
CANADA / JUDGMENT

I.F. v. R.J.R.

2015 BCSC 793

COURT

Supreme Court of British Columbia

DECIDED

5 March 2015

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2015 BCSC 793 I.F. v. R.J.R.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

I.F. v. R.J.R.,

2015 BCSC 793

Date: 20150305

Docket: E141767

Registry: Vancouver

Between:

I.F.

Claimant

And

R.J.R., also known as R.R.,

also known as G.M.

Respondent

Before: The Honourable Madam Justice Ballance

Oral Reasons for Judgment

Counsel for the Claimant:

H. Dale

Counsel for the Respondent:

R. Huinink

Place and Dates of Hearing:

Vancouver, B.C.

September 2, 3, November 10, 19, December 5, 11 and 16, 2014, February 23 and 24, 2015

Place and Date of Judgment:

Vancouver, B.C.

March 5, 2015

Introduction

- [1] The claimant applies for interim spousal support and, pursuant to s. 89 of the Family Law Act, S.B.C. 2011, c. 25 (the "FLA"), for an order that the sum of \$100,000 of family property be released to her to fund her litigation costs and/or the resolution of this proceeding.
- [2] A complicating factor that arises in this case is the existence of a marriage agreement by which the claimant has ostensibly relinquished her rights to any interest in the respondent's property and has arguably waived her entitlement to receive spousal support.
- [3] The parties separated in or about June 2013. They continued to live under the same roof at the matrimonial home. The arrangement was emotionally draining for both.
- [4] On July 9, 2014, a protection order was granted in favour of the claimant and the young child of the marriage, as well as a restraining order over the respondent's assets. On the respondent's motion, the restraining order was subsequently varied and an interim parenting schedule was put in place until the parties attended a judicial case conference. Little in the way of resolution was achieved at the judicial case conference. A ten day trial was set to commence on March 30, 2015.
- [5] The claimant's within notice of application, which seeks several orders beyond those described above, first came before me on September 2, 2014. The time allotted for the hearing was woefully inadequate to accommodate the several matters to be spoken to. The scheduling shortcoming was exacerbated by the insufficient financial documentation presented by both sides. The matter was therefore adjourned to enable the parties to gather additional documentation.
- [6] I made interim orders at that time and on subsequent dates that were understood to stand as temporary measures concerning spousal and child support and an expansion of the respondent's parenting time.
- [7] In terms of support, the respondent was ordered, on a without prejudice basis, to increase spousal support to \$2,500 per month, and raise his monthly child support payments to \$800. I also directed the claimant to make all reasonable efforts to locate the financial documents relating to her personal corporation, FEE, and to outline the distribution of the proceeds of

sale of her beauty spa and salon (the "Salon"). As well, I ordered additional document disclosure in relation to Mr. R.J.R.'s business interests. As those interests are held in a number of related corporations, gathering the relevant documentation was no small undertaking.

- [8] As a means of streamlining the issues, I directed, with counsels' agreement, that this hearing would address the issue of spousal support and the claimant's application under s. 89 of the FLA. The issues pertaining to the child of the marriage were adjourned generally due to lack of time and the pressing priority of these other financial issues.
- [9] The hearing next continued for a full day on November 10, 2014, but did not complete until after a further continuance in December and counsel's subsequent confirmation of the existence of an executed marriage agreement.

general remarks about interim orders

- [10] The volume of material on this application is staggering for an interim matter.
- [11] In the space of a few short months, the claimant has sworn multiple affidavits. The respondent has sworn even more, plus two financial statements. His second financial statement alone stands close to 3-inches thick. Both parties have also submitted numerous affidavits from third parties in support of various aspects of their evidence. The exhibits span several hundreds of pages. Many of the disputed facts are collateral to, and of marginal or no relevance, on this application.
- [12] It is regrettably clear from the sheer volume and inflammatory tone of the affidavit evidence filed at this relatively early stage, that this proceeding has the very real potential to quickly develop into a protracted, scorched-earth type battle.
- [13] This would seem a logical place to make some general remarks about interim orders. By their very nature, they are stop-gap orders. It is routinely the situation that parties embroiled in matrimonial litigation will have conflicting versions of the material facts. In the vast majority of cases, the evidence required for a complete exploration of the controversial issues is underdeveloped or not available.
- [14] It is commonplace for the chambers judge on an interim application to make preliminary findings based on the evidence as it then stands. Due to the interlocutory nature of the proceeding, it is understood that those findings are almost invariably drawn from a limited record. They are not intended to fetter the trial judge who will decide the issues on a broader and more developed body of evidence and, for that reason, may arrive at different conclusions. Appreciating that only when extensive evidence is adduced at trial can the disputed issues be fairly determined on their merits, does not mean that the court will necessarily be hamstrung on an interim application.
- [15] While the court is inclined to take a cautionary approach on most every interim application, it strives to ensure that it is not so overly cautious as to be timid.

Background

· Early Days

- [16] The claimant deposes that she and the respondent began their relationship in approximately August 2002. At the time, she was 18 years old and the respondent was 36. The respondent does not dispute that assertion directly, but says that they did not start living together until the spring of 2003.
- [17] The parties eventually married several years later, on May 24, 2008. The claimant was 25 and the respondent was 43.
- [18] The respondent deposes that the parties did not have a "common law marriage" and had no marriage ceremony of any kind before May 24, 2008. I understand his evidence to mean that they did not participate in a marriage ceremony recognized as a formal marriage at common law. There can be little doubt, however, that for several years before the parties wed in 2008, they had lived together in a marriage-like relationship of the kind contemplated by s. 3 of the FLA.
- [19] The parties' son, A., was born on June 11, 2009. He is their only child.

· The Franchise Business

- [20] The respondent had started a chain of fast food restaurants (sometimes referred to as the "Franchise Business") three years or so before the parties met. The claimant deposes that when their relationship began, he owned three franchise locations; the respondent says there were six. The precise number does not matter for my purposes.
- [21] The respondent operates the Franchise Business through three corporate entities, which I will refer to as "Food", "Holdings" and "Properties" respectively. He is the sole shareholder of Food and of Holdings. Holdings, in turn, owns Properties.
- [22] Until March 2013, Food was the operating arm of the Franchise Business. In March 2013, its assets were purchased by a new company incorporated by the respondent, which I will refer to as "Equipment", with the result that Food effectively became dormant. The respondent deposes that this transaction was undertaken to isolate the failings of the Franchise Business in Ontario from the B.C. operation and was intended to improve Equipment's balance sheet. He explained that the transaction basically left Food to deal with the potential claims of the franchisees in Ontario and, correspondingly, removed that "problem" from Equipment's books.

- [23] As had been the case with Food, the majority of revenue and expenses of the Franchise Business are run through Equipment. Equipment pays all the staff wages and benefits, as well as the rent for the head office premises and for any corporately owned stores. Holdings retains the capital assets and business loan receivables. It produces a modest revenue stream from the interest income earned on those receivables. No revenue is generated by Properties.
- [24] Under the current business model, at any given time there may be five or six franchises that underperform or fail and are taken over by the respondent's group of companies. If the failing franchise cannot be turned around and become profitable, it is disbanded.
- [25] For the most part, the respondent has been able to self-finance the Franchise Business with the result that none of the group of companies have significant bank loans. As will be seen, this point has relevance to the respondent's ability to access funds from those companies for his personal use, and speaks to the core issue of his financial means for the purposes of this application.

· Problems in Ontario

- [26] There was considerable evidence tendered about the recent failed expansion of the Franchise Business into Ontario.
- [27] The respondent deposes that the competition in Ontario has been more fierce than had been expected and that none of the Ontario franchises have performed well. He described how expansion into Ontario required over \$1.0 million dollars in capital costs, practically all of which he claims has been lost because those operations did not achieve the necessary sales levels. Compounding that problem is the decline in franchise growth. The respondent deposes that about 40 new locations were opened and sold in 2011 and 2012, in comparison to only six in 2013. As well, ten existing stores were closed that year and many were taken over by "head office" to be run corporately. He states that the corporately-run stores were a cash drain and were eventually sold to new franchisees. Even though financing terms were highly favourable to those franchisees, many of them have been unable to repay the financed amounts. The respondent says that none of the six remaining Ontario locations have been making payments on their loan principal or interest.
- [28] Despite the setbacks in Ontario, the respondent advocates the need to invest additional monies in that attractive market in order to turn around the drastic decline and accomplish other corporate objectives.
- [29] When the Franchise Business moved into Ontario, the respondent was unaware of the far-reaching provisions of the Arthur Wishart Act (Franchise Disclosure) 2000. British Columbia does not similar legislation. The Wishart Act is remedial legislation intended to level the legal playing field between franchisees and franchisors by protecting franchisees when they enter into franchise agreements. Among other things, it imposes a duty of fair dealing on parties to a franchise agreement and requires a franchisor to provide prospective

franchisees with detailed disclosure before they enter into a franchise agreement. A franchisee may rescind a franchise agreement for the franchisor's failure to provide disclosure. The Wishart Act provides a right to damages for losses suffered because of a misrepresentation in the disclosure documents. A director of the franchisor or a franchisor's associate may be held personally liable for the compensable damages.

