
CANADA / JUDGMENT

James v. James

2016 BCSC 292

COURT

Supreme Court of British Columbia

DECIDED

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2016 BCSC 292 James v. James

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

James v. James,

2016 BCSC 292

Date: 20160223

Docket: E112411

Registry: Vancouver

Between:

Richard David Leslie James

Claimant

And

Bronwyn Sian James also known as Bronwyn Sian Clift

Respondent

Before: The Honourable Madam Justice Gray

Reasons for Judgment

Counsel for the Claimant:

K.P. All

Counsel for the Respondent:

H.W. Wiebach

Place and Date of Trial:

Vancouver, B.C.

May 25 - 29 and

June 1 - 2, 22 - 26, 2015

Written Submissions Received:

July 8, 2015

Place and Date of Judgment:

Vancouver, B.C.

February 23, 2016

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INTRODUCTION

- [1] The parties to this divorce proceeding have twin sons who are 11 years old. The parties' life together was characterized by adventure, including living in Australia, New Zealand, Texas, England, and Vancouver, and sailing the South Pacific as a family for a year in a 58-foot long, 29-foot wide catamaran named "Twin Image". At the time of trial, the claimant father ("Father") was self-employed as a carpenter and builder, and the respondent mother ("Mother") was working as an information technology systems architect, primarily in the utilities industry.
- [2] The parties are Australian citizens. They were married in July 1999 and separated about 11½ years later, in February 2011. They seek a divorce.
- [3] The issues proceeded to a 12-day trial. The major issues relate to spousal and child support.
- [4] With respect to spousal support, the issues are whether the Father is entitled to spousal support, and if so, on what basis, how much, and for how long. The Father claims spousal support on both a compensatory and a non-compensatory basis.
- [5] The Father's position is that he sacrificed his career both by spending his time caring for the children and by moving to various locations, and that in doing so he enabled the Mother to advance her career. In contrast, the Mother's position is that both parties were equally responsible to care for the children, and that the parties moved to various locations

primarily, or at least partly, to enable the Father to pursue his dream of sailing professionally. The parties disagree about the effect of the changes in location on the Father's earning potential.

- [6] Calculation of the parties' respective incomes is a major issue for both spousal support and child support. Both parties take the position that the other party has recently been significantly underemployed, and both ask the court to impute income to the other.
- [7] The Father also claims that the Mother is in contempt of several court orders. The Mother admits that she is significantly in arrears of interim support payable pursuant to a court order, but she argues that the order was unfair in the circumstances of these parties and she asks that there be a retroactive correction eliminating or reducing the arrears.
- [8] The parties were prepared to consent to an order regarding parenting arrangements for the children. However, they were unable to resolve an issue regarding whether a parent could relocate with the children to Deep Cove or Bowen Island, B.C. There have also been post-trial applications, including one which resolved an issue of interpretation regarding the commencement of the Christmas holiday break.
- [9] The property division issues are governed by the Family Relations Act, R.S.B.C. 1996, c. 128 [FRA]. About \$250,000 is being held in trust from the sale of the Twin Image, and about \$505,000 is being held in trust from the sale of real property in New Zealand.
- [10] The Father's position is that the family assets should be divided unequally in his favour to pay him for arrears of support, and for expenses he incurred following separation for the benefit of the Twin Image. Alternatively, he seeks an order under s. 170 of the Family Law Act, S.B.C. 2011, c. 25 [FLA], that the Mother must pay a lump sum into trust as security for payment of future child support and spousal support.

FACTS

- [11] The Mother was born in December 1967 and is presently 48 years old. The Father was born in July 1970 and is presently 45 years old.
 - a) Before the Parties Met
- [12] Before the parties met, the Father completed grade 10 at a technical school and then took a four-year program leading to qualification in 1990 in Australia as a carpenter/joiner.
- [13] In 1990, the Father was convicted of culpable driving in connection with a fatal car accident and served time in prison. This conviction affected his ability to work in the United States and Canada.
- [14] The Father worked as a self-employed contractor for about six years, from 1989 to 1995.
- [15] In 1994, the Mother obtained a Bachelor of Applied Science degree in exercise physiology from the Victoria University of Technology in Victoria, Australia.

- [16] The Mother worked in Melbourne, Australia, for about three years as a sports scientist, earning about \$40,000 AUS per year.
- b) The Parties Meet
- [17] The parties met in Melbourne, Australia in 1996 through sailing. They began a relationship in 1997. At that time, the Father was 27 years old and was working as a project manager for a local government in Australia, earning about \$39,000 AUS per year. The Mother was working as a customer service officer with a local government in Australia, earning about \$40,000 AUS per year and receiving the use of a car. She acquired information technology experience in this job.
- c) New Zealand 1998-2001 and Marriage
- [18] The Mother obtained a job in Auckland, New Zealand, with Tui Consulting at a salary of \$80,000 NZD per year. This was a significant pay increase for her. The parties moved to Auckland, New Zealand and started living together there in May 1998.
- [19] The parties disagree about the purpose of this move, and about the purpose of most of the moves in the period that they lived together. As I discuss in more detail below, it is my view that the purpose of the move is not relevant to the question of entitlement to spousal support, and that only the effect of the move is legally relevant. However, in case I am held to be wrong and it is necessary to have findings on those points, I will make those findings.
- [20] The Mother testified that the parties agreed it was mutually beneficial to move to New Zealand, and the parties thought that the Father could continue building his career despite moving there. The Mother testified that Australia provided more opportunity for her than New Zealand, because Australia has much larger economic centres. She testified that the Father could work anywhere, but the Father wanted to pursue a career as a professional sailor, and New Zealand was a better place for him to do so.
- [21] The America's Cup is the pre-eminent trophy in yacht racing circles. New Zealand won the America's Cup in 1995, and as defending champion, was required to host the following America's Cup within five years.
- [22] As a result, Auckland, New Zealand was the principal location for professional yachting in the southern hemisphere at the time. Boat owners in New Zealand were prepared to pay \$1,000 a week plus food and expenses for top sailors, while in Australia, owners only paid in the range of \$400 a week.
- [23] The Father wanted to become a member of the crew for an America's Cup racing team or a Volvo Ocean Race team. The route for the Volvo Ocean Race changes, but it is essentially a race around the world. It takes about eight months, with periodic stops along the route.

