
CANADA / JUDGMENT

Blair v. Johnson

2015 BCSC 761

COURT

Supreme Court of British Columbia

DECIDED

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2015 BCSC 761 Blair v. Johnson

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Blair v. Johnson,

2015 BCSC 761

Date: 20150508

Docket: E131308

Registry: Vancouver

Between:

James Edward Blair

Claimant

And

Gweneth Lyn Johnson

Respondent

Before: The Honourable Madam Justice Fleming

Reasons for Judgment

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Place and Date of Trial/Hearing:

Vancouver, B.C.

November 3 - 7, 2014

Place and Date of Judgment:

Vancouver, B.C.

May 8, 2015

Introduction

[1] The claimant, James Blair, and the respondent, Gweneth Johnson, began living together in May 2003. At that time Ms. Johnson was a successful realtor and Mr. Blair was operating two companies, the shares in which later became wholly owned by a holding company. Both had adult children from earlier marriages. The parties married in December 2007 and separated in the summer of 2012. The main issues in this action are the date of valuation and the division of the increased value of shares in the holding company. To a lesser extent the parties disagree about the value of the matrimonial home. Ms. Johnson seeks non-compensatory spousal support pending a compensation payment for her share of the increase in the value of the shares.

Background Facts

[2] There was not a great deal of conflict in the evidence of the parties.

[3] Both were 58 years old at the time of trial.

[4] Mr. Blair grew up in Alberta. His mother is Cree and he is Cree speaking. He dropped out of high school in grade 11 and then completed grade 12 by correspondence in the early 1980's. Mr. Blair obtained a job as an apprentice insulator with the City of Edmonton and worked as an insulator in BC and Alberta until the late 1990's. In 1987, he was managing a company in Alberta. He came to BC around that time because his first wife and their three children had moved here. In the early 1990s, he entered into a partnership that operated a business called Blair Insulation. In 1993, he started a "shrink wrap" business called Integral Shrink Wrap, again with a partner. Once Integral Shrink Wrap became financially "secure", he shut down the insulation business. In or about 1997, he purchased his partner's interest in Integral Shrink Wrap.

- [5] In 1996, he married his second wife. She received shares in Integral Shrink Wrap and became involved in its operations. According to Mr. Blair, she tried to take over the company. The marriage ended in 2001. The company operated out of the matrimonial home to which Mr. Blair was denied access. He resigned as director. Mr. Blair described their divorce proceedings as financially devastating.
- [6] The parties met in the late summer of 2001. Ms. Johnson was working as a successful realtor in South Surrey.
- [7] In 2002, Mr. Blair established a company called Indian Head Contracting ("Indian Head") that provided specialized insulation services in BC and the Lower Mainland. In the same year, he and a business partner, James Klassen, incorporated Enviro-Wrap Containment Systems Inc. ("Enviro-Wrap"), which later changed its name to Integral Containment Systems Inc. ("Integral"). They became equal shareholders. Mr. Blair's shares were held in trust by Mr. Klassen until September 2003. The company specialized in providing custom shrink wrap structures for industrial and commercial use in Alberta. Much later in 2009, Mr. Klassen's shares in Integral were redeemed by the company.
- [8] The parties began living together after they purchased a home in May 2003. It was registered in the name of Ms. Johnson given Mr. Blair's divorce proceedings. A trust declaration was executed in November 2003 which provided she held a one half interest in the property on his behalf. Each contributed \$60,000 toward the purchase price of \$421,000. A mortgage of \$300,000 was obtained to pay for the balance. The parties also obtained a line of credit that was used to finance renovations to the house, holidays and purchases, such as a boat and household items. They shared living expenses by making equal contributions to a joint account out of which those expenses were paid. Each paid their own business expenses out of separate accounts.
- [9] In 2005, Mr. Blair incorporated a holding company, 1201316 Alberta Ltd. ("Alberta Co."), to which all of the shares in Indian Head and Enviro-Wrap were transferred in exchange for 1000 Class E preferred shares. Ms. Johnson was provided with 100 non-voting shares in Alberta Co. During this time Mr. Blair continued to manage both companies. Integral's operations were in Alberta and so his work with that company involved a significant amount of travel. Ms. Johnson carried on her work as a realtor.
- [10] After their marriage in 2007, the parties continued to share living expenses equally. In 2009, Ms. Johnson told Mr. Blair she wished to retire. At that point their line of credit was about \$90,000. Mr. Blair said if she paid off the line of credit she could retire. Ms. Johnson stopped contributing to the joint account and made payments on the line of credit for about nine to twelve months. Mr. Blair supported her financially until their separation, paying all of their living expenses.

- [11] Throughout their relationship, the parties had very little involvement with one another's work. Mr. Blair occasionally helped Ms. Johnson put up for sale signs. During one period when she had a broken leg, he drove her to and from appointments. Ms. Johnson acknowledges she did not assist the claimant with his companies apart from loans she said she provided to him or his businesses, on perhaps five occasions, ranging in amounts from \$10,000 - \$20,000. She testified the loans were repaid except for the last one of \$12,000.
- [12] The parties shared household chores, although Ms. Johnson did most of the cooking. In 2012, the parties renewed the mortgage on the matrimonial home and Mr. Blair obtained a business line of credit secured against the house for Integral with Ms. Johnson's cooperation.
- [13] Around the time of separation, the balance on the parties' personal line of credit was \$19,075. Shortly after the separation, the respondent withdrew \$30,000 for living expenses and anticipated legal expenses. Mr. Blair continued to pay the mortgage until September 2013. The parties arranged for the basement suite in the home to be renovated so that it could be rented, along with the three car garage, with Mr. Blair paying most of those costs. By the end of July 2013, Mr. Blair had repaid the secured line of credit for Integral.
- [14] Ms. Johnson's semi-retirement ended with the separation and she returned to her work as a realtor. In 2013, she earned gross commissions of \$103,256 and line 150 income of \$58,814. She expects to continue earning an income of about \$60,000 after business expenses.
- [15] Ms. Johnson has continued to live in the matrimonial home and wishes to remain there.
- [16] The balance owing on the mortgage is approximately \$396,000, which includes a fixed line of credit account of approximately \$65,000.
- [17] Mr. Blair now lives in Edmonton in a house owned by Alberta Co. He draws salaries from both Indian Head and Integral. He estimates that 70% of his time is spent on Integral and 30% on Indian Head.
- [18] Gross revenues for Integral were \$1,969,957 in 2012 up from \$1,385,318 in 2011 and \$1,349,767 in 2010, after a drop from \$3,476,737 in 2009. In seven months ending April 30, 2013, they were up considerably to \$4,059,863 and then as of April 30, 2014, they jumped again significantly to \$8,166,014.
- [19] In addition to his own evidence, Mr. Blair relied upon the testimony of the bookkeeper for his companies and his accountant. Ms. Johnson testified in support of her claim, along with Denise Barker who prepared appraisals of the matrimonial home. Mr. Ghanavizchian, who was retained by the parties as a joint expert, provided opinion evidence regarding his business valuation report with respect to the shares owned by the parties in Mr. Blair's companies.

Business Valuation

[20] In his report dated October 23, 2014, Mr. Ghanavizchian provided an estimate valuation of the fair market values for the parties' combined share ownership at three different dates: May 1, 2003; July 1, 2012; and the "current" 2014 date. Those dates represent the date of cohabitation; the date of separation; and the hearing date. The companies include All Access Scaffolding Services Inc. ("All Access"), Indian Head, Integral and Alberta Co.