- [30] There are currently four separate Ontario lawsuits involving the Franchise Business, which entail ongoing legal costs. At this time, there is no reliable assessment of the exposure to liability of any one or more of the companies or to the respondent personally. Although the claimant appears to have been named in some of the actions in the capacity of "franchisor's associate", the respondent himself deposes that there are weaknesses in those cases as to whether she is a proper defendant at all.

· Claimant's Involvement in the Franchise Business

- [31] One of the many areas of contention between the parties is the nature and extent of the claimant's involvement in the Franchise Business.
- [32] I accept her evidence that she had always been interested in pursuing a career in the aesthetics/beauty industry. She deposes the respondent did not approve of her following that path because he believed it would not be profitable. She says she capitulated to the respondent's wishes that she establish a career that would benefit the Franchise Business.
- [33] The claimant characterises the Franchise Business as a "family business". She explained that her intended meaning was that the business was owned and/or run by family members, including herself. It is her evidence that, starting in August 2002 and continuing until she went on maternity leave in May 2009, she worked solidly in the Franchise Business, holding positions in human resources, marketing, franchise development, bookkeeping and training. She deposes that virtually throughout their relationship, she and the respondent have devoted all of their time and energy toward building the Franchise Business and, through their joint efforts, the business climbed from three or six locations at the beginning of their collaboration to over 70 franchises at its height.
- [34] The respondent disputes the claimant's contention that she held anything other than an entry-level position in the Franchise Business until after their separation. Expanding on the point, he says the claimant started as a cashier for an individual franchisor and was paid minimum wage or slightly more. He deposes that her minimal involvement in the actual Franchise Business was mostly in the form of low-skill positions, such as a receptionist, and that she performed what he termed were "girl Friday" tasks. He denies that she was ever in a position to influence the course of the Franchise Business and that it was only after their separation that he gave her the position of "franchise developer in training", which she performed for a mere two months.

- [35] The respondent claims he made it abundantly clear to the claimant from the outset that, as an employee in any of his companies, she would enjoy no favours from him other than access to his business knowledge. She would receive a regular paycheque and nothing more or less than any other employee in the same position. The respondent now claims to lament having hired the claimant at all, complaining that her skill-set was not a good fit. He says he only gave her a job to help her gain some experience so she could "get on her feet".
- [36] The respondent spoke favourably about the claimant's talents on the entrepreneurial side. He deposes that he encouraged her to acquire one of the fast food franchises from the Franchise Business, get it up and running, establish a customer base and an income stream, and then sell it. He elaborated that although he freely provided the claimant with his business know-how and encouragement, he expected her to develop her own financial base.
- [37] The claimant ran her first fast food franchise successfully, working long hours and minimizing costs. To the respondent's recollection, she ultimately sold the first franchise at a significant profit of approximately \$100,000. It is not clear from the evidence how the claimant financed the acquisition of her first franchise and, more to the point, the extent of the financial assistance she may have received from the respondent personally and/or his group of companies in that regard.
- [38] The respondent deposes that the claimant repeated her successful pattern with several more fast food franchises. He elaborated that one of her franchises was especially successful, having achieved an income, after costs but before tax, of about \$200,000 per year. He pointed out that shortly after their son was born, the claimant sold her Metrotown Mall franchise for \$470,000. The parties disagree as to whether she actively marketed the sale of that franchise to enable her to spend more time with their son, or that it came to her "out of the blue", as suggested by the respondent. Nothing turns on that point for the purposes of this application.
- [39] The respondent says that the claimant kept the profits from all of the fast food franchises she owned and operated. He is adamant that those undertakings were not joint enterprises as suggested by the claimant. He insists that he did not see a penny of those monies, except to the extent that she may have treated him to dinner or a vacation or the like.
- [40] The timeline of the respondent's evidence appeared to suggest that the claimant went into the business of buying and selling franchises fairly early on in their relationship. However, the preponderance of the evidence shows that she did not start that endeavour until late 2006 or early 2007, nearly five years after the parties became romantically involved. It was around then that she incorporated her own company, FEE, to act as the central operating company for the franchises she intended to acquire.

- [41] The evidence shows that, starting in about 2007, or slightly before then, the claimant opened franchise stores, one at a time. It was within this general timeframe that she also attended college to study business administration and real estate. She was encouraged to do so by the respondent who paid some of her tuition costs.
- [42] The claimant explained that, quite apart from her successes with the individual franchise stores, as a key member of the executive team of the Franchise Business, she held several significant titles, including financial coordinator, franchise developer, human resources and office manager. She deposes that she was the franchise developer during the greatest period of expansion experienced by the Franchise Business. She also says that her signature appears on company documents, such as subleases, payroll, negotiation documents and franchise documents. However, no such document was in evidence except for an undated magazine proof of an advertisement showing her title as "franchise developer". The respondent says this proof was prepared after the claimant returned to the Franchise Business in that position in 2014.
- [43] The respondent did not satisfactorily explain the contents of the letter he authored in February 2012, which was addressed "To Whom It May Concern". In it, he confirmed that, since June 2003, the claimant had been working for Food "with good performance" and had held several executive positions, including franchise developer and finance coordinator. Also in evidence was correspondence dated February 2012 from a law firm addressed to Food to the claimant's attention describing her title as "Licensee and Financial Coordinator".
- [44] This evidence undermined the respondent's repeated denials that the claimant held executive positions in the Franchise Business before 2014, and was one of a number of pieces of evidence that reflected poorly on his credibility.
- [45] Another of the contentious themes of the claimant's evidence is that, although she helped shape the Franchise Business, she was financially dependent on the respondent throughout the entirety of their relationship. The respondent balks at her evidence on this point, maintaining that they were at all times financially independent of each other and that they had agreed they would keep their finances and assets separate. He claims that, to that end, they did not even share a joint bank account.
- [46] A determination of the claimant's role in the Franchise Business and the degree of her financial dependence on the respondent throughout the course of their relationship will have to await trial.

· Marriage Agreement

(i) Preparation and Execution

- [47] As mentioned, a pivotal issue to be determined at trial is the enforceability of the marriage agreement. The parties have vastly different versions of the circumstances surrounding its inception and execution by the claimant.

- [48] The claimant's evidence is that a little more than a week before the wedding, the respondent told her she "had to" sign a marriage contract. She contends that she was preoccupied with the details of the wedding, and that the presentation to her of a marriage contract caught her completely off guard. She says she was shocked to be asked to sign one at all, and that he would raise it on such short notice before the wedding. According to the claimant, when the respondent broached the subject with her, she had already planned an elaborate "dream" wedding, and between 80 to 100 guests, including some from as far afield as Iran, Montréal and Texas, had confirmed their attendance.
- [49] The claimant deposes that she was opposed to signing the agreement and did not want to even think about it, and on several occasions tried to broach the topic with the respondent. She claims, however, that he was inflexible and stridently insisted that she sign it, saying that if she truly loved him she would have no problem doing so.
- [50] The claimant explained that in her cultural and family background, marriage is considered to be about mutual trust. She felt too ashamed to tell her family and friends that her fiancé had asked her to sign such a contract and so she kept it a secret from them.
- [51] The claimant says she could not bear to cancel the wedding and so she just "gave up" and agreed to sign the contract. She says it was at that point that the respondent provided her with the contact information of a lawyer and arranged an appointment for her to meet with him. She read the marriage agreement for the first time during that appointment.
- [52] The claimant says that, as English is her second language, she did not fully grasp the meaning of the marriage contract, other than it was probably "bad" for her. In reading it, she noticed that the respondent had declared the value of his business interests to be \$6.0 million. She had no idea what that valuation was based upon or whether it was accurate, and says she had no reasonable opportunity to verify its accuracy.
- [53] The claimant regarded the marriage agreement as a document that she had to sign in order to prove to the respondent that she loved him, and understood that her refusal to do so would put her wedding in jeopardy. It was on that basis, she says, that she told the lawyer that she "understood" the marriage agreement and signed it. The respondent paid the lawyer's account.
- [54] The respondent deposes that he had insisted on having a long engagement with the claimant, largely because there were several times when he did not think their relationship was working. That was also his rationale for requiring a marriage contract.
- [55] He responded to the claimant's evidence about the circumstances surrounding her becoming aware of and signing the marriage agreement in a general way only. His view is that delving into the details was unnecessary because the legal issues relating to the enforceability of the marriage agreement cannot be determined on an interim application.

- [56] The respondent's evidence is that, at least two years before they wed, he and the claimant began discussions to the effect that when they married their finances would be governed by a prenuptial agreement. He says he insisted on it and she "never insisted on anything else".
- [57] He deposes that a couple of months before the wedding he raised the matter of preparing a pre-nuptial agreement with a lawyer he had used previously. That lawyer referred him to a family law lawyer. The family law lawyer prepared the marriage agreement in consultation with the respondent over the span of several weeks. The respondent deposes, and the claimant denies, that by the time the marriage agreement was in final form, it incorporated the terms that the parties had periodically discussed during the preceding two years and thus it could not have been a shock or surprise to the claimant. There is no evidence that the claimant had any direct input into the terms of the marriage agreement or that it was negotiated on her behalf in advance of its presentation to her in the lawyer's office.
- [58] In terms of the claimant's knowledge about the value of the Franchise Business at the time she entered into the marriage agreement, the respondent says that within the two-year window preceding its signing (2006-2008), she had been working much of the time at the head office. He deposes that, as such, she had access to most of the business's financial information, including the gross margins that were being earned. I found it difficult to square his evidence on this point with his testimony that, before 2014, the claimant held low level, even menial, positions in the Franchise Business, and was treated like any other employee.
- [59] The marriage agreement was executed in counterpart by the claimant on May 16, 2008 and by the respondent on May 20, 2008.

