

CANADA / JUDGMENT

Chan-Henry v. Liu

2018 BCSC 2140

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Supreme Court of British Columbia

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2018 BCSC 2140 Chan-Henry v. Liu

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Chan-Henry v. Liu,

2018 BCSC 2140

Date: 20181204

Docket: E113516

Registry: Vancouver

Between:

Christopher Michael Chan-Henry

Claimant

And

Jennifer Yee-Ping Liu

Respondent

- and -

Docket: E152799

Registry: Vancouver

Between:

Jennifer Yee-Ping Liu

Claimant

And

Christopher Michael Chan-Henry

Respondent

Before: The Honourable Mr. Justice Kent

Reasons for Judgment

Counsel for Mr. Chan-Henry:

Johanna M. Stein

Counsel for Ms. Liu:

Lolita Rudovica

Place and Dates of Trial:

Vancouver, B.C.

January 9-10, 2018;

July 31, 2018;

August 1-3, 2018;

September 25-28, 2018;

October 1, 17, and 30-31 2018;

November 1-2, 2018

Supplemental Submissions re Child Support:

November 26, 2018

Place and Date of Judgment:

Vancouver, B.C.

December 4, 2018

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INTRODUCTION and PROCEDURAL BACKGROUND

- [1] This is an acrimonious family law dispute concerning a Separation Agreement made February 16, 2011, a Settlement Agreement embodied in a Consent Final Order made by this Court on June 19, 2015, and ongoing claims in two separate actions respecting property division and retroactive/prospective child support and spousal support.
- [2] The parties were married on August 27, 2006, separated in June 2010 and formally divorced on February 17, 2014.
- [3] There are two children of the marriage: Evan, born May 29, 2007 (currently aged 11) and Andrew, born December 26, 2008 (currently aged 9).
- [4] A Separation Agreement was negotiated with the assistance of legal counsel and was signed on February 16, 2011. The Separation Agreement purported to resolve issues respecting custody of the children, child support, spousal support, and division of property.
- [5] A Notice of Joint Family Claim was issued by the parties in Action E113516 ("E113516") on November 14, 2011 to obtain a formal divorce. The parties were self-represented at the time. The documentation submitted to the court in support of a desk order divorce was deficient and a desk order was rejected.
- [6] Communications deteriorated and resulted in Ms. Lui withdrawing from the Joint Family Claim and issuing a Counterclaim for divorce in November 2013. The claim initially proceeded as an undefended family law case in which Ms. Lui secured a Final Order for divorce on February 17, 2014. That Order also provided that, "The balance of corollary relief is hereby dismissed as abandoned", although no such relief had actually been claimed in the action at the time.
- [7] Mr. Chan-Henry filed an Amended Notice of Family Claim in the action on March 18, 2014. He sought a variation of parenting arrangements, a reduction in child support and termination of spousal support. Ms. Lui filed a Response to Family Claim on April 15, 2014 as well as a further Counterclaim on the same date. She sought to reduce Mr. Chan-Henry's parenting time, and to increase child support retroactively and prospectively, along with other relief.
- [8] Applications were later filed by both parties seeking to enforce their respective claims against each other. Various interlocutory housekeeping orders ensued. The matter was set for trial in July 2015 but did not proceed. Instead, with the assistance of legal counsel, the parties settled the litigation by way of a Consent Final Order issued by the court on June 19, 2015.
- [9] The Consent Final Order required Mr. Chan-Henry to pay \$74,200 in satisfaction of all claims for child support and spousal support from the date of the Separation Agreement to May 31, 2015. Spousal support was terminated and child support was increased from \$1,162 to \$1,331 per month, subject to future review pursuant to the provisions of the Separation Agreement.

Other terms of the Separation Agreement were cancelled, varied or clarified. Otherwise, Mr. Chan-Henry's claim to vary/set aside the Separation Agreement was "dismissed as if tried on the merits".

[10] The Consent Final Order resolved neither the acrimony nor the dispute. Four months later Ms. Lui issued a second family law action on October 5, 2015. This is Action No. E152799 ("E152799"). Her Notice of Family Claim sought an order requiring Mr. Chan-Henry to fully disclose assets acquired and owned during the marriage as well as an order for equal division of family property and family debt.

[11] Ms. Lui's pleading has been twice amended. It now seeks to vary the property division effected by the Separation Agreement dated February 11, 2011 on numerous grounds, including non-disclosure and fraud by Mr. Chan-Henry, "lack of proper negotiation", unfairness, unconscionability and duress. The pleading also seeks to "vary or quash" paragraphs 3 and 8 of the Consent Final Order pertaining to child support.

[12] Mr. Chan-Henry defends the claims in E152799 on various grounds including that they are res judicata or otherwise an abuse of process.

[13] On November 4, 2016 Ms. Lui filed a further application in both actions seeking an order for trial of various issues including:

- deletion of paragraph 8 in the June 19, 2015 Consent Final Order (clarifying the interpretation of the Separation Agreement related to child support variation);
- whether Mr. Chan-Henry is "estopped from relying on or enforcing the Separation Agreement";
- imputation of substantially increased income to Mr. Chan-Henry;
- reinstitution of spousal support retroactively and prospectively;
- increased retroactive and prospective child support; and
- an award of damages against Mr. Chan-Henry for "non-compliance with the Separation Agreement dated June 16, 2011 until the [final order] in June of 2015".

[14] On November 18, 2016 Mr. Justice Leask of this Court ordered that all outstanding matters in both actions should be heard together in a single trial.

[15] On January 25, 2017 Master Taylor issued a well-intentioned case management order requiring the parties to determine at trial (then scheduled for February 14, 2017) two threshold issues considered by the parties to be largely dispositive of their respective claims, namely:

- whether Ms. Lui is estopped from varying the Separation Agreement on the basis of the Consent Final Order in E113516; and
- whether paragraph 8 of the Consent Final Order regarding child support is enforceable.

- [16] The trial did not proceed as scheduled. Instead, following several procedural "bumps in the road" the matter eventually came to trial before me in early January 2018. I expressed reservations about "litigating in slices" and the ability to properly try two discrete issues in an action alleging misconduct such as fraud, material non-disclosure, unconscionability and duress. Since counsel for Ms. Liu indicated she was not ready to try these latter issues, I adjourned the trial, seized myself of the case and directed that a full trial of all issues be scheduled at the earliest convenient date.
- [17] The trial resumed on July 31 and proceeded by instalment for parts of August, September, October and November.
- [18] Before resumption of the trial on July 3, 2018, Ms. Liu filed yet another application in E113517 seeking to:
- strike out or set aside all pleadings and proceedings in E113516 subsequent to the final order for divorce granted February 17, 2014; and
 - set aside the Consent Final Order dated June 19, 2015.
- [19] The basis for this application was the wording of the desk order for divorce obtained February 17, 2014, which not only granted the divorce sought by Ms. Liu but which also ordered that "the balance of corollary relief [be] dismissed as abandoned". Ms. Liu's argument is that, from a procedural point of view, this final order was dispositive of the action and any subsequent proceedings were required to be framed either as a separate action or as an application to vary the final order or to vary/set aside the Separation Agreement.
- [20] Mr. Chan-Henry asked that I immediately dismiss Ms. Liu's July 3, 2018 application as an absurdity. However, I directed that the issues raised on the application would be determined on the merits at the conclusion of the trial, along with all the other issues being tried by the parties.

ISSUES TO BE DECIDED

- [21] Because of their potential for a "cascading" effect, I will determine the following broad issues in the following order:
1. Should the Consent Final Order be set aside on procedural grounds?
 2. Should the Consent Final Order be set aside for material non-disclosure or any other grounds that might invalidate the Settlement Agreement embodied therein?
 3. Are the property re-distribution claims in E152799 res judicata or otherwise to be dismissed as an abuse of process?

4. If E152799 is not dismissed by reason of res judicata or abuse of process principles, should the provisions of the Separation Agreement relating to division of matrimonial property be varied pursuant to s. 65 of the Family Relations Act, R.S.B.C. 1996, c. 128?
5. Is Ms. Liu entitled to retroactive or prospective spousal support?
6. Are paragraphs 3, 5 and 8 of the Consent Final Order enforceable? If so, to what effect? If not, should child support be varied retroactively and/or prospectively?
1. Should the Consent Final Order be set aside on procedural grounds?

Facts

- [22] The parties executed their Separation Agreement on February 16, 2011. A Notice of Joint Family Claim was filed on November 14, 2011 seeking a divorce. Paragraphs 4 and 5 of that standard form pleading required the parties to particularize any orders they sought respecting parenting arrangements and child support (paragraph 4) and also respecting spousal support (paragraph 5). No such details were provided nor, indeed, were the boxes indicating the existence of any such claim filled out by an X or ü. However, the boxes requiring the parties to identify the legislation under which any such orders were being sought (i.e. the Divorce Act, R.S.C. 1995, c. 3 (2nd Supp.) or the Family Relations Act) are marked with an X. Hence confusion might have existed whether the Notice of Joint Family Claim was seeking any formal orders respecting parenting, child support or spousal support. As these matters had been recently addressed in the Separation Agreement, it is unlikely that was the case.
- [23] On July 26, 2012, counsel for Ms. Liu filed the Separation Agreement in E113516. This had the effect of making the terms of the Separation Agreement enforceable as a court order.
- [24] On May 16, 2013 the parties filed a Requisition for desk order divorce. Included in the materials was a draft order, and jointly sworn divorce and child support affidavits. The Separation Agreement was attached as an exhibit to the child support affidavit. That affidavit states that the proposed order required child support to be payable in accordance with the Separation Agreement, however the draft order did not actually contain such a provision.
- [25] On July 19, 2013, the court rejected the desk order application for divorce. Various deficiencies were identified in the material, including:
- the date of the marriage in the order did not match the date in the Notice of Joint Family Claim;
 - corollary relief had not been dealt with and an indication was made by the registry that such relief must either be "claimed or dismissed";
 - questions were raised about (i) condonation being identified as a ground for divorce and (ii) confirmation of the full names of the children.

- [26] Ms. Liu attempted to remedy the identified deficiencies but Mr. Chan-Henry was not cooperative. In the result, on November 4, 2013 Ms. Liu filed a Notice of Withdrawal from Joint Family Law Case along with a Counterclaim for divorce. The Counterclaim did not seek any corollary relief. These materials were served on Mr. Chan-Henry on November 10, 2013 but he did not file any Response, thereby permitting the divorce to proceed on an uncontested basis by desk order.
- [27] On December 12, 2013 Mr. Chan-Henry served Ms. Liu with a Notice to Mediate.
- [28] On December 16, 2013 Ms. Liu filed another Requisition for a desk order divorce including as part of the materials a divorce affidavit and a child support affidavit, each sworn December 16, 2013. The draft divorce order granted the divorce and also contained a provision that, "The balance of corollary relief is hereby dismissed as abandoned".
- [29] A copy of the Separation Agreement was attached as an exhibit to the child support affidavit. The affidavit stated that there were no arrears of child support. The divorce affidavit contained the statement, "I wish to abandon the corollary relief claimed except for the claim for divorce".
- [30] This time the desk order materials passed scrutiny by the Registrar and the final order was signed by Madam Justice Bruce of this Court on February 17, 2014 and entered with the registry the following day. It was not served on Mr. Chan-Henry until some time later.
- [31] Meanwhile, on January 20, 2014 Mr. Chan-Henry filed a financial statement in the action. On February 19, 2014 he filed a Notice of Judicial Case Conference and on March 18, 2014 he filed an Amended Notice of Family Claim. Thereafter ensued all of the various interlocutory proceedings ultimately leading to the settlement embodied in the Consent Final Order issued June 19, 2015.

Positions of the Parties

- [32] By way of a mid-trial application filed July 3, 2018, Ms. Liu applies for an order striking out or setting aside all pleadings filed in E113516 subsequent to the final order for divorce issued February 17, 2014, as well as an order setting aside the Consent Final Order issued June 19, 2015. She argues:
- the Supreme Court Family Rules do not permit the filing of an Amended Notice of Family Claim following a final order dismissing all corollary relief as abandoned--the pleading filed by Mr. Chan-Henry is therefore a nullity which should be struck out along with all subsequent steps followed in response; and
 - hence, "the matter of E113516" should never have come before the court in June 2015 in the form that it did--the Consent Final Order resulted from various procedural errors and "compromises made as a result of a looming trial scheduled on an erroneously filed" pleading and should thus be set aside.

