
CANADA / JUDGMENT

Brown v. Chyplyk

2021 BCSC 1564

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Supreme Court of British Columbia

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2021 BCSC 1564 Brown v. Chyplyk

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Brown v. Chyplyk,

2021 BCSC 1564

Date: 20210812

Docket: E65307

Registry: Nanaimo

Between:

Jeremy Blake Brown

Claimant

And

Tania Arlene Chyplyk

Respondent

Before: The Honourable Mr. Justice Davies

Reasons for Judgment

Counsel for the Claimant:

B.K. Soloway

Counsel for the Respondent:

T.A.B. Vining

Place and Date of Trial/Hearing:

Nanaimo, B.C.

May 17 - 20, 27 and 28, 2021

Place and Date of Judgment:

Nanaimo, B.C.

August 12, 2021

Table of Contents

INTRODUCTION. 3

ISSUES. 4

PRE-SEPARATION CIRCUMSTANCES. 4

CREDIBILITY. 9

POST-SEPARATION CIRCUMSTANCES. 12

DISPOSITON OF INTEREST IN ROTOR MAXX. 15

CLAIMS FOR REAPPORTIONMENT. 26

Reapportionment of Unified's One-third Interest in Rotor Maxx. 28

Reapportionment of Equity in Former Matrimonial Home. 34

CLAIM FOR SPOUSAL SUPPORT. 37

SUMMARY AND DISPOSITION. 43

The Revelstoke Rental Property. 44

Mr. Brown's Locked-in RRSP Investment Accounts. 44

Ms. Chyplyk's Pulp and Paper Industry Pension. 45

The Parties' Canada Pension Plans. 45

COSTS. 46

INTRODUCTION

- [1] The parties were married on September 20, 1997 after having lived in a common-law relationship for five years. They separated on December 20, 2010. This family law proceeding was commenced by the claimant, Jeremy Brown on February 3, 2012. The respondent, Tania Chyplyk filed a counterclaim on April 13, 2012.

- [2] On May 3, 2012 a declaration was made under s. 57 of the Family Relations Act, R.S.B.C. 1996 c. 128 ["FRA"] declaring that there was no reasonable prospect of reconciliation between Mr. Brown and Ms. Chyplyk. At the same time an order was made under s. 67 of the FRA restraining disposition of family assets without the parties' consent or a further court order.
- [3] The matters now in issue remained unresolved until this trial commenced in late May, 2021.
- [4] During the trial the parties applied for and obtained an order for divorce.
- [5] The lengthy period between the date of separation and commencement of these proceedings and the many years that passed before this trial commenced requires that most of the disputed property issues between the parties be determined under the provisions of the FRA rather than the Family Law Act, S.B.C. 2011 c. 25 ["FLA"].
- [6] That lengthy period of delay also not only gave rise to many changes in the values of properties owned by the parties at the time of separation that remain subject to division but also claims for reappportionment by Ms. Chyplyk under the FRA.
- [7] Those reappportionment claims are based not only upon valuation issues but also based upon her alleged improvement of the former matrimonial home (in which she still resides) and her allegations that, by his blameworthy mismanagement, Mr. Brown caused the value of shares in a family owned corporation, Unified Investments Ltd, ("Unified"), a one-third partner in Rotor Maxx Support Limited ("Rotor Maxx"), to be significantly diminished to her detriment.

ISSUES

- [8] Ms. Chyplyk's claims seeking reappportionment of family assets in her favour under the FRA are the primary subject of these reasons.
- [9] Ms. Chyplyk also seeks retroactive lump sum spousal support under the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.) for a period after the parties separated at the end of 2010 until the end of the 2015 during three years of which Mr. Brown's income significantly exceeded hers, primarily because of the success of Unified and Rotor Maxx during those years.
- [10] Mr. Brown seeks an equal division of all family assets and the dismissal of Ms. Chyplyk's claims for spousal support.

PRE-SEPARATION CIRCUMSTANCES

- [11] Mr. Brown is now 52 years of age and Ms. Chyplyk is 50. They commenced residing together in September 1992 and were married on September 20, 1997. They separated on December 20, 2010, but resided separate and apart in the same home on Bloedel Road on Sproat Lake near Port Alberni until about May 2011 after which Mr. Brown left that former family home.
- [12] Ms. Chyplyk remained in the Bloedel Road home and still resides there.

- [13] Mr. Brown and Ms. Chyplyk have no children. They have both worked industriously and successfully since completing high school and some post-secondary education.
- [14] Mr. Brown became a helicopter repair and servicing technician and worked in that capacity for a number of employers until, with Ms. Chyplyk's assistance, he became the sole shareholder in Unified in about 2006.
- [15] Unified was incorporated by Mr. Brown to pursue an opportunity to create a helicopter repair and servicing business (that subsequently became Rotor Maxx) with two associates, Ken Norie and Michael Wiggins.
- [16] To create Rotor Maxx each of Mr. Brown, Mr. Norie and Mr. Wiggins used their personal corporations to hold one-third of its issued shares. Each of the personal corporations then contributed \$200,000 in shareholders loans to start operations.
- [17] The three corporations also entered into various agreements, including a shareholders agreement (the "Rotor Maxx Shareholder's Agreement") related to the ownership and operation of Rotor Maxx.
- [18] The corporate structure of Rotor Maxx and the terms of the Rotor Maxx Shareholder's Agreement (that I will later discuss in more detail) are of central importance to the resolution of the disputes between Ms. Chyplyk and Mr. Brown.
- [19] The \$200,000 shareholder's loan from Mr. Brown's company Unified used to fund the initial operations of Rotor Maxx was obtained through the use of a line of credit backed by a mortgage of the former family home on Bloedel Road.
- [20] That mortgage, which has been paid down since 2006 to approximately \$150,000, remains the only financial encumbrance on the title to that home.
- [21] There is no dispute that the value of the shares of Unified and the original \$200,000 shareholder's loan are family assets that are subject to division under the provisions of the FRA.
- [22] There is also no dispute that the balance of the mortgage on the Bloedel home used to secure the \$200,000 shareholder's loan is a family debt.
- [23] As I earlier indicated the issues that arise in respect of the Unified shares and their ownership interest in Rotor Maxx concern Ms. Chyplyk's assertions of entitlement to an unequal division of the shares based primarily upon her submissions that Mr. Brown's post-separation actions de-valued those shares to such an extent that equal division would be unfair.
- [24] Before Mr. Brown incorporated Unified to pursue the Rotor Maxx venture both he and Ms. Chyplyk had each been very successful as employees in their chosen careers.

- [25] Mr. Brown had worked in the helicopter repair and servicing industry for a number of employers. He worked primarily upon the Sikorski S-61 helicopter and gained expertise not only in repair and servicing but also in technical support. A large part of that employment and his expertise involved the buying and repairing of used parts for re-use.
- [26] The experience and expertise he gained over the years before the incorporation of Unified also led to Mr. Brown knowing many persons in the industry with whom he developed personal and business relationships.
- [27] The impetus for the formation of Unified and thus Rotor Maxx was the closing of Mr. Brown's employer's operations on Vancouver Island with the result that many employees, some of whom had come to that employer with Mr. Brown, were left without work.
- [28] With Ms. Chyplyk's support, Mr. Brown sought to take advantage of that void in the market place resulting in him becoming an owner/employee in the Rotor Maxx venture with Mr. Wiggins and Mr. Norrie and Mr. Brown having primary responsibility for day-to-day shop and field operations.
- [29] Ms. Chyplyk's career path was less direct than that of Mr. Brown. She worked in various jobs in Vancouver after completing some secondary education. Her work included work in one of the helicopter companies that employed Mr. Brown.
- [30] As part of her working career Ms. Chyplyk obtained qualifications in non-destructive testing that allowed her to assist in the certification of helicopter parts that were repaired for their owners before being re-used or sold to others by them. Those qualifications in non-destructive testing were a valuable asset for Rotor Maxx early in the start-up of its operations as she also worked to train others to perform that work. Ms. Chyplyk worked without pay in providing that start-up assistance.
- [31] Although Ms. Chyplyk worked in the helicopter repair field for short periods of time her primary career path was centered upon become a journeyman millwright.
- [32] When the parties moved to Port Alberni in 1999 Ms. Chyplyk obtained employment with Catalyst Pulp and Paper ("Catalyst") and has worked there since then.
- [33] In addition to their individual employment endeavours and successes from which they pooled their income before the incorporation of Unified and the start-up of Rotor Maxx, Mr. Brown and Ms. Chyplyk were also involved together in various money-making endeavours that had allowed them to accumulate significant assets.
- [34] Some of those ventures included the buying and improving of residences resulting in substantial legitimately non-taxable gains. In by far the majority of instances, however, substantial profits garnered by the couple over the years from the buying, importing from the United States and selling in Canada cars, other vehicles, or equipment and helicopter parts were not declared as income for tax purposes.