[21] Mr. Ghanavizchian's conclusions as to the fair market value of the shares in the companies on those dates are as follows:

2003 Valuation Date

Low

Midpoint

High

All Access

n/a

n/a

Indian Head (Sch. 3.1)

\$9,000

\$9,000

Integral (Sch. 4.1)

48,000

48,000

Alberta Co.

n/a

n/a

Total

\$57,000

\$57,000

\$57,000

2012 Valuation Date

Low

Midpoint

High

Alberta Co. (Sch. 5.3)

\$590,000

\$670,000

Total

\$590,000

\$630,000

\$670,000

2014 Valuation Date

Low

Midpoint

High

Alberta Co. (Sch. 5.4)

\$4,910,000

\$5,240,000

Total

\$4,910,000

\$5,075,000

\$5,240,000

[22] Mr. Ghanavizchian determined All Access had no material value at both the 2012 and 2014 valuation dates. It did not exist as of the 2003 date. For the 2012 and 2014 valuation dates, Mr. Ghanavizchian did not attempt to allocate the en bloc value of Alberta Co. to the various issued and outstanding share classes, almost all of which are owned by Mr. Blair. Ms. Johnson is the only other shareholder. Mr. Ghanavizchian estimated Alberta Co.'s values as of the valuation dates in 2012 and 2014 based on values he came to for Indian Head and Integral on those dates. It is the dramatic increase in the value of Integral that accounts for the increase in the en bloc value of Alberta Co. on the 2014 valuation date.

- [23] In conducting his valuation, Mr. Ghanavizchian relied upon information provided by Mr. Blair and management employees from his companies, in addition to extensive financial records. Neither party took issue with the accuracy or completeness of the information and records relied upon by Mr. Ghanavizchian.
- [24] The valuation report includes helpful descriptions of Indian Head and Integral. Indian Head employs approximately 13 non-unionized employees. Management employees estimated that 60% of Indian Head's business is generated by Mr. Blair's key client contacts and relationships. Most of Indian Head's business occurs in the Lower Mainland.
- [25] Integral employs about 33 full and part time unionized employees. Mr. Blair manages the company's operations. His son, Shawn Blair, is the company's project manager in Fort McMurray. There is another project manager for the company in Edmonton. Mr. Blair spends most of his time overseeing Integral's business. Management employees estimated that 80 - 90% of Integral's business is the result of Mr. Blair's key client contacts and relationships and on account of his First Nations status.
- [26] Mr. Ghanavizchian used an asset based approach to determine the share values for Indian Head and Integral on the 2003 valuation date and for Alberta Co. on both the 2012 and 2014 valuation dates. He described the asset approach, which focuses primarily on the assets and liabilities of a company instead of its earnings, as appropriate for start-up companies that lack sufficient historical operating results, holding companies such as Alberta Co. and operating companies that lack commercial good will. Indian Head commenced operations in May 2002 and Integral was incorporated under its previous name, Enviro-Wrap, in that same month.
- [27] Mr. Ghanavizchian used an income or capitalization of cash flow approach to value Indian Head and Integral on the 2012 and 2014 dates. This approach determines value by capitalizing the expected future earnings or cash flow of the business. It assumes the business is a going concern. The method Mr. Ghanavizchian used for both companies on both dates multiplied discretionary cash flow by a multiplier and added the present value of both the tax shield associated with the company's depreciable assets and the loss carry forwards, if any, that may be used to offset taxable income in the future.
- [28] Mr. Ghanavizchian explained discretionary cash flow may be estimated on a levered or unlevered basis. When the estimate is determined on a levered basis, as it was here, redundant assets, net of income tax considerations, are then added to the estimate of the fair market value of the operations to produce an en bloc value for the company's issued and outstanding shares. Mr. Ghanavizchian also pointed out that when estimating a company's discretionary cash flow, its historical earnings are adjusted for any unusual, non-recurring, non-arm's length and/or non-cash transactions in order to estimate the company's maintainable cash flow on a prospective basis. The adjustments normalize the past income. With respect to both Indian Head and Integral, various adjustments were made for both the 2012 and 2014 valuation dates, including adding back the actual salary paid to Mr. Blair for

his work with Integral which Mr. Ghanavizchian saw as falling below industry norms and deducting an economic salary. For Indian Head the same sort of adjustment was made to account for an economic salary for both Mr. Blair and the company's manager.

- [29] In addition to making adjustments to the companies' discretionary cash flows, Mr. Ghanavizchian also weighted the normalized past income to reflect how much emphasis a prospective purchaser would place on the company's performance in the various years. With respect to Integral, 2010 and 2011 were not profitable years. Gross profits dropped from approximately \$675,000 in 2009 to \$139,000 in 2010 and \$58,000 in 2011. Management staff advised Mr. Ghanavizchian poor performance in those years was due, in part, to too many employees and significant problems with the payroll accounting function attributed to an outside bookkeeper who made numerous errors that may have resulted in overpayments. In 2012, the problem was corrected. Gross profits for that year were approximately \$456,000. Mr. Ghanavizchian concluded the company's poor performance in 2011 was an anomaly. Accordingly, he put no weighting on 2011 but gave some weighting to 2010 to fairly capture the impact of an occasional bad year. No such weighting was done in coming to an estimate of discretionary cash flow for Integral as of the 2014 valuation date.
- [30] Mr. Ghanavizchian's report discusses, in some detail, the factors that influenced his selection of the multipliers for the valuations of both companies in 2012 and 2014, including the positive and negative industry and company specific factors in existence at the time. A multiplier is the inverse of a capitalization rate which is defined as the rate of return used to convert an estimate of cash flow into value. Mr. Ghanavizchian acknowledged choosing a multiplier is a subjective decision. He selected a multiplier of 3 in determining the value of the Indian Head shares in 2012. His estimate of Indian Head's share value for 2014 used two multipliers - a low of 3.5 and a high of 4. For Integral, Mr. Ghanavizchian selected multipliers of 3.5 and 4 for 2012 and 3.5 for 2014.
- [31] Mr. Ghanavizchian estimated the fair market value of Indian Head's shares as of the 2012 date at a low of \$300,000 and a high of \$310,000; \$214,000 of those amounts being the fair market value of the company's net redundant assets. His estimate of the fair market value of the shares for 2014 was somewhat lower with a low of \$240,000 and a high of \$260,000.
- [32] For Integral, Mr. Ghanavizchian estimated the fair market value of its shares for the 2012 date at a low of \$140,000 and a high of \$210,000, based on the fair market value of the company's operations. No value was given to net redundant assets. In 2014, his estimate of the fair market value of Integral's shares increased dramatically to a low of \$3,660,000 and a high of \$3,970,000, based on valuing its operations at a low of \$2,740,000 and high of \$3,050,000 and net redundant assets at \$917,000.