(ii) Substance

- [60] A plain reading of the marriage agreement readily demonstrates that it predominantly addresses property entitlement and division.
- [61] The recitals provide that its purpose is to:
- ... determine management of, ownership in, and division of family assets or other property during their marriage, in the event of the death of one of the parties, and in the event of the breakdown of the marriage and, specifically, to preserve the integrity of [the respondent's] assets and ensure that his existing assets will be unaffected by the marriage.
- [62] In the agreement, both parties acknowledge that one of its purposes is to preserve the respondent's assets for the benefit of "his children upon his death".
- [63] The recitals are silent about spousal support.
- [64] In the body of the agreement, the parties agree that the provisions govern the division of property. Schedules listing their respective property at the time are appended to the agreement.

[65] The respondent's property is shown as:

- Cash:

\$70,000

- Property (2009):

7077 Beresford Street, Burnaby, B.C.

Approximate value \$600,000

4040-3628 McRae Avenue, Vancouver, B.C.

Approximate value \$340,000

- Interest in properties, holdings and food:

Companies have a total net worth of approximately \$6.0 million

- One-half interest in 2004 CLK 500 Mercedes Benz

[66] The claimant's property is listed as:

- Guaranteed investment certificate at ING:

Approximately \$40,000

- Interest in [FEE]:

Nominal value

- One half-interest in 2004 CLK 500 Mercedes-Benz

[67] Under the marriage agreement, the parties agree that their enumerated property and all "accretions, accumulations and substitutions" in relation to it, as well as all subsequently acquired property (unless registered in both names or recorded in writing to be co-shared), is not considered family property, notwithstanding that it is used for a family purpose. It is agreed that each party's respective property is to remain their sole property during the marriage and in the event of a marriage breakdown. They further agree that neither of them shall acquire any interest in the other's property or be entitled to any compensation in relation to it.

[68] Following the recitals and paragraphs of the marriage agreement that pertain exclusively to the subject matter of property, there are only two paragraphs that touch on the matter of support. The first is titled "Support during the Relationship". As the heading implies, it does not address spousal support in the event of a marriage breakdown:

Support during the Relationship

22 It is the intention that during the relationship each party will be self-supporting.

23. During the marriage, each party will contribute to the household expenses to the best of their abilities, having regard to such factors as [the claimant's] wish to receive further education and to child-rearing responsibilities.

[69] The only other place in the agreement that refers to support is in the general release provision. It stipulates that, unless otherwise provided in the agreement, each party gives up:

all claims at law, in equity, or by statute against the other relating to support or a division of property, including, without restricting the generality of the foregoing, all claims under the Family Relations Act, the Wills Variation Act, the Estate Administration Act, and the Divorce Act, with respect to support, property division, succession rights and any other matters arising from the relationship. [Underlining added]

[70] In the remaining paragraphs, the parties expressly waive protection of s. 65(1) of the former Family Relations Act and any other right to set aside the marriage agreement on common law grounds. It does not contain an express waiver of spousal support.

[71] Finally, there is an acknowledgement by each party that he or she has received independent legal advice.

[72] In my opinion, it is a live issue as to whether the marriage agreement applies to spousal support in the event of a marriage breakdown. It is essential that threshold issue not be overlooked in determining whether this is an appropriate case to award the claimant interim spousal support.

· Events in 2010 and 2011

[73] The claimant deposes that when their son was born in 2009, she took a year-long maternity leave from working at the Franchise Business's head office. However, as touched upon earlier, she continued to run the franchise store she had opened in the Metrotown Mall, selling it only a few months after A.'s arrival.

[74] The claimant returned to the head office in August 2010. She deposes that while on maternity leave she had learned that the respondent was having an affair with an employee who worked at head office. That awkward situation caused tension in the workplace and made it difficult for the claimant to work there.

[75] The respondent denies having had an affair with the employee and accuses the claimant of having returned to work at the head office in an attempt "to dig up dirt trying to incriminate" him to support her belief that he was having an affair. He noted that the issue was before the Court in a separate lawsuit launched by the employee for wrongful dismissal. In his Reasons for Judgment following the trial of the proceeding (indexed at 2014 BCSC 1927), Bernard J. concluded that the respondent was not being truthful to the Court in his denials of the extra-marital affair. The respondent has appealed the decision.

[76] With the dual goals of salvaging her marriage by creating more "breathing space" between the parties and following her long-standing passion, the claimant left her job with the Franchise Business in 2011 to take a nine-month course in aesthetics. She used her own funds to pay for the course that cost approximately \$15,000.

• The Salon

[77] Drawing, in part, on her own funds, which the claimant does not quantify precisely, she opened the Salon the following summer, in June 2012. The Salon was intended to provide a wide array of beauty services to high-end clientele in a luxurious setting.

[78] The respondent counters that the reason the claimant quit her job in June 2011 to enter the beauty business was because she did not find the employees in the Franchise Business, both at the franchise and the head office levels, to be sufficiently stimulating. The preponderance of the evidence on this application does not support his position. Rather, it indicates that from the earliest days of their relationship, the respondent was well aware of the claimant's career aspirations in the beauty industry and had actively dissuaded her from pursuing them.

[79] The respondent says he prevailed upon the claimant to prepare a business plan in the lead-up to opening the Salon, but she rebuffed his advice. Recognizing that she was bound and determined to forge ahead with building and decorating her high-end Salon, and feeling "powerless" to stop her, the respondent says he decided to help her. According to him, the form of his contribution was to regularly impart business advice to the claimant and to advertise the Salon, at no cost, on the TV monitors in all of the franchise locations. He also offered her various resources that were at his disposal through the Franchise Business, such as a designer, project manager and tradesmen, whom he asked to give her the best available deals.

[80] The respondent deposes that the claimant spent "hundreds of thousands of dollars" bringing the Salon into operation and claims to have advanced her roughly \$171,000 in loans.

• Promissory Note

[81] The Salon did not fare well. The respondent says that within just months of its opening, the claimant confided that it was performing poorly and that the revenues were not achieving the expected levels. In or about October 2013, she told him that the Salon was not breaking even. Yet, despite the Salon's gloomy financial picture that month, the respondent and/or his company provided the claimant or FEE, a further \$18,000.

[82] The respondent claims that he subsequently became concerned about the lack of security for the so-called loans and asked the claimant to sign a promissory note in favour of Food, Equipment, and the respondent personally. She did so. The note is dated October 16, 2013, and is in the principal amount of \$171,761.78. The debtors are said to be the claimant and FEE. It is not a demand note. The due date is shown as being just 16 days after the note was signed, namely on November 1, 2013. The interest rate is unclear. In one place, the note

appears to show a 9% rate, but that figure is crossed out in the only other place it appears. The note stipulates that the claimant has obtained or waived independent legal advice. There is no evidence that she obtained such advice. Her signature was witnessed by the respondent.

- [83] The claimant disputes that she or her company, FEE, owes the sum recorded in the promissory note. She says that the respondent told her the note was required to "correct the books" in light of the fact that he had liquidated Food and transferred its assets to Equipment. She asserts that she was forced and intimidated by him to sign because her dire financial circumstances at the time left her with little choice.
- [84] The respondent disputes the claimant's evidence concerning the rationale for the creation of the promissory note. He deposes that when he presented the note to her she told him she thought she may not be able to repay the debt. He responded that was no reason not to sign it, assuring her they would worry about how she would repay the amounts after the sale of the Salon.
- [85] The respondent gave inconsistent evidence about whose funds were used to make the advances to FEE and/or the claimant. At times, he said that the loans reflected in the promissory note were made by Food and/or Equipment. However, there are numerous other places in his evidence where he claims that the loans were made by him personally. For example, in one of his affidavits, in the context of discussing whether he could take a greater salary from Equipment, the respondent says, "I have already taken \$171,000 from [Food and Equipment] during the build out by the claimant of her failed salon". His own documents record that all of the advances were made by one or other of his companies between May 2012 and October 2013, and were made to FEE, as opposed to the claimant personally.
- [86] There is no cogent evidence that the respondent or any of his companies have ever demanded repayment of the alleged loans from the claimant or FEE, or have taken any steps that would indicate they have any bona fide intention of attempting to collect on them. In fact, Equipment's financial statements indicate that shortly after the due date on the note, the loan was classified in the company books as being uncollectible.
- [87] The circumstances giving rise to the preparation and execution of the promissory note, will no doubt be further explored at trial and will be evaluated in the context of the larger factual picture. A material feature to that picture is that within a few months of opening the Salon, the parties were experiencing significant problems in their relationship. The respondent deposes that by early 2013, they were sleeping in separate bedrooms. According to the claimant, they officially separated in June 2013 and, by November that year, were discussing divorce.