[33] In reply, Mr. Chan-Henry says:

- it would be an absurd result if the last four years of litigation were undone on the basis paragraph 2 of the divorce order or because he should have filed an application instead of an amended claim--sending the parties back to square one at this stage would be a "colossal waste of both the parties' and judicial resources";
- neither party raised any concerns before the Consent Final Order regarding the procedural legitimacy of the litigation in which both parties filed pleadings, brought applications, produced documents, undertook discovery, and ultimately agreed to settle the litigation by way a consent order;
- in any event, while Ms. Liu invokes Rule 21-5(1) and *Halliday v. Halliday*, 2015 BCCA 82, in support of her application to strike, subrule 21(5)(2) requires the court to treat procedural non-compliance "as an irregularity and [one which] does not nullify ... (b) a step taken in [a] family law case or (c) ... any order made in the family law case".

Analysis

[34] I agree with all the points raised by Mr. Chan-Henry.

[35] The object of the Supreme Court Family Rules is to secure the just, speedy and inexpensive determination of a family law case on its merits in a practical manner and one proportionate to the interests at stake. To that end, form must not prevail over substance and particularly so where the result, as here, would be to nullify litigation conducted over many years in accordance with procedures to which the parties and the court have acquiesced.

[36] I am not prepared to declare all these matters a nullity just so the same issues can be litigated afresh. Rule 21(5)(1) is not mandatory but only confers a discretion on the court to impose remedies having regard to the object of the Rules as a whole. To that end, it will only be in truly exceptional cases where non-compliance with the rule will result in a nullification of proceedings or court orders and not simply a non-fatal irregularity.

[37] Ms. Liu's application to strike out or set aside on procedural grounds all pleadings and proceedings taken in E113516 following the final divorce order dated February 17, 2014, including the Consent Final Order dated June 19, 2015, is dismissed.

2. Should the Consent Final Order be set aside for material non-disclosure or any other grounds that might invalidate the Settlement Agreement embodied therein?

[38] This is the primary issue in dispute and lies at the heart of the litigation. Ms. Liu contends that Mr. Chan-Henry failed to properly disclose the extent of his income and his financial assets at the time the parties negotiated the Separation Agreement in February 2011. As a result, she says the amount of child and spousal support was unduly low and the division of assets was unfair.

- [39] Ms. Liu also claims that Mr. Chan-Henry engaged in a campaign of deception and non-disclosure directed not only at her but also at the court throughout the subsequent litigation, including the negotiation of the Settlement Agreement in June 2015 and the application for the Consent Final Order. She thus seeks to have child support, spousal support and division of assets re-evaluated in her favour notwithstanding the Consent Final Order purporting to resolve the litigation.
- [40] Each party was represented by legal counsel at various times including during the negotiation of the Separation Agreement in February 2011 and the Settlement Agreement in June 2015 leading up to the Consent Final Order. Ms. Liu made declarations on both occasions that full disclosure had been made, she had been advised of her legal rights and obligations, and she was entering into the Agreements without duress, undue influence or deception on the part Mr. Chan-Henry.
- [41] The Separation Agreement contains a mutual release of all claims and causes of action against each party and the Consent Final Order dismisses "as if tried on the merits" any claims that Mr. Chan-Henry might have to set aside or vary the Separation Agreement. The Separation and Settlement Agreements thus ostensibly provide powerful defences to Ms. Liu's claims, which may not be set aside absent compelling evidence of deceptive conduct on Mr. Chan-Henry's part.

Mr. Chan-Henry's Employment and Income History

- [42] Mr. Chan-Henry was born December 21, 1973 and is 44 years old. He graduated from the University of British Columbia with a Bachelor of Science degree and his entire working life has been in the technology industry, primarily as a software developer.
- [43] He and Ms. Liu started dating in 2004, at which time he was employed by Sierra Wireless Inc. in Richmond, B.C. During the period 2005 to 2017, Mr. Chan-Henry was consecutively employed by UB Video Inc., Scientific-Atlanta Inc., Cisco Systems Inc., and Cypress Solutions Inc. In 2017 he became re-employed by Sierra Wireless Inc. and remains so today.
- [44] Mr. Chan-Henry's employment with UB Video Inc. commenced in June 2005. He was paid an annual salary of \$75,000. Pursuant to a stock option agreement with UB Video, Mr. Chan-Henry had acquired 35,000 common shares of the company as of January 31, 2006.
- [45] On February 2, 2006 UB Video Inc. was acquired by Scientific-Atlanta resulting in the sale of all Mr. Chan-Henry's shares in the company. A portion of the sale price was paid to Mr. Chan-Henry in 2006 and the balance, which was subject to reduction, was payable in 2011. The gross sale price per share was approximately CDN \$2.20 at the time but was subject to later adjustment. Income tax law deemed receipt of the full purchase price at the time of the sale (in excess of \$70,000) and Mr. Chan-Henry was taxed accordingly in the 2006 tax year.

- [46] Following the sale, Mr. Chan-Henry became an employee of Scientific-Atlanta Inc., a company which, in turn, almost immediately became a subsidiary of Cisco Systems Inc. On February 15, 2006 Mr. Chan-Henry was granted an option to acquire 500 shares in Scientific-Atlanta at an exercise price of approximately \$42 per share. Upon acquiring Scientific-Atlanta, Cisco Systems entered into a Stock Option Assumption Agreement with Mr. Chan-Henry pursuant to which the Scientific-Atlanta share option was effectively replaced by an option to acquire 1,099 Cisco shares at an exercise price of \$19.47 per share. The assumed option vested according to a five-year vesting schedule (20% annually) subject to continuation of Mr. Chan-Henry's employment with the company.
- [47] Scientific-Atlanta was a subsidiary of Cisco Systems. In May 2006, Mr. Chan-Henry was awarded 600 Cisco "restricted stock units" under Cisco's 2005 Stock Incentive Plan. As long as he remained employed with Cisco or one of its subsidiaries, the award of restricted stock was to vest over four years (25% per annum), although vesting would terminate if his employment with the company came to an end.
- [48] The parties married on August 27, 2006 and started cohabiting in a house owned by Mr. Chan-Henry at 1071 56th Avenue East, Vancouver.
- [49] In 2009 Mr. Chan-Henry became eligible to participate in Cisco's Employee Share Purchase Plan ("ESPP"). This plan permitted employees to purchase Cisco's shares on a periodic basis by way of contributions through payroll deductions. Such contributions would be made during an "offering period" (six months) with the purchase occurring at the end of that six-month period. The purchase price for the shares was 85% of fair market value.
- [50] All Cisco employee share transactions were managed through an account set up for the employee with Charles Schwab & Co. The employee can access their Charles Schwab account online to obtain details of transactions and statements of account, including accumulated values.
- [51] Cisco remunerated Mr. Chan-Henry with a base salary, performance bonuses, and access to employee stock option/purchase plans. The latter allow employees to acquire shares at a discounted price, i.e. an amount less than the fair market value of the stock at the time the shares are acquired. The taxable benefit received by the employee at the time the shares are acquired is the amount of the discount. The benefit appears in box 38 of an employee's T4 slip and is included in the amount of employment income shown on box 14 of the T4 slip. If the employee does not immediately dispose of the shares at the time of acquisition, any increase in value between the date of acquisition and the date of any subsequent sale is treated as a taxable gain.

- [52] Mr. Chan-Henry's total employment income from Cisco in 2009 was \$97,500 (rounded). The total income set out on line 150 of his 2009 tax return was approximately the same, an amount later confirmed by CRA's Notice of Assessment. The recitals of the Separation Agreement state that Mr. Chan-Henry's employment income was "approximately \$97,595 annually" and that he "expects to earn a similar income in the future".
- [53] At the time the Separation Agreement was negotiated Mr. Chan-Henry did not have his Cisco T4 slip setting out his employment income for 2010. However, in September 2010, he had received a letter from Cisco informing him that his annual base salary had been increased from \$85,100 to \$87,653 effective November 1, 2010. As well, Cisco issued to employees such as Mr. Chan-Henry a "Statement of Earnings and Deductions" along with each paycheque setting out the "Year to Date" amount of earnings and benefits. Before the Separation Agreement was executed, Mr. Chan-Henry had documentation indicating that his total employment income (including benefits) for 2010 was approximately \$113,340, the same amount that was later reflected in his 2010 tax return filed in the spring of 2011.
- [54] Mr. Chan-Henry did not disclose his \$113,340 employment income number to Ms. Liu before the Separation Agreement was executed, and the support amounts payable in the Separation Agreement were based on the 2009 income.
- [55] The matrimonial home owned and occupied by the parties contained a rental suite and at the time of the Separation Agreement was generating an annual gross rental income of approximately \$10,000. The rent was received by Mr. Chan-Henry but was not reported on his tax returns until a reassessment some years later. However, both parties were aware of the rental income and also that it was not considered in the calculation of spousal and child support in the Separation Agreement.
- [56] On the date of the Separation Agreement, Mr. Chan-Henry owned the following Cisco-related financial assets:
1. 1,099 stock options granted before the marriage with an exercise price of US \$19.57 (not actually exercised until January 2015) but which then had a fair market value of only US \$18.58 per share;
 2. 768 restricted stock units with an aggregate fair market value of CDN \$14,054; and
 3. 592 shares purchased through ESPP with an aggregate fair market value CDN \$10,832.
- Thus, all the Cisco stock owned by Mr. Chan-Henry on the date of the Separation Agreement had an aggregate value of a little under CDN \$25,000. These assets were not disclosed by Mr. Chan-Henry to Ms. Liu and did not appear in the list of Mr. Chan-Henry's assets attached to the Separation Agreement.
- [57] It should be noted, Mr. Chan-Henry takes the position that these shares do not constitute a "family asset" subject to distribution under the Family Relations Act.

The Separation Agreement

- [58] Both parties were represented by legal counsel during the negotiation of the Separation Agreement, although Mr. Chan-Henry had terminated the retainer of his lawyer shortly before he signed the document.
- [59] The Agreement spans 15 pages. It contains two pages of recitals, eight paragraphs addressing discrete subject matters, a Solicitor's Certification of Independent Legal Advice respecting Ms. Liu, a Waiver of Independent Legal Advice by Mr. Chan-Henry, and two schedules purporting to list the assets and liabilities of Ms. Liu (Schedule A) and Mr. Chan-Henry (Schedule B) respectively.
- [60] The recitals contain paragraphs identifying Mr. Chan-Henry's employment income as approximately \$97,595 and Ms. Liu's employment income as \$15,000.
- [61] The recitals also contain an acknowledgement by the parties that:
- they have each made "full disclosure of their assets and liabilities as set out in [the schedules]";
 - "no formal disclosure has been provided by either" party and "each of them accepts [the schedules] as being the entire listing of assets and liabilities"; and
 - they have each "been advised by independent legal counsel as to their entitlement to discovery, and other legal means by which they may obtain further information with respect to the other's financial affairs".
- [62] Paragraph 2.6 of the Agreement permits the parties to institute proceedings for divorce but provides that they will remain bound by the terms of the Agreement subsequent to any divorce. Paragraph 8.4 of the Agreement acknowledges a full discharge of all causes of action the parties might have against each other and contains a mutual release of all claims and causes of action arising out of the marriage, including all claims for spousal support or in respect of property under the Family Relations Act.
- [63] Paragraph 3 of the Separation Agreement obligates Mr. Chan-Henry to pay Ms. Liu the sum of \$2,000 per month as spousal support commencing January 1, 2011 until the earlier of the following events:
- Ms. Liu's re-marriage;
 - Ms. Liu receiving employment income of \$55,000 per annum; and
 - the seventh anniversary of the date of the signing of the Agreement.

[64] Paragraph 4 of the Agreement addresses custody, guardianship and access to the children, and child support. Given the approximately equal parent custody/access and the stated incomes of the parties, the net amount of "table" child support payable by Mr. Chan-Henry pursuant to s. 9 of the Federal Child Support Guidelines, SOR/97-175 ("Guidelines") is stated to be \$1,162 per month commencing January 1, 2011 "and continuing thereafter until such time as the earlier of the following occurs":

- the children qualify for their first university degree;
- the children turn 21 years of age;
- the children commence full-time employment;
- the children move out of the home of either parent; or
- the children marry,

in which event "a review of the appropriate child-support payments will be triggered".