- [24] A letter written in October 2012 by legal counsel for the Father and another regarding Canadian work permit issues stated that the Father's "love of sailing led him to move to New Zealand". However, the Father testified that the statement in the letter was not true.
- [25] After the parties moved to Auckland, the Father found work as a self-employed carpenter for \$25 per hour. While living in Auckland, the Father regularly sailed with world-class sailors, including members of an America's Cup racing team. He also sailed on the yacht of Jim Farmer, Q.C., from New Zealand to Australia and back, and raced on it while in Australia.
- [26] The parties were married in July 1999 in Melbourne, Australia, and returned to Auckland after the wedding.
- [27] The parties moved to Wellington, New Zealand, for about one year, from June 1999 to July 2000. The purpose of this move was to enable the Mother to work for Andersen's Contracting, the predecessor company to Accenture. Her salary was \$900 NZD per day, being \$198,000 NZD for 44 weeks of five work days each, which was a very significant salary increase.
- [28] The Father testified that the parties jointly decided to move to Wellington, but he did not have a job arranged before moving there. The Father spent a few months sailing to and near Australia.
- [29] While working for Andersen's Contracting, the Mother obtained on-the-job training in a software product known as "SAP".
- [30] In 1999, while they lived in Wellington, the parties became trustees of a family trust. It acquired property at 22 Anne Street ("Anne Street Property"), in Devonport, New Zealand, a popular suburb of Auckland. This property had two living spaces, one much larger than the other.
- [31] While the parties lived in Wellington, the Father obtained self-employed carpentry work for \$25 per hour working about 40 hours per week. He also did some sailing trips lasting a few weeks each for modest earnings of \$100 - \$400 per week plus food and accommodation.
- [32] Auckland was a better location than Wellington for the Father to pursue his sailing career, and both parties preferred Auckland to Wellington.
- [33] Around July 2000, the parties moved back to Auckland from Wellington. After the move, the Mother obtained a job with Tui Consulting's project with Mighty River Power. This job was at a lesser salary than her job in Wellington, but both parties wanted to return to Auckland.
- [34] The parties stayed in Auckland during this second period for about 9 months, until March 2001. While in Auckland this second time, the Father worked for Southern Spars, which at the time was the leading racing spar company in the world. He wanted experience with rigging so that he would be more attractive as a crew member for a long race like the Volvo Ocean Race.

d) Texas, U.S.A. 2001

- [35] Before March 2001, the parties considered taking positions aboard a catamaran owned by two Americans who were sailing the world with their two children. The Father was a prospect for the job of skipper, and the Mother a prospect for the role of children's tutor, and the jobs were open-ended.
- [36] The parties considered the advantages and disadvantages of this opportunity, and ultimately declined. They decided that they wanted to sail around the world at some point, but wanted to try to obtain their own yacht and do it themselves.
- [37] Soltius offered the Mother a job in Texas. It was very attractive financially, not only because of the hourly rate, but also because the exchange rate from U.S. dollars to New Zealand or Australian currency was favourable. The job paid about \$700 US per day. Assuming 44 weeks of five workdays each, that would be an annual salary of \$154,000 US. At the time, US dollars were exchanging at \$2.50 NZD, so the salary would have been worth about \$385,000 NZD.
- [38] The parties considered that the substantial income the Mother would earn in Texas would put them closer to purchasing an ocean-going yacht of their own. It was also attractive because the Father could attempt to further his sailing career in the northern hemisphere with sailors from that hemisphere.
- [39] In March 2001, the parties moved to San Antonio, Texas. They stayed about eight months, until November 2001.
- [40] The Father was not able to work in Texas because he did not have a work visa. He did not obtain many opportunities to sail with northern hemisphere sailors, and attributed that to a general slowdown related to the 9/11 events in the eastern U.S.A. However, the Father did some professional sailing in the period the parties lived in Texas.
- [41] Shortly after arriving in Texas, the Father went to the Caribbean and participated in the Antigua Race Week, which at the time was the biggest sailing race week in the Caribbean. The Father was hired to sail for about two months in total on the Mari-Cha III, a 145-foot super yacht considered at the time to be one of the fastest, and perhaps the fastest, monohull yacht in the world.
- [42] While in Texas, the Mother was offered a job in London, England. Again, it was at a high salary, and again, the applicable exchange rate, from British pounds sterling to New Zealand currency, was about 3.5, being very favourable in NZD. By this time, the Father had done a significant amount of sailing in the U.K. and other parts of Europe. The Father testified that "part of the idea of going to the U.K. was for travel and adventure".

e) London, England Late 2001

- [43] In late 2001, the parties moved to London, U.K. The Mother had a job with Accenture earning 170,000 pounds sterling per year, worth about \$595,000 NZD per year.

- [44] The Father worked briefly in Spain, and then did a lot of sailing.
- [45] While the parties lived in England, the Father began to sail and race on the Playstation, a 125-foot catamaran owned by Stephen Fawcett, and known as the fastest catamaran in the world. While on the Playstation, the Father participated in three trips which broke speed records, including sailing around the British Isles and sailing from Marseilles to Tunisia.
- [46] The Father worked briefly for a rigging firm in England, but lost the job because his sailing schedule conflicted with the work schedule.
- [47] The parties filed income tax returns in New Zealand for the periods ending March 31, 2002 through March 31, 2012. These returns were for years ending each March 31, and only included income earned in New Zealand.
- [48] The parties lived in London together for two years, from late 2001 until November 2003. However, during the last eight months of that period, the Mother worked on a project in Dublin, Ireland, leaving London on Monday mornings and returning on Thursday evenings.
- [49] While living in London, the parties travelled to a number of European countries, including France, Belgium, and Sweden.
- [50] While the parties lived in England, they purchased a house in Chertsey, Surrey, near London. They undertook a significant renovation. The Father did most of the renovation work, although he was assisted by plumbing, electrical, and drywall contractors, and an assistant. The Mother assisted with sourcing fixtures and painting. The renovations occurred over a period of about a year, but the work was interrupted while the Father was away sailing or the parties were on holiday.
- [51] While living in the U.K., the parties purchased other properties in New Zealand, including one in Piha ("Piha Property"), and another in Northcote ("Northcote Property"), near Auckland. They rented out the houses and the rent covered the mortgages and other costs. They planned to develop the Piha Property with a holiday home, and planned to subdivide the Northcote Property.
- [52] The parties sold the Chertsey house in late 2003. The profit was around 100,000 pounds sterling, worth almost \$300,000 NZD.
- f) Vacations in Maine, Las Vegas, Caribbean and Australia Late 2003 - 2004
- [53] In November 2003, the Mother's contract in Ireland finished. At around the same time, the parties learned that the Mother was pregnant. The parties decided to take a break, and then move back to New Zealand for the children's birth. They went to Maine, U.S.A., Las Vegas, U.S.A., and the Caribbean, and then visited family in Australia.
- [54] Around April 2004, The Father was hired to deliver a boat from Antigua through the Panama Canal to San Francisco. He went from Australia to Antigua for this job.