· Sale of the Salon

- [88] The Salon was sold in November 2013.

- [89] The preliminary income statement and balance sheet of FEE, through which the Salon operated, shows that basically from its inception it operated at a loss. The balance sheet as at December 31, 2013 shows a negative equity of just over \$84,000. The claimant's uncontradicted evidence is that her accountant advised that FEE's final financial statements will not be materially different from the preliminary ones.
- [90] The respondent places the blame for the failure of the Salon squarely on the claimant. He criticizes her for refusing to devise and follow a sound business plan and for overspending on lavish, promotional events without a realistic sense of the amount of revenues which could be generated.
- [91] The claimant, on the other hand, points an accusatory finger at the respondent. She says he disapproved of the long hours she had to devote to network and socialize with prospective clients in order to develop clientele for the Salon, and that his disapproval fueled an increasing hostility between them. She says he falsely accused her of drinking and partying to excess and of having extramarital affairs. She also claims that he intimidated, harassed, and threatened her and became increasingly verbally abusive. She itemized numerous examples of his misconduct along those lines, including telling her that he had a detective following her; regularly calling the Salon to check up on her whereabouts; telling her she could not have privacy in the matrimonial home because he owned it; attempting to extract information about her from one of her employees; and depriving her of any financial autonomy.
- [92] The respondent denies her allegations. More specifically, as to her claim that he hired a detective to follow her, the respondent says that his brother had suggested to him that he should hire a detective, but that the respondent did not intend to do so because he considered it to be "tacky and tasteless". It is not clear and not explained by his evidence what the rationale of hiring a private detective would have been in the first place.
- [93] The respondent claims that the Salon was sold for \$150,000, and that at the time, there was only approximately \$70,000 outstanding on the business line of credit. The claimant deposes that the Salon was actually sold at a loss and there were no net proceeds at the end of the day. She admits, however, to having enough funds to take a trip to Thailand with her son and her sister-in-law and niece, feeling it was a necessary expenditure in order for her to de-stress after the ordeal of losing her business on the heels of her marriage breakdown.
- [94] The claimant recalls that, just before she departed on the trip to Thailand, the respondent confiscated her cell phone and refused to return it. The respondent admits to taking the claimant's phone. His purported justification appears to be that it was a corporate phone, implying that he had every right to reclaim it as he did. The claimant refuted this claim saying that he had taken her personal iPhone and that the Franchise Business does not issue corporate cell phones.

- [95] I consider the respondent's version on this point to be problematic, given that, according to his own evidence, the claimant had been a "girl Friday" type of employee and thus would hardly be the type of employee who would be allocated a corporate phone. That point to the side, by that stage the claimant had not even worked for the Franchise Business for about 18 months.
- Montréal Joint Venture - 2013
- [96] In March 2013, the respondent loaned \$400,000 to his cousin who is a land developer. The respondent claims the loan was intended to be short-term to enable the cousin to pay off loan sharks from whom he had borrowed money in relation to a land development project in Montréal. According to the respondent, when the cousin was not able to repay the loan, he invited the respondent to become a joint venture partner in the development. The respondent accepted and the loan was subsequently secured against the land being developed.
- [97] In his first financial statement, the respondent recorded the investment in the Montréal land development as being his business interest, describing it in these terms: "interest in Montreal area condo development - one million dollars". In an updated financial statement dated November 4, 2014, he described the interest in slightly modified terms, appearing to suggest that Equipment has some kind of ownership interest in it: "interest in Montreal area condo development (owned by [Equipment])".
- [98] In a subsequent affidavit, the respondent described the financial commitment to the Montréal joint venture more comprehensively. He clarified that the total investment had been \$1.1 million made between March and August 2013, and was secured by a hypothecation in favour of Equipment. He further explained that \$100,000 of the investment had been repaid several months later, although he did not specify to whom. Despite the fact that Equipment holds the hypothecation, it does not appear to be recorded as a corporate asset in Equipment's financial statements.
- [99] At first, the respondent deposed that the \$400,000 came from one of the company's lines of credit and that the remaining \$600,000 was advanced using monies drawn on Equipment's bank account. As I understand his evidence, he later deposed that he used his personal funds, as well as corporate funds and/or a line of credit for the \$600,000.
- [100] The preponderance of the evidence suggests that four sources were used to finance the Montréal joint venture: (i) the respondent's line of credit; (ii) the respondent's bank accounts; (iii) Food's bank account; and (iv) \$200,000 drawn against Equipment's line of credit. Although it seems clear that funds and/or the borrowing power of the business were relied on, the respondent repeatedly deposes that it was he who committed \$1.0 million dollars to the development project.

[101] The source of the respondent's \$1.10 million investment in the joint venture is emblematic of his perspective that funds belonging to or available to Food and/or Equipment, are likewise available to him to spend or invest as he likes for his personal benefit.

[102] It is notable that the respondent expects the development will be sold in 2015 at which time he will realize on his investment.

· Claimant's Return to Work - 2104

[103] The respondent claims that in the weeks following the sale of the Salon, he and the claimant discussed a number of settlement options relative to the breakdown of their marriage. He says the only reason he was even prepared to discuss settlement was because she had threatened to "destroy him", and he feared that she might reveal the trade secrets of the Franchise Business to its competitors. He deposes that the claimant herself proposed a settlement by which she would receive certain financial benefits and would be employed in the Franchise Business at an annual salary of \$50,000, plus bonus.

[104] According to the respondent, he instructed in-house counsel to prepare a settlement agreement along the lines proposed by the claimant. Although the unsigned separation agreement in evidence is silent about the employment terms he described, he is adamant that the agreement to employ the claimant was part and parcel of the overall settlement deal. He also maintains that her employment was conditional on her executing the settlement agreement. The claimant never did sign the agreement; however, she returned to work at the head office of the Franchise Business in February 2014.

[105] The claimant deposes that she returned to the head office because she was in financial difficulty after the loss of the Salon and because the Franchise Business was suffering a human resource crisis of some kind that required application of her skill-set. On that basis, she accepted the position of franchise developer and was also in charge of human resources.

[106] The claimant denies proposing or endorsing the settlement terms that are contained in the agreement prepared by in-house counsel, claiming instead that it was actually the respondent who came up with those terms. She found the terms of the proposed settlement agreement to be completely unacceptable and refused to sign it. It is her allegation that, in retaliation, the respondent fired her on May 16, 2014.

[107] The respondent admits that he fired the claimant at that time. However, he maintains that he was justified in doing so because she had essentially repudiated the settlement agreement and in doing so had relinquished any entitlement to an employment position at head office.

· Purchase of Downtown Condominium - 2104

- [108] In June 2014, the respondent purchased a condominium in downtown Vancouver. The purchase price was \$1,155,000. He deposes that he used a "company" cheque in the amount of \$55,000 for the down payment. At closing, he withdrew \$50,000 from one of his personal bank accounts and issued a second cheque against Equipment's account for \$148,732.17. The balance of the purchase price was financed by way of a mortgage in the amount of \$924,000, obtained by the respondent personally. He also paid for the condominium to be renovated before he moved in and purchased furnishings in the neighbourhood of between \$20,000 and \$25,000.
- [109] The respondent deposes that if he does not repay Equipment within one year, he will be taxed on the amount withdrawn from Equipment's account as a taxable benefit on the basis it is an unpaid shareholder's loan from Equipment. I take it that the respondent is referring to the rules under the Income Tax Act that would require repayment by him of such a loan within a year after the fiscal year in which it was made or be subject to paying tax on it. It is noteworthy that the respondent does not depose that he actually intends to repay the loan to Equipment. Rather, he merely explains the tax ramifications that would follow if he chooses to not repay it within the prescribed timeframe.

· Mutual Accusations

- [110] Throughout the extensive affidavit material each party makes scurrilous accusations about the shortcomings and unsavory behaviour of the other. Each denies the other's accusations and provides evidence from family members and current and former employees in the Franchise Business, aimed at refuting the majority of them.
- [111] But one example is the respondent's allegation that, while involved in the Salon, the claimant developed a serious drinking problem and has been known to drive while intoxicated. He alleges that she received a three-month driving suspension and was criminally charged although, in the end, the criminal charges did not proceed. The evidence of third parties submitted on the respondent's behalf speculate that the claimant may have accessed company data without authority, and may have tampered with the company's books and fabricated financial statements.
- [112] At the business level, the claimant accuses the respondent of deceptively moving money around, keeping two distinct sets of books for the Franchise Business, being inclined to hide assets and being an unpopular CEO. More personally, she calls him a tax evader and a controlling and threatening bully. She also contends that he occasionally gives beer to their young son to drink.
- [113] These bitter exchanges vividly expose the depth of acrimony and distrust between the parties. Whether there is merit to these cross-allegations cannot be determined from the morass of untested evidence tendered on this application.

