

CANADA / JUDGMENT

Deisman v. Paddle

2022 BCSC 1164

COURT

Supreme Court of British Columbia

DECIDED

3 June 2022

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2022 BCSC 1164 Deisman v. Paddle

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Deisman v. Paddle,

2022 BCSC 1164

Date: 20220603

Docket: E19033

Registry: Duncan

Between:

Quentin Andrew Deisman also known as Quentin Deisman

Claimant

And

Cindy Lynn Paddle also known as Cindy Lynn Deisman

Respondent

Before: The Honourable Justice Blake

Oral Reasons for Judgment

Counsel for the Claimant:

K.A. Cantelon

Counsel for the Respondent:

S.E. Tradewell

Place and Date of Hearing:

Duncan, B.C.

May 30-31, 2022

Place and Date of Judgment:

Duncan, B.C.

June 3, 2022

[1] THE COURT: The applicant, Ms. Deisman, seeks the following:

- a) An order setting aside a consent order entered January 16, 2020 (the "Consent Order"), on the basis that the respondent on this application, Mr. Deisman, made fraudulent representations and negotiated in bad faith in coming to the terms of the Consent Order;
- b) An order that Mr. Deisman pay retroactive spousal and child support pursuant to the parties' separation agreement entered into April 25, 2016 (the "Separation Agreement");
- c) An order calculating the prospective spousal support and child support payments, commencing March 1, 2022, imputing Mr. Deisman's annual income at \$160,000, and Ms. Deisman's annual income at \$35,000;
- d) An order for a fine to be payable by Mr. Deisman in the amount of \$5,000.00 pursuant to s. 213 of the Family Law Act, S.B.C. 2011, c. 25, [FLA]; and
- e) Special costs of this application.

I. BRIEF BACKGROUND

- [2] The parties were married on July 6, 2002 and separated on October 10, 2015. They have one child together, who is currently 14 years old. They entered into the Separation Agreement on April 25, 2016, which incorporated Minutes of Settlement dated December 22, 2015. The Separation Agreement provides:
- a) the claimant's income is \$160,000 and the respondent's income is \$15,000;
 - b) child support is payable by Mr. Deisman in the amount of \$1,397 per month; and
 - c) spousal support is payable by Mr. Deisman in the amount of \$3,500 per month.
- [3] With respect to spousal support, the Separation Agreement provides that Ms. Deisman's spousal support entitlement will be reviewed in 2024 or earlier if there is a material change of circumstances, and the parties will use the Dispute Resolution terms of the Separation Agreement for such a review. The Separation Agreement specifically lists a number of possible material changes in circumstances, including if there is a change in either Mr. Deisman or Ms. Deisman's financial position. The Separation Agreement further provides in clause 6.8:

Until spousal support is adjusted by an amending agreement, court order or arbitration award, Quentin will continue to pay spousal support under this Agreement or Quentin and Cindy's most recent written agreement, court order or arbitration award.

[4] With respect to child support, the Separation Agreement provides:

4.4 Once a year, if either Quentin or Cindy asks in writing, with email or text message being an appropriate form of writing, Quentin and Cindy will review the child support arrangements in this Agreement. If Quentin and Cindy do not agree about any change, they will use the "Dispute Resolution" section of this Agreement to resolve the issues(s).

[5] Clause 4.5 provides that either party may ask for disclosure for the purpose of a child support review, and sets out details of the necessary disclosure, including "the documents required in s. 21(1) of the Guidelines that have not previously been provided" and "any other information needed to review child support". Similar to the spousal support provisions, clause 4.6 provides that until child support is adjusted by an amending agreement, court order or arbitration award, Mr. Deisman will continue to pay child support and his share of the special and extraordinary expenses as agreed to in the Agreement or most recent amending agreement, court order or arbitration award.

[6] Throughout the parties' relationship, Mr. Deisman worked out of province for Valard Construction.

[7] Ms. Deisman has been the primary caregiver for the parties' child, as Mr. Deisman has worked out of town. Ms. Deisman's income is approximately \$15,000 a year. She operates a day care in her house and also hosts students in her house. In 2020, her annual income increased to \$49,000, as a result of the CERB payments she received, which payments have now terminated. She intends to register and complete a part-time Teacher's Educational Assistant online course, which will cost \$2,000, but says she has been unable to register for the course to date as a result of her financial circumstances. The course will take her approximately 4-6 months to complete, while allowing her to continue to work at her day care on a part-time basis.

