virtue of the transfer of funds from his parents, brother and sister-in-law.
- [524] In the result, the home should be apportioned 70% in favour of Sukh and 30% in favour of Komal. The reapportionment in Sukh's favour does not alter my earlier conclusion that the outstanding mortgage is charged against his share alone.
- [525] I have factored any re-apportionment required to ameliorate unfairness into the compensation order earlier made regarding the dissipation of all of SB's worth from separation until trial.

Parenting

- [526] The parties' separation occurred over seven years ago. Despite their ongoing residency in the same house, the interaction between the Sukh and his two sons has been non-existent over the years proceeding trial.
- [527] Harjeet testified and made clear his wishes to have nothing to do with his father. He gave reasons for his decision that speak more to an estrangement based upon Harjeet's assessment of his father's conduct rather than alienation as a result of actions by Komal.
- [528] While Gurjeet did not testify, I take his actions, or lack thereof involving Sukh, to speak as loudly as words.
- [529] The boys are 17 and 15, respectively. Gurjeet will be sixteen in July.
- [530] In my view, it would be wrong and not in keeping with the boys' best interest to accede to Sukh's submission regarding joint custody and an order providing that he and the boys attend joint counselling.
- [531] My reasons for judgment relating to Sukh's conduct throughout this litigation provide ample reason for providing Komal with custody of the two boys under the provisions of the Divorce Act together with the right to exercise the whole of the parenting responsibilities (guardianship) provided for in s. 41 of the FLA.
- [532] The lack of dialogue between Komal and Sukh would likely create friction if, suddenly, they were obliged to discuss and agree on matters pertaining to their children.

- [533] Komal shall be obliged to inform Sukh regarding issues of significance respecting the children including, but not limited to, matters of their health, (both physical and psychological), education, activities which require some financial contribution from Sukh, and well as financial matters affecting them. As to the latter, I am referring to efforts by the boys, or either of them, to contribute financially to their post-secondary educational endeavours.
- [534] I encourage Komal to arrange for counselling for both of the boys to try to affect a reconciliation with their father arising out of my view that in the long term, both boys will be better served if they have a relationship with their father and their extended family.

Support

- [535] Komal has been retrained post separation but has, to the date of her evidence in July 2016, failed to find full-time work in her field of health care assistant.
- [536] Derek Nordin gave opinion, in the form of statistical information, as to the employment prospects for care workers with credentials similar to those obtained by Komal, and opined that the average earnings for persons similarly qualified was in the range of \$40,000+ annually. Some variation was noted and he allowed that likely a period of part time employment would precede full time remuneration.
- [537] Komal, despite an earlier order of the Court to produce information respecting her employment search, has offered up little that leads me to conclude she is actively pursuing employment as a health care worker. Instead, she seems content working as a part time bookkeeper earning approximately \$700 monthly.
- [538] Given the absence of any compelling reason dictating that she work only part-time, such as child rearing responsibilities, her part-time employment amounts to under employment entitling me to impute an income to her that accords with her training and the statistical probability of her finding employment in that field.
- [539] I acknowledge Komal's language skills might negatively affect her employability, albeit modestly. Nonetheless, Mr. Nordin's evidence leads me to conclude that care workers with training such as Komal have reasonable expectations of finding employment at a wage ranging from \$33,000 to \$44,000 annually.
- [540] Noting it has been five years since the claimant completed her training, it is reasonable in my view to impute her an income based on full-time employment at the mid-point offered by Mr. Nordin: \$38,000 annually. I so find.
- [541] As to the income for Sukh, counsel suggests it is as stated by him in his most recent Form 8: \$33,000 annually. Such results, according to Mr. Fairburn's submission, from a combination of Sukh's health issues as described by him and Dr. Watt, as well as a loss of clients/customers since 2012.

- [542] For reasons earlier stated, I place no reliance on Sukh's self-report of the business's loss of customers or his health. Dr. Watt reviewed Sukh's medical history (from prior to the marriage breakdown) and offered an opinion, based on that history coupled with Sukh's report to him, at the Independent Medical Examination.
- [543] Sukh's medical history over the years indicates some degenerative disease that accounts for his present complaints. I discount those complaints for reasons noted. He treats his complaints by "working 50% to 60% of normal full-time hours about three to four days a week".
- [544] Sukh reported to Dr. Watt his best earning years were \$50,000 to \$55,000. I find that an understatement.
- [545] In the years leading to separation -- 2009 and 2010 -- the salaries paid by SB to Sukh and Komal, its only employees, were \$85,500 and \$182,445. Net income in those years was \$56,800 and \$7,600, respectively.
- [546] Given the limited need of SB to retain cash on hand, the combined earnings in 2009 might well have been over \$140,000.
- [547] The earlier mentioned deposits of over \$8,000 monthly from SB into the parties' joint account is a further illustration of the collective incomes of the parties during 2011 and on.
- [548] Sukh's sudden protestation of poverty, or something close to it, follows closely upon the heels of marriage breakdown. It is no coincidence. I find Sukh is following Tarsem's footsteps and has created the situation of which he now complains. There is likely merit to Komal's suggestion that the rise of Tarsem's business is connected to the demise of SB.
- [549] Historically, I find Sukh's income, for Guideline purposes, would be in excess of \$90,000 annually based on my conclusion he was entitled to the lion's share of earnings based on his greater contribution to SB.
- [550] Even allowing for some diminishment of physical ability, such could be rectified by hiring a helper for heavy work rather than working what appears to be, according to his report to Dr. Watt, a workweek consisting of approximately 20 hours weekly.
- [551] In the result, I find that Sukh is and has been underemployed. I impute an income to him, for support purposes, of \$65,000 annually. Such more closely approximates his historical earning capacity while allowing some reduction for decreased capacity because of occasional back pain.

Child Support

- [552] According to Sukh, he has paid child support of \$520 monthly since June 2013 under the terms of a Provincial Court order.
- [553] Prior to then, he made voluntary payments.

- [554] Throughout separation, he has paid the expenses associated with Komal and the boy's occupation in the upstairs portion of 77 Avenue.
- [555] In view of my determination of Sukh's income at \$65,000, I order that he continue to pay the \$520 paid pursuant to the earlier order and maintain those housing payments he has made to date. When the property issues are settled, and by that, I mean when it is clear who will remain in the home following these reasons, child support will increase to the Guideline amount of \$1,009 monthly.

Spousal Support

- [556] Sukh did not suggest that Komal was not entitled to support, but that none was payable because of their comparable income as submitted by him.
- [557] Given my determination of the parties' incomes, no support is payable at present.
- [558] Retroactively, while there may well have been entitlement to spousal support, Komal did not apply when her income might have been seen as lower than the \$38,000 that I find she is presently capable of earning.
- [559] Regardless, the contribution by Sukh to Komal and the children's living expenses post-separation, beyond the child support he paid, obviates the obligation to pay retroactive spousal support.
- [560] When child support is no longer payable, Komal may re-apply for spousal support based upon the parties' then circumstances. Similarly, either may apply in respect of support, generally, upon a material change in circumstances.

Divorce

- [561] There will be an order for divorce subject to s. 12 of the Divorce Act.

Costs

- [562] If the parties are unable to agree on costs they may arrange a date through the registry for further submissions.
- [563] Given the orders I have made, I have little doubt a further appearance will be required to sort out the mathematics underlying those orders. Specifically, appraisals of both 77 Avenue and the Warehouse will be required if the parties are unable to agree on their value.

"Harvey J."

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