- [114] That said, there is some independent evidence that lends some support to the recurring grievance by the claimant that the respondent's demeanour toward her was often that of a threatening bully. The evidence I refer to is in the form of a transcription of a conversation between the claimant and the respondent on June 14, 2014.
- [115] An employee of the law firm that represents the claimant deposed that she transcribed the recorded conversation verbatim. Her typewritten transcription, together with the disc of the recording, was in evidence. Some of the words or phrases are noted to be inaudible.
- [116] At the time of its recording, the claimant was driving, with her niece, L., and their respective sons in the car. Her phone was on the speaker setting and she asked L. to record the call on her phone. The respondent was unaware that the phone was on the speaker and was being recorded.
- [117] The parties were discussing where the claimant was going to drop off their son who no longer wished to attend a pre-planned outing. In the midst of expressing his disagreement with the claimant's proposed drop-off spot, the respondent spewed offensive profanities at her, calling her foul and insulting names. L. deposes that during this conversation, the respondent was speaking in an angry manner.
- [118] The respondent says that during the call the claimant had insisted on delivering their son to her sister-in-law's home, which posed an inconvenience for the respondent. He admits that he became angry over her refusal to do as he wished. He deposes that despite his polite requests, or as he puts it, requests that were "polite, initially at least", the claimant was deliberately trying to push his buttons emotionally. He further submits that the transcript leaves out the foul language that the claimant herself used in that exchange. I am not satisfied of any such omission.
- [119] It strikes me as revealing that not once did the respondent take responsibility for his appalling rant of expletives, much less acknowledge the inappropriateness of his conduct.

DISCUSSION

· Claim for Interim Spousal Support

(i) Legal Framework

- [120] The Notice of Civil Claim refers to both the FLA and the Divorce Act, R.S.C. 1985, c. 3 (2nd Sup.). The relevant provisions of the Divorce Act read as follows:

Spousal support order

15.2(1) A court of competent jurisdiction may, on application by either or both spouses, make an order requiring a spouse to secure or pay, or to secure and pay, such lump sum or periodic sums, or such lump sum and periodic sums, as the court thinks reasonable for the support of the other spouse.

Interim order

- (2) Where an application is made under subsection (1), the court may, on application by either or both spouses, make an interim order requiring a spouse to secure or pay, or to secure and pay, such lump sum or periodic sums, or such lump sum and periodic sums, as the court thinks reasonable for the support of the other spouse, pending the determination of the application under subsection (1).

Terms and conditions

- (3) The court may make an order under subsection (1) or an interim order under subsection (2) for a definite or indefinite period or until a specified event occurs, and may impose terms, conditions or restrictions in connection with the order as it thinks fit and just.

Factors

- (4) In making an order under subsection (1) or an interim order under subsection (2), the court shall take into consideration the condition, means, needs and other circumstances of each spouse, including
- (a) the length of time the spouses cohabited;
 - (b) the functions performed by each spouse during cohabitation; and
 - (c) any order, agreement or arrangement relating to support of either spouse.

[]

Objectives of spousal support order

- (6) An order made under subsection (1) or an interim order under subsection (2) that provides for the support of a spouse should
- (a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;
 - (b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;
 - (c) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and
 - (d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.

[121] The objectives set out in the Divorce Act are reflected in s. 161 of the FLA. Section 162 of the FLA refers to the criteria for determining the amount and duration of support, which largely mirror the factors laid out in s. 15.2(4) of the Divorce Act.

- [122] The main purpose of an interim order for spousal support is to bridge the period between when the action is commenced and the trial at which time the court will be in a position to make a decision on the merits: *D.R.M. v. R. B.M.*, 2006 BCSC 1921; *Goriuk v Turton*, 2011 BCSC 652.
- [123] Because interim orders are summary in nature and temporary, they provide a rough justice at best: *Newson v. Newson*, 65 B.C.L.R. (3rd) 22 (C.A.) at para. 11. The "rough justice" approach underlying the temporary order implicitly recognizes that the evidence before the chambers judge on the interim application is often insufficient to permit an in-depth analysis of the wide array of factors relevant to entitlement and quantum of support: *R.C.G. v. C.L.G.*, 2010 BCSC 1596, para. 11; *Johnson v Johnson*, [1993] B.C.J. No. 2140 at 16.
- [124] The legal test governing interim support is not necessarily the same as the test applicable in reaching the final order: *Goriuk*. This is because the full picture of many of the considerations under the applicable legislation will not be known until a fulsome inquiry on the merits is embarked upon a trial.
- [125] Relying on *Newson*, *Goriuk* confirmed that where the marriage is admitted and need is proved interim support should be ordered without adjudicating the issues, unless the action is frivolous or vexatious.
- [126] While the other relevant factors that inform the issue of spousal support are to be considered to the extent possible, the respective needs and means of the parties are ordinarily the central factors, if not the most prominent, on an interim application. The corollary is that considerations such as compensatory factors and the need to achieve self-sufficiency often hold less significance: *R.C.J. v. C.L.G.*, 2010 BCSC 1596 at para. 11; *Goriuk* at para. 33.
- [127] In *Goriuk*, MacKenzie J. (as she then was) refers to the discussion of this principle by the Court of Appeal in *Loesch v. Walji*, 2008 BCCA 214 at paras. 19-20, where it cited *Traber v. Traber*, [1998] B.C.J. No. 2195, 82 A.C.W.S. (3d) 744 :
- [5] Mrs. Traber argues that an interim order should take the following three criteria into account:
- (1) needs;
 - (2) ability to pay or means;
 - (3) presumptive claim to an equal standard of living subject to an equal sharing of the consequences of the dissolution of the marriage.

The final criteria stems from the decision of the Supreme Court of Canada in *Moge v. Moge* (1992), 43 R.F.L. (3d) 345, and is a relevant factor on applications for interim spousal support: *Carr v. Carr* (1993), 46 R.F.L. (3d) 326 (B.C.S.C.) and *Myers v. Myers* [1996] B.C.J. No. 6805, Cranbrook Registry (B.C.S.C.). However, the extent to which the "equal standard of living" criteria, or any other factor found in s. 15(7) of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.) influences the

amount of interim support will depend on the nature, extent and reliability of the evidence. It must be remembered that interim applications are based on affidavit evidence that is often conflicting and incomplete. Here, it is too early to fully address all the economic advantages or disadvantages arising from the marriage or its breakdown. It is also too early to fully determine whether Mrs. Traber is able to work full-time and achieve economic self-sufficiency. Accordingly, in spite of all factors being relevant, the evidence as to means and needs is more complete at this stage than the evidence respecting other factors. The difficulty this presents on an application for interim support was recognized in two authorities not referred to by counsel: *Johnson v. Johnson*, [1993] B.C.J. No. 2140, New Westminster Registry No. D031650 and *Short v. Short* (1996), 21 R.F.L. (4th) 429 (B.C.S.C.).

Thus, the central factors that are usually to be considered on an interim application for either child or spousal support are the means or ability to pay support, and the needs of the spouse and children.

[Emphasis added]

[128] In *Martin v. Martin*, 2013 BCCA 327, the Court of Appeal recently endorsed the wide interpretation given to the term "means" in s. 15.2 (4) of the Divorce Act, by Cory J. in *Strang v. Strang*, [1992] 2 S.C.R. 112, 39 R.F.L. (3rd) 233 at para. 15:

this interpretation of "means" is consistent with the historical interpretation of the term as including all pecuniary resources, capital assets, income from employment or earning capacity and other sources from which the person receives gains or benefits.

[129] The concept of "needs" in this context is acknowledged to be a relative and flexible one. It is not necessarily fully addressed when the applicant-spouse achieves a subsistence level or any level of income that surpasses subsistence: *Myers v. Myers*, 1995 17 R.F.L. (4th) 298, 65 B.C.A.C. 226.

[130] There is case authority to the effect that if the payor's ability to pay warrants it, the interim order should permit the applicant to continue living at the same standard of living enjoyed before separation: *Robles v. Kuhn*, 2009 BCSC 1163 (Master). There is also authority for the proposition that imputing income, which necessitates an assessment of income, earning capacity and opportunities, is not suitable on an interim application, unless there are exceptional circumstances: *Nankivell v. Nankivell*, 2002 BCSC 778; *Campbell v. Campbell*, 2008 BCSC 154.

[131] The Spousal Support Advisory Guidelines (the "SSAG") are acknowledged as being a useful tool in determining the quantum of interim support. Absent exceptional circumstances that indicate otherwise, interim support should be ordered in the range suggested by the SSAG: *Ladd v. Ladd*, 2006 BCSC 1280; *Beauregard v. Beauregard*, 2014 BCSC 1188.

