

CANADA / JUDGMENT

C.S. v. C.B.

2020 BCSC 1020

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 1020 C.S. v. C.B. IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: C.S. v. C.B., 2020 BCSC 1020 Date: 20200708 Docket: E182841 Registry: Vancouver Between: C.S. Claimant And C.B. Respondent Before: The Honourable Mr. Justice Funt Reasons for Judgment Counsel for the Claimant: T.L. Jackson N. Khodarahmi, Articled Student Counsel for the Respondent: A. Thiele Place and Dates of Trial: Vancouver, B.C. September 23-27, 2019, January 8-10, and March 6, 2020 Place and Date of Judgment: Vancouver, B.C. July 8, 2020 TABLE OF CONTENT

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- 1. introduction
- [1] In April 2005, the parties started to reside together in a marriage-like relationship. In 2006, they entered into a cohabitation agreement (the "Cohabitation Agreement"). In February 2007, they were married. In March 2018, they separated. The claimant mother and the respondent father have two daughters.
- [2] The key issues that the Court must address are:
 - a) property division;
 - b) parenting arrangements;
 - c) child support;
 - d) spousal support; and
 - e) a divorce.
- [3] An order for divorce is not opposed and the grounds for a divorce are readily met. The parties have lived separate and apart for at least one year.

- [4] The legal question that gave rise to great controversy at trial was, whether as a result of the cohabitation agreement, the property division provisions of the Family Law Act, S.B.C. 2011, c. 25 [FLA] or the provisions of the former legislation, the Family Relations Act, R.S.B.C. 1996, c. 128 [FRA] apply.
- [5] The relevant transitional provision is s. 252 of the FLA. The language of this provision is precise and unequivocal. It directs that the property division provisions of the FRA apply "as if the [FRA] had not been repealed".
2. key background facts
- [6] The claimant and the respondent are 50 and 58 years old respectively.
- [7] The respondent separated from his first wife in late 2003. In 2004, the claimant and the respondent first met.
- [8] On April 26, 2005, the parties started to reside together in a marriage-like relationship at a rental property in North Vancouver.
- [9] On June 23, 2005, the respondent executed a separation agreement with his first wife.
- [10] On December 8, 2005, the respondent purchased a home on Borthwick Road in North Vancouver (the "Borthwick Property"). The parties then moved to the Borthwick Property and it became their family home. The parties had together selected the Borthwick Property. The Borthwick Property was registered solely in the respondent's name.
- [11] On June 14, 2006, the parties entered into the Cohabitation Agreement which addressed various matters, including property division.
- [12] In cross-examination, the respondent acknowledged that under the Cohabitation Agreement, he wished to be able to make gifts to the claimant and for the claimant to be able to make gifts to him.
- [13] On February 28, 2007, the parties were married.
- [14] The parties' two daughters were born on December 9, 2007 and January 11, 2010.
- [15] The respondent has a daughter from his previous marriage born August 22, 1995.
- [16] By 2009, each party had designated the other party as the beneficiary under their respective RRSPs.
- [17] On November 6, 2009, the parties acquired a vacation home located on Isabella Point Road on Salt Spring Island (the "Salt Spring Property"). The Salt Spring Property was registered in the names of the parties as joint tenants. The parties had together selected the Salt Spring Property.
- [18] The parties were jointly and severally liable under the mortgage used to finance the purchase of the Salt Spring Property.

- [19] By 2010, the parties were using a joint chequing account to deposit their separate pay cheques and pay most expenses. The parties also had a joint bank account for U.S. funds.
- [20] On September 19, 2013, the parties each executed a Will. Under the claimant's Will, she left the residue of her estate (after paying outstanding debts, funeral and similar expenses, and any related taxes) to the respondent (if he survived her by 30 days).
- [21] The respondent's Will was similar to the claimant's Will other than the respondent provided that his interest in a property, referred to as the Cannon Beach Property, to be transferred to his daughter from his previous marriage. The residue of his estate was left to the claimant (if she survived him by 30 days).
- [22] The Cannon Beach Property is a vacation property in Oregon. The respondent's parents had originally acquired the Cannon Beach Property. On February 18, 2005, the respondent received a one-eighth interest in the Cannon Beach Property under a May 7, 1995 residence trust.
- [23] On May 7, 2010, the respondent received a further one-eighth interest in the Cannon Beach Property as part of a trust distribution. At the time of trial, the respondent continued to hold a one-quarter interest in the Cannon Beach Property. Each of the respondent's three siblings also received a one-quarter interest in the Cannon Beach Property.
- [24] The parties spent some of their vacation time at the Cannon Beach Property.
- [25] From September 2013 to 2014, the respondent took a sabbatical. The parties, with their children, went to New Zealand. They had planned to stay six months but returned a month earlier than expected because the respondent's father had suffered a stroke. On their return to Canada, the parties then went to and stayed at the Cannon Beach Property. The Borthwick Property had been rented for a six-month period. Rental income was not reported for tax purposes
- [26] On September 24, 2015, the Borthwick Property was registered in the names of the parties as joint tenants. At this time, a \$200,000 home equity line of credit ("HELOC") was arranged and secured by the Borthwick Property. The parties were jointly liable under the HELOC.
- [27] On the September 24, 2015 Form A-Freehold Transfer for the Borthwick Property, the parties are recorded as the transferees of the fee simple to be held as joint tenants.
- [28] Using the HELOC, the respondent, with the claimant's approval, acquired a sailboat for \$90,000.
- [29] The Borthwick Property expenses were shared by the parties and these expenses included mortgage payments, property taxes, insurance, and repairs.
- [30] The respondent would refer to the Borthwick Property as "ours".

- [31] The respondent acknowledges that from the date of first cohabitating to the date of separation, the claimant contributed her entire income to the family.
- [32] In 2017 and 2018, rental income was received by the parties with respect to the Salt Spring Property. The Salt Spring Property was also rented to a third party for approximately two months sometime after its purchase in November 2009. The rental income was not reported for tax purposes.
- [33] On March 1, 2018, the parties separated. They have lived separate and apart since that date.
- [34] June 26, 2018 is the parties' financial separation date.
- [35] The claimant inherited approximately \$180,000 from her late father. On March 5, 2018 she first received \$150,000 from her father's estate. On February 22, 2019, the balance was received. Both sums were deposited in the claimant's separate bank account.
- [36] In cross-examination, the respondent acknowledged that the claimant did not receive any portion of her inheritance from her father until after the parties separated.
- [37] On March 7, 2018 and June 20, 2018, using the HELOC, the respondent borrowed \$15,834 and \$68,000 respectively. The respondent had sole use of these funds.
- [38] On May 18, 2018, the respondent withdrew \$38,374 USD (equivalent to \$51,650 CAD) from the parties' joint U.S. account and deposited these funds in his U.S. chequing account. The respondent had sole use of these funds.
- [39] On July 30, 2018, the Borthwick Property was sold for \$1,275,000. After the relevant mortgage payout, the net proceeds were \$1,106,137. By agreement these funds were placed in trust with counsel pending agreement by the parties or court order.
- [40] On August 22, 2018, the Salt Spring Property was sold for \$650,000. After the relevant mortgage payout, the net proceeds were \$311,626. By agreement these funds were placed in trust with counsel pending agreement by the parties or court order.
- [41] On May 9, 2019, Master Dick for the Court declared that pursuant to s. 57 of the FRA, the parties had no reasonable prospect of reconciliation.
- [42] In September 2019, the parties agreed to a release of funds held in trust of \$100,000 and \$32,000 to the claimant and respondent respectively.
- [43] The claimant is a graphic designer. When the parties met, the claimant was employed by a significant graphic design firm.
- [44] The claimant was the day-to-day caregiver for the parties' children. The parties agreed that the claimant would take a one-year maternity leave for each child. The parties did not require childcare while the claimant was on maternity leave. After the end of the claimant's second maternity leave, the claimant worked part-time as a freelance graphic designer. The respondent acknowledges that he encouraged the claimant to freelance and one of the

objectives was to have the flexibility to spend lengthy periods of time at the Salt Spring Property. After approximately three years, the claimant returned to employment with the graphic design firm.

- [45] The respondent is a tenured professor at Simon Fraser University. In the four years immediately prior to joining SFU, the respondent was on the faculty of DePaul University in Chicago. In previous years, he had taught school in Washington State. He obtained a Master's Degree in 1991 and his PhD in 1999.
- [46] The claimant's reported Line 150 income for recent years is: 2015: \$58,483 2016: \$53,346 2017: \$67,211 2018: \$68,513
- [47] The respondent's reported Line 150 income for recent years is: 2015: \$162,087 2016: \$133,532 2017: \$128,993 2018: \$130,100
- [48] The respondent helped to fund the acquisition of properties and the making of investments from settlement proceeds from his first marriage in relation to a home he had owned with his first wife (approximately \$279,000), inheritance funds from his mother, distributions from a fifteen year U.S. family trust settled by the respondent's parents on December 13, 1994, gifts from his father, and a small gift from his brother.
- [49] In connection with the foregoing settlement proceeds from the respondent's first marriage, inheritance, distributions, and gifts, the respondent says that the total should be excluded from property division as "excluded property" under the FLA. Alternatively, the respondent says that under the Cohabitation Agreement, of the approximately \$1,418,000 in net proceeds from the sale of the Borthwick Property and the Salt Spring Property, the claimant is entitled to approximately \$193,000 and he is entitled to the balance of approximately \$1,225,000 or should otherwise be credited a very significant amount as a matter of fairness under the FRA.
- [50] The claimant was aware that significant funds came from the respondent's family and settlement proceeds from the respondent's first marriage.
- [51] The claimant currently resides in a small condominium in North Vancouver (the "Mountain Highway Condo"). On July 18, 2018, she acquired the Mountain Highway Condo. The Mountain Highway Condo has not been used with the respondent for family purposes. Accordingly, it is not a "family asset" under the FRA. The claimant financed the purchase of the Mountain Highway Condo with a \$650,000 loan from her uncle and approximately \$34,000 from the funds inherited from her father.
- [52] The respondent is currently renting in a three-bedroom house in North Vancouver ("the Valley Road House"). He pays \$3,400 per month with utilities excluded. The respondent, for the months of July and August 2019, also paid \$1,000 per week to rent a vacation property on Salt Spring Island where he vacationed with the parties' two daughters.
- [53] Prior to separation, the respondent handled most of the financial matters of the parties.

- [54] The list of the parties' assets and liabilities is shown below. The current value shown for an asset is its value as of the commencement of trial: Value Real Property 1. The Borthwick Property Net Sale Proceeds as at the date of sale: \$1,106,137 2. The Salt Spring Property Net Sale Proceeds as at the date of sale: \$311,626 3. The Cannon Beach Property \$450,000 Vehicles 4. 1994 Toyota Truck \$5,000 current value 5. 1995 Catalina Sailboat \$75,000 current value 6. Sea Ray Motor Boat \$7,000 current value Financial Assets 7. Joint Investment Account \$33,576.34 current value 8. Claimant's Dynamic Mutual TFSA \$6,645.48 current value Pensions 9. [Simon Fraser University] Pension Approx. \$303,678.21 as at Separation Date 10. Washington State Pension Approx. \$56,660.21 USD as at Separation Date X 1.3341890863 as at Separation Date = \$75,595.43 CAN RRSPs, SRSP, LIRA and RESP 11. Respondent's RRSP \$26,972.27 current value 12. Claimant's RRSP \$19,471.97 current value 13. Claimant's SRSP \$153,796.58 current value 14. Claimant's LIRA \$19,211.50 current value Liabilities 15. Respondent's VISA (\$5,270) as at Financial Separation Date 16. Claimant's VISA (\$5,400) as at Financial Separation Date 17. Joint Line of Credit is paid off from proceeds of sale of the Borthwick Property and the Salt Spring Property (\$21,294) 18. Total advances made from the sale of the Borthwick Property and Salt Spring Property (\$132,000) 19. Bill for mediation on September 3, 2019 (\$5,751.85) Interest from Funds Held in Trust 20. Interest from funds held in trust, as at September 3, 2019 \$11,693 Total Net Value \$2,435,689
- [55] During argument, there was discussion as to the increase in value of the Cannon Beach Property. In the above table, I have used as the current value of the respondent's one-quarter interest in the Cannon Beach Property to be \$450,000. This is the value the respondent ascribes to his one-quarter interest in the Cannon Beach Property in his Form F8-Financial Statement filed August 28, 2019.
- [56] Several post-separation withdrawals and advances must also be considered. First, as noted, on March 7, 2018, the respondent used the HELOC to borrow \$15,834 and further on June 20, 2018 to borrow \$68,000.
- [57] By agreement in September 2019, as noted, \$100,000 and \$32,000 were released from funds held in trust to the claimant and the respondent respectively.
- [58] Accordingly, the respondent received \$115,834 (\$15,834 + \$68,000 + \$32,000) and the claimant received \$100,000. To equalize the amounts, the claimant says the respondent should pay her \$7,917 $((\$115,834 - \$100,000) \div 2)$.
- [59] On May 18, 2018, the respondent withdrew \$38,374 USD from the parties' joint U.S. bank account. The respondent says this amount was from funds (approximately \$28,000 USD) given to the respondent by his father to be used for the parties' daughters. The balance he says was given to him by his father without conditions. Three cheques are in evidence all dated December 7, 2017 made payable to the parties' older daughter, the parties' younger daughter, and the respondent for \$14,000 USD, \$14,000 USD, and \$10,000 USD respectively (\$38,000 USD in total). During the January 10, 2020 argument, claimant's counsel proposed that the \$38,374 USD (approximately \$50,000 CDN) should be divided equally. Each party

would then contribute \$25,000 each to the RESPs established for the parties' daughters.