- [35] Ms. Chyplyk sought to characterize her involvement in ventures where tax was not declared as being minimal as compared to that of Mr. Brown and her involvement in home improvement and resale that was legitimately not taxable as being far greater than his.
- [36] I find that those characterizations were calculated to attempt to rationalize or disavow Ms. Chyplyk's own participation in ventures where profits were not declared and to attempt to gain advantage in respect of the division of the family assets attained as a consequence of the parties' joint endeavors.
- [37] Although Mr. Brown was in many instances the one who saw an opportunity to make profit from the buying, importing and reselling of items, I am satisfied that Ms. Chyplyk not only participated fully in the use of the profits obtained from those ventures but was also actively involved in the finding and procuring of the items obtained, imported and sold.
- [38] I need not discuss in any detail the specifics of the parties' untaxed business endeavours because: the results of all of those ventures; their non-taxable gains in their ownership of real estate over the years; and, the income and benefits obtained by them over the years of their marriage before separation, resulted in the accumulation of the following family assets that are now subject to division:
- 1) The home on Bloedel Drive in Port Alberni owned jointly by the parties, having a present value of approximately \$1,660,000 (less approximately \$150,000 being the remaining balance on the mortgage used to secured the original \$200,00 shareholder's loan to Unified to purchase its interest in Rotor Maxx);
 - 2) A rental property in Revelstoke, British Columbia purchased with an \$80,000 loan from Mr. Brown's parents (that was repaid from untaxed business ventures) having a present value of approximately \$610,000 less a mortgage in the amount of approximately \$175,000;
 - 3) The \$200,000 shareholder's loan in Unified;
 - 4) The contested value of Unified's shares for its former interest in Rotor Maxx that was purchased by a corporation controlled by Mr. Norie in 2016 as I will later discuss;
 - 5) Locked-in RRSP Investment Accounts in the name of Mr. Brown having a present value of approximately \$115,000;
 - 6) Ms. Chyplyk's Pulp and Paper Pension Plan (which has not been valued);
 - 7) The parties' respective Canada Pension Plans; and
 - 8) Various vehicles and miscellaneous assets in the possession of each of the parties which, subject to an equalization payment of \$35,000 from Mr. Brown to Ms. Chyplyk, the parties have agreed will become their sole properties.

- [39] Of the family assets subject to division it must be noted that any sale of the former family home in Port Alberni is not taxable and that if, or when, it is sold the Revelstoke rental property is likely subject to capital gains taxation.
- [40] As I will later discuss, the proceeds from the sale of Unified's shares in Rotor Maxx are also subject to taxation.
- [41] I have no evidence about any the impact of tax considerations on any of the other assets subject to division.

CREDIBILITY

- [42] Before turning to the parties' post-separation circumstances and the determination of Ms. Chyplyk's claims to unequal division of family assets (primarily concerning the former family home and the shares in Unified) and her claim for spousal support, I must first address issues of credibility that impact my conclusions with respect to those claims and Mr. Brown's responses to them.
- [43] Both Ms. Chyplyk and Mr. Brown asserted that the other was not forthcoming with the production of relevant documentation concerning issues that now require determination.
- [44] Ms. Chyplyk's disclosure complaints related for the most part to information sought from Mr. Brown concerning the sale of Unified's interest in Rotor Maxx, his subsequent employment by Rotor Maxx as part of that transaction and the termination of that employment.
- [45] Although some documentary information may exist that might further inform those circumstances and events I am satisfied that not all of the information sought is in Mr. Brown's possession or control. I am also satisfied that the adverse relationship that now exists between Mr. Brown and his former partners would make it very difficult for him to obtain and produce what is sought. That difficulty is, at least to some extent, exacerbated by Ms. Chyplyk's allegations and interference in the sale of Unified's interest in Rotor Maxx to Mr. Norie's company in 2016, including some threats made by her that I will later discuss.
- [46] I am not persuaded that any alleged lack of document production by Mr. Brown undermines either his credibility or the positions he advances in this litigation.
- [47] I reach those conclusions in part because of Mr. Brown's candid admission of his failure to report all profits earned from his various ventures with Ms. Chyplyk before their separation as well as his admissions related to the termination of his employment by Rotor Maxx.

- [48] Mr. Brown was also not evasive in cross-examination on any issue of substance even if his responses have or could have adverse consequences to him now or in the future. Mr. Brown also at all times fairly and frankly admitted not only the facts of but also the value of Ms. Chyplyk's contribution to the acquisition of their assets as well as their improvement. He also recognized without hesitation the value of her early efforts in the establishment of Rotor Maxx that subsequently became a successful business venture.
- [49] I do not reach the same conclusions with respect to either Ms. Chyplyk's credibility or her failure to produce relevant documents.
- [50] Ms. Chyplyk has, since shortly after the parties separated, rented parts of the Bloedel home for both long and short periods of time. More specifically, she has rented a lower floor suite for most if not all of the time post-separation and admitted on examination for discovery that she has rented out the upstairs of the home in the summer for vacation rentals.
- [51] Notwithstanding repeated requests for the production of records related to that rental income Ms. Chyplyk did not produce any such records. She also did not declare rental income on her income tax returns, although she did say that she had prepared worksheets that convinced her she had no income to declare. She did not, however, produce those obviously relevant worksheets in this litigation.
- [52] Ms. Chyplyk's discovery of documents in respect of the expenses that she testified she had incurred over the years to maintain, repair or improve the family home since the parties separated was also at best both incomplete and selective having regard to her assertions concerning the cost and magnitude of those endeavors.
- [53] On cross-examination Ms. Chyplyk's testimony concerning the rental of the downstairs rental unit and the summer rentals of the upstairs of the home was at best confusing and at worst evasive and inconsistent.
- [54] At times she claimed that that downstairs was rented in return for dog sitting by the renter but at other times agreed that it rented for \$850 per month. Also, at trial she initially testified that she had only recently been renting the upstairs portion of the house during the summer (for approximately 28 days per summer at about \$360 per night) but later accepted that she had done so earlier because on discovery in 2016 she had stated that she had been renting the upstairs "every summer".
- [55] Ms. Chyplyk provided further contradictory evidence about the rental and maintenance of the family home arising from a personal loan that, on her July 12, 2016 financial statement, she claimed was owing to Christopher Brady in the amount of \$20,276.

- [56] At trial Ms. Chyplyk testified that maintenance of the family home was done by her with little assistance from others and also that Mr. Brady was for a time one of the tenants who looked after her dog or dogs in lieu of rent. However, on examination for discovery on October 11, 2016 she answered questions about owing money to Mr. Brady in part by saying, "he does all the maintenance around the house and occasionally looks after the dog".
- [57] In all of those circumstances, as well as her general tendency to exaggerate her own contributions to the accumulation and maintenance of assets while minimizing those of Mr. Brown, I have concluded that I must have serious reservations about the extent that I can rely upon Ms. Chyplyk's evidence when it is not supported by contemporaneous documentary evidence, especially when considering issues of reapportionment.

POST-SEPARATION CIRCUMSTANCES

- [58] When the parties separated in December 2010 Mr. Brown moved into the downstairs suite in the Bloedel home for a short period of time. Although the length of that time and the reason why it ended with Mr. Brown's parents removing all of his belongings is in dispute the circumstances of that short period of occupation are only relevant to the extent that Mr. Brown testified that when he attended home from a business trip the suite in which he had been living had been rented by Ms. Chyplyk.
- [59] Ms. Chyplyk testified that Mr. Brown had already moved out and the suite was then occupied by someone who did not pay rent but looked after the dogs for her while she worked. Given my concerns about the reliability of Ms. Chyplyk's evidence about the rental of the downstairs of the family home, I accept Mr. Brown's testimony as to what occurred and doubt Ms. Chyplyk's evidence about a tenant then or at other times looking after her dog or dogs in lieu of rent.
- [60] After separation Ms. Chyplyk continued to work for Catalyst as a millwright earning approximately \$90,000 per year. She is still employed there with similar compensation. She had continued and still continues to contribute to her Pulp and Paper Industry Pension Plan.
- [61] Mr. Brown continued to work at Rotor Maxx in the years following separation as a part owner, manager and employee until mid-2016 when issues within that organization resulted in Mr. Norie's company purchasing the shares of Unified at a value significantly less than the value of its underlying assets.
- [62] I will discuss in detail the circumstances leading to that purchase of Unified's shares in Rotor Maxx in the context of Ms. Chyplyk's reapportionment claims later in the reasons under the heading "Disposition of Interest in Rotor Maxx".