- [33] Mr. Blair cross-examined Mr. Ghanavizchian at some length but his opinion as to the fair market value of the shares in the companies on the valuation dates remained unchanged. Indeed, no different value for the various shares on various dates was ever put to him. Mr. Ghanavizchian provided cogent, thoughtful explanations for the various aspects of his valuation report that were challenged by Mr. Blair. Objectivity, precision and care were evident not only in his report but throughout his testimony.
- [34] He was persuasive in defending the use of an asset approach for Indian Head and Integral on the 2003 valuation date and the appropriateness of using different approaches when the issue before the court is the increase in the value of shares.
- [35] Mr. Ghanavizchian aptly explained his rationale for the weighting of averages he did during the process of valuing the discretionary cash flow, which he described as the second most subjective part of the valuation process after selecting a multiplier.
- [36] In cross-examining Mr. Ghanavizchian about his selection of multipliers, Mr. Blair did not suggest Mr. Ghanavizchian ignored an important factor or considered something he ought not to have. As noted above, Integral management employees told him that 80 to 90% of its business is generated by Mr. Blair's key client contacts and relationships, as well as his First Nations status. Mr. Ghanavizchian confirmed that this information was a negative factor in choosing a multiplier, particularly for Integral.
- [37] In estimating Integral's discretionary cash flow as of the 2014 valuation date, Mr. Ghanavizchian used the operating results for 2012, 2013 and 2014. Mr. Ghanavizchian noted Integral's revenues for the four month period ending August 31, 2014, were down 35% from the same period in 2013 and estimated, based on the trend continuing for the remainder of the fiscal year, Integral's total revenues for the fiscal year would be approximately \$5.3 million. Mr. Ghanavizchian asked Mr. Blair for his best estimate of Integral's total revenues for 2015 and he indicated they were likely to be between \$5 and \$5.5 million.
- [38] Mr. Ghanavizchian's estimates of the fair market value of the shares of Alberta Co. on the 2012 and 2014 valuation dates offer a range of values. In 2012, the range is \$590,000 to \$670,000, with a midpoint of \$630,000. In 2014, it is \$4,910,000 to \$5,240,000, with a midpoint of \$5,075,000. In his report Mr. Ghanavizchian stated that, if asked to be more specific, he would select the midpoint of the ranges. During cross-examination he testified, because of the uncertainty inherent in the valuation process, he did not think any one number within the ranges was better than another. However, he also maintained that if he was being asked to estimate a single point of value, there was no reason why the midpoint should not be chosen. He was not asked to consider factors that might influence choosing one point along with range.

Further Evidence Regarding Integral and Indian Head

- [39] Mr. Blair testified about the operations of both Integral and Indian Head. With respect to the substantial increase in Integral's revenues in 2013 - approximately \$4 million in a seven month period up from \$1,970,000 the year before - Mr. Blair said, simply, "we just had a lot of work". He specified the company did a great deal of "modular" work for two companies that involved shrink wrapping prefabricated sections of plant to protect them during transportation to the work site. The modular work was not new but little had been done between 2010 and 2012. Integral also started what Mr. Blair referred to as the Fort Hills project that year which involves providing labour to Suncor Energy Inc. ("Suncor").
- [40] In 2014, the company's new work included \$3.6 million from the Fort Hills project, tent rentals, and the sale of tents to a company he referred to as CNRL. Integral was also doing work for Suncor at "base plant". Mr. Blair estimated the sale and rental of tents generated approximately \$500,000 in revenue.
- [41] Consistent with the information provided to Mr. Ghanavizchian by management employees, Mr. Blair's evidence was that Integral obtains a big chunk of its work through people he knows having been in the industry for 40 years. He also acknowledged the company's identity as an aboriginal business, because of his own heritage, as a factor. He testified oil companies in Northern Alberta are driven by the federal government to contract with aboriginal companies which Mr. Ghanavizchian accepted in conducting his valuation. The point was not challenged by Ms. Johnson. Mr. Blair said Integral's aboriginal identity played a role in the Fort Hills project, along with the quality of the company's work and its safety record.
- [42] In cross-examination, Mr. Blair confirmed that at the time of separation 53% of Integral's work was with Suncor. By 2014, it had increased to approximately 71%. He agreed that market forces within the oil industry have a significant effect on Integral's business. For this reason, he expressed pessimism about the near term future for the company due to the drop in the price of oil. In direct examination, he estimated Integral would earn \$4 million in revenue in this fiscal year. In cross-examination, he agreed the estimate he provided to Mr. Ghanavizchian was between \$5 and \$5.5 million when the price of oil was around \$100 a barrel.

Division of Property

- [43] The principal issue between the parties arises from the significant increase in the market value of Alberta Co.'s shares after separation. Mr. Blair asks that the increase be valued as of the date of separation. He also asks for an unequal division in his favour arguing it would be significantly unfair to divide the increase equally.
- [44] Ms. Johnson's position is that the shares should be valued as of the date of trial and all family property and debt should be divided equally.

[45] To a lesser extent the parties dispute the fair market value of the matrimonial home but not the date of valuation. Mr. Blair submits the net equity in the home should be determined, leaving aside a \$60,000 increase to the line of credit caused by Ms. Johnson's post separation spending.

Statutory Framework

[46] Section 81 of the Family Law Act, S.B.C. 2011, c. 25 [FLA] provides that, on separation, each spouse is entitled to an undivided half interest in all family property as tenants in common and is equally responsible for family debt, regardless of "their respective use or contribution". Pursuant to s. 84, family property includes all real and personal property owned by one or both spouses at the date of separation, unless the property is excluded. Section 85 defines excluded property and includes the following:

85(1) The following is excluded from family property:

- (a) property acquired by a spouse before the relationship between the spouses began;
- (g) property derived from property or the disposition of property referred to in any of the paragraphs (a) to (f).

[47] The increase in value of excluded property during the relationship is also family property: s. 84(2)(g).

[48] Family debt is defined in s. 86 to include all financial obligations incurred by a spouse during the relationship and until separation, and after separation if incurred for the purpose of maintaining family property.

[49] Section 87 provides the value of family property and debt is the fair market value as of the date of the hearing, unless an agreement or order provides otherwise.

[50] Pursuant to s. 95(1), the court may order an unequal division of family property and/or family debt if it would be significantly unfair to divide it equally, based on the factors found in s. 95(2) and (3), including the following:

- (2) For the purposes of subsection (1), the Supreme Court may consider one or more of the following:
 - (a) the duration of the relationship between the spouses;
 - (c) a spouse's contribution to the career or career potential of the other spouse;
 - (f) whether a spouse, after the date of separation, caused a significant decrease or increase in the value of family property or family debt beyond market trends;
 - (i) any other factor, other than the consideration referred to in subsection (3), that may lead to significant unfairness.

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

[51] In *L.G. v. R.G.*, 2013 BCSC 983, Mr. Justice Brown interpreted the significantly unfair threshold set out in s. 95(1) as "a caution against a departure from the default of equal division in an attempt to achieve 'perfect fairness'" (at para. 71). He concluded:

Only when an equal division brings consequences sufficiently weighty to render an equal division unjust or unreasonable should a judge[s] order depart from the default equal division.

[52] In *Remmem v. Remmem*, 2014 BCSC 1552 Mr. Justice Butler concluded the legislature had raised the threshold for a finding of unfairness justifying an unequal distribution and it is necessary to find the unfairness is meaningful or compelling, having regard to the factors set out in s. 95(2) (at para. 44).

Analysis

The Alberta Co. Shares

- [53] Mr. Blair submits the shares in Alberta Co. are excluded property, having derived from shares in Indian Head and Integral that he owned before the parties lived together. Therefore, he submits, it is only the increase in their value since cohabitation that is family property. Ms. Johnson does not dispute this characterization and suggests crediting the claimant with the value of the shares as of the date of cohabitation at \$57,000, based on Mr. Ghanavizchian's valuation report.
- [54] Mr. Blair quarrels with simply using Mr. Ghanavizchian's estimate of the value of the shares as of the 2003 valuation date because Indian Head and Integral had shareholder loans payable to Mr. Blair of \$68,472 at that time. Those loans no longer existed by the 2012 and 2014 valuations dates. Instead, the parties were indebted to the companies \$63,056 and \$258,745 respectively. Mr. Ghanavizchian testified that Mr. Blair's shareholders loans in 2003 were financial interests in the companies but the shareholder loans now owed to the companies do not affect the value of the shares.
- [55] I agree with Ms. Johnson's submission that the shareholder loan due to Mr. Blair in 2003 is not excluded property because it no longer existed at the date of separation and, based on the evidence, it cannot or has not been traced to property "derived from it or from its disposition": s. 85(1)(g). Accordingly, I conclude \$57,000 is the value of the excluded property owned by Mr. Blair that must be deducted in determining the value of the family property at issue here - the value of the increase in the shares.