3. cohabitation agreement

[60] On June 14, 2006, the parties executed the Cohabitation Agreement. By this date, the parties were living in the Borthwick Property as their family home.

[61] The Cohabitation Agreement had schedules which showed the parties' respective assets and liabilities. The claimant had few assets and liabilities. The net value was approximately \$11,000.

[62] The respondent's most valuable assets were shown to be an inheritance of \$200,000, a one-eighth interest in the Cannon Beach Property valued at \$163,000, and the Borthwick Property valued at \$636,000. His only liability was a \$318,000 mortgage on the Borthwick Property.

[63] The Cohabitation Agreement was prepared by the lawyer the respondent had used for the separation agreement respecting his first wife.

[64] Each party received independent legal advice before signing the Cohabitation Agreement.

[65] The Cohabitation Agreement is a valid contract.

[66] The key clauses of the Cohabitation Agreement read:

1. The Parties are entering into this Agreement to
 - a) determine ownership, management and division of all property either or both of them may acquire
 - i. during the time they live together, and ii. if the parties' relationship ends,
 - b) avoid acrimony and litigation in the unlikely event that their relationship ends.
3. The Parties are aware that the law provides for judicial intervention in some circumstances if this Agreement is found to be unfair now or in the future.
4. The Parties wish to confirm that
 - a) each of them relies on this Agreement to be enforced according to its terms,
 - b) neither of them would have entered into the relationship or Agreement had it been anticipated that the other would ever apply to vary the Agreement, and
 - c) either of them may chose not to pursue economic opportunities because of their relationship, but each party recognizes that certain sacrifices will be made within, and because of the relationship, and the consequences of those choices will not be used to avoid the terms of this Agreement. [sic]
5. The parties acknowledge that each of them is prepared to abide by the terms of this Agreement because each recognize that

- a) The importance of them being able to rely on the Agreement far outweighs the risk that it may operate unfairly at some future date, and
 - b) The impossibility of returning the Parties to the positions they occupied before they entered this Agreement would any variation, however, fair viewed solely in the changed circumstances unfair on the whole because all dealings with their property during the course of their relationship will have been based on the binding nature of this Agreement. [sic]
6. [C.B.] and [C.S.] wish to confirm that
- b) Both of them intend to leave their respective estates to their respective children and designated heirs, and
10. The Parties will review the terms of this Agreement in the event of significant changes to their relationship such as marriage or the birth of a child.
11. If the Parties do not review the Agreement as provided for under clause 10, or review the Agreement and do not amend or revise it, both Parties are deemed to consider that the terms of the Agreement continue to operate fairly.
12. [C.B.] will pay 50 per cent and [C.S.] will pay 50 per cent of the monthly household and family expenses. These expenses include, but are not limited to, utilities, food, phone, cable and mortgage payments.
19. [C.B.] and [C.S.] will maintain separate bank accounts.
23. Except as provided for in this Agreement,
- a) all property acquired by [C.B.] before the date of this Agreement is separate property and will maintain so after the relationship ends, and
 - b) all property acquired by [C.S.] before the date of this Agreement is separate property and will maintain so after the relationship ends.
25. Any property acquired by [a] party during the relationship is the separate property of the party who acquired it, unless
- a) it is registered in both parties' names, and
 - b) the Parties record in writing that it is co-owned.
27. The Family Residence is the separate property of [C.B.] and [C.S.] shall not have any interest in the family residence until after December 17, 2010 as per clause 28.
28. After December 17, 2010, the Family Residence shall be appraised and if the Parties choose to sell the house or if after December 17, 2005 there is a change in the status of the relationship, [C.B.] shall retain 75% of the profit derived from the base value of the appraisal and [C.S.] shall be entitled to retain 25% of the profit derived from the base value. [C.B.] shall

retain the entire base value of the Family Residence upon sale, or a change in the relationship, to reflect his purchase of the Family Residence. [C.S.] shall not have any further claim to the Family Residence except for the 25% share of the profits after December 17, 2010.

29. [C.B.] and [C.S.] will be equally responsible for the mortgage, property taxes, utilities, and all expenses required to maintain the Family Residence.
30. All inheritance, windfalls, gifts or damages for personal injury received by either Party before or during the relationship, or after it ends, are the separate property of the recipient.
31. Nothing in this Agreement prevents either [P]arty from making gifts to the other.
32. If property is purchased by one [P]arty and is placed in the name of the other or in both names as co-owners, the transaction constitutes a gift.
33. A gift received by one [P]arty from the other becomes the recipient's separate property.
34. Unless a third party specifically provides the contrary,
 - a) a gift from the third party is the recipient's separate property,
 - b) a gift from a third party is a parent or close relative of one of the parties is deemed to be a gift to that party, and
 - c) a gift from a third party that is used as a down payment for the purchase or residence
 - i. is traceable into the purchased property and any substitute for it, and
 - ii. remains the separate property of the recipient.
35. Neither Party shall have any claim against the other's estate.
36. If the Parties' relationship has not ended when the first of them dies, and the survivor is not the sole owner of the Family Residence, the survivor is entitled to reside in the Family Residence for at least one year and each party will make a will confirming this.
37. If the Parties' relationship has not ended when [C.B.] dies, [C.S.] will have a first right of refusal to purchase the Family Residence, and [C.B.] will make a will to confirm this.
38. The net proceeds of sale of the Family Residence will be the sole benefit of the registered owner of the estate ("Heirs" of the estate) if the property is sold before December 17, 2010. If the Family Residence is sold after December 17, 2010, then [C.S.] or her heirs shall be entitled to 25% of the profits derived from the base value.
41. [C.B.] releases [C.S.] from any claims [C.B.] may have or may acquire in the future against [C.S.'s] separate property other than any claims arising under this Agreement or to enforce the provisions of this Agreement.

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42. [C.S.] releases [C.B.] from any claims [C.S.] may have or may acquire in the future against [C.B.'s] separate property other than any claims arising under this Agreement or to enforce the provisions of this Agreement.
43. Neither Party will claim an interest in the property of the other based on the law pertaining to trusts or unjust enrichment.
44. Neither Party will obtain, any interest in, or have the right to compensation by reason of any direct or indirect contribution to Property owned by the other whether or not savings occur through effective management of the household responsibilities, and despite the use of the property for a family purpose.
45. [C.B.] and [C.S.] separately acknowledges that
- a) their relationship resembles a marriage;
 - b) in the course of the relationship, each of them confer benefits upon the other;
 - c) benefits conferred by one on the other are gifts, and the making of these gifts does not result in an unjust enrichment of the recipient to the detriment of the donor;
 - d) neither Party intends to share legal or beneficial ownership of that Party's separate property, owned before, or acquired after the making of this Agreement, except where the Parties expressly and agree in writing, and neither party will rely on an oral expression or other conduct of the other Party that may suggest an intention to share any portion of separate property, or to hold any portion of separate property in trust for the other, except in accordance with the terms of this Agreement,
46. Each of the Parties waives the application to their relationship and to this Agreement of Parts 5 and 6 of the Family Relations Act, or of similar legislation in any other jurisdiction where they reside.
47. Neither Party will make any claim under any enactment now in force or to come into force in the future against any property, real or personal, that the other may now own, or in the future may own.
48. Except as otherwise provided in this Agreement, each Party gives up all claims at law, in equity, or by some statute against the other relating to support or division of property if their relationship ends, including, without restricting the generality of the foregoing, all claims under the Family Relations Act, the Wills Variation Act, the Estate Administration Act with respect to
- a) Support;
 - b) Property;
 - c) Succession right; and

- d) Any other matters arising from their relationship.
4. property division "as if" under the FRA
- [67] Section 252 of the FLA provides the transitional provision from the FRA to the FLA with respect to property division.
- [68] To be clear, in all circumstances, it is the FLA that applies. However, in certain circumstances, the FLA applies to property division "as if" the FRA had not been repealed.
- [69] Section 252 of the FLA reads: 252 (1) This section applies despite the repeal of the former Act and the enactment of Part 5 [Property Division] of this Act.
- (2) Unless the spouses agree otherwise,
- (a) a proceeding to enforce, set aside or replace an agreement respecting property division made before the coming into force of this section, or
- (b) a proceeding respecting property division started under the former Act must be started or continued, as applicable, under the former Act as if the former Act had not been repealed.
- [70] The reference to "former Act" means the FRA "as it read immediately before its repeal by [the FLA]": FLA, s. 250.
- [71] In the case at bar, the parties are spouses, the Cohabitation Agreement was made before the coming into force of s. 252 of the FLA on March 18, 2013 (B.C. Reg. 131/2012). The Cohabitation Agreement is an agreement respecting property division, and the parties have not otherwise agreed. In her notice of family claim, the claimant, among other matters, seeks a reapportionment of family assets from that set forth in the Cohabitation Agreement, relying on s. 65 of the FRA.
- [72] In his amended counterclaim, the respondent, among other matters, seeks that the Cohabitation Agreement "be varied and/or be replaced with orders pursuant to s. 93(3) of the [FLA]". Among other orders, the respondent also seeks: A determination of family assets and a declaration of division, ownership and possession of such family assets as may be appropriate under the circumstances, pursuant to the provisions of Parts 5 and 6 of the Family Relations Act.
- [73] In his amended counterclaim, the respondent also states: The Respondent does not rely on the terms of [the Cohabitation Agreement] in this litigation.
- [74] The respondent also sought a declaration pursuant to s. 57 of the [FRA].
- [75] As noted, on May 9, 2019, a declaratory judgment that the parties had no reasonable prospect of reconciliation was made.
- [76] I find the respondent's pleadings to be confusing. That said, it is clear that the respondent is seeking to set aside or replace the Cohabitation Agreement.

- [77] At trial, it was clear that the respondent wished to rely on the FLA's "excluded property" provisions. In his written submissions, the respondent stated that he "is not relying on the provisions in the Cohabitation Agreement which may have become unfair to the claimant over the course of their marriage but is asking for the protection provided under the FLA for his excluded property".
5. statutory interpretation
- [78] The respondent argues that as a matter of statutory interpretation, s. 252 of the FLA does not apply to have property division considered under FRA provisions.
- [79] In *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, the Supreme Court of Canada again confirmed its adoption of the "modern principle" of statutory interpretation:
- [117] A court interpreting a statutory provision does so by applying the "modern principle" of statutory interpretation, that is, that the words of a statute must 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 Parliament": *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC), [1998] 1 S.C.R. 27, at para. 21, and *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 26, both quoting E. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87. Parliament and the provincial legislatures have also provided guidance by way of statutory rules that explicitly govern the interpretation of statutes and regulations: see, e.g., *Interpretation Act*, R.S.C. 1985, c. I-21.
- [118] This Court has adopted the "modern principle" as the proper approach to statutory interpretation, because legislative intent can be understood only by reading the language chosen by the legislature in light of the purpose of the provision and the entire relevant context: *Sullivan* [on the *Construction of Statutes*, 6th ed. (Markham, Ont.: LexisNexis, 2014)], at pp. 7-8. Those who draft and enact statutes expect that questions about their meaning will be resolved by an analysis that has regard to the text, context and purpose, regardless of whether the entity tasked with interpreting the law is a court or an administrative decision maker.
- [80] In *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, the Supreme Court of Canada stated:
- [10] The interpretation of a statutory provision must be made according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole. When the words of a provision are precise and unequivocal, the ordinary meaning of the words play a dominant role in the interpretive process. On the other hand, where the words can support more than one reasonable meaning, the ordinary meaning of the words plays a lesser role. The relative effects of ordinary meaning, context and purpose on the interpretive process may vary, but in all cases the court must seek to read the provisions of an Act as a harmonious whole.