[65] Paragraph 4.7 of the Agreement requires Mr. Chan-Henry and Ms. Liu to respectively pay on an 80-20 percentage basis the costs of enrolment, equipment and other costs "necessary for full involvement [of the children] in ... any lessons, extra-curricular sports, classes or activities of any kind". The same percentage obligation is imposed in respect of daycare costs incurred during any future education or employment on Ms. Liu's part.

[66] Paragraph 4.11 of the Agreement (later cancelled by the Consent Final Order) provides:

The Wife and the Husband will each provide the other with a copy of their filed Income Tax Return by June of each year and the child support, spousal support and special payment amounts will be adjusted based on the previous year's employment income of each of the parties. The new payment amount will commence on July 1st of each year.

[67] Paragraph 6.1 of the Agreement addresses the sale of the matrimonial home, an asset which is neither listed nor valued in the schedules. It contemplates Ms. Liu selling her interest in the property to Mr. Chan-Henry for a lump sum payment of \$305,000, with him assuming all debt related to the property including the mortgage and any other charges, taxes, and title transfer transaction costs.

[68] Paragraph 6.3 of the Separation Agreement may have implications for any property re-distribution claim in these proceedings and provides:

6.3 With the exception of the Spousal Registered Retirement Savings Plan held by the TD Waterhouse, each party shall retain all vehicles, savings, money, registered retirement savings plans, GICs, stocks, stock options and restricted stock units, mutual funds, Canada Savings Bonds, insurance policies, bank accounts, Canada Pension Plan credits, certificates, properties and the like in his or her own name, and the other party waives any and all interest in such assets.

Litigation Steps Preceding Consent Final Order

- [69] On July 2, 2013 Ms. Liu enrolled with the Family Maintenance Enforcement Program (FMEP). As noted above, the Separation Agreement had already been filed with the court on July 26, 2012.
- [70] I have described above the procedure ultimately leading to the final order for divorce granted February 18, 2014. I will not repeat it here.
- [71] On February 19, 2014 Mr. Chan-Henry, who was unaware of the existence of the final order for divorce at the time, filed a Notice of Judicial Case Conference. The conference was scheduled for March 20, 2014.
- [72] On March 18, 2014 Mr. Chan-Henry filed an Amended Notice of Family Claim. In that pleading he:
- seeks a divorce;
 - alleges that Ms. Liu is unilaterally enrolling the children in childcare and extra-curricular activities without consultation and then cancels such enrolment while continuing to collect funds for same through FMEP;
 - seeks to vary the access/parenting time specified in the Separation Agreement ("to ensure 50%" sharing) and to require consent before special expenses are incurred; and
 - expresses the belief that Ms. Liu is earning unreported income in excess of \$55,000 (from piano tutoring and U.S. property rental income as well as her income as a bank teller) and seeks termination of spousal support.
- [73] On March 20, 2014 the parties attended a Judicial Case Conference. Ms. Liu was directed to file a Response to the Amended Notice of Family Claim along with a Counterclaim if she wished. Mr. Chan-Henry was directed to report the rental income being derived from his residence. The parties were also required to attend mediation.
- [74] On April 15, 2014 Ms. Liu filed her Response and Counterclaim. She denies Mr. Chan-Henry's allegations and points out that an order for divorce has been granted. She seeks reduction and supervision of Mr. Chan-Henry's parenting time based on "issues of anger management". She alleges non-disclosure of income and assets, and asserts that Mr. Chan-Henry's income is "in the area of \$140,000". She seeks increased retroactive and prospective child support accordingly.
- [75] In June 2014 Mr. Chan-Henry stopped paying spousal support. Both parties attended a mediation in August 2014, without resolution.
- [76] On November 27, 2014, and now represented by counsel, Mr. Chan-Henry filed a Notice of Application seeking to:
1. impute income to Ms. Liu in the amount of \$71,000 per annum; and

2. vary the Separation Agreement to reduce child support, vary contribution to s. 7 expenses, and reduce spousal support.
- [77] The material change in circumstances alleged in the Notice of Application as the basis for reducing support is the loss of his employment at Cisco in October 2014 and the securing of alternate employment effective January 5, 2015 at an annual salary of approximately \$125,000, being a reduction of the approximately \$160,000 earned from Cisco Systems. His severance pay of \$52,000 was also disclosed.
- [78] In support of his application, Mr. Chan-Henry filed an affidavit in which, among other things, he details his change of employment status and the nature/extent of his income in 2013 and 2014.
- [79] On December 1, 2014, Ms. Liu wrote to counsel for Mr. Chan-Henry raising procedural objections to the November 27 Notice of Application, which was returnable on December 9, 2014. Among other things, she notes the application will take a minimum of two days. She threatened to apply for an adjournment.
- [80] On December 8, 2014 the court heard Ms. Liu's short notice application for an adjournment. The court directed certain parts of Mr. Chan-Henry's application to be adjourned to December 29, 2014 and the remainder adjourned generally. Directions were given to Ms. Liu respecting the filing of her Application Response and affidavits.
- [81] On December 17, 2014 Ms. Liu (who had now retained counsel) filed an Application Response, an affidavit and a sworn Form 8 Financial Statement. Among other things, Ms. Liu swears in that affidavit:
- at the time of the Separation Agreement the parties were "well aware that investment and rental income was not to be included in determining spousal support, as this source of income would not be permanent nor would it be reliable" and this was why "both the term 'salary' and 'employment income'" were used in the document;
 - both parties "agreed not to disclose any of our own bank accounts in the Separation Agreement as set out in paragraph 6.3 of the filed Separation Agreement as we agreed to keep our own bank accounts".
- [82] On December 29, 2014 the court ordered a further adjournment of Mr. Chan-Henry's partial application. The matter was put over to February 3, 2015, a date to be preemptory upon Ms. Liu. Liberty was granted for the other aspects of Mr. Chan-Henry's application to also be advanced at the February 3 hearing.
- [83] On February 3, 2015 the court again adjourned Mr. Chan-Henry's November 27, 2014 application and directed that the matter be set down for a five-day trial commencing July 6, 2015. Without prejudice directions were also given respecting s. 7 expenses. Lists of documents and complete financial information were ordered to be exchanged by February 27, 2015 and any examinations for discovery were to be completed by May 15, 2015.

- [84] On February 17, 2015 Ms. Liu, now again self-represented, filed a Notice of Application seeking to increase child support retroactively and prospectively. The basis of her application references Mr. Chan-Henry's gross employment income of \$160,000 in 2014, his current annual salary of \$125,000 plus a rental income of approximately \$8,000.
- [85] On March 9, 2015 the court adjourned Ms. Liu's application directing that, "All matters are adjourned to trial, including spousal support."
- [86] On March 24, 2015 Ms. Liu filed an application for an order that spousal support is still payable by Mr. Chan-Henry in the amount of \$2,000 per month pursuant to the Separation Agreement and seeking a declaration of spousal support arrears in the amount of \$20,000. Mr. Chan-Henry filed his Application Response on April 2, 2015, again alleging under-reporting of income by Ms. Liu and seeking to impute income to her of \$71,000 per annum. The Response again references numerous properties owned by Ms. Liu in Vancouver and the U.S., as well as other financial assets.
- [87] On April 7, 2015 the court adjourned Ms. Liu's March 24, 2015 application so that it might be heard before Master MacNaughton (as she then was), who had granted the earlier adjournment on March 9, 2015. Part of the question at the time was whether the earlier application before Master MacNaughton had included spousal support. Conditional special costs were ordered against Ms. Liu dependent upon the outcome of that question.
- [88] Ms. Liu then again retained counsel and some additional order was imposed on the file. Mr. Chan-Henry swore an updated Form 8 Financial Statement on May 8, 2015. Arrangements were made for an examination for discovery of Mr. Chan-Henry on May 28, 2015. Mediation was raised, as was the possibility of a Judicial Settlement Conference. A Trial Management Conference was scheduled for June 2.
- [89] The May 8, 2015 Financial Statement listed Mr. Chan-Henry's various financial assets including his Cisco stock. The acquisition date for these assets was not disclosed as, indeed, was the case for all of the financial assets, pensions and RRSPs listed. The restricted Cisco stock had earlier been mistakenly listed as "expired" and unable to be sold. This error was remedied in the "Revised Financial Statement" made on May 28, 2015.
- [90] Other changes made in the Revised Financial Statement were the inclusion of Mr. Chan-Henry's 2004 Notice of Assessment and updated values of Charles Schwab accounts. Both Financial Statements also disclosed that Mr. Chan-Henry had disposed of his "Charles Schwab Cisco stock options" on January 2, 2015 for a stated value of CDN \$8,691.11.
- [91] At his examination for discovery, Mr. Chan-Henry was questioned about his compensation structure at Cisco. He specifically identified the existence of a stock option grant, a restricted stock unit grant, and an employee stock purchase plan as well as a group RRSP plan and "CAP awards" (bonuses) in which he participated "to some level". The questioning was not particularly penetrating and he was not cross-examined in any meaningful way on the contents of either the May 8, 2015 Financial Statement or the May 28, 2015 Revised Financial

Statement, which had been provided to counsel that day.

- [92] During his examination for discovery, Mr. Chan-Henry was also questioned respecting the termination of his employment by Cisco, the severance package he had received, and the remuneration paid by his new employer commencing January 2015. He confirmed that his Cisco stock holdings were disclosed in the Financial Statement(s), that he no longer held any more Cisco stock options, and that he had exercised those options in January 2015. Again, he was not asked penetrating questions respecting acquisition or value of these assets, although he was requested to produce "statements for the past three years regarding the Cisco stock options including any information about when they are exercisable and expirations". He confirmed the existence of Charles Schwab and ESPP statements and was requested to provide the documents since the date of separation.
- [93] On May 29, 2015, the day after the examination for discovery of Mr. Chan-Henry, his counsel forwarded to Ms. Liu's counsel a draft Further Amended Notice of Family Claim requesting consent for the amendments failing which the matter would be raised at the Trial Management Conference on June 2, 2015. The rationale for the requested amendments was that "it is in the interests of this proceeding to have all the issues in dispute properly pled before the court".
- [94] The proposed amendments to the Notice of Family Claim were substantial, although most of the substance was already incorporated into Mr. Chan-Henry's application filed in November 2014. The divorce relief was deleted. An order was sought to "set aside or replace" the Separation Agreement with respect to child support, to change the amount of child support payable by Mr. Chan-Henry retroactively and prospectively, and to secure credit for "overpayments" made in that regard. Similarly, the pleading was revised to seek an order "to set aside the Separation Agreement provisions respecting spousal support, and terminate Mr. Chan-Henry's obligation to provide spousal support to Ms. Liu both prospectively and retroactively" on the basis of an imputed income of \$71,000. Termination or variation of spousal support was also claimed to be justified on the basis of, among other things,
- lack of financial disclosure by Ms. Liu including "failure to disclose income and significant property and other information relevant to the negotiation of the Separation Agreement";
 - "lack of proper negotiations in entering the Separation Agreement"; and
 - "the parties' lack of understanding of the nature and consequences of the Separation Agreement", as well as "unfairness, unconscionability and duress".
- [95] On June 1, 2015 Mr. Chan-Henry provided a First Supplemental List of Documents (the original list had been delivered on February 27, 2015). The additional discovery was substantial but did not include all of the documents requested at Mr. Chan-Henry's examination for discovery a few days earlier, nor any of the historical documents respecting stock options and acquisitions in the period 2005-2011. Ms. Liu later agreed to settle the litigation even though some of the document requests arising from Mr. Chan-Henry's

discovery were outstanding.

- [96] The Trial Management Conference took place on June 2, 2015. The trial briefs were filed late (on the date of the TMC) and both addressed the proposed amended pleading. The court declined to make any amendment at the conference itself and ultimately adjourned the conference granting liberty to set a further TMC after further chambers applications had been heard (presumably including one to amend the pleading).
- [97] During the course of the TMC, counsel for Ms. Liu voiced her objection to the proposed amendments to the Notice of Family Claim. She pointed out that the amendments sought to set aside the spousal support provisions of the Separation Agreement, that those provisions were "inextricably linked to the division of assets", a matter that "opens up a whole other bag of worms that we didn't conduct our discoveries on". She also pointed out that if the court was "inclined to allow the amendments, then we would be seeking an adjournment of the trial, costs thrown away and leave to amend Ms. Liu's counterclaim as well." She suggested, "This should go to an application so that those matters can be heard properly in chambers", a sentiment with which the court obviously agreed at the time.
- [98] A Judicial Settlement Conference occurred before Justice Weatherill of this Court on June 5, 2015. No settlement was reached at that time, however discussions continued in the following days culminating in the June 19, 2015 application for the Consent Final Order.

