

CANADA / JUDGMENT

E.K. v. M.L.F.

2025 BCSC 1361

COURT

Supreme Court of British Columbia

DECIDED

17 July 2025

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2025 BCSC 1361 E.K. v. M.L.F.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

E.K. v. M.L.F.,

2025 BCSC 1361

Date: 20250717

Docket: E170936

Registry: Vancouver

Between:

E.K.

Claimant

And

M.L.F.

Respondent

Corrected Judgment: The text of the judgment was corrected on the front page and at paragraphs 190 and 233 on July 21, 2025.

Before: The Honourable Justice Fleming

Reasons for Judgment

Counsel for the Claimant:

M.G. Perry

M. Lokshin

Counsel for the Respondent:

H.B. Chiu

Place and Dates of Hearing:

Vancouver, B.C.

April 13-14, 2023,

November 3, 2023,

December 7, 2023,

June 24, 2024 and

November 14, 2024

Written Submissions of the Claimant

July 31, 2024

Written Submissions of the Respondent

August 23, 2024

Reply Submissions of the Claimant

September 6, 2024

Place and Date of Judgment:

Vancouver, B.C.

July 17, 2025

Table of Contents

Introduction.. 3

Background.. 4

Legal Framework.. 20

Procedural Unfairness under s. 164(3) 27

Failure to Disclose. 27

Misrepresentation. 30

Significant Unfairness under s. 164(5) 37

Entitlement 39

Use of the SSAG in Determining Amount and Duration. 43

Use of the SSAG in the Final Agreement Context 44

Use of the SSAG and High Incomes. 46

Approach to the Parties' Post-Agreement Incomes. 47

Increases in Payor's Income Post-Separation. 49

Applying the s. 164(5) Factors. 55

Child Support. 61

Cost of the Bell Report. 62

Initialized Style of Cause. 63

Costs. 63

Introduction

- [1] The respondent applies under s. 164 of the Family Law Act, S.B.C. 2011, c. 25 [FLA] to set aside a spousal support agreement made in November 2020 (the "Spousal Support Agreement") and asks for a spousal support order based on the parties' annual incomes pursuant to the Federal Child Support Guidelines (the "Guidelines") since then, and applying the Spousal Support Advisory Guidelines ("SSAG"), the mid-range amount.
- [2] The parties married in August 2001, their only child R was born in July 2007, and they separated in August 2016. The Spousal Support Agreement was the last of three separately mediated settlements. Prior to the Spousal Support Agreement, the parties agreed to equal parenting time (and child and spousal support) in January 2018 (the "Parenting Agreement") and family property and debt division in May 2018 (the "Property Division Agreement"). The respondent was represented by experienced family law counsel throughout. With respect to financial issues, she and her counsel received advice and assistance from an accountant.
- [3] In the Spousal Support Agreement, the parties' incomes were fixed at \$435,000 for the claimant, and \$100,000 for the respondent. The claimant was required to pay the respondent monthly spousal support of \$7,821, and monthly child support of \$2,633. But in January 2021, R started living with the claimant full-time and since March 2022, the respondent has been paying him child support.
- [4] The respondent advances procedural and substantive grounds in support of her applications. She contends the Spousal Support Agreement was unfairly reached because the claimant misled her about his income and income trajectory. She also contends the Spousal Support Agreement is significantly unfair given material changes in their financial circumstances. The key change is a substantial increase in the claimant's income since 2019.

- [5] Both the claimant and the respondent also applied for orders dealing with retroactive and prospective child support and s. 7 special and extraordinary expenses. Those issues were settled in an undisclosed agreement, excepting the issue of the parties' incomes for 2022 onward with respect to s. 7 expenses.
- [6] Lastly, the claimant seeks an order apportioning 100% of the cost of a s. 211 report prepared by Dr. Deborah Bell in 2022 (the "Bell Report") to the respondent, based on his view the report would have been unnecessary without her parenting misconduct and unfounded allegation of parental alienation.

Background

- [7] The respondent filed two applications seeking very similar relief under s. 164 of the FLA, the first in October 2022 and the second in March 2023.
- [8] The respondent's applications and two similarly timed applications of the claimant were scheduled for hearing on April 13 and 14, 2023. The claimant's second application sought to cross-examine the respondent on her affidavit evidence, which I permitted with respect to particular issues. The applications hearing did not complete on April 14, 2023. After continuations and case management conferences, it finally concluded on November 14, 2024. The time frame was due in part to what became a much-disputed issue--the relationship between the claimant's increased income and his 80-hour per week plus on call hours work schedule, and the appropriateness of using an income based this schedule in determining the substantive fairness question. Related to this, the parties could not agree on how to estimate the claimant's income if his work hours were normalized. Their submissions relied in part on a review of voluminous source documents and other materials related to the earnings of gastroenterologists.
- [9] The claimant and the respondent are now 56 and 58 years of age, respectively. The parties had established careers when they met. The claimant was a family physician with his own medical practice and the respondent was a registered nurse working full-time in a hospital.
- [10] Shortly before the marriage, the respondent took a part-time position (.6 full time equivalent hours, "FTE") as a clinical nurse educator. Early in the marriage, the claimant began working as a hospitalist. After completing specialized training in renal nursing, the respondent accepted another part-time position (.54 FTE) in a hospital renal program, where she worked for a number of years. She also described working extra shifts, being on-call, and taking extra renal nursing courses before her pregnancy.
- [11] The respondent underwent a surgery and some rounds of IVF before becoming pregnant with twins. Tragically, R's twin died shortly after they were born.
- [12] Around that time, the claimant started six years of additional medical training and obtained specialities in internal medicine, gastroenterology, endoscopic retrograde cholangiopancreatography ("ERCP"), and specialized ultrasound guided therapy. He deposed

to working 75-80 hours a week for those six years, which meant the respondent was primarily responsible for R's care and managing the household. The claimant acknowledges working similarly long hours as a gastroenterologist in Abbotsford, after completing his training, between 2014 and the separation in 2016, which also involved a long commute and being on-call 36 hours per week for multiple hospitals.

- [13] When R was a year old, the respondent returned to her .54 FTE position on the renal unit at the hospital.
- [14] Three years later, she took a clinical nurse educator position that was also part-time but involved more hours (.72 FTE).
- [15] The respondent's parents provided all of R's childcare and assisted with pick-ups and drop-offs once she was in school.
- [16] The parties dispute why the respondent worked part-time throughout the marriage. In some of her evidence and during her submissions, the respondent said she worked part-time from the outset at the request of the claimant or because that is what he wanted. She also deposed that his hospitalist job was very demanding and stressful, so he asked her to stay in her part-time role because he needed her support and to look after the home. Elsewhere, she gave evidence that she and the claimant decided the .6 FTE nurse educator position she took on before the marriage would be ideal given their desire to start a family and her "possible return" to work in the future with a child or children. The respondent similarly described it as a mutual decision for her to work part-time at the start of the marriage. But she also stated the claimant "had promised" her she could work part-time so she could spend time at home and enjoy being a first-time mother, in explaining why she did not work extra shifts after her maternity leave.
- [17] In contrast the claimant deposed:
- it was the respondent who chose to work part-time due to her own preferences;
 - he never asked her to;
 - in fact, he did not agree with her choice to go down to the .6 FTE; and spoke to her several times about working full time, but she was not inclined to;
 - she could have worked full time in renal nursing if she wanted to;
 - he encouraged her to advance her career and pursue professional opportunities;
 - his hospitalist job was not demanding--it involved regular full-time hours with an occasional weekend shift; and
 - there was no need for either of them to work part-time, especially before R was born.
- [18] Acknowledging the respondent did "somewhat" more of the housework during that time, the claimant also highlighted that they had a weekly housekeeper.

- [19] During cross-examination, the respondent continued to offer two slightly different explanations for working part time--that the claimant wanted or needed her to, and that working part-time was part of "our family agreement". She conceded he did not work long hours as a hospitalist, but then said she continued to work part-time because he was concerned they would not see each other if she worked full-time too, given their rotating shifts. The respondent reluctantly agreed the claimant had encouraged or was supportive of her specialized renal nursing training. She also agreed that full-time work in renal nursing would have been available.
- [20] R was nine at the time of separation.
- [21] The parties continued to live together in the former family home until the claimant left in February 2017.
- [22] This proceeding started in April 2017.
- [23] While the respondent says the claimant asked her to keep her .72 position when they separated so she could continue to be R's primary caregiver, the claimant denies this and alleges he made persistent efforts to arrange equal parenting time before and after he moved out, corroborated by counsels' correspondence. In addition to attempting to negotiate parenting time through counsel, he prepared an application seeking equal time and sought an exemption from the requirement to first attend a judicial case conference, which was refused.
- [24] The claimant deposed to a substantial increase in his parenting time after he filed his application in June 2017. An interim order made July 13, 2017, dealt with parenting arrangements, child and spousal support. The claimant's Guidelines income was fixed at \$367,128 and the respondent's, at \$71,395. Regarding support, the claimant was required to pay \$2,930 and \$7,433 in monthly child and spousal support respectively.
- [25] The interim order also appointed psychologist, Dr. Michael Elterman, to complete a s. 211 report regarding an assessment of the needs of R. His report, delivered in December 2017, recommended equal parenting time. The respondent deposed to not agreeing with the recommendation, or equal parenting time before she received Dr. Elterman's report, due to the claimant's long work hours. But the parties agreed to equal parenting time, as well as different Guidelines incomes and support terms at a mediation on January 4, 2018 (the "January 2018 Mediation").
- [26] They entered into the Property Division Agreement at a subsequent mediation on May 31, 2018 (the "May 2018 Mediation").
- [27] The respondent suggested the claimant's financial disclosure prior to the May 2018 Mediation was less than adequate. She indicated it was limited to "some financial information" about the claimant's various companies and the parties did not exchange Form F8 financial statements. I agree with the claimant that this significantly understates his disclosure. The evidence shows the respondent's lawyer received rather extensive financial

information, which was also reviewed by an accountant she retained. Further, her accountant corresponded directly with the claimant's accountant to obtain additional information, and the mediation date was postponed twice so he could complete his review.

- [28] Regarding the Property Division Agreement itself, the respondent asserted she had agreed to receive less than half of the net family property because she wanted to ensure she retained her municipal pension, and she did not want to engage in a long court battle that would diminish the family's financial resources. However, she did not provide any evidence in support of the assertion she received less than 50%. Indeed, the only "evidence" regarding the value of the assets and debts at the time of the May 2018 Mediation was a Scott Schedule prepared by the claimant.
- [29] Under the Property Division Agreement and based on the values in the Scott Schedule, the respondent retained the former family home debt-free (\$975,000) and its contents (\$40,000), her municipal pension (\$133,052), her TFSA (\$22,584), her RRSP (\$174,287) and a time-share (\$4,000). The claimant retained his corporate assets which included his medical corporation ("Medical Corp."- \$998,000) and two numbered companies ("160 Ltd."-\$106,978) and ("512 Ltd."-\$104,417), and his motor vehicle (\$80,000). He also assumed sole responsibility for the vehicle debt on a line of credit (-\$75,989) and transferred \$60,000 from his RRSP to the respondent to equalize their respective RRSPs (approximately \$230,000 each). In addition, he paid the respondent \$40,000 in cash. Each party kept any other assets (and debts) in their own names, which for the respondent included a bank account (\$46,678) and the claimant, a TFSA (\$22,172), as well as a tax liability (-\$74,678).
- [30] Regarding the claimant's numbered companies, the Scott Schedule noted 160 Ltd. owned a building (purchased for \$2,610,000, with a 2018 appraised value of \$2,900,000) that was subject to a mortgage; and 512 Ltd. owned a building that was sold in 2017, with the proceeds paid to Medical Corp. to repay a loan.
- [31] Based on the values in the Scott Schedule, the respondent said she received \$1,221,314 in family property and the claimant, \$1,311,567. By my calculation, she received approximately \$1.455 million. Her calculation of the claimant's share did not account for the claimant's liability for the line of credit, nor the estimated deduction of \$475,411 in corporate tax liability (upon dissolution) included in the Scott Schedule, at a rate of 34% for distribution tax. The respondent disputed its inclusion and stated she did so at the May 2018 Mediation, pointing to her mediation brief. She also stated her lawyer argued the distributive tax the claimant proposed was too high.
- [32] The claimant acknowledged the respondent took the position in her brief that distributive tax should not be accounted for, but he asserted she did not advance that position during the mediation itself. The respondent's mediation brief dealt with the issue only briefly--it proposed that her share in the claimant's medical corporation be valued without a deduction for tax because there was no reason to dissolve it.