- [81] In *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, Justice Iacobucci, writing for the Supreme Court of Canada, stated:
- [29] What, then, in law is an ambiguity? To answer, an ambiguity must be "real" (*Marcotte v. Deputy Attorney General of Canada*, [1976] 1 S.C.R. 108], at p. 115). The words of the provision must be "reasonably capable of more than one meaning" (*Westminster Bank Ltd. v. Zang*, [1966] A.C. 182 (H.L.), at p. 222, per Lord Reid). By necessity, however, one must consider the "entire context" of a provision before one can determine if it is reasonably capable of multiple interpretations. In this regard, Major J.'s statement in *CanadianOxy Chemicals Ltd. v. Canada (Attorney General)*, [1999] 1 S.C.R. 743, at para. 14, is apposite: "It is only when genuine ambiguity arises between two or more plausible readings, each equally in accordance with the intentions of the statute, that the courts need to resort to external interpretive aids" (emphasis added), to which I would add, "including other principles of interpretation".
- [82] I would add that, except where a genuine ambiguity arises (or other clearly defined exception applies), a court should not consider external materials (e.g., *Hansard*, *White Papers*, and *Explanatory Notes*) for four key reasons. First, by referring to external materials, the rule of law is challenged. A layperson should be able to read a statutory provision and guide his or her affairs accordingly, without concern that there may be something further in *Hansard* or a *White Paper* from years past.
- [83] Second, the cost in time and money in researching external materials may be considerable and would be a challenging task for most laypersons. Ready access to justice is adversely affected. Lord Reid in *Beswick v. Beswick*, [1968] A.C. 58 at 73-74 recognizes the quixotic nature of the task: In construing any Act of Parliament we are seeking the intention of Parliament and it is quite true that we must deduce that intention from the words of the Act. If the words of the Act are only capable of one meaning we must give them that meaning no matter how they got there. But if they are capable of having more than one meaning we are, in my view, well entitled to see how they got there. For purely practical reasons we do not permit debates in either House to be cited: it would add greatly to the time and expense involved in preparing cases involving the construction of a statute if counsel were expected to read all the debates in *Hansard*, and it would often be impracticable for counsel to get access to a least the older reports of debates in Select Committees of the House of Commons; moreover, in a very large proportion of cases such a search, even if practicable, would throw no light on the question before the court. But I can see no objection to investigating in the present case the antecedents of section 56.
- [84] Third, the Will of our Legislative Assembly (or Parliament) as expressed by statute is challenged. A statute is typically the result of debates, discussions, considerations, reflections, and negotiations occurring both outside and inside our Province's Parliament Building by our Members of the Legislative Assembly.

- [85] The Will of our Legislative Assembly is an aggregated, collective will. For example, it may be that if all of our Members of the Legislative Assembly were each asked if recently enacted legislation is exactly that which he or she desired each might answer: No. Yet, the legislation still passed. With complex legislation, it is not surprising that a Member may not get everything he or she may have sought.
- [86] Fourth, it is only in recent years that courts have started to refer to Hansard on a more frequent basis. In *Constitution of Statutes*, 2d ed. (Toronto, ON: Butterworths, 1983), Professor E. Driedger describes at pages 156 to 158 the then limited use of parliamentary debates, parliamentary papers, and other external materials and starts with Lord Reid's discussion in *Beswick* regarding the intent of Parliament.
- [87] One of Professor Driedger's references leading to his articulation of the modern rule (at 86-87) is Lord Reid's statement in *Westminster Bank Ltd. v. Zang*, [1966] A.C. 182 at 222: But no principle of interpretation of statutes is more firmly settled than the rule that the court must deduce the intention of Parliament from the words used in the Act. If those words are in any way ambiguous--if they are reasonably capable of more than one meaning--or if the provision in question is contradicted by or is incompatible with any other provision in the Act, then the court may depart from the natural meaning of the words in question. But beyond that we cannot go.
- [88] In *Bell ExpressVu*, as may be seen above, the Supreme Court of Canada refers to the same paragraph from *Westminster Bank*, which, in my view, shows that recourse to external materials can only be justified under a clearly defined exception, such as genuine ambiguity.
- [89] Sullivan on the Construction of Statutes, 6th ed. (Markham, Ont.: LexisNexis, 2014) describes the distinction between purposive analysis and purposive approach. Sullivan states at 262-263 (in part): Purposive analysis as described in this chapter differs from what is sometimes called a purposive approach to interpretation. Under the modern principle, an interpreter must always carry out an analysis to determine the relevant purpose or mix of purposes, but the results of this analysis are not necessarily controlling. Purpose is not inherently more important than other contextual factors, and purpose cannot be relied on to justify adopting an implausible interpretation. Under a purposive approach, however, the purpose or mix of purposes identified by the interpreter is the primary concern and other indicators of legislative intent, including the words of the text, are subordinate. The so-called purposive approach is thus a reincarnation of equitable construction. This approach is well described by Justice Shamgar in the following passage quoted by L'Heureux-Dubé in *R. v. St. Pierre*: [L]anguage does not govern the purpose, rather it serves it. The law is an instrument for realizing legal policy, and therefore interpretation needs to aim toward emancipating the wording from its semantic bonds, were those to distance it from the legislative purpose which the words are intended to realize.
- [90] The modern principle embraces a purposive analysis and not a purposive approach.

- [91] If Hansard were to come to be used on a regular basis by the courts, a Member of Parliament, a Member of the Legislative Assembly, or a Member of the National Assembly may, in debate, speak without just a focus on convincing other Members of his or her position but also with a further awareness that his or her comments may be used by a court in interpreting the proposed legislation in the future, making the reliability of such statements as an interpretive tool particularly suspect.
- [92] In sum, reference to external materials should only arise where there is a "genuine ambiguity" (or other clearly defined exception) and should accord with a purposive analysis rather than a purposive approach.
- [93] The respondent made several arguments that the property division provisions of the FLA should apply. First, I understood the respondent to argue that the Legislature, as a matter of policy, wished to modernize our Province's family law and consistent with such a policy, the Legislature would have intended that the new property division provisions of the FLA should apply. Respondent's counsel says that the new property division provisions provide greater certainty and are more easily applied.
- [94] With respect, the Legislature's intent is clearly stated in s. 252(1). Despite the repeal of the FRA and the enactment of the FLA's new property division provisions, in certain circumstances, the property division provisions of the FRA are to be applied "as if" the FRA had not been repealed.
- [95] Read in the context of the FLA, the meaning of s. 252's clear language is not changed. The Legislature also had a purpose. Otherwise, the Legislature would not have had a transitional provision other than simply stating that the FLA's property division provisions apply to proceedings started after a certain date, such as the date the FLA came into force.
- [96] Section 252's intended transitional effect can further be seen from the Legislature's use of the words, "started" and "continued" in s. 252's closing language. The word, "started", refers to s. 252(2)(a) and the word, "continued", refers to s. 252(2)(b).
- [97] Section 252(2)(b) "grandfathers" proceedings respecting property division commenced under the FRA by keeping the FRA as the applicable statute. Similarly, s. 252(2)(a) grandfathers the statutory context for agreements respecting property division made before the coming into force of s. 252 (March 18, 2013, B.C. Reg. 131/2012) as that of the FRA and not the FLA.
- [98] One of the Legislature's considerations may have been to not affect agreements respecting property division made in the context of the FRA by having the relevant FRA property division provisions apply. Contracts are interpreted in the light of their factual matrix: *Sattva Capital v. Creston Moly*, 2014 SCC 53. The Legislature may have further considered the framework established by the relevant jurisprudence, such as that of the Supreme Court of Canada in *Hartshorne v. Hartshorne*, 2004 SCC 22, for considering the fairness of agreements made in the context of the FRA.

- [99] Second, the respondent argued that s. 252(2)(a) is meant to apply to separation agreements and not other agreements such as marriage or cohabitation agreements.
- [100] The word, "agreement", in s. 252 of the FLA is unadorned other than the agreement must be respecting property division. "Agreement" is also not defined in the FLA to either limit or expand its meaning from its ordinary meaning. The Cohabitation Agreement is an agreement and it is an "agreement respecting property division".
- [101] In *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29, the Supreme Court of Canada stated (at p. 39): The words "in respect of" are, in my opinion, words of the widest possible scope. They import such meanings as "in relation to", "with reference to" or "in connection with". The phrase "in respect of" is probably the widest of any expression intended to convey some connection between two related subject matters.
- [102] I see no reason to give the word, "respecting", a narrower meaning than the phrase, "in respect of".
- [103] Third, the respondent argued that the claimant's interpretation of s. 252 is inconsistent with s. 104(2) of the FLA, which reads: 104 (2) The rights under this Part [Property Division] are in addition to and not in substitution for rights under equity or any other law.
- [104] I understand the respondent's argument to be that the FLA allows the respondent to assert he had "excluded property" (FLA, s. 85) as in addition to any applicable FRA provision based upon the FRA as "any other law".
- [105] With respect, it is only the FLA that is engaged. The FRA has been repealed. It is not "any other law". Section 252(1) states that s. 252 "applies despite the repeal of the [FRA] and the enactment of Part 5 of [the FLA]". Section 252(2) then incorporates by reference the former provisions "under the [FRA] as if the [FRA] had not been repealed".
- [106] Fourth, the respondent referred the Court to Continuing Legal Education of British Columbia materials, White Papers, and Hansard. As *Bell ExpressVu* makes clear such materials only come into play where there is a "genuine ambiguity".
- [107] In short, I see no ambiguity and certainly no "genuine ambiguity" in reading s. 252 of the FLA in the circumstances at bar.
- [108] In sum, in applying the modern principle of statutory interpretation, I find the language of s. 252 of the FLA and, in particular, that of s. 252(2)(a) to be precise and unequivocal. Accordingly, the Court will apply the property division provisions of the FRA "as if" the FRA had not been repealed.
- [109] I will note finally that I am, in any event, bound by the decision of our Court of Appeal in *Halliday v. Halliday*, 2015 BCCA 82. Justice Goepel, writing for the Court, states:

- [42] The effect of s. 252(1) of the FLA is to allow parties that would otherwise have been subject to the FLA property regime at the time they filed their claim to proceed under the old FRA regime despite it having been repealed. In essence, s. 252(1) preserves the FRA regime as it concerns property division for any separation agreements that were finalized before the FRA was repealed, unless the parties elect to proceed under the FLA.
- [43] There is no evidence that the parties agreed that the dispute be governed by the FLA rather than the FRA. Accordingly, an application such as that brought by the Wife to set aside or replace a separation agreement made before the FLA came into force and dealing with property division must be resolved under the FRA. Procedurally, this means that s. 198 of the FLA, the section upon which the Husband relies, could not be used as a means of dismissing the Wife's proceeding to set aside the property provisions of the Separation Agreement.
- [110] Halliday dealt with a pre-FLA separation agreement. As I have described above, I cannot read s. 252 so as to limit it to separation agreements given the word, "agreement", is used. The Court of Appeal's language in Halliday is binding on me and, in my view, properly and fairly so.
6. credibility and reliability
- [111] I found the claimant to be credible and generally reliable. She testified in a forthright manner and was not challenged effectively under cross-examination.
- [112] I found the respondent not to be credible or reliable.
- [113] For example, in examination in chief, the respondent, who is a U.S. citizen and a permanent resident of Canada, testified that he "honestly pays taxes every year in the United States" and is "completely transparent" in this regard as his father had recommended.
- [114] In cross-examination, he testified: Q All right. So in the 2013/2014 year, sir, when Borthwick was registered in your sole name and you received rental revenue, you would agree with me, sir, that you did not declare that rental revenue on either your Canadian or your U.S. tax returns, did you, sir? A Neither [C.S.] nor I declared the rental revenue. Q And so yesterday, sir, during your evidence you said that you scrupulously were honest in your declarations on your U.S. tax returns, didn't you, sir? A That's -- that's a bit of a mischaracterization. I think I said I was scrupulous to do my US, tax returns. Q I don't think so. I don't think that's what you said, sir. I think you said that you were very honest with respect to your U.S. tax returns. A What I meant was I was honest in the sense that I do them, yeah, and I -- Q Oh, so the content was irrelevant on - with respect to the honesty, sir, is that your evidence? A No. What I'm saying is that in those year - or that year we didn't report our rental income and we didn't re -- and I didn't report it on my U.S. taxes either. Q But, sir, you were the owner of the property in 2013 and 2014, correct? A I was. Q Yes. And so you would agree with me, sir, that it would have appropriately gone onto your tax return because you owned the property? A Yes. Q Okay. And so you were the one, sir, in 2013/2014, who didn't declare the -- A Oh, I see.