- [56] Mr. Blair seems to suggest the family property in relation to the shares is limited to the increase in value between the date of cohabitation and the date of separation, based on s. 84(1)(g) in particular. I do not agree. Section 84(1)(g) provides that family property includes the increase in value of excluded property since the later of the date the relationship began or the date the excluded property was acquired. It does not specify when it is to be valued. Section 87 alone governs that determination.

Valuation Date

- [57] Mr. Blair argues the court should exercise its discretion pursuant to s. 87 of the FLA and depart from the hearing date as the valuation date for the increased value of the shares. He proposes the court rely instead upon the date of separation. He objects to the use of the hearing date because to do so introduces tremendous uncertainty into the valuing of family property. His point is the date of valuation should not be subject to the uncertainties surrounding the availability of trial dates. In this case, the parties consented to an adjournment of the first trial dates because additional time was required for the completion of the business valuation. Mr. Ghanavizchian, however, was not asked to estimate the value of the shares as of any earlier hearing date.
- [58] Mr. Blair provided no analysis of s. 87 or what considerations ought to guide the court in deciding when to depart from valuing family property on the date of the hearing.
- [59] Ms. Johnson submits Mr. Blair has the onus of convincing the court that the date of valuation should be other than the date of trial and there is no compelling reason to do so.

Jurisprudence

- [60] The wording of s. 87 does not contain any criteria with which to guide the court's discretion to depart from the hearing date as the date of valuation. It appears to have attracted little judicial attention thus far in relation to family property. In *K.M.J. v. J.H.D.N.*, 2014 BCSC 1895, Mr. Justice Betton valued some of the family debt at separation in circumstances where one of the parties had significantly reduced family debt after separation and prior to the hearing date. Applying the modern approach to statutory interpretation, he interpreted s. 87 in the context of its surrounding provisions, including s. 95. He commented at para. 140, "some of the challenges with interpretation seem to arise from the drafters' decision to deal with property and debts together". He noted that family property can take many forms and the idea that parties should, as a starting point, share in fluctuations in value caused by market trends is easily understood. In the case of debt, however, a decrease in value is almost never the result of passive market trends (para. 143).
- [61] Justice Betton identified the intention of s. 95 as removing elements of judicial discretion in the first instance but providing for the ability to avoid "significant unfairness". At para. 154, he concluded s. 87 provides a mechanism to use a different valuation date, if necessary, where s. 95 is not applicable, offering the example of family property disposed of in good

faith prior to the hearing date such that s. 95(2)(g) would not apply. Section 87 may be used to select the disposition date as the valuation date to ensure the other spouse is not deprived of the value of their interest in that property (paras. 154 - 155). He then suggested that either s. 87 or s. 95 might apply to a given set of circumstances, stating: "The peculiar circumstances of each case may drive the selection of which section to use and the date to be selected" (para. 156).

- [62] Very recently, in *Slavenova v. Ranguelov*, 2015 BCSC 79, Mr. Justice Savage relied upon the s. 87 analysis in *K.M.J.* in relation to family property. He found it appropriate to order that the parties' real property be valued at the date of separation, rather than at the date of trial. At paras. 52 - 53, he stated:
- [52] It is generally agreed that the various real property assets at issue in this proceeding have gone up in value since separation. It is also the case that the claimant has been solely responsible for the preservation and maintenance of those properties, and has paid down debt. In this case, immediately after separation the respondent left for Bulgaria. As all of the family property was either in Canada or the United States, the claimant has managed all of the family property since separation, paid the mortgages, paid taxes, arranged rentals, and collected the rents. These efforts of the claimant were of value.
- [53] In short, the FLA provides two alternate routes to address potential unfairness that may arise from a party's post-separation contributions, namely s. 87 and s. 95. Under s. 95 a court can order reapportionment to address any "significant unfairness" that may arise from an equal division of property and debt in light of the spouse's post-separation contribution. Alternatively, under s. 87 the Court may depart from the date of hearing or agreement as the valuation date.

Codification of the Common Law

- [63] The well-established modern approach to statutory interpretation requires the words of an Act to be read in their entire context and in their grammatical and ordinary sense, harmoniously with the scheme of the Act, the object of the Act, and the intention of the legislature: *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42 at paras. 26. The discussion found in *Hansard* between the Minister of Justice and Leonard Krog, the opposition critic, offers limited assistance in understanding the legislator's purpose in enacting s. 87. The Minister described s. 87 as a "big step forward" because the Family Relations Act, R.S.B.C. 1996, c. 128 [FRA] did not provide any guidance on setting a valuation date and there had been considerable criticism of the broad judicial discretion to determine the date: BC, Legislative Assembly, Official Report of Debates (*Hansard*), 39th Parl., 4th Sess., Vol. 28/No. 8 (23 November 2011) at 1620 (Shirley Bond). In the Family Law Act Transition Guide, the Ministry of Justice provides the same explanation for s. 87 and the following commentary:

It codifies how and when the value of family property and family debt is determined. Except in relation to benefits under a pension plan, the presumptive valuation date is the date of trial or the date of agreement, unless otherwise provided for in an agreement or order. The Family Relations Act did not provide any guidance on valuation date. However, s. 87 is consistent with the principles that have emerged in case law about valuation date of family assets (see, for example, *Blackett v. Blackett* (1989), 22 R. F.L. (3d) 337 (B.C.C.A.)) (at 3-128).

[64] In other words, it seems the legislator intended for s. 87 to codify the common law developed under the FRA which provided the valuation date was, presumptively, the trial date. In *Blackett v. Blackett* (1989), 40 B.C.L.R. (2d) 99 (C.A.), the Court of Appeal overturned the trial judge's decision that the husband should pay compensation to the wife using the date of separation to value shares in a company found to be a family asset. Madam Justice Southin ordered the trial date to be the date of valuation, stating at 103 - 104:

When an asset is determined to be a family asset, the Court must ask itself whether s. 51 should be invoked. For that purpose, it is often necessary to have some idea of the value of an asset as at the triggering event for whether or not there is to be a variation of the right given by s. 43 must be determined by the facts existing when that right came into existence. It is then, and then only, that the right can be unfair.

But when the Court considers what to do by way of a compensation order under s. 52, it is the value at date of trial which is significant for it is at that point that one spouse is having taken away a vested interest and the other spouse is paying for that vested interest.

The reason is simple. Section 43 gives the wife an undivided one-half interest in the shares - not an undivided one-half interest in the value of the shares at the date of the triggering event or at any other date.

[65] Not long after, in *Gilpin v. Gilpin* (1990), 29 R.F.L. (3d) 250 at 253 (B.C.C.A.), the Court of Appeal observed numerous authorities made it clear "having regard to the issue of fairness that unless there be reason to the contrary the valuation date for family assets including the matrimonial home should be chosen as of the date of trial" (emphasis added).