- [55] The parties returned to New Zealand around May 2004 and began living in the larger living space in the Anne Street Property.
- [56] In June 2004, the parties settled the RBJGlobal Developments Trust (which I will refer to as the "Developments Trust"). The trustee was RBJGlobal Developments Limited (which I will refer to as "Developments Limited").
- [57] Also in June 2004, the parties settled the R & B James Family Trust (which I will refer to as the "Family Trust"). The trustees were the parties and Nicholas Corporate Trustee Limited.
- [58] Neither party received employment income at any time from Developments Limited or the Developments Trust or the Family Trust. These entities were established to allow the parties to minimize tax while they developed properties. For the purposes of these reasons for judgment, the distinctions between the various entities are not important.
- g) Twins born in July 2004 and Auckland 2004-2009
- [59] The twins were born in July 2004 in New Zealand. The Mother was very ill just prior to and following the delivery. The boys were premature and remained in hospital for about four weeks.
- [60] The parties' evidence differed about the length and severity of the Mother's illness surrounding the delivery. I accept that the Mother was seriously ill for weeks, and suffered weakness and pain for months after the birth.
- [61] Over the period 2004 to 2008, neither parent worked full-time. The Father left Auckland from time to time to sail professionally. He also worked for Developments Limited, although he did not receive any employment income from it. The Father worked primarily on the Northcote Property, doing things like consulting with the architect and finding tradespeople to do the work.
- [62] The Mother worked for Mighty River Power from May 2004 to June 2007. She had previously worked on a project for Mighty River Power in 2000-2001. Her work for Mighty River Power briefly overlapped with her work for Soltius from April 2007 to October 2008.
- [63] The parties disagreed about the contribution of each to the day-to-day care of the twins when they were young. The Mother's evidence was that she was a "hands on" mother, and that she chose not to work full-time during this period because she wanted to participate fully in the children's upbringing. The Father's evidence was that both parties engaged in the children's day-to-day care.
- [64] The parties had in-house assistance for about 20 hours a week when the children were young, and also had assistance from their respective parents, who periodically visited New Zealand from Australia.

- [65] I accept that both parties contributed substantially, and roughly equally, to the parenting of the children. From time to time the Father went away sailing, and the Mother was involved with work. Both parties also sailed recreationally.
- [66] The Father's tax return for the period from April 1, 2003 to March 31, 2004 reported income of only about \$200 NZD, and it was in rental income. The tax return refers to 50% of the rental income from the Northcote Property, the Piha Property, and the Anne Street Property. The gross rents were reported as about \$77,000 NZD. Expenses of about \$59,000 NZD in interest and \$15,000 NZD in depreciation were deducted to achieve the net figure.
- [67] The Mother sent personal invoices to Mighty River Power for her work in 2004 through the first half of 2006 at the rate of \$80 NZD per hour.
- [68] The Mother's tax return for the period from April 1, 2004 to March 31, 2005 reported income of about \$17,000 NZD from self-employed consulting. The Father's tax return for that period reported income of almost \$18,000 NZD from sailing, plus additional rental income.
- [69] Excavation began on the Northcote Property in early 2005. The project was to develop the vacant back part of the property. There was an existing house with the address of 9 Lake Road, and the new home on the back of the property was known as 9A Lake Road.
- [70] The Father managed the project to develop the Northcote Property, but was not on the site full-time.
- [71] In late 2005 or early 2006, the parties purchased property on Cambridge Terrace, in Auckland, for over \$1 million NZD ("Cambridge Terrace Property"). They moved into it and again rented out the larger part of the Anne Street Property.
- [72] The Mother's tax return for the period April 1, 2005 to March 31, 2006 reported income of about \$90,000 NZD from self-employed consulting. The Mother estimated that she worked about 11 days per month on average in 2005.
- [73] The Father's tax return for that period reported income of almost \$9,000 NZD from sailing.
- [74] Starting with invoices in June 2006, the Mother began billing Mighty River Power at the rate of \$110 NZD per hour.
- [75] The Mother's tax return for the period from April 1, 2006 to March 31, 2007 reported income of about \$126,000 NZD from self-employed consulting. The Mother estimated that she worked about 13 days per month on average in 2006.
- [76] The Father's tax return for that period reported no income.
- [77] At some time in 2006, the parties sold the newly developed 9A Lake Road part of the Northcote Property for a profit. They then began renovating the 9 Lake Road part. The Father did some of the work with the assistance of contractors.

- [78] Starting in February 2007, the Mother began billing Soltius at the rate of \$1,140 NZD per day. The Mother estimated that she worked about 4 days per month on average in 2007 and 2008.
- [79] The Mother's New Zealand tax return for the period from April 1, 2007 to March 31, 2008 reported income of about \$103,000 NZD from consulting. The Father's New Zealand tax return for that period reported income of about \$30,000 NZD from sailing. The Father testified that when he was away sailing for a few weeks, his mother or both of his parents cared for the children.
- [80] The parties bought 36 Calliope Road ("Calliope Property"), a three unit villa in Devonport, New Zealand, in early 2007 and renovated it. The parties sold the Calliope Property in 2008.
- [81] Starting in April 2008, the Mother began billing Soltius \$1,040 NZD per day. In 2008, the Father went on a sailing trip to Croatia.
- [82] The parties sold the Cambridge Terrace Property in 2007 or 2008. It was a poor time in the real estate market for the sale, but the parties wanted to raise funds to buy a yacht.
- [83] The Father's New Zealand tax return for the period from April 1, 2008 to March 31, 2009 reported income of about \$20,000 NZD from sailing. The Mother did not report any income that year on her New Zealand tax return.
- [84] The Family Trust's New Zealand tax return for the period from April 1, 2008 to March 31, 2009 reported gross interest income of about \$56,000 NZD and net income of about \$7,500 NZD. It reported that about \$7,500 NZD was paid to trustees, and about \$155,000 NZD of losses were carried forward. The interest payor was the Developments Trust.
- [85] The Developments Trust's New Zealand tax return for the period from April 1, 2008 to March 31, 2009 reported a total loss of about \$23,000 NZD, and a loss to carry forward of about \$470,000 NZD.
- [86] Beginning in April 2008, the Mother was paid by Soltius through Developments Limited. While Developments Limited's tax return was not in evidence, its invoices to Soltius in 2008 totalled about \$68,000 NZD, exclusive of GST.
- [87] In 2008, the parties sold the Piha Property at a profit of about \$250,000 NZD.
- [88] In December 2008, the parties purchased the Twin Image, a 1988-built 58-foot ocean-going Profile catamaran which could provide sleeping accommodation for ten people and which was designed for long trips like sailing around the world. Its mast was 75 to 80 feet high. The purchase price was about \$500,000 NZD.
- [89] The parties obtained clear title to the Twin Image, and did not take out a mortgage against the vessel, although there were mortgages on their real properties.
- h) Sailing Trip in 2009 - 2010