[8] This application arises out of Mr. Deisman's unilateral decrease in his support payments, and the information that was available to Mr. Deisman at the time the Consent Order was entered into, but which he failed to disclose to Ms. Deisman.

[9] In February 2018, Mr. Deisman advised Ms. Deisman that Valard Construction had decreased the number of hours he was able to work and he advised in April 2018 that he would be reducing his support payments to \$1,212 in child support and \$2,662 in spousal support. Mr. Deisman acknowledges that he ultimately reduced these support payments as of October 1, 2018. The parties agree that there was no agreement between the parties as to the reduced support payments, nor any court order to that effect.

- [10] Mr. Deisman ultimately left Valard Construction at the end of June 2018. He explains that he left his position at Valard Construction for a number of reasons:
- a) the project he had been working at in Alberta was coming to a close in June 2018 and he was scheduled to be laid off by the end of the year;
 - b) he was not certain of his continuing options for employment with Valard Construction;
 - c) his father, who lived in Nanaimo, was terminally ill, and he wanted to move to Nanaimo to be closer to him; and
 - d) his job with Valard Construction was "a physically and mentally demanding position, which required long stays at northern work camps", and he found it took a mental toll on him.
- [11] Mr. Deisman's position is that "[his] decision to change employment to a less demanding position on Vancouver Island was reasonable given [his] age, education, health, work history, and work availability".
- [12] On August 23, 2018, Mr. Deisman advised Ms. Deisman that he had accepted a job with Milner Group Ventures with a starting salary of \$60,000, and that spousal and child support payments should be calculated based on his new income. His salary ultimately increased to \$75,000.
- [13] A year later, in August 2019, Mr. Deisman left Milner Group as he was offered a better paying job at Hazelwood Construction Inc. He was ultimately fired from this position on October 31, 2019, which he says was to make an example of someone.

II. The Consent Order

- [14] On July 22, 2019 the parties attended a Judicial Case Conference (the "JCC"). At the time Mr. Deisman was represented by counsel, who is not his current counsel. The parties disagree as to what occurred at the JCC. Ms. Deisman states that after the JCC, the parties continued to negotiate the terms of their eventual Consent Order. In October 2019 she became aware Mr. Deisman had started a new job working at Hazelwood Construction, where he made a higher income than his previous job. Although Mr. Deisman did not inform her of this change in employment, when requested he did provide a copy of his most recent pay stub from Hazelwood Construction. Ms. Deisman says that in October and November 2019 the parties continued to negotiate, and that notwithstanding, her position was that Mr. Deisman "remained purposefully underemployed and was doing so to subvert his support payments". She says as a result of her financial circumstances, she ultimately agreed to the terms of the Consent Order, which was entered in January 2020.
- [15] Mr. Deisman, however, deposes that the Consent Order was "agreed upon at the JCC". The notes from the JCC clearly indicate this belief was incorrect, which Mr. Deisman's counsel properly admitted. The issue is whether the Consent Order should be set aside as a result of events which occurred after the JCC and before the Consent Order was entered.

- [16] Upon being fired by Hazelwood Construction on October 31, 2019, the evidence is clear that Mr. Deisman returned to work for Valard Construction in November 2019 and was employed by Valard Construction during the negotiation of the Consent Order. In his affidavit sworn April 26, 2022 Mr. Deisman deposes that after being terminated he "began desperately looking for new employment" and he called Valard Construction looking for work. He was advised they would hire him for a new project beginning in January or February 2020, but that they "would try to find a way to keep [him] busy until then". He admits he did not advise Ms. Deisman of the change in his employment status and says he did not do so "as [he] was not sure at that time how much work [he] was going to get from Valard, and [he] did not believe [he] had an obligation to notify her at that time".
- [17] As already set out, the settlement between the parties was distilled into the Consent Order which was entered on January 16, 2020. Ms. Deisman says she entered into this agreement because, as a result of Mr. Deisman's non-payment of support and the engagement of legal counsel, she was incurring substantial debt and was unable to meet her daily needs.
- [18] The Consent Order stipulated that Mr. Deisman had a guideline income of \$80,000. Based on his income, child support was \$765per month, and spousal support was \$1,735per month. The Consent Order further provided that Mr. Deisman owed child support arrears in the sum of \$26,928.45; and spousal support arrears in the sum of \$24,290. The Consent Order was silent on the income of Ms. Deisman. Further, the Consent Order was silent on the basis for the child support and spousal support arrears, and neither counsel on this application had any understanding of the basis for those arrears.
- [19] At no time before the Consent Order was entered into did Mr. Deisman disclose to Ms. Deisman that his employment had changed, that he had been fired from Hazelwood Construction, or that he was again working for Valard Construction for a greater amount of remuneration. While I do not have evidence of Mr. Deisman's salary from Valard Construction in 2019 or 2020, Ms. Deisman set out in her notice of application his CRA Re-Assessments as follows:
- a) 2017 (Notice of Reassessment): \$166,282.00
 - b) 2018 (Notice of Reassessment): \$118,269.00
 - c) 2019 (Notice of Reassessment): \$95,833.00
 - d) 2020 (Notice of Assessment): \$203,950.00

