

CANADA / JUDGMENT

Harper v. Harper

[1980] 1 SCR 2

COURT

Supreme Court of Canada

DECIDED

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Harper v. Harper

Collection

Supreme Court Judgments

Date

1979-06-28

Report

[1980] 1 SCR 2

Judges

Laskin, Bora; Martland, Ronald; Ritchie, Roland Almon; Pigeon, Louis-Philippe; Dickson, Robert George Brian; Beetz, Jean; Estey, Willard Zebedee; Pratte, Yves; McIntyre, William Rogers

On appeal from

British Columbia

Subjects

Evidence

Family law

Decision Content

Supreme Court of Canada

Harper v. Harper, [1980] 1 S.C.R. 2

Date: 1979-06-28

Hazel Maggie Jennie Harper (Plaintiff) Appellant;

and

Eldon Stewart Harper (Defendant) Respondent.

1979: May 10; 1979: June 28.

Present: Laskin C.J. and Martland, Ritchie, Pigeon, Dickson, Beetz, Estey, Pratte and McIntyre JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Husband and wife—Divorce—Interest of divorced wife in matrimonial home—Discretionary jurisdiction of trial judge—Review of trial judge’s discretion—Family Relations Act, 1972 (B.C.), c. 20, s. 8.

Evidence—Court of Appeal misled by wrongful assertion in notice of appeal as to title to property—Motion for leave to adduce new evidence—Motion granted—Party not disclosing true facts—Candour expected from counsel and solicitors.

The appellant, the divorced wife of the respondent, brought an action claiming an undivided one-half interest in what was their matrimonial home. The action proceeded through trial and to the British Columbia Court of Appeal on the footing that the title to the property was, as between the respondent and the Director of the Veterans’ Land Act in the Director who was shown as the registered owner under the British Columbia Land Registry Act. The house on the property had been constructed through financing arrangements under the Veterans’ Land Act, now R.S.C. 1970, c. V-4, as amended, and title was put in the name of the Director pursuant to that Act.

The appellant brought her action under the Family Relations Act, 1972 (B.C.), c. 20, on May 9, 1975. Prior to the enactment of this statute, she had commenced a so-called trust action in 1971 when she was still formally married to the respondent, and a *lis pendens* was registered against the property in that action. It, however, remained dormant and she later sought relief under s. 8 of the Family Relations Act. In her statement of claim, dated August 8, 1975, the appellant asserted, which was a fact, that the property in question was occupied by the respondent and was registered in the name of the Director of the Veterans’ Land Act. The appellant alleged that the “lands and premises were purchased by the Plaintiff and Defendant on or about May 8th, 1962 with funds borrowed jointly from the Port Alberni Credit Union and were transferred into the name of the Director of the Veterans’ Land Act on the 13th of August 1962”. She also alleged that the “lands and premises were used as the matrimonial home by the Plaintiff and Defendant from the date of the completion of the construction of the premises on or about June 1st, 1963 until the 21st day of December 1968, when the Plaintiff left the matrimonial home, fearing for her mental health”.

Alleging, further, that the ownership of the land and premises had always been considered a joint venture, the appellant claimed an undivided half interest in the property “as a result of her contributions towards the economic wealth of the family as a whole”. The respondent denied the aforementioned allegations, and the case went to trial accordingly. The trial judge concluded, on the evidence and notwithstanding that the registered title was in the Director of the Veterans’

Land Act , that the appellant should have a one-quarter interest in the net value of the property. He noted that the respondent had remarried and that the appellant planned to remarry.

On appeal, the British Columbia Court of Appeal allowed the appeal on the ground that the now respondent had no interest in the property which was entirely in the Director of the Veterans' Land Act .

Leave to appeal to this Court was given principally to consider the validity and applicability of the Veterans' Land Act and, in the result, both the Attorney General of British Columbia and the Attorney General of Canada intervened.

A motion by the appellant in this Court, returnable at the hearing of the appeal, to adduce fresh evidence by way of an affidavit sworn by Douglas E. Humphrey, Director, Property and Securities Division, in the Veterans' Land Act Administration, was granted, with reasons to be delivered later. The affidavit disclosed that on July 29, 1974, the respondent applied to the Regional Director, Veterans' Land Act for a conveyance to him of the property in which title had theretofore been in the Director of the Veterans' Land Act . A conveyance dated July 31, 1974, was executed in the respondent's favour and, pursuant to a letter from the Royal Bank of Canada which had advanced \$5,916.69 to discharge the respondent's indebtedness under the Veterans' Land Act , the conveyance was sent to the bank to be held as security.

Held (Pigeon, Estey, Pratte and McIntyre JJ. dissenting in part): The appeal should be allowed and a one-third interest awarded to the appellant in the property, the calculation of the value of the appellant's interest to be subject to the prior claim of the Royal Bank of Canada for the sum of \$5,916.69 advanced by it to discharge the respondent's indebtedness on the property and the respondent to register his title thereto forthwith in the appropriate Land Registry Office.

Per Laskin C.J. and Martland, Ritchie, Dickson and Beetz JJ.: The special grounds for the admission of new evidence by this Court under the proviso to s. 67 of the Supreme Court Act include a situation where there has been a failure of an officer of the Court, e.g. a trustee in bankruptcy, to bring all the relevant matters to the Court's attention, although the matters were not newly discovered but existed before trial. Equally, they will yield to a situation where a solicitor as an officer of the Court has not brought to the Court's attention pre-existing matters of which he had knowledge or where a party to the proceedings has misled the Court as to facts in issue or has misled his own solicitor or counsel, with the result that the action has proceeded on an erroneous factual basis.

The Court of Appeal was misled by the assertion in the now respondent's notice of appeal that "legal title" to the property was in the Director of the Veterans' Land Act . In fact, as between the respondent and the Director it was in the respondent long before the action was begun. The transfer of title to the respondent did not become known to appellant's counsel until the leave to appeal to this Court was granted.

There was no justification for the resistance of counsel for the respondent to the admission of the evidence contained in the Humphrey affidavit. Its admission would mean only that the constitutional issue could be put to one side and the claim of the appellant determined on a proper factual basis as between her and the respondent. Refuge in the pleadings at trial and in the record at trial, as sought by counsel for the respondent, irrespective of the wrongful assertion as to title by the respondent on appeal to the Court of Appeal and, again, in his affidavit on taxation of costs after the appeal was determined in his favour, would mean insistence on a state of facts which were untrue and which would involve this Court in a constitutional exercise which would be unnecessary if the truth had been told.

The new evidence sought to be adduced would not have involved any change in the cause of action, but bespoke a failure of candour by the respondent in order to take advantage of the appellant if he could. No Court can condone attempts to mislead it; and if the respondent put his counsel in an unenviable position, the Court was entitled to have their co-operation in clarifying the record once they became aware of the true state of the title.