- [90] The parties planned to sail around the world without any predetermined end date. They planned to assess from time to time whether to interrupt the journey to raise funds by working. They planned to sail the South Pacific, go through the Panama Canal to the Atlantic, and then sail through Europe.
- [91] The Father spent the first few months of 2009 preparing the Twin Image for the trip.
- [92] The parties started their sailing trip in the spring of 2009. The Mother was 41 years old, the Father was 39 years old, and the boys were almost five years old.
- [93] The tax returns of both of the parties for the period from April 1, 2008 to March 31, 2009 reported no income. The Family Trust's financial statement for that period reported about \$55,000 in rent received from the Anne Street Property. It reported mortgages of about \$483,000 against that property.
- [94] The parties sailed in the Pacific. From time to time they were joined by others, including the Father's parents and some nannies, who assisted with childcare, cooking, and cleaning.
- [95] On April 1, 2010, the Twin Image was about 120 miles northeast of Saipan. Saipan is in the Northern Mariana Islands in the South Pacific, north of Polynesia. The Twin Image's mast broke during the night, creating a perilous situation. The mast and rigging were abandoned. The Mother credits the Father with saving everyone's life.
- [96] The Twin Image returned safely to Saipan under power. The cost to replace the mast and rigging, and repair the Twin Image, was about \$170,000 NZD.
- i) Move to Vancouver Area in 2010
- [97] The parties hoped to repair the Twin Image and resume their sailing trip. They spent a couple of weeks investigating their options.
- [98] The Mother was not able to find work in New Zealand, but was able to find work in Vancouver for Ajilon Consulting, a division of Ajilon Canada Inc. ("Ajilon"). Ajilon is a contracting agency which provides the services of contractors to its clients. Accenture is one of Ajilon's clients.
- [99] The Mother entered into a term employee agreement with Ajilon for consulting work at the rate of \$145 CAD per hour over the period May 24, 2010 to November 30, 2010, unless extended in writing. At the time, the Mother's specialized SAP ISU and utilities skills were rare. As stated earlier, SAP is a software product. ISU is a utility-specific solution for creating customer bills.
- [100] Unfortunately, although the parties had taken steps to obtain insurance on the Twin Image, they had been defrauded. They did not receive any insurance proceeds.
- [101] The Twin Image remained in Saipan. The parties put the contents in storage, except for some clothes and toys for the children.

- [102] The parties gave conflicting evidence about what they planned to do on moving to Vancouver. The Mother's evidence was that both parties planned to work in Canada, and they expected that the Father could work in Canada by relying on the Mother's work visa.
- [103] The Father's evidence was that the parties did not intend that he would work in Canada until after the separation in February 2011.
- [104] The Mother's evidence is more likely, because at the time, the parties were interested in earning money rapidly to enable them to continue with their sailing venture. In addition, as set out below, the Father took steps to try to mitigate the impact of his Australian culpable driving conviction, presumably so that he could obtain a work permit.
- [105] The Mother flew to Vancouver with the children. She obtained a work permit dated May 14, 2010 for the period ending November 30, 2010. The permit limited her to working for Ajilon in Vancouver as an embedded system software designer. The Father's mother also came to Vancouver to look after the boys while the Mother worked. The Father remained in Saipan to pack the Twin Image for the monsoon season.
- [106] The Mother rented the top half of a house in West Vancouver, B.C. and enrolled the children in school. Since then, both parties have lived continuously in the area of the lower mainland known as West Vancouver and Lions Bay. However, for simplicity, I will refer to this area as being in "Vancouver", except when the distinction is relevant.
- [107] The Father arrived in Vancouver in around May 2010. He was not permitted to work. In order to work, he required a temporary residence visa and work permit.
- [108] The Father was inadmissible to Canada owing to his Australian culpable driving conviction. He was granted admissibility with a temporary resident permit.
- [109] The Father was advised that he could not work in Canada until he was considered to be rehabilitated.
- [110] Shortly after he arrived in Canada, the Father requested a criminal record search of the Australian police records and the records of the New Zealand Ministry of Justice. He also obtained letters of reference to submit to Canadian immigration authorities. These steps are more consistent with the Father seeking the ability to work than with the Father not intending to work outside the home.
- [111] In June or July 2010, the twin I will refer to as "T" became seriously ill and was hospitalized for about a week. The parties did not have medical insurance. The bills for this hospital stay were about \$20,000. Unless otherwise indicated, from this point forward in these reasons for judgment, currency references will be in Canadian dollars.
- [112] Also around June 2010, the Mother's contract with Ajilon was extended to July 2012. In a letter dated June 2, 2010, Ajilon stated that "the total value of the contract for one year is \$316,680.00".

- [113] On September 1, 2010, the Mother obtained a second Canadian work permit, for the period ending July 15, 2012. Again, she was limited to working for Ajilon in Vancouver as an embedded system software designer.
- [114] The Father obtained a Canadian temporary residence permit on October 4, 2010 which was valid until April 2011. It did not permit him to work in Canada.
- [115] The Mother's Canadian income tax return for 2010 reported about \$205,000 in earnings, all of which was employment income from Ajilon. She also received a tax-free housing allowance of \$2,300 for the three months of October through December 2010. Grossing up the \$6,900 for taxes equals about \$12,000. Using those figures, the Mother's 2010 income was about \$217,000. The Mother's employer from late May 2010 to the end of December 2010 was Ajilon.
- [116] The Father did not file any tax return in respect of 2010. I assume that he did not earn any income in 2010.
- [117] The Mother's evidence was that during the first few years of living in Vancouver, she worked harder than she had ever worked before. She testified that she did so initially to try to earn enough to resume the sailing trip as soon as possible, and later, because of the high interim support order. However, her evidence is that she could not sustain this pace of work.
- [118] The Mother is required to participate in administrative meetings and training but she is not paid for those hours, or for travel time. She is only paid for billable work, and she sometimes bills less than the time she spends. For example, she does not consider herself to be proficient at advanced Excel spreadsheets and PowerPoint presentations, and it takes her longer to prepare such items than if she were more adept. As a result, she does not bill for all the hours she spends doing such tasks.
- [119] The only part of 2010 when the Mother worked was the second half. Her earnings reflect about 1,400 billable hours for that six-month period, which would be an annual amount of 2,800 billable hours. I accept the Mother's evidence that she would not have been able to work so many billable hours for an extended period.
- [120] Starting in January 2011, the Mother's employer was Modis Canada Inc. ("Modis"). Like Ajilon, Modis is a contracting agency which provides the services of its employees and contractors to customers like Accenture.
- j) Separation in February 2011
- [121] The parties separated on February 7, 2011.
- [122] The Father had returned to Vancouver from a trip to New Zealand and Australia for a wedding and to visit family. The Father confronted the Mother about an alleged extra-marital relationship, and insisted that she leave the house and the children immediately.