- [63] For the purpose of this post-separation chronology, however, and in relation to Ms. Chyplyk's retroactive lump sum spousal support claim it is only necessary to record that after separation and before ceasing any involvement with Rotor Maxx, Mr. Brown's income in the years 2011 to 2015 averaged \$175,761 per year while Ms. Chyplyk's income averaged \$87,282.
- [64] The purchase of Unified's shares in Rotor Maxx by Mr. Norie's company Kenlor Investment Limited ("Kenlor") included a three-year non-competition agreement entered into by both Unified and Mr. Brown in favour of Rotor Maxx and Kenlor. An exception to that non-competition agreement allowed Mr. Brown to pursue employment in the U.S.A. with Croman Corporation of White City, Oregon ("Croman") provided that any such employment would be limited to working to maintain and repair Croman's own assets in its flight operations.
- [65] Under a separate termination of employment agreement Rotor Maxx and Kenlor agreed to pay Mr. Brown \$13,750 per month for 18 months ending January 1, 2018 less applicable payroll taxes and remittances.
- [66] The monthly payments due under that termination of employment agreement were, however, only paid by Rotor Maxx until February 2017.
- [67] As I will later discuss Rotor Maxx discontinued all payments to Mr. Brown under that agreement in February 2017 as a consequence of actions by him that Rotor Maxx determined justified termination of the employment agreement.
- [68] After the termination of his employment with Rotor Maxx, Mr. Brown continued to work in the helicopter repair and servicing field with Croman. In the years 2016 to 2020 Mr. Brown earned income from employment averaging approximately \$131,300 per year.
- [69] In that same period Ms. Chyplyk has continued her employment with Catalyst and has declared average earnings of approximately \$85,000 per year prior to deduction of union dues and inclusive of Workers' Compensation payments of approximately \$32,357 received in 2018.
- [70] As I have noted, Ms. Chyplyk has lived in the former family home since separation. She has paid all property taxes and has also paid the utilities, insurance, costs of maintenance and repair as well as the costs of any improvements made to the home since separation. Mr. Brown has, however, paid one-half of the payments due each month on the mortgage that was obtained to secure the \$200,000 shareholder's loan to Unified for the start-up of Rotor Maxx.
- [71] The Revelstoke rental home has been rented since it was purchased by the parties. Although Ms. Chyplyk managed the property prior to separation for the most part Mr. Brown did so after separation. The monies received from the rental of the home are generally sufficient to cover the mortgage, insurance and taxes for the home. To the extent that Mr. Brown may have had to expend additional funds on the Revelstoke home he makes no claim for any

reimbursement of those funds and does not seek any reapportionment of the value of the home.

- [72] After he left the family home after separation Mr. Brown resided for some years in a home in Parksville that had been purchased by his parents for approximately \$600,000. He testified that he paid rent to his parents for his use of that home.
- [73] Ms. Chyplyk sought to assert that Mr. Brown had an ownership interest in the home that was sold after Mr. Brown ceased to reside there. She made that claim because Mr. Brown and his parents paid \$20,000 to settle a claim with his then common law spouse who sought to obtain a share of the gross proceeds of the sale of the in 2019 for about \$650,000.
- [74] I find the evidence is not capable of establishing that Mr. Brown had any ownership interest in that home.
- [75] Mr. Brown now lives in MacKenzie, British Columbia in a home purchased by his present spouse. That home has a value of approximately \$235,000. The MacKenzie property was purchased for the most part with monies contributed by Mr. Brown's present spouse from funds received upon the dissolution of her prior marriage. Ms. Chyplyk makes no claim to the division of that property.
- [76] Against that background I will now turn to my consideration of the evidence related to the sale of Unified's interest in Rotor Maxx in 2016, Mr. Brown's subsequent employment by Rotor Maxx and the termination of that employment as well as Ms. Chyplyk's claim's for reapportionment under the FRA and lump sum retroactive spousal support under the Divorce Act.

DISPOSITON OF INTEREST IN ROTOR MAXX

- [77] When Mr. Brown decided to enter the repair and servicing of helicopters business as an owner rather than as an employee and consultant he was supported in that start-up by Ms. Chyplyk. As I have previously mentioned that support included her use of her non-destructive testing qualifications. She also helped locate a facility for the operations near Nanaimo and assisted in the improvement of that facility for use in the business. She was not paid for her efforts.
- [78] Mr. Brown realized that the business that was contemplated by him in late 2006 and in early 2007 required more capital and broader expertise than he himself could provide.
- [79] In his years of work in the helicopter industry Mr. Brown had met many others involved in the industry in various capacities. One of those was Michael Wiggins who had particular expertise in sales and marketing as well as many business contacts in the industry that could help build the new business. Ken Norie was a close friend of Mr. Wiggins who had more financial wherewithal than either Mr. Wiggins or Mr. Brown. Mr. Norie also had many contacts who could hopefully provide work for the new endeavor.

- [80] Mr. Brown and Mr. Wiggins became the day-to-day managers of the business with Mr. Brown responsible primarily for the actual work done in the shop and in the field as well as in the procurement of parts which would be refurbished by Rotor Maxx and resold or used in repairs. Mr. Wiggins was primarily involved in administration and sales. Mr. Norie was for the most part a "silent partner" in the business.
- [81] To formalize their business relationship Mr. Brown, Mr. Wiggins and Mr. Norie each either incorporated a company or used an existing company to enter into a number of agreements by which those companies each become one-third shareholders in Rotor Maxx. One of those documents was the shareholder's agreement that came to be of great importance in the eventual sale of Unified's interest in Rotor Maxx in 2016.
- [82] Among other things the Rotor Maxx Shareholders Agreement provided that:
- 1) Except with the unanimous consent of the other shareholders in writing no shareholder could, while a shareholder in Rotor Maxx or within a period of five years after ceasing to be a shareholder, enter into competition with Rotor Maxx.
 - 2) The parties to agreed by clause 4.02 of the agreement to obtain their capital requirements from banks and also that:

In the event that the company is unable to obtain funds as provided for in paragraph 4.02 and if approved by all the directors of the board and all the shareholders, the company may make written requests to all shareholders for a loan. The company's request for a loan shall be made to each shareholder rateably in proportion to his or her shareholdings of the shares in the company.

The company shall advance the money requested from him or her within 30 days of receipt of the written request for the loan.

Unless specified in the company request, the loans will not bear interest.

- 3) A shareholder was restricted from selling its shares to third parties without offering to Rotor Maxx and the other shareholders the right to purchase those shares. Only if an offer of sale was not accepted could the shareholder then sell to third parties.
 - 4) That restriction on the sale of a shareholders shares to third party was also subject to a "shot gun" buy-out clause.
- [83] Early in its operation, as Rotor Maxx's business was growing, after a few months Mr. Brown was paid a salary of \$60,000 per year while Ms. Wiggins and Mr. Norie were not paid for their efforts.
- [84] Ms. Chyplyk continued to work for Catalyst at a salary of around \$85,000. As earlier noted, she received no pay for any of the work she did for Rotor Maxx including her work in non-destructive testing and the training of others to also become certified so that her work in that capacity was no longer needed.

- [85] Mr. Brown and Ms. Chyplyk agreed in their respective testimony that they anticipated Ms. Chyplyk would eventually be compensated for her work by sharing in the growth of the company if it became as successful as they both expected it would.
- [86] Over the years Rotor Maxx's business grew. Mr. Brown's yearly earnings had reached approximately \$64,500 in 2010 before the parties separated and in 2011 were approximately \$86,000.
- [87] In the following years, however, between 2012 and 2015 Mr. Brown's income from his employment at Rotor Maxx increased dramatically going from approximately \$121,000 in 2012 to \$226,500 in 2015 as the business grew and profited.
- [88] After separation, at the joint request of the parties, a draft business valuation of Rotor Maxx as of August 12, 2012 (dated June 24, 2013) prepared by Chris Goodburn valued Rotor Maxx as a going concern as being between \$4.2 million and \$5 million with its assets valued at \$5.15 million.
- [89] Mr. Goodburn then estimated the fair market value of Rotor Maxx as "falling within the range of \$4.6 million to \$5.15 million". He estimated the value of Unified's one-third interest in Rotor Maxx to be from a low of approximately \$1.3 million to a high of approximately \$1.46 million. Mr. Goodburn re-issued that draft valuation with the same values, as a final valuation on September 3, 2020.
- [90] Another valuation was later prepared by Mr. Goodburn at the joint request of the parties.
- [91] For that second valuation Mr. Goodburn was instructed to value Unified as of July 31, 2016 a date that was immediately before Unified's shares were purchased (as I will next discuss) by Mr. Norie's company Kenlor in August, 2016. He was also instructed to ignore that share purchase agreement and all related documents.
- [92] Most significantly, given the issues in this litigation, as to the value of Rotor Maxx as at July 31, 2016, Mr. Goodburn concluded that:

I have concluded that the company's maintainable earnings as at the valuation date would / have produced a going concern value significantly less than the asset value calculated in the next section. Accordingly, I have assumed that a prudent buyer would have liquidated the inventory and wound up the company over a two-year period so as to maximize realizations at fair market value.

- [93] Mr. Goodburn then calculated Rotor Maxx's asset value as of July 31, 2016 to be between a low of \$10 million and a high of \$16 million.
- [94] Mr. Goodburn valued Unified's one-third interest in Rotor Maxx as being between a low of \$2.83 million and a high of \$4.53 million as of July 31, 2016.