The Consent Final Order Application

- [99] The Consent Final Order was obtained in chambers before Madam Justice Fisher on June 19, 2015. A copy of that order is attached as a schedule to these reasons for judgment and all of the terms will not be repeated here.
- [100] The application, which proceeded by consent, was framed as a summary trial. The terms represent the Settlement Agreement reached by the parties. It is no doubt for this reason that the terminology in the order does not strictly comply with technical requirements. Strictly speaking, recitals such as that found in paragraph 1 of the order ought not be included and the wording should be limited to process disposition. Similarly, it is not appropriate to ask the court to issue an order stating, "The parties hereby confirm and agree ..."; this is not a determination within the jurisdiction of the court. See for example, the comments on this subject at paras. 66-69 of *Canadian Centre for Bio-Ethical Reform v. South Coast British Columbia Transportation Authority*, 2018 BCCA 344.
- [101] Notwithstanding any strictly technical deficiencies, however, the Consent Final Order clearly embodied the Settlement Agreement made by the parties. It has the effect of affirming the Separation Agreement, albeit subject to revisions specified in the order. The result was that:

- Mr. Chan-Henry was to pay Ms. Liu \$74,200 in discharge of all claims respecting arrears of child support (including any s. 7 expenses) up to May 31, 2015 and past and future spousal support, including all sums claimed by FMEP in that regard;
- commencing June 1, 2015 Mr. Chan-Henry was to pay "basic" child support to Ms. Liu in the amount of \$1,331 per month which would be subject to review (i.e. change) only on the grounds specified in paragraphs 4.4.1 through 4.4.5 of the Separation Agreement;
- clarification was made of the quantum and mechanics of reimbursement of costs agreed by the parties to constitute s. 7 special or extraordinary expenses;
- the obligation of mutual annual financial information exchange and consequential adjustment to spousal support and child support (including special expenses) was expressly cancelled;
- express cancellation was also made of the paragraph in the Separation Agreement requiring Mr. Chan-Henry to pay spousal support with the proviso that such a step did "not compromise the validity or effect of the remaining provisions of the Separation Agreement in any way"; and
- "By Consent, any and all claims [Mr. Chan-Henry] may have, whether at law or in equity, to set aside, vary or replace the [Separation] Agreement, including but not limited to claims of duress, lack of disclosure, lack of proper negotiations, lack of legal advice, imputation of income, marriage, change in circumstances and fairness, shall be dismissed as if tried on the merits".

[102] The Notice of Application seeking the Consent Final Order was prepared and filed by counsel for Ms. Liu and was supported by Mr. Chan-Henry's Revised Financial Statement dated May 28, 2015, Ms. Liu's Financial Statement dated May 26, 2015, and affidavits from Mr. Chan-Henry and Ms. Liu sworn June 15 and June 16, 2015 respectively.

[103] The Notice of Application provides in part:

Part 2: FACTUAL BASIS

6. In an attempt to resolve all outstanding issues, including parenting, guardianship, child and spousal support and division of assets, the parties entered into a separation agreement dated February 16, 2011 (the "Separation Agreement").
7. An order for divorce was granted on February 17, 2014.
8. The Claimant filed a Notice of Family Claim on March 18, 2014.
9. Since then, the parties, with the assistance of their respective counsel, exchanged financial statements and engaged in substantial document disclosure.
10. Through their respective counsel, the parties exchanged various proposals and reached a final settlement of all the issues in this proceeding.
11. Both parties have had independent legal advice, have been represented by counsel and had independent legal advice in reaching this settlement.

Part 3: LEGAL BASIS

1. Supreme Court Family Rules, generally and specifically:
 - a. Rule 10-7(1), (1-1), and (2)
 - b. Rule 11-3(2)
- 2..... Family Law-Act, generally and specifically:
 - a..... Sections 81, 92, 94, 95
3. Schlenker v. Schlenker, 1999 CanLII 3658 (BCSC)
 - (1) In this case, the Honourable Mr. Justice Preston reviewed the bases upon which courts have reviewed agreements in family matters. He found 3 bases for review:
 - A. Is the agreement a contract?
 - B. Was the agreement obtained fairly?
 - C. Is the agreement fair?
 - (2) Justice Preston found that "The court must consider whether the agreement contains the essential ingredients of a contract (offer, acceptance, consideration) so that the promises contained in it are enforceable." (para. [7])
 - (3) In considering whether the agreement was obtained fairly, Justice Preston noted:
 - [8] This ground of review may be characterised as one of procedural fairness. Did one party take unfair advantage of the other or were they bargaining on more or less equal terms. The issues examined by the courts include duress, undue influence, unconscionability, fraud and non-disclosure, mistake, incomplete agreements, and lack of independent legal advice.
 - [9] Independent legal advice acts as a strong counterweight to the otherwise unequal bargaining positions that often result from marriage and its breakdown. A person who is properly advised of his or her legal rights and of the significance of a contemplated agreement is less likely to be a victim of duress and undue influence or to enter into an unfair bargain: *Miris v. Miris* (1980), 15 R.F.L. (2d) 152 (B.C.S.C.); *Valta v. Valta* (1978), 1978 CanLII 410 (BC CA), 8 R.F.L (2d) 133 (B.C.C.A.).
 - (4) At paragraph 11 Justice Preston characterizes the final ground of review "as one of substantive fairness" arising out of the principles in ss. 65 and 68 of the Family Relations Act (now ss. 92 and 93 of the Family Law Act). He concludes at paragraph 34 that "sufficient material should be placed before the court to establish that the proposed division of property is not prima facie unfair."

- (5) In the present case, with respect to the first ground of review, all the elements of a contract are present. The parties exchanged several proposals, one of which was accepted by both of them. In accepting this agreement, they have both made concessions and both are receiving consideration.
- (6) Further, with respect to the second ground of review, the Respondent submits that neither party has taken unfair advantage of the other and that they have both bargained on more or less equal terms.
- (7) The parties have both been represented by legal counsel in these proceedings. They have had independent legal advice. Both have had the opportunity to be properly advised of their legal rights to ensure that they do not enter into an unfair bargain.
- (8) Through independent legal advice both parties have been made aware of the documents they are signing and the terms they are agreeing to.
- (9) The parties have both had full and frank disclosure through extensive Lists of Documents and through updated and thorough F8 Financial Statements. The Respondent submits the parties are both fully aware of each other's financial situations.
- (10) The terms of the settlement were reached following the aforementioned substantial disclosure of documents from both sides and have been endorsed by the parties' respective counsel.
- (11) The Respondent submits that in coming to the present agreement, there have been no allegations of duress, undue influence, unconscionability, fraud and non-disclosure, mistake, or incomplete agreement. Both parties have agreed that the terms sought are fair in these circumstances. The Respondent submits that there is no evidence of any procedural unfairness surrounding the circumstances that have led to the present agreement.
- (12) With respect to the third ground of review, the original agreement was entered into in 2011 and the parties have acted and relied upon that agreement, demonstrating that they thought there was fairness. Any issues of unfairness in that agreement have since been considered by counsel and dealt with through the present settlement terms the parties negotiated with the help of counsel and now seek to have entered as a consent order.
- (13).... Counsel in this matter have considered the provisions of the Family Law Act the Family Relations Act with their respective clients and provided independent legal advice. The parties have agreed that this consent order provides a substantially fair resolution of all issues having regard to the principles of fairness and property division found in the Family Law Act.

[Emphasis added.]

[104] The chambers hearing was relatively brief. Part of the exchange between Justice Fisher and counsel for Ms. Liu was as follows:

The Court: While I take it the property issues were resolved in the separation ...

Ms. Jamal: They were.

The Court: ... agreement.

Ms. Jamal: They were.

The Court: Okay, so this is just support issues?

Ms. Jamal: It is, but it was sort of tied in because spousal support was part of the separation agreement as well. And one of the issues at ... would have been at trial is whether that could be overturned and ... and the spousal support was negotiated hand in hand with the division of property.

The Court: Right.

Positions of the Parties

[105] Ms. Liu submits that Mr. Chan-Henry deliberately failed to disclose and, indeed, concealed various matters at the time the Separation Agreement was signed including his "true" employment income (\$97,000 versus \$113,000), the rental income derived from the house, the fact he was to receive a second instalment payment in 2011 for the 2006 sale of the UB Video shares (\$12,000), his unexercised stock option for 1,099 Cisco shares, and the Cisco shares that had already vested.

[106] Ms. Liu also submits that Mr. Chan-Henry perpetrated various deceits upon her and the court in the course of the E113516 proceedings. This includes failing to properly disclose the extent and value of his Cisco shares and stock options in his Financial Statements, failing to disclose and attempting to disguise the dates on which such assets were acquired, providing untruthful or incomplete answers at his examinations for discovery respecting these assets, failing to disclose supporting documentation relating to rental income, and Cisco stock holdings/values, altering an RBC bank statement to falsely increase the amount of money in Ms. Liu's bank account, and the like.

[107] All of this, Ms. Liu submits, amounts to non-disclosure and dishonesty sufficient to set aside the settlement evidenced in the Consent Final Order and to permit a retrospective re-evaluation of property division, child support, and spousal support.

[108] Mr. Chan-Henry submits that any deficiencies in disclosure at the time of the Separation Agreement were all remedied before the Settlement Agreement and the Consent Final Order. The existence and value of the Cisco shares was set out in his Financial Statement as was his exercise of his Cisco stock options in January 2015, which yielded a profit of approximately \$8,700. His Cisco employment income over the years, including his severance payment in 2014 and the details of the remuneration from his new employment was fully disclosed, as was the nature and extent of rental income received from his residence. In May 2015 Ms. Liu received a formal appraisal of the fair market value of the former matrimonial home at \$1,075,000 as at February 1, 2011 and she was thus aware of

the value. He flatly denies fabricating evidence by altering Ms. Liu's bank account information.

[109] In sum, Mr. Chan-Henry submits there is no basis in law or in fact for setting aside the Consent Final Order.

Analysis

[110] I conclude that there is no basis for the Consent Final Order to be set aside. Neither the Settlement Agreement nor the Consent Final Order was obtained as a result of deceit or material non-disclosure on the part of Mr. Chan-Henry. To the contrary, Ms. Liu and her legal counsel were well aware of the true state of Mr. Chan-Henry's finances at the time settlement was reached. No undue influence or duress was at play and there is no evidentiary basis to find that the Agreement was in any way unconscionable.

[111] The representations made to the court on Ms. Liu's behalf at the hearing of the consent order application are fatal to her present claim. The Notice of Application assured the court that substantial document disclosure had occurred, both parties were fully aware of each other's financial situations, neither party had taken unfair advantage of the other, bargaining was on more or less equal terms, both were represented by counsel, and no duress or fraudulent non-disclosure had occurred. The court was also assured that any issues of unfairness in the Separation Agreement had been considered by counsel and that the proposed consent order was a substantially fair resolution of all issues having regard to, among other things, the principles of property division under the Family Law Act, S.B.C. 2011, c. 25.

[112] I certainly agree that complete disclosure of each party's financial affairs at the time of the Separation Agreement may not have occurred. Mr. Chan-Henry did not disclose his current employment income and thereby reduced the amount of child and spousal support he should have paid. As well, he did not disclose his unexercised Cisco stock options nor his Cisco shareholdings at the time.

[113] However, both parties were aware that Schedules A and B were not an "entire listing of assets and liabilities" regardless of the statement to the contrary in recital M of the Separation Agreement. The matrimonial home was not listed. No formal appraisal was obtained (although Ms. Liu spoke with a realtor to discuss value), but they nonetheless negotiated a mutually acceptable value that would generate a lump sum payment of \$305,000 to Ms. Liu. Her motor vehicle, which had a value of approximately \$22,000, was not included in the schedules. Ms. Liu did not include her bank accounts and she relied on s. 6.3 of the Separation Agreement as justification. Specific reference was also made in s. 6.3 to stocks and options, and yet neither Ms. Liu nor her counsel inquired further. Rather, they each agreed to retain the financial assets and properties registered in their own name and to waive claims respecting same. According to Ms. Liu, they also agreed to exclude rent and investment income from the calculation of support.