- [33] With or without the distributive tax deduction, the property division agreed to strikes me as close if not very close to equal. Further, as the claimant emphasized, in contrast to his corporate assets, the respondent's major asset, the former family home was mortgage-free and provided her with the benefit of no tax consequences should she choose to sell it. Certainly, the then Property Division Agreement provided for an equitable sharing of family property and debt between the parties.
- [34] A consent order granted June 4, 2018, incorporated the terms of the Property Division Agreement and the Parenting Agreement regarding equal parenting, the parties' Guidelines incomes and child and spousal support (the "Consent Order").
- [35] As a result, under the Consent Order the claimant was required to pay the respondent \$4,100 per month in spousal support once the respondent's vehicle lease expired. Both child and spousal support were to be reviewed in June 2019. Failing an agreement on continued spousal support, the parties were required to mediate before bringing an application.
- [36] Regarding the parties' Guidelines incomes, the Consent Order reads:
9. The parties acknowledge that (a) [the claimant's] income has been significantly reduced from his pre-separation income and (b) [the respondent's] income of approximately \$75,000 is based on her working .72 of a [FTE]. The parties have agreed that for the purpose of the [Guidelines], [the claimant's] Guideline Income is imputed to be \$275,000 and [the respondent's] is imputed to be \$85,000. On the review of support contemplated herein, [the respondent's] Guideline income will be imputed to be not less than \$90,000.
- [Emphasis added.]
- [37] The significant reduction in the claimant's income referred to in the Consent Order related to health issues he experienced after the separation.
- [38] The claimant's fourth amended list of documents dated May 9, 2018, included medical letters from 2017 that were originally listed earlier. Some of those letters are in evidence. The first, dated June 22, 2017, is from psychiatrist Dr. N.G. Nair. He described the claimant as suffering from specified significant symptoms of anxiety and depression, as well as hypertension, high cholesterol, and an enlarged heart, while working almost 80 hours per week plus on-call. Dr. Nair diagnosed the claimant with major depressive disorder "with anxious distress, moderate severity". Noting the claimant's condition had been slowly improving with antidepressant medication, the letter set out a treatment plan that included significant lifestyle changes. In terms of work, Dr. Nair bluntly cautioned the claimant against continuing to work 80 hours per week and recommended 35-40 hours instead. The second letter, from his family physician Dr. I. Lieu, dated June 23, 2017, indicates she had diagnosed him with hypertension and high cholesterol, as well as anxiety and depression in February 2017. Based on current testing, she found his anxiety was moderate to severe and his depression was severe. Like Dr. Nair, she expressed the view that the claimant needed to scale back his practice and work reduced hours, in the range of 35-40 hours per week, which

could be adjusted based on future assessments.

- [39] There is also an undated letter from Dr. A.C.H. Vivian, the claimant's business partner, with a faxed date of June 26, 2017. He indicated the two of them were the only specialist gastroenterologists performing hospital-based call duties in the Fraser East health region at that time. Dr. Vivian wrote the claimant had told him he needed to reduce his workload and his 80.5-hour work week (plus 36 hours on-call per week), due to significant health concerns. The letter also stated that after several years of long hours to make up for the income the claimant lost during his speciality training, his plan was to change his practice and significantly reduce his work hours.
- [40] The parties did not address whether the letters were admissible for a hearsay, as well as a non-hearsay purpose, or as expert opinion evidence. Certainly, the content of the letters is admissible for the facts of the diagnoses and recommendations made and their timing.
- [41] I also note the claimant's mediation brief for the January 2018 Mediation described the claimant's "extremely poor state of health" at the end of the marriage and his subsequent diagnosis of "extremely high blood pressure and anxiety". The brief provided that, acting on medical advice, the claimant had reduced his work schedule to approximately 40 hours per week beginning in early 2017. It attached financial statements from Medical Corp. for 2017 which showed a net income of \$59,379 as well as a loan provided to the claimant as a shareholder in the amount of \$166,420 (a total income of \$246,326.17).
- [42] Before the letters and the brief, in an affidavit made March 31, 2017, the claimant deposed to suffering from anxiety, depression, and insomnia and having been diagnosed with severe hypertension. He also deposed to needing significantly more time away from work and Dr. Lieu advising him to make an immediate change to his work life.
- [43] In subsequent affidavit evidence, the claimant said he had to reduce his work schedule in 2017 from 80 hours per week to 35-40 hours per week. In his affidavit made April 5, 2023, the claimant also said he raised his health issues and reduced work hours/income at the January 2018 Mediation, as reflected in his mediation brief dated January 3, 2018. He denied raising these issues or suggesting his health was impeding his work (and income) at the mediation on November 23, 2020 (the "November 2020 Mediation"), which resulted in the Spousal Support Agreement.
- [44] Correspondence between counsel, the claimant's 7th amended list of documents dated November 16, 2020, and the index to his book of documents for the November 2020 Mediation also indicate that he provided reasonable if not fulsome personal and corporate financial document disclosure for up to the end of 2019. The book of documents included the claimant's personal income tax documents from 2016-2019, and various financial statements, trial balances, corporate income tax returns, and general ledgers for each of Medical Corp., 160 Inc., and 512 Inc., spanning 2015-2020.

- [45] The respondent's evidence of her understanding of the claimant's income leading up to, and during the November 2020 Mediation, is discussed below.
- [46] Summarizing, the terms of the Spousal Support Agreement include:
1. The claimant will pay the respondent \$59,500 for retroactive child support and retroactive after-tax spousal support up to and including November 15, 2020.
 2. The parties agree that for the purpose of the Federal Child Support Guidelines, and the calculation of spousal support, the claimant's Guidelines income is \$435,000 and the respondent's is \$100,000.
 3. Commencing December 15, 2020 and continuing until reviewed as provided in paragraph 8, the claimant will pay basic child support to the respondent in the amount of \$2,633 per month.
 4. The parties will share R's school expenses in proportion with their respective incomes.
 5. The parties will share equally any other s. 7 expenses for R including extraordinary expenses for extracurricular activities that are agreed upon in writing in advance of being incurred.
 6. Basic child support and the proportionate sharing of school expenses and other s. 7 expenses will be reviewed annually in June of each year, commencing June 2022, and for the purposes of the review each party will provide the other with all income information specified in paragraph 21 of the Federal Child Support Guidelines.
 7. Commencing December 15, 2020 and continuing until and including December 15, 2028, the claimant will pay spousal support to the respondent in the amount of \$7,821 per month.
 8. As of the final payment of spousal support on December 15, 2028, the respondent's entitlement to spousal support will cease and the claimant's obligation to pay spousal support will be terminated absolutely, regardless of any future change in the circumstances even if unforeseen.
 9. The parties confirm that they intend to be bound by the terms of this Agreement and will instruct their respective counsel to prepare and enter a Consent Order incorporating the terms of this Agreement and such other terms as counsel may advise and agree.
- [47] In January 2021, R began living full time with the claimant. She was 13 by then. The respondent described being blindsided as well as devastated by the sudden change and the loss of parenting time with R.
- [48] The circumstances related to this change are outlined because the respondent relied on them as part of the material change in circumstances she said followed the Spousal Support Agreement and the claimant asks that she be required to pay the full cost of the Bell Report.

- [49] In brief, the claimant alleged R had been complaining to him for some time before January 2021 about the respondent's outbursts of anger and verbal abuse. On one occasion she phoned him from the respondent's car, and he could hear her screaming and swearing at R. R also made multiple recordings of the respondent yelling and swearing at her and her distress, to convince him the problem was real. In early January 2021, R asked the claimant to pick her up from the respondent's home, which he did. She was adamant about not wanting to see the respondent because of her conduct. R was also experiencing significant mental health symptoms. Concerned about R's fragile emotional state, the claimant said he did not feel it was in her best interests to force contact. The respondent accused the claimant of parental alienation.
- [50] Based on another s. 211 order, psychologist Dr. Deborah Bell completed the Bell Report, which examined a range of issues including R's views and needs, the parties' parenting capacities, and the reasons for R's "estrangement" from the respondent.
- [51] Dr. Bell concluded the claimant had not alienated R and identified the primary reason for R's ongoing estrangement as the respondent's out-of-control behaviour when she had attempted to direct or discipline R, before she insisted on living with the claimant. Dr. Bell opined that this behaviour had caused a "breach" for R.
- [52] Although the respondent acknowledged she had been struggling in 2020 and was yelling more at R as a result and she listened to R's recordings during the assessment process, she remained convinced that the claimant had maliciously interfered with her relationship with R. Apart from her past yelling, Dr. Bell noted, the respondent was unable to identify how her behaviour had and was contributing to R's ongoing reluctance to see her. Dr. Bell described the respondent as tending to be overly forceful with R when she expressed distress or upset. She remained fixated on making her point rather than "seeing through her daughter's eyes".
- [53] Dr. Bell also highlighted the negative effect of ongoing text messages from the respondent and her parents, which R experienced as a "campaign of guilting, needling and manipulation". Dr. Bell opined the respondent would need to do "some work herself" to understand the breach from R's perspective and to heal it. This included learning how her communication style impacts R.
- [54] Regarding the claimant, Dr. Bell accepted his and R's assertions he had consistently encouraged her to see the respondent. Dr. Bell also indicated the claimant understood that not seeing the respondent was not in R's best interest and expressed dismay over the estrangement, as well as empathy for the respondent. Further, he conveyed to Dr. Bell that an equal parenting schedule would be easier for him, given his work schedule.
- [55] But Dr. Bell also found that the claimant had unintentionally engaged in behaviours that prolonged the breach, rooted in his passive parenting style. Dr. Bell explained his difficulty as not knowing when to take charge and when to empathize with R. Identifying the claimant as "intimidated by [R's] emotional state", Dr. Bell concluded R's significant mental health symptoms and emotional outbursts made him scared to take action. Instead, he was very

hesitant to direct her out of fear of upsetting her, even when he knew it would be better if R "did something, like talk to her mother".

- [56] Dr. Bell also underscored what I would describe as both parties' poor co-parenting when they shared equal parenting time: "[R] was left in the middle of two parents who did not communicate well, were not welcome in the other's home, shared inappropriate information about the other parent and did not demonstrate much insight into [her] experience of all this".
- [57] At the same time, Dr. Bell characterized each party as an "attentive and effective" parent to R with different limitations.
- [58] She recommended different forms of therapeutic support for each of them and R. Regarding parenting time, Dr. Bell stated there was "no reason for changes to the current parenting agreement". But she also contemplated a gradual return to R enjoying parenting time with each party, in the context of successful therapy: "Although [R] does not want to spend time with her mother at this time, it is my sincere hope that with each family member getting the appropriate therapeutic supports that [R] will be able to enjoy parenting time with both of her parents". She further explained:

Once both of these parents start addressing how their own behaviour may be impacting [R], they will be in a better position to start shifting her back to an equal schedule. It is important that [R] is not pushed into anything either. Given the history and all of the hurt and misunderstanding of the last year, it is important that her return to her mother's is gradual and done with the support of the therapists involved, who will be able to determine readiness.

- [59] Dr. Bell later clarified her recommendation about parenting time in an email dated April 25, 2022, stating:

It was my hope that both parties would understand that what [R] needs is a gradual return to 50-50 parenting time in a manner that is supported by experienced therapist(s) for both [R] and her mom. Any attempt to "enforce" a 50-50 parenting schedule would be traumatic for [R] and almost surely fail. It would cause an increase in the rupture between [R] and her mother.

- [60] In their more recent affidavits, each party deposed to following Dr. Bell's recommendations for therapeutic services. The respondent identified an educational parenting program she completed and some parenting coaching she has received. She also described her relationship with R as improved and continuing to improve, noting the two of them had enjoyed a spring break vacation together. The claimant too attended counselling, seeking guidance, he stated, on developing a more assertive parenting style.

[61] The respondent has continued to work in her .72 position since the separation. Her most recent Form F8 from 2023 identified her annual income as \$77,639.72. In submissions and a DivorceMate calculation, she projected her 2023 income at \$91,631, still at .72 FTE. The parties dispute what the respondent would earn working full time or 1.0 FTE (37.5 hours per week). I gather she is paid based on an hourly rate. Based on her projected income of \$91,631 for 2023, a full-time income amounts to \$117,286.

[62] After the Spousal Separation Agreement, the respondent enrolled in a Master of Education program, which she expected to complete in June 2023. Willing to work full time after obtaining the master's degree, she did not anticipate it would lead to a meaningful increase in her income. During submissions, her counsel suggested that with the degree, her income would be between \$80,000 and \$100,000. During cross-examination, the respondent testified she would be eligible to work in non-unionized consultant jobs with a starting salary of \$103,000 to \$105,000.