- [95] Notwithstanding the increase in Rotor Maxx's asset value as assessed by Mr. Goodburn the business affairs of Rotor Maxx suffered significant setbacks before August 2016 when Unified's shares were purchased by Mr. Norie's company.
- [96] In part, those setbacks arose from disputes between Mr. Brown and Mr. Wiggins with respect to Mr. Brown's concerns about some of Mr. Wiggins' dealings and practices that Mr. Brown believed were detrimental to the affairs of Rotor Maxx.
- [97] More significantly, however, those setbacks arose from disputes Rotor Maxx had with Transport Canada which Mr. Goodburn referenced in detail in his second valuation at pages 5 to 10.
- [98] Although Mr. Goodburn was not called as a witness by either party it is obvious to me that those then unresolved disputes significantly impacted his conclusion that a prudent buyer of Rotor Maxx on July 31, 2016 would have liquidated its assets and then wound up the company so as to realize its value rather than continue operations.
- [99] As to the background of those disputes with Transport Canada and their impact upon the value of Rotor Maxx as a going concern the evidence establishes that to start up the Rotor Maxx helicopter repair and servicing business Mr. Brown was required to create a manual for servicing and maintaining helicopter parts for use in the industry which required the approval of Transport Canada.
- [100] After that approval was obtained the business operations and facilities of Rotor Maxx were then subject to continued inspection, supervision and regulation by Transport Canada to ensure compliance with the approved manual and Transport Canada regulations.
- [101] If Transport Canada's inspectors determine that there have been breaches of regulations or the approved manual involving inspection, repair and maintenance Transport Canada has the authority to issue a Civil Aviation Safety Alert ("CASA") against the business.
- [102] Issuance of a CASA which is published and made known to all related businesses in the industry can be devastating to the reputation of a business and its continued success or survival.
- [103] In 2014 Transport Canada issued and published a CASA against Rotor Maxx.
- [104] Rotor Maxx disputed the validity of the CASA and challenged it in legal proceedings. Those proceedings were not only contentious and protracted but expensive. They were also not resolved in Rotor Maxx's favour until after Unified's interest in Rotor Maxx had been bought out by Mr. Norie's company Kenlor in August 2016
- [105] The factual background to that buy out is not greatly contested by Ms. Chyplyk. She does, however, contest and question the reasons for the buy out; whether Mr. Brown was compelled to sell; and, the price obtained by him for United's interest in Rotor Maxx.

- [106] As to compulsion, Mr. Vining on behalf of Ms. Chyplyk asserted that Mr. Brown has not strictly proven that he was forced to sell the Unified shares when and how he did because no written demands or communications relating to that transaction have been produced. I do not accept that submission.
- [107] Although Mr. Norie, through Kenlor, may not have strictly complied with the notice or other provisions of the Rotor Maxx Shareholder's Agreement, the totality of the evidence satisfies me that Mr. Brown was forced to sell and that any non-compliance with written terms is of no practical consequence.
- [108] In reaching that conclusion I accept Mr. Brown's evidence.
- [109] Also, although Mr. Vining sought to cast doubt on the veracity of Mr. Brown's testimony by suggesting that he was eventually to receive some additional unidentified benefit from the transaction to Ms. Chyplyk's detriment there is not only no evidence to support that submission but it is contrary to Ms. Chyplyk's own evidence that she believed that Mr. Brown was "forced out" of Rotor Maxx.
- [110] I also note that to allow the share purchase transaction to proceed Mr. Brown sought an order from the Court for relief from the terms of the consent order made many years earlier under s. 67 of the FRA that restrained disposition of family assets without the parties' consent or a further court order.
- [111] On the hearing of that application (which was opposed by Ms. Chyplyk) in June 2016 Armstrong J. held that the transaction was not "caught" by the restraining order. In unreported oral reasons issued in this proceeding on June 24, 2016 Armstrong J. decided "not to interfere in the decision made by Unified".
- [112] While Armstrong J.'s decision on that application is not binding as to the issues now before the Court with respect to the value of the shares of Unified in Rotor Maxx or in respect of Ms. Chyplyk's reapportionment claims, the fact that the application was made by Mr. Brown together with the disclosure necessarily made by him in making that contested application strongly infers that the transaction was an arm's length one made against the background of the difficult financial and corporate circumstances faced by Mr. Brown forcing that sale.
- [113] Those difficult circumstances arose as a consequence of:
- 1) Mr. Brown's disagreements with Mr. Wiggins concerning the management of and handling of financing in Rotor Maxx that led to serious personal and business conflict to the extent that a continuation of both as officers and shareholder in Rotor Maxx was not practically possible;
 - 2) The existence of the CASA that made the shares in Rotor Maxx virtually unsellable because of its chilling effect upon the value of Rotor Maxx as a going concern;

- 3) The ongoing cost to Rotor Maxx of the protracted dispute with Transport Canada over the CASA from both a lost business and legal perspective with legal costs to have the CASA set aside eventually exceeding \$1 million; and
- 4) The decision by Rotor Maxx's bankers to require a capital injection of \$1.5 million dollars by its shareholders as a condition of the bank's support of Rotor Maxx's \$10 million credit facilities in the face of the CASA and the rising legal costs.
- [114] When Rotor Maxx's bankers required that injection of capital Mr. Brown was in the midst of this litigation with Ms. Chyplyk and did not have the funds to make that injection.
- [115] He approached Mr. Norie with the proposal that Mr. Norie buy out Mr. Wiggins' share and assist in the injection of capital.
- [116] Mr. Brown underestimated the extent of Mr. Norie's friendship and business relationships with Mr. Wiggins and, by late 2015 and into 2016 Rotor Maxx's employees had gained much of the technical expertise from their association with Mr. Brown over the years that he alone had brought into the venture when the corporate partnership was formed. He was thus less important to the continued success of the venture than he was during the start-up and early growth stages of its existence.
- [117] In the result, Mr. Norie decided to side with Mr. Wiggins and force the buy out of Unified's shares in Rotor Maxx from Mr. Brown.
- [118] Mr. Brown did not have the financial wherewithal to make the \$500,000 capital injection required by the bank or to buy out Mr. Norie's company's shares in Rotor Maxx. Even if he had been able to raise sufficient funds to make the deposit and trigger a reverse of the offer to purchase Unified's shares from Mr. Norie's company, Mr. Brown would then have been faced with having to also buy out Mr. Wiggins' company's shares.
- [119] Although Ms. Chyplyk was not involved in the negotiations and now criticizes Mr. Brown's actions in not requiring Mr. Norie to pay one-third of the break-up value of Rotor Maxx (being approximately \$10 million and \$16 million) to acquire Unified's interests she was not silent during the negotiations.
- [120] On May 16, 2016 at about 2:18 p.m. Ms. Chyplyk sent an email to Mr. Brown's Rotor Maxx e-mail that was accessible by Mr. Norie and Mr. Wiggins in which she stated:
- Just so you know if you think it is not Important to consult me when you sell out to your partners that's up to you I intend to keep the house & minimum \$500 000. If you sell out for less than that or think we are sharing your losses equally you; are delusional. I will have a case to sue you for losses as you will be proven personally responsible for the devaluation of the business. When I send Jeff Phipps what I found I'm sure your partners will sue you for fraud and lost revenue.
- [121] About three hours later that day Ms. Chyplyk sent another email to the same email account in which she stated:

I need to do the right thing and pass the proof of your Illegal parts dealings to Mr Phipps, I suppose customs would be Interested In you smuggling them In the country and stealing them from Carson. Lol you'll probably end up in prison. Hopefully your partners are reading your emails off the server. Once a loser always a loser.

[122] Jeff Phipps to whom she referred in those emails was a high ranking official with Transport Canada who had significant influence or control over the ongoing CASA dispute between Rotor Maxx and Transport Canada.

[123] When confronted with those emails on cross-examination Ms. Chyplyk said she had not in fact contacted Mr. Phipps or sent him any information as she had threatened to do. When asked why she had said she would do so, she testified that she must have been angry and intoxicated when she sent both emails.

[124] On discovery she also admitted that she did not in fact know that Mr. Brown had stolen parts as she had stated.

[125] Although Mr. Brown tried to have Mr. Norie increase the amount to be paid for Unified's interest in Rotor Maxx he was unsuccessful in doing so.

[126] In the result, after Mr. Brown obtained the ruling from Armstrong J. on June 24, 2016 that allowed the sale of Unified's shares in Rotor Maxx to Mr. Norie's company Kenlor to proceed, the transaction was completed with the purchase price being:

- 1) \$500,000 to be paid upon closing;
- 2) repayment of the \$200,000 shareholder's loan owing by Rotor Maxx to Unified; and
- 3) "earn out" payments of up to \$300,000 over a five year period.

[127] Mr. Brown and Unified also entered into a non-competition agreement with Rotor Maxx in which he and Unified agreed not to compete with Rotor Maxx for a period of up to three years with the exception that Mr. Brown could pursue employment in the United States with Croman.

[128] In addition, Mr. Brown and Rotor Maxx entered into the termination of employment agreement pursuant to which Rotor Maxx agreed to pay Mr. Brown \$13,750 per month, less applicable payroll taxes and remittances, for 18 months and keep Mr. Brown on its standard employment benefits program during that 18 month period.