[114] Any non-disclosure that may have occurred at the time of the Separation Agreement was mostly remedied before the Consent Final Order. It is true that Mr. Chan-Henry did not make document discovery at that time to the same extent made during the ongoing litigation following the Consent Final Order. Nonetheless, there was more than sufficient disclosure on his part, and discovery opportunity on behalf of Ms. Liu, to obtain an accurate history of his assets and finances to June 2015, including his income during that period. Indeed, recalculation and settlement of support claims was made based on this updated history.

[115] Insofar as asset division was concerned, in an affidavit sworn November 5, 2015, in E152799, Ms. Liu acknowledges that:

- she knew that "division of property ... was still an issue" in the litigation back in June 2015, however it "could not be addressed";
- at that time an appraisal was obtained for the matrimonial home and its fair market value at the time of separation was assessed at \$1,075,000. She concluded that Mr. Chan-Henry "had purchased the home [by way of the Separation Agreement] at \$231,506 below the appraised cost value" (a value actually \$46,000 higher than the fair market value);
- she learned through Mr. Chan-Henry's discovery in May 2015 that he "had obtained Cisco restricted stock unit grants, small CAP awards, and Cisco EPP stocks during marriage which he had failed to disclose at the signing of the Separation Agreement", however;
- "despite having discovered that there was unequal division of family property, I was hoping that the matter could be settled out of court".

[116] Given the acrimonious nature of this litigation, including Ms. Liu's accusation that Mr. Chan-Henry had fraudulently manufactured evidence (the bank account statement), it is disingenuous for her to say that she was "hoping the matter [of unequal division of family property] could be settled out of court". And despite the fact that unequal division of property was still an issue (at least in her mind), neither she nor her counsel raised it with the court at the time of the Consent Final Order or indicated further claims in that regard may be forthcoming in the future. To the contrary, she made representations to the court that the settlement embodied in the Consent Final Order was a "substantially fair resolution of all issues" including property division.

[117] I agree with Ms. Liu (and the case law she cites) that family law cases generally, and settlement agreements in such cases specifically, stand on a different footing from commercial cases and that any assessment of the enforceability of such agreements are not to be strictly governed by common law principles developed in a conventional, commercial context. I also agree that the integrity of any bargaining process is an important consideration and that parties in family law cases are obliged to truthfully, accurately and comprehensively disclose information and documentation necessary for a fair determination of the legal issues arising from the breakdown of marriage. The court will

not tolerate conduct that is fraudulent, whether at law or in a broader equitable sense, including conduct falling short of deceit but which nonetheless results in unfair dealing and unconscionable outcomes.

[118] Case law exists for the proposition that s. 93(3) of the Family Law Act has mostly codified the law developed by the Supreme Court of Canada in, among other cases, *Miglin v. Miglin*, 2003 SCC 24 and *Rick v. Brandsema*, 2009 SCC 10. In appropriate cases, the court will set aside family law agreements where a party:

- fails to disclose significant information relevant to the matters being negotiated;
- takes improper advantage of the other party's vulnerability, ignorance, need or distress; or
- did not understand the nature or consequences of the agreement.

[119] Representation by legal counsel is not necessarily a defence where circumstances exist that would otherwise the family law agreement to be set aside. As was noted in *Rick v. Brandsema*, at para. 61, "Exploitation is not rendered anodyne merely because a spouse has access to professional advice."

[120] See also the recent summary of law respecting unconscionability in separation and settlement agreements in *Gibbons v. Livingstone*, 2018 BCCA 443 at paras. 35-47.

[121] The difficulty for Ms. Liu is the absence of a sufficient evidentiary foundation for the relief she seeks. While she portrays Mr. Chan-Henry as a controlling, manipulative individual with far more experience than she in business matters, she is herself neither uneducated nor unsophisticated. She has a university degree and works at a bank. During her testimony she displayed a thorough understanding of the terms of the Separation Agreement and the Settlement Agreement. Her conduct of the litigation during the periods when she was unrepresented by counsel was more competent than most and the content of her affidavits was articulate and thorough. Before finalizing the Settlement Agreement, she was well aware that even though non-disclosure concerns continued, she already had enough information in hand to know an unequal division of family property had occurred. She was represented by experienced family law counsel at the relevant time. She could have applied to adjourn the trial to require further disclosure from Mr. Chan-Henry and/or to explicitly frame inequitable property division in the pleadings, but instead she chose to proceed. In these circumstances, it is entirely fair and appropriate for the Settlement Agreement embodied in the Consent Final Order to be enforced.

[122] The claim by Ms. Liu to set aside the Consent Final Order for material non-disclosure by Mr. Chan-Henry or on any other grounds that might invalidate the Settlement Agreement embodied therein is dismissed.

3. Are the property re-distribution claims in E152799 res judicata or otherwise to be dismissed as an abuse of process?

Facts

[123] The facts underlying the determination of this issue are much the same as in the previous section of this judgment and I will not repeat them here. Some additional facts must also be taken into account.

[124] Mr. Chan-Henry's Notice of Application filed November 27, 2014 asserts that:

- he was under "significant distress" and did not have "proper legal advice" before signing the Separation Agreement, the nature and consequences of which he "did not fully understand";
- Ms. Liu "did not provide full financial disclosure" before the execution of the Separation Agreement and she "failed to disclose significant income and assets", all of which amount to "significant procedural unfairness"; and
- "the Separation Agreement is also significantly unfair under the current circumstances".

[125] Paragraphs 7 through 13 of Mr. Chan-Henry's affidavit sworn November 26, 2014 amplifies these assertions.

[126] In her responding affidavit sworn December 16, 2014, Ms. Liu expressly disputes Mr. Chan-Henry's assertions. Among other things, she swears that:

- Mr. Chan-Henry had been corresponding with his lawyer for two months regarding drafting the Separation Agreement and "he was not under any more duress than myself in the breakdown of our family";
- she and Mr. Chan-Henry discussed the terms of the Separation Agreement before a draft was made by her lawyer and reviewed by both lawyers. This resulted in changes being requested and made by both sides;
- both parties agreed there would be no disclosure of bank accounts in the Separation Agreement and "as set out in paragraph 6.3" of the document, also agreed to keep their respective bank accounts, the sums in which were known to both of them at the time;
- the amount of spousal support set out in the Agreement was part of a "global settlement" in which both parties were to keep their own assets and she was aware that Mr. Chan-Henry's assets "had a much greater total value" than her own.

[127] This acknowledgment that "spousal support was negotiated hand in hand with the division of property" was repeated by Ms. Liu's counsel in her submissions to the court on June 19, 2015 (see para. [104] above). During the course of the June 1, 2015 trial management conference, Ms. Liu's counsel had also pointed out that the spousal support provisions in the Separation Agreement was "inextricably linked to the division of assets" (see para. [97] above).

- [128] Ms. Liu called Mr. Chan-Henry's legal counsel, Ms. Wu, as a witness at the trial. She testified that the unfiled Amended Notice of Civil Claim "was part of the deal" even though it was not filed and that the Consent Final Order settled "all issues between the parties whether pleaded or not".
- [129] Former counsel for Ms. Liu, Ms. Jamal, was also called as a witness at the trial. She testified that the Consent Final Order "dealt with the pleadings as filed" although the order "speaks for itself". However, she acknowledged that even though nothing had been expressly pled respecting issues of property division, paragraph 9 of the Consent Final Order was meant to be a waiver by Mr. Chan-Henry of any "potential claim" in that regard and this was why the Notice of Application, which her office had drafted, made reference to ss. 81, 92, 94 and 95 of the Family Law Act respecting property division.
- [130] Ms. Jamal testified that she "can't say what I'm referring to" in her remarks at the June 1, 2015 trial management conference about seeking "leave to amend Ms. Liu's counterclaim as well" should the court be inclined to allow Mr. Chan-Henry's proposed amendments to the Notice of Family Claim.
- [131] I accept Ms. Jamal's testimony. I find as a fact that division of assets and potential claims by both parties for redistribution of same, albeit in the context of a support variation claim, was expressly considered and taken into account by both parties in the settlement embodied in the Consent Final Order.
- [132] Before I leave the fact-finding portion of this section of the judgment, I wish to comment on the settlement conference that occurred before Mr. Justice Weatherill on June 5, 2015. Counsel for Ms. Liu sought to have the transcript of that settlement conference available for use at trial, including cross-examination of parties and former lawyers. Such settlement negotiations are, of course, subject to privilege but that privilege may not apply in exceptional circumstances, i.e. to prove the existence of a settlement later denied. As well, privilege can be set aside if it has the effect of permitting a deceit to be perpetrated, whether on the court or otherwise.
- [133] I was assured by counsel for Ms. Liu that the settlement conference transcript contained an express reservation by Ms. Liu of a right to assert a property division claim at a later date and that it was thus impermissible for Mr. Chan-Henry to assert otherwise at this time. Treating the exercise as a *voir dire*, the transcript was received by the court. A careful review reveals that no such express reservation was made by Ms. Liu or on her behalf. Hence, I declined to waive privilege and permitted neither the transcript to be put into evidence at trial nor any cross-examination on its contents to occur. I have given no weight whatsoever to the contents of that transcript nor to any exchanges that may have occurred between the court and counsel with respect to same.

Positions of the Parties

- [134] Ms. Liu submits that cause of action estoppel and issue estoppel (the two forms of res judicata in modern practice) are both equitable remedies to which Mr. Chan-Henry is not entitled by virtue of his proverbial "unclean hands", namely "deliberate non-disclosure, misdeeds, litigation abuse and deceit". She argues that s. 9 of the Consent Final Order is limited to a waiver by only Mr. Chan-Henry of any remedies for lack of disclosure. Properly construed, the Consent Final Order does not waive or otherwise preclude Ms. Liu to make a claim in that regard. In the circumstances of this case, it would be "unfair and profoundly unjust" to reward Mr. Chan-Henry by allowing him to "walk away with not disclosing his true financial situation", misconduct that benefitted him and was to the detriment of Ms. Liu.
- [135] Mr. Chan-Henry submits that the principles of res judicata squarely apply to the facts of this case. He also submits that it is an abuse of process for Ms. Liu to defend the enforceability and fairness of the Separation Agreement as part of one action (E113516) and thereafter claim that the same Agreement should be varied for unfairness in a subsequent action (E152799). These are inconsistent pleadings and positions that should not be entertained.

Analysis

- [136] The principles of res judicata estoppel were reviewed in detail by our Court of Appeal in *Cliffs Over Maple Bay (Re)*, 2011 BCCA 180:
- [25] The policy objectives underlying res judicata generally are well-known and have been discussed at length in the jurisprudence and in the academic context: see for example, Donald J. Lange, *Res Judicata in Canada* (3rd ed., 2010), chapter 1; *Henderson v. Henderson*, supra; *Hoystead v. Taxation Commissioner* [1926] A.C. 155 (J.C.P.C.); *Angle v. Minister of National Revenue* [1975] 2 S.C.R. 248; and *Danyluk v. Ainsworth Technologies Ltd.* 2001 SCC 44, [2001] 2 S.C.R. 460. The authors of *Spencer Bower and Turner, The Doctrine of Res Judicata* (4th ed., 2009), state:

Two policies support the doctrine of res judicata estoppel: the interest of the community in the termination of disputes and the finality and conclusiveness of judicial decisions; and the interest of an individual in being protected from repeated suits and prosecutions for the same cause. *Maugham L.C.* said:

The doctrine of estoppel is one founded on considerations of justice and good sense. If an issue has been distinctly raised and decided in an action, in which the parties are represented, it is unjust and unreasonable to permit the same issue to be litigated afresh between the same parties or persons claiming under them.

- [26] Appellate courts in Canada have emphasized that the importance of finality and the principle that a party should not be 'twice vexed' (*bis vixari*) for the same cause, must be balanced against the other "fundamental principle" (see *Hoque* at para. 21) that courts are

reluctant to deprive litigants of the right to have their cases decided on the merits: see *Toronto (City) v. Canadian Union of Public Employees, Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77, at para. 55; *Revane v. Homersham* 2006 BCCA 8, 53 B.C.L.R. (4th) 76 (C.A.) at paras. 16-7; *Lange* at 7-8.