It is clear that Mr. Deisman's annual salaries for 2017 through to 2020 have all been greatly in excess of the \$80,000 agreed to by the parties in the Consent Order. Further, the parties tendered evidence of Mr. Deisman's notices of reassessment, which make clear that his line 150 income for 2017 was actually \$195,095 and his line 150 income for 2018 was actually \$144,667. It is clear these amounts were in fact higher than the income set out in the notice of application, and it is the actual line 150 income which must be used to calculate retroactive support.

- [20] Ms. Deisman argues that Mr. Deisman did not disclose the material fact of his change of employment, and so negotiated in bad faith, ultimately to his benefit and her detriment. Her position is that he sought a reduction in his income to negotiate a lower amount of support, and then returned to earning a higher income once an agreement was in place regarding support.
- [21] Mr. Deisman says he did not seek to deceive Ms. Deisman nor conceal his change of employment from her as:
- a) he was of the belief the terms of the Consent Order had been agreed to at the JCC in July 2019;
 - b) he was embarrassed at having been fired by Hazelwood Construction;
 - c) he did not believe he had an obligation to make immediate disclosure of this change to Ms. Deisman so long as he continued to make payments;
 - d) the nature and pay of his new employment with Valard Construction was unclear when he was initially hired; and
 - e) when he began receiving regular income from Valard Construction, he says the income was comparable to his prior income from Hazelwood Construction.
- [22] Mr. Deisman's position is that the Consent Order should not be set aside.
- [23] A consent order is in the nature of a contract, and principles of contract such as fraud and misrepresentation are applied: *Rick v. Brandsema*, 2009 SCC 10 at para. 64.
- [24] A consent order may be set aside on a number of grounds, including common mistake, fraud, collusion, duress and illegality: see *Kinley (Guardian ad litem of) v. Krahm* (1995), 58 B.C.A.C. 139 at para. 21. Where the order is interlocutory, it is appropriate for a notice of application to be brought to set it aside.
- [25] I am satisfied that the Consent Order was entered into as a result of a mistake on Mr. Deisman's part as to his obligation to disclose his current employment and salary, and a resulting and corresponding mistake on Ms. Deisman's part as to his employment at the time the Consent Order was agreed to. Accordingly, I order that the Consent Order be set aside on the basis of mistake.
- [26] However, I note, I do not accept that the evidence establishes that Mr. Deisman acted in bad faith, nor that he made fraudulent misrepresentations. Rather, I accept that he was embarrassed as a result of being fired from Hazelwood Construction, and mistakenly failed to appreciate his obligation to advise Ms. Deisman of that fact.

III. IMPUTATION OF INCOME

- [27] As a result of my decision to set aside the Consent Order, I must consider the position of the parties with respect to the appropriate Guideline income for each of them.
- [28] Ms. Deisman's position is that the Separation Agreement should continue to govern Mr. Deisman's support obligations, and that income of \$160,000 should continue to be imputed to him, both pursuant to the terms of the Separation Agreement and in accordance with s. 19(1)(a) of the Federal Child Support Guidelines SOR/97-175 [FCSG]. If so, she agrees income of \$35,000 would be appropriate to impute to her.
- [29] Mr. Deisman's position is that income should not be imputed to him, but that any calculation of past child and spousal support should be calculated on the basis of the actual income earned by the parties, and not on the basis of the amount agreed to in the Separation Agreement. He goes further, and in oral argument took the position that additional income of \$20,000 per year should be imputed to Ms. Deisman, on the basis of her online business re-selling items she purchases in a thrift shop, and the exchange students she hosts in her home.
- [30] To support her position, Ms. Deisman says that the evidence shows that Mr. Deisman has regularly sought employment positions with a lower salary at periods of time where the parties are negotiating support, and then returns to earn a higher income once an agreement is in place regarding support.
- [31] In addition to the events leading to the Consent Order, she relies upon the following.
- [32] Ms. Deisman says she was forced to bring an application on August 27, 2020 for disclosure regarding Mr. Deisman's employment, after repeated requests for the same.
- [33] Further, she says the parties agreed to attend a mediation in August 2021, and on July 15, 2021, Mr. Deisman advised her he had accepted a new position with Milestones Equipment Contracting Inc., with an annual income of approximately \$60,000. The August 2021 mediation was ultimately unsuccessful.
- [34] In response, Mr. Deisman says he left his employment at Valard Construction in July 2021 as the job was too demanding physically and emotionally, and that these problems were compounded by COVID-19 restrictions. Upon commencing his employment at Milestones Equipment, he was ultimately terminated in October 2021, as there was insufficient work for him.
- [35] Upon his termination, he obtained work at Bright Landscapes immediately, which job lasted only three weeks as they did not have enough work.
- [36] On December 17, 2021 he began his current job at Built Contracting, as an Equipment Operator and head of the Civil Division. He is paid an estimated annual salary of \$99,000 in this position.