[66] In *N.M.M. v. N.S.M.*, 2004 BCSC 346, Mr. Justice Joyce summarized the relevant principles as follows:

[76] From my review of the forgoing authorities I distill the following principles:

1. Because it was the triggering event that gave each spouse a prima facie equal interest as tenants in common in each family asset, the circumstances at that date should be considered to determine whether an equal division would be unfair.
2. Generally the spouses share any increase or decrease in value of a family asset that occurred after the triggering event because their interests in the asset vested.

3. Valuation at the date of trial was generally appropriate when considering the mechanism under s. 66 to achieve the division of family assets, for example, by dividing the assets in specie by vesting the assets in the names of the parties or by vesting an asset in the name of one party in exchange for an order compensating the other for the divested interest.
 4. Generally the appropriate date for valuing family assets was the trial date, however there was a discretion to fix another date, not earlier than the triggering event, if it was necessary to achieve fairness.
 5. Discretion may have existed to reapportion assets or to vest title in one spouse while awarding the other compensation taking into account events following the triggering event where for example, the conduct of one party caused the asset to increase or decrease in value and it would have been unfair and unjust to ignore those events.
 6. Where it was established that one spouse disposed of a family asset or caused it to decrease in value significantly, the court could order compensation for that loss. The compensation was based on the loss in value, which necessarily involved determining the value of the asset prior to the loss.
- [67] In *Berg v. Berg*, 2012 BCCA 92 at para. 15, the Court of Appeal affirmed the trial date was the appropriate valuation date in cases where the court took away the interest of one spouse in a family asset and ordered the other spouse to pay compensation for it. In *N.A.J. v. P.L.J.*, 2014 BCSC 948 at para. 236, Mr. Justice Harvey expressed the view that while the court retained the discretion to determine the valuation date so as to achieve "substantial fairness", Blackett remained the "default position", particularly where reapportionment was being sought by one of the parties.
- [68] As can be seen, the court's discretion to depart from the date of trial was exercised in the context of the reapportionment provision of the FRA on the grounds of unfairness. In other words, if dividing an asset or fixing a value at a certain date would be unfair, having regard to the factors set out in s. 65(1), then different shares could be fixed: *Rutherford v. Rutherford* (1981), 30 B.C.L.R. 145 at 154 (C.A.). As a practical matter, fixing a valuation date other than the date of trial was also a remedy where reapportionment of the parties' interests at the time of trial was impossible or inappropriate. If s. 87 is intended to codify the common law developed under the FRA, which carried with it the threshold of unfairness for reapportionment and departing from the date of trial as the date of valuation, the question arises whether unfairness remains an appropriate threshold for departing from the presumptive valuation date under the FLA.
- [69] Section 95 of the FLA requires significant unfairness on specified grounds before the court may order an unequal division of family property. To the extent that s. 95 and s. 87 may provide alternate routes to address the substantial unfairness that would arise from awarding parties equal shares in family property valued at trial, it seems to me the significant unfairness threshold should also be met before the court departs from the date of trial as the valuation date pursuant to s. 87. To conclude otherwise would allow for an earlier

valuation date resulting in a radical departure from an equal division as of the date of trial in circumstances where the significant unfairness threshold under s. 95 is not met. I say this leaving aside circumstances where it is necessary to set an earlier date because family property has been sold etc. or debt eliminated prior to the hearing. It is important to bear in mind the basic principle of equal entitlement (and responsibility) found in s. 81 that is integral to the division of family property regime in the FLA.

Conclusion on Valuation Date

[70] The respondent in this case, however, has not persuaded me it would be unfair, let alone significantly unfair, to value the increase in the value of shares as of the trial date. While the respondent argues, and I agree, Ms. Johnson contributed very little directly or indirectly to Mr. Blair's businesses over the course of the whole relationship, at the time of separation and up to the end of July 2013, Integral's secure line of credit remained in place. Ms. Johnson's consent and cooperation was necessary for Mr. Blair to obtain the line of credit because she was the registered owner of the matrimonial home. Valuing the shares as of the date of separation would, in my view, improperly ignore this contribution. Although the trial of this matter was previously adjourned, the respondent chose not to seek the opinion of Mr. Ghanavizchian as to the value of the shares on those earlier dates.

Application of s. 95(2) Factors

[71] Invoking s. 95(2)(a), (c) and (f), Mr. Blair seeks an unequal division of the increased value of the shares on the grounds of significant unfairness based on the following circumstances:

- a) the entire relationship including the marriage is just over nine years, a short to medium length marriage;
- b) neither spouse contributed in any meaningful way to the career or career potential of the other (in the case of Mr. Blair the value of his companies);
- c) the appraised value of the companies increased very dramatically between 2012 and 2014. All of this increase in value occurred after the separation of the spouses. It is submitted that the increase in value was attributable to Mr. Blair's efforts and not merely market forces;
- d) it cannot be said the earning capacity of Ms. Johnson has been affected in any way at all by the responsibilities and other circumstances of the relationship; and
- e) it would be significantly unfair not to re-apportion the increase in value of the shares of the companies in Mr. Blair's favour because the establishment of the companies, and their financial success, is entirely the result of Mr. Blair's assistance with no meaningful contribution from Ms. Johnson.

[72] Conversely, Ms. Johnson argues Mr. Blair has failed to prove how much, if any, of the post separation increase in the value of the shares was due to his efforts as opposed to market trends and has not established Integral would have enjoyed the same results without the

secured line of credit taken out in 2012. She points to Mr. Blair's evidence that he told the banker he needed the line of credit for Integral's upcoming contracts. She notes the line of credit was in use for seven months of the 2013 fiscal year and some of the 2014 year, both highly profitable periods for Integral. She also identifies the absence of any evidence from Mr. Blair proving the (new) contracts he testified led to increased revenues for Integral in 2013 and 2014. According to Ms. Johnson, Mr. Blair has conceded Integral's profitability is determined by the market forces of the oil industry, having repeatedly admitted the oil market determined good and bad years for the company.

- [73] I regard the length of the parties' relationship as a neutral factor here.
- [74] In Remmen, the court found that in order to determine if it would be significantly unfair to divide family property equally, the family property must first be notionally divided, taking into account the exclusions, in accordance with the FLA (para. 47). I have already determined \$57,000 is the value of the excluded property to be deducted from the value of the shares in arriving at the value of the family property here: the increase in the value of the shares. As discussed above, Mr. Ghanavizchian provided a range of values for the shares in Alberta Co. as of the 2014 valuation date. Accepting the thrust of his opinion evidence that the mid-point should be used if a single point of value must be selected, I value the shares in Alberta Co. at \$5,075,000. Accordingly, the increase in value to which the parties are presumptively entitled to share equally is \$5,018,000 or \$2,509,000 each.
- [75] In order to consider whether a significant unfairness would arise from an equal division due to a significant increase in the value of the shares caused by Mr. Blair pursuant to s. 95(2)(f), I must also determine the value of the shares at the time of separation. Using the midpoint provided by Mr. Ghanavizchian for the 2012 valuation, I value the shares in Alberta Co. at the time of separation at \$630,000.
- [76] There is no dispute that the dramatic increase in the value of Alberta Co.'s shares between the 2012 and 2014 valuation dates was driven by increased revenues for Integral. Other than faulting Mr. Blair for not separately proving the existence of new contracts, Mr. Blair was not challenged about the accuracy of his evidence regarding the nature and sources of revenue for Integral during that time. Nor was there any dispute about the evidence provided by Mr. Blair regarding the importance of his role in generating work for Integral through his key client contacts, relationships and his First Nations status. Management employees provided this same information to Mr. Ghanavizchian. Consequently, he identified Integral's reliance on Mr. Blair for a significant portion of its business (80 to 90%) as a negative factor in selecting a multiplier for both the 2012 and 2014 valuation of that company's operations.
- [77] Mr. Blair testified that, in 2013, Integral began to do much more modular work than they had in previous years for two companies other than their main client, Suncor. The company also started the Fort Hills project which provided labour to Suncor. The Fort Hills project generated \$3.6 million in 2014. He estimated that in 2012, 53% of Integral's business was with Suncor and by 2014 this had grown to just over 70%. Mr. Blair identified his and the