Q -- income. Do you agree with that? A Yes, yes. I'm the one, yes. Q So you weren't scrupulously honest on your U.S. tax returns, were you, sir? A I'll have to admit that in those days as well as recently I haven't really -- I haven't necessarily declared our income on my taxes. Our income in that -- in the -- of those rental properties, I don't know about scrupulously honest. I'm just -- the word is -- I -- I just - yeah.

[115] At trial, the claimant was forthright that she had not declared rental income with respect to the Salt Spring Property for 2017 and 2018 (and also apparently in 2018 with respect to the Borthwick Property). The Court stated that it did not wish to be viewed as acquiescing in the non-reporting of income. The claimant stated that she was committed to making the appropriate voluntary disclosure with the Canada Revenue Agency. I realize that the net rental income is likely less than the gross rental income.

[116] The respondent was not also a forthright witness. For example, in cross-examination, he testified: Q And so that allegation of fact, sir, that the respondent transferred the Borthwick property into joint tenancy with the claimant in September 2015, that's a true statement, isn't it, sir? A You know, I -- I need to talk about this, because I don't have my responses in front of me. I think this is an unfair hoodwinking of what -- what's happening here. I -- I'm left to guess whether I did not admit. I don't know if that's fair or not. Q Sir, no one's asked you what you said in the Notice to Admit. The question is extraordinarily straightforward, and it's this: That statement is true, isn't it, sir? A I cannot answer that without the context of how I may have [glossed] it. I was told in the responses to the Notice to Admit - Q I don't think you should be talking about what -- what advice you were given, sir, and that's unwise. Are you prepared to admit, sir, that question 56, that allegation of fact, is true? The respondent transferred the Borthwick property into joint tenancy with the claimant in September of 2015. A You know, I'm sorry, I have to talk honestly of my heart. You know, if I have written that it's not, like, admitted, then I wrote a gloss and I'd like to see the gloss that tells me why I said it wasn't admitted. Q That's not how it works, sir. Are you prepared to acknowledge that this is true or not? It's a very straightforward question. The respondent transferred the Borthwick property into joint tenancy with the claimant in September of 2015. A I am prepared to admit that's true

[117] Over the course of the litigation, the respondent showed that he was also not reliable. In cross-examination, the respondent acknowledged when he was referred to his July 19, 2019 examination for discovery that he had never told the claimant that she was holding her fifty percent interest in the Borthwick Property for him: Q If you go to question 748 over the page, sir. A Yeah. Q Q And in fact, you never told [C.S.] that she was holding her 50 percent interest in the Borthwick property in trust for you, did you? A We did not have that discussion at all. Question 749: Q Well, you never told her that, did you? A No. You were asked those questions, sir, and you gave those answers, correct? A Okay. Now that I understand that it doesn't include any settlement discussions, correct. Q All I asked you was that you were asked those question and you gave those answers? A Yes. Q And those answers were true; correct? A Yes. Q And they are true; correct? A Yes.

- [118] The relevant request and answer from the claimant's notice to admit dated September 6, 2019 and the respondent's response dated September 20, 2019 addressing the same subject read: R At no point before, during, or after the Respondent transferred the Borthwick property into joint names, did the Respondent tell the Claimant that she was holding her 50% interest in the Borthwick Property in trust for the Respondent. A Not admitted. During their relationship, the Respondent told the claimant that the purchase of the Borthwick Property derived from the Respondent's Exclusions. The Respondent informed the Claimant that these Exclusions were being held in trust by the Claimant as the Respondent's Excluded property. The Claimant agreed that she would honor the Respondent's Exclusions, and transfer to the Respondent the Excluded property in case of separation.
- [119] In short, the respondent's answer to the claimant's notice to admit was not consistent with his testimony in cross-examination. I find that the respondent's answer to the notice to admit question was not true.
- [120] Other than accepting the respondent's testimony that while on sabbatical he spent significant time preparing papers and being engaged in other academic activities consistent with his position as a tenured professor, I have not accepted his testimony unless supported by independent evidence.
- [121] I accept the claimant's testimony that with respect to the various property transfers and the holding of property (including the Borthwick Property and the Salt Spring Property), the respondent never told her that she was holding the property in trust for him, or that it was not otherwise her property or would be required to be returned on separation.
7. Hartshorne analysis
- [122] In Hartshorne, the Supreme Court of Canada set forth the approach to be taken where the parties have an agreement respecting property division. The Court stated:
- [47] The ultimate point then is this: in determining whether a marriage agreement operates unfairly, a court must first apply the agreement. In particular, the court must assess and award those financial entitlements provided to each spouse under the agreement, and other entitlements from all other sources, including spousal and child support. The court must then, in consideration of those factors listed in s. 65(1) of the FRA, make a determination as to whether the contract operates unfairly. At this second stage, consideration must be given to the parties' personal and financial circumstances, and in particular to the manner in which these circumstances evolved over time. Where the current circumstances were within the contemplation of the parties at the time the Agreement was formed, and where their Agreement and circumstances surrounding it reflect consideration and response to these circumstances, then the plaintiff's burden to establish unfairness is heavier. Thus, consideration of the factors listed in s. 65(1) of the FRA, taken together, would have to reveal that the economic consequences of the marriage breakdown were not shared equitably in all of the circumstances. This approach, in my view, accords with the underlying principle of the FRA, striking an appropriate balance between deference to the parties' intentions, on

the one hand, and assurance of an equitable result, on the other.

[123] In considering matters, having regard to other entitlements, the Court must be careful not to "double count" in determining whether an agreement operates unfairly.

8. first step - property division under the cohabitation agreement

[124] The first step is to apply the terms of the Cohabitation Agreement. The claimant says that the application of the Cohabitation Agreement would result in an allocation of \$845,719 and \$1,589,970 to the claimant and respondent respectively. These figures are prior to two post-separation adjustments.

[125] The claimant provided the following figures: Asset Characterization under the Cohabitation Agreement Value Allocation to Claimant Allocation to Respondent Real Property 1. The Borthwick Property (shared asset) Net Sale Proceeds as at the date of sale: \$1,106,137 \$553,068.50 \$553,068.50 2. The Salt Spring Property (shared asset) Net Sale Proceeds as at the date of sale: \$311,626 \$155,813 \$155,813 3. The Cannon Beach Property (Respondent's separate asset) \$450,000 \$0 \$450,000 Vehicles 4. 1994 Toyota Truck (Respondent's separate asset) \$5,000 current value \$0 \$5,000 5. 1995 Catalina Sailboat (Respondent's separate asset) \$75,000 current value \$0 \$75,000 6. Sea Ray Motor Boat (Respondent's separate asset) \$7,000 current value \$0 \$7,000 Financial Assets 7. Joint Investment Account (shared asset) \$33,576.34 current value \$16,788.17 \$16,788.17 8. Claimant's Dynamic Mutual TFSA (Claimant's separate asset) \$6,645.48 current value \$6,645.48 \$0 Pensions 9. SFU Pension (Respondent's separate asset) Approx. \$303,678.21 as at Separation Date \$0 \$303,678.21 10. Washington State Pension (Respondent's separate asset) Approx. \$56,660.21 USD as at Separation Date X 1.3341890863 as at Separation Date = \$75,595.43 CAN \$0 \$75,595.43 RRSPs, SRSP, LIRA and RESP 11. Respondent's RRSP (Respondent's separate asset) \$26,972.27 current value \$0 \$26,972.27 12. Claimant's RRSP (Claimant's separate asset) \$19,471.97 as at current value \$19,471.97 \$0 13. Claimant's SRSP (Claimant's separate asset) \$153,796.58 as at current value \$153,796.58 \$0 14. Claimant's LIRA (Claimant's separate asset) \$19,211.50 as at current value \$19,211.50 \$0 Liabilities 15. Respondent's VISA (Respondent's sole responsibility) (\$5,270) as at Financial Separation Date \$0 (\$5,270) 16. Claimant's VISA (Claimant's sole responsibility) (\$5,400) as at Financial Separation Date (\$5,400) \$0 17. Joint Line of Credit is paid off from proceeds of sale of the Borthwick Property and the Salt Spring Property (\$21,294) (\$10,647) (\$10,647) 18. Total advances made from the sale of the Borthwick Property and Salt Spring Property (net difference in advances received by each party accounted for in adjustments at para. 21 and 22 of this table) (\$132,000) (\$66,000) (\$66,000) 19. Bill for mediation on September 3, 2019 (\$5,751.85) (\$2,875) (\$2,875) Interest from Funds Held in Trust 20. Interest from funds held in trust, as at September 3, 2019 \$11,693 \$5,846 \$5,846 Total Assets to Each Party under the Cohabitation Agreement before Adjustments: Total Assets: \$2,435,689 \$845,719 \$1,589,970 21. Payment the Respondent must pay to the Claimant in CAN to equalize post-separation advancements \$7,917 \$7,917 (\$7,917) 22. Payment the Respondent must pay to the Claimant in USD to equalize post-separation advancements \$19,197 USD X 1.3459690386 exchange

rate as at 18/MAY/2018 = \$25,825.11 CAN \$25,825 (\$25,825) Total Asset Each Party under the Cohabitation Agreement \$879,461 \$1,556,228

- [126] I have reviewed the claimant's figures and I agree with them. I will describe below the legal basis for each asset (or liability) where there was a dispute as to the allocation.
- a) Borthwick Property
- [127] On September 24, 2015, the respondent transferred the Borthwick Property from his name into the names of the claimant and respondent as joint tenants.
- [128] Clause 25 of the Cohabitation Agreement applies. The Borthwick Property was acquired December 2005 after the commencement of the parties' cohabitation in May 2005. On September 25, 2015, the Borthwick Property was registered in the parties' names as joint tenants. In granting the contemporaneous mortgage, the parties record in writing that they are the owners as joint tenants.
- [129] The Borthwick Property remained in joint tenancy until its sale in July 2018.
- [130] In the alternative, the placing of the claimant's name on title was a gift of a one-half interest: Clauses 32 and 33 of the Cohabitation Agreement.
- [131] In *V.J.F. v. S.K.W.*, 2016 BCCA 186, Justice Newbury, writing for the Court of Appeal, defines at para. 49 a gift as "a gratuitous transfer of property in which the donor retained no interest and expected no remuneration". It is the transferor's intention at the time of transfer that is relevant: *Berdette v. Berdette* (1991), 3 O.R. (3d) 513 (C.A.).
- [132] As noted, I have rejected the respondent's assertions that he told the claimant that the Borthwick Property was to be held in trust by her for him or that she agreed to transfer her interest in the Borthwick Property to him upon separation.
- [133] I find that the respondent intended to give the claimant a one-half interest in the Borthwick Property.
- [134] I also note, as may be seen above, in cross-examination, the respondent suggested that the claimant had an interest in the Borthwick Property even before the one-half interest was transferred to the claimant. With respect to the reporting of rental revenue in 2013 and 2014 from the Borthwick Property, the respondent testified that neither he nor the claimant declared the rental revenue. The respondent must have viewed the claimant as having a sufficient interest in the Borthwick Property such that it would be viewed as a source of income for income tax purposes.
- [135] The use of the Borthwick Property to secure the HELOC is not inconsistent with a gift. Both parties were liable under the HELOC.
- [136] In *V.J.F.*, the Court cited with approval Lord Denning's statement in *Tinker v. Tinker*, [1970] 1 All E.R. 540 (C.A.):