(ii) Findings Concerning the Parties' Means and Needs

- [132] Unless otherwise noted, all monetary sums referred to in this portion of my Reasons have been rounded up or down for convenience.
- [133] In his first financial statement sworn on July 21, 2014, the respondent declared his income for child support purposes as \$85,790. That figure was comprised of \$59,990 in employment income, \$14,400 in interest/investment income and \$11,400 in rental income derived from the McRae Avenue property. In his subsequent financial statement, completed just over three months later, he declared total income of \$71,390. The difference between the two amounts seems to be that the latter does not include any interest/investment income.
- [134] Despite the respondent's insistence that his child support income is as reported in his income tax returns, he admits that in 2014 he instructed his company accountant to prepare a letter "confirming" the respondent's annual salary to be \$170,000, which is significantly greater than those reported amounts. He explained that he wanted a letter "overstating" his income in case he experienced difficulty securing the mortgage financing he needed to close the purchase of his condominium. The respondent clarified that, as things turned out, he was able to secure financing based on a stated income of \$60,000 per year, along with the down payment of roughly \$250,000 and, therefore, did not have to rely on the letter.
- [135] This evidence suggests that the respondent is prepared to play fast and loose in representing his income to others and has no compunction in enlisting his staff to assist him to that end. It further indicates that the pool of money available to him is far greater than the amount he declares for tax purposes and has reported in his Form 8.
- [136] It is the claimant's position that the income contained in the respondent's Form 8 does not remotely reflect his true income, much less his significant means and actual capacity to pay. The position that she advanced early on in this application and before better disclosure of the financial documents, was that this was an appropriate case to conclude that the respondent's line 150 did not fairly reflect his available total income to attribute to him some or all of Equipment's pre-tax income pursuant to s. 18 of the Federal Child Support Guidelines. Her submission raises the issue of the amount of Equipment's 2014 pre-tax corporate income.
- [137] With respect to that matter, the claimant says that, by chance, she discovered what seemed to be two different sets of financial statements for Equipment for the same period. The financial statements that she relies on reports pre-tax corporate income of \$1,374,748 for Equipment's first fiscal year of operations ending January 31, 2014.

- [138] The respondent, the internal accountant for the Franchise Business and the respondent's former systems coordinator deny that Equipment or any of the related companies maintained two sets of books, as suggested by the claimant. Their evidence is that the financial statements said to be authentic by the claimant are riddled with accounting errors. They go so far as to speculate that the statements she relies upon might be fabrications and hint that she may have had a hand in their preparation.
- [139] The internal accountant deposes that Equipment's true 2014 year-end financial statements, which were submitted to the Canada Revenue Agency along with its T-2 corporate return, show there was no pre-tax income at all. To the contrary, those statements report a sizeable net loss of \$710,547 (reported as a loss of \$704,706 in the corresponding T-2 return).
- [140] The single largest expense shown in those financial statements after salaries and employee benefits is the sum of \$1,217,974 recorded as "bad debt". Had that expense not been deducted, Equipment's pre-tax income would have been in the neighborhood of \$507,427. Even though these financial statements cover only about a 10-month period, the \$507,427 figure is in line with the pre-tax income of Equipment's predecessor, Food, in the fiscal year ending 2012. I note that Food's pre-tax income in the 2013 fiscal year was recorded as a loss. It was in that year that Food's assets and its bad debts were transferred to Equipment and it is unclear on the evidence what impact that transaction may have had on Food's bottom line, if any.
- [141] The claimant asserts that the bad debt expensed by Equipment is a "one off" and is not likely to recur. She also submits that the quantum of the bad debt is suspicious on its face. In the first place, it is significantly more than the amount of bad debt previously recorded in the books of Food (effectively, Equipment's predecessor). Secondly, it seems implausible to her that such a significant component of the receivables would "suddenly" become uncollectible all in the same fiscal year. The claimant urges that, all things considered, the court ought to conclude that the respondent's income or financial means is not less than \$500,000 for the purposes of support.
- [142] The claimant's assertions may prove to have merit at the end of the day. However, there is an insufficient evidentiary record before me to meaningfully and fairly evaluate them. Indeed, I find that the evidence concerning the bad debts raises more questions than it answers. As a partial illustration, the respondent deposes that Equipment acquired \$1.82 million in bad debt from Food, which it then transferred to Holdings on January 31, 2014. However, Equipment's financial statements records the amount of its bad debt as \$1,217,974. At another point, the respondent says that the amount of the loan receivables considered to be uncollectible is only \$1.0 million and embedded within that indebtedness, is the amount of \$171,000 that may be owed to the respondent (not to Equipment) by the claimant and/or FEE. Substantially better clarification of the calculation and basis of the bad debt amount and its ultimate treatment for tax, accounting and corporate purposes will be required for trial.

- [143] In the absence of more developed evidence concerning the value of Equipment and an analysis of the quantum and authenticity of the claimed bad debts, the Court is not in a position, nor should it be prepared on an interim application, to determine the legitimacy of the bad debt deduction.
- [144] In sum, on the evidence as it currently stands, there is not a justifiable foundation to disregard the expensed bad debts in Equipment's financial statements so as to effectively convert what is reported to be a pre-tax loss into pre-tax income for the purposes of support.
- [145] For the foregoing reasons, I cannot accede to the claimant's submission that an income of \$500,000 or more ought to be attributed to the respondent on the basis that such a figure accurately reflects Equipment's pre-tax corporate income, or on any other cogent premise.
- [146] That is not to say, however, that I am satisfied that the respondent's income in his Form 8 is reflective of his financial means for the purposes of support on an interim basis.
- [147] I have already touched on the fact that several times in his evidence, the respondent describes particular loans, investments, bank accounts and assets as being his, and at other times, he refers to them as belonging to one or another of his companies. As mentioned, he variously describes the monies advanced to the claimant in respect of the Salon as loans that he made, or sums that he took from Food and Equipment on the one hand, and as loans made by those companies on the other.
- [148] This evidence is noteworthy because it indicates that the respondent comports himself on the footing that he has ready access to the corporate funds and corporate borrowing power to service his own personal needs and benefit, quite unconnected to any business objectives of the particular company. That mindset and conduct is also exemplified in his use of corporate funds and lines of credit as sources of capital to invest in "his" Montréal joint venture and to acquire his condominium. The timing of his use of those funds and borrowing power to his personal advantage is highly relevant; he availed himself of them in 2013 and 2014, which he claims was when the Franchise Business was exposed to actual and potential liabilities and the corporate cash flow was tight.
- [149] I do not regard the respondent's inclination to refer to his person and his companies interchangeably with respect to these financial matters to be accidental or due to a lack of precision. Rather, they belie the reality that he has significant financial resources available to him from the Franchise Business group of companies that are not captured by his reported income or reflected in his Form 8 which he accesses at his discretion for his personal benefit. Moreover, it is clear that the respondent has personal savings at his disposal which he has used in order to invest in the Montréal joint venture and to purchase, renovate and furnish his new condominium.

- [150] Along similar lines, the respondent's evidence speaks starkly of the direct control that he has over the amount of his salary. After explaining the financial and operational problems of the Franchise Business group of companies, he claims that he could not take more money as salary because the funds were badly needed in the company. In this context, he repeats reference to a number of potential corporate liabilities; for example, a tax liability stemming from an unfavourable CRA audit, the Wishart Act actions instituted in Ontario and the judgments against Properties and Foods respectively stemming from lawsuits in British Columbia. Those judgments appear to total \$258,000, including costs although, as mentioned previously, at least one of them is under appeal.
- [151] In a subsequent paragraph in the same affidavit, however, the respondent rather matter-of-factly states that although his latest paystub shows his annual salary to be \$60,000, he is "going to have to increase [his] salary as a result of the cost of paying spousal support and child support to the claimant". He raises the possibility of characterizing the increased payments to himself as repayment of his shareholder's loan so as to avoid increasing his personal income tax that would presumably result were he to increase his salary. The respondent elaborates that the shareholder's loan currently payable to him by the "company" (he does not specify which one), is approximately \$1.0 million.
- [152] I pause to observe that there is no cogent evidence about when such loan or series of loans were made by the respondent or the source of the monies he used to make them. As well, there is no evidence that "the company" is paying him any interest in respect of his significant shareholder's loan.
- [153] In any case, the respondent continues that "the company" does not have the cash or net income stream to enable it to repay him the entirety of the \$1.0 million shareholder's loan. His own evidence leaves open the possibility that the company may well be able to repay some portion of it and, indeed, suggests it will do so to enable him to pay his support obligations.
- [154] Another compelling piece of evidence that as a direct bearing on the respondent's considerable financial means is his budgeted expenses. He initially tallied his annual expenses at \$126,284. He lowered that number slightly to \$113,576 in his second financial statement.
- [155] The respondent's mortgage payments alone in respect of his new condominium are \$43,812 annually, plus \$4,000 in property taxes and an unspecified amount of strata fees. Recognizing that these amounts are expressed in after tax dollars and the income he declares as being available is a gross figure, his declared income after tax would barely cover his housing costs, much less the remaining \$65,764 or so that he claims as additional annual expenses. I would observe, as well, that at the time the respondent completed his second financial statement, he was obligated to pay \$3,300 per month in combined child and spousal support. He has not included that sum, which amounts to additional annual expenses of \$39,600. When that figure is added to his itemized budget, the respondent's

annual expenses climb to approximately \$153,176.