company's First Nations status and the company's positive safety records as factors in obtaining the work. Mr. Blair attributed approximately \$500,000 in revenues for 2014 to the rental and sale of tents. While there can be little doubt that Suncor's demand for labour was driven by market forces, it chose Integral to provide that labour. Based on the evidence, I find that in addition to market forces, which will always be at play for resource based businesses, Mr. Blair's role in the operations of Integral - his expertise, key client contacts and relationships within the industry - contributed significantly to the dramatic increase in the value of Alberta Co.'s shares between the 2012 and 2014 dates, particularly with respect to obtaining the Suncor project and with respect to the rental and sale of tents. While Mr. Blair's role in the company was just as critical in 2012, I do not regard s. 95(2)(f) as requiring a spouse to cause an increase in the value of family property by a new means after separation.

- [78] Mr. Blair also seeks an unequal division in the increase in the value of the shares based on Ms. Johnson's lack of contribution to his businesses throughout their relationship, relying on s. 95(2)(c). Ms. Johnson submits guaranteeing the secured line of credit for Integral in early 2012 was a significant contribution. She also points to small loans she made to Mr. Blair's company, all of which she said were repaid with interest, except the last one provided to All Access. Mr. Blair disputes that evidence. He denied ever borrowing funds from the parties' personal line of credit for business purposes other than \$10,000 for All Access which he said was repaid. He could not recall borrowing for his businesses "on the house" prior to obtaining Integral's secured line of credit. There are no records confirming the loans. While I do not disbelieve Ms. Johnson, Mr. Blair's testimony was also credible. In my view, resolving the conflict in the evidence on this point is not critical to either party's position on the question of contribution. Ms. Johnson's main point is she put herself in some financial jeopardy by agreeing to Integral's line of credit being secured by the matrimonial home. Her consent was necessary because the house was registered in her name.
- [79] Mr. Blair confirmed Integral's line of credit was used to pay some of its operating expenses up to the time it was paid off in July 2013, although, during a seven month period in 2013, Integral earned approximately \$4,000,000 in revenues. In cross-examination, Mr. Blair testified one of the reasons he obtained the line of credit for Integral was he knew he was leaving the relationship and he wanted to protect his financial interest in the matrimonial home. He estimated the value of the equity in the home to be \$800,000. He was concerned Ms. Johnson would run up the other line of credit on the house which had a limit of \$1,000,000. Somehow maintaining a significant balance on Integral's line of credit gave him a feeling of security. While I agree with Ms. Johnson that Mr. Blair's "strategy" does not make sense, I accept Mr. Blair was being truthful when giving this evidence. I cannot and was not asked to consider Mr. Blair's motivation for obtaining the secured line of credit, namely, his plan to leave the marriage.

- [80] The other important evidence relating to the question of Ms. Johnson's contribution was that the parties were not involved either directly or indirectly with one another's professional lives. There is no dispute they operated their respective businesses separately. Until later in the relationship, neither supported the other. They shared living expenses equally. Integral does its business in Alberta. Accordingly, Mr. Blair was often in Alberta, given his role in its operations. Ms. Johnson never travelled with Mr. Blair on business or participated in any business related activities with him or for him.
- [81] As set out above, in or about 2009, Ms. Johnson advised Mr. Blair she wished to retire. Evidently, he was surprised when she discussed this with him. Nonetheless he told her if she paid off their line of credit she could do so. In response, she stopped contributing to their shared living expenses and paid down the line of credit for some months. She estimated that during that time the balance went from about \$90,000 to \$60,000. After that, she stopped making those payments as well, even though she earned a net income of \$118,923.24 in 2009 and \$90,589 in 2010. Mr. Blair continued to support her financially until their separation and then continued to pay the mortgage until September 2013, as well as for renovations to the home that included a rental suite which has earned rental income since 2013.
- [82] While I agree Ms. Johnson's role in arranging for a secure line of credit for Integral was a form of contribution, I am not persuaded in the context of the relationship as a whole that it was a significant one. Ms. Johnson testified that she had no real plans for her retirement although she did want to write a cookbook. After she stopped working for the most part, Ms. Johnson's lack of involvement in Mr. Blair's businesses continued, reflecting, in my view, the extent to which the parties intended to keep their business lives separate. This was a third marriage for Mr. Blair and a second marriage for Ms. Johnson. They met at a time when both were well established in their respective fields, Ms. Johnson perhaps more so given the impact of Mr. Blair's divorce proceedings.
- [83] In all of these circumstances, including Mr. Blair's role in causing a dramatic increase in revenues for Integral and, therefore, the value of the shares in Alberta Co. post separation and Ms. Johnson's overall lack of contribution to Mr. Blair's businesses throughout the relationship, I find it would be significantly unfair to equally divide the increase in the value of the shares. I order the increase to be divided 70% in favour of Mr. Blair and 30% to Ms. Johnson, resulting in values of \$3,512,600 and \$1,505,400 respectively.

Compensation Payment

- [84] Ms. Johnson asks that Mr. Blair be ordered to make a compensation payment to her in particular installments that include a first payment of \$800,000 in the form of a dividend to her as a shareholder. As a pre-tax payment for Mr. Blair which is taxable to her, she argues a dividend payment is fair to him. The valuation report shows that as of the 2014 valuation date, Integral had over \$1,000,000 in cash and term deposits. Mr. Ghanavizchian assigned a fair market value to its net redundant assets of \$917,000 at that time. In his testimony, Mr. Ghanavizchian confirmed that \$200,000 of the cash and all of the term deposits (\$592,077),

an amount equal to \$792,077, were not required for the operations of the company. Ms. Johnson points out that Mr. Blair did not provide evidence the cash position of the company had changed significantly, although he testified that revenues had continued to drop since the report was being prepared. I agree a first payment of \$800,000 is appropriate here. I am satisfied, based on the evidence of Mr. Ghanavizchian, it will not interfere with the operations of Integral. That leaves a balance of \$705,400 to be paid by Mr. Blair.

- [85] Ms. Johnson proposes the balance owing on the compensation payment be paid at a rate of \$400,000 per year as a dividend, reflecting less than half of the discretionary cash flow projected by Mr. Ghanavizchian's report at Schedule 4.12. Ms. Johnson's submission assumes a total compensation payment for her equal share of the increased value of the shares of \$2,529,000. I conclude the subsequent balance should also be paid as dividends at a rate of \$250,000 for two years to be followed by a final payment of \$205,400.