- [123] The Father tape-recorded part of the discussion between the parties. The Father testified that he told the Mother he was recording it, but she denies that, and it is not disclosed in the tape recording. The children were upset. The Father threatened to inform her employer that she was having an affair with a co-worker. The Mother protested that she could lose her job, but the Father repeated his threat.
- [124] The Mother testified that the Father acted aggressively towards her in the period after the tape-recording ended, and that she left, fearing for her own safety and for the impact of the altercation on the children.
- [125] The Father was about 40 years old, the Mother was about 43 years old, and the children were about 6½ years old.
- [126] The Mother left the family home. She began living with Mr. Wharton, and they lived together for over three years, until June 2014.
- [127] For the period of about three months from February 7 to May 2011, the children were primarily resident with their Father. The Mother saw the children when she could.
- k) Separation Agreement in March 2011
- [128] The parties tried to resolve their differences through collaborative law. They entered into a "Separation Agreement" dated March 31, 2011, after each of them had obtained independent legal advice.
- [129] The Separation Agreement included Recital C(2) as follows:
- At the present time, [the Father] is not employed outside the home and he is awaiting the outcome of his application for a work permit. [The Father] fully intends to work when and if he is able to get a work permit. Once [the Father] is employed this agreement will be reviewed and adjusted immediately.
- [130] The Separation Agreement provided that, for the purpose of calculating interim child and spousal support, the Mother's gross income was \$276,000 per year, and that the agreement would be reviewed if she became unemployed.
- [131] The Separation Agreement set out agreed amounts for child and spousal support payable on the first day of each month in the six-month period from April 2011 to September 2011. It provided that the Mother would pay the Father \$2,100 per month for child support plus \$7,000 per month for spousal support, and would share the \$2,300 housing allowance with him equally (meaning that she would pay him \$1,150).
- [132] That resulted in the Mother being required to pay the Father the total of \$10,250 per month, of which \$3,250 was not taxable or tax-deductible. In addition, the parties agreed to share special and extraordinary expenses equally for the period from April 1, 2011 to September 1, 2011.

[133] The Separation Agreement also provided that the children's interim primary residence would be with the Father. At the time, the children were spending most of their time with the Father.

[134] The parties had a vehicle, which the Father retained after separation. He agreed to pay the Mother \$1,500 for her interest in it but did not do so.

[135] The parties signed a written agreement dated April 6 and 8, 2011. It is partly typed and partly in handwriting. It is as follows:

1. The owners are [the Father and the Mother] and that they agree to the below.
2. To share agreed (by both parties) costs 50% each
3. Of delivering boat from Saipan [to] B.C. Canada
4. To share 50% costs to repair damage as agreed by both parties, Rigging, Sails and Relevant Boat Building.
5. All costs to be approved by both owners prior to work beginning
6. To sharing costs 50% of ongoing maintenance as agreed by both parties until boat is sold
7. To put the boat up for sale immediately the boat arrives in Canada
8. [deleted]
9. All receipts to be kept and accessible
10. A weekly email until the boat leaves Saipan to indicate costs - itemised please.

[136] The Father testified that the parties agreed that he would not charge for his labour.

[137] At the end of April 2011, Mr. Wharton was laid off from his job at Accenture. During the following period of over three years when he lived with the Mother, the Mother's earnings essentially covered the household expenses for Mr. Wharton and the Mother and the children when they were living in that household, except that Mr. Wharton apparently contributed the dividends discussed below which he received from Innyanook Consulting Ltd. ("Innyanook"), the company the Mother incorporated later in 2011.

[138] In May 2011, the Father went to Saipan for about three weeks to prepare the Twin Image to travel to Vancouver. The children stayed with their Mother during this period. The Father testified that the Mother's parents were in the Vancouver area at this time and able to look after the children.

[139] Commencing with the Father's return to the Vancouver area in around June 2011 and continuing since then, the children have been living alternate weeks with each parent.

- [140] The Father received a work permit on June 1, 2011 ("Father's First Work Permit"). It permitted him to work for anyone until April 21, 2012. It was apparently granted on the basis of his temporary resident permit.
- [141] The Father did not work for anyone in the period of the Father's First Work Permit. Instead, he worked on the Twin Image.
- [142] On June 20, 2011, Inyanook was incorporated. The Mother and Mr. Wharton each received fifty shares in Inyanook.
- [143] Starting in the end of June 2011, the Mother worked for Modis as a consultant provided through Inyanook as the contractor. Modis had in turn agreed with Accenture to provide the Mother's services.
- [144] Inyanook has a fiscal year end of July 31. As a result, work the Mother performed through Inyanook for Modis in late 2011 is reflected by earnings in the Mother's 2012 tax return.
- [145] The Mother's evidence included a "Breakdown of Earnings" which identified her earnings for the period she worked, rather than reflecting her use of a company with a different year end.
- [146] At some point, at a time which was not clear in the evidence, the Mother suggested to the Father that they purchase a property which the Father could renovate and resell at a profit, and in which he could live during the renovations. The Father did not pursue this idea, on the basis that he did not trust the Mother enough to go into business with her.
- [147] The Twin Image's trip from Saipan to Vancouver took about two to three months. The Mother wanted the Father to bring the boat, but the Father did not agree. The parties hired a skipper to make the voyage and the Twin Image arrived in Vancouver in August 2011. The only damage it suffered was relatively minor, and was from striking a log in the Vancouver harbour.
- [148] At some point in 2011, the parties listed Twin Image for sale, but it did not sell until 2014.
- [149] In August 2011, Modis and Inyanook agreed to extend their contract for the period from December 1, 2011 through December 31, 2013. The extension agreement provided that Modis would pay an hourly rate of \$145.00 for each hour of "client services" performed by the Mother.
- [150] Starting around August 2011, Mr. Wharton began assisting the Mother with her work. I accept that Mr. Wharton's assistance enabled the Mother to focus on billable work, and to avoid reducing her billable hours to reflect her lack of proficiency in some tasks.
- [151] Mr. Wharton did not keep timesheets or other written records of the amount of time he devoted to assisting the Mother with her work tasks. I accept his estimate that he worked about 800 to 900 hours per year, working from zero to 40 hours in various weeks.