- [152] Accepting that in the present case the husband was honest - he acted, he said, on the advice of his solicitor - nevertheless I do not think that he can claim that the house belongs to him. The solicitor did not give evidence. But the only proper advice that he could give was: 'In order to avoid the house being taken by your creditors, you can put it into your wife's name; but remember that, if you do, it is your wife's and you cannot go back on it.' But, whether the solicitor gave that advice or not, I am quite clear that the husband cannot have it both ways. So he is on the horns of a dilemma. He cannot say that the house is his own and, at one and the same time, say that it is his wife's. As against his wife, he wants to say that it belongs to him. As against his creditors, that it belongs to her. That simply will not do. Either it was conveyed to her for her own use absolutely; or it was conveyed to her as trustee for her husband. It must be one or other. The presumption is that it was conveyed to her for her own use; and he does not rebut that presumption by saying that he only did it to defeat his creditors. I think that it belongs to her. [At 542; emphasis added by Newbury J.A.]
- [137] In the case at bar, the respondent similarly "cannot have it both ways". He cannot say the Borthwick Property is his but at the same time say to the bank that it is owned by the parties as joint tenants.
- [138] By September 25, 2015, the parties had also executed their September 19, 2013 Wills. In his Will, the respondent left the residue of his estate, which would have included his interest in the Borthwick Property, to the claimant.
- [139] I reject the respondent's argument that the claimant should be allocated \$159,750 under clauses 27 to 29 of the Cohabitation Agreement. Clause 25 applies. In the alternative, clauses 32 and 33 apply. Clause 31 gives clauses 32 and 33 specific effect.
- b) Salt Spring Property
- [140] On November 6, 2009, the Salt Spring Property was acquired as a vacation home. Title was registered in the names of the parties as joint tenants. In granting a contemporaneous mortgage, the parties record in writing that they are the owners as joint tenants.
- [141] Clause 25 of the Cohabitation Agreement applies to make the Salt Spring Property shared property and not the respondent's separate property.
- [142] I accept the claimant's testimony that renovation to the Salt Spring Property was planned and organized by both parties with funding coming from the parties' joint chequing account.
- [143] When the Salt Spring Property was rented, the parties shared the responsibilities associated with finding and dealing with tenants.
- [144] The rents received for the 2017 and 2018 rentals were deposited in the parties' joint chequing account.

- [145] Consistent with co-ownership, the property tax, mortgage, and insurance payments were made from the parties' joint chequing account.
- [146] In the alternative, clauses 31 and 32 of the Cohabitation Agreement apply so that the respondent received a one-half interest in the Salt Spring Property as a gift: V.J.F., para. 49.
- [147] I reject the respondent's assertion that he told the claimant that her interest in the Salt Spring Property was to be held in trust for him or that she agreed to transfer her shown interest to him upon separation. I accept the claimant's denial of the respondent's assertion.
- [148] I reject the respondent's argument that under clause 34(c) of the Cohabitation Agreement, the claimant is entitled to \$33,457 in relation to the Salt Spring Property. The \$33,457 represents one-half of the value of the Salt Spring Property (\$300,000) after deducting \$233,084 that the respondent says were funds given to him by his father.
- [149] In cross-examination, the respondent testified: Q In any event, sir, you intended to share the property with [C.S.] at the time you purchased it; correct? A In a nonlegal sense, I intended for us to use it as a family, yes. Q That's not what I asked you, sir. I didn't ask you about the use. I said you intended to share the property with [C.S.] when you purchased it? A I can't repeat the word "share". I don't agree with the word, "share", no. Q You didn't intend to share the property with [C.S.] when you purchased it; is that -- A Sorry? Q -- your evidence? A Sorry? Q You didn't intend to share the property with [C.S.] when you purchased it -- A I -- Q -- is that your evidence, sir? A I am a professor. I care about words. I'd rather not use the word "share" or make a judgment about the word "share". Q All right. So you -- why did you put it in joint names, sir? A Because it was the easiest way for us to pay -- sorry, [indiscernible/voice low]. Because that was the easiest way for us to --once again, it was the easiest way for us to pay a mortgage, and a mortgage broker suggested that it should be in joint names so we could pay the mortgage together. Q So you want [C.S.] to share in the payments, but you didn't want to share the property with her; is that your evidence, sir? A I wanted [C.S.] -- I wanted for us both to share in the payments of -- of the mortgage. Q But you are not prepared to say that you intended to share the property with her, sir, because don't like the word "share"? A Yes. Q That's convenient, sir. You took no steps, sir, at that time when you purchased Salt Spring Island to protect your investment in that property, did you, sir? A What do you mean -- I'm sorry. I don't follow. Q You didn't enter into any agreement with [C.S.]? You didn't have her sign anything to say that she owed you any money? You took no steps, sir, to protect your investment, your down payment, into the Salt Spring Island property at the time you purchased it, did you, sir? A At the time I purchased it, I took no steps to -- that's correct. Q And you and [C.S.] remained, sir, as joint tenants on the Salt Spring Island property until it was sold in 2018; correct, sir? A That's correct. And then further: Q Except for the settlement negotiations, sir, you would agree with me that you took no steps to obtain agreement from [C.S.] that she would transfer her interest in the Salt Spring Island property to you -- A Yes. Q -- during the period of 2009 to 2018? A Yes. Q You'd agree, sir, that the -- that [C.S.], [C.S.], was jointly liable on the mortgage

registered against the Salt Spring Island property; correct? A Yes. Q Throughout the period of ownership; correct? A Yes. Q And the mortgage payments, property tax payments, insurance payments with respect to the Salt Spring Island property were paid for from your joint family operating account ending in 030; correct? A Yes. Q And that is the same account, sir, into which [C.S.] deposited her paycheques; correct? A Yes.

[150] With the foregoing circumstances, I find that there was a gift. Clause 31 of the Cohabitation Agreement reads: Nothing in the Agreement prevents the other from making gifts to the other.

[151] In my view, clauses 31 and 32 override clause 34(c), the provision on which the respondent relies.

c) Joint Investment Account

[152] On the date of separation, the parties had an investment account with a balance of \$32,285.

[153] The account was in the names of both parties with the financial records showing both parties as co-owners. Accordingly, clause 25 of the Cohabitation Agreement applies to divide the account balance equally.

[154] In the alternative, the respondent had given one-half of the joint investment account to the claimant: V.J.F., para. 49. The respondent represented the joint investment account to be owned with the claimant equally. For example, in his 2017 income tax return, the respondent reported 50% of the small eligible dividend paid to the joint investment account.

[155] With the funds having been given to him by his father, the respondent says that the joint investment account was opened with a \$40,000 deposit. He relies on clause 34(b) to say that the joint investment account is his property if the Cohabitation Agreement were to apply. In my view, clauses 31 and 32 override clause 34(b).

[156] The respondent also says the account should be viewed as "excluded property" under the FLA. This argument is separate from the treatment under the Cohabitation Agreement and the Hartshorne analysis and depends upon the claimant's interpretation of s. 252 of the FLA which I have rejected.

d) Spousal RRSP

[157] The claimant owns a spousal RRSP. The respondent says a significant portion of the total contributions to the spousal RRSP came from funds that had been given to him by his father. The respondent's tax information shows contributions of \$25,000, \$25,000, \$25,000, and \$12,974 for 2013 to 2016 respectively.

[158] With the contribution to the spousal RRSP, the respondent's tax liability was reduced from what it would have otherwise been. He represented to our tax authorities that he had made contributions to a registered savings plan designed to benefit the claimant.

[159] The respondent's contributions to the spousal RRSP were gifts: V.J.F., paras. 49 and 52.

Accordingly, under clauses 31 to 33 of the Cohabitation Agreement, the spousal RRSP is the claimant's property. Clause 31 to 33 override clause 34(b).

e) Summary of Application of the Cohabitation Agreement to Total Assets

[160] In sum, under the Cohabitation Agreement, the total assets of \$2,435,689 (before the post-separation adjustments) allocated to each of the claimant and respondent would be \$845,719 and \$1,589,970 respectively.

9. second step - property division under the FRA

a) Claimant's Figures

[161] The claimant provided the following figures as to property division under the FLA "as if" the FRA applied: Asset Characterization under the FRA, absent any agreement Value Allocation to Claimant Allocation to Respondent Real Property 1. The Borthwick Property (family asset) Net Sale Proceeds as at the date of sale: \$1,106,137 \$553,068 \$553,068 2. The Salt Spring Property (family asset) Net Sale Proceeds as at the date of sale: \$311,626 \$155,813 \$155,813 3. The Cannon Beach Property (family asset) Reapportionment of approx. 60% to the Respondent \$450,000 \$180,000 \$270,000 Vehicles 4. 1994 Toyota Truck (family asset) \$5,000 current value \$2,500 \$2,500 5. 1995 Catalina Sailboat (family asset) \$75,000 current value \$37,500 \$37,500 6. Sea Ray Motor Boat (family asset) \$7,000 current value \$3,500 \$3,500 Financial Assets 7. Joint Investment Account (family asset) \$33,576.34 as at current value \$16,788.17 \$16,788.17 8. Claimant's Dynamic Mutual TFSA (family asset) \$6,645.48 as at current value \$3,322.74 \$3,322.74 Pensions 9. SFU Pension (Family Property, to be divided pursuant to Part 6 of the FLA) Approx. \$303,678.21 as at Separation Date Approx. \$21,842.38 as at the Cohabitation Date Approx. \$281,835.83 accrued during the relationship Approx. \$140,917.92 Approx. \$140,917.92 + \$21,842.38 = \$162,760.30 10. Washington State Pension (Respondent's separate property) Approx. \$56,660.21 USD as at Separation Date X 1.3341890863 as at Separation Date = \$75,595.43 CAN \$0 \$75,595.43 RRSPs, SRSP, LIRA and RESP 11. Respondent's RRSP (family asset) \$26,972.27 as at current value \$13,486.13 \$13,486.13 12. Claimant's RRSP (family asset) \$19,471.97 as at current value \$9,735.95 \$9,735.95 13. Claimant's SRSP (family asset) \$153,796.58 as at current value \$76,898.29 \$76,898.29 14. Claimant's LIRA (family asset, reapportioned 100% to the Claimant) \$19,211.50 as at current value \$19,211 \$0 Liabilities 15. Respondent's VISA (family debt) (\$5,270) as at Financial Separation Date \$0 (\$5,270) 16. Claimant's VISA (family debt) (\$5,400) as at Financial Separation Date (\$5,400) \$0 17. The Parties agreed to pay off the Joint Line of Credit with funds held in trust at Lindsay Kenney (\$21,294) (\$10,647) (\$10,647) 18. Total advances made from the sale of the Borthwick Property and Salt Spring Property (net difference in advances received by each party accounted for in adjustments at para. 21 and 22 of this table) (\$132,000) (\$66,000) (\$66,000) 19. Bill for mediation on September 3, 2019 (\$5,751.85) (\$2,875) (\$2,875) Interest from Funds Held in Trust 20. Interest from funds held in trust, as at September 3, 2019 \$11,693 \$5,846 \$5,846 Total to Each Party after

Reapportionment, before Adjustments Total Assets: \$2,435,688 \$1,133,666 \$1,302,022 21. Payment the Respondent must pay to the Claimant in CAN to equalize post-separation advancements \$7,917 \$7,917 (\$7,917) 22. Payment the Respondent must pay to the Claimant in USD to equalize post-separation advancements \$19,197 USD X 1.3459690386 exchange rate as at 18/MAY/2018 = \$25,825.11 CAN \$25,825 (\$25,825) Total Assets to Each Party under the: Family Relations Act division. \$1,167,408 \$1,268,280

[162] The claimant's figures are generally based on the various assets being family assets or family debt with a presumptive equal division.