Matrimonial Home

- [86] The family property includes the former matrimonial home located in White Rock, BC where the respondent continues to reside. The appraisal report of Denise Barker dated October 14, 2014 estimates the market value of the home at \$1,050,000. Her report updates an earlier report she completed on September 17, 2013 which valued the home at \$1,010,000. Ms. Barker inspected the home in order to prepare the earlier report but not again when asked to provide an update. In the earlier report she noted the detached garage required new perimeter drain tile to correct water ingress issues. Ms. Baker assumed the property was in essentially the same condition when she provided her updated assessment. In fact, the drain tile issue had been addressed. The updated appraisal considered six new comparables reflecting recent sales.
- [87] The claimant argued Ms. Barker's estimate of market value is too low. During cross-examination, she rejected his suggestion that \$1,200,000 is a more reasonable estimate. Although challenged to some extent on her choice of comparables and the fact that her estimate falls slightly below the assessed value of the home, Ms. Barker ably defended her estimate. Bearing in mind the specific market, she explained that a buyer would likely tear down the house. She described the garage as overbuilt for the property. It too would have to be taken down to allow a buyer to build a bigger home. The respondent agreed to an increase of \$25,000 in the estimate to account for the cost of the repair to drainage tile. Accordingly, I conclude the current market value of the home is \$1,075,000.
- [88] The matrimonial home is encumbered with a mortgage that includes a fixed line of credit account. The current balance is approximately \$396,000. Mr. Blair argues the increase in the line of credit caused by Ms. Johnson after separation is not family debt and, therefore, should not be included in calculating the net equity in which the parties have an equal interest. Ms. Johnson suggested the debt be divided equally in lieu of retroactive spousal support which is not claimed in her pleadings.

- [89] The evidence is that at the time of separation the amount owing on the line of credit was approximately \$19,000. After separation Ms. Johnson withdrew \$60,000. Most of the withdrawals occurred in August 2012, although the account records dating until November 2013 indicate they continued until May 2013. The balance on the account as of November 13, 2013 was \$66,410.46. Ms. Johnson's evidence was she withdrew the funds to pay living expenses and legal fees and then later on to pay the most recent property taxes. She did not specify the amount of the property taxes.
- [90] Section 86 of the FLA provides that family debt includes all financial obligations incurred by a spouse between the time the relationship began and separation, and then after separation if incurred for the purpose of maintaining family property.
- [91] Based on the evidence I largely agree with Mr. Blair. The outstanding balance on the line of credit less \$19,000 should not be deducted from the value of the home in determining the net equity. Neither party has suggested how the interest charges that have accrued on the line of credit should be divided and so I shall say nothing further about that. Ms. Johnson did not provide evidence as to what amount of her spending on the line of credit, if any, related to maintaining family property apart from mentioning payment of unspecified property taxes. Therefore, I find that \$47,410.46 of the line of credit (\$66,410.46 - 19,000) is Ms. Johnson's personal debt, not family debt. The portion of the mortgage which is family debt is \$348,589.54, for which Mr. Blair is responsible for \$174,294.77. Ms. Johnson is responsible for \$221,705.23 of the debt related to the matrimonial home.
- [92] I find that an equal division of the matrimonial home, taking into account the family debt of the mortgage and Ms. Johnson's personal debt as delineated above, results in a net value of \$363,205.23 for Mr. Blair and \$315,794.77 for Ms. Johnson. At the time of trial, Ms. Johnson's wish was to remain in the matrimonial home. If that is, in fact, her intention, she must pay compensation to Mr. Blair in the amount of \$363,205.23.

RRSPs

- [93] The parties agree their RRSPs should be equalized by a spousal rollover. Neither provided clear evidence of the value of their RRSPs at the date of cohabitation. I agree with the respondent's suggestion that the values set out in their current Form F8 financial statements should be used, reducing the claimant's balance by deducting 50% of his contributions in 2012 and those he has made since separation (\$309,250 - \$70,970 = \$238,280). The respondent's Form F8 values her RRSPs at \$186,588, resulting in a difference of \$51,692. Consequently the claimant must transfer to the respondent \$25,846 by way of spousal rollover.

CPP

- [94] In a schedule for asset division that accompanied Ms. Johnson's written submissions she asked that the parties' CPP credits be equalized. Apart from this neither party said anything about this issue. There is no evidence of the parties' respective contributions during the period of cohabitation or otherwise. It is clear that contributions must have been made. I conclude the parties' entitlements to their respective CPP pensions should be divided in accordance with Part 6 of the FLA from the date of cohabitation to the date of separation.

Bank Accounts

- [95] I accept the submissions of the respondent that each party should retain the balances in their respective bank accounts. The parties have not provided evidence of the balances at the date of separation. I agree with the respondent's suggestion the current balances likely represent post separation earnings. The claimant did not make a contrary argument on this point.

Boats and Vehicles

- [96] The parties agree that the vehicles and boat purchased by Mr. Blair during the marriage should be subject to a compensation order in favour of Ms. Johnson for half of their value. The only evidence of their value is an estimate provided by Mr. Blair in his sworn F8 financial statement. There he lists the following vehicles: 2013 GMC, 1962 Nova, BMW 200/ motor cycle, 1970 Chevy, Regal Boat and 1956 Chevy. He values all of them at \$126,000. In the asset schedule prepared by the respondent she attributes to the respondent's vehicles that are family property a value of \$51,750 and includes a 2011 ATV which she values at \$1,750. In the claimant's asset schedule he does not list his vehicles but sets out a value for them of \$50,000. Mr. Blair did not testify to owning an ATV. He gave evidence he purchased the motor cycle and the 2013 GMC after separation. Given the absence of any apparent dispute between the parties regarding the value of Mr. Blair's vehicles which are family property, I order Mr. Blair to pay Ms. Johnson the amount of \$25,000 as compensation for the value of her equal interest in those vehicles.

Household Chattels

- [97] Mr. Blair asks for an order that the contents of the matrimonial home be divided on an equal basis. As Ms. Johnson points out, the household chattels have not been identified or valued. Ms. Johnson wishes to remain in the home. She is unaware of what items Mr. Blair wants to retain. In the absence of any evidence at all, but finding Mr. Blair entitled to an equal share of the chattels, I order the parties to divide them or for Ms. Johnson to pay compensation for half of their value as agreed to by the parties. If necessary, the parties may appear before me to seek further directions on this issue.

Rum Kay Property

[98] In 2008, the parties purchased a property in the Bahamas along with another couple for \$167,000 (US). Mr. Blair testified that most of the funds for their half of the purchase price came from Indian Head. Mr. Meares, an accountant for Mr. Blair's companies, testified that the property is "booked" as an investment of the company, although registered in the names of the parties. Neither party took the position Rum Kay should be subject to division. No orders were sought in relation to it and so none shall be made.

Restraining Order

[99] During the trial, in response to an application by Ms. Johnson, I granted an order that the parties be restrained and enjoined from encumbering, assigning or in any similar manner dealing with their direct or indirect shareholdings in Mr. Blair's companies and their respective RRSP's until further order. The restraining order allowed the parties to dispose of, encumber, or assign the identified assets if necessary, in the ordinary course of business and with notice to the other party. The parties were granted leave to seek to vary the order on two days' notice. At the conclusion of the trial, Ms. Johnson submitted the restraining order should remain in place until the claimant has paid her the full amount of the compensation payment. She also argued that to secure payment a further order should be made prohibiting the claimant from providing himself or his son with annual compensation and dividends of more than \$260,000, or selling any of the shares of any of the businesses or substantially all the assets of the businesses including the assignment of contracts, unless he has made compensation to her for that year. Mr. Blair opposed the further order but not the proposal that the existing restraining order continue. Mr. Blair submitted there is nothing in the evidence to suggest that he will not comply with the any orders of the Court. I agree. Accordingly the restraining order granted November 4, 2015 shall continue until Mr. Blair has made the compensation payment to Ms. Johnson in full, again subject to further court order. To clarify the restraining order should not prevent the parties from complying with order set out above requiring an equalization of their RRSPs by way of a spousal rollover. The parties continue to be at liberty to apply to vary the order on two days' notice.