- [152] The Mother sent an email to the Father dated September 12, 2011, in which she stated that her work was very slow and she had only worked 20-30 hours per week over the previous three weeks. She suggested that she pay the Father half of her earnings for the low weeks.
- [153] In September 2011, the Mother reduced her payments to the Father from \$10,250 per month to about \$1,800 per month. She did this on the basis that she did not believe that the Father would make a reasonable effort to achieve self-sufficiency so long as he was receiving enough support from her that he could maintain a comfortable lifestyle.
- [154] On October 12, 2011, Master MacNaughton made a declaration under s. 57 of the FRA that there is no reasonable prospect of reconciliation between the parties. She also ordered, by consent, that neither party shall remove the children from B.C. without the written consent of the other party or court order authorizing the removal.
- [155] In late October and early November 2011, the parties corresponded by email about work on the Twin Image. The Father suggested that the costs should include an amount for his labour, but the Mother's position was that the Father's time should not be considered a shared expense.
- l) MacNaughton Interim Support Order November 2011 and January 2012
- [156] The Father applied for an order for interim spousal and child support, as well as orders relating to custody, guardianship, and access. Master MacNaughton heard the application on November 16, 2011.
- [157] The Father's position was that the Mother's income was about \$400,000 per year. The Mother's evidence was that she had earned about \$300,000 in the prior year, and was also entitled to the tax-free housing allowance. The Mother's position was that income of \$100,000, or alternatively \$65,000, should be imputed to the Father. The Mother's position was that spousal support should be on the basis of a 50/50 split of the net disposable income available to the family.
- [158] Master MacNaughton reserved judgment and provided written reasons for judgment on December 15, 2011.
- [159] Master MacNaughton concluded that the Mother's income was \$347,000 for interim child and spousal support purposes. She concluded that income should be imputed to the Father based on the amount he could be expected to earn as a fully-employed skilled construction worker, the type of position he was most likely to obtain. She wrote that she had no evidence about what that level of income might be, and so if the parties were not able to agree on an appropriate figure after discussion, they could appear before her and provide the necessary evidence.

- [160] Master MacNaughton wrote that this might be a case in which, at trial, the court would split the net disposable income of the parties, but that she was not prepared to make such an order on an interim basis. She wrote that "interim spousal support should be paid in the middle of the range on the 'with child support' formula in the Spousal Support Advisory Guidelines" ("SSAG").
- [161] The Mother's earnings in 2011, both received by her personally that year and received by Inyanook that year, were about \$343,500. That includes an amount for the housing allowance which has been grossed-up in respect of income tax. The Mother's position is that Inyanook incurred expenses of about \$2,400 to generate its revenue.
- [162] The Mother's 2011 Canadian income tax return, as assessed, reports employment income of about \$162,000, and a net rental loss on a gross rental income of about \$42,000. The rental income was from the Anne Street Property.
- [163] The Father filed a 2011 tax return in Canada. The only income he declared in 2011 was spousal support.
- m) 2012
- [164] On January 12, 2012, the Mother obtained a Canadian work permit for the period until January 11, 2013. She was limited to working for Modis as an embedded system software designer in Vancouver.
- [165] The parties were not able to agree on the amount of income to be imputed to the Father.
- [166] On January 13, 2012, the parties appeared again before Master MacNaughton. She found the Father "to have a Guideline income imputed at \$48,400" and the Mother "to have a Guideline income imputed at \$347,000."
- [167] Master MacNaughton ordered the Mother to pay the Father, commencing February 1, 2011, \$3,852 per month in child support calculated on a set-off basis, plus \$6,783 per month in spousal support, being a total of \$10,635 per month. She also ordered the Mother to pay forthwith \$15,408 as retroactive child support for the period from October 2011 to January 2012, and \$27,000 as retroactive spousal support for that period. The result was a total retroactive payment, net of some payments that had been made, of about \$24,000. I refer to that order as the "MacNaughton Interim Support Order".
- [168] At the mid-range of the "with child" formula, which was the amount ordered in the MacNaughton Interim Support Order, using the incomes already described, the Father received 53.2% of the parties' net disposable income and the Mother received 43.8%.
- [169] In the Father's January 10, 2012 affidavit, he deposed that he did not have the necessary tools to do certain carpentry work, and he needed \$5,000 to \$10,000 to purchase such tools. He did not take steps before trial to acquire those tools, on the basis that he could not afford them.

- [170] In 2012, the Father did some construction work and some paid sailing work. The construction work was for friends, acquaintances, Brammy Bros. Painting & Restoration (2011) Ltd. ("BBPR"), Clear Impact Restoration Ltd. ("Clear Impact"), and JV Construction. Clear Impact is a company related to BBPR.
- [171] In mid-January 2012, the Mother sent an email to the Father stating that there was not consistent work in Vancouver, so she would be returning as soon as possible with the children to Australia, and she asked the Father to call her to discuss it.
- [172] However, the Mother did not return to Australia. Instead, she was able to work on a project for SaskPower. From January 16, 2012 to October 30, 2012, she worked alternate weeks in Saskatchewan on the project. She was not paid for her travel time from Vancouver. While in Saskatchewan, she worked long hours. She worked remotely for shorter hours during her weeks in Vancouver, when the children lived with her.
- [173] In April 2012, the Father enrolled in the Family Maintenance Enforcement Program ("FMEP") for the collection of support payments from the Mother.
- [174] The Mother, acting in person, made an arrangement with FMEP regarding payment of the arrears of support by making payments of \$500 per week.
- [175] The Father obtained a second work permit, which was for the period from May 23, 2012 to January 11, 2013 ("Second Work Permit"). This permitted the Father to work for any employer.
- [176] In around July 2012, BBPR employed the Father to do construction work. He impressed one of the owners, Mr. Bramwell, as being a very skilled and hard worker, capable of working as a foreman.
- [177] Inyanook's Canadian tax return for the period from August 1, 2011 to July 31, 2012 reported income of about \$143,000, on the basis of total revenue of about \$306,500. It reported salaries and wages of about \$142,000.
- [178] In September 2012, Modis and Inyanook agreed to extend their contract, and agreed that for the period from September 1, 2012 to August 31, 2013, Modis would pay Inyanook \$163 per hour for client services provided by the Mother. The Mother ceased receiving a housing allowance at that time.
- [179] By letter agreement dated October 16 and 22, 2012 BBPR agreed to employ the Father as a full-time, permanent site foreman, at an annual salary of \$45,000.
- [180] On October 24, 2012, the Father applied for Canadian permanent residence for himself and the children.
- [181] The Father and BBPR jointly retained a law firm to act for them in connection with the Father obtaining a further Canadian work permit. The application documents included a letter dated October 24, 2012 from the law firm to the B.C. Provincial Nominee Program.