[163] The respondent does not challenge the categorization of a particular asset or debt as a family asset or a family debt. The respondent's primary challenge was that a division such as the claimant suggests would be "unfair". The respondent submits that the inheritance, trust distributions, and gifts he received should be recognized as a factor weighed in his favour.

b) Section 65 of the FRA

[164] Section 65(1) of the FRA reads: 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.

[165] Although the parties were subsequently married, the Cohabitation Agreement is not a marriage agreement (nor a separation agreement). For the purposes of property division, s. 61 of the FRA defines a "marriage agreement" as an agreement respecting property entered into "by two people before or during their marriage to take effect on the later of the date of the marriage or the execution of the agreement" for, among other matters, property division.

- [166] Under s. 120.1 of the FRA, a cohabitation agreement is treated as a "marriage agreement" for the purposes of Part 5 of the FRA properly division provisions provided that the formal requirements of a marriage agreement as set forth in s. 61(3) of the FRA are met: *Wiest v. Middelkamp*, 2003 BCCA 437, paras. 26-27; *Waters v. Conrod*, 2007 BCCA 230, paras. 10-12, 16. In the case at bar, the formal requirements are met.
- [167] Section 120.1(3) provides that in applying Part 5 for the purpose of s. 120.1, a reference to "marriage" in Part 5 "must be deemed to be a reference to a marriage-like relationship between the spouses who are not married to each other". Section 1 of the FRA defines "spouse", in part, as a person who lived with another person in a marriage-like relationship for a period of at least two years if the application under the FRA is made within one year after they ceased to live together.
- [168] As noted, on April 26, 2005, the parties started to live together in a marriage-like relationship. On June 14, 2006, the parties entered into the Cohabitation Agreement. On February 28, 2007, the parties were married.
- [169] The parties in this case began living separate and apart on March 1, 2018. The notice of family claim was filed in this proceeding on October 18, 2018, within one year of the parties' separation.
- [170] Section 120.1 was in effect when the parties executed the Cohabitation Agreement. Section 120.1 was repealed on the Royal Assent of the FLA on November 24, 2011: FLA, ss. 258 and 482.
- [171] Section 120.1's repeal was not stated to be retroactive. As noted, s. 252(2)(a) is a transitional provision that allows a proceeding to be brought to enforce, set aside, or replace an agreement respecting property division made before the coming into force of s. 252.
- [172] Section 252 came into force on March 18, 2013: B.C. Reg. 131/2012.
- [173] The fact that s. 120.1 of the FRA was repealed before s. 252 came into force does not affect s. 252's transitional application to agreements made before the repeal of s. 120.1.
- [174] In writing for the majority, Justice Dickson (as he then was) in *Gustavson Drilling (1964) Ltd. v. Canada (Minister of National Revenue)*, [1977] 1 S.C.R. 271 stated at 279: The general rule is that statutes are not to be construed as having retrospective operation unless such a construction is expressly or by necessary implication required by the language of the Act.
- [175] The repeal of s. 120.1 of FRA also "does not reach into the past and declare that the law or the rights of parties of an earlier date shall be taken to be something other than they were as of that earlier date. ": *Gustavson, Dickson J.*, at 279.
- [176] Section 35(1)(b) of the Interpretation Act, R.S.B.C. 1996, c. 238 reads: 35 (1) If all or part of an enactment is repealed, the repeal does not

- (b) affect the previous operation of the enactment so repealed or anything done or suffered under it,

[177] Returning to s. 252(2)(a) of the FLA, the Cohabitation Agreement is an agreement respecting property division before the coming into force of s. 252. The Cohabitation Agreement was made before the repeal of s. 120.1 of the FRA.

[178] If the Cohabitation Agreement had been made after the repeal of s. 120.1 of the FRA and before the coming into force of s. 252 of the FLA, *Blunt v. Lee*, 2019 BCSC 351 would apply. The Cohabitation Agreement would still be a valid agreement but s. 65 of the FRA (including on "as if" basis) could not have application. The claimant would need to rely on the equitable principles of unconscionability and unjust enrichment.

[179] Here, the Cohabitation Agreement is treated as a "marriage agreement" for the purposes of Part 5 of the FRA property division provisions before their repeal as part of the March 18, 2013 repeal of the FRA: FLA, ss. 259 and 482, B.C. Reg. 131/2012.

[180] Under the "previous operation" of s. 120.1, Part 5 of the FRA was applied to s. 120.1 cohabitation agreements.

[181] The language of s. 252 of the FLA "as if the former Act had not been repealed" enables s. 65 of the FRA to apply "as if" it had not been repealed rather than leaving the parties to such s. 120.1 agreements to rely on the equitable principles of unconscionability and unjust enrichment -- a possibly expensive and difficult legal voyage.

[182] The result has sensible harmony. In the case at bar, the legal framework is the same as that of a couple that entered into a "marriage agreement" in, say, June 2006, and then separated in, say, March 2018. In each case, s. 65 of the FRA applies "as if" it were still in force.

c) Current Circumstances Not Contemplated

[183] Various events unfolded after the execution of the Cohabitation Agreement, which were inconsistent with key premises of the Cohabitation Agreement.

[184] First, contrary to clause 6(b) of the Cohabitation Agreement, the parties made Wills in 2013 leaving their estates to the other party (other than the respondent's Cannon Beach Property left to his daughter from his first marriage). Similarly, the parties each also designated their respective RRSPs to the other party.

[185] Second, contrary to clause 10 of the Cohabitation Agreement, neither party sought to review the terms of the Cohabitation Agreement, including when they were married and the birth of each of their daughters.

[186] In his amended counterclaim, the respondent pleaded that he understood that the Cohabitation Agreement "was no longer in force and effect due to the marriage".

- [187] I have difficulty accepting the truth of the respondent's pleading because the parties had been married less than a year after the Cohabitation Agreement was made. The respondent is an intelligent individual. He had suggested the Cohabitation Agreement and received independent legal advice. I do not accept that he would have forgotten such a key term of the Cohabitation Agreement in a short period of time. In cross-examination, the respondent could not "say for sure" that he had forgotten.
- [188] The respondent also testified that at the time of the 2009 purchase of the Salt Spring Property that he had forgotten the Cohabitation Agreement.
- [189] If the respondent had thought that the Cohabitation Agreement would no longer have effect at the time of the parties' marriage and if he were concerned about keeping his assets separate from the claimant's assets, he would have insisted on a new agreement or have taken other steps to document matters. Similarly, if the respondent had forgotten about the Cohabitation Agreement by the time of the 2009 Salt Spring Property purchase, he would have taken steps to document matters. His inaction is consistent with one of making gifts.
- [190] Other than under the Cohabitation Agreement, the respondent took no steps to document that interests in any of the various properties in issue were to be held in trust by the claimant for him or that she agreed to transfer her interests to him on separation.
- [191] Third, contrary to clause 12 of the Cohabitation Agreement, household and family expenses were not shared equally. The claimant became financially dependent upon the respondent. Moreover, as the respondent described, the parties lived "above our means".
- [192] Fourth, contrary to clause 19 of the Cohabitation Agreement, the parties did not maintain separate bank accounts. The parties pooled their incomes in joint bank accounts.
- [193] Fifth, contrary to clauses 27 to 29 of the Cohabitation Agreement, the parties did not contemplate that the Borthwick Property would subsequently be transferred in 2015 into joint tenancy. The contemplated 2010 appraisal of the Borthwick Property also did not occur.
- d) Section 65 Factors
- i) Duration of marriage
- [194] The duration of the marriage was approximately 11 years. Prior to marriage, the parties had cohabitated for approximately 22 months. The parties had two children. In short, the length of the parties' relationship is a significant one in considering property division. ii) Time living separate and apart
- [195] The period between separation and the conclusion of that argument at trial was approximately one year and ten months. This period is not a significant factor. iii) Timing of acquisition of property

- [196] Most of the family assets were acquired during the parties' relationship. As set forth, in the Cohabitation Agreement, the main assets the respondent brought into the relationship were a \$200,000 inheritance, an one-eighth share in the Cannon Beach Property, and the Borthwick Property with a net equity value of approximately \$318,000 (\$636,000 - \$318,000).
- [197] As noted, the current value of assets is approximately \$2,400,000.
- [198] Most of the current value arises from the subsequent acquisition of assets and the approximately \$800,000 increase in the net equity value of Borthwick Property (\$1,106,137 - \$318,000 = \$788,137) since the parties' relationship began.
- [199] Further, some of the funds used to pay expenses related to the Borthwick Property came from the claimant's earnings which were deposited in their joint chequing account.
- [200] In short, the timing of the acquisition of assets is a factor that weighs in favour of an equal division. iv) Acquisition by inheritance or gift
- [201] Property was acquired by the respondent through inheritance, gift, and trust distributions. With respect to inheritance and gifts, as noted above, the respondent brought to the relationship a \$200,000 inheritance and the one-eighth interest of the Cannon Beach Property. As noted, under the Cohabitation Agreement, the one-eighth interest in the Cannon Beach Property was to remain as the respondent's separate property.
- [202] In 2006, as a gift from his father, the respondent received \$385,947 USD representing a portion of the net sale proceeds from the sale of a property (Fox Island).
- [203] The respondent received further cash gifts and trust distributions of approximately \$440,000 USD throughout the years.
- [204] In *Lodge v. Lodge* (1993), 79 B.C.L.R. 2d 360 (C.A.), our Court of Appeal stated at para. 17 (in part):
- [17] The significance of an inheritance as a factor in a reapportionment diminishes according to the length of time that the marriage subsists following the receipt of the inheritance.
- [205] Other than under the Cohabitation Agreement and continuing to hold an interest in the Cannon Beach Property in his name, the respondent took no steps to keep separate or to have held in trust for him the inheritance, gifts, and trust distributions he received.
- [206] Without the respondent taking steps to keep inheritances, gifts, and trust distributions separate, the ready inference is that he did not intend to do so. As above, I have found that the respondent made significant gifts to the claimant.
- [207] Overall, the timing of the inheritance, gifts, and trust distributions diminishes their significance as a s. 65 consideration.

v) Economic Independence

- [208] The need for the claimant to become economically independent and self-sufficient weighs in favour of an equal division. The claimant is economically dependent. She assumed the primary child care and household responsibilities. She sacrificed opportunities to advance her career as a graphic designer.
- [209] The respondent left his estate (other than the Cannon Beach Property) to the claimant under his Will. The respondent referred to the parties' properties as "ours". By placing assets in the parties' joint names or in the claimant's name, the respondent served to recognize the claimant's financial need and dependence. From a legal perspective, the claimant gained significant assets. vi) Other Circumstances
- [210] With respect to other circumstances, as I have previously noted, the parties cohabited for almost two years before marriage and the respondent took no steps to keep inheritance, gifts, or trust distributions he received as separate property other than entering into the Cohabitation Agreement and keeping his interest in the Cannon Beach Property in his name.
- e) The Claimant's LIRA and the Respondent's Washington State Pension
- [211] The claimant's Locked-In Retirement Account ("LIRA") and the respondent's Washington State pension each arose before the parties' relationship with all contributions made before the commencement of the relationship. Under s. 65 of the FRA, it would be unfair if either of the assets were to be divided.
- f) Cannon Beach Property
- [212] The claimant says that the respondent would likely be awarded a 60% interest in the Cannon Beach Property. The claimant recognizes that although the Cannon Beach Property was used for family purposes, the respondent received his interest in the Cannon Beach Property under his parents' family trust.
- [213] I am satisfied that the claimant's suggested 60% interest for the respondent falls within a range of reasonable possibilities. Although I will not adopt it, for the purposes of examining overall fairness, the 60% figure is illustrative. In the context of approximately \$2.4 million, the difference between a 60% ($\$450,000 \times 60\% = \$270,000$) and a 100% interest for the respondent in the one-quarter Cannon Beach Property interest is \$180,000 ($\$450,000 - \$270,000$), which is 7.5% ($\$180,000 / \$2,400,000$).
10. comparison of property division under the cohabitation agreement and the FRA
- [214] The claimant's comparison of property division under the Cohabitation Agreement and the FRA is reflected in the following chart. The chart excludes the respondent's Washington State pension, the claimant's LIRA, and is based on the respondent receiving a 60% interest in the Cannon Beach Property: Property Division Claimant Respondent Under Cohabitation Agreement \$879,461 (36%) \$1,556,228 (64%) Under the Family Relations Act \$1,167,408 (48%) \$1,268,280 (52%) Difference (\$287,947) \$287,947