[27] *Res judicata* takes two forms in modern practice, cause of action estoppel (still sometimes called *res judicata*) and issue estoppel. *Lange* summarizes them as follows:

In their simplest definitions, issue estoppel means that a litigant is estopped because the issue has clearly been decided in the previous proceeding, and cause of action estoppel means that a litigant is estopped because the cause has passed into a matter adjudged in the previous proceeding. [At 1.]

The distinction was described in more elaborate terms by Lord Denning, M.R. in *Fidelitas Shipping Co., Ltd., v. V/O Exportchleb* [1965] 2 All E.R. 4 (C.A.):

The law, as I understand it, is this: if one party brings an action against another for a particular cause and judgment is given on it, there is a strict rule of law that he cannot bring another action against the same party for the same cause. *Transit in rem judicatam* ... But within one cause of action, there may be several issues raised which are necessary for the determination of the whole case. The rule then is that, once an issue has been raised and distinctly determined between the parties, then, as a general rule, neither party can be allowed to fight that issue all over again. The same issue cannot be raised by either of them again in the same or subsequent proceedings except in special circumstances ... And within one issue, there may be several points available which go to aid one party or the other in his efforts to secure a determination of the issue in his favour. The rule then is that each party must use reasonable diligence to bring forward every point which he thinks would help him. If he omits to raise any particular point, from negligence, inadvertence, or even accident (which would or might have decided the issue in his favour), he may find himself shut out from raising that point again, at any rate in any case where the self-same issue arises in the same or subsequent proceedings. ... But this again is not an inflexible rule. It can be departed from in special circumstances. ... [At 8-9; quoted with apparent approval in *Grandview v. Doering*, *infra*.]

[28] Although grounded in the same basic considerations, each form involves, or has traditionally involved, criteria that have been expressed in slightly different terms. The traditional criteria for cause of action estoppel, confirmed in Canada in *Angle*, *supra*, were summarized by Chief Justice Hewak in *Bjarnarson v. Manitoba* (1987) 38 D.L.R. (4th) 32 (Man. Q.B.) at 34, *aff'd.* (1987) 45 D.L.R. (4th) 766 (Man. C.A.), as taken from *Grandview v. Doering* [1976] 2 S.C.R. 621:

1. There must be a final decision of a court of competent jurisdiction in the prior action [the requirement of "finality"];
2. The parties to the subsequent litigation must have been parties to or in privity with the parties to the prior action [the requirement of "mutuality"];

3. The cause of action and the prior action must not be separate and distinct; and
4. The basis of the cause of action and the subsequent action was argued or could have been argued in the prior action if the parties had exercised reasonable diligence. [At para. 6; emphasis added in 2011 BCCA 180.]

It is perhaps unnecessary to state that the doctrine contemplates two "causes" - the first having ended in a final judgment that bars a "second claim for the same cause": see *Mohl v. University of British Columbia*, 2006 BCCA 70 at paras. 23-4. In this context, "cause of action" does not refer to the name or classification given to the wrong or remedy, but to a factual situation which entitles one to a remedy: see also *Lange* at 147; *Comeau v. Breau* (1994) 145 N.B.R. (2d) 329 (C.A.) at para. 18; and *Letang v. Cooper* [1965] 1 Q.B. 222 (C.A.) at 242-43.

...

[31] Turning then to issue estoppel, I note the three traditional "tests" adopted by the Supreme Court of Canada in *Angle*, namely:

- (1) that the same question has been decided;
- (2) that the judicial decision which is said to create the estoppel was final; and,
- (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised, or their privies. ... [At 254; emphasis added in 2011 BCCA 180.]

There is also the well-known formulation of issue estoppel given by Middleton J.A. in *McIntosh v. Parent* [1924] 4 D.L.R. 420 (Ont. C.A.):

When a question is litigated, the judgment of the Court is a final determination as between the parties and their privies. Any right, question, or fact distinctly put in issue and directly determined by a Court of competent jurisdiction as a ground of recovery, or as an answer to a claim set up, cannot be re-tried in a subsequent suit between the same parties or their privies, though for a different cause of action. The right, question, or fact, once determined, must, as between them, be taken to be conclusively established so long as the judgment remains. [At 422; emphasis added in 2011 BCCA 180.]

[32] The narrow wording ("directly determined") adopted in these and other authorities, however, has not been construed as strictly as one might expect. In *Danyluk, Binnie J.* for the Court stated at para. 54 that issue estoppel applies "to the issues of fact, law, and mixed fact and law that are necessarily bound up [emphasis added in 2011 BCCA 180] with the determination of that 'issue' in the prior proceeding". This would seem to echo the formulation provided by Lord Shaw in *Hoystead*:

Parties are not permitted to begin fresh litigations because of new views they may entertain of the law of the case, or new versions which they present as to what should be a proper apprehension by the Court of the legal result either of the construction of the documents or the weight of certain circumstances. If this were permitted litigation would have no end, except when legal ingenuity is exhausted. It is a principle of law that this cannot be permitted, and there is abundant authority reiterating that principle.

Thirdly, the same principle - namely, that of setting to rest rights of litigants, applies to the case where a point, fundamental to the decision, taken or assumed by the plaintiff and traversable by the defendant, has not been traversed. In that case also a defendant is bound by the judgment, although it may be true enough that subsequent light or ingenuity might suggest some traverse which had not been taken. The same principle of setting parties' rights to rest applies and estoppel occurs. [At 165-66; emphasis added in 2011 BCCA 180.]

The wording used in *Hoystead* (where it was held that issue estoppel applied not only to the admission of a fact fundamental to the first decision, but also to "an erroneous assumption as to the legal quality of that fact") which I have underlined above was approved in *Angle*, supra, at 255, and by this court in *Morgan Power Apparatus v. Flanders Installations Ltd.* (1972) 27 D.L.R. (3d) 249, at 252. (See also *Hill v. Hill* (1966) 57 D.L.R. (2d) 760 (B.C.C.A.) at 764; *Insurance Co. of the State of Pennsylvania v. Global Aerospace Inc.* 2010 SKCA 96 at para. 78; *Foster v. Reaume* [1927] 1 D.L.R. 1024 (Ont. S.C., App. Div.) at 1033; *Prince v. T. Eaton Co.* (1992) 91 D.L.R. (4th) 509 (B.C.C.A.) at 522.)

...

[42] This brings us to the exercise of the chambers judge's discretion not to apply issue estoppel, a question that is also dependant on case law that is not completely consistent and in which subtleties abound. In *Danyluk*, the Court ruled that it was an error of principle not to address the factors for and against the exercise of the discretion not to apply issue estoppel and that "The list of factors is open ... The objective is to ensure that the operation of issue estoppel promotes the orderly administration of justice but not at the cost of real injustice in the particular case." (Para. 67.) The most important of these, the Court said, was the potential for injustice since, as noted by Jackson J.A. in dissent in *Iron v. Saskatchewan (Minister of the Environment & Public Safety)* [1993] 6 W.W.R. 1 (Sask. C.A.):

The doctrine of *res judicata*, being a means of doing justice between the parties in the context of the adversarial system, carries within its tenets the seeds of injustice, particularly in relation to issues of allowing parties to be heard. [At 21.]

[43] Binnie J. was referring, however, to the tribunal-to-court context rather than the court-to-court context. He noted the Court's earlier decision in *G.M. (Canada) v. Naken* [1983] 1 S.C.R. 72, where it was said that the discretion not to apply issue estoppel is "very limited in its application". A broader discretion, Binnie J. stated, was warranted in relation to the decisions of administrative tribunals. This distinction was made in *Furlong v. Avalon Bookkeeping Services Ltd.*, 2004 NLCA 46, where the Court emphasized that *Danyluk* had

not modified *Naken*, supra, and that potential injustice becomes relevant only where, having exercised due diligence, a party has not received a "full and fair hearing". (At paras. 41-2; emphasis added in 2011 BCCA 180.)

[44] In *Proctor & Gamble Pharmaceuticals Canada, Inc. v. Canada (Minister of Health)* [2004] 2 F.C.R. 85, Rothstein J., then of the Federal Court of Appeal, suggested for the majority that the discretion is limited to "special circumstances" (citing *Henderson v. Henderson*, supra, at 115), which would include fraud, misconduct or the discovery of decisive fresh evidence that could not have been adduced at the earlier proceeding by the exercise of reasonable diligence, although "fairness considerations could cancel the exercise of discretion." (Para. 29.) In *Saskatoon Credit Union Ltd. v. Central Park Enterprises Ltd.* (1988) 47 D.L.R. (4th) 431 (B.C.S.C.), Chief Justice McEachern described the exception as requiring "some overriding question of fairness" necessitating a rehearing. (At 438.)

[137] The law respecting abuse of process was discussed by our Court of Appeal in *Gonzalez v. Gonzalez*, 2016 BCCA 376:

[18] Courts have the inherent jurisdiction and residual discretion to prevent misuse of the court's procedure in a way that would be manifestly unfair to a party or bring the administration of justice into disrepute: see *Behn v. Moulton Contracting Ltd.*, 2013 SCC 26; [2013] 2 S.C.R. 227 at para. 39; *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77 at para. 35.

...

[21] The true concerns of abuse of process are "with the integrity and the coherence of the administration of justice" (para. 29). The doctrine is used in a variety of contexts. The concept was stated by Goudge J.A. in *Canam Enterprises Inc. v. Coles* (2000), 51 O.R. (3d) 481 at paras. 55-56 (C.A.) (dissenting, and approved 2002 SCC 63; [2002] 3 S.C.R. 307). As cited in *Toronto* at para. 37:

The doctrine of abuse of process engages the inherent power of the court to prevent the misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute. It is a flexible doctrine unencumbered by the specific requirements of concepts such as issue estoppel. See *House of Spring Gardens Ltd. v. Waite*, [1990] 3 W.L.R. 347 at p. 358, [1990] 2 All E.R. 990 (C.A.).

One circumstance in which abuse of process has been applied is where the litigation before the court is found to be in essence an attempt to relitigate a claim which the court has already determined.

[Emphasis added by Arbour J. in *Toronto*.]

- [22] In Toronto, the Supreme Court of Canada observed that the overriding concern with abuse of process has less to do with a "sense of unfairness to a party being called twice to put its case forward" (which is a core concern of issue estoppel) and more to do with "the integrity of judicial decision making" (para. 43). The Court discussed several relevant considerations concerning the decision of whether relitigation ought to be considered an abuse of process, at paras. 51-53:
- [51] Rather than focus on the motive or status of the parties, the doctrine of abuse of process concentrates on the integrity of the adjudicative process. Three preliminary observations are useful in that respect. First, there can be no assumption that relitigation will yield a more accurate result than the original proceeding. Second, if the same result is reached in the subsequent proceeding, the relitigation will prove to have been a waste of judicial resources as well as an unnecessary expense for the parties and possibly an additional hardship for some witnesses. Finally, if the result in the subsequent proceeding is different from the conclusion reached in the first on the very same issue, the inconsistency, in and of itself, will undermine the credibility of the entire judicial process, thereby diminishing its authority, its credibility and its aim of finality.
- [52] In contrast, proper review by way of appeal increases confidence in the ultimate result and affirms both the authority of the process as well as the finality of the result. It is therefore apparent that from the system's point of view, relitigation carries serious detrimental effects and should be avoided unless the circumstances dictate that relitigation is in fact necessary to enhance the credibility and the effectiveness of the adjudicative process as a whole. There may be instances where relitigation will enhance, rather than impeach, the integrity of the judicial system, for example: (1) when the first proceeding is tainted by fraud or dishonesty; (2) when fresh, new evidence, previously unavailable, conclusively impeaches the original results; or (3) when fairness dictates that the original result should not be binding in the new context. This was stated unequivocally by this Court in *Danyluk*, supra, at para. 80.
- [53] The discretionary factors that apply to prevent the doctrine of issue estoppel from operating in an unjust or unfair way are equally available to prevent the doctrine of abuse of process from achieving a similar undesirable result. There are many circumstances in which the bar against relitigation, either through the doctrine of *res judicata* or that of abuse of process, would create unfairness. If, for instance, the stakes in the original proceeding were too minor to generate a full and robust response, while the subsequent stakes were considerable, fairness would dictate that the administration of justice would be better served by permitting the second proceeding to go forward than by insisting that finality should prevail. An inadequate incentive to defend, the discovery of new evidence in appropriate circumstances, or a tainted original process may all overcome the interest in maintaining the finality of the original decision (*Danyluk*, supra, at para. 51; *Franco*, supra, at para. 55).