As to the merits of the appellant's claim, the question was whether the trial judge's award of a one-quarter interest in the property should be affirmed and the appeal allowed accordingly, or whether a larger interest should be awarded. Although an appellate Court, and especially an ultimate Court, should ordinarily refrain from interfering with the exercise by a trial judge of the type of broad discretionary jurisdiction conferred by s. 8 of the Family Relations Act, there was the fact that the trial judge acted on certain irrelevant considerations and ignored relevant ones and that the Court of appeal was misled as to the legal title and thus did not address itself to the exercise of the discretionary authority of the trial judge. In all the circumstances, it would be equitable and just that the appellant be awarded a one-third interest in the property, and that it be based on the present value of the property, less the sum of \$5,916.69 advanced by the Royal Bank to discharge the respondent's indebtedness to the Director of the Veterans' Land Act .

Dormuth and Ursel v. Untereiner and Muskovitch, [1964] S.C.R. 122; *Brown v. Gentleman*, [1971] S.C.R. 501; *Rathwell v. Rathwell*, [1978] 2 S.C.R. 436, referred to.

Per Pigeon, Estey, Pratte and McIntyre JJ., dissenting in part: The fundamental question raised in this Court was narrow and simple. Should this Court, on the record of this appeal, review the exercise of the discretion of the trial judge under s. 8 of the Family Relations Act? An appellate Court should be extremely reluctant to interfere with the exercise of a discretionary power by a trial judge. However, there are cases where justice demands that the exercise of discretion be reviewed. This was one such case because the trial judge had proceeded on the basis of certain irrelevant and erroneous considerations. Also, the new evidence adduced in this Court raised serious questions as to the credibility of the respondent, and it was not at all clear that the trial judge would have reached the conclusion that he did had he been made aware of the true facts.

It was impossible to weigh the relative contributions of the spouses to the joint venture, and it would require a very extensive and elaborate hearing to thrash out in detail all the admissible evidence that could be garnered in support of their completing claims with respect to the acquisition of this home. Family law as it has evolved in this country has not found it necessary or indeed in the public interest to require parties to these differences to so litigate their disputes.

A court exercising its discretion under s. 8 of the Family Relations Act is not in any way bound by the line of cases in this Court and in England which have limited the discretion of a trial judge under the various Married Women's Property Act statutes. Also, as was the view of Hinkson J.A. in *Deleeuw v. Deleeuw* (1977), 5 B.C.L.R. 106, it is not a necessary prerequisite to obtaining relief pursuant to the provisions of s. 8 that an applicant "show that he or she has in some real way contributed to the acquisition of the property in question or has done something to enhance or maintain its value..."

It has become a reality of life and indeed of family law, at least in the common law provinces of this country, that trial judges in all levels of the courts have recognized as a general principle that the husband and wife divide up family properties on a 50/50 basis unless the circumstances otherwise require. There may be a great number of instances where the general rule of 50/50 is moderated or adjusted by reason of the origin of specific assets or by reason of unusual contributions.

While it might be said that the recognition of the one-half interest in the wife is judicial legislation bringing about a community of property without expressly so stating and without deferring on such a policy matter to the Legislature, such was not the case, even though in many provinces such a result has been reached by legislation. The realities of life today require a recognition in the courts that the parties enter into not the marital contract but the ensuing social joint venture on the basis that each spouse will play his or her assigned role without deliberate and final agreement, and certainly without daily or periodic accounting. The common and basic intent is clearly a sharing of the good with the bad, the debts and the assets. In this proceeding it was clear that the wife was not forced to found her claim to an interest in the husband's property on the fact of marriage alone. The process of valuation of contribution has its economic limits when applied to an interspousal dispute. Here the record revealed sufficient of their respective contributions to allow allocation by approximation. The trial judge had misdirected himself and thereby the exercise of discretion became reviewable. A proper exercise of discretion would find the wife entitled to a one-half interest in the matrimonial home.

The appeal should be allowed and an order directed that the lands and premises be valued at the date of judgment either by agreement between the parties or in a manner as provided, and that there be deducted from such valuation (a) the sum of \$5,916.69 being the moneys paid by the respondent to the Director, Veterans' Land Act, and (b) the sum of \$3,786 being the contribution by the husband to the premises, and that the net remaining value be divided one-half to the appellant and one-half to the respondent; and that the respondent register his title to the lands forthwith in the appropriate Land Registry Office.

APPEAL by the plaintiff from a judgment of the Court of Appeal for British Columbia, reversing a judgment of Stewart L.J.S.C., in an action taken pursuant to s. 8 of the Family Relations Act, 1972 (B.C.), c. 20. Appeal allowed and a one-third interest awarded to the appellant, Pigeon, Estey, Pratte and McIntyre JJ. dissenting in part.

Robert Doell and Miss Deborah Acheson, for the plaintiff, appellant.

John W. Horn, for the defendant, respondent.

The judgment of Laskin C.J. and Martland, Ritchie, Dickson and Beetz JJ. was delivered by

THE CHIEF JUSTICE—This appeal, which is here by leave of this Court granted on March 7, 1978, concerns the entitlement of the appellant, the divorced wife of the respondent, to an interest in what was their matrimonial home. The action proceeded through trial and to appeal to the British Columbia Court of Appeal on the footing that the title to the property was, as between the respondent Harper and the Director of the Veterans' Land Act in the Director who was and is shown as the registered owner under the British Columbia Land Registry Act. The house on the property had been constructed through financing arrangements under the Veterans' Land Act, now R.S.C. 1970, c. V-4, as amended, and title was put in the name of the Director pursuant to that Act.

The appellant brought her action under the Family Relations Act, 1972 (B.C.), c. 20, on May 9, 1975. Prior to the enactment of this statute, she had commenced a so-called trust action in 1971 when she was still formally married to the respondent, and a *lis pendens* was registered against the property in that action. It has, however, remained dormant and she later sought relief under s. 8 of the Family Relations Act, which reads as follows:

8. (1) Where the court makes an order for dissolution of marriage or judicial separation, or declaring a marriage to be null and void, and it appears that a spouse is entitled to any property, it may, not more than two years from the date of the order, make any order that, in its opinion, should be made to provide for the application of all or part of the property, including settled property, for the benefit of either or both spouses or a child of a spouse or of the marriage.
- (2) Where the court makes an order under subsection (1), it may order that the property be sold and direct the disposition of the proceeds.

In her statement of claim, dated August 8, 1975, the appellant asserted, which was a fact, that the property in question was occupied by the respondent and was registered in the name of the Director of the Veterans' Land Act. Paragraphs 6 and 7 of the statement of claim are as follows:

The aforesaid lands and premises were purchased by the Plaintiff and Defendant on or about May 8th, 1962 with funds borrowed jointly from the Port Alberni Credit Union and were transferred into the name of the Director of the Veterans' Land Act on the 13th of August 1962.

The aforesaid lands and premises were used as the matrimonial home by the Plaintiff and Defendant from the date of the completion of the construction of the premises on or about June 1st, 1963 until the 21st day of December 1968, when the Plaintiff left the matrimonial home, fearing for her mental health.