[63] The parties calculate the claimant's Guidelines incomes for 2019 through 2022 as follows:

Year

Claimant's Calculations

Respondent's Calculations

(includes pre-tax corporate profits and adds back CCA deductions)

2019

Employment Income:

Corporate Pre-Tax Income of Medical Corp.:

Corporate Pre-Tax Income 512 Ltd.:

Corporate Losses from

160 Ltd.:

Add backs for

Amortization from Medical Corp. and 160 Ltd.:

TOTAL:

\$172,209.72

\$199,295

\$47

(\$16,978)

\$12,248 and \$62,377

\$429,198.72

\$615,976

or

\$591,659

(excludes dividends paid from pre-tax corporate profits)

2020

Employment Income:

Corporate Pre-Tax Income of Medical Corp.:

Corporate Losses from 160 Ltd. and 512 Ltd.:

Add backs for Amortization from Medical Corp. and 160 Ltd.:

TOTAL:

\$176,858.34

\$463,522

(\$2,094) and (\$12,887)

\$59,882 and \$19,772

\$705,053.34

\$833,601

(no dividends paid)

2021

Employment income:

Corporate Pre-Tax Income of Medical Corp.:

Corporate Pre-Tax Income of 197 Ltd:

Corporate Losses from 160 Ltd. and 512 Ltd.:

Add backs for Amortization from Medical Corp. and 160 Ltd. and 197 Ltd.:

TOTAL:

\$247,310

\$662,249

\$29,982

(\$57,217) and (\$1,070)

\$20,813 and \$57,487 and \$2,515

\$962,069

\$1, 266, 891

or

\$1,067,404

(excludes dividends paid from pre-tax corporate profits)

2022

Employment Income:

Corporate Pre-Tax Income of Medical Corp. (w/ Amortization added back:

Corporate Pre-Tax Income of 160 Ltd. w/ Amortization added back:

Corporate Pre-Tax Income of 197 Ltd. w/ Amortization added back:

512 Ltd. is Dissolved

TOTAL:

\$143,400

\$733,085 plus \$19,997

\$22,104 plus \$55,197

\$25,184 plus \$4,930

NIL

\$1,003,897

\$1,396,727

or

\$1,003,887

(excludes dividends paid from pre-tax corporate profits)

[64] The differences in the parties' calculations turn largely on the inclusion of dividend income. Both include pre-tax corporate income pursuant to s. 18 of the Guidelines. As the dividends are derived from pre-tax corporate profits, the claimant argues, and I agree, that also including the dividends he received in his income amounts to double counting.

[65] The respondent does not dispute that the claimant's work schedule equates to about 80 hours per week (before on-call hours). The claimant is on-call 24 hours each week and every fifth weekend from Friday evening to Monday morning (an additional 60 hours). Being on-call requires him to be available to attend at three hospitals and perform endoscopic procedures on one hour's notice, and to answer calls from three hospitals and doctors in the community.

[66] Addressing his schedule in his November 2022 affidavit, the claimant deposed:

Overall, the work schedule I maintain and income I earn require many sacrifices for my personal life, and especially given my history, may carry health risks. While I've decided that it is worth it for myself at this time so that I can catch up on some areas and plan for a slightly early retirement, it is not something I wish to maintain for the long-term.

[67] Referring to this evidence, the respondent submits the claimant will continue to work at his current pace, continue to earn significantly more than \$435,000 per annum and given his age, he can practice medicine for many more years. She also asserts the claimant's income has increased because he is performing more of a particular, specialized ERCP procedure, which pays a higher fee, based on his evidence that, while ERCP has been part of his practice for a long time, since 2021 he has increased his ERCP work from every second week to every week.

[68] The claimant attributed the increase in ERCP work to there being two instead of three specialists performing the procedure for the past few years. He deposed the hiring of a third specialist was expected to reduce work loads. One doctor was hired in 2022 and subsequently replaced by another in 2023 who has been away since May 2024 but was expected to return by the end of June 2025. Since then, a fourth gastroenterologist was hired by the health authority and was slated to begin working in August 2024.

[69] The claimant also acknowledged that an increase in his efficiency may have had some impact on his income but stressed that the primary factor affecting his income is simply the increase in the volume of work he performs. He noted also that his office expenses are largely fixed and do not increase commensurate with his overtime hours.

[70] In an effort to assess whether changes in procedure billings may have contributed to the claimant's increases in income, the parties agreed to compare the claimant's MSP billings for 2019 and 2023 regarding the number and nature of the procedures done. The affidavit of Bianca Domingo, made July 31, 2024 attaches a claimant's counsels' comparison, which indicates that the total number of procedures the claimant billed in 2019 was 11,586, compared to 23,018 in 2023. In subsequent submissions, counsel explained their review of the billing records double-counted procedures that were listed twice (once on the billing date and once on the payment date). They submit, and I accept, that this error is not material to the comparative exercise. Even halving the figures from each year to account for this double-counting, the point stands that it appears the claimant roughly doubled the number of procedures he performed from 2019 to 2023.

[71] The parties disputed how to approach estimating the claimant's income based on regular full-time hours. The respondent disagreed with the claimant's proposal to treat all of his work time equally, even though the more lucrative procedures came up more during overtime. She asserted that it is not the claimant's work hours that have changed but what he gets paid for the work he does. The respondent also emphasized a 40-hour week is not the industry standard for gastroenterologists, referring to Canadian Medical Association document that indicated in 2019 gastroenterologists worked 55 hours per week on average, excluding on-call hours. Relying on the MSP Physician Resource Report, published by the BC Ministry of Health, she further submitted that in the 2022/2023 fiscal year the claimant billed MSP approximately 38% more than the average gastroenterologist in BC.

Legal Framework

[72] Section 164 of the FLA is engaged where spouses have signed and witnessed a written agreement respecting spousal support:

Setting aside agreements respecting spousal support

164

- (3) On application by a spouse, the court may set aside or replace with an order made under this Division all or part of an agreement described in subsection (1) only if satisfied that one or more of the following circumstances existed when the parties entered into the agreement:
 - (a) a spouse failed to disclose income, significant property or debts, or other information relevant to the negotiation of the agreement;
 - (b) a spouse took improper advantage of the other spouse's vulnerability, including the other party's ignorance, need or distress;
 - (c) a spouse did not understand the nature or consequences of the agreement;
 - (d) other circumstances that would under the common law cause all or part of a contract to be voidable.
- (4) The court may decline to act under subsection (3) if, on consideration of all of the evidence, the court would not replace the agreement with an order that is substantially different from that set out in the agreement.
- (5) Despite subsection (3), the court may set aside or replace with an order made under this Division all or part of an agreement if satisfied that none of the circumstances described in that subsection existed when the parties entered into the agreement but that the agreement is significantly unfair on consideration of the following:
 - (a) the length of time that has passed since the agreement was made;

- (b) any changes, since the agreement was made, in the condition, means, needs or other circumstances of a spouse;
- (c) the intention of the spouses, in making the agreement, to achieve certainty;
- (d) the degree to which the spouses relied on the terms of the agreement;
- (e) the degree to which the agreement meets the objectives set out in section 161 [objectives of spousal support].

[73] The objectives of spousal support set out in s. 161 and referred to in s. 164(5)(e) include:

Objectives of spousal support

161 In determining entitlement to spousal support, the parties to an agreement or the court must consider the following objectives:

- (a) to recognize any economic advantages or disadvantages to the spouses arising from the relationship between the spouses or the breakdown of that relationship;
- (b) to apportion between the spouses any financial consequences arising from the care of their child, beyond the duty to provide support for the child;
- (c) to relieve any economic hardship of the spouses arising from the breakdown of the relationship between the spouses;
- (d) as far as practicable, to promote the economic self-sufficiency of each spouse within a reasonable period of time.

[74] There appears to be some uncertainty about the extent to which the two-stage inquiry established in *Miglin v. Miglin*, 2003 SCC 24 applies to applications under s. 164.

[75] *Miglin* involved an application for an initial spousal support order under s. 15.2(1) of the Divorce Act, R.S.C., 1985, c. 3 (2nd Supp.), where the parties had executed a final agreement respecting spousal support. Section 15.2(4) requires an agreement to be considered as part of the condition, means, needs and other circumstances of the parties. The Supreme Court of Canada viewed the issue as one that involved balancing the objectives of spousal support under the Divorce Act and the objectives of the statute as a whole, including the "compelling policy goals of certainty, autonomy and finality": at para. 57.

[76] The majority in *Miglin* began by recognizing that the emotionally-charged context of negotiations in separation and divorce proceedings is unique and different and the intimate nature of the spousal relationship may render it "difficult to overcome potential power imbalances and modes of influence": at paras. 74-75. The Court also emphasized the uncertainty that follows separation and the difficulties of predicting the full impact of marital breakdown. These considerations were described as the backdrop to the scheme governing agreements for spousal support in the Divorce Act.

- [77] In considering s. 15.2(1), Miglin mandated an examination of the parties' circumstances both at the time the agreement was made and at the time of the application.
- [78] Step one of the two-part inquiry contains two parts. First, the court examines the circumstances in which the agreement was negotiated and executed. Particular attention is paid to whether there were any circumstances of oppression, pressure, or other vulnerabilities: at para. 81. If the agreement was fairly obtained, the second part of stage one examines the substance of the agreement to determine the extent to which it took into account the factors and objectives of the Divorce Act at the time it was made. If the agreement is not impugned at stage one, Miglin specified, the court "should defer to the wishes of the parties and afford the agreement great weight": at para. 87.
- [79] The second stage of the Miglin inquiry examines events that occurred after the agreement was made. The applicant is required to "clearly show" that in light of new circumstances not reasonably anticipated by the parties, the terms of the agreement no longer reflect the parties' original intentions and the objectives of the Divorce Act. On the issue of new circumstances, Miglin provided that parties are presumed to be aware that health, job markets, parental responsibilities, housing markets and values of assets are all subject to change. It is only where the current circumstances represent a significant departure from the range of reasonable outcomes anticipated by the parties, in a manner that puts them at odds with the objectives of the Divorce Act, that the court may be persuaded to give the agreement little weight.
- [80] After Miglin, in *L.M.P. v. L.S.*, 2011 SCC 64, the Court articulated a different approach to intervening in spousal support agreements in the context of an application to vary an order (which had incorporated a prior agreement) under s. 17 of the Divorce Act. The majority observed that, unlike s. 15.2(1), s. 17 does not refer to agreements. *L.M.P.* affirmed the material change of circumstances threshold established in *Willick v. Willick*, [1994] 3 S.C.R. 670, 1994 CanLII 28. While holding that the variation threshold is the same whether or not the order in question incorporates an agreement, *L.M.P.* reiterated Miglin's emphasis on the "significant policy goal of negotiated settlement" (at para. 66) and underscored that the incorporated agreement is still relevant.
- [81] In *Reid v. Reid*, 2017 BCCA 73, the Court of Appeal applied the Miglin framework in assessing whether a separation agreement dealing with property division and spousal support should be set aside under the Family Relations Act, R.S.B.C. 1996, c. 128 [FRA], focussing on its comportment with the FRA's objectives.
- [82] Before Reid, *Ashton v. Ashton*, 2015 BCSC 790 suggested that s. 164 essentially codified the analysis from Miglin: at para. 43.
- [83] But as Justice Schultes observed in *S.T.T. v T.C.T.*, 2023 BCSC 903, there is a crucial difference between s. 164 of the FLA and the Miglin framework. While s. 164 deals with setting aside or varying a spousal support agreement, Miglin concerns the role of an agreement in deciding on an initial order for spousal support: *Zimmerman v. Shannon*, 2006 BCCA 499. In

Zimmerman, the Court of Appeal determined Miglin affirmed the power to order spousal support inconsistent with an agreement, but it did not purport to supersede provincial jurisdiction over private contracts dealing with spousal support: at para. 65.