11. claimant's proposal - property division

- [215] The claimant proposes that the result under the FRA as described above be adopted with a further 20% interest in the Cannon Beach Property assigned to the respondent. In other words, the respondent would be credited with an 80% and not a 60% interest in the Cannon Beach Property.
- [216] The result of the claimant's proposal is that the claimant would be allocated \$1,077,488 and the respondent \$1,358,280 or approximately 44% and 56% respectively.
- [217] Clause 3 of the Cohabitation Agreement provides "for judicial intervention in some circumstances if the Agreement is found to be unfair now or in the future" [emphasis added].
- [218] The respondent argues that under clause 28 of the Cohabitation Agreement, the claimant is entitled to \$159,750 with respect to the Borthwick Property (representing 25% of profit beyond base value).
- [219] With respect to the Salt Spring Property, the respondent says that under clauses 34(b) and (c) of the Cohabitation Agreement, the claimant is entitled to \$33,457.
- [220] As discussed above, the Cohabitation Agreement is a valid contract. Clause 3 of the Cohabitation Agreement shows that the parties contemplated judicial intervention if the Cohabitation Agreement was found to be "unfair in the future". With the current circumstances not contemplated, clause 3 overrides the releases set forth in clauses 41 to 47 of the Cohabitation Agreement.
- [221] The claimant argues that application of the Cohabitation Agreement results in an unfair division of property. For four key reasons, I agree.
- [222] First, the provisions of the Cohabitation Agreement do not align with the expectations for the future the parties had when they entered into it. Both parties subsequently arranged their financial affairs differently than either had contemplated near the outset of their relationship.
- [223] Second, as the Hartshorne analysis shows, the difference between the results under the Cohabitation Agreement and the operation of the FRA absent the Cohabitation Agreement is significant and more so if the respondent's interpretation of the Cohabitation Agreement were to be adopted.
- [224] Third, under s. 56 of the FRA, an undivided half interest in family assets is the Legislature's presumptive view of fairness.

- [225] Fourth, I have found that the respondent intended to share property as "ours" and took no steps to keep property funded by inheritance, gifts, or trust distributions as separate property other than the Cohabitation Agreement and title to his interest in the Cannon Beach Property being kept in his name. As noted, the respondent pleaded that he thought the Cohabitation Agreement "was no longer in force and in effect due to the marriage".
- [226] It would be unfair for a party to give property or an interest in property and then be able, without more, to take it back on separation.
- [227] I will adopt the claimant's proposal for property division with one change. I will award the respondent a 100% interest in the one-quarter interest in the Cannon Beach Property. The Cannon Beach Property was not placed in the names of both parties. Moreover, as the respondent's Will reflects the Cannon Beach Property was to be a bequest and not part of the residue that would pass to the claimant.
- [228] In making the division, I have considered other financial entitlements, such as spousal support. Such other entitlements would not prevent the Cohabitation Agreement from operating unfairly. The 100% interest in the Cannon Beach Property also serves to avoid double counting. In sum, the reapportionment before post-separation adjustments is \$987,488 and \$1,448,280 for the claimant and respondent respectively.
- [229] I find that the claimant is entitled to \$7,917 as a post-separation adjustment as described in paragraph 58 above.
- [230] I also find that the claimant is entitled to the second post-separation adjustment under which she is entitled to \$25,825. The relevant amounts were received by the respondent before the parties' separation and were deposited by him in the parties' joint U.S. account.
- [231] With respect to the second post-separation adjustment, the Court would be receptive to the claimant's proposal set forth in paragraph 59 if the respondent is in agreement.

12. parenting arrangements

- [232] During argument, the parties were able to agree on many aspects involving parenting arrangements and between the January 8 to 10, 2020 and March 6, 2020 hearing dates reached further agreement.
- [233] The only outstanding aspect is set forth in paragraphs 6 and 7 of the Court's March 6, 2020 Order which reads:
6. If, after consultation, the parties are unable to agree on a parenting decision regarding either Child, the Claimant shall have the right to make the final decision subject to the right of the Respondent to apply to court for a review of the Claimant's decision if he is of the view that it is contrary to the best interests of the Child or Children. This paragraph does not apply to any significant changes to the equal shared residence of the Children or to the selection of either Child's post-secondary school. The Claimant shall not make decisions that unreasonably interfere with the Respondent's parenting time. If either party seeks a

variation of the equal parenting time regime and the parties are unable to agree, that application will be determined by the court. BY CONSENT.

7. Paragraph 6 of this Order shall come into force immediately and shall remain in force for at least a period of one year from the date of this Order subject to the trial judge's determination in his trial reasons as to whether paragraph 6 will continue after the expiry of one year. BY CONSENT.

[234] Section 37(1) of the FLA reads: In making an agreement or order under this Part respecting guardianship, parenting arrangements or contact with a child, the parties and the court must consider the best interests of the child only. [Emphasis added.]

[235] The Legislature directs that the "only" consideration is the best interests of the child. The best interests of the child is more than a paramount consideration, it is the only consideration.

[236] It is in the best interests of each child that there is certainty to the maximum degree reasonably possible. The FLA's focus is on the child, not the parents. I find that paragraph 6 of the March 6, 2020 serves to provide certainty and, accordingly, will not limit the duration of its effect.

13. child support

[237] The parties agree that the retroactive child support owing as of January 2020 is \$3,097.

[238] With the parties sharing parenting time equally, in the case at bar, counsel say that the effect of any unreported net rental income is not significant to the computation of retroactive child support.

[239] With respect to prospective child support, the parties' respective incomes come into play. The parties agree that the respondent's annual income should be imputed at \$129,153.

[240] The claimant says that her annual income should be imputed at \$70,000. The respondent says that the claimant's annual income should be imputed at \$78,000. The respondent says that the claimant does not work full-time from May to October. During this period, the claimant works generally four days per week.

[241] The claimant has been the primary day-to-day caregiver for the parties' two daughters. The daughters have had difficulty with their parents' separation.

[242] During the parties' relationship, the claimant worked four days per week during the winter months and three days a week during the summer months. The respondent had also encouraged the claimant to freelance to facilitate flexible working hours and vacation time.

[243] It is in the best interests of each child that each parent be available to provide the necessary emotional support. As a tenured professor, the respondent enjoys a degree of flexibility. The less than full-time hours for the claimant will serve to provide a degree of flexibility for her. I will impute the claimant an income at \$70,000 per year.

[244] I will also order that either party may apply for a review of child support in January 2027 and February 2029 which are the respective months following the each daughter reaching the age of majority.

[245] Section 7 expenses will be shared 38% and 62% by the claimant and respondent respectively.

14. Spousal support

[246] Each party states that a lump sum spousal support award is appropriate. The claimant says that award should be \$80,000. The respondent says the award should be \$30,000.

[247] The fundamental principles underlying spousal support are succinctly described by our Court of Appeal in *Chutter v. Chutter*, 2008 BCCA 507, paras. 45-61. These paragraphs read:

(i) Relevant statutory provisions and the case authorities

[45] Section 15.2 of the Divorce Act is the main provision governing entitlement to spousal support. Subsection 15.2(6) 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.

[46] In order to achieve a fair and equitable distribution of resources, all four of these objectives should be examined: *Moge v. Moge*, [1992] 3 S.C.R. 813 at 850-853, 43 R.F.L. (3d) 345. Having regard to these policy objectives, courts must consider the condition, means, needs and other circumstances of each spouse, including the factors set out in s. 15.2(4):

- (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.

- [47] Based on the statutory provisions and the case authorities, the Supreme Court of Canada has identified three grounds for entitlement to spousal support: (1) compensatory support, which primarily relates to the first two objectives of the Divorce Act; (2) non-compensatory support, which primarily relates to the third and fourth objectives; and (3) contractual support (*Bracklow v. Bracklow*, [1999] 1 S.C.R. 420 at paras. 15, 41-42, 44 R.F.L. (4th) 1).
- [48] The claim for spousal support in this case was advanced on compensatory and non-compensatory support principles.
- [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). (ii) Compensatory support
- [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 of Rowles J.A.]

- [52] The Court in *Moge* discussed the relevance of the parties' standards of living in the context of compensatory support 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. [Emphasis of Rowles J.A., internal citations omitted.]
- [53] In *W. v. W.*, 2005 BCSC 1010, 19 R.F.L. (6th) 453, a frequently cited decision in trial decisions in British Columbia, Justice Martinson made the following helpful observation about the interpretation in this province of the emphasized portion in *Moge*:
- [11] In British Columbia this comment in *Moge* has been interpreted to mean that in long marriages the result will likely be a rough equivalency of standards of living. Doing so recognizes that the longer a marriage lasts, the more intertwined the economic and non-economic lives of the spouses become.
- [12] Throughout the marriage, each spouse makes decisions that accommodate the economic and non-economic needs of the other. The decisions include the way in which child care and other family responsibilities will be handled and the way careers will develop. These decisions can have a significant impact upon the income earning ability of each at the time of separation. Yet it is not easy to determine exactly the relationship between these decisions and the consequent benefits and detriments to each spouse. The rough equivalency of standard of living approach has operated as a workable substitute to assess compensatory claims. See for example, *Dithurbide v. Dithurbide* (1996), 23 R.F.L. (4th) 127 (B.C.S.C.); *Rattenbury v. Rattenbury*, 2000 BCSC 722; *Rinfret v. Rinfret*, [1999] B.C.J. No. 2945 (S.C.); *O'Neill v. Wolfe* (2001), 14 R.F.L. (5th) 155 (B.C.S.C.); *Walton v. Walton*, [1997] B.C.J. No. 1089 (S.C.); *Ulrich v. Ulrich*, 2003 BCSC 192; and *Carr v. Carr* (1993), 46 R.F.L. (3d) 326 (B.C.S.C.). [Emphasis of Rowles J.A.] (iii) Non-compensatory support
- [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.
- [55] The concept of "needs" in the context of non-compensatory spousal support goes beyond basic necessities of life and varies according to the circumstances of the parties. As stated by Finch J.A. (as he then was) in *Myers v. Myers* (1995), 17 R.F.L. (4th) 298, 65 B.C.A.C. 226, at para. 10: "Need" or "needs" are not absolute quantities. They may vary according to the circumstances of the parties and the family unit as a whole. "Need" does not end when the

spouse seeking support achieves a subsistence level of income or any level of income above subsistence. "Needs" is a flexible concept and is one of several considerations which a trial judge must take into account in deciding whether any order for spousal support is warranted.