Alleging, further, that the ownership of the land and premises had always been considered a joint venture, the appellant claimed in para. 9 of her statement of claim an undivided half interest in the property “as a result of her contributions towards the economic wealth of the family as a whole”. The respondent denied the allegations in paras. 6, 7 and 9 above mentioned, and the case went to trial accordingly. The trial judge, His Honour Judge Stewart, acting as a Local Judge of the Supreme Court of British Columbia, concluded, on the evidence and notwithstanding that the registered title was in the Director of the Veterans’ Land Act, that the appellant should have a one-quarter interest in the net value of the property. He noted that the respondent had remarried and that the appellant planned to remarry. He said this in the concluding portion of his reasons:

As far as I can judge each party was as much to blame as the other for the breakdown of their marriage. No attempt at reconciliation was made by either. The defendant eventually obtained the divorce some five years after the separation and at that time the plaintiff made no effort to advance a claim to the home property. Thereafter the defendant started to build a new life for himself around the home in which the plaintiff claims a half interest. His new wife has invested a substantial amount in improvements. He has one child of the marriage with him. He is contributing to the maintenance of those now with the plaintiff. I have concluded that an allocation equivalent to a one-quarter interest in the net value of the property would be fair.

If the parties are unable to agree on value and the steps required to give effect to this application of the property, I will deal with the matter after hearing counsel, who may also wish to speak to costs.

The respondent appealed on May 5, 1976, being represented on the hearing of the appeal by Mr. J.W. Horn. His counsel at the trial was R.A. Scoffield, who also signed the notice of appeal. That notice contained the following assertions in paras. 1 and 2 thereof:

1. The learned Judge erred in the law in holding that the Appellant is a spouse “entitled to....property” the subject of the case at bar, where the legal title to such property is held by the Director, the Veterans’ Land Act .
2. The learned Judge erred in law in holding that the Respondent is a spouse “entitled to property” the subject of the case at bar, where the legal title to such property is held by the Director, the Veterans’ Land Act .

In his factum on the appeal, counsel for the appellant, respondent on the appeal to the British Columbia Court of Appeal, said this in para. 7 of the factum:

The indebtedness of the Director was retired in 1974 but the husband has not exercised his right pursuant to s. 11 of the Veterans’ Land Act to call for title to be placed in his name.

An affidavit produced in support of the now respondent Harper pointed out that there was nothing in the record to support the aforementioned statement.

The British Columbia Court of Appeal allowed the appeal on the ground that the now respondent had no interest in the property which was entirely in the Director of the Veterans' Land Act . In the course of his reasons for the Court, Farris C.J.B.C. said this:

... The title to the land has remained in the Director ever since the conveyance to him. At the trial, no evidence apparently was led to show ... the present state of the account between the veteran husband and the Director.

Mr. Doell, Counsel for the wife Respondent, was unable to point to any evidence in the Appeal Book to support his statement in the factum, paragraph 7, that the indebtedness of the Director was retired in 1974. So that is the factual situation. It is clear to me, from an examination of the documents, that the arrangements with the Director of Veterans' Land Act , were made pursuant to Part II of the Veterans' Land Act .

Section 59(1) provides for a reconveyance by the Director to the veteran, when all the necessary payments have been made. We do not know from the evidence here, whether all the necessary payments have been made.

Section 60, subsection 2 of the Act provides:

"Nothing in this Part, and nothing in any contract or collateral agreement entered into under section 55 or 57 shall be construed as conferring upon or vesting in any veteran, prior to the conveyance to that veteran by the Director under subsection 59(1) of the land in respect of which the contract or agreement was entered into, any right, title, interest or estate in that land."

So, at the time of trial, no conveyance having been made to the veteran, by the Director, the veteran had no right, title, interest or estate in the land.

This application is brought under Section 8 of the Family Relations Act, which provides, as has been noted above: "it appears that a spouse is entitled to any property."

At the time of the trial, he was not entitled to any property, because the conveyance, the title was in the Director, and Section 60, subsection 2, expressly says he is not.

Now this was not an action where an application was made, or where it was alleged in the pleadings that all the money had been paid, that the husband veteran had the right to acquire title, and for an application that an injunction be granted ordering him to apply and obtain title. That was not the basis upon which this case was presented. It was on the basis of a claim under Section 8, for an order in relation to the land, and as I have said, the husband at that stage had no entitlement to it.

Then there is the further difficulty in this case, that there was no evidence as to the present value of the property in question.

It seems to me that in exercising the discretion that is given under Section 8, it can only be properly exercised if you know what you are dividing, and its value.

...

Now those proceedings, take place after the exercise of the discretion by the Trial Judge, and in my view, he had no material before him upon which he could exercise a judicial discretion, which is required under Section 8 of the Family Relations Act.

Leave to appeal to this Court was given principally to consider the validity and applicability of the Veterans' Land Act and, in the result, both the Attorney General of British Columbia and the Attorney General of Canada intervened.

I have enlarged on the pleadings and on the position taken on appeal to the provincial Court of Appeal because of a motion by the appellant in this Court, returnable at the hearing of her appeal, to adduce fresh evidence by way of an affidavit sworn by Douglas E. Humphrey, Director, Property and Securities Division, in the Veterans' Land Act Administration. The affidavit discloses that on July 29, 1974, the respondent applied to the Regional Director, Veterans' Land Act for a conveyance to him of the property in which title had theretofore been in the Director of the Veterans' Land Act. A conveyance dated July 31, 1974, was executed in the respondent's favour and, pursuant to a letter from the Royal Bank of Canada which had advanced \$5,916.69 to discharge the respondent's indebtedness under the Veterans' Land Act, the conveyance was sent to the bank to be held as security.

The general principles which govern the admission of new evidence in this Court were stated in *Dormuth and Ursel v. Untereiner and Muskovitch*[1], at p. 131, where Ritchie J., speaking for the majority, referred to an earlier case in this Court concerning the admission of evidence discovered after trial and sought to be admitted in a provincial Court of Appeal. He then continued as follows:

The above statements were made with respect to the role of a court of first appeal in relation to evidence discovered after the trial but, in my view the same considerations apply when evidence is tendered for the first time before this Court on appeal from a provincial Court of Appeal. The special grounds required in an application made under the proviso to s. 67 include, in my opinion, being able to show that the evidence could not have been discovered by reasonable diligence before the conclusion of the hearing in the Court of Appeal and being able also to satisfy this Court that the evidence, if accepted, would be practically conclusive.

It is clear that Justice Ritchie did not lay down an exhaustive test for the admissibility of fresh evidence in the Supreme Court, saying only what the special grounds under the proviso to s. 67 include. In my opinion, they also include a situation where there has been a failure of an officer of the Court, e.g. a trustee in bankruptcy, to bring all the relevant matters to the Court's attention, although the matters were not newly discovered but existed before trial: see *Brown v. Gentleman*[2]. Equally, in my opinion, they will yield to a situation where a solicitor as an officer of the Court has not brought to the Court's attention pre-existing matters of which he had

knowledge or where a party to the proceedings has misled the Court as to facts in issue or has misled his own solicitor or counsel, with the result that the action has proceeded on an erroneous factual basis.