- [84] S.T.T. and Zimmerman align with *Anderson v. Anderson*, 2023 SCC 1, which clarified the proper interpretive framework for assessing a family law settlement is statute-specific; and useful general principles emerge from Miglin and the Court's subsequent jurisprudence. In discussing those principles, the Court specified as a starting point, domestic contracts should generally be encouraged and supported by courts within the bounds of the relevant statutory scheme, absent a compelling reason to discount an agreement. The Court identified the deference as flowing from the recognition that self-sufficiency, autonomy and finality are important objectives in the family law context. Not only are parties better placed to understand what is fair in the context of their relationship, but private dispute resolution outside the adversarial context avoids the cost and tumult of litigation: at para. 33. Accounting for the "singularly challenging environment" (at para. 34) in which family law agreements are negotiated, Anderson also underscored Miglin's emphasis on an approach that balances the values of contractual autonomy and certainty with fairness. But the Court emphasized the assessment of the agreement's substance is "generally determined" by the governing legislative regime: at para. 37.
- [85] Section 164 of the FLA permits a spousal support agreement to be set aside based on deficiencies that existed when the parties entered the agreement as enumerated in subsection (3) subject to declining to act under subsection (4); or where the agreement is significantly unfair based on five factors in subsection (5).
- [86] It is not clear that s. 164 contemplates the substantive fairness assessment that comprises stage two of step one of the Miglin framework.
- [87] The seems to be the suggestion in *Hinz v. Davey*, 2022 BCCA 232. The Court of Appeal referred to comments in the Ministry of Justice's Family Law Act Transition Guide (Vancouver: Continuing Legal Education Society of British Columbia, 2014) regarding the comparative differences in the tests for setting aside a child support agreement and spousal support or property division agreements:
- [56] The above is in contrast to the Ministry's comments on s. 164 of the FLA, which governs the setting aside of agreements respecting spousal support and sets a higher threshold for intervention at 3-227.

This section restricts the ability for judges to set aside spousal support agreements in order to promote finality and certainty, while also allowing some flexibility to adjust spousal support amounts where circumstances have changed.

First, a spousal support agreement may be set aside if there was a procedural defect in the creation of the agreement

Second, if the agreement was procedurally fair when it was entered into, then the court may only set aside an agreement on substantive grounds, in the limited circumstances where it would be substantially unfair.

[Emphasis in original.]

- [88] Further, in *Megson v. Megson*, 2014 BCSC 2467, Justice Fitch (as he then was) observed that s. 164(5) requires all of the enumerated factors to be considered in determining whether the agreement has become significantly unfair: at para. 161. Three of the factors under subsection (5) refer to subsequent events.
- [89] Justice Fitch also concluded at para. 158 the test to be applied to subsection (5)(b) "any changes since the agreement was made, in the condition, means, needs or other circumstances of a spouse", is the Willick test for variation of a spousal support order, which requires (as a threshold requirement) a material change in circumstances. The Willick test, affirmed as I have said in *L.M.P.*, requires a change that is substantial, continuing and if known at the time would likely have resulted in a different order (or agreement). Not known is also described as unforeseen.
- [90] The Willick test appears somewhat different then from the requirement for new circumstances that were not reasonably anticipated by the parties articulated in *Miglin* regarding stage two.
- [91] The objectives of spousal support in s. 161 of the FLA, referred to in s. 164(5)(e), are the same as those in the Divorce Act. The broader objectives of the FLA include encouraging alternative dispute resolution options, promoting conflict prevention, and moving away from a model in which a court proceeding is the presumptive starting point: see, "White Paper on Family Relations Act Reform: Proposals for a new Family Law Act" (Ministry of Attorney General, Civil Policy and Legislation Office, 2010). These objectives are also reflected in s. 4(b) of the FLA which discusses one purpose of the Act as being "to encourage parties to a family law dispute to resolve the dispute through agreements and appropriate family dispute resolution before making an application to a court".
- [92] Significant unfairness, the threshold for intervention with respect to both spousal support and property division agreements property division agreements on substantive grounds, under ss. 164(5) and 93(5), is also the threshold for departing from the presumptive equal division of family property and debt, under s. 95. In that context, the cases establish that significant unfairness is a "high" bar. It requires unfairness that is "compelling or meaningful having regard to the factors set out in s. 95(2)", or something objectively unjust, unreasonable or unfair in an important or substantial sense: *Nazarinia v. Amid-Navarinia*, 2024 BCSC 189 at para. 325 citing *Remmem v. Remmem*, 2014 BCSC 1552 at para. 44; *V.J.F. v S.K.W.*, 2016 BCCA 186 at para. 10; and *Jaszczewska v. Kostanski*, 2016 BCCA 286 at paras. 41-42.

Procedural Unfairness under s. 164(3)

[93] Relying on s. 164(3)(a) alone, the respondent advances two grounds in support of her assertion the Spousal Support Agreement was unfairly constituted. One, she alleges the claimant ought to have but failed to disclose information and documents related to his purchase of two real properties around the time of the November 2020 Mediation. Two, she alleges that during the mediation he misrepresented that his income was on a downward trajectory due to health issues.

Failure to Disclose

[94] Section 164(3)(a) requires the respondent to demonstrate the claimant "failed to disclose income, significant property or debts, or other information relevant to the negotiation of the agreement". She complains he failed to advise her of the following:

- he was in the process of entering into a contract of purchase and sale regarding a new family home with a purchase price of \$1,725,000 (he signed the contract in or about December 1, 2020, after the Spousal Support Agreement was executed); and
- he had already purchased another property for \$950,000 under a purchase and sale contract dated September 26, 2020 "in the name of" 197 Ltd. (one of his numbered companies).

[95] Based on his evidence the purchases were heavily financed, the respondent also alleges that the claimant must have advised the financial institutions of his actual income in order to qualify for financing but he did not disclose "this information" to her.

[96] The respondent contends that, had she been aware he was purchasing the two properties with large mortgages, she would not have agreed to his income being \$435,000 because she would have known he could not afford to service the mortgages and pay spousal support, child support, s. 7 expenses and his other expenses.

[97] The claimant takes the position the purchase and sale contracts and the pending purchase of a family home were irrelevant to the negotiation of spousal support, given the Property Division Agreement. In other words, the claimant says because the parties had already finally divided their family property and debt, these subsequent transactions had no bearing on the negotiation of spousal support, and he was not required to disclose documents and information related to them.

[98] Based on principles and observations set out in Miglin, in Rick v. Brandsema, 2009 SCC 10, the Court concluded a duty to make full and honest disclosure of all relevant financial information is required to protect the integrity of the result of negotiations in family proceedings. But it is the deliberate failure of a party to provide full and honest disclosure of all relevant financial information may render an agreement vulnerable to judicial intervention, where the result is a negotiated settlement that is "substantially at variance from the objectives of the governing legislation": at para. 47. The Court also held that the decision to intervene in the agreement will depend on the particular circumstances,

including the extent of the defective disclosure, the degree to which the defective disclosure was deliberately generated, as well as the extent to which the negotiated terms do not comport with the goals of the relevant legislation: at para. 49.

- [99] A duty of disclosure is also captured in s. 5(1) of the FLA which provides that a party to a family law dispute must provide to the other party "full and true information for the purposes of resolving a family law dispute".
- [100] In applying s. 164(3)(a), a failure to disclose "income, significant property or debts, or other information relevant to the negotiation of the agreement", it is also useful to consider the disclosure requirements in the Supreme Court Family Rules.
- [101] Under R. 9-1(1), parties to a family law case must prepare and serve a list of documents that lists all documents that could be used by any party at trial to disprove or prove a material fact. Disclosure of financial information and documents is also governed by R. 5-1 through the vehicle of the Form F8 financial statement ("Form F8"). The parts of the Form F8 that must be completed and the documents that must be attached depend on the claims being made or order(s) sought. Requisite or "applicable" income documents are defined in R. 5-1(1).
- [102] Without suggesting the requirements of R. 5-1 directly apply to the process of negotiating the Spousal Support Agreement, as the rule is only engaged in the context of a "family law case" (defined in R. 1-1); it nonetheless provides a helpful comparator.
- [103] Under R. 5-1(9) which addresses applications for spousal support, parties are required to complete Parts 1, 2 and 3 of a Form F8. Part 3 deals with property and requires a party to list all real and personal property that they own or have an interest in, as well as "business interests", but not the assets of a party's company. Neither of the real estate transactions the respondent raises would have been captured by an F8. The purchase and sale contract regarding the new family home post-dated the November 2020 Mediation. The other property appears to be an asset owned at least beneficially by 197 Ltd.
- [104] The respondent also asserts the claimant misled her because he must have disclosed his actual income to the lending institutions and did not disclose the information he provided to those institutions. However, she has not suggested he failed to produce relevant source documents regarding his income or "applicable income documents" after the Consent Order and leading up to the November 2020 Mediation. Here, there is no question how the claimant earns his income--from practicing medicine and his corporate interests. If what the respondent is really concerned about are potential inconsistencies between the claimant's income documents and his representations about his income, those representations are potentially relevant to credibility (which I discuss below). Further to this point, and her stated concern about him knowing and not disclosing his actual income, I am not aware of the respondent pursuing production of any documents or information he provided to the lending institutions. Nor did she apply to cross-examine him.

- [105] If there was a defect in the claimant's disclosure, which I am not accepting, it would have been minor. Nor am I persuaded that not disclosing the information/documents at issue was deliberate in the sense of the claimant intending to deprive the respondent of "full and honest" disclosure of all relevant financial information. Appreciating at the same time, that s. 164(3)(a) does not qualify the failure to disclose as deliberate or intentional, I accept the claimant viewed his own or his companies' asset purchases following the Property Division Agreement as irrelevant to the subsequent negotiation of final spousal support. This view accords with the well-established approach to determining the division of property and debt before determining an award of spousal support: see *Parton v. Parton*, 2016 BCSC 1528 at para. 18.
- [106] In light of the financial disclosure he did provide and what I have found was an approximately equal division of net family property prior to the November 2020 Mediation, I have no difficulty concluding the respondent has not made out her first ground under s. 164(3)(a).

Misrepresentation

- [107] Turning to the second ground, the respondent alleges the claimant also misled her about his income by making representations during the November 2020 Mediation about his poor health and declining income trajectory, including by referring to or relying on the 2017 letter from Dr. Vivian.
- [108] There is a conflict in the parties' evidence regarding this issue.
- [109] As I have indicated, the claimant deposed to significant health issues after the separation that reduced his work hours in 2017, as well as raising these circumstances when they were current at the January 2018 Mediation. The claimant denies relying on medical letters or Dr. Vivian's letter at the November 2020 Mediation or making any representations about his health or a reduction in income at that time.
- [110] In her affidavit filed October 21, 2022, the respondent said she understood from the November 2020 Mediation that the claimant agreed to increase the amount of child and spousal support because his income had increased substantially from \$272,00 to \$435,000 in the two years since the Consent Order (June 2018). She deposed to not knowing at the time of the November 2020 Mediation that he was "misleading" her about his actual annual income, which was significantly more than \$435,000. According to the respondent, she only learned about the significant increase in his income from the 2022 financial statement of Medical Corp., which she received prior to a mediation in August 2022.
- [111] But the respondent's mediation brief for the January 2018 Mediation calculated the claimant's income for 2017 as \$421,926.51, and her mediation brief for the November 2020 Mediation (the "2020 Brief") set out his income at \$609,535 for 2018 and \$498,768 for 2019. The calculations were based on his employment income, Medical Corp.'s pre-tax net income (with a 50% add-back for some expenses) and 160 Ltd.'s pre-tax income. The 2019

calculation also included other income such as dividends from 152 Ltd. Paragraph 22 of the 2020 Brief reads: "At the initial mediation, Ed projected his 2018 income to be less than his 2017 income. In fact both his 2018 and 2019 income is substantially higher than projected and is in line with the revenue for 2015 and 2016" (emphasis added). The 2020 Brief also contains a chart of Medical Corp.'s revenue along with the pre-tax net income, retained earnings, actual paid dividends and income paid to the claimant from 2015 through 2019 taken from its financial statements. For 2015 and 2016 the revenue was \$716,709 and \$813,194 respectively. The chart shows a significant drop in revenue to \$447,235 in 2017 and then rebounding to \$787,386 and \$716,453 in 2018 and 2019. The respondent's DivorceMate calculations attached to the 2020 Brief relied on incomes of \$640,863 (2018) and \$547,392 (2019).