- [56] The Ontario Court of Appeal in *Allaire v. Allaire* (2003), 170 O.A.C. 72, 35 R.F.L. (5th) 256, held that self-sufficiency, a spousal support objective primarily related to non-compensatory support (Bracklow, at paras. 41-42), was a relative concept informed by the standard of living previously enjoyed by the parties:
- [21] self-sufficiency is not a free-standing concept. It must be seen in the context of the standard of living previously enjoyed by the parties. Where, as here, the economic consequences of the marital relationship were to permanently reduce Ms. Allaire's income, it is inappropriate to consider Ms. Allaire's annual income of \$68,000 as "sufficient" without considering whether Mr. Allaire can financially assist her to live a lifestyle closer to what they shared as a couple.
- [57] In *Yemchuk v. Yemchuk*, 2005 BCCA 406 at paras. 41, 48-49, 16 R.F.L. (6th) 430, Prowse J.A. referred to *Myers* and further held that in the context of a long-term marriage involving a sharing of resources, the concept of "need" should take into account the relative standards of living of the spouses following the marriage breakdown. In *Yemchuk*, the husband had appealed the decision of the trial judge dismissing his claim for spousal support on the basis that he had not established any need. While Prowse J.A. found that the husband was entitled to spousal support on compensatory grounds, she also went on to state that the trial judge's treatment of the husband's need for support had been "unduly restrictive":
- [41] I am also satisfied that the trial judge erred in viewing Mr. Yemchuk's "need" for support from too narrow a perspective. He treated "need" as solely a question of whether Mr. Yemchuk could meet his stated expenses with the income available to him. After attributing \$800-\$1,000 per month to Mr. Yemchuk, the trial judge found that Mr. Yemchuk could meet his expense sand, therefore, was not entitled to support.
- [58] In *Tedham v. Tedham*, 2005 BCCA 502, 20 R.F.L. (6th) 217, Prowse J.A. referred to *Yemchuk* as illustrative of the fact that the courts, at least in longer marriages, are measuring need against the marital standard of living (para. 55), and followed *Allaire* in finding that the objective of self-sufficiency must be viewed in the context of the marital standard of living (para. 60).
- [59] Non-compensatory support was also considered in *Hodgkinson v. Hodgkinson*, 2006 BCCA 158, 25 R.F.L. (6th) 235. In that case, the parties divided assets of close to \$7 million, and the wife was awarded time-limited spousal support on non-compensatory grounds. The trial judge had found that the wife was not entitled to spousal support on either compensatory or non-compensatory grounds: she was not financially disadvantaged by the marriage; she was both highly trained and capable of stepping back into the work force; and she was able to earn investment income from her share of the capital assets. On appeal, Saunders J.A., for

the court, held that the trial judge's analysis of the wife's needs and means was "impermissibly narrow"; in part because it had not taken into account the marital standard of living or the husband's post-separation standard of living:

- [68] However, the trial judge did not relate that capacity to earn income from her capital assets and from employment to the standard of living the parties enjoyed during marriage or to the standard of living of Mr. Hodgkinson after trial, or advert to the time lag that would be involved in earning income from a business if Mrs. Hodgkinson immediately resumed work as a chef or caterer. While none of these factors is, by itself, a determinant of Mrs. Hodgkinson's entitlement to spousal support, their absence illustrates what I consider an impermissibly narrow approach to the issue of spousal support.
- [69] Both the question of hardship to Mrs. Hodgkinson ([15.2(6)(c)]) and her self-sufficiency([15.2(6)(d)]) bear some relationship to the standard of living enjoyed by the parties during the marriage (tempered by the income available) and by the other spouse after the marriage. While Mrs. Hodgkinson is not entitled to support at a level that would maintain the highly affluent lifestyle the parties shared, particularly as it appears to have been beyond the level of Mr. Hodgkinson's earnings, in these circumstances she is entitled to a degree of comfort well beyond "basic needs".
- [74] It was an error, in my view, for the trial judge to fail to recognize these several aspects. The arrangement between the parties during marriage as described by the trial judge, in my view, required consideration of spousal support from the perspective of the standard of living that is still reasonably available to them, although in two residences. While recognizing that Mrs. Hodgkinson is not necessarily entitled, step for step, to Mr. Hodgkinson's standard of living, something closer is required.
- [60] The trial judge distinguished Hodgkinson on the basis that the wife had been awarded non-compensatory support for the time required to restore her career, whereas in this case the appellant had been continuously employed for many years. However, the factual differences between Hodgkinson and this case do not diminish the principle that an analysis of the support-seeking spouse's "needs" under non-compensatory support, i.e., the objectives of ss. 15.2(6)(c) and 15.2(6)(d) of the Divorce Act, requires some consideration of the standard of living enjoyed by the parties during the marriage and by the other spouse after the marriage.
- [61] Finally, I note that in *Fisher v. Fisher*, 2008 ONCA 11,88 O.R. (3d) 241, the Ontario Court of Appeal recently reiterated the principle that self-sufficiency is a relative concept encompassing more than the ability to meet basic expenses:

- [53] Self-sufficiency, with its connotation of economic independence, is a relative concept. It is not achieved simply because a former spouse can meet basic expenses on a particular amount of income; rather, self-sufficiency relates to the ability to support a reasonable standard of living. It is to be assessed in relation to the economic partnership the parties enjoyed and could sustain during cohabitation, and that they can reasonably anticipate after separation.
- [248] Clause 48 of the Cohabitation Agreement addresses spousal support by stating that each party "gives up all claims at law, in equity, or by some statute against the other relating to support".
- [249] The applicable statute is the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.).
- [250] In the case at bar, the respondent is not relying of clause 48 of the Cohabitation Agreement.
- [251] Respondent's counsel says that the claimant is not entitled to retroactive spousal support (of the \$80,000 claimed by the claimant, approximately \$16,000 relates to retroactive spousal support). Respondent's counsel further says that the claimant owns a condominium financed by a loan from her uncle.
- [252] The loan from the claimant's uncle is to be repaid as soon as the proceeds from the Borthwick Property and the Salt Spring Property are released. The loan is forgiven if the claimant's uncle dies in the interim. The loan does not bear interest.
- [253] The argument that the claimant's uncle may forgive the loan relies on speculation. Like a possible future inheritance, such should be disregarded: *H.S.S. v. S.H.D.*, 2018 BCCA 199 paras. 72-78.
- [254] I will not depart from considering Guideline Income. In most cases, the parties may have various and varying personal expenses (such as interest payments). I see no basis for not recognizing retroactive spousal support.
- [255] I find that the claimant has a sound basis for compensatory and non-compensatory spousal support. The claimant's career did not advance as it otherwise would have. The claimant had the key responsibility for most of the day-to-day care of the parties' daughters. She also helped with the care of the respondent's daughter from his first marriage when this daughter was younger. The claimant and the parties' two daughters still enjoy a good and healthy relationship with the respondent's oldest daughter.
- [256] On a non-compensatory basis, the claimant has suffered a disproportionate economic disadvantage. As claimant's counsel submitted, the claimant in the past could rely on the respondent's health and dental benefits plan. The claimant also does not have a pension available to her through her employer.

[257] The claimant also has a strong compensatory claim. The parties were married for over ten years before they separated and they have two young daughters. The younger daughter will not reach the age of majority for almost nine years after the time of trial. The claimant assumed "primary childcare and household responsibilities" which resulted in a "lower earning potential and fewer future prospects of financial success".

[258] A lump sum award is appropriate. A lump sum will help to reduce conflict. The funds are readily available from the funds currently held in trust.

[259] The Court will award the high range spousal support \$80,000 lump sum, which claimant's counsel submits based on the maximum spousal support duration of 12.83 years.

15. divorce

[260] I will order that the parties be divorced.

[261] As is common practice, and my preferred practice in most cases, the divorce order may be separated from the corollary relief ordered, if counsel so wish.

16. Ancillary aspects

[262] Various ancillary matters are engaged with the relief sought. The claimant's draft order submitted as part of her legal argument addressed these matters.

[263] The Court orders that the ancillary matters reflected in the paragraphs from the claimant's draft order which are set forth in Schedule A to these reasons be incorporated into the final order(s).

[264] If there are other aspects that arise or any aspects of the order(s) that the parties require to be settled, I ask counsel to contact Supreme Court Scheduling within 60 days of these reasons to schedule a 9 a.m. 55-minute hearing before me.

17. costs

[265] If either party wishes to address costs, they should contact Supreme Court Scheduling within 60 days of these reasons to schedule a 55-minute 9 a.m. hearing before me. "Funt J." Schedule "A" Life Insurance/Security for Child Support

1. The Respondent shall forthwith name the Claimant as the irrevocable beneficiary of a Life Insurance policy with a face value/death benefit of \$250,000 pursuant to s. 60 of the Insurance Act (BC) until December 31, 2026.
2. Commencing January 1, 2027 and until such time as the parties have agreed in writing or a court has determined that neither Child qualifies as a "child" under the FLA, the Respondent shall name the Claimant as the irrevocable beneficiary of a Life Insurance policy to a maximum face value/death benefit of \$100,000 pursuant to s. 60 of the Insurance Act (BC).

3. Once annually, the Respondent shall provide the Claimant with proof that the policy is in good standing and that he has complied with the provisions set out herein. Medical/Dental Expenses for the Children
4. Both Parties shall maintain medical, extended health and dental insurance ("Extended Health") that is available to them through their employments for the Children for so long as the Children are eligible. Both Parties will pay the monthly premiums required for the Extended Health.
5. Both Parties will take all such reasonable steps to ensure that the other Party is reimbursed for any expenses paid by that Party that are covered by the Extended Health.
6. Any agreed-upon or court-ordered uninsured health or dental expenses for the Children shall be shared by the Parties as a s. 7 expense. Real Property
7. The Claimant shall retain for her own use absolutely the Mountain Highway Condo.
8. The Respondent shall retain for his own use absolutely the Cannon Beach Property. Vehicles
9. The Claimant shall retain for her own use absolutely the 2007 Honda CRV.
10. The Respondent shall retain for his own use absolutely the 1994 Toyota Truck, the 1995 Catalina Sailboat, the Sea Ray Motor Boat, and the 2016 Mazda CX-5. Pension Division
11. The Parties shall equally divide their unadjusted pensionable earnings under the Canadian Pension Plan pursuant to ss.55, 55.1 and 55.2 of the Canada Pension Plan for the period of their cohabitation, being April 26, 2005 to March 1, 2018.
12. The Respondent's SFU Pension shall be divided equally in accordance with Part 6 of the FLA. The Parties shall jointly retain Colin Galinsky to advise them on the division of the Respondent's SFU Pension and the Parties shall incorporate the clauses as advised by Mr. Colin Galinski to effect the pension division. For the purposes of the pension division, the period of their cohabitation is from April 26, 2005 to March 1, 2018.
13. Until such time as the Claimant is a limited member of the Respondent's SFU Pension with full survivor death benefits, the Respondent shall designate the Claimant as the beneficiary of 50% of any death benefits from the Respondent's SFU Pension and shall provide proof to the Claimant that he has complied with this provision by no later than 30 days after the date of this Order.
14. Either party shall be at liberty to apply for directions, if necessary, regarding the pension division. RRSPs and SRSP
15. Provided that the Parties have taken no withdrawals from their RRSPs post-separation, the parties shall divide equally their respective RRSPs on the following terms:

- a. Within 15 days of the date of this Order, the Respondent shall provide to the Claimant the required documentation to effect the transfer to the Claimant 50% of the assets held in the Respondent's RRSPs as at the date of this Order in specie by way of a spousal rollover pursuant to s.146(16)(b) of the Income Tax Act (Canada). Thereafter, the Respondent shall retain his RRSPs for his own use absolutely, free and clear of any claim from the Claimant.
 - b. Within 15 days of the date of this Order, the Claimant shall provide to the Respondent the required documentation to effect the transfer to the Respondent 50% of the assets held in the Claimant's RRSPs as at the date of this Order in specie by way of a spousal rollover pursuant to s.146(16)(b) of the Income Tax Act (Canada). Thereafter, the Claimant shall retain her RRSPs for her own use absolutely, free and clear of any claim from the Respondent.
 - c. Within 15 days of the date of this Order, the Claimant shall provide to the Respondent the required documentation to effect the transfer to the Respondent 50% of the assets held in the Claimant's SRSP as at the date of this Order in specie by way of a spousal rollover pursuant to s.146(16)(b) of the Income Tax Act (Canada). Thereafter, the Claimant shall retain her SRSP for her own use absolutely, free and clear of any claim from the Respondent.
- Joint Accounts
16. The Joint Investment Account shall be divided equally as between the Parties within 15 days of the date of this Order. Other Property
 17. Except as otherwise provided in this Order, each Party shall be the sole owner of any other personal property and assets in their possession, including but not limited to real property, bank accounts, air miles, shares, ventures, business interests, options, financial instruments, pensions, registered accounts, vehicles, jewelry, clothing, recreational equipment and the like in that Party's possession. Liabilities
 18. The Respondent shall be solely responsible to pay all liabilities in his sole name including but not limited to tax, in the US and Canada from the date of separation forward and for all corporations, trusts, partnerships; the Respondent shall save harmless and indemnify the Claimant for any expense or loss the Claimant may incur as a result of the Respondent's liabilities.
 19. The Claimant shall be solely responsible to pay all liabilities in her sole name including but not limited to tax, and for all corporations, trusts and partnerships; the Claimant shall save harmless and indemnify the Respondent for any expense or loss the Respondent may incur as a result of the Claimant's liabilities.
 20. The Parties shall divide equally any interest received from the Net Sale Proceeds and shall each include 50% of the amount received on their respective tax returns.

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