In view of the disposition of the appeal by the British Columbia Court of Appeal (the appeal was heard on November 15, 1977 and disposed of on that day in oral reasons for judgment), it is clear that that Court was misled by the assertion in the now respondent's notice of appeal that "legal title" to the property was in the Director of the Veterans' Land Act. In fact, as between the respondent and the Director it was in the respondent long before the action was begun. In his affidavit in support of the motion to adduce new evidence, counsel who appeared for the appellant in the Courts below made the following assertions in paras. 21, 22, 23, 25 and 26:

21. THAT I became aware that the indebtedness of the Director had been retired in 1974 in the fall of 1977 prior to the hearing before the British Columbia Court of Appeal, by reason of a telephone call placed to a Mr. Birrell at the Office of the Director, Department of Veterans' Affairs, Victoria, British Columbia, on or about the 9th day of September, 1977. 22. THAT I was not advised that legal title had been delivered to the Defendant Eldon Stewart Harper during that conversation.

23. THAT the factum of the Appellant, Eldon Stewart Harper, was filed on May 24, 1977. The following is alleged in the statement of facts of that factum:

"8. The Defendant applied to the Director of Veteran's Land Act for financing to build a home and the application was granted. (A.B. p. 179, 1.24)

9. A contract was entered into with the Director on the 13th day of September, 1962, (A.B. p. 163, Exhibit 7) and the property was conveyed to the Director on the 3rd day of August, 1962. (A.B. p. 174, Exhibit 8)

10. The Title remained in the Director at the time of action. (A.B. p. 153, Exhibit 3)."

The aforementioned facts of factum are annexed hereto and marked as Exhibit "II" to this my Affidavit.

...

25. THAT in the taxation of the Defendant's bill of costs in the Family Relations Act action a further Affidavit of Eldon Stewart Harper was sworn the 5th day of January, 1978 and filed January 9, 1978. THAT annexed and marked as Exhibit "I" hereto is a copy of the aforementioned Affidavit which reads, in paragraph 2:

"THAT I am purchaser by unregistered agreement for the sale of land where The Director, The Veterans' Land Act, is Vendor of lands and premises situate in the Alberni Assessment District, Beaver Creek Improvement District, Province of British Columbia, more particularly known and described as:

Lot 24, District Lot 166, Alberni District, Plan 1474,

(hereinafter referred to as the “Premises”).”

26. THAT on or about the 11th day of July, 1978, I received an anonymous telephone call from a male person who disclosed that he was calling from Ottawa. That person advised me that legal title to the said matrimonial property had been reconveyed to the veteran in 1974.

It appears, therefore, that the transfer of title to the respondent did not become known to appellant’s counsel until the leave to appeal to this Court was granted. Counsel for the respondent in this Court said that he became aware in late 1977 that respondent’s debt to the Director of the Veterans’ Land Act had been satisfied but he did not know of any transfer of title to the respondent. This Court does not have any affidavit from Mr. Horn’s instructing solicitor, Mr. R.A. Scoffield, who represented the respondent at the trial and who signed the notice of appeal to the British Columbia Court of Appeal, as to what he knew or whether his client the respondent had omitted to tell him about the conveyance from the Director of the Veterans’ Land Act. Certainly, if there was any knowledge of the conveyance, the proper course would be to disclose it (in answer to the usual notice to produce relevant documents) or to refuse to continue acting for the respondent.

Before this Court, counsel for the respondent took a technical position on the motion to adduce fresh evidence, contending that he was under no obligation to assist the appellant in her action and that he was entitled to stand by the record of the proceedings before and at trial. It is evident, however, from the material that I have canvassed that the respondent could not properly rest on those proceedings, certainly not after the matter went to appeal and certainly not in the light of what was included in the affidavit of Mr. Humphrey and of Mr. Doell, the appellant’s counsel. (I should say here that Mr. Doell did not argue the motion for leave to adduce new evidence.) There are the further relevant facts that we are concerned with a claim to an interest in the matrimonial home, a family issue to be judged equitably, and that by reason of the non-disclosure of the conveyance, a serious constitutional issue was necessarily raised which brought interventions from the provincial and federal Attorneys-General.

I am bound to say—all members of this Court reacted the same way—that I was unable to understand the resistance of counsel for the respondent to the admission of the evidence contained in the Humphrey affidavit. Its admission would mean only that the constitutional issue could be put to one side and the claim of the appellant determined on a proper factual basis as between her and the respondent. Refuge in the pleadings at trial and in the record at trial, as sought by counsel for the respondent, irrespective of the wrongful assertion as to title by the respondent on appeal to the Court of Appeal and, again, in his affidavit on taxation of costs after the appeal was determined in his favour, would mean insistence on a state of facts which were untrue and which would involve this Court in a constitutional exercise which would be unnecessary if the truth had been told.

The new evidence sought to be adduced would not involve any change in the cause of action, but bespeaks a failure of candour by the respondent in order to take advantage of the appellant if he could. No Court can condone attempts to mislead it; and if the respondent put his counsel, be he Mr. Scofield or Mr. Horn, in an unenviable position, the Court is entitled to have their co-operation in clarifying the record once they have become aware of the true state of the title.

At the conclusion of the hearing of the motion for leave to adduce new evidence, the Court was unanimously of the opinion that the motion should be granted, with costs of the motion to the successful appellant and with reasons to be delivered later. The reasons have been set out in what has gone before, and I turn now to the merits in the light of the newly admitted evidence.

The constitutional question has now disappeared and counsel for the respective Attorneys-General asked to withdraw, having no submissions to make on the merits. They were, accordingly, excused and, although they felt they should have some costs in view of the unnecessary trouble to which they were put, a not unreasonable position for them to take, I think it best to follow this Court's general rule that no costs are awarded to or against any intervenant.

On the merits of the appellant's claim, the question is whether the trial judge's award of a one-quarter interest in the property should be affirmed and the appeal allowed accordingly, or whether a larger interest should be awarded. Counsel for both parties expressed the wish that this case be finally resolved here and not be sent back for retrial and, in my opinion, this wish should be accommodated.

Section 8(2) of the Family Relations Act leaves a large discretion to the trial judge. In my view, the observations of the British Columbia Court of Appeal that there was no proper basis for the exercise of a judicial discretion must be taken in the light of its concern with the application of the Veterans' Land Act. I am of the same view in respect of the Court of Appeal's statement that there was a further difficulty in the case because of the absence of evidence as to the present value of the property. Since title is now in the respondent, I do not think that the question of lack of evidence as to value of the property can militate against the making of an order in the appellant's favour.

I have already quoted the considerations that moved the trial judge to his conclusion that the wife should be allowed a one-quarter interest in the property. There are a number of comments to be made on the considerations on which the trial judge appears to have acted. Whether or not attempts at reconciliation were made, the appellant's claim cannot be discounted on the ground that no such attempts were made by either spouse. Again, it was wrong to suggest a failure by the appellant to advance a claim to the matrimonial property at the time of the divorce when it is clear that since the institution of her trust action in 1971 she had asserted an interest in the matrimonial home. Furthermore, the fact that the husband had started to build a new life for himself in the home and was contributing to the maintenance of the children residing with the appellant are not grounds for affecting her claim to a property settlement; see *Rathwell v. Rathwell*[3], per Dickson J., at p. 462. In my opinion, the trial judge ought to have also considered as a factor in the appellant's favour that the respondent has had the use and occupation of the

subject property for some ten years since the parties separated. I do not think that this can be discounted by reason of the respondent's remarriage and of the fact that his new wife has paid for some improvements to the property by an outlay of about \$5,000.