- [112] Responding to the claimant's evidence that she did know his income was higher than \$435,000 by the time of the November 2020 Mediation as reflected in the 2020 Brief and the DivorceMate calculations, in her affidavit filed March 29, 2023, the respondent agreed the 2020 Brief set out higher incomes than \$435,000. She then deposed the claimant was failing to acknowledge the representations he made at the November 2020 Mediation that he could not sustain working long hours due to his health and that his income was on a downward trajectory, supported by the letter from Dr. Vivian (faxed in June 2017).
- [113] The respondent also went on to discuss the claimant's gross billings to BC MSP for the fiscal years ending March 31 from 2017 through 2022, which show gross billings of \$403,544 for 2018, \$669,462.35 in the previous year, and \$463,875.87 in 2019. As of the fiscal year ending March 31, 2020, his gross billings were \$873,028.44. The respondent said she did not obtain copies of the 2019 and 2020 gross billings from the government website until August 2021.
- [114] If the respondent included the gross billings in her evidence to show she did not know the claimant's income had recovered before the November 2020 Mediation, the content of the 2020 Brief demonstrates otherwise.
- [115] The claimant's responding affidavit evidence confirmed the gross billing figures but noted their distinction from net income, specifying they do not account for practice expenses or the use of locum doctors. The claimant also highlighted that s. 2 of the Financial Information Act, R.S.B.C. 1996, c. 140, requires the gross billing records to be prepared and available within six months of the financial year end, meaning those for the March 31, 2020 year-end would have been available by the end of September 2020.
- [116] During cross-examination, the respondent agreed that all the financial documents her counsel requested were provided before the November 2020 Mediation and the claimant's 2017 medical letters were listed before the January 2018 Mediation. However, when asked to agree the claimant never made any statements about health issues and a decline in his income going forward at the November 2020 Mediation, the respondent emphasized that she remembered discussions about his health failing and a downward trajectory in his income and this was how they came to an agreement.

- [117] The November 2020 Mediation was conducted remotely. The respondent agreed she did not communicate directly with the claimant. Unable to confirm that Dr. Vivian's letter was discussed, as she had indicated in her affidavit evidence, the respondent said she just knew there were discussions about his failing health, and him not being able to maintain his workload and needing to decrease it.
- [118] The respondent would not accept the suggestion she was mixing up representations made about his income at the January 2018 Mediation with what occurred at the November 2020 Mediation. She queried why either of them would discuss health issues in a mediation brief, although in fact the claimant did so in his brief for the January 2018 Mediation. Accepting however, the claimant's income declined considerably in 2017 and then rebounded, the respondent acknowledged that "doing the work" was the driving force for Medical Corp.'s revenue, meaning the claimant's work schedule, along with the type and number of procedures he performed.
- [119] At the same time and similarly to the contents of Dr. Vivian's 2017 letter, the respondent testified that she understood the claimant's income had previously rebounded to refresh the bank accounts he felt were drained by his six years of speciality training, but he could not keep up that trajectory of growth and sustain those hours; it was not humanly possible and now that he had refreshed his accounts he would be levelling out his hours. She seemed to be suggesting then the claimant's alleged representations at the November 2020 Mediation were in effect that he was experiencing health issues again resulting in another decline in income.
- [120] The respondent was also asked about how some of the terms of the Spousal Support Agreement were reached. She acknowledged she was the one that wanted a fixed duration of spousal support, although she compromised on the end date of December 2028 instead of March 2029. But the respondent also said she agreed to a fixed duration because of her belief about the claimant's health situation. She gave mixed evidence about which of them wanted a review of spousal support but then agreed to it not being included in the settlement. For instance, the respondent mentioned backing down on a review as part of the give and take of mediation, but she was unclear when asked about not wanting her income reviewed for spousal support purposes. The respondent also said she felt she made a concession by allowing her income to be imputed at \$100,000, along with other concessions "as you do at mediation". In this context and contrary to her other evidence about what she was led to believe, she testified to thinking it was more likely that the claimant's income would increase than hers.
- [121] Addressing the conflict in the parties' evidence about what the claimant did or did not state at the November 2020 Mediation, the respondent argued it is implausible that she would have agreed to the claimant's income being fixed at \$435,000 if he did not represent what she recalled being said about his health being poor and being unable to continue to work as much going forward.

- [122] In resolving this factual conflict and others, it is necessary to assess the parties' disputed evidence in the context of all of the relevant evidence and a number of factors including but not limited to, as the respondent has highlighted, whether the evidence seems improbable, unreasonable or unlikely bearing in mind the probabilities affecting the case: see *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186, *aff'd* 2012 BCCA 296.
- [123] As is often the case, each party's disputed evidence aligns with their interest in the outcome. In my view, the respondent's evidence displays a more pronounced alignment and a less factual approach generally. There is, for example, the respondent's unsubstantiated allegation that she agreed to receive less than an equal net division of family property.
- [124] Although what the respondent alleges the claimant represented at the November 2020 Mediation certainly could explain why she agreed to the claimant's income being fixed at \$435,000, it is also plausible that she would have agreed because she was concerned his income would decline without the representations. Other plausible explanations include the prospect of his 2017 health issues reoccurring or new health issues emerging given his work schedule, or simply recognizing that sustaining an 80-hour work week even without significant health issues is unrealistic.
- [125] I have also outlined some internal inconsistencies and shifts in the respondent's evidence, lack of directness, and inconsistencies between her evidence and objective, independent or undisputed evidence (e.g., the mediation briefs, timing of the medical letters), along with consistencies between the claimant's disputed evidence and the same corroborating documents with respect to what he did or did not say at the November 2020 Mediation.
- [126] The parties' disputed evidence about why the respondent worked part-time from early on in the relationship shows a similar pattern. Again, there was some shifting and internal inconsistency in the respondent's evidence. Initially she deposed it was the claimant who wanted and needed her to work part-time and she depicted his hospitalist position as demanding and stressful. During cross-examination she conceded the job involved regular full-time hours, as he had deposed. She then said the claimant wanted her to keep working part-time because he was concerned they would not see each other if they both worked full-time, given shift rotations. In her evidence on this issue, she also described working part-time as a mutual decision given their plan to have children, and as part of their family agreement. Although these explanations are similar, both of them are inconsistent with the respondent's other evidence that once she went back to work after her maternity leave, she no longer did extra shifts because the claimant promised her she could work part-time and enjoy being a first-time parent.
- [127] In contrast, the claimant's evidence regarding the respondent's part-time work schedule is not inconsistent nor does it vary. It is also much more plausible. The claimant makes the point that leaving aside the parties' preferences, there was no practical reason for the respondent to work part time before R was born. Certainly, working full-time (37.5 hours

per week) would not have interfered with managing their home. This is also my view with respect to managing the home and being the primary caregiver to one child. While I can appreciate fulfilling the role of primary parent, particularly when also responsible for the home, may be more fulfilling on a part-time work schedule, there is nothing unusual about working full-time and being primarily responsible for the care of more than one child.

- [128] The claimant's version of events, that is, encouraging the respondent to work full-time and not agreeing with her choice to work part-time, is also more plausible from an economic perspective. Clearly, the parties would have benefitted financially from the respondent earning a larger salary, while the claimant was working as a family physician and a hospitalist (regular full-time) and his income would have been much lower than what he was paid as a gastroenterologist working an 80-hour work week plus on-call. The claimant's version of events also accords with the respondent's continued part-time work schedule after the parties began an equal parenting schedule in or about January 2018, and even more so once R began living with the claimant full time in January 2021. Further, while she suggests she kept working part-time after the Spousal Support Agreement because she was completing a Master of Education, she chose a graduate degree that on her evidence is not expected to meaningfully increase her income. All of this indicates the respondent had not been motivated to maximize her income, either by increasing her work hours or by enhancing her earning capacity.
- [129] Considering my assessment, then, I am left concerned about the credibility of the respondent's disputed evidence regarding financial issues. As a result, I cannot accept her evidence that the claimant represented he had health issues and that his income trajectory was declining at the November 2020 Mediation.
- [130] Having already rejected the respondent's assertion the claimant failed to disclose information and documents related to the two real estate transactions, I am left to conclude she has not made out the circumstances provided for in s. 164(3)(a).
- [131] In the absence of other alleged deficiencies, the respondent has not demonstrated she was prevented from making an informed decision about what income the claimant could potentially earn in agreeing to the claimant's imputed fixed income of \$435,000 for the duration of the spousal support period at the November 2020 Mediation. On the contrary, the record indicates the respondent received rather fulsome disclosure and was also assisted and advised by the same experienced counsel (and an accountant regarding financial issues) throughout the period during which the Parenting Agreement (which also included child and spousal support), the Property Division Agreement and the Spousal Support Agreement were negotiated. She was aware the claimant's income had varied significantly over the years, and in particular, after dropping due to health issues and a regular work schedule in or about 2017, it had rebounded although it continued to fluctuate. She also knew including a review of spousal support was an option. Indeed, the November 2020 Mediation resulted from the review provision in the Consent Order, which incorporated the terms of the Parenting Agreement, and the parties in fact agreed to review

child support (annually) in the Spousal Support Agreement.

[132] I am more than satisfied then that the respondent has not established the Spousal Support Agreement was procedurally unfair or unfairly constituted.

[133] The respondent also referred briefly to the Spousal Support Agreement being significantly unfair when it was made because she received less than 50% of the net family property along with the procedural grounds. Assuming an analysis of substantive (significant) unfairness is available under s. 164 at the time a spousal support agreement was made, I have already found that the Property Division Agreement provided for an equal or approximately equal division and will not discuss the question further.

Significant Unfairness under s. 164(5)

[134] The respondent argues the agreement is significantly unfair and should be set aside in favour of an order for spousal support based on her calculations of the claimant's Guidelines income each year since December 15, 2020.[1] She submits the mid-range support from the SSAG should be applied to that income because of various financial changes after the Spousal Support Agreement was made, and what she characterizes as her strong compensatory entitlement. The changes include a drop in her own income because she stopped receiving child support of \$2,633 per month and later began paying the respondent \$717 per month, the higher (current) value in the claimant's assets and property relative to hers, and most importantly, substantial increases in the claimant's income since 2019.

[135] Although the parties calculate most of the claimant's post-agreement Guidelines incomes somewhat differently, the respondent does not dispute the claimant's work schedule is approximately 80 hours per week, plus on-call hours.

[136] In quantifying the spousal support order she proposes and in support of her allegations of significant unfairness, the respondent relies on DivorceMate calculations that use her calculations of the claimant's Guidelines incomes and her own based on her actual .72 FTE work schedule.

[137] The respondent provides two DivorceMate calculations for 2021, one that applies the "with child support formula", which assumes the recipient parent has sole custody or primary care of the children, although R is noted as living with both parties. The other applies the custodial payor formula, which is correct, given R was living with the claimant full time as of January 2021.

[138] Based on Guidelines incomes of \$1,266,892 for the claimant and \$80,591 for the respondent, under the with child support formula, monthly spousal support ranges from a low of \$30,560 to a high of \$37,072. Applying the custodial payor formula the range drops to a low of \$17,618 to a high of \$23,491.

- [139] The respondent also provides a DivorceMate calculation based on projected 2023 incomes of \$1,013,087 for the claimant (including \$392,840 in dividend income and eight months of rental income), and her own, at \$91,631, again based on a .72 FTE work schedule. The custodial payor formula generates a range of \$13,650 to \$18,199.
- [140] The claimant takes the position the Spousal Support Agreement is not significantly unfair and suggests the respondent's approach to the issue is more in line with an application for an initial spousal support order. Related to the latter point, the claimant disagrees with her use of the SSAG and its formulas, and her assertion she is entitled to the benefit of all of his post-separation (agreement) increases in income. Related to the SSAG, the claimant makes the important point that the Spousal Support Agreement's monthly spousal support amount of \$7,821 corresponds to an annual income of \$550,000 rather than \$435,000 when the custodial payor formula is applied, which means that since January 2021, the respondent has been receiving the benefit of a portion of his increased income.
- [141] The claimant also disputes the respondent's claim of a strong compensatory entitlement to spousal support.
- [142] Addressing each of the s. 164(5) factors, the claimant submits a finding of significant unfairness cannot be made because the agreement was not made long ago; it reflects a strong intention to achieve certainty; the parties have conducted themselves in accordance with the agreement; and their respective conditions, means, needs and other circumstances have not changed in a way that could not have been reasonably predicted or such that the objectives of spousal support are no longer met.
- [143] Before applying each of the subsection (5) factors myself, I turn to consider the issues related to entitlement, applying the SSAG and determining income for spousal support, and the claimant's 80-hour plus on-call hours work schedule.