Spousal Support

[100] The respondent seeks non-compensatory spousal support pending receipt of the \$800,000 dividend, the first installment of the compensation payment. Based on a guideline income for her of \$60,000 and \$269,485 for the claimant, she proposes monthly payments within the range of \$2,357 (low), \$2,749 (mid) and \$3,142 (high) provided by the Spousal Support Advisory Guidelines ("SSAG").

[101] The claimant does not dispute the respondent is entitled to some temporary non-compensatory support.

Guideline Incomes

- [102] The respondent has worked as a realtor since 1994. Her gross earnings during the relationship until 2011 ranged from \$112,500 to \$198,000, with net incomes of between \$57,000 and \$139,000. In the few years before she decided she wanted to retire, Ms. Johnson worked for one property developer selling new townhomes. When she sold out the project the developer stopped his work. Ms. Johnson received her final payments from that project in 2010. She testified she was not able to find work with new condominium projects and explained developers now hire marketing companies rather than individual realtors. In 2011, Ms. Johnson's line 150 income was \$2,770; in 2012, it was \$14,621; and in 2013, it was \$58,814. She expects to continue earning approximately \$60,000, net of business expenses. Ms. Johnson was cross-examined at some length about those expenses. I am satisfied they do not include unreasonable expenses and, therefore, set Ms. Johnson's guideline income at \$60,000.
- [103] Ms. Johnson does not dispute the guideline income of \$269,485 that Mr. Blair sets out in his Form F8 financial statement sworn October 17, 2014. In his DivorceMate calculations Mr. Blair instead used an income of \$252,698. His line 150 income for 2013 is, however, the one set out in his Form F8. In the absence of any submissions on this point, I set his guideline income at \$269,485.
- [104] Mr. Blair suggests Ms. Johnson be awarded an amount at the low end of the range provided by the SSAG because of the benefit she derives from her gross income.

Statutory Framework

- [105] Although the question of entitlement is not in issue here, it is worth reviewing the legislative framework and the governing principles in deciding the amount of spousal support to be awarded to Ms. Johnson.
- [106] Section 15.2(6) of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.) provides that a spousal support order should meet the following objectives:
- (a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;
 - (b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;
 - (c) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and
 - (d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.

- [107] No single objective is paramount; all must be borne in mind: *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420 at para. 35.
- [108] Section 15.2(4) further provides the court must consider the condition, means, needs and other circumstances of each spouse when dealing with an application for spousal support, including these factors:
- (a) the length of time the spouses cohabited;
 - (b) the functions performed by each spouse during cohabitation; and
 - (c) any order, agreement or arrangement relating to support of either spouse.
- [109] Where non-compensatory principles apply, spousal support aims to narrow the gap between the needs and means of the spouses. The concept of need, however, goes beyond the basic necessities of life and varies according to the circumstances of the parties. In longer marriages, the courts have measured need against the marital standard of living or the payor's post-separation standard of living: *Chutter v. Chutter*, 2008 BCCA 507 at para. 59, leave to appeal ref'd [2009] S.C.C.A. No. 41; *Hodgkinson v. Hodgkinson*, 2006 BCCA 158 at paras. 68 - 69. In *Moge v. Moge*, [1992] 3 S.C.R. 813, the Court said at 870:

Although the doctrine of spousal support which focuses on equitable sharing does not guarantee to either party the standard of living enjoyed during the marriage, this standard is far from irrelevant to support entitlement. As marriage should be regarded as a joint endeavour, the longer the relationship endures, the closer the economic union, the greater will be the presumptive claim to equal standards of living upon its dissolution.

- [110] In addition to the statutory framework and the jurisprudence, Chapter 9 of the SSAG discusses factors that may impact upon determining the precise amount of spousal support within the range. Among them is the strength of the support claim, with strong compensatory claims being suitable for awards at the higher end of the range; the recipient's needs, with limited income and/or earning capacity pushing the award to the higher end; and the payor's needs and ability to pay, with the obvious suggested consequences. What emerges from the discussion is that the mid-range is not intended as a default outcome.

Analysis

- [111] The parties shared a medium length marriage. I would not characterize Ms. Johnson's entitlement to spousal support as strong. It is fairly clear from the evidence as a whole however that the significant difference in the parties' incomes has resulted in some differences in their life styles since separation. Ms. Johnson is not on a fixed income but she does earn and expects to continue earning significantly less than she usually earned during the relationship, prior to semi retiring. Conversely, Mr. Blair's guideline income means he has the ability to pay the high end of the range. Weighing the objectives of spousal support, the considerations set out in s. 15.2(4) of the Divorce Act and taking guidance from the

discussion in the SSAG referred to above, I conclude \$2,600 is an appropriate amount for monthly spousal support, given the range produced by the SSAG.

- [112] The parties appear to agree that Mr. Blair should continue paying that amount only until he provides Ms. Johnson with her first compensation payment of \$800,000. In my view, it is appropriate to suspend, rather than end, his obligation to make further spousal support payments at that time. Once all of the installments of compensation payments have been made, his spousal support obligation will be at an end. I also regard it as appropriate for Mr. Blair's obligation to pay monthly spousal support to commence December 1, 2014, shortly after the conclusion of the hearing in this matter.

Divorce

- [113] I am satisfied the grounds for divorce, pursuant to s. 12 of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.) have been met. I therefore grant the order of divorce, which will take effect 31 days from the date of these reasons.

Summary

- [114] I make the following orders in respect of the Alberta Co. shares:

- 1) The increase in the Alberta Co. shares will be divided 70% in favour of the claimant and 30% to the respondent, resulting in values of \$3,512,600 and \$1,505,400 respectively.
- 2) The claimant will make a compensation payment to the respondent for \$1,505,400 which will include a first installment of \$800,000 in the form of a dividend to her as a shareholder by August 1, 2015 or such other date as may be agreed to by the parties.
- 3) The claimant will pay the subsequent balance to the respondent as dividends at a rate of \$250,000 for two years by no later than August 1, 2016 and August 1, 2017 respectively, to be followed by a final payment of \$205,400 by August 1, 2018, or such other dates as may be agreed to by the parties.
- 4) Following receipt of the final installment of the compensation payment set out above, the respondent will transfer her shares in Alberta Co. to the claimant.
- 5) Until such time as the final installment of the compensation payment has been made to the respondent, the current restraining order shall remain in place, subject to an application to vary on two days' notice.

- [115] I make the following additional orders in respect of the outstanding issues between the parties:

- 1) In the event the respondent chooses to remain in the matrimonial home, she will pay the claimant \$363,205.23 as compensation for his equal interest in the matrimonial home which may occur after she receives the first installment of the compensation payment set out in paragraph 2 of the orders above.

- 2) The claimant will pay the respondent \$25,846 in the form of an RRSP spousal rollover.
- 3) The parties' CPP contributions will be divided in accordance with Part 6 of the FLA from the date of cohabitation to the date of separation.
- 4) The parties will retain the balances in their respective bank accounts.
- 5) The claimant will pay the respondent \$25,000 as a compensation payment for her equal interest in his vehicles that are family property which may be offset from the compensation payment for his interest in the matrimonial home.
- 6) The parties will equally divide the household chattels or the respondent will pay the claimant compensation for half of their value as agreed to by the parties.
- 7) The claimant will pay the respondent spousal support in the amount of \$2,600 per month commencing December 1, 2014. The claimant's obligation to make such monthly payments will be suspended upon the first installment of the compensation payment being provided to the respondent as set out in paragraph 2 of the orders above and will come to an end upon payment of the last installment set out in paragraph 3 above.

Costs

[116] The parties have asked for the opportunity to make further submissions as to costs.

"Fleming J."

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