[129] The funds payable under the purchase agreement on closing (totalling \$700,000) as well as the first \$60,000 paid as the first instalment of the \$300,000 "earn out" component of the purchase price were paid into trust pursuant to agreements between Mr. Brown and Ms. Chyplyk.

- [130] However, as I have earlier indicated Rotor Maxx stopped making the monthly payments otherwise due under the termination of employment agreement because Mr. Norie learned that Mr. Brown had participated in a scheme with a seller of parts to Rotor Maxx in which Mr. Brown received the parts at a lower price than that invoiced to Rotor Maxx.
- [131] Mr. Brown did not dispute that he did so although he testified that the amount he received from those "kickbacks" was about \$118,000, not \$138,500 as alleged by Rotor Maxx.
- [132] Rotor Maxx not only stopped payment of funds otherwise owing under the termination of employment agreement for the balance of its 18-month term, but also threatened to seek indemnity for the alleged \$138,500 wrongfully received by Mr. Brown and offset that amount from further payments due over the five year "earn out" portion of the purchase price for the shares of Unified.
- [133] Rotor Maxx did not, however, follow through with either of those threats.
- [134] I accept Mr. Brown's evidence that while the "kickback" practise in which he engaged was contrary to his obligations to Rotor Maxx the practise is common in the industry and that Mr. Wiggins participated in similar practises.
- [135] No evidence was adduced at trial to indicate that Rotor Maxx continues to assert any entitlement to repayment from Mr. Brown. To the contrary, there is uncontested evidence that Rotor Maxx is now prepared to immediately pay the whole of the \$240,000 remaining balance of the "earn out" component of the sale purchase price.
- [136] However, because Ms. Chyplyk would not agree to share in the payment of corporate taxes due on that amount or allow payment out of trust in respect of corporate taxes due on the \$60,000 first instalment or on the \$240,000 balance of the earn out component, Mr. Brown and Unified have not yet accepted the \$240,000 payout to complete the purchase price for Unified's shares in Rotor Maxx by Mr. Brown.
- [137] Following the conclusion of the evidence at trial an affidavit of Aaron Dovell, Unified's accountant, that was admitted by consent establishes that:
- 1) Corporate taxes in the total amount of \$21,700.46 are owed by Unified for its corporate year end in 2020 for the first \$760,000 of the purchase price paid for its shares in Rotor Maxx; and
 - 2) Corporate taxes in an approximate amount of \$39,857 will be payable on the \$240,000 earn out for the corporate year end in 2021.
- [138] There was also some evidence adduced by Mr. Brown that tax penalties in an amount that has not yet been quantified could be imposed upon Unified for failure to make all tax payments when due.
- [139] The sum of \$582,157 is presently held in trust from the proceeds of the sale of Unified's shares in Rotor Maxx.

[140] That present balance reflects the fact that Mr. Brown received \$17,187.81 of the funds in trust for payment of his legal fees that he should not have received. He acknowledges that he must account for those monies.

[141] Also, of the funds held in trust from the sale of Unified's shares in Rotor Maxx a tax instalment \$15,297 was paid to Revenue Canada. The evidence establishes that a tax refund in the amount of \$14,475 was received by Mr. Brown in respect of that instalment.

[142] Mr. Brown acknowledges that he must also account for that refund.

CLAIMS FOR REAPPORTIONMENT

[143] As I have previously noted, Ms. Chyplyk seeks substantial reapportionment of the parties' assets in her favour under the provisions of s. 65 of the FRA.

[144] Her claims to reapportionment centre primarily upon the value of the former matrimonial home and her assertions concerning the asset value of Rotor Maxx and Unified's one-third interest in those assets.

[145] Although centering specifically upon those assets, her claims in respect of Unified's investment in Rotor Maxx would require a reapportionment of the parties' equity in all family assets to reflect her assertions about the value of Unified's interest in Rotor Maxx. That is so because her reapportionment claim exceeds the total purchase price paid by Kenlor for Unified's shares in Rotor Maxx by approximately \$1.8 million.

[146] Ms. Chyplyk's submissions with respect to the reapportionment of the value of Unified's shares in Rotor Maxx are based upon the valuations authored by Mr. Gooburn, coupled with her assertion that Mr. Brown was negligent in failing to preserve or obtain optimum value when he negotiated the sale of Unified's shares in Rotor Maxx to Kenlor.

[147] Ms. Chyplyk's claim to the reapportionment of the value of the family home is based upon her contributions to its maintenance and improvement since the parties separated in 2010, which she submits is integral to the increase in its value since that time.

[148] The provisions of ss. 56 and 65 of the FRA that are relevant to the issues to be decided state:

56 (1) Subject to this Part and Part 6, each spouse is entitled to an interest in each family asset on or after March 31, 1979 when

- (a) a separation agreement,
- (b) a declaratory judgment under section 57,
- (c) an order for dissolution of marriage or judicial separation, or
- (d) an order declaring the marriage null and void

respecting the marriage is first made.

- (2) The interest under subsection (1) is an undivided half interest in the family asset as a tenant in common.

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,
- (b) the duration of the period during which the spouses have lived separate and apart,
- (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,
- (e) the needs of each spouse to become or remain economically independent and self sufficient, or
- (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.

- (2) Additionally or alternatively, the court may order that other property not covered by section 56, Part 6 or the marriage agreement, as the case may be, of one spouse be vested in the other spouse.

[149] Mr. Brown submits that the provisions of s. 56 of the FRA should be applied in respect of all family assets and debt so that each of the parties obtains an equal share of the properties valued as of the date of trial.

[150] Mr. Brown favours the sale of both the Revelstoke rental property and the Bloedel home to achieve that equal division. He does not, however, oppose the Bloedel home being retained by Ms. Chyplyk provided that doing so results in an equitable and equal division of both taxable and non-taxable assets and recognition of equal responsibility for debts associated with all family assets.

[151] Ms. Chyplyk relies primarily upon the provisions of s. 65(1)(f) in advancing her claims for reapportionment. She seeks to obtain sole ownership of the Bloedel home and a substantial reapportionment of all other assets to account for her care and maintenance of the family home and to reflect Mr. Brown's failure to maintain the value of Unified's one-third share in Rotor Maxx in August, 2016.

[152] To address the issues raised I will first discuss Ms. Chyplyk's claims for reapportionment of the value of Unified's interest in Rotor Maxx as of August 2016 followed by my consideration of her claims in respect of the former matrimonial home.

Reapportionment of Unified's One-third Interest in Rotor Maxx

- [153] As I have noted Ms. Chyplyk asserts that Mr. Brown negligently or deliberately failed to maintain and preserve the value of her interest in Unified's one-third ownership of Rotor Maxx so that it would be substantially unfair to divide the purchase price obtained for that one-third ownership equally. She further submits that:
- 1) It would be unfair to allow Mr. Brown to retain all of the monies obtained by him personally from that sale by reason of the employment agreement that was part of the share transaction; and
 - 2) Mr. Brown should be required to account for the loss of the balance of that employment contract especially when, by his wrongdoing, he has received at least \$118,500 in "kickbacks" on which he paid no income tax.
- [154] It is difficult to comprehend how and to what extent Ms. Chyplyk's reapportionment submissions apply to each aspect of Mr. Brown's conduct with respect to the sale of Unified's interest in Rotor Maxx and with respect to the employment agreement and its termination.
- [155] What is obvious, however, is that collectively or cumulatively those submissions would result either in Mr. Brown receiving little or none of the funds held in trust in addition to being required to make an additional substantial compensation payment to Ms. Chyplyk.
- [156] In her submissions concerning Mr. Brown's failure to maintain the value of Unified's one-third interest in Rotor Maxx of approximately \$2,800,000 based upon Mr. Goodburn's valuation of Rotor Maxx's assets as of July 31, 2016, Ms. Chyplyk relied upon the decision in *N.M.M. v. N.S.M.*, 2004 BCSC 346 as authority for the use of a valuation date other than the s. 57 FRA triggering event (May 3, 2012) or the date of trial.
- [157] I am satisfied that in the circumstances of this case where the sale of shares in Unified and the amounts obtained for those shares is both ascertainable and effectively frozen in time as of August 2016, it would be fair and in the interest of both parties to assess the parties' entitlement to their interests in Unified as at August 2016.
- [158] As to Mr. Brown's actions regarding the sale of the shares of Unified to Kenlor in August 2016 which she says should result in substantial reapportionment of the value of those shares in her favour, Ms. Chyplyk relies upon the decision of the Court of Appeal in *Lawrence v. Mular*, 2014 BCCA 507 [Lawrence].
- [159] In *Lawrence*, the Court considered whether the refusal of the wife to complete a sale of the matrimonial home on the completion date under a contract entered into by the parties pursuant to a consent order for conduct of sale that resulted in a loss of that sale and the subsequent sale of the home at a discount should have resulted in an order for reapportionment of the sale price in favour of the husband.