- [156] In his Form 8, the respondent reports assets with a collective value of \$3,030,003, comprised of three condominiums, a vehicle, bank account, RSP, interest in the Montréal land development, and furnishings. He does not specify the value of his shares in the Franchise Business group of companies, nor disclose the \$1.0 million shareholder's loan payable to him. Other than the mortgage against his condominium, his personal debt load is negligible.
- [157] The evidence satisfies me that, even in the face of the costly failures of the franchises in Ontario, the risk of exposure to liability occasioned by the Ontario lawsuits and the B.C. judgments and other potential legitimate calls against the companies (including, for example, any fallout from the CRA audit relative to the corporate bad debt), the respondent remains a man of substantial financial means.
- [158] All things considered, I find that his means to pay support is, at a minimum, equivalent to an annual income of \$250,000.
- [159] On the other side of the financial equation is the claimant, who asserts that she has no savings or assets and is in financial need of interim support.
- [160] The respondent vehemently disputes her self-portrayal. He argues that the claimant cannot establish need as a justification for interim spousal support. This is largely because he is covering many of her costs and says that in so doing he is already providing more than adequate financial assistance to meet the rest of her reasonable needs.
- [161] The parties' depiction of their standard of living before separation is significantly divided. The claimant says that they lived luxuriously and had considerable disposable income available, which enabled them to routinely make non-essential, discretionary expenditures, including taking several vacations together to destinations in Europe, Hawaii and Mexico. The respondent counters that they lived well, but modestly. The parties' pre-separation standard of living is another issue that is better suited for determination at trial after completion of pre-trial discovery processes and after the conflicting evidence has been tested in cross-examination. There is cogent evidence that indicates that, although the claimant used at least a portion of her personal funds (whether derived from employment earnings or the sale of a franchise location) to cover certain of her own personal expenditures during the marriage, the respondent paid for the lion's share of their collective living expenses as a couple and later as a family unit. The extent of the claimant's financial dependency on the respondent must also await trial. These observations fortify the view that the needs and means analysis is the preferred approach.
- [162] It is common ground that the claimant, who is residing in the matrimonial condominium, has no housing costs. The respondent continues to cover payment of the associated property taxes and insurance, strata fees and utilities and heat. He also pays for their son's school fees and supplies. One of the companies pays for the MSP and extended health

coverage for the claimant and their son. The respondent has permitted the claimant to use one of the corporate "wrap" vehicles free of cost. The vehicle has become a bone of contention because the claimant insists it is unsafe. The respondent and/or the Franchise Business also contributes toward the cost of the car insurance and licensing of the corporate vehicle.

- [163] The respondent says that, given he continued to pay for the majority of the family's living expenses after separation, the claimant should have been able to save some of the employment income she earned when she returned to head office in 2014. Between servicing her debt load and paying for her expenses not covered by the respondent or the current level of spousal support, which soon enough likely included legal expenses, I am not convinced that her net monthly earnings for those few months would have reasonably given rise to any savings to speak of.
- [164] The respondent also deposes that by 2012 the claimant had amassed close to \$500,000 from the sale of her various franchises. As a means of bolstering his evidence on the point, he submitted the affidavits of others, including his brother, who essentially parrot his evidence, practically word for word.
- [165] The claimant denies accumulating funds of that magnitude or anything close to it. She says that each time she sold a franchise store, she reinvested all or most of the proceeds into the next acquisition and sometimes spent some of the money on family expenses. She also used a small portion of those funds, namely about \$15,000, to attend aesthetics school. According to the claimant, she invested substantially all of her remaining savings into the Salon. This general point is acknowledged by the respondent.
- [166] For the few months that the claimant worked at the head office in 2014, she earned approximately \$4,166 per month. She reports credit card debt of \$15,000 as well as \$36,000 still owing against a line of credit she established for the Salon. In late September 2014, she began to apply for suitable employment positions. In December 2014, she secured employment as an assistant manager in a facility at the Vancouver Airport. The claimant is still in the probationary period and cannot confirm whether the job is permanent. Her pay is \$22 per hour.
- [167] When the claimant's monthly expenses that are covered by the respondent are subtracted from her projected monthly budget, her expenses fall from \$16,015 to approximately \$10,700. Certain components of the remainder of her budget appear excessive on their face. Falling within that category are the monthly budgeted expenses of \$500 for haircare, \$1,500 for toiletries/cosmetics, \$1,500 for entertainment, and \$500 for gifts (not including gifts for her son). Adjusting for unreasonable expenses and those that the claimant is not currently required to pay, and incorporating a modest allowance for a vehicle and insurance, I conclude that the claimant's current reasonable living expenses are in the range of between \$6,200 and \$7,000 per month. In the event that her housing situation were to change and the respondent ceased making payments for that expense and/or her medical coverage, her

monthly expenses would increase.

- [168] Before the claimant obtained her current job, the respondent's position was that I should impute a reasonable level of income to her. As mentioned, the court may do so in exceptional circumstances for the purposes of interim support. Given that the claimant has obtained employment, I am not prepared to find on an application of this kind that income ought to be imputed to her for the six months or so between being fired by the respondent and securing a new job. Nor am I prepared to hold, on the evidence placed before me, that she is intentionally under-employed in her current position.

(iii) Effect of the Marriage Agreement on the Support Claim

- [169] I turn next to consider the impact, if any, of the impugned marriage agreement on an award of interim spousal support.
- [170] It is within the court's discretion to make an interim order for spousal support despite the existence of a marriage agreement that purports to disentitle the applicant from support, provided the applicant is seeking to have the agreement set aside at trial: *Thompson v. Thompson*, [1987] B.C.J. No. 2339 (S.C.); *Ziniuk v. Ziniuk* (1986), 2 R.F.L. (3d) 398 (BCCA). The twin factors that typically dominate the analysis, beyond the applicant's financial need and the payor's financial means and ability to pay, are the strength of the applicant's case to set aside the agreement and his or her capacity to repay the amount awarded on an interim basis.
- [171] The respondent concedes that this Court has jurisdiction to make an interim support order in the face of the parties' marriage agreement. He asserts that the discretion should be exercised cautiously, with particular emphasis in this case on the claimant's ability to repay in the event that her claim to set aside the marriage agreement fails at trial. His position is that, with this in mind, the current level of support of \$2,500 per month is appropriate and perfectly adequate to meet the claimant's financial requirements on an interim basis.
- [172] Drawing on the authorities, and placing particular emphasis on the instructive analysis of the Saskatchewan Court of Appeal in *Evashenko v. Evashenko*, 2011 SKCA 22, it is my view that an applicant is not required to demonstrate a strong *prima facie* case or a likelihood or probability of success of impeaching the marriage agreement. Those standards pose too high a bar to meet at the interim stage. Rather, the test is whether the preliminary evidence is sufficient to raise a substantial question about the enforceability of the impugned agreement. Stated another way but to the same evidentiary effect, the applicable threshold test is whether the evidence shows there is a reasonable prospect of success in impeaching the marriage agreement at trial.
- [173] The evidence concerning the circumstances surrounding the execution of a marriage agreement and its contents, to the extent it has been developed on an interim application, is to be examined through the lens of *Miglin v. Miglin*, 2003 SCC 24 and *Hartshorne v. Hartshorne*, 2004 SCC 22.

(iv) Analysis

- [174] My assessment of the evidence within the framework of the two steps of stage one of Miglin raises serious issues about the integrity of the parties' marriage agreement. The claimant has presented evidence about her vulnerability and the power imbalance in the circumstances of the negotiation and execution of the agreement that has not been discredited on this application.
- [175] I confess to having difficulty in accepting the claimant's assertion that the fact that the marriage agreement was written in English, which is her second language, played a role in her lack of understanding of its far-reaching provisions. That said, her evidence is nonetheless suggestive of having potentially received perfunctory legal advice when she signed it at an appointment that had been pre-arranged for her by the respondent in close proximity to the wedding day. I find as an interim proposition that the claimant has shown a reasonable prospect of success of impeaching the marriage agreement on the first step of stage one of the Miglin analysis, due to circumstances that are suggestive of the exertion of pressure, power imbalance and other vulnerabilities that may have flawed its negotiation and execution.
- [176] The case at hand is somewhat peculiar in that the marriage agreement itself says surprisingly little about the waiver of spousal support in the event of a marriage breakdown. It is certainly not a subject that is addressed in an obvious or comprehensive way. Whether on a proper interpretation of the marriage agreement the claimant can even be said to have waived her entitlement to support will be a live issue for determination at trial. That it can be readily identified as a serious triable issue is a factor that supports the exercise of my discretion in favour of awarding interim support.
- [177] Given that the net effect of the marriage agreement is that the claimant is to receive nothing upon the marriage breakdown regardless of her circumstances, a serious question arises about whether the applicable objectives, such as her self-sufficiency and financial independence, can be said to have been promoted. This is particularly the case if, as a respondent urges, the claimant has relinquished her entitlement to spousal support under that agreement.
- [178] At this interim stage, I find there is a reasonable prospect of success of impeaching the marriage agreement at trial on the ground that its contents do not substantially align with the relevant spousal support objectives. It bears repetition that my observations and determinations are interim only and are not intended to circumscribe the tasks and findings of the trial judge.