- [37] Ms. Deisman argues that Mr. Deisman has a history of quitting his employment and taking significantly lower paying jobs in or around times that the parties are set to negotiate his income for the purposes of support. She argues he is underemployed, and that his education, job history and skills enable him to earn well in excess of the income of the jobs he has accepted, and his current position. She says he is an extremely qualified and desirable employee.
- [38] Mr. Deisman argues that there is no history or pattern of him evading his support obligations, and that his decision to seek employment in Nanaimo when his father was terminally ill was reasonable in all of the circumstances. Further, he argues that it would not have been feasible for him to continue to work in the northern camps he worked in during his time at Valard Construction indefinitely, and given his age, history and circumstances it is both understandable and reasonable for him to seek employment on Vancouver Island.
- [39] I pause to note that Mr. Deisman takes the position that since he was re-employed by Valard Construction in late 2019 he has advised Ms. Deisman of all changes to his employment, which Ms. Deisman denies. I need not resolve that disagreement to determine this issue.
- [40] The starting point for determining income is set out in sections 15 to 20 of the FCSG. Section 19 of the FCSG provides in part:
- 19(1) The court may impute such amount of income to a spouse as it considers appropriate in the circumstances, which circumstances include the following:
- (a) the spouse is intentionally under-employed or unemployed, other than where the under-employment or unemployment is required by the needs of a child of the marriage or any child under the age of majority or by the reasonable educational or health needs of the spouse;
- [41] Pursuant to section 19(1)(a) of the FCSG, the court may impute such amount of income to a spouse as it considers appropriate in the circumstances, when a spouse is intentionally under-employed or unemployed. An intention to evade or minimize the payment of child support is not required for a finding of intentional underemployment or unemployment: *Barker v. Barker*, 2005 BCCA 177 at para. 19.
- [42] The test for a finding of underemployment is established in *Watts v. Willie*, 2004 BCCA 600 at para. 16, citing *Donovan v. Donovan*, 2000 MBCA 80 at para. 21:
1. There is a duty to seek employment in a case where a parent is healthy and there is no reason why the parent cannot work. It is "no answer for a person liable to support a child to say he is unemployed and does not intend to seek work or that his potential to earn income is an irrelevant factor" (*Van Gool v. Van Gool* (1998), 166 D.L.R. (4th) 528 (B.C.C.A.)).

2. When imputing income on the basis of intentional under-employment, a court must consider what is reasonable under the circumstances. The age, education, experience, skills and health of the parent are factors to be considered in addition to such matters as availability of work, freedom to relocate and other obligations.
 3. A parent's limited work experience and job skills do not justify a failure to pursue employment that does not require significant skills, or employment in which the necessary skills can be learned on the job. While this may mean that job availability will be at the lower end of the wage scale, courts have never sanctioned the refusal of a parent to take reasonable steps to support his or her children simply because the parent cannot obtain interesting or highly paid employment.
 4. Persistence in unremunerative employment may entitle the court to impute income.
 5. A parent cannot be excused from his or her child support obligations in furtherance of unrealistic or unproductive career aspirations.
 6. As a general rule, a parent cannot avoid child support obligations by a self-induced reduction of income.
- [43] Counsel agree that it is factor #2 which is the relevant one on this application, that is, what is reasonable in all of the circumstances. (See also: *T.K. v. R.J.H.A.*, 2015 BCCA 8; *Willms v. Willms*, 2020 BCCA 51.)
- [44] There must be an evidentiary basis upon which to attribute or impute income to a party under s. 19(1) of the FCSG. The party seeking to impute income to the other spouse bears the burden to establish an evidentiary basis for the imputation: *MacCarthy v. MacCarthy*, 2015 BCCA 496 at para. 35. The test for imputing income for intentional under-employment is one of reasonableness "having regard to the parties' capacity to earn income in light of their age, education, health, work history and work availability": *Marquez v. Zapiola*, 2013 BCCA 433 at para. 37.
- [45] I am not satisfied that it is reasonable to impute income to either Mr. Deisman or Ms. Deisman in the circumstances.
- [46] With respect to Mr. Deisman, I accept his evidence that given his age, family history, and personal circumstances it was not reasonable to require him to continue working in the remote northern camps on an indefinite basis. He is currently 44 years old, and I accept his evidence that working in those camps was difficult for him, and made worse by COVID-restrictions. Further, the evidence establishes that he was never out of work for an extended period of time, and he never worked less than full time. I do not accept that Mr. Deisman is underemployed within the meaning of s. 19(1)(a) of the FCSG, and I decline to impute income to him.