- [160] After a trial of the convoluted issues raised by the failed sale and subsequent discounted sale, in reasons for judgment indexed at 2013 BCSC 1158, the trial judge concluded that Ms. Lawrence "was responsible for the aborted sale".
- [161] In doing so, he wrote at paras 39 to 40:
- [39] I am satisfied that the defendant acted unilaterally and capriciously when she breached Master Tokarek's order that the former matrimonial home was to be listed for sale and sold. She did sign the listing agreement, but when it came time to sign the conveyance documents, she decided to balk. One explanation from her was her view that the arrival of the Olympics in 2010 would lead to the former matrimonial home fetching a higher price – as noted by his counsel, this was a gamble on her part, not on the part of the plaintiff.
- [40] I also reject the position of the defendant that she was acting in good faith when she refused to sign the conveyance documents. She likely did have in her mind at the time that she wished to retain her one-half share of the proceeds being held in trust so that she could use the funds to purchase a larger residence with a yard and garden, but it is plain from her testimony that the overriding motive on her part for balking at the sale was her petulant attitude towards the plaintiff. She conceded in her testimony that she told the plaintiff that she did not care if the parties would be sued and that she was going to put him back to where he was ten years earlier, nor did she care if the former matrimonial home went into foreclosure.
- [162] The trial judge also stated at para 42:
- [42] Although the defendant insists that she remains entitled to share equally in the proceeds held in trust from the sale of the former matrimonial home as provided for in the order of Master Tokarek, I have concluded otherwise. The whole of the evidence is compelling that it was her unreasonable conduct that was primarily responsible for the actual loss sustained by the parties from the aborted sale which, I find, has led to an unfairness to the plaintiff such that he should not have to share in the loss. While conduct is generally not a relevant consideration when effecting an unequal division, it may properly be considered where a party has dealt with an asset in a manner that reduces the amount available for distribution and is unfair to the other party: *Jacobsen v. Jacobsen*, (1991), 60 B.C.L.R. (2d) 40 (C.A.); *Newson v. Newson* (1986), 3 B.C.L.R. (2d) 1 (C.A.). As a result, after considering the factors set out in s. 65 of the Family Relations Act in the context of the whole of the evidence, I find that the plaintiff is entitled to a reapportionment 100% in his favour and to receive payment of the total amount of the proceeds from the sale of the former matrimonial home remaining in trust.
- [163] On appeal, Kirkpatrick J.A. for the Court stated at para. 59 that "conduct" itself is not a factor to be taken into account in the judicial reapportionment of family assets. She then went on to consider in detail "reapportionment in the context of improvident depletion of family assets" under s. 65 of the FRA.

- [164] In doing so, after setting out the provisions of s. 65(1) of the FRA (at para. 61) Kirkpatrick J.A. stated at para. 62 that:
- [62] It is well-established that a court cannot take into account any consideration not listed in ss. 65(1)(a)-(f): *Girard v. Girard* (1983), 42 B.C.L.R. 305 at 308-309 (C.A.). It is also well-established that s. 65(1) does not permit a court to generally consider the conduct of a spouse as a basis for reapportionment: see *Girard* at 308 and *Malhotra v. Malhotra* (1983), 49 B.C.L.R. 8 at 15 (C.A.).
- [165] She then said at para. 63:
- [63] According to the trial judge, an exception to the latter rule exists "where a party has dealt with an asset in a manner that reduces the amount available for distribution and is unfair to the other party" (at para. 42). In my view, that is a correct statement of principle. However, the judge relied on two cases for this proposition: *Jacobson* and *Newson*.
- [166] At paras. 67 and 68 (after having discussed (at para. 66) principles derived from Court's earlier decision in *Newson v. Newson*, (1986), 3 B.C.L.R. (2d) 1 (C.A.) concerning Court's authority to make compensation or adjusting orders under s. 2(2)(c) of the FRA having regard to the concept of "fairness" in s. 51 of the FRA) Kirkpatrick J.A. wrote:
- [67] The difficulty with extending the principle in *Newson* to this case is that the present case does not simply deal with the "disposal" of a family asset, but rather with the loss of value resulting from the intentional refusal to execute the conveyancing documents to permit completion of the sale. The true issue, in other words, is whether there is a provision in s. 65(1)(a)-(f) of the Family Relations Act that captures a case where an action required to effect the sale of a matrimonial home is withheld, which action leads to the diminution in value of the home.
- [68] In my opinion, a circumstance where a spouse refuses to complete the agreed sale of a matrimonial home falls within the meaning of "any other circumstances relating to the preservation [and] maintenance of property" (i.e., s. 65(1)(f)). The plain and ordinary meaning of the phrase "preservation and maintenance of property" clearly includes not just physical preservation and maintenance, but also the preservation and maintenance of the value in a property: see e.g. *Malhotra* at 19. This interpretation gives effect to the legislative purpose of the Family Relations Act, namely, to achieve a fair division of assets between spouses on their separation.
- [167] Most significantly, with respect to the issues engaged by the facts of this case Kirkpatrick J.A. stated at paras. 69 to 71:
- [69] It is not the conduct of a spouse in dealing with an asset that makes it unfair to give effect to an equal division of assets. A loss does not become more or less unfair based on the manner in which it is incurred, at least with respect to the language of the Family Relations Act. If the intent of the Family Relations Act was to provide for reapportionment where a spouse behaved badly, the Legislature would have made a provision for such reapportionment in

clear and explicit language. This is the case, for example, in the Ontario Family Law Act regime (in respect of s. 5(6)(d)).

[70] The Court in Jacobson summarized the principles from Newson as follows:

A compensation order may lie where assets have been deliberately given away or wasted, or have been secreted or disposed of with a view to defeating the other spouse, or have been dealt with in some other way which would necessarily reduce the amount available for distribution.

[71] This proposition reflects the language in s. 65 of the Family Relations Act, identifying those circumstances in which the manner with which a spouse dealt with assets creates the kind of unfairness that would warrant departure from equal division: see Newson at 10-11. It is not the motive in secreting assets but the fact of their being secreted away (defeating the intent of the Family Relations Act to effect equal division of all assets) that triggers the jurisdiction to reapportion on the basis of fairness.

[168] In dismissing the appeal Kirkpatrick J.A. wrote at paras. 77 to 79:

[77] The proper inquiry under s. 65(1)(f) is not whether the "unreasonable conduct" of a spouse "was primarily responsible for the actual loss sustained" by the other. It is irrelevant that one spouse had a "petulant attitude" toward the other (para. 40). The question is simply whether the property was dealt with by a spouse in a manner that necessarily had the effect of reducing the amount available for distribution, and whether the circumstances surrounding the reduction render equal division unfair.

[78] That said, it is clear on the facts of this case that Ms. Lawrence's refusal to complete the sale of the matrimonial home would almost inevitably have resulted in the reduction of value of the home.

[79] Refusing to execute the conveyancing documents to defeat completion of the sale was a circumstance properly considered in relation to the preservation of value of the matrimonial home within the meaning of s. 65(1)(f). Absent any other circumstances providing a reasonable justification for the refusal or absent any evidence of a possible alternative buyer at the same or higher price, such a circumstance is available for the court to consider in deciding whether equal division is unfair and an eventual conclusion that judicial reapportionment on the basis of fairness is warranted under s. 65(1)(f).

[169] Having considered the evidence I find to be reliable, I am satisfied that Mr. Brown did not deal with the shares of Unified in any manner in the sale of its interest in Rotor Maxx to Kenlor that had the effect of reducing the amount available for distribution.

[170] Mr. Brown was in an impossible financial and corporate minority position in 2016 when he sold the shares for the price paid by Kenlor for them.

- [171] Although the Goodburn valuation appraisal amply illustrates that the price obtained was far below the asset value of a one-third interest in Rotor Maxx, the fact that he was instructed to ignore the actual share purchase agreement renders that valuation of no assistance as a measure of value in the circumstances that actually existed at the time of the sale.
- [172] As Ms. Chyplyk acknowledged in cross-examination, Mr. Brown was forced out of Rotor Maxx by his partners to the ultimate financial disadvantage of both himself and Ms. Chyplyk.
- [173] I find that it would not be unfair to divide the net proceeds of the sale (after deduction of all corporate income taxes and any penalties) equally between Mr. Brown and Ms. Chyplyk.
- [174] I also find that Ms. Chyplyk's reapportionment submissions based upon s. 65(1) of the FRA related to Mr. Brown's post-share sale employment contract with Rotor Maxx and its subsequent termination cannot succeed.
- [175] I say that because I find that in all of the circumstances the employment contract was not a family asset subject to division under the provisions of the FRA.
- [176] While I agree that obtaining the employment contract could be viewed in some respects as a benefit to Mr. Brown that arose as a consequence of an ownership interest in Rotor Maxx through Unified, there is no reliable evidence that the existence of that employment contract was other than a personal contract of employment or that the employment contract had the effect of reducing the amount otherwise available for distribution from the sale of the shares of Unified.
- [177] Even if I am wrong in that analysis, given that the employment contract restrained Mr. Brown from working for any competitor of Rotor Maxx other than Croman (and then only in a limited non-competitive way), when he would otherwise have at least arguably been personally free to compete with Rotor Maxx after being forced out, I am not satisfied that the existence of that employment contract would render an equal division of the proceeds of the sale of the shares of United unfair.
- [178] As to Ms. Chyplyk's submissions with respect to reapportionment of the proceeds of sale of the United shares in Rotor Maxx arising from the employment contract and its termination because of Mr. Brown's blameworthy actions while employed by Rotor Maxx, as explained in Mulnar (at para. 59 quoted above), conduct itself is not a factor to be taken into account in the judicial reapportionment of family assets.
- [179] I will discuss the potential relevance of the employment contract and its termination to Ms. Chyplyk's claims for spousal support later in these reasons.