n) Cullen Contempt Order of November 2012

- [182] The Mother did not pay forthwith all of the arrears which she was ordered to pay pursuant to the MacNaughton Interim Support Order. The Father brought an application for a finding of contempt, as well as for orders for financial disclosure by the Mother, regarding a vacation with the children, and regarding the expenses to repair the Twin Image. The Mother brought cross-applications for financial disclosure from the Father, medical services, and a variation of the MacNaughton Interim Support Order to provide for payment on a weekly basis rather than a monthly basis.
- [183] The parties reached agreement about financial disclosure, the medical services issue, and the children's vacation.
- [184] Associate Chief Justice Cullen heard the Father's contempt application on November 7 and 13, 2012. On November 13, 2012, Associate Chief Justice Cullen found that the Mother had the capacity to pay forthwith the payments required by the MacNaughton Interim Support Order and had failed to do so. He found her to be in contempt of court.
- [185] Associate Chief Justice Cullen adjourned the sentencing hearing for two weeks to enable the Mother to purge her contempt by paying the arrears in full.
- [186] Associate Chief Justice Cullen also varied the MacNaughton Interim Support Order to provide that the Mother must pay the Father support on a weekly basis, rather than a monthly basis. Associate Chief Justice Cullen concluded that the parties should share in the expenses for the Twin Image on an equal basis, and the determination of what were legitimate expenses was adjourned for consideration at trial or on the sale of the boat.
- [187] I refer to the order of November 13, 2012 as the "Cullen Contempt Order".
- [188] The Mother paid the arrears within 14 days of the Cullen Contempt Order and thereby purged her contempt.
- [189] In late December 2012, Modis and Inyanook agreed to extend their contract for the period from January 12, 2013 through January 12, 2016, with no change in the Mother's hourly rate of \$163 for client services.
- [190] The Mother's earnings in 2012, on the basis of what was actually received by Inyanook that year, were about \$344,500. That includes an amount for the housing allowance, which ended after August 2012, and which has been grossed-up in respect of income tax. It does not include any deductions for expenses to earn the income.
- [191] The Mother's 2012 Canadian income tax return, as assessed, reported line 150 income of \$288,750. This consisted of \$170,000 in employment income and \$118,750 in the taxable amount of dividends from Inyanook. She also received a rental benefit with a grossed-up value of about \$32,500 in 2012.

- [192] The Mother's position is that Inyanook incurred expenses of about \$21,500 in 2012 to generate its revenue. In addition, Inyanook paid Mr. Wharton a dividend of \$62,500 in 2012. The Mother's position is that about 25% of that payment reflected income splitting, but the remaining 75% reflected work that Mr. Wharton did for the benefit of Inyanook, essentially by enabling the Mother to maximize her billable work.
- [193] Mr. Wharton's 2012 income tax return reported line 150 income of about \$62,000, consisting of \$50,000 in the taxable amount of dividends from taxable Canadian sources, and about \$12,000 in other income.
- [194] The Father's 2012 Canadian income tax return declared net business income of about \$13,000 in 2012, from gross business income of about \$23,000. Of this income, about \$5,000 gross was from sailing on the Mari-Cha III, and about \$18,000 was for construction work. Of the construction work, about \$10,000 was for BBPR and its related company, Clear Impact.
- o) 2013 and Father Living with Ms. Ireland
- [195] In February 2013, the Father began living with Ms. Ireland and her two children, who live with them almost full-time. Ms. Ireland's two children occasionally visit with their own father, who travels frequently, and they usually see him only on some weekends.
- [196] The Father and Ms. Ireland share common expenses equally, including housing costs, food, household supplies, and recreation. They each pay expenses directly related to their own children.
- [197] On January 9, 2013, the Mother obtained another work permit, for the period until January 8, 2016. It limits her to working for Modis as a computer analyst and consultant.
- [198] The Father obtained a third work permit, for the period from January 9, 2013 through January 8, 2016 ("Father's Third Work Permit"). This work permit restricted the Father to working only for BBPR, and to working only as a residential home builder.
- [199] BBPR did not provide the Father with the amount of work in 2013 that it anticipated when it provided the October 16, 2012 letter. That letter referred to paying the Father an annual salary of \$45,000, but instead, BBPR paid the Father for the hours worked. BBPR offered the Father so little work because it did not obtain enough projects requiring carpentry skills.
- [200] The Father did not look for a different employer to replace BBPR as his work sponsor, because he was concerned that doing so might slow his permanent residence application with the Canadian immigration authorities.
- [201] On April 6, 2013, the Mother bought a used 2003 Ford Escape vehicle for \$3,000.
- [202] On May 3, 2013, the U.S.A. issued a business visitor visa to the Mother for the period ending May 1, 2018.

- [203] Inyanook's Canadian income tax return for the period ending July 31, 2013 reported net income of about \$92,000. It reported total revenue of about \$288,000, and among the expenses claimed was about \$170,000 for salaries and wages.
- [204] In October 2013, the Father and Ms. Ireland purchased a recreational vehicle for \$9,000, with each contributing \$4,500.
- [205] In late December 2013, a paralegal at the Father's immigration law office advised the Father that he was not allowed to start a business with his current visa in Canada, but could do so once he received his permanent residency status.
- [206] The Mother's income declined in 2013. In the summer of 2013, she began to pay the Father less than the amount required by the MacNaughton Interim Support Order. In August 2013, the amount of the arrears was about \$1,400. By December 10, 2013, the arrears were about \$10,000.
- [207] The Mother's 2013 line 150 income was about \$233,500.
- [208] The Mother's earnings in 2013, again on the basis of what was received by Inyanook that year, were about \$255,500. Again, that figure does not include any deductions for expenses to earn the income. The Mother's position is that Inyanook incurred expenses of about \$28,500 in 2013 to generate its revenue. In addition, Inyanook paid Mr. Wharton a dividend of \$50,000 in 2013, and the Mother claims 75% of that as an expense.
- [209] The Mother's 2013 Canadian tax return, as assessed, reported line 150 income of about \$233,000, consisting of about \$170,000 in employment income and \$62,500 as the taxable amount of dividends from Inyanook.
- [210] From those funds, the Mother paid the Father about \$117,500 in support payments, leaving her \$138,000 for the support of herself and Mr. Wharton and the children when they were with her, as well as for her expenses such as income tax.
- [211] Mr. Wharton's 2013 tax return, as assessed, reported about \$10,000 in employment income and \$62,500 as the taxable amount of dividends from taxable Canadian corporations.
- [212] The Father's 2013 Canadian income tax return reported that he had received about \$117,500 in support payments, and earned about \$2,500 in net business income. He reported gross business income of about \$16,500. He also reported about \$47,000 in gross rental income (mostly for the Anne Street Property, but partly also for a portion of his home in Vancouver, B.C.), and under \$1,000 in net rental income.
- [213] Ms. Ireland's line 150 taxable income in 2013 was a total of about \$94,500, including about \$74,500 in employment earnings, and a modest amount for spousal support.