Entitlement

- [144] Under s. 161 of the FLA, a spouse's entitlement to spousal support is determined by considering all of the objectives set out at (a) through (d).
- [145] Compensatory support is animated by the first two objectives-- recognizing any economic advantages or disadvantages to the spouses arising from the relationship or its breakdown and apportioning between them any financial consequences arising from the care of their child.
- [146] If compensatory support is not justified, need alone may establish an entitlement to non-compensatory support, which is intended to narrow the gap between the means and needs of the spouses upon marriage breakdown, as contemplated by the third and fourth objectives in s. 161 of the FLA. The fourth objective, promoting self-sufficiency, was helpfully considered in *Tedham v. Tedham*, 2005 BCCA 502:

- [33] s. 15.2(6)(d) of the [Divorce] Act [and s. 161(d) of the FLA] does not require self-sufficiency, but simply seeks to promote self-sufficiency "in so far as practicable". In determining what is practicable, regard must be had to all of the circumstances, including the age and gender of the spouse, her/his skills and education, or lack thereof, the opportunities for retraining, and the realistic prospect of the spouse being able to find not just a job, but one which enables her/him to become self-sufficient, which may be quite a different matter.
- [147] The principles governing compensatory and non-compensatory spousal support were established in *Moge v. Moge*, [1992] 3 S.C.R. 813, 1992 CanLII 25 and *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420, 1999 CanLII 715, and helpfully reviewed in *Chutter v. Chutter*, 2008 BCCA 507.
- [148] In sum, compensatory support is intended to provide a spouse with redress for an economic disadvantage (such as diminished earning capacity and lost career opportunities) or an economic advantage conferred on the other spouse (such as enhanced earning capacity through career development) arising from the spousal relationship or its breakdown. The jurisprudence recognizes that assuming the role of primary caregiver to children especially, but also other family responsibilities such as managing the household, often results in a lower earning potential and fewer prospects for financial success in the future: *Chutter* at para. 50. Compensatory support is also concerned with addressing the economic advantages enjoyed by the other spouse as a result of the recipient spouse's role and efforts, related to the underlying doctrine of equitable sharing of the economic consequences of marriage and its breakdown.
- [149] Where non-compensatory principles apply, the concept of need extends beyond the basic necessities of life and varies with the circumstances of the parties: *Chutter* at para. 55; *H.C.F. v. D.T.F.*, 2017 BCSC 1226 at para. 212; *Loesch v. Walji*, 2008 BCCA 214 at para. 39. In longer marriages, need is measured against the marital standard of living or the payor's post-separation standard of living: *Chutter* at para. 59.
- [150] *Bracklow* underscored the importance of considering both compensatory and non-compensatory bases or theories of support, as reflected in the statutory objectives. Both *Moge* and *Bracklow* made it clear that marriage is a joint endeavour. Although the doctrine of equitable sharing does not guarantee the marital standard of living, the longer the relationship and the closer the economic union, the "greater will be the presumptive claim to an equal standard of living on dissolution": *Moge* at 870.
- [151] The respondent takes the position she has a strong compensatory entitlement rooted in both an economic disadvantage to her and an economic advantage to the claimant arising from the marriage. She argues she subordinated her nursing career to his professional development, which allowed him to become the medical specialist he has been since 2014, through her role as R's primary caregiver and in managing the household. She also emphasizes the length of the marriage: approximately 15 years.

- [152] Initially the claimant denied the respondent was entitled to spousal support on compensatory grounds. Ultimately, he seemed to acknowledge she had a compensatory claim limited to the advantage he gained by increasing his qualifications and earning capacity during the marriage, contending she did not suffer a corresponding loss.
- [153] Based on my assessment of the evidence and considering the statutory objectives and legal principles, I find the respondent has a compensatory entitlement to spousal support that arose not with the start of the marriage in 2001, but in 2007 when R was born and the claimant began his speciality training, which involved an 80-hour work/study schedule. These circumstances required the respondent to assume primary responsibility for R and management of the household until in or about the time the claimant left the former family home after the separation, pursued and obtained significant parenting time with R. I also find however that the strength of her compensatory entitlement is attenuated. Although there is no question that fulfilling her role conferred an economic advantage on the claimant, I agree with the claimant that she did not suffer an economic disadvantage.
- [154] I say this alive to the commonsense approach that applies in assessing an economic disadvantage arising from the marriage or its breakdown: *Sahrmann v. Otto* (1995), 17 R.F.L. (4th) 324, 1995 CanLII 2593 at para. 5 (B.C.C.A.). In *Moge*, the Court recognized the disadvantages women experience when their employment continues but plays a secondary role and stated the general economic impact of divorce on women should be amenable to judicial notice, at least as background information. Justice L'Heureux-Dubé, writing for the majority, also recognized that expert evidence on the issue is out of reach for many parties and not required in most cases, although spousal support orders remain a function of the evidence. Ultimately, judges are required to be aware of the social reality when examining the objectives of spousal support and deciding on spousal support. In concurring reasons, Justice McLachlin (as she then was) similarly prescribed a common-sense, non-technical view of causation in determining whether a spouse has been disadvantaged by the marriage or its breakdown.
- [155] Unlike in many if not most cases where one spouse's career is sacrificed or put on hold to assume responsibility for care of the children and the household, I am not persuaded the respondent's role resulted in any lower earning capacity, fewer work opportunities or limitations on her ability to maximize her income by working in her chosen profession of nursing. The only potential disadvantage I can see is a potential impact on the respondent's pension contributions assuming reduced contribution during the period of her compensatory entitlement, would result in a reduction in benefits, but this was not suggested. In terms of employment income, opportunities and earning capacity, the respondent was a qualified nurse with an established career when the parties met. During the first six years of the marriage, before R was born, she became even more qualified and experienced through specialized renal nursing training in renal nursing and work in renal nursing. Although the respondent worked part-time, full-time work in renal nursing was available to her and there is no indication she lost out on any other additional training or

advancement opportunities. The claimant's evidence and the notorious long-standing shortage of qualified nurses also satisfied me the opportunities for full-time if not much more than full-time work have remained.

Use of the SSAG in Determining Amount and Duration

[156] Section 162 of the FLA requires the amount and duration of spousal support to be determined by considering the conditions, means, needs and other circumstances of each spouse, including the following:

- (a) the length of time the spouses lived together;
- (b) the functions performed by each spouse during the period they lived together;
- (c) an agreement between the spouses, or an order, relating to the support of either spouse.

[157] Under the SSAG however, the core concept is income sharing. Relying primarily on the incomes of the parties, they apply a mathematical formula to determine the portion of spousal incomes to be shared, although the presence of dependent children and the length of the marriage are relevant factors.

[158] In *Yemchuk v. Yemchuk*, 2005 BCCA 406, the Court of Appeal endorsed the SSAG "as a useful tool to assist judges in assessing the quantum and duration of spousal support", observing they are intended to reflect the current law rather than to change it: at para. 64. *Redpath v. Redpath*, 2006 BCCA 338, went further. The Court concluded that, if a particular award is substantially lower or higher than the SSAG range and there are no exceptional circumstances to explain the anomaly, it may be the standard of review should be reformulated to permit appellate intervention: at para. 42.

[159] At the same time, both the SSAG and the case law considering them recognize that decisions about the amount and duration of spousal support are discretionary. The factors that may be considered in choosing a point along the range include the strength of any compensatory entitlement, the recipient's needs, the age, number, needs and standard of living of the children, the payor's needs and ability to pay, the need to preserve work incentives for the payor, property division and debt and self-sufficiency incentives for the recipient: *N.Z.N. v. M.R.N.*, 2024 ONSC 17 at para. 138. Regarding the strength of entitlement, need and property division, *N.Z.N.* further explained:

- a. A strong compensatory claim may be a factor that favours a spousal support award at the higher end of the ranges both in terms of quantum and duration. By contrast, a weaker compensatory claim, where the economic advantage or disadvantage to one of the spouses is limited in duration or effect, may militate in favour of a lower amount of spousal support and/or a shorter duration; *Bracklow*; *Midgley v. Midgley*, 2001 CarswellBC 2009 (C.A.).
- b. Where the recipient has limited income and/or earning capacity, the level of their needs may call for an award at the higher end of the quantum and duration ranges.

- f. An absence of property to divide may render an award in the higher range appropriate. On the other hand, a significant property award to the recipient may cause the judge to determine that an award in the lower range is appropriate.

Use of the SSAG in the Final Agreement Context

- [160] The role of the SSAG in the context of a final agreement is more confined. The authors of "Spousal Support Advisory Guidelines: The Revised User's Guide" (Department of Justice Canada, 2016) (The "User's Guide"), write that a final agreement "will preclude" the application of the SSAG unless it can be set aside under the legal framework found in the Divorce Act or provincial legislation: at 12. With respect to step two of the Miglin framework, they comment, the SSAG ranges based on the parties' current circumstances can offer some insight into whether there has been any "departure from the range of reasonable outcomes anticipated by the parties, in a manner that puts them at odds with the objectives of the Act": at 14.
- [161] In *S.E. v. J.E.*, 2013 BCCA 540, the trial judge was found to have erred in applying Miglin to uphold a lump sum spousal support agreement because he failed to test the lump sum for substantial compliance with the objectives of the Divorce Act. The Court of Appeal referred to a significant variation from SSAG results in reaching this conclusion:
- [42] I am not suggesting that when a court is assessing whether an agreement substantially complies with the objectives of the Divorce Act, the effect of the agreement must be explicitly compared to the results indicated under the SSAG. Parties can legitimately negotiate valid agreements that depart from the Guidelines, particularly when other issues are being resolved. But in this case, such a comparison does illuminate, in broad terms, the degree to which this agreement shows a significant variation from what the SSAG suggests as an appropriate award.
- [162] But more recently in *Nicholl v. Nicholl* 2020 BCCA 173, the Court of Appeal opined:
- [47] While this Court has recognized the utility of the SSAG, it must be remembered that they are "advisory guidelines" and thus are not intended to be written in stone. As the SSAG itself states, the guidelines are "intended to be informal guidelines that operate on an advisory basis only, within the existing legislative framework": SSAG at 14 (Emphasis in original). If a court can determine whether an agreement substantially complies with the Divorce Act objectives without comparing the agreement with the SSAG, there is no requirement to do so. That is particularly the case where one of the spouses is a high income earner as the SSAG are considered to be discretionary for spouses with income above \$350,000. Above that income level, "the formulas should no longer be automatically applied to divide income": SSAG at 110.

[48] While a judge is not required to explicitly compare an existing agreement's spousal support provisions with the SSAG, the judge must nonetheless analyze how the terms of the agreement accommodate an equitable sharing of the economic consequences of the marriage and its breakdown. Such an analysis is essential to properly assess whether the agreement substantially complies with the objectives of the Divorce Act. That analysis will usually require the judge to consider the couple's incomes after separation.

[Emphasis in original.]

Use of the SSAG and High Incomes

[163] In this case, any use of SSAG ranges is also affected by the income ceiling of \$350,000. Although the respondent asserts that she proposes a quantum of support produced by the SSAG formulas, the SSAG provide that once the payor's gross income reaches the ceiling of \$350,000, "the formulas should no longer be automatically used to divide income beyond that threshold": at 110. The SSAG offer an example of a payor with an income of \$500,000, a recipient with no income, and a 25-year marriage. Under the without child support formula, based on the ceiling amount, monthly spousal support ranges from \$10,937 to \$14,583. If the formula is applied to the income of \$500,000, support amounts increase to a range from \$15,625 to \$20,833 monthly. The SSAG note the court could decide on an amount somewhere in between the two ranges or go higher, but no formula "would push" this. It is an individualized decision.

[164] The case law dealing with the use of the SSAG when the payor's income is above \$350,000 is discussed in *Hathaway v. Hathaway*, 2014 BCCA 310, leave to appeal to SCC ref'd [2014] S.C.C.A. No 412; *M.A.T. v. K.P.T.*, 2017 BCSC 1603; and the User's Guide. The principles that emerge include:

- The ceiling is not an absolute or hard cap, as spousal support can and usually does increase where the payor's income is above \$350,000;
- Above the ceiling, however, the approach to determining the quantum of spousal support is discretionary, and an individualized, fact-specific analysis is required;
- Where the payor's income is "not too far" above the ceiling, the courts frequently order an amount of support at the low end of the range; and
- Once the payor's income is "far" above the ceiling, the amount of support ordered is usually below the low end of the SSAG range.

[165] I would note that the User's Guide raises a contrary issue regarding the custodial payor formula where the payor has a very high income: the grossed-up notional amount of child support that is deducted will be very large, compared to the actual cost of caring for children. Consequently, as the custodial payor's income increases toward the ceiling and above it, moving higher in the range for spousal support becomes "possible, and even advisable": at 38, citing *T.T. v. J.M.H.*, 2014 BCSC 451.

Approach to the Parties' Post-Agreement Incomes

[166] While the parties agree that under the Guidelines the claimant's post-agreement income increases must be used for child support purposes, they dispute whether the respondent would be entitled to share in the post-agreement increases, in the context of assessing the substantive fairness of the Spousal Support Agreement.

[167] Child and spousal support invoke different public policy considerations. Section 147 of the FLA codifies the duty of each parent of a child to provide them with support, often also characterized as the right of the child. Section 150 requires the amount of child support to be determined in accordance with the Guidelines. A key objective of the Guidelines is to establish a fair standard of support for children that ensures they continue to benefit from the financial means of both parents after separation.