- [138] While many of the cases deal with abuse of process in the context of attempted "relitigation", it has also been invoked where a party advances inconsistent factual and legal positions in different proceedings. Not every instance of such inconsistency will amount to an abuse of process and a careful consideration of the context and circumstances of the case is required. Sometimes, properly interpreted, no inconsistency exists. In other cases inconsistencies that were not advanced deliberately or with full knowledge of the facts may not qualify. However, knowingly advancing irreconcilable positions that are not articulated as alternative claims will usually constitute an abuse of process. See *Pan Afric Holdings Ltd. v. Athabasca Holdings Ltd.*, 2018 BCCA 113 and *Este v. Esteghamat-Ardakani*, 2018 BCCA 290.
- [139] In this case nothing turns on whether the division of assets is a discrete cause of action or merely an issue involved in the process leading up to the parties' Settlement Agreement and/or the Settlement Agreement itself. In the vernacular, the facts of this case clearly establish that the matter was "on the table".
- [140] Ms. Liu herself testified that "division of property ... was still an issue" and that she had "discovered that there was an unequal division of family property" before the Settlement Agreement was reached. It was thus something that either was explicitly interwoven in the issues framed in the filed pleadings/applications or, at the very minimum, was something that could have been argued in the litigation.
- [141] Mr. Chan-Henry was explicitly raising non-disclosure of assets by Ms. Liu as one basis for challenging the fairness of the Separation Agreement. This can be found in his Notice of Application filed in November 2014 and his supporting affidavit of the same date. It was explicitly referred to in the unfiled Amended Notice of Family Claim. Indeed, these claims (and others in a similar vein) were the very reason why Ms. Liu negotiated the inclusion of paragraph 9 of the Consent Final Order.
- [142] In arguing that her own claims for unequal division of property were somehow not included in the Settlement Agreement, Ms. Liu fails to appreciate the lack of logic in the argument. Any claim by Mr. Chan-Henry that lack of disclosure rendered the Separation Agreement unfair (whether limited to property division issues or more broadly) necessarily requires an assessment of such fairness. In resisting any such claim, Ms. Liu is necessarily defending the fairness of the property division. There is only one pool of assets to be (fairly) divided. Both Mr. Chan-Henry's claim and Ms. Liu's claim are with respect to the same thing--they are the reverse sides of the same coin!
- [143] I have found as a fact that division of assets and potential claims by both parties for redistribution of same was expressly considered and taken into account by both parties in the settlement embodied in the Consent Final Order. Whether it be on the basis of cause of action estoppel, issue estoppel or simply abuse of process arising out of inconsistent factual and legal positions in different proceedings, I conclude that Ms. Liu is estopped from advancing the claims in E152799. That action is therefore dismissed with costs.

4. If E152799 is not dismissed by reason of res judicata or abuse of process principles, should the provisions of the Separation Agreement relating to division of matrimonial property be varied pursuant to s. 65 of the Family Relations Act?

[144] In light of my conclusions in the immediately preceding section of this judgment, it is not necessary to address this issue. I will, however, make some comments for the benefit of the parties.

[145] The parties agree that this claim is governed by Part 5 of the Family Relations Act. Under that legislation not all assets owned by a spouse were considered "family assets". Rather, s. 58(2) of the Family Relations Act set out a general definition and subsection (3) amplified what might be included in that regard. For the purposes of the present case, the following questions arise:

1. What was the property owned by one or both of Mr. Chan-Henry and Ms. Liu that was "ordinarily used by them for a family purpose"? and
2. What investments/properties did each of them own to which the other contributed "money or monies worth, directly or indirectly"?

[146] Mr. Chan-Henry claims that some of the assets in his name did not qualify as "family assets". He includes in this category assets that he owned before the marriage, including the UB Video shares, the 56th Avenue property, and the 1,099 Cisco stock options and 600 Cisco restricted stock units. The only Cisco shares that would likely be characterized as a family asset would be those purchased through the ESPP program, assets to which Ms. Liu indirectly contributed by being at home looking after the children while Mr. Chan-Henry was working.

[147] The 56th Avenue property had been purchased by Mr. Chan-Henry in May 2000 for \$264,000. At her insistence, Ms. Liu was added to title as a joint tenant on April 16, 2007. The 56th Avenue property was sold in December 2007 for \$580,000 and the matrimonial home at 3544 48th Avenue East was purchased at that time for \$750,000.

[148] Mr. Chan-Henry testified that following separation he wanted to buy out Ms. Liu's interest in the 48th Avenue property at \$950,000. He testified, and I accept, that Ms. Liu consulted with a realtor at the time and countered with a value of \$990,000, a number he reluctantly accepted. The assessed value of the property for tax purposes was \$805,000 in 2010 and \$837,000 in 2011. When Mr. Chan-Henry applied to increase his mortgage in order to facilitate the purchase of Ms. Liu's interest, Scotiabank appraised the property at \$975,000.

[149] Hindsight historical appraisals were completed in 2015 and 2017 and express the opinion that the fair market value of the 48th Avenue property at the time of the Separation Agreement was between \$1.075 million and \$1.1 million.

[150] In my view, the agreement to value the property at \$990,000 was entirely reasonable.

- [151] The starting point in any asset division analysis is presumptive entitlement on the part of each spouse to 50% of the family assets. That presumption can be displaced if the court finds an equal division would be unfair having regard to the criteria set out in s. 65 of the Family Relations Act, which include duration of the marriage, date of acquisition and disposal, and other circumstances. Any such reapportionment is to be determined as of the date of the "triggering event".
- [152] Quite apart from his argument that some of his assets do not qualify as "family assets", Mr. Chan-Henry also argued for a reapportionment in his favour with respect to other assets, particularly the matrimonial property, on a 75/25 basis. With respect to the home, he particularly relied upon the history of the original contribution, the value of his interest in the home before marriage, and the short duration of the marriage as militating in his favour.
- [153] In my view, Mr. Chan-Henry had strong arguments on these points. Had I been obliged to decide the matter, my conclusion would ultimately have been that the division of assets made at the time of the Separation Agreement was well within the range of what could be considered reasonable and fair in the circumstances.
5. Is Ms. Liu entitled to retroactive or prospective spousal support?
- [154] I have already held that the Consent Final Order is a valid and enforceable order of this Court. That order required a lump sum payment by Mr. Chan-Henry to Ms. Liu in satisfaction of all past and future claims for spousal support. While this was the product of a Settlement Agreement, the court was satisfied it was a fair and appropriate determination of the claim and all related issues in that regard.
- [155] Under s. 17(1) of the Divorce Act, the court has jurisdiction to vary a final order respecting spousal support retroactively and prospectively provided there has occurred a material "change in the condition, means, needs or other circumstances" of either spouse.
- [156] Section 17(1) of the Divorce Act means a spousal support order is never truly final and hence the doctrine of res judicata technically does not apply: see the case law discussed in C.B. v. H.H., 2018 NBCA 45.
- [157] An application to vary a spousal support order does not operate as an appeal. To the contrary, such a variation application treats the original order as correct and is confined to examining whether subsequent changes justify its variation. Such changes must be material in the sense that it is a change that, if known at the time of the original order, would likely have resulted in different terms.
- [158] The evidence does not establish any material change in the condition, means, needs or other circumstances of either Mr. Chan-Henry or Ms. Liu sufficient to warrant a variation of the Consent Final Order. Since that order was made, Ms. Liu is now employed full time as a financial services manager at the Bank of Montréal earning approximately \$45,000 per annum. She derives additional rental income from the properties she owns in Florida,

U.S.A. She enjoyed substantial capital gains from the sale of properties in Florida as well as her own residence in Vancouver. She is currently biding her time and awaiting a continued decrease in property values in Vancouver before jumping back into the local real estate market. Meanwhile, she is living with a friend, rent-free.

[159] Ms. Liu's entitlement to spousal support was undisputed. The length of her marriage to Mr. Chan-Henry was short but, at his insistence, she played the role of a "stay-at-home mother". With the aid of counsel, the parties determined an appropriate period for spousal support that would advance the objectives of self-sufficiency within a reasonable period, would be seven years. That determination was further affirmed at the time of the Consent Final Order when periodic payments were terminated and a lump sum payment was negotiated. This was considered by all parties, including the court, to be fair and reasonable in the circumstances. It remains so today as no material change in circumstances has since occurred.

[160] Ms. Liu's claim to vary the Consent Final Order respecting spousal support is dismissed.

6. Are paragraphs 3, 5 and 8 of the Consent Final Order enforceable? If so, to what effect? If not, should child support be varied retroactively and/or prospectively?

General Principles re Child Support

[161] Whether child support jurisdiction is governed by the Divorce Act or the FLA (or both), the Supreme Court of Canada cases *D.B.S. v. S.R.G.*, 2006 SCC 37, and *Kerr v. Baranow*, 2011 SCC 10, and their progeny, have articulated certain fundamental principles of law applicable to all child support matters:

1. a parent-child relationship is a fiduciary relationship of presumed dependency and the obligation of both parents to provide financial support for the child automatically arises at birth;
2. parents have a joint and ongoing legal obligation to provide financial support for their children in a way that is commensurate to their income;
3. this obligation and the children's concomitant right to support exists independently of any statute or court order;
4. child support is the right of the child, not of the parent seeking support on the child's behalf;
5. support payments are based on earning capacity and not just on what a parent actually earns - as a result, parents have a legal obligation to earn as much as they reasonably are capable of earning so that the children receive an appropriate level of support;
6. a parent does not fulfil his/her obligation to his/her children if (s)he does not increase child support payments when his/her income increases significantly; and

7. both parents must put their child's interests ahead of their own in negotiating and litigating child support.

[162] The Divorce Act and the Family Law Act provide for child support and grant the court jurisdiction to make an order requiring the payment of child support. Both pieces of legislation make it mandatory for child support to be determined in accordance with the Guidelines. In turn, those Guidelines determine the amount of child support based upon the annual income of a spouse.

[163] The Guidelines provide for a three-step process for determining income for child support purposes.

[164] First, reference is made to the spouse's "total income" as set out in line 150 of a standard form Income Tax Return ("ITR"). That ITR requires the spouse to itemize income from a wide variety of sources including:

- employment income;
- pensions;
- disability benefits;
- (un)employment insurance benefits;
- dividends from corporations;
- interest and other investment income;
- rental income;
- taxable capital gains;
- income received from RRSPs;
- social assistance payments; and
- any "other income".

[165] The second step is to adjust the line 150 total income of a spouse in accordance with Schedule III of the Guidelines. Among other things, adjustments are made respecting:

- certain employment expenses;
- social assistance;
- dividends from taxable Canadian corporations;
- capital gains and capital losses;
- business investment losses;
- employee stock options;

- net self-employment income;
- partnership or sole proprietorship income;
- capital cost allowance for property.

[166] The third step is to make any applicable adjustments/determinations under ss. 17-19 of the Guidelines, which address fluctuating patterns of income, consideration of pre-tax corporate income where the spouse is a shareholder, director or officer of the corporation, and imputing income to a spouse in a wide variety of circumstances including such things as intentional under/unemployment, failing to use property to generate income, unreasonable deduction of expenses from income, and deriving income from dividends, capital gains or other sources taxed at a lower rate or not at all.

[167] Sections 21-25 of the Guidelines impose obligations upon a spouse to disclose documentation respecting income. This includes personal tax returns for the three most recent taxation years, copies of each Notice of Assessment and Reassessment respecting those returns, a recent Statement of Earnings from an employer, financial statements of businesses and corporations in which the spouse is involved, and the like. Once a child support order has been made, the payor spouse must, upon request, continue to make such disclosure on an annual basis (s. 25).

[168] For reasons of predictability and consistency, parliament has mandated that child support will be determined with reference to income not capital. Gifts, inheritances, and non-taxable capital gains (e.g. gains on the sale of a principal residence) are not included in a payor's presumptive income because they are not subject to income tax. However, if significant one-time, non-recurring sums of capital are received, e.g. by way of inheritance or sale of a property, investment income from that capital may be imputed to a payor for child support purposes where it is reasonable to do so. See the discussion in *Bright v. Brown*, 2018 BCSC 560 and *Dunnett v. Dunnett*, 2018 BCCA 262.

[169] The present case involves a situation of "shared custody", which triggers the application of s. 9 of the Guidelines. That section makes it mandatory for the amount of any child support order to be determined by taking into account:

- the applicable table amount of child support for each spouse based on each spouse's income;
- the increased costs of shared custody arrangement; and
- the conditions, means, needs and other circumstances of each spouse and each child.