Although an appellate Court, and especially an ultimate Court, should ordinarily refrain from interfering with the exercise by a trial judge of the type of broad discretionary jurisdiction conferred by s. 8 of the Family Relations Act, there is the fact that the trial judge acted on certain irrelevant considerations and ignored relevant ones and that the British Columbia Court of Appeal was misled as to the legal title and thus did not address itself to the exercise of the discretionary authority of the trial judge. In all the circumstances, it would be equitable and just that the appellant be awarded a one-third interest in the property, and that it be based on the present value of the property, less the sum of \$5,916.69 advanced by the Royal Bank to discharge the respondent's indebtedness to the Director of the Veterans' Land Act .

The proper order to make is that this appeal be allowed, that the judgments on appeal and at trial be set aside and that a one-third interest be awarded to the appellant in the property, that the calculation of the value of the appellant's interest be subject to the prior claim of the Royal Bank of Canada for the sum of \$5,916.69 advanced by it to discharge the respondent's indebtedness on the property and that the respondent register his title thereto forthwith in the appropriate Land Registry Office. If the parties cannot agree on the sum of money representing the interest herein accorded to the appellant, the question should be referred either to the trial judge or to another Local Judge of the Supreme Court of British Columbia for determination upon such appraisal evidence as may be brought before him. The respondent shall pay to the appellant the sum agreed upon or determined by the Local Judge, and the property shall be charged therewith until payment, with interest at five per cent per annum from the date of this judgment, or the Local Judge may order a sale of the property to realize the appellant's interest.

The appellant is entitled to costs throughout as well as to costs of the motion to adduce new evidence.

The reasons of Pigeon, Estey, Pratte and McIntyre JJ. were delivered by

ESTEY J. (dissenting in part)—This appeal concerns the award of an interest to the wife in the family home pursuant to an action brought under s. 8 of the Family Relations Act, 1972 (B.C.), c. 20. The trial judge awarded an undivided one-quarter interest in the wife with a reference to the Registrar of the Court to determine the value thereof in the event the parties cannot agree. The Court of Appeal set aside the award and dismissed the wife's action. This Court is invited to restore the trial judgment but revise the allocation to the wife upwards from a $\frac{1}{4}$ to a $\frac{1}{2}$ interest.

A preliminary matter of some importance arose with reference to the conduct of the husband's case, particularly in the Court of Appeal. These circumstances are reviewed by the Chief Justice and need not be repeated for my purposes here. I am concerned with the disposition of the basic appeal after the new evidence has been admitted by this Court.

The evidence introduced by and on behalf of the two spouses is typical in a matrimonial dispute where, after the divorce, proceedings are launched under provincial legislation to divide up the family assets. Unfortunately, this has been done in this action in a very expensive manner. A short chronology of events is all that is required to set the stage. The parties were married in 1949. Neither brought any assets into the marriage. There are seven children of the marriage. The family lived in rented accommodation until 1962 when the property which is the subject-matter of this dispute was purchased. The parties separated in 1968. The wife and the three infant children lived separate and apart in the City of Victoria. One of these children is now living with the respondent. In 1971 she brought an action in the Supreme Court of British Columbia for a declaration that the husband held an undivided one-half interest in the matrimonial home in trust for and on behalf of the appellant. At that time, it is now clear that the title to the matrimonial home was in fact and in law in The Director, Veterans' Land Act . The Family Relations Act, supra, was proclaimed in force on July 1, 1972. After the commencement of this Act, the trust action was held in abeyance.

The respondent brought an application for divorce on the basis of three years separation, and a Decree Absolute was issued in 1973. The appellant has been receiving \$45 monthly for her own maintenance and \$35 monthly for each child residing with her.

By an action commenced in May 1975, under the Family Relations Act, supra, the wife sought a one-half interest in the family home. Counsel for the wife explained the delay in the bringing of these proceedings under the provincial legislation as being due to the impecuniosity of the wife, and it is obvious from the state of affairs of the family as revealed on the record that this is true. It is this action which is the basis of this appeal.

In the statement of claim the wife pleaded that the matrimonial home was "registered in the name of the Director of the Veterans' Land Act ..." and at the date of the statement of claim, and indeed today, this is true. In the meantime, but only in response to a motion brought in this Court by the wife, it is learned that the husband paid off the Director in August 1974 and received a deed to the land from the Director of the Veterans' Land Act transferring title to the husband. The husband had directed the Director to deliver the deed to the Royal Bank of Canada as security for a loan, the proceeds of which may indeed have been paid over in whole or in part to the Director in order to support the deed conveying the land to the husband. In any case it is clear that when the action was commenced by the wife, the husband had received a deed from the Director, Veterans' Land Act and therefore the Director at that time had no interest in the land whatsoever.

The husband, in his statement of defence and in his position throughout the trial, simply agreed that the land was in fact registered in the name of the Director, Veterans' Land Act and apparently chose, in response to a notice to produce, not to confess to the receipt of the deed from the Director, Veterans' Land Act . Hence the matter proceeded through trial to judgment on the assumption by the wife and indeed the trial judge that title was in law and in fact still in the Director, Veterans' Land Act .

From the judgment at trial awarding a one-quarter interest in the wife, the husband appealed asserting in the Notice of Appeal as the first two grounds that:

1. The learned Judge erred in the law in holding that the Appellant [husband] is a spouse “entitled to ... property” the subject of the case at bar, where the legal title to such property is held by the Director, the Veterans’ Land Act .
2. The learned Judge erred in law in holding that the Respondent [wife] is a spouse “entitled to ... property” the subject of the case at bar, where the legal title to such property is held by the Director, the Veterans’ Land Act .

In the Court of Appeal the question as to the state of the title arose, apparently, by reason of an assertion in the factum of the wife that the Director, Veterans’ Land Act had been paid off by the husband, but as the counsel for the wife was unable to point to anything on the record to substantiate this submission, the Chief Justice of the Court stated, in giving oral judgment:

So, at the time, no conveyance having been made to the veteran by the Director, the veteran had no right, title, estate, interest in the land.

Counsel for the husband in this Court stated that he made no response in the Court of Appeal when this statement was made by the Chief Justice in giving oral judgment. It may be that counsel was unaware of the facts at that time and, in any case, the matter only came to light by reason of an anonymous telephone call from someone in Ottawa to the wife advising her that the husband had received long ago a deed of the land from the Director. The wife by that time had appealed these proceedings to this Court and consequently made application for the admission of new evidence to establish the ownership of the land throughout all these proceedings. For reasons that entirely escape my understanding, the husband opposed the admission of this new evidence.

The fundamental question raised in this Court is narrow and simple. Should this Court, on the record of this appeal, review the exercise of the discretion of the learned trial judge under s. 8 of the British Columbia statute? Section 8 provides as follows:

8. (1) Where the court makes an order for dissolution of marriage or judicial separation, or declaring a marriage to be null and void, and it appears that a spouse is entitled to any property, it may, not more than two years from the date of the order, make any order that, in its opinion, should be made to provide for the application of all or part of the property, including settled property, for the benefit of either or both spouses or a child of a spouse or of the marriage.
- (2) Where the court makes an order under subsection (1), it may order that the property be sold and direct the disposition of the proceeds.