[168] In contrast, the duty to provide spousal support, under s. 160, is subject to proof of entitlement and consideration of the spousal support objectives. Further, s. 160 does not refer to income let alone the Guidelines in setting out the criteria for determining the amount and duration of spousal support.

[169] The SSAG identify the definition of (annual) income in the Guidelines as the starting point for determining income under the SSAG. Section 16 of the Guidelines provides that, subject to ss. 17-20, annual income is determined using the sources of income set out under the heading "Total Income" in the Canada Revenue Agency T1 General form. The Guidelines use "gross" income: income before taxes and other deductions. This same gross income is the basis for the calculations under all the SSAG formulas.

[170] I have already indicated my preference for the claimant's calculations of his Guidelines incomes, which include pre-tax corporate income but exclude dividends. Based on DivorceMate calculations that apply the custodial payor formula and use 2021 and 2022 Guidelines incomes for the claimant comparable to his own (\$1,055,047 and \$1,096,081[2]) and the full time equivalent of the respondent's .72 FTE Guidelines incomes (\$111,932 and \$107,953), the range for 2021 is \$14,134 to \$18,846 and for 2022, \$14,801 to \$19,734.

[171] I would impute full-time incomes to the respondent because working less than full-time, in my view, constitutes underemployment as contemplated by s. 19(1) of the Guidelines. Further, she agreed to an income of \$100,000 in the Spousal Support Agreement, which equated to her income working 1.0 FTE at the time, and in 2018, and she agreed to an imputed income of \$85,000 (on an actual income of about \$75,000, as well as to an imputed

income of not less than \$90,000 when support was to be reviewed, in the Consent Order). Unlike the many women who are economically disadvantaged by taking on childcare and other responsibilities during the spousal relationship, the respondent was not. Before and after the agreement she has chosen not to work full-time. Appreciating she devoted some time to completing a Master of Education degree, given the evidence indicates it will not enhance her earning capacity, I do not view it as reasonable to fix her Guideline income at less than full-time, while she was obtaining it.

[172] As the court in N.Z.N. observed at para. 141, "[a] court can find that child support should increase, but not spousal support under the SSAGs", citing *Sarophim v. Sarophim*, 2010 BCSC 216.

[173] The question is really whether it is appropriate to use the claimant's Guidelines incomes and the associated SSAG ranges as a reference point in assessing substantive unfairness given his extraordinary work schedule.

[174] At 144, the SSAG discuss payors' post-separation income increases based on the "current" law (as of the SSAG's publication in July 2008):

Some rough notion of causation is applied to post-separation income increases for the payor, in determining both whether the income increase should be reflected in increased spousal support and, if it should, by how much. It all depends on the length of the marriage, the roles adopted during the marriage, the time elapsed between the date of separation and the subsequent income increase, and the reason for the income increase (e.g. new job vs. promotion within same employer, or career continuation vs. new venture). The extent of sharing of these post-separation increases involves a complex, fact-based decision.

Increases in Payor's Income Post-Separation

[175] How the court deals with a payor's post-separation increase in income in a spousal support case, like determinations of the amount and duration of support generally, is discretionary.

[176] The respondent relies on N.Z.N., which helpfully discussed the factors and circumstances that have been considered in determining whether to use post-separation increases in income for spousal support purposes: at para. 147. Among them are these:

- A spouse is not automatically entitled to increased spousal support when a spouse's post-separation income increases;
- Compensatory support claims may provide a foundation for entitlement to share in post-separation income increases in certain circumstances. The strength of the compensatory claim and the nature of the recipient's contributions appear to be the major factors which may tip the balance either for or against an entitlement to share in the increased income;

- The recipient spouse may be permitted to share in post-separation increases in earnings if they can demonstrate that they made contributions that can be directly linked to the payor's post-separation success. The question of whether the contributions made by the recipient specifically influenced the payor's post-separation success will depend on the unique facts of every case;
- A spousal support award is more likely to take into account post-separation income increases where the relationship was long-term, the parties' personal and financial affairs became completely integrated during the course of the marriage and the recipient's sacrifices and contributions for the sake of the family and resulting benefits to the payor have been longstanding and significant;
- If the skills and credentials that led to the post-separation income increase were obtained and developed during the relationship while the recipient spouse was subordinating their career for the sake of the family, there is a greater likelihood of the recipient deriving the benefit of post-separation income increases;
- By contrast, the likelihood of sharing in such increases lessens if the evidence indicates that the payor spouse acquired and developed the skills and credentials that led to the increase in income during the post-separation period, or if the income increase is related to an event that occurred during the post separation period;
- Assuming primary responsibility for childcare and household duties, without any evidence of having sacrificed personal educational or career plans, will likely not be sufficient to ground an entitlement to benefit from post-separation income increases; and
- Evidence that the payor also made contributions to the recipient's career advancement, or that the recipient has not made reasonable steps towards achieving self-sufficiency are also factors that may preclude an award that takes into account post-separation income increases.

[177] In N.Z.N. itself, the Court concluded the wife was entitled to share in the husband's post-separation income increases, based on what I would describe as a particularly strong compensatory claim. Although at 13 years the marriage was not all that long, the family moved at least five times in support of the husband's career as a military doctor. The wife had worked before the marriage, but the moves made working outside the home difficult. After their first child was born, she remained at home, caring for their two children and managed the household, their finances and all aspects of the moves. She left the marriage bankrupt with no assets and suffering from significant mental health issues related in part to the husband's conduct. Entirely dependent on him for support, he did not pay any until an order was made some years after the separation.

[178] The fact that the increases in the husband's income had to do with payouts relating to a time during the marriage was also considered. Both this and the strength of the wife's compensatory entitlement readily distinguish N.Z.N. from the circumstances here.

- [179] In *Judd v. Judd*, 2010 BCSC 153, Justice Punnett also reviewed cases that analyze how to address post-separation increases in income, including *Hartshorne v. Hartshorne*, 2009 BCSC 698, and concluded:
- [23] The resolution of the issue of post-separation wage increases is clearly fact based. The principle that appears to emerge from current case authority is that the connection the increase in salary has to the recipient's contribution during the marriage is determinative. If the increase in salary is founded in expertise and seniority established during the marriage and no intervening event or events are the cause of the increase, then the increase is to be included unless the recipient's role during marriage necessitates a different determination. If an event after separation is the reason for the increase, in whole or in part, then the increase may be excluded from consideration, also in whole or in part.
- [180] Based on *Judd*, the trial judge was found to have erred in his analysis of whether increases in the husband's post-separation income should be shared between the parties in *Helle v. Helle*, 2019 BCCA 97. The Court of Appeal emphasized that whether increases should be included is not an all or nothing proposition, along with identifying expertise acquired during the relationship and the extent to which payors find themselves in favourable circumstances as a result of the joint enterprise of the marriage, as two of the most important considerations: at para. 39.
- [181] The respondent contends she should receive the benefit of the claimant's increased income, because it flows from her strong compensatory entitlement and in particular his enhanced earning capacity resulting from his specialty training, which also involved an 80-hour work/study schedule.
- [182] In contrast, the claimant argues she is not entitled to share in the increases in his income attributable to his excessive work hours, because they are not causally linked to the respondent's compensatory entitlement. Instead, they are a function of his personal sacrifice and acceptance of risk.
- [183] Given the claimant worked very long hours from the start of his training except for a period in or about 2017 due to health issues, it is difficult to say the increases attributable to his schedule are not connected to the marriage or causally linked to the respondent's compensatory entitlement. Clearly his expertise is.
- [184] At the same time, I accept that the shortage of one specialist within a complement of three has played a role if not a significant one in the claimant's work-schedule since the Spousal Support Agreement. This factor is not attributable to the marriage or the respondent's role in the marriage. Nor is the fact that new procedures such as telehealth, have enabled the claimant, and all physicians I expect, to service more patients in a shorter period of time.
- [185] Based on the combination of a causal connection and intervening events then, if this were an application for a spousal support order and leaving aside the claimant's work schedule, I would conclude the respondent should share in only a portion of the increases in his post-

agreement income. The attenuated strength of the respondent's compensatory entitlement (and the various considerations that underlie the attenuation, namely she suffered no economic disadvantage and in fact her own professional qualifications were increased during the marriage), as discussed in N.Z.N., would also support a reduction to her share. I would not consider although identified in N.Z.N., what I view as the respondent not taking reasonable steps towards self-sufficiency, by continuing to work .72 FTE. Instead, I would and have accounted for her decision to continue to work part-time by imputing a full-time income.

- [186] In my view, the question of whether or the extent to which the respondent should share in the claimant's increased post-agreement income must also consider the claimant's extraordinary work hours. Frankly, I find it difficult to comprehend how anyone could sustain a work schedule of 80 hours for any length of time, never mind 80 hours plus on call hours. The claimant deposes to the personal sacrifices and the risks involved but it is obvious that spending as much time as he does working will have profound impacts, including for example, an inability to spend appreciable amounts of time with family and friends, engaging in physical and social activity or even resting and sleeping adequately. A risk to health too seems undeniable. Here the claimant has already experienced significant health issues after working much the same schedule for some years, which he was advised to reduce and did as part of his recovery.
- [187] Clearly changes in spouses' incomes may form part of "any changes, since the agreement was made, in the condition, means, needs or other circumstances of a spouse" the Court considers under s. 164(5)(b) and they may also be relevant to whether the agreement meets the objectives of spousal support under s. 164(5)(e), in assessing the question of significant unfairness.
- [188] But I cannot see how it could be fair or reasonable to assess significant unfairness using incomes for the claimant that include increases attributable to his extreme work schedule.
- [189] The parties spent a great deal of time and effort disputing what the claimant's income would be on a normalized schedule, based on their competing analysis of MSP billing records and other documents and materials. The impact of his increased involvement in more lucrative procedures was a significant point of contention as was the correct interpretation of some of the documents.
- [190] The respondent submitted a calculation of his revenues adjusted for a 40-hour work week, which as the claimant points out, is substantially above 60 percent of his revenues on an 80-hour work week.

- [191] The claimant identified his income under the Spousal Support Agreement, \$435,000, as a starting point or roughly corresponding to what he could be expected to earn working regular full-time hours. He went on to propose an income of \$550,000 which adds \$115,000 to account for the contribution of greater efficiency and increased performance of more lucrative procedures to the increases in his income since 2020.
- [192] Another approach is to consider the SSAG ranges based on half of the claimant's Guidelines incomes, which for 2021 is \$585,278[3] and for 2022, \$612,091. This income approach accounts for all the variables that contribute to the increases to income, assuming an equal distribution of procedures, appointments and so on throughout the claimant's 80-hour per week plus on call hours work schedule, or a correspondence between time spent and income.
- [193] Using the custodial payor formula and the same imputed (full-time) 2021 and 2022 incomes for the claimant (\$111,932 and \$107,953), the SSAG generates ranges of \$6,969 to \$9,292, and \$7,428 to \$9,904.
- [194] Averaging the 2021 and 2022 ranges based on the claimant's Guidelines incomes referenced at para. 171 above (80-hour work week plus on-call hours) and half his Guidelines incomes (40-hour work week plus on-call hours) results in a range that corresponds to 75% of his Guidelines incomes and approximates a 60-hour work week plus on call hours. For 2021, the range is \$10,552 to \$14,069 and for 2022, \$11,115 to \$14,819.
- [195] Recognizing the discretionary and individualized approach to determining the amount (and duration) of support when the payor's income well exceeds the \$350,000 ceiling, and the guidance offered by the SSAG and the User's Guide on this issue, as well as the impact of the custodial payor formula on the ranges for very high incomes, I view the lower end of the ranges as useful reference points.

Applying the s. 164(5) Factors

- [196] As I have said, determining whether the respondent has established the Spousal Support Agreement is significantly unfair requires me to consider all of the factors under subsection (5), which I reiterate here for ease of reference:
- (a) the length of time that has passed since the agreement was made;
 - (b) any changes, since the agreement was made, in the condition, means, needs or other circumstances of a spouse;
 - (c) the intention of the spouses, in making the agreement, to achieve certainty;
 - (d) the degree to which the spouses relied on the terms of the agreement; and
 - (e) the degree to which the agreement meets the objectives set out in section 161 [objectives of spousal support].