Section 9 of the Guidelines thus means that the income disclosure obligations referred to above apply to both spouses in "shared custody" situations.

[170] Under s. 7 of the Guidelines child support orders can, on request, provide for the payment of certain "special or extraordinary expenses" over and above any support payment based on the tables incorporated into the Guidelines. The guiding principle is that expenses

which qualify as "special or extraordinary" will be shared by spouses pro rata to their respective incomes after deducting any contribution from the child. A very helpful summary of the law related to what constitutes special or extraordinary expenses can be found in *Clarke v. Clarke*, 2014 BCSC 824 at para. 47-55.

[171] I have referred to these child support principles at some length because the parties have at various times had disputes about what should or should not be treated as "income" for child support purposes. For current and future purposes, I clarify that:

- all salaries and taxable employee benefits constitute income;
- so too does net rental income and dividends, interest or other investment income;
- non-taxable capital gains derived from the sale of a primary residence do not constitute income for child support purposes, however investment income derived from that capital receipt may be imputed as income for child support purposes in some circumstances;
- other capital gains, including gains derived from investment/rental properties which are not a spouse's principal residence, constitute income for child support purposes;
- income and returns on investment received within an RRSP do not constitute income for child support purposes until withdrawn from the RRSP; and
- the grant of an employee stock option does not constitute income until the option is exercised, at which time the difference between the exercise price and the fair market value of the shares is treated as a taxable employment benefit classified as employment income and will be taken into account for child support purposes.

[172] These general statements are, of course, subject to refinement as required by Schedule 3 of the Child Support Guidelines.

Enforceability of Consent Final Order Terms Limiting Child Support

[173] Given the nature of their dispute and the acrimony between the parties, it is not difficult to understand why their Settlement Agreement in June 2015 sought to impose a regime incorporating a fixed amount for child support that would be subject to very limited review. Any mechanism that reduces the potential for dispute might result in improved communications and a more positive relationship between the parties in the long run, an outcome that would clearly be in the best interests of their children.

[174] A similar argument was addressed in *Lambright v. Brown*, 2003 BCCA 621 at para. 15:

Counsel for Ms. Lambright suggested that attempting to bring an end to litigation between the parties for the psychological benefit of the parents and the children is a legitimate basis for absolving one parent of the obligation to pay support for the children even where that parent is financially able to pay. I have grave reservations with that suggestion. First, I can find no justification for that position in the language of the Act or the Guidelines. Secondly, giving

credence to such an argument could encourage one parent to use intimidation to coerce the custodial parent into an agreement which does not adequately provide for the support of the children, solely to obtain peace. And, thirdly, if peace is not achieved through such an agreement, the custodial parent is in the difficult position of having to take steps to "undo" the bargain. ...

[175] In *T.S.D. v. S.L.S.*, 2015 BCSC 127, the court stated at para. 48:

Under both the Federal and Provincial schemes regulating child support, the Guidelines are to be applied unless the court is satisfied that the provisions in an order or agreement containing different provisions would benefit the child. While the court has generally taken a deferential approach to separation agreements which are freely negotiated by the parties, in *Miglin v. Miglin*, 2003 SCC 24, the Supreme Court of Canada emphasized that the policy issues and legislative requirements for child support are significantly different than they are for spousal support and that child's right to support cannot be bargained away by a parent.

[176] The Separation Agreement originally provided:

- a Guidelines payment of \$1,162 per month;
- 20/80 per cent payment by mother and father respectively of certain identified categories of additional cost (s. 7 expenses);
- an annual exchange of ITRs by June of each year and an adjustment of child support and "special payment amounts" commencing July 1 of each year and based on the previous year's employment income for each party (para. 4.11); and
- a review of child support in certain specified events (turning 21, full-time employment, getting a degree, getting married, or moving out of the house).

[177] The Settlement Agreement and Consent Final Order modified these earlier child support provisions by:

- fixing child support at \$1,331 per month;
- cancelling the annual ITR exchange and adjustment (para. 4.11);
- limiting future child support reviews to the five events referred to above; and
- prescribing a special costs remedy should either party attempt to have child support varied on any other grounds, including such things as decrease in income, loss of employment, medical leave or imputing income.

[178] In my opinion, the agreement by the parties to have child support paid in a fixed amount on an indefinite basis is contrary to public policy and unenforceable at law. This is also true of the agreement to exclude the possibility of child support variation based on events, which, at law, would clearly constitute a material change in circumstances, i.e. loss of employment, inability to work for medical reasons, et cetera. Such provisions fail to recognize and, indeed, breach the fundamental principles of law applicable to child

support matters referred to in para. [161] above.

[179] For example, assume Mr. Chan-Henry's income doubles next year. The effect of the Settlement Agreement would be to deprive the children of the substantially increased support to which they would otherwise be entitled.

[180] Similarly, assume an accident renders Mr. Chan-Henry unable to work. Even in such catastrophic circumstances, the Separation Agreement would oblige him to pay the fixed child support regardless of the fact that he no longer receives any employment income.

[181] These examples illustrate the potential for injustice that has been woven into the revised child support regime agreed to by the parties. Paragraph 8 of the Consent Final Order must be set aside and the annual information exchange/support adjustment mechanics in the Separation Agreement restored, perhaps with some modification. In order to accomplish this, I order that the Consent Final Order dated June 19, 2015 in E113516 be varied as follows:

1. paragraphs 5 and 8 are deleted;
2. the words in paragraph 3 "which is subject to review under the sole provision set out in paragraphs 4.4.1 through to 4.4.5 of the Agreement" are deleted; and
3. a new paragraph 3.1 shall be inserted following paragraph 3 to read:

"For as long as the children are eligible to receive child support, the claimant and the respondent will each provide the other with a complete copy of their filed Income Tax Return, including all enclosures and attachments, by June 1st of each year and, unless varied by further court order, the amount of child support to be paid for the following year commencing on July 1st of each year will be the appropriate table amount payable pursuant to the Federal Child Support Guidelines, SOR/97-175."

[182] The Consent Final Order amended the provisions of the Separation Agreement respecting the payment of special and extraordinary expenses. The agreement reached by the parties is reasonable and the terms of the Consent Final Order in that regard will continue to be in full force and effect until varied either by agreement of the parties or further order of the court. However, given the conflict that has since ensued with respect to payment of these experts, I vary paragraph 4 of the Consent Final Order to add paragraph 4.7E as follows:

"4.7E The claimant shall pay \$200 to the respondent on the 1st day of each month as an advance payment on account of s. 7 expenses. The receipts for all such expenses will be sent by the respondent to the claimant at the end of each month in which they were incurred; a reconciliation of amounts due shall be made at calendar year end and must be paid no later than January 31st of the next year."

[183] I have already set aside paragraph 8 of the Consent Final Order, which, as indicated above, included a special costs penalty in the event either party sought variation of child support on grounds other than those expressly permitted in the Agreement. I wish to make it clear

that, while parties are free to negotiate litigation cost consequences in commercial or family law agreements, such terms do not bind the court and the court's jurisdiction to award costs is in no way restricted by such contractual provisions. The court may or may not take such contractual provisions into account when making any determination of costs in any given case, but that is a matter of judicial discretion which will be exercised having regard to all the circumstances of the case. The special costs provision should not have been inserted into the Consent Final Order.

Retroactive and Prospective Child Support

- [184] The child support adjustment mechanism contemplated by the Separation Agreement provided for the following year's support to be based previous year's income as reflected in each party's ITR. The Consent Final Order effectively made that adjustment for the 12-month period commencing July 1, 2015 and in doing so had regard to the parties' incomes the previous calendar year.
- [185] The question thus remains whether the restoration of that annual adjustment process should be applied retroactively to the child support paid during the period July 1, 2016 to date, i.e. the past 29 months.
- [186] In my view, it is entirely appropriate for a retroactive adjustment to be made. Ms. Liu's income in the past two years has increased (particularly in 2016 when she enjoyed substantial taxable capital gains) whereas Mr. Chan-Henry's income has declined, albeit in a relatively modest way. I anticipate the exercise may result in a net credit in Mr. Chan-Henry's favour, which ultimately may be set off against Ms. Liu's claim for unpaid s. 7 expenses. I invite the parties to undertake the necessary accounting and to agree on any outstanding amounts as well as the amount of Guidelines child support that Mr. Chan-Henry should be paying during the period July 1, 2018 to June 1, 2019. If they are unable to agree, then the necessary accounting and determinations will be referred to the Registrar.
- [187] For the purpose of taking these accounts, I wish to clarify some other areas of dispute that emerged during the trial. In particular, I am satisfied that Ms. Liu's chosen occupation is a reasonable career path and one suitable to her education and abilities. There are no grounds for imputing any additional income to Ms. Liu, whether on the basis of underemployment or otherwise.
- [188] Second, I am satisfied that Ms. Liu's ITRs accurately reflect the net rental income that she derives from the properties she owns in Florida. The reporting in that regard was prepared by a professional accountant who, it turns out, has not been cooperative with Mr. Chan-Henry's inquiries, but whose professionalism has not been impugned. Mr. Chan-Henry's counsel made great effort to "reconstruct" Ms. Liu's rental regime insofar as expenses are concerned, but I am satisfied that the figures produced by the accountant are sufficiently complete and accurate and that they should be accepted for child support purposes.

[189] As well, I entirely reject any assertion by Mr. Chan-Henry that Ms. Liu has engaged in deceptive behaviour respecting the children's activities in respect of which she seeks reimbursement as a s. 7 expense. I am satisfied that her claims are genuine and they should be treated as such in any accounting between the parties, whether directly undertaken or in any reference to the Registrar.

CONCLUSIONS and SUMMARY

[190] In the result and for the reasons stated above:

1. Ms. Liu's application to strike out or set aside on procedural grounds all pleadings and proceedings taken in Action No. E113516 following the final divorce order dated February 17, 2014, including the Consent Final Order dated June 19, 2015, is dismissed.
2. The claim by Ms. Liu to set aside the Consent Final Order for material non-disclosure by Mr. Chan-Henry or on any other grounds that might invalidate the Settlement Agreement embodied therein is dismissed.
3. Action No. E152799 is dismissed with costs.
4. Ms. Liu's claim to vary the Consent Final Order respecting spousal support is dismissed.
5. The Consent Final Order dated June 19, 2015 in Action No. E113516 is varied as follows:

- paragraphs 5 and 8 are deleted;
- the words in paragraph 3 "which is subject to review under the sole provision set out in paragraphs 4.4.1 through to 4.4.5 of the Agreement" are deleted;
- a new paragraph 3.1 shall be inserted following paragraph 3, to read:

"For as long as the children are eligible to receive child support, the claimant and the respondent will each provide the other with a complete copy of their filed Income Tax Return, including all enclosures and attachments, by June 1st of each year and, unless varied by further court order, the amount of child support to be paid for the following year commencing on July 1st of each year will be the appropriate table amount payable pursuant to the Federal Child Support Guidelines, SOR/97-175."

6. a new paragraph 4.7E shall be inserted following paragraph 4.7D to read:

"The claimant shall pay \$200 to the respondent on the 1st day of each month as an advance payment on account of s. 7 expenses. The receipts for all such expenses will be sent by the respondent to the claimant at the end of each month in which they were incurred; a reconciliation of amounts due shall be made at calendar year end and must be paid no later than January 31st of the next year."

[191] Mr. Chan-Henry is awarded the costs of Action No. E152799. He has been mostly successful with respect to the various applications in Action No. E113516 that were determined at trial and my preliminary view is that costs should follow the event and Mr. Chan-Henry should

also be awarded the costs of the proceedings taken to trial in Action No. E113516. I am aware that accusations of fraudulent non-disclosure were made against Mr. Chan-Henry and that some basis might exist for awarding costs to be assessed as special costs. While his conduct may not have been fraudulent, it is fair to say that his disclosure at various times during these proceedings has been less than entirely fulsome and in such circumstances I would order that costs should be assessed under s-s 4 of Appendix B to the Supreme Court Family Rules as if the case involved ordinary difficulty.

[192] If there exist circumstances warranting a costs disposition other than set out above, the parties are granted liberty to secure a hearing before me at their earliest opportunity, otherwise costs are awarded as set out above.

"KENT J."

SCHEDULE

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