In my view, it is a proper case for this Court to review the trial judge’s discretion because the trial judge proceeded on the basis of irrelevant and erroneous considerations. The learned trial judge concluded that the wife has a one-quarter interest in the property after stating the following:

As far as I can judge each party was as much to blame as the other for the breakdown of their marriage. No attempt at reconciliation was made by either. The defendant eventually obtained the divorce some five years after the separation and at that time the plaintiff made no effort to advance a claim to the home property. Thereafter the defendant started to build a new life for himself around the home in which the plaintiff claims a half interest. His new wife has invested a substantial amount in improvements. He has one child of the marriage with him. He is contributing to the maintenance of those now with the plaintiff. I have concluded that an allocation equivalent to a one-quarter interest in the net value of the property would be fair.

The appellant began the trust action, discussed earlier, in 1971 and therefore it is incorrect to state that” ... The defendant eventually obtained the divorce some five years after the separation and at that time the plaintiff made no effort to advance a claim to the home property.” The appellant has at all times maintained that she has an interest in the matrimonial home.

It can also be seen that the trial court revealed a consideration of at least three irrelevant elements:

- (a) that no attempt at reconciliation had been made;
- (b) the defendant (the husband) had started to build a new life for himself around the home in which the plaintiff claims a one-half interest;
- (c) the bare fact that the husband has been contributing to the maintenance of the wife and of the children residing with her. (This may on a later consideration of future entitlements be reflected in the inter-spousal account.) In the case of *Garratt v. Garratt*[4], Hutcheon L.J.S.C., quite correctly in my view, stated that “... the question of maintenance whether by a lump sum or by periodic payment, ought not to be confused with the question of property settlement.” (p. 170) In the case of *Rathwell v. Rathwell*[5], Dickson J. stated:

It was argued that Mrs. Rathwell should be denied a proprietary interest because she was awarded \$250 per month maintenance. I agree with the Saskatchewan Court of Appeal in the present case that an order for alimony and maintenance in her favour does not bar a wife from seeking a further order declaring that she has an equitable proprietary interest. The two forms of relief are obtained in separate actions based on different legal rights. They are related only to the extent that the wife’s success in the latter proceeding may permit the husband to seek a change in the award of alimony and maintenance in the earlier proceeding. (p. 462)

It should also be noted that the new evidence adduced in this Court raises serious questions as to the credibility of the respondent, and it is not at all clear that the trial judge would have reached the conclusion he did had he been made aware of the true facts.

An appellate Court should be extremely reluctant to interfere with the exercise of a discretionary power by a trial judge. However, there are cases, and for the reasons given above I believe this is one, where justice demands that the exercise of discretion be reviewed.

If a judge proceeds on principle properly applicable to the facts of a case and makes a decision judicially, in the exercise of his discretion, this Court will not interfere. But, if it appears that a judge has misdirected himself, or that his decision is so clearly wrong as to amount to an injustice, the Court can and should review the facts upon which the judgment ought to be given. (Re Hull Estate[6] per Laidlaw J.A. p. 785)

I note also that in the case of Deleeuw v. Deleeuw[7] the Court of Appeal reviewed the trial judge's discretionary exercise of the s. 8 power and concluded that "the learned trial judge had applied a wrong test to the interpretation of s. 8 ..." (p. 113). In this case, because of the respondent's success before the Court of Appeal, that Court did not review the trial judge's application of s. 8.

The evidence, as I have stated at the outset, is typical of the unfortunate circumstances attendant upon the breakup of a family. It is impossible to weigh the relative contributions of the spouses to the joint venture, if I may use that term without intending to thereby attribute unusual legal consequences to the marital union. The husband made his contribution by the direct investment of time, effort and money. The wife made her contribution less directly, but no less importantly, through the management of the family so as to release the husband for sufficient time to make his contribution to the construction of the house built by the family on the lands in question. She did more than that. The evidence is clear that she fed, and in at least one instance housed, persons who helped with the carpentry and other physical elements in the construction of the home. She also executed a chattel mortgage securing the funds which enabled the husband to acquire the property which he then conveyed to the Director, Veterans' Land Act so as to obtain the funds with which the house was built. This loan was secured in part against the household goods of the family and there is no evidence that the wife did not own at least a part of or have an interest in those goods.

The learned trial judge stated in a summary way his conclusions with reference to the ultimate ownership of this property:

There was at no time any discussion between the parties on the question of ultimate ownership of the property, nor would one expect there to have been any. The defendant now says that throughout it was his clear intention to retain ownership himself giving as a reason the instability of his marriage. He may have convinced himself that this was the case but I have no faith in that testimony. I am satisfied no thought was given to the question at the time. The parties wanted a better home. This was the only way it could be financed and it was well understood that the defendant alone could be a party to the arrangement with the Director.

The plaintiff was at pains to describe her contribution to outside work around the home in the care of the few animals and fowl and care of the garden. She also made much of her efforts in preserving fruits, vegetables and some meat and fowl. The defendant depreciated these efforts. The only conclusion I can draw from the evidence is that both parties were kept fully occupied in the creation, operation and maintenance of the two homes I have described. There was never any extra money and their responsibilities prevented joint holidays of significance. During all this time the defendant was employed and the plaintiff's duties included the catering to the needs of a

number of boarders from time.

It would require a very extensive and elaborate hearing to thrash out in detail all the admissible evidence that could be garnered in support of the competing claims of husband and wife with respect to the acquisition of this home. Family law as we have seen it evolve in this country has not found it necessary or indeed in the public interest to require the parties to these differences to so litigate their disputes. It may be stated with accuracy as well as fairness that in the division of the family assets upon the destruction of the marital union, the courts have sought to do justice as expeditiously as can fairly be done because it is the single, disintegrating family unit which bears the legal costs of both sides of the contest. Hence it has not been necessary in the ordinary case to demonstrate values of the properties being divided except in those instances where sale is not a realistic alternative in the event of disagreement, or where it is in the interest of the parties to divide property in specie. Such is not the case here.

It should be noted that a court exercising its discretion under s. 8 of the Family Relations Act is not in any way bound by the line of cases in this Court and in England which have limited the discretion of a trial judge under the various Married Women's Property Act statutes. I am here referring to such cases as *Murdoch v. Murdoch*[8] and *Thompson v. Thompson*[9]. I agree entirely with the following description of the effect of s. 8 given by Munroe J. in the case of *Stevenson v. Stevenson*[10], at p. 250:

It is the submission of counsel for Mr. Stevenson that s. 8 has made no change in the substantive law and that accordingly the law as enunciated by the Supreme Court of Canada in such cases as *Thompson v. Thompson*, [1961] S.C.R. 3, 26 D.L.R. (2d) 1, and *Murdoch v. Murdoch*, 1 R.F.L. 185, [1974] 1 W.W.R. 361, 41 D.L.R. (3d) 367, must govern my disposition of the claims made herein by the wife. I do not agree. If that is so, s. 8 need not have been enacted and is superfluous. In my respectful opinion, s. 8 confers upon the Court a discretion which it did not previously have—a discretion to make an order that allocates property held in the name of either or both spouses between them and their children in a just and equitable way according to all the circumstances. Section 8 thereby altered the rigours of the common law as it existed prior to its enactment, when determining the property rights of members of a family following dissolution of the marriage of the spouses.