Reapportionment of Equity in Former Matrimonial Home

- [180] The parties purchased the former matrimonial home on Bloedel Drive on Sproat Lake near Port Alberni in October 1999 shortly after moving to Vancouver Island to begin their respective careers there after selling a home they owned in North Vancouver.
- [181] The Bloedel home has been appraised as having a value of \$1,660,000 as of October 20, 2020.
- [182] Title to the home is encumbered only by the mortgage taken out by the parties in 2006 to fund the initial \$200,000 investment in Rotor Maxx under which approximately \$150,000 now remains owing.
- [183] Ms. Chyplyk asserts entitlement to a 60% reapportionment of the equity in the home or, alternatively a compensation payment from Mr. Brown to her in order to achieve fairness because of her expenditure of funds and labour in maintaining and improving the home and lakefront property since separation.
- [184] For the reasons that follow I have concluded that Ms. Chyplyk's claims under s. 65(1) of the FRA for a reapportionment of the equity in the Bloedel Drive property as well as her claims for a compensation order cannot succeed.
- [185] The evidence establishes that after the parties separated in December 2010 Mr. Brown continued to reside in the basement suite in the home until Ms. Chyplyk decided to rent out that suite while Mr. Brown was absent from Port Alberni on business as he often was during late 2010 and early 2011.
- [186] As I have discussed in some detail when addressing my concerns with the credibility and reliability of Ms. Chyplyk's testimony earlier in these reasons:
- 1) Ms. Chyplyk has, since shortly after the parties separated, rented parts of the family home for both long and short periods of time.
 - 2) She has rented a lower floor suite for most if not all of the time post-separation and has rented out the upstairs of the home in the summer for vacation rentals.
 - 3) Notwithstanding repeated requests for the production of records related to that rental income, Ms. Chyplyk did not produce any such records.
 - 4) She also did not declare rental income on her income tax returns.
 - 5) Although she said she had prepared worksheets that convinced her she had no such income, she did not produce those worksheets.
 - 6) Ms. Chyplyk's discovery of documents in respect of the expenses that she testified that she had incurred over the years to maintain, repair or improve the family home since the parties separated was at best both incomplete and selective.

- 7) On cross-examination Ms. Chyplyk's testimony concerning the rental of the downstairs rental unit and the summer rentals of the upstairs of the home was at best confusing and inconsistent and at worst evasive.
 - 8) At times Ms. Chyplyk claimed that the downstairs was rented in return for dog sitting by the renter and at times agreed that it rented for \$850 per month.
 - 9) She initially testified that she had only recently been renting the upstairs portion of the house during the summer for approximately 28 days per summer at about \$360 per night but later accepted that she had done so earlier because on discovery in 2016 she had stated that she had been renting the upstairs "every summer".
 - 10) She provided further contradictory evidence about the rental and maintenance of the family home arising from a personal loan that she claimed on her July 12, 2016 financial statement was owing to Christopher Brady in the amount of \$20,276.
 - 11) At trial Ms. Chyplyk testified that maintenance of the family home was done by her with little assistance from others and also that Mr. Brady was for a time one of the tenants who looked after her dog or dogs in lieu of rent.
 - 12) On examination for discovery in October 11, 2016, however, she answered questions about owing Mr. Brady in part by saying, "he does all the maintenance around the house and occasionally looks after the dog".
- [187] In all of those circumstances, in the absence of an accurate accounting of all of her rental receipts and expenses that was both within her ability to produce and necessary to support her claims to reapportionment of the equity in the Bloedel property I find that Ms. Chyplyk has not only failed to prove entitlement to reapportionment, but must also be taken to have substantially profited from her exclusive occupation and use of the home since separation.
- [188] It is not possible to assess with any certainty the extent of the revenue obtained by Ms. Chyplyk from her rental of the home because of her failure to produce relevant documents. However, her own reluctant concessions at trial and on discovery are capable of establishing that she has rented the downstairs suite for at least 10 years at \$350 per month (totalling approximately \$42,000 by the time of trial) and the upstairs during the summer for 28 days per summer for at least nine years at \$360 per night (totalling approximately \$90,000 by the time of trial).
- [189] In addition to those factors that weigh against any reapportionment of the equity in the Bloedel Drive home, or the making of a compensation order in Ms. Chyplyk's favour, the evidence establishes that since separation Mr. Brown has at all times paid one-half of all mortgage payments due on the original \$200,000 loan secured by the mortgage that now encumbers title to the home in the amount of approximately \$150,000.

CLAIM FOR SPOUSAL SUPPORT

[190] Ms. Chyplyk claims entitlement to spousal support under the Divorce Act, the relevant provisions of which are engaged by her submissions are ss. 15.2 (1),(4) and (6) which state:

15.2 (1) A court of competent jurisdiction may, on application by either or both spouses, make an order requiring a spouse to secure or pay, or to secure and pay, such lump sum or periodic sums, or such lump sum and periodic sums, as the court thinks reasonable for the support of the other spouse.

(4) In making an order under subsection (1) or an interim order under subsection (2), the court shall take into consideration the condition, means, needs and other circumstances of each spouse, including

- (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.

(6) An order made under subsection (1) or an interim order under subsection (2) that provides for the support of a spouse should

- (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.

[191] Ms. Chyplyk advances her claims for spousal support on both compensatory and non-compensatory bases.

[192] Because of the length of time that the parties have lived separate and apart and the parties' relatively similar incomes since the termination of Mr. Brown's employment with Rotor Maxx Ms. Chyplyk submits that the circumstances favour the making of a lump sum spousal support which she submits should be based upon Mr. Brown's earnings in the five year period following separation.

[193] In *Chutter v. Chutter*, 2008 BCCA 507 [Chutter] Rowles J.A. discussed the compensatory and non-compensatory models of spousal support.

[194] As to the interplay between both grounds she wrote at para. 49:

[49] Although the compensatory and non-compensatory grounds for spousal support are animated by different models of marriage, the case authorities hold that there is no single basis of support or objective under the Divorce Act that supersedes the other, and that many claims involve aspects of both compensatory and non-compensatory principles (Bracklow, at para. 27; Moge, at 852). A court is not called upon to decide on one basis for support to the exclusion of the other but rather to "[apply] the relevant factors and strik[e] the balance that best achieves justice in the particular case" (Bracklow, at para. 32). Moreover, the doctrine of equitable sharing is the overarching principle that must be borne in mind (Moge, at 864).

[195] In specifically addressing compensatory support she then wrote at paras. 50 and 51:

[50] Compensatory support is intended to provide redress to the recipient spouse for economic disadvantage arising from the marriage or the conferral of an economic advantage upon the other spouse. The compensatory support principles are rooted in the "independent" model of marriage, in which each spouse is seen to retain economic autonomy in the union, and is entitled to receive compensation for losses caused by the marriage or breakup of the marriage which would not have been suffered otherwise (Bracklow, at paras. 24, 41). The compensatory basis for relief recognizes that sacrifices made by a recipient spouse in assuming primary childcare and household responsibilities often result in a lower earning potential and fewer future prospects of financial success (Moge, at 861-863; Bracklow, at para. 39). In Moge, the Supreme Court of Canada observed, at 867-868:

The most significant economic consequence of marriage or marriage breakdown, however, usually arises from the birth of children. This generally requires that the wife cut back on her paid labour force participation in order to care for the children, an arrangement which jeopardizes her ability to ensure her own income security and independent economic well-being. In such situations, spousal support may be a way to compensate such economic disadvantage.

[51] In addition to acknowledging economic disadvantages suffered by a spouse as a consequence of the marriage or its breakdown, compensatory spousal support may also address economic advantages enjoyed by the other partner as a result of the recipient spouse's efforts. As noted in Moge at 864, the doctrine of equitable sharing of the economic consequences of marriage and marriage breakdown underlying compensatory support "seeks to recognize and account for both the economic disadvantages incurred by the spouse who makes such sacrifices and the economic advantages conferred upon the other spouse" (emphasis added).

[196] At para. 54 in Chutter Rowles J.A. then discussed the non-compensatory model of spousal support in the following terms:

[54] Where compensatory principles do not apply, need alone may be sufficient to ground a claim for spousal support (Bracklow, at para. 43). Non-compensatory support is grounded in the "social obligation model" of marriage, in which marriage is seen as an interdependent union. It embraces the idea that upon dissolution of a marriage, the primary burden of meeting the needs of the disadvantaged spouse falls on his or her former partner, rather

than the state (Bracklow, at para. 23). Non-compensatory support aims to narrow the gap between the needs and means of the spouses upon marital breakdown, and as such, it is often referred to as the "means and needs" approach to spousal support.