- [197] Turning to apply the factors, the respondent brought her applications to set aside the agreement, not long after the agreement was made. It had been only (almost) three years by the time the hearing started.
- [198] I agree with the claimant that the terms of the Spousal Support Agreement regarding spousal support show a strong intention to achieve certainty. The terms provide for a fixed amount of support, based on fixed incomes, for a fixed duration with no provision for review or variation. Importantly, the absence of a spousal support review or variation provision also contrasts with the requirement for child support to be reviewed annually based on an exchange of income information. The Parenting Agreement (and Consent Order) also included review provisions regarding both spousal and child support.
- [199] There is no indication the parties conducted themselves in a way that does not fully accord with the agreement or that they did not fully rely on the terms. The claimant's reliance seems particularly acute. His evidence indicates that, to the extent he has had an ability to reduce his work hours, he has continued his extreme work schedule with a view to retiring early.
- [200] The respondent argues the parties' financial circumstances have materially changed since the Spousal Support Agreement because, most significantly, the claimant's income has increased substantially. Other changes include for her the loss of income from child support payments of \$2,633 per month, along with her monthly child support payments of \$719.
- [201] In addition to the claimant's increased post-agreement Guidelines incomes, the respondent relies on her calculation of a significant gap in the "current" value of the parties' assets to argue the agreement is significantly unfair. She emphasizes that her standard of living now is well below the claimant's, given her income is a fraction of his and his assets are worth much more than hers.
- [202] The claimant argues the respondent has not demonstrated a material change given she knew his revenue and income fluctuated from year to year and would continue to do so. She also knew his actual income at the time of the November 2020 Mediation was higher than \$435,000 as reflected in the 2020 Brief and her DivorceMate calculations. The claimant contends the loss of child support is not a material change, given R has lived with him since January 2021 and the amount of spousal support she receives under the Spousal Support Agreement accords with an income of \$550,000 applying the custodial payor formula.
- [203] Again, Megson provides the Willick test for establishing a material change of circumstances applies to s. 164(5), although factor (b) is considered in determining whether the agreement is significantly unfair as opposed to providing a threshold requirement.

- [204] In Megson, Fitch J. reasoned that a change resulting in significant unfairness contemplates a standard that could not possibly be lower than a material change of circumstances. Again, this is a change that is substantial, "unforeseen" at the time the agreement was made and continuing: at para. 158. In reaching this conclusion, he identified the policy purposes for the material change requirement as a threshold for variation and significant unfairness under s. 164(5) of the FLA as the same: the need for stability in support orders to promote certainty and predictability and to enable the parties to plan their affairs in reliance on the order, discouraging re-litigation and avoiding inconsistent exercises of discretion by successive judges hearing the same case: at para. 160.
- [205] L.M.P made it clear that what amounts to a material change will depend on the actual circumstances of the parties at the time of the order including the terms of the order or agreement.
- [206] I would agree with the claimant that the respondent's loss of child support does not assist in showing a material change for the reasons he provides. Also, although the respondent said she was blindsided by R's refusal to spend time with her after the November 2020 Mediation, it was her "out of control" behaviour toward R for some time prior that led to the loss of her parenting time. In other words, there can be no question she was fully aware of the circumstances underlying this particular financial change. I also agree the respondent knew or believed the claimant's income was higher than agreed to and knew to expect significant fluctuations in the claimant's income year to year. However, the magnitude of the increases comparing his 2019, 2021 and 2022 Guidelines incomes is a change that is substantial and continuing. While the increases may be reasonably foreseeable, I am inclined to conclude they were not expected or actually foreseen at the time the agreement was made.
- [207] I return to my view that it is not appropriate to use the claimant's post-agreement Guidelines incomes in assessing significant unfairness.
- [208] Applying the approach to payors' post-separation income increases in determining spousal support orders, I concluded the respondent would be entitled to share in only a portion of the increases in the claimant's Guidelines income. I also conclude it would not be fair or reasonable to consider increases in his income attributable to his extreme work hours.
- [209] Using the SSAG and 2021 and 2022 incomes of \$585,278 and \$612,091 that approximate the claimant working 40 and 60-hour plus on call work weeks as reference points, results in the following ranges:

Year

40-hour week

60-hour week

2021

\$6,969 to \$9,292

\$10,552 to \$14,069

2022

\$7,428 to \$9,904

\$11,115 to \$14,819

- [210] The amount of spousal support under the Spousal Support Agreement (\$7,821) exceeds the lower end of the range for both 2021 and 2022 based on a 40-hour plus on call hours work week and is below the low end of the range when accounting for a 60-hour plus on call hours work week.
- [211] Along with my underlying conclusions about the respondent's notional entitlement to only a portion of the increases in the claimant's income and the unfairness involved in using his Guidelines income related to his extreme work schedule, I also consider what I see as a strong possibility if not a likelihood that his work schedule (and with it his income) will significantly reduce, due to the ongoing involvement of a third specialist (reduced work load), personal reasons including health issues, just becoming unable to continue working more regular full time work week or some combination of these variables.
- [212] Turning to the parties' other circumstances, in addition to noting the respondent has significantly misstated some of the numbers, the claimant argues there is nothing unfair about the parties' current asset value differential, bearing in mind that working extraordinary hours is a large part of what has enabled him to increase his assets. Another factor, the business or investment decisions involved, have nothing to do with the marriage.
- [213] The claimant also emphasizes the spousal support objectives are not meant to preserve the relative financial positions of former spouses indefinitely into the future. Certainly, it is the division of property that is considered as part of the means, needs and other circumstances of a spouse in determining awards of spousal support. And I have found the Property Division Agreement provided each party with approximately half of the net value of the assets.
- [214] I would tend to agree that the relative growth in the parties' assets in this case should not play much of a role in assessing the question of significant unfairness. Although the growth in the claimant's assets may constitute a material change, the same concerns about fairness regarding his extraordinary work schedule arise given the connection between their growth and his increased income. The growth is also attributable, as the claimant suggests, to his decision making unrelated to the expertise he acquired during the marriage. Further there is risk and debt involved, as well as potential tax consequences.
- [215] While it is true the respondent' income and the value of her assets are much lower than the claimant's, I am satisfied her standard of living compares to if not exceeds the marital standard. She lives in and owns the former family home, a detached house of reasonable

size, mortgage free. Its BC Assessment value for 2023 was \$1,556,000. In terms of her financial assets, she has had the opportunity to increase the value of half of the RRSPs, along with her TFSA, and a bank account, which had a significant balance. When she retires, she will also have the benefit of the whole of her municipal pension.

- [216] Her 2022 income from employment if she worked full time (\$107,953) plus spousal support (\$93,852) amounts to \$201,805. The expenses in her 2022 Form F8 including her master's degree tuition of \$13,404 per year, were \$116,834. The nature and amount for her personal and other expenses reflect a comfortable if not very comfortable lifestyle. Her financial expenses include moderate monthly RRSP contributions, indicating she is also able to accumulate additional financial assets.
- [217] The respondent's 2023 Form F8 shows a rise in her expenses to \$210,136. The expenses include additional income tax payments required by the CRA (\$25,304), a number of other one-time expenses (such as the purchase of a new furnace of \$17,000), as well as 100% of the cost of R's s. 7 expenses (\$12,260), adding up to over \$54,000 per year. The respondent acknowledges that this will be reduced once the s. 7 expenses are apportioned. She also includes a \$20,000 line of credit which she indicates is for legal fees that she is paying off at a monthly rate of \$500.
- [218] Whether or not the respondent chooses to continue to work .72 FTE, her employment income will continue to increase. Either way, I am satisfied her income from spousal support under the Spousal Support Agreement employment is more than sufficient to meet her actual ongoing expenses. Choosing to continue to work .72 FTE and completing a graduate degree that is not expected to increase her earning capacity also underscore a lack of need.
- [219] The respondent also has the option of capitalizing on her earning capacity by working more than full-time or increasing the value of her assets by investing some of the significant value of her house, through downsizing, without any tax consequences.
- [220] When I consider her attenuated compensatory entitlement along with needs-based support principles, I am satisfied the Spousal Support Agreement meets the objectives of spousal support. While the amount of support it provides for is below what the respondent could receive based on 75% of the claimant's Guidelines incomes, representing a 60-hour plus on call work week, this schedule would still involve very long hours, and as stated in Reid, "[t]he question is not whether the payments under the agreement mirror those that would have been ordered in the absence of the agreement, but rather whether the agreement comported with the objectives and factors that needed to be considered in setting spousal support": at para. 72.
- [221] Along with adequately recognizing the economic advantage to the claimant arising from the marriage or its breakdown (until equal parenting time was established) and adequately apportioning that financial consequence (arising from the care of R and the management of the household), together with the property division provided in the Property Division

Agreement, the Spousal Support Agreement relieves any economic hardship measured by the marital standard of living. Further the Spousal Support Agreement continues to promote self-sufficiency in so far as the absence of a review provision regarding spousal support (not child support) provides an incentive for the respondent to work more, as the spousal support she receives will not be reduced if she increases her income. My calculations of her full-time equivalent incomes for 2021 and 2022, which exceed her imputed income of \$100,000 under the agreement, indicate at least some increase could be easily achieved

- [222] I am satisfied then that the Spousal Support Agreement comports with the objectives of spousal support.
- [223] Based on considering the subsection (5) factors, it is clear to me the agreement is not significantly unfair. This becomes even clearer when the significant policy goals of encouraging spouses to negotiate settlements and the parties' autonomy and freedom to "structure their post divorce lives in a manner that reflects their own objectives and concerns", or self-sufficiency, autonomy and finality are recognized: Miglin at para. 66.

Child Support

- [224] The parties have asked me to determine their Guidelines incomes for 2022 onward for the purpose of child support and specifically s. 7 expenses. As mentioned, they entered into an undisclosed agreement regarding the other disputed child support issues.
- [225] I have already determined the claimant's Guidelines income for 2022. The same amount should be used.
- [226] I have also estimated the respondent's Guidelines income for 2022, by imputing full-time income based on calculating 1.0 FTE from her current .72 FTE income, which should be used subject to Schedule III adjustments i.e., union dues.
- [227] I am not able to determine the parties' annual Guidelines incomes after that, but the approaches should be clear. Again, the main difference between the parties regarding the claimant's income related to his dividend income, given the inclusion of pre-tax corporate income. Regarding the respondent, a full-time income should continue to be imputed to her.

Cost of the Bell Report

- [228] As I have stated, the claimant takes the position the respondent should be responsible for the whole cost of Dr. Bell's report, arguing the report makes it clear the respondent's conduct was the primary cause of R's estrangement from her. The claimant emphasizes that Dr. Bell's various findings are consistent with his version of events. He suggests the report would have been unnecessary without the respondent's misconduct and unfounded allegations of parental alienation.

- [229] I start by recognizing that s. 211 reports provide the courts with very helpful information and expert opinion evidence that can be invaluable in making critically important determinations about children's best interests. With a view to the need to not discourage s. 211 reports, then, I would not endorse an approach to apportioning the cost of a s. 211 report to one party based on the writer's findings regarding fault for harm to a child. I can well imagine exceptions or other circumstances attributable to one party that could demonstrate the inevitable intrusiveness for the child involved in the assessment process was entirely unwarranted.
- [230] In any event, Dr. Bell's findings were not as stark as the claimant suggests and were in fact somewhat mixed. Although she did find the respondent's "out of control" behaviour was the primary reason for R's original estrangement, and ongoing text messages from her and her parents perpetuated it, she also found the claimant had contributed unintentionally through his passive parenting style. Additionally, Dr. Bell identified both parties' poor co-parenting as a real problem for R. As a result, she recommended therapeutic services for the claimant and R, as well as the respondent.
- [231] In the absence of a principled basis for imposing the whole cost of the Bell Report on the respondent, I order the parties to contribute equally to the cost of the Bell Report.

Initialized Style of Cause

- [232] Although an anonymization order was not sought, I make one that requires the parties' names to be initialized to protect the privacy interests of R given the discussion of R's highly personal information in these reasons.

Costs

- [233] As the substantially successful party, the claimant is entitled to regular costs, unless there are circumstances I am unaware of, in which case, the parties will have 45 days to schedule a costs hearing before another presider.

"Fleming J."

- [1] The respondent applied for an order that increased the amount of spousal support to reflect his actual Guidelines incomes starting in 2019, premised on setting aside or varying paras. 7 and 8 of the Spousal Support Agreement, which provided for prospective monthly support payments starting December 15, 2020. During the hearing she agreed that the application then could not seek an order for increased support prior to the agreement.
- [2] For 2021 Taxable losses have been inputted as "Tax Deductions - Business investment loss (gross)" in the absence of another option. DivorceMate describes this category as "Business Investment loss (gross) A business investment loss is a special type of capital loss that occurs when shares or debts of a small business corporation are disposed of at a loss, or when a small business goes bankrupt or becomes insolvent".

[3] Using the same capital cost allowance adjustments and the business investment losses.

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/25/13/2025BCSC1361cor1.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/e-k-v-m-l-f-2025>

Prepared on 25 October 2026 · Esheria