The oft-quoted remarks of Romer L.J. in *Rimmer v. Rimmer*[11], at p. 866, that "... cases between husband and wife ought not to be governed by the same strict considerations, both at law and in equity, as are commonly applied to the ascertainment of the respective rights of strangers" are applicable to s. 8 cases.

I also agree with Hinkson J.A. in the case of *Deleeuw v. Deleeuw*, *supra*, wherein he states:

A consideration of the provisions of s. 8 of The Family Relations Act does not lead me to conclude that a necessary prerequisite to obtaining relief pursuant to the provisions of that section requires the applicant to show that he or she has in some real way contributed to the acquisition of the property in question or has done something to enhance or maintain its value. Those matters are some of the factors which the judge hearing the application may take into

consideration in determining whether or not to exercise his discretion, and in the event it is exercised in favour of the applicant, in further determining the extent to which the applicant is entitled to share in the property. Thus, I think that the learned trial judge was in error in concluding that Mrs. Deleeuw must fail in her application for relief pursuant to the provisions of The Family Relations Act because she had done nothing more than what might naturally be expected of her as a wife and mother. A wife may not be able to show that she played a part in the acquisition of a particular property, yet her frugality and ability to manage may have enabled her husband to enjoy savings which he has shrewdly invested and which have resulted in the acquisition of a particular property. Such a wife is entitled to seek a share in the property so acquired. In a given set of circumstances the court may decide to exercise the discretion in favour of an applicant where the applicant can show no more than the fact that she was a good wife and mother and in that way should be regarded as having contributed to the acquisition of property now registered in the name of the husband.

It has also become a reality of life and indeed of family law, at least in the common law provinces of this country, that trial judges in all levels of the courts have recognized as a general principle that the husband and wife divide up family properties on a 50/50 basis unless the circumstances otherwise require. There may be a great number of instances where the general rule of 50/50 is moderated or adjusted by reason of the origin of specific assets or by reason of unusual contributions.

Many of the British Columbia decisions indicate the division of matrimonial property on a 50/50 basis. (Vide *Shehousky v. Shehousky*[12] *Stevenson v. Stevenson*[13]; *Wiley v. Wiley*[14].) In the 1975 unreported decision in the case of *MacLœd v. MacLœd*, Meredith J. stated:

What I do consider relevant is the fact that although the plaintiff [husband] brought into the marriage some property from which the assets ultimately acquired to some extent derived, in the main the creation of those assets must be taken to have been by virtue of the joint efforts of the plaintiff and the defendant: the plaintiff for the most part earned the money, and he worked hard at his improvement of both properties; the defendant devoted her efforts in large part to the five children, joint assets, as it were, of incomparable value.

So I think little or no rational distinction can be drawn between the respective contributions of the husband and the wife to the acquisition of the two properties. I think their contribution should be regarded as equal and that the assets should, so far as is possible, be divided equally.

In the Manitoba case of *Atamanchuk v. Atamanchuk*[15] Duval J. described the “joint purse” approach to the division of assets under the Manitoba statute:

Where there is a joint purse between husband and wife and a common pool into which they put all their resources, it is not consistent that the assets should thereafter be divided with reference to their respective contributions, crediting the husband with the whole of his earnings and the wife with the whole of her earnings. It would be impossible to make any such calculation. It is also clear that when a husband and wife, by agreement, work together in operating a farm and the properties are in the husband’s name, he will be held to hold title thereto as a trustee for her

to the extent of onehalf. See *Jones v. Maynard* [1951] 1 TLR 700, [1951] 1 All ER 802; *Sywack v. Sywack* (1942) 51 Man R 108; *Kropielnicki v. Kropielnicki* [1935] 1 WWR 249; *S. v. S.* (1952) 5 WWR (NS) 523; *Mitchelson v. Mitchelson* (1953) 9 WWR (NS) 316 (p. 305).

(Underlining added.)

It may be said that the recognition of this interest in the wife is judicial legislation bringing about a community of property without expressly so stating and without deferring on such a policy matter to the Legislature. In my view, such is not the case, even though in many provinces (for example, British Columbia and Ontario) such a result has been reached by legislation. As we have seen in *Pettitt v. Pettitt*[16], and in *Gissing v. Gissing*[17], the realities of life today require a recognition in the courts that the parties enter into not the marital contract but the ensuing social joint venture on the basis that each spouse will play his or her assigned role without deliberate and finite agreement, and certainly without daily or periodic accounting. The common and basic intent is clearly a sharing of the good with the bad, the debts and the assets. In stating this, I am also quick to agree with that which was said by my colleague, Dickson J., in *Rathwell v. Rathwell*, *supra*, at p. 448.

A third limit: Although equity is said to favour equality, it is not every contribution which will entitle a spouse to a one-half interest in the matrimonial property. The extent of the interest will be proportionate to the contribution, direct or indirect, of the spouse. Where the contributions are unequal, the shares will be unequal. A spouse who fails to make a contribution has no claim in justice to assets acquired wholly by the efforts of the other spouse.

Canadian common law does not recognize the concept of community of property resulting from the sole fact of marriage. In the absence of legislative provision to that effect, it is not proper for a court to upset current matrimonial property practice by acting as if such an institution existed. This is a point of great importance and needs re-emphasis here. See *Pettitt v. Pettitt*, *supra*, at p. 803. But it must also be noted that there is a considerable distinction between judicial legislation of community of property and judicial enforcement of the equitable doctrines of resulting and constructive trust. It is understandable that confusion between the two should arise in matrimonial property disputes for the apparent net effect of each is normally a divestiture of property, or an interest in it, and transfer from the titled to the non-titled spouse. The essential difference, however, is that the divestiture from community of property has as its source the fact of marriage; the divestiture in trust arises out of a common intention (resulting trust), or out of inequitable withholding resulting in an unjust enrichment (constructive trust).

In this proceeding it is clear that the wife is not forced to found her claim to an interest in the husband's property on the fact of marriage alone. The finding by the trial judge, if anything were needed, makes this abundantly clear. The process of valuation of contribution has its economic limits when applied to an inter-spousal dispute. Here the record reveals sufficient of their respective contributions to allow allocation by approximation, which I observe to be the *modus operandi* of the courts of the country engaged in family law, by reason of the process followed by the learned trial judge in discretion under s. 8 of the British Columbia statute. I conclude that the

learned trial judge misdirected himself and thereby the exercise of discretion becomes reviewable, and I conclude that a proper exercise of discretion would find the wife entitled to a one-half interest in the matrimonial home.

The actual formal order issued after trial provided:

AND THIS COURT DOTH ORDER AND ADJUDGE that in the event the parties cannot agree on the value of the Plaintiff's one-quarter ($\frac{1}{4}$) interest in the aforesaid property as of the date of this Order, then in that event, an enquiry shall be held by the Registrar of this Honourable Court to determine the said value which shall be determined by having the said lands and premises appraised and from the appraisal value, deducting the balance owing by the Defendant to the Director of Veterans' Land Act , and then determining the Plaintiffs one-quarter ($\frac{1}{4}$) interest on that said amount.