[197] In advancing her spousal support claims based upon compensatory principles Ms. Chyplyk relied upon:

- 1) The relatively long period from 1992 until 2010 during which the parties cohabited both before and after their marriage.
- 2) Her support of Mr. Brown in his career as a helicopter repair technician through a number of jobs in which he advanced his skills to the point where he could embark upon the highly successful Rotor Maxx venture.
- 3) Her personal involvement in the start-up and early operations of Rotor Maxx to Mr. Brown's benefit including:
 - a) The use of their line of credit for the \$200,000 shareholder's loan and their personal credit cards to fund operations before being reimbursed by Rotor Maxx;
 - b) Her use of her NDT license to enable Rotor Maxx to perform non-destructive testing work in-house;
 - c) Her buying and selling of parts and training of new employees;
 - d) Her locating the initial shop for Rotor Maxx's operations and doing carpentry work in its initial setup as well as her locating the second shop for operations closer to Port Alberni.
 - e) Her "coming up" with Rotor Maxx's name and the company logo.
- 4) The fact that she received no compensation from Rotor Maxx for all of those contributions to its success.
- 5) The intention of the parties that their contributions to Rotor Maxx in the early years would be rewarded later on.
- 6) The fact that in the years after separation Mr. Brown did begin to earn significant income from Rotor Maxx in which she did not participate.
- 7) The fact that in addition to his reported income from Rotor Maxx in the years following separation he also received a "kickback" benefit of at least \$118,000 that led to the termination of his employment by Rotor Maxx.

[198] I am not satisfied that Ms. Chyplyk's efforts or support were instrumental in Mr. Brown's development of his skills as a helicopter repair technician. While she was supportive of his efforts she also gained significant benefits from them and also pursued her own career path that has led to steady well-paying employment. Their time together before separation was a joint effort in which each prospered financially.

- [199] Although the evidence does establish that Ms. Chyplyk's efforts in the start-up and early years of the operation of Rotor Maxx were of significant assistance to its ultimate success and that, unlike Mr. Brown, she did not receive compensation for those efforts in the way of salary, the evidence also establishes that during that time she remained employed by Catalyst often earning substantially more per year than Mr. Brown did from Rotor Maxx. That was the case in 2009 and also in 2010 when the parties separated, as well as in 2011 following separation.
- [200] In all of those circumstances, together with the fact that she will be compensated in some measure for her early efforts with Rotor Maxx from her share of the significant proceeds of sale of Unified's interest in Rotor Maxx, I am satisfied that Ms. Chyplyk has failed to establish either that she was economically disadvantaged by the marriage or that Mr. Brown was unfairly advantaged by her efforts.
- [201] As to Ms. Chyplyk's reliance on the "kickback" received by Mr. Brown in 2012 or 2013 that led to the termination of his employment with Rotor Maxx as a basis for her claim to compensatory spousal support, I note that his acknowledged misconduct is not only in keeping with the parties' joint pursuit of untaxable income during their marriage, but also in keeping with Ms. Chyplyk's approach to rental income.
- [202] If a third party should take issue with their receipt of those benefits the parties will be answerable for their respective actions. As between the parties, however, this Court will not engage in a determination of relative blameworthiness or monetary recompense.
- [203] Ms. Chyplyk's claim for compensatory spousal support is dismissed.
- [204] In advancing her claim for non-compensatory spousal support Ms. Chyplyk asserts that her needs and means in comparison to those of Mr. Brown are such that a support order is necessary to address those differences.
- [205] The evidence establishes that Ms. Chyplyk has resided in the former matrimonial home, with a value of in excess of \$1.6 million, since separation. She earns income of approximately \$85,000 to \$90,000 per year from her employment.
- [206] Mr. Brown lives in a home having a value of \$235,000 in MacKenzie, British Columbia with his new wife. He earns income in the range of \$135,000 per year.
- [207] Although Ms. Chyplyk asserts that she has little or no disposable income I do not accept that submission. I say that in part because of my general credibility findings but also more specifically because of her convoluted and unbelievable explanations concerning her expenditure of \$51,923 in United States currency in 2019 and 2020 for the purchase of a used van from the United States valued by her on her latest financial statement at \$4,500.
- [208] I find that Ms. Chyplyk has failed to prove that her means and needs arising from the breakdown of the marriage as compared to those of Mr. Brown establish entitlement to non-compensatory support as claimed by her.

SUMMARY AND DISPOSITION

[209] I have dismissed Ms. Chyplyk's claims for:

- 1) the reapportionment of the proceeds from that sale of Unified's shares in Rotor Maxx in August of 2016 under s. 65(1) of the FRA;
- 2) the reapportionment of the equity of the former family home on Bloedel Drive in Port Alberni under s. 65(1) of the FRA;
- 3) a compensation order in respect of the maintenance of the former matrimonial home; and
- 4) spousal support under s. 15(2) of the Divorce Act.

[210] In result, the after-tax proceeds from the sale of Unified's shares in Rotor Maxx on August 16, 2016 as well as the net equity in the former family home as at the date of trial will be subject to equal division under s. 56 of the FRA.

[211] Also, as earlier indicated the parties have agreed that, subject to an equalization payment of \$35,000 from Mr. Brown to Mrs. Chyplyk, various vehicles and miscellaneous assets in their respective possession will become their sole property.

[212] In addition to that equalization payment, Mr. Brown must pay to Ms. Chyplyk one-half of all funds received by him to date for payment of his personal legal fees in the amount of \$17,187.81 from the funds held in trust from the sale of Unified's shares in Rotor Maxx as well as one-half of the corporate installment tax refund in the amount of \$14,475 received by him.

[213] The total equalization payment required to be paid by Mr. Brown is therefore \$50,831.40.

[214] That leaves for consideration the division and disposition of:

- 1) the Revelstoke rental property;
- 2) the locked-in RRSP Investment Accounts in the name of Mr. Brown having a present value of approximately \$115,000;
- 3) Ms. Chyplyk's Pulp and Paper Pension Plan (which has not been valued); and
- 4) the parties' respective Canada Pension Plans.

[215] In determining the issues that arise in respect of those assets I will also discuss ancillary orders that may be necessary to effect their division and disposition as well as orders that may effect the disposition of the parties' equal entitlement to the net sale proceeds of the sale of Unified's shares in Rotor Maxx and the net equity in the family home.

The Revelstoke Rental Property

- [216] Under s. 56 of the FRA the parties are entitled to share equally in the net equity of the Revelstoke rental property and neither seeks any compensation orders in relation to its management or maintenance.
- [217] Unless the parties otherwise agree the Revelstoke rental property will be sold with the parties having joint conduct of its sale. The net sale proceeds after deduction of financial encumbrances will be divided equally. Any income or capital gains taxes payable as a consequence of the disposition of the Revelstoke property will be shared equally by the parties.

Mr. Brown's Locked-in RRSP Investment Accounts

- [218] All contributions to Mr. Brown's RRSP Investment Accounts were made before the parties separated. In those circumstances I am satisfied that the parties are entitled to share equally in the RRSP Investment Accounts.
- [219] Unless the parties otherwise agree or this Court orders to the contrary on application by one of the parties, the parties' respective equal interests will be divided equally pursuant to the provisions of Part 5 of the FRA. See: Lade v. Perreault, 2016 BCSC 535 at paras. 21 to 24; and the transition provisions under s. 252 of the FLA.

Ms. Chyplyk's Pulp and Paper Industry Pension

- [220] Ms. Chyplyk's Pulp and Paper Industry Pension Plan will be divided pursuant to the provisions of the FLA because it is a local plan in which no forms have been delivered to the plan administrator. See: Kotyk v. Kotyk, 2020 BCSC 1975 at para. 154.
- [221] Mr. Brown's share of that division will be calculated under the provisions of the Division of Pensions Regulation, B.C. Reg 348/2012 s. 17(3) for the period commencing with the beginning of Ms. Chyplyk's participation in that pension plan and ending on the date of separation being December 10, 2010.

The Parties' Canada Pension Plans

- [222] Any entitlement of the parties to share in their respective Canada Pension Plans will be governed by the provisions of the Canada Pension Plan, R.S.C. 1985 c. C-8.

Further Directions

- [223] If the parties are unable to agree upon the means of distribution of, or realization upon, their respective interests in the net equity in the former family home, the net proceeds of sale of the Unified shares in Rotor Maxx, the net equity in the Revelstoke rental property or any other family assets, including without limitation by means of distribution in specie, asset purchase and/or equalization payment, they are at liberty to apply for directions.

[224] Unless I otherwise order I will be seized of any such application.

COSTS

[225] If the parties are unable to agree upon the disposition of the costs of this proceeding they may make arrangements through Supreme Court Scheduling to address any such costs issues, within 30 days from the release of this decision.

"Davies J."

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