- [179] The claimant sustained a significant financial loss with respect to her Salon. Apart from that single financial downturn, she has a proven track record spanning several years as a successful businesswoman or, to use the respondent's descriptor, as a "serial entrepreneur". The six-month lag or so between being fired by the respondent and securing a new position in the circumstances of the marriage breakdown was not unreasonable and is not typical of the claimant's work ethic.
- [180] The claimant is relatively young and has no health issues that would impair her capacity to work. It is reasonable to infer that the claimant has many years of gainful employment and/or successful business endeavours ahead.
- [181] As part of my consideration of the claimant's wherewithal to repay support in the event that her attack of the marriage agreement is unsuccessful, I have taken into account the respondent's evidence that the claimant and/or FEE owes him and/or his companies the sum of approximately \$171,000 as reflected in the promissory note. On the evidence as a whole, I conclude there is a bona fide question about whether the advances made to the claimant and/or FEE were in the nature of genuine loans that carried any expectation of repayment. It is a consideration that is counterbalanced by other factors and warrants slight weight only in the overall assessment of the claimant's capacity to repay if her claim is unsuccessful.
- [182] All things considered, I am satisfied that the claimant has sufficient financial ability in the future to repay to the respondent over time interim support in the amount I am about to order should she be required to do so by the trial judge. I am likewise satisfied that the dispute concerning the alleged outstanding loan to the claimant and/or FEE reflected in the promissory note does not militate against ordering such interim support.
- [183] Several scenarios have been inputted into the DivorceMate calculations to produce an array of potential outcomes for support pursuant to the SSAG. Using the sum of \$250,000 as the respondent's income and the claimant's income as zero yields support of \$6,100 at the low end. Using the same income for the respondent but imputing the claimant's income as \$40,000 in light of her new job produces low-range support in the amount of \$4,488. Imbedded within those calculations is monthly child support of \$2,063 payable by the respondent.
- [184] I order that the claimant is entitled to monthly support of \$6,100 for November and December, 2014. Starting on January 1, 2015, she is awarded support of \$4,488. This order is predicated on the footing that the respondent and/or his companies will continue to cover the claimant's expenses referred to previously.
- [185] I will leave it to counsel to do the arithmetic to determine the respondent's shortfall position.

• Release of Funds Pursuant to Section 89 of the FLA

[186] I turn next to the claimant's application under s. 89 of the FLA for the release to her of \$100,000 out of the family property.

[187] Section 89 reads as follows:

89 If satisfied that it would not be harmful to the interests of a spouse and is necessary for a purpose listed below, the Supreme Court may make an order for an interim distribution of family property that is at issue under this Part to provide money to fund

- (a) family dispute resolution,
- (b) all or part of a proceeding under this Act, or
- (c) the obtaining of information or evidence in support of family dispute resolution or an application to a court.

[188] Less than a handful of cases have been decided under s. 89 and fewer still have discussed, in any detail, the factors that inform the court's discretion in deciding to approve or refuse the requested interim distribution.

[189] In *L.L.J. v. E.J.*, 2013 BCSC 1233, the father failed to detail his anticipated expenditures for legal fees or tender satisfactory evidence as to why he was unable to meet those expenses from his other resources. The father's application was dismissed with leave to reapply if it was supported by satisfactory evidence. In *M.A.L. v. N.A.L.*, 2014 BCSC 203, the court approved the spouse's application for an interim distribution of family property in the amount of \$200,000 to fund her anticipated legal costs connected to an upcoming two-week trial. In concluding that the request was reasonable, Melnick J. was influenced by the fact that the parties were moving toward trial in very unequal financial circumstances due, in large part, to the disparity in their incomes and access to assets. The chief objective of the award was to level the playing field in the sense of the parties' access to justice.

[190] In none of the cases yet decided of which I have been made aware has the court confronted the thorny question of the impact of a marriage agreement that, if enforceable, would preclude the applicant spouse from the division of family property.

[191] The provision itself does not bar the making of an interim order where there is an existing agreement concerning property division. I can conceive of no principled basis to read such a limitation into s. 89 or to otherwise consider the existence of such an agreement as an absolute bar to relief.

[192] The blunt purpose of s. 89 is to assist economically disadvantaged spouses to access justice in matrimonial disputes; it is meant to help level the litigation playing field that is so often skewed when one spouse controls all or the majority of the wealth and assets. Application of s. 89 calls for a purposive interpretation, where the need of the applicant spouse to receive an interim distribution and the potential entailing harm to the other spouse are evaluated contextually with an eye on the larger objectives endorsed by the FLA.

- [193] In my opinion, the plain meaning of the phrase "harmful to the interests of the spouse" in s. 89 contemplates actual or potential economic harm, and is likely broad in its scope. Determination of the presence of harm requires the court to reasonably anticipate and then assess the consequences that may flow from the interim order being sought. That approach, in turn, invites a highly individualized component to the inquiry. For example, would the distribution being sought in the particular case require a sale of property or of the encumbering of assets; what income tax ramifications might be triggered and what other transactional costs would arise? The concept of harm under s. 89 would also encompass economic implications such as whether the distribution would adversely impact the other spouse's lifestyle or effectively undermine or prejudice his or her argument for reapportionment.
- [194] In cases where the applicant may be precluded from entitlement to the family property based on a pre-existing agreement, the notion of being harmful to the other spouse's interests could also take the form of the court permitting a distribution so as to enable the funding of an unmeritorious claim. A reasonable way to attenuate that manifestation of harm is to require the applicant to show there is a reasonable prospect of success of impeaching the subject agreement. The claimant in the case at hand has satisfied that hurdle.
- [195] There are a number of avenues available to the respondent to obtain funds in order to facilitate a distribution under s. 89. By way of example, he could receive repayment of a portion of his shareholder's loan to cover all or some of the required amount, he could borrow against the matrimonial property or the apartment on McRae Avenue, or sell the latter.
- [196] In terms of a harmful consequence to the respondent's interests, the main concern is that the claimant would be unable to repay the amount distributed to her if the marriage agreement stands. Evaluating the claimant's ability to repay has caused me pause. This is because if it is ultimately determined that the marriage agreement precludes her from spousal support as well as the division of assets, she may have to repay support as well as any distribution ordered. The aggregate amount could be considerable and may take several years for the claimant to repay.
- [197] Adoption of a strict interpretation of "harmful" could mean that the applicant must be in a position to repay the distributed funds more or less immediately upon the failure of his or her claim to impeach the pre-existing agreement at trial. Were the court to endorse that formulation, then it would follow that a distribution might only be sanctioned where the applicant has assets equal or greater to the amount of the distribution, or a corresponding borrowing power or an assured minimum entitlement to family property so the court could be confident of repayment. Such an interpretation would place the most economically disadvantaged spouses beyond the reach of s. 89 and is not harmonious with a purposive approach.

- [198] In my view, the concept of being harmful to the financial interests of the spouse in terms of the recipients spouse's capacity to repay, must mean harm of an enduring nature. Accordingly, the fact that the recipient spouse may only be able to repay the distribution over a reasonable period of time into the future, as opposed to immediately following an unfavourable outcome at trial, would not, of itself, qualify as being harmful to the other spouse's interests.
- [199] The factors I have weighed in considering the claimant's ability to repay interim spousal support, including that there is a reasonable prospect of success of impeaching the marriage agreement at trial, apply equally in this assessment. In all the circumstances, I am satisfied that a distribution to the claimant of family property in the amount of \$50,000 is necessary to fund the matters referred to in s. 89(b) and (c). I am satisfied that a \$50,000 interim distribution from family property can be made without negatively impacting the respondent's standard of living, compromising his asset base or triggering adverse income tax costs and without harming his financial interests in the overall picture.
- [200] In closing, I would observe that the claimant did not provide a budget of her anticipated legal expenses or a timeline within which she expected they would be incurred. I would endorse the tendering of such evidence in support of an application under s. 89 as the preferable approach. It does not follow, however, that the absence of such evidence will render the application fatal, as urged by the respondent. Where, as here, it is abundantly clear that the litigation and business valuation issues are complex, expert opinion evidence is likely required and the history of the court proceedings already predicts a protracted and costly battle, the court may have sufficient information before it to approve a distribution.
- [201] That concludes my Ruling.
- [DISCUSSION CONCERNING CHILD SUPPORT]
- [202] THE COURT: I imagine that if counsel cannot agree on what my findings mean for child support, you will arrange to reappear.
- [203] MR. HUININK: Yes. This would be the over \$150,000 argument?
- [204] THE COURT: Yes.
- [205] MR. HUININK: Very well. My Lady, I do not know if you are expecting my learned friend and I to make submissions on costs. I have some preliminary thoughts.
- [206] THE COURT: I do not wish you to make them now. If you are not able to agree on costs, you are at liberty to make submissions in writing or orally. I will leave that to counsel and ask that you make the necessary arrangements with Supreme Court scheduling.
- [207] THE COURT: Ms. Dale, have you any questions?

[208] MS. DALE: Only one quick one, My Lady, and the rest I will save for after my friend and I have had a chance to discuss. The \$50,000 advance, is there a date when that should be advanced by?

[209] THE COURT: Now that you have told me you have obtained a July trial date, I would think within three weeks, one month at the outside. The respondent would have to have a fairly extraordinary reason to seek extension of the deadline beyond four weeks.

[210] MS. DALE: Can we say by the end of this month?

[211] THE COURT: I will hear from your friend.

[212] MR. HUININK: I assume that a good chunk of it will end up going to my learned friend who deserves to be paid, I am certain. However, I have no information from my client about whether the timeline Your Ladyship is suggesting would be problematic or not at all. I will simply have to speak to him and I will relate to him, of course, Your Ladyship's comment that it would have to be pretty extraordinary circumstances for him not to pay within that time frame.

[213] THE COURT: I am going to impose a deadline of four weeks from today, namely close of business on Thursday, April 2.

__ "Ballance J." __

Ballance J.

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