AND THIS COURT DOTH FURTHER ORDER AND ADJUDGE that Judgment herein be lodged with the Director of Veterans' Land Act for the purpose of having the Defendant honour the Plaintiffs interest as determined herein upon sale or disposition of the said property.

As we now know the husband did not make any payment to the Director by reason of that Court Order and the Director did not have any interest in the lands in question at any time throughout these lengthy proceedings. A series of questions must, however, be answered in order to establish the appropriate order at this time. I say at once that in the field of family law, the concept of retrial is abhorrent. Neither the parties nor the community can afford such luxury. This may thrust a burden upon the appellate tribunals, but better the burden be so reposed than placed back on the parties. The husband is, of course, entitled in all fairness to a credit for that which he has paid to clear the title from any claim by the Director, Veterans' Land Act .

This must be so notwithstanding the fact that he co-operated, to put it mildly, in causing this defective provision in the order of the trial court. We know that this payment amounted to \$5,916.69, and in any final accounting the husband should receive a credit for this contribution before the division of the proceeds of any sale or other dividing processes are determined. As for the contribution said to have been made by the "new wife", may it be observed at the outset that this was made not before some date in 1975, that being the time of the husband's second marriage. By this time the property had been subject to a *lis pendens* filed by the wife for four years. The evidence as to the details of this contribution are extremely brief and for our purposes, very unsatisfactory. Unhappily, no cross-examination occurred with respect to this evidence. There is no documentation of the claim which is stated to amount to \$5,050. Indeed, we do not even know how much, if any, of such contribution relates to real estate and fixtures and how much may relate to personal property which has added nothing to the value of the real estate. The evidence of the husband is that these contributions were "moneys towards the improvement of the house". For example, reference is made to "new drapes" and to carpets. The improvements were apparently brought about by the new wife providing money "for all the material" and the husband doing the work. The new wife is, of course, not a party to these proceedings, and at most these contributions can be attributed to the husband so as to increase

entitlement. It is impossible to determine with any precision how much of the \$5,050 related to material and how much related to work performed by the husband. It is also impossible to determine how much of the materials and work related to the enhancement of the value of the real estate. As I have said above, the evidence required in a family law dispute does not approach the precision of a mercantile dispute, at least for the purpose of measuring precisely the contribution translated to financial terms of the competing spouses. A reference or a new trial to determine the amount and character of these “improvements” will entail expense on the part of the spouses out of all proportion to the worth of the result in the settlement of this family law matter. Therefore, under the circumstances of this case, in order to bring matters to a conclusion, and to reflect so far as possible the evidence introduced by the parties, I would attribute 75 per cent or \$3,786 of this contribution to the credit of the husband in the same manner as the husband is credited above with the final payment to the Director, Veterans’ Land Act .

Then there is the question of the unilateral occupation of these premises by the husband for the 10 years which have passed since the wife vacated the premises, or eight years from the commencement of litigation between husband and wife. Whether the wife’s interest in the property be ultimately determined to be 50 per cent or something less, the husband has arrogated to himself considerable value in the form of use and occupation of the former family home. It is clear beyond debate that this unilateral occupation was extended by the husband’s filing of the notice of appeal to the Court of Appeal in May 1976. Again we are faced with the economic limitation beyond which judicial exploration cannot proceed in the field of family dispute. To determine the value of use and occupation over a decade would require a reference, more evidence, more argument, and perhaps further appeal. Therefore, placing, as the modern tradition in my view does, more emphasis on expeditious justice than finite justice, I would consider the husband’s unilateral and extra-legal gain to be swallowed up in the ultimate division of the property between the spouses on a 50/50 basis.

I turn then to the state of the title. So far as this Court can ascertain from the record and from submissions of counsel, the deed from the Director, Veterans’ Land Act to the husband was transmitted by the Director on the direction of the husband to the Royal Bank of Canada presumably as security for a loan or loans by the husband and perhaps now by the husband and his new wife. The state or balance of this indebtedness is, of course, unknown to us. It may be that the Royal Bank asserts a possessory lien on the deed as collateral security to the personal indebtedness of the husband and/or the new wife. It may be therefore that the only effective disposition that can now be made of this family asset is to direct the sale thereof with an accounting before the appropriate official of the Supreme Court of British Columbia so as to protect the possessory lien of the Royal Bank of Canada, but not at the wife’s expense beyond those credits already accorded above to the husband with respect to moneys paid by the husband to the Director, Veterans’ Land Act in discharging the agreement and recovering the deed to the premises, and the aforementioned improvements to the house made by the husband. Therefore, in implementation of the division of this real estate between husband and wife on the basis already indicated, failing agreement between the parties on the payment of the wife’s interest, I

would direct a sale of these premises by the Court and a division of the net proceeds of sale in the manner herein provided for. Unless there be some prohibitory British Columbia legislation, such an order would in my view include a term entitling either spouse to bid in the resulting sale process.

I would therefore allow the appeal with costs to the appellant-wife throughout, set aside the judgment of the Court of Appeal and at trial, and direct that the said lands and premises be valued at the date hereof either by agreement between the parties or in the manner hereinafter provided, and that there be deducted from such valuation of the said lands and premises (a) the sum of \$5,916.69 being the moneys paid by the respondent to the Director, Veterans' Land Act , and (b) the sum of \$3,786 being the contribution by the husband to the premises as described in these reasons, and that the net remaining value be divided one-half to the appellant-wife and one-half to the respondent-husband; and that the respondent register his title to these lands forthwith in the appropriate Land Registry Office. In the event the parties cannot agree on the value of the said property, the question shall be referred either to the trial judge or to another local judge of the Supreme Court of British Columbia for determination upon such appraisal or other evidence as he may direct or as the parties may present. The interest of the appellant in the said lands determined in accordance with this order shall be a charge against the said lands and premises until paid with interest at the rate of 5 per cent per annum from the date hereof. In the discretion of the said local judge, an order may issue for the sale of the said lands and premises so as to realise the interest of the appellant therein on the basis herein set forth.

Appeal allowed with costs, PIGEON, ESTEY, PRATTE and MCINTYRE JJ. dissenting in part.

Solicitors for the plaintiff, appellant: Stevenson, Doell & Co., Victoria.

Solicitors for the defendant, respondent: Badovinac, Scoffield & Mosley, Port Alberni.

[1] [1964] S.C.R. 122.

[2] [1971] S.C.R. 501.

[3] [1978] 2 S.C.R. 436.

[4] (1974), 16 R.F.L. 168 (B.C.S.C.).

[5] [1978] 2 S.C.R. 436.

[6] [1943] O.R. 778 (C.A.).

[7] (1977), 5 B.C.L.R. 106.

[8] [1975] 1 S.C.R. 423.

[9] [1961] S.C.R. 3.

[10] (1974), 15 R.F.L. 248 (B.C.S.C.).

[11] [1952] 2 All E.R. 863.

[12] (1974), 17 R.F.L. 269 (B.C.S.C.).

[13] (1974), 15 R.F.L. 248 (B.C.S.C.).

[14] (1971), 6 R.F.L. 36 (B.C.S.C.).

[15] (1955), 15 W.W.R. 301.

[16] [1970] A.C. 777.

[17] [1971] A.C. 886.

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