- [47] With respect to Ms. Deisman, I accept that while she has supplemented her income as a part-time day care operator with selling used items online, and hosting exchange students in her home, the burden of proof is on the party seeking to impute income to demonstrate that income should be imputed: *Windle v. Windle*, 2010 BCSC 18 at para. 88. On the evidentiary record before me I cannot impute income to her, as there is not a sufficient rational and evidentiary basis to do so.
- [48] However, I stress that nothing in these reasons is intended to fetter the discretion of a judge hearing any future application to determine any future issue of appropriate imputation of income to either party, either at the spousal support review set for 2024 in accordance with the Separation Agreement, or upon any future application for review or variation of child or spousal support. Both parties have an obligation to obtain reasonable employment commensurate with their age, experience, and circumstances. Both parties would be wise to keep this obligation in mind, and take all appropriate steps to obtain and retain such reasonable employment.

IV. Child and Spousal Support

- [49] The FLA provides that the court may vary part of a separation agreement with respect to child and spousal support. Section 148(3) of the FLA provides the court may replace all or part of an agreement respecting child support if the court would make a different order on consideration of the matters set out in s. 150. Section 164 of the FLA provides similar powers with respect to spousal support. It is my opinion that the terms of the Separation Agreement must be changed to account for the material change in circumstances which were effective as of October 1, 2018, being the date Mr. Deisman unilaterally decreased his support payments, contrary to the provisions of the Separation Agreement.
- [50] While Mr. Deisman's counsel urged that it would be best if I use current incomes, in these circumstances, I find the only reasonable basis upon which to analyze the retroactive support owing is to use the parties' respective line 150 incomes for the previous year from their tax returns and notices of re-assessment. This would also be reasonable as a mechanism upon which to base the next year's child and spousal support. Part of the difficulty with Mr. Deisman's changing employment has arisen from him immediately seeking an adjustment to support, when there should be a proper process through which the parties' exchange financial information, determine whether a review is necessary, and if so, engage in that review process. Structuring matters in such a way is fair and reasonable to both parties, and provides both of them with clarity and structure.
- [51] Accordingly, further to the FLA, I order retroactive spousal and child support to be due and owing from Mr. Deisman to Ms. Deisman from October 1, 2018 to June 30, 2022, and is to be calculated on the following basis, with spousal support to be at the mid range prescribed by the Spousal Support Advisory Guidelines:

- a) from October 1, 2018 through to September 30, 2019, on the basis of line 150 2017 income of Mr. Deisman of \$195,095 and line 150 2017 income of Ms. Deisman, which amount was not in the evidence before me;
 - b) from October 1, 2019 through to September 30, 2020, on the basis of line 150 2018 income of Mr. Deisman of \$144,667 and line 150 2018 income of Ms. Deisman of \$31,990;
 - c) from October 1, 2020 through to September 30, 2021, on the basis of line 150 2019 income of Mr. Deisman of \$95,833 and line 150 2019 income of Ms. Deisman of \$17,045; and
 - d) from October 1, 2021 through to September 30, 2022, on the basis of line 150 2020 income of Mr. Deisman of \$203, 950 and line 150 2020 income of Ms. Deisman of \$49,025.
- [52] I have based the above off the affidavit evidence before me. While in the notice of application Ms. Deisman states that Mr. Deisman made \$166, 282 in 2017, his 2017 notice of reassessment shows line 150 income of \$195,095, and whereas the notice of application states he made \$118,269 in 2017, his notice of reassessment shows line 150 income of \$144,667.
- [53] The Consent Order has been set aside, but I do not have any evidence of the basis for the arrears of spousal and child support set out in that Consent Order. Therefore, counsel will have to re-calculate any arrears owing at the time the Consent Order was entered into, and the arrears owing as a result of these reasons for judgment.
- [54] Further, with these reasons for judgment, counsel should be able to easily calculate the child and spousal support due and owing from October 1, 2018 to the date of this judgment, and further should be able to calculate the appropriate child and spousal support payable for July 1, 2022, based upon the parties' respective 2020 line 150 incomes as set out above. That amount is payable on July 1, 2022, and every month thereafter, until further court order or written agreement of the parties.
- [55] There remains one last issue, which is that while the parties agree on the amount Mr. Deisman has paid through the Family Maintenance Enforcement Program, Ms. Deisman says she has received an additional amount of \$18,000 from Mr. Deisman outside of that program, while Mr. Deisman says he has paid an additional \$28,000. Neither party adduced independent documentary evidence of either payment nor lack of receipt of payment of this \$10,000, so this is not a matter I am able to decide on this application. This should be a matter which can easily be resolved between counsel.
- [56] Neither party provided their 2021 tax returns, nor their 2021 notices of assessment. I am ordering that they must do so within two weeks of these reasons for judgment, and that Ms. Deisman must likewise provide her 2017 tax return and 2017 notice of assessment at the same time.

- [57] Further, I am ordering that commencing October 1, 2022, the spousal and child support payments shall be based upon Mr. Deisman's line 150 income from his 2021 tax assessment, and Ms. Deisman's line 150 income from her 2021 tax assessment.
- [58] Finally, moving forward, I asked counsel for some suggested wording to assist the parties in reviewing the support obligations in a more effective and efficient manner, and they agreed to the following wording, which I order now with some minor revisions. For clarity, this wording replaces clause 4.4 of the Separation Agreement (the clause which provides that either party may ask to review child support once a year) but otherwise is in addition to the terms of the Separation Agreement:
- a) for as long as the child of the relationship is eligible to receive child support the parties will exchange:
 - i. copies of their respective income tax returns for the previous year, including all attachments, not later than June 30 each year; and
 - ii. copies of any Notice of Assessment or Reassessment provided to them by the Canada Revenue Agency, immediately upon receipt;
 - b) for as long as the child of the relationship is eligible to receive child support both parties will advise the other of any change to their employment status, including if a new job is obtained, their new annual salary, in writing, within seven days of such a change occurring;
 - c) under s. 222 of the FLA, upon exchange of their income tax returns and notices of assessment, the parties are required to discuss any material change in circumstances which warrant a change in the amount of support payable, on or before July 31 each year. If the parties are unable to agree on whether the amount of support payable should be changed, the parties have leave to bring an application to this Court to change the order for child and spousal support;
 - d) the effective date for any new child or spousal support shall be as of October 1; and
 - e) for clarity, this order is in addition to the disclosure provisions set out in the Separation Agreement dated April 25, 2016.

V. FINE and Special Costs

- [59] Ms. Deisman seeks a fine payable by Mr. Deisman in the amount of \$5,000, pursuant to s. 213 of the FLA. Section 213 provides that if a person fails to comply with an order for disclosure or provides information that is incomplete, false, or misleading, the court may make an order requiring the person to pay up to \$5,000 to or for the benefit of the other party.

- [60] Factors relevant to the imposition of a penalty include the reasons (or lack thereof) for the failed disclosure or compliance, whether the failure was excusable, whether there has been a flagrant disregard of the court process, or whether the disclosure was deficient: *Chan v. Ming et al.*, 2018 BCSC 1094 at para. 44.
- [61] I do not believe, in all of the circumstances, Mr. Deisman was false or misleading in failing to disclose the circumstances of his employment in late 2019, and so I do not find it appropriate to order a fine.
- [62] Further, Ms. Deisman also seeks an order for special costs. This Court recently summarized the relevant principles underlying special costs in *Chapman v. Chapman*, 2020 BCSC 1896 at paras. 6, 7, and 10. I do not find that Mr. Deisman's conduct to be reprehensible such that it warrants sanctioning by way of the imposition of special costs, and I decline to make such an order.
- [63] Both parties seek their costs of this application. I accept that this application was necessary, and as Ms. Deisman has been significantly successful, she is entitled to her costs of this application, to be assessed under Scale B of Appendix B to the Supreme Court Family Rules.

"Blake, J."

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