- [214] The combined 2013 income of the Father/Ireland household was about \$214,500 (not including rental income; \$94,500 plus \$120,000). In contrast, the combined 2013 income of the Mother/Wharton household was about \$210,500 (not including rental income; \$138,000 plus \$72,500).
- p) 2014
- [215] The Mother was earning less in 2014 than she had earned in 2012 and 2013. She asked the Father to agree to a reduction in the support payments, but he did not agree.
- [216] By February 2014, the Mother had asked the Father to cancel the registration with FMEP. He did not agree to that either.
- [217] The Canadian government issued a confirmation of permanent residence to the Father on February 25, 2014. However, the certificate refers to the Father's last entry date of March 8, 2014, and it appears that it became effective upon that re-entry to Canada. The effect of obtaining permanent residence status was that the Father was free to work for anyone, including himself. He was no longer limited to working for BBPR.
- [218] The Father commenced his own business as a sole proprietorship under the name Domicile Construction & Property Maintenance ("Domicile"). He sent a flyer by email to a number of contacts on March 31, 2014, and started working and billing in Domicile's name.
- [219] The Father thinks he can make more money in his own business than as an employee. He wants to work as a general contractor. He has experience from developing properties in New Zealand, although he was working on the family's projects, rather than for clients. The Father believes that getting general contracting work depends on relationships. Finding work and providing quotations is not something the Father did until he started his own business as Domicile.
- [220] Master Baker made an order on April 22, 2014 by consent. The terms included requirements that each party provide financial documentation to the other.
- [221] On April 25, 2014, the Father filed a second application to find the Mother in contempt of the MacNaughton Interim Support Order.
- [222] The Mother's romantic relationship with Mr. Wharton ended around the end of April 2014.
- [223] The Mother did not make any support payments to the Father after April 28, 2014, except for three payments of \$1,000 each.
- [224] On May 2, 2014, about a week after the Father filed his second application for a finding of contempt, the Mother filed a responding application to vary the MacNaughton Interim Support Order, including a request to cancel arrears. The Mother's 5th affidavit, dated May 2, 2014, includes the following:

I recognize that I should have applied to court to vary the order on the basis that I do not earn and have not earned the income attributed to me. I meant no disrespect to the court but now recognize that the self-help approach I adopted is in fact disrespectful. It will not happen again and I ask this Court for [sic] forgive my intransigence. This application could have been avoided had I made an application earlier.

[225] The Father's Form 8 Financial Statement dated July 9, 2014 included a number of errors. It did not reveal that he shared expenses with Ms. Ireland, it did not reflect the tenant's contribution to expenses, it substantially overestimated the continuing costs of maintaining the Twin Image, and it did not reflect the expenses which the Father had deducted as business expenses from his income. In this Financial Statement, the Father claimed monthly expenses of about \$9,800, being about \$117,500 annually. The total amount of support set out in the MacNaughton Interim Support Order was about \$127,500 annually.

[226] As with the Father's Form F8, the Mother's later Form 8 Financial Statement dated April 27, 2015 contained errors, by including some expenses which were paid by Inyanook as personal expenses.

[227] On July 18, 2014, Mr. Justice Butler heard the cross-applications for contempt and for a reduction of the interim spousal support amounts. At that time, the trial was scheduled to proceed in October 2014. Mr. Justice Butler adjourned both applications to trial, with liberty to reset the application after October 6, 2014 if the trial did not proceed as scheduled in October 2014.

[228] Mr. Justice Butler's reasons for judgment are indexed at 2014 BCSC 1566, and include the following at paras. 44 to 47:

[44] This brings me to the difficulty I have in attempting to resolve both parties' incomes. A tremendous amount of documentation and affidavit material regarding [the Mother's] income was placed before the court. In response to [the Mother's] application, [the Father] says that if the court was inclined to find a variation then it should also vary his Guidelines income, as that will impact on both child and spousal support. Quite simply, he says that [the Mother's] income cannot be considered in isolation. I agree.

[45] Accordingly, a great deal of evidence was placed before the court about [the Father's] employment, his income and his visa situation. The evidence before me was highly contentious. Indeed, each party challenges many of the statements made by the other party relative to their employment and calculation of their incomes.

[46] There is no doubt that a court will need to hear viva voce evidence to resolve many of these issues. I will not examine that evidence given the decision I have arrived at, but will simply say that the issues which are challenged by the parties include: the validity of the dividend payments to [Mr. Wharton]; [the Mother's] statement that her revenues are declining; the amount of expenses claimed by [the Mother]; the late or incomplete disclosure of

documents by both parties; [the Father's] failure to work during the period he says he was sponsored by B.B.P.R.; his failure to change sponsors if he was not receiving work; and the lack of a full explanation for his modest income.

- [47] These questions are important but I am unable to resolve them on the affidavit evidence. Further, and more importantly, I find that this is precisely the kind of case where the court should not be asked to resolve these issues three months before trial. It is a very poor use of the parties' resources to attempt to do so and a poor use of the court's resources to ask the court to do so. The issues raised by the parties are substantial issues, but they can wait three months to trial and should not be resolved at this time.
- [229] Inyanook's Canadian income tax return for the period ending July 31, 2014 reported net income of about \$36,000. It reported total revenue of about \$211,000, and among the expenses claimed was \$150,000 for salaries and wages.
- [230] The trial was adjourned from October 6, 2014, apparently because there was a failure to file a trial certificate. The Mother did not reset her application to vary the amount payable for interim support. I accept that it was appropriate not to reset the matter for hearing before trial, in light of Mr. Justice Butler's comments about the difficulty of determining the issues in this case on the basis of affidavit evidence.
- [231] Judge Gedye of the Provincial Court made an order on November 28, 2014 that Inyanook is jointly and severally liable with the Mother for payments required under the maintenance order filed pursuant to the Family Maintenance Enforcement Act, R.S.B.C 1996, c. 127 [FMEP Act].
- [232] Around November 4, 2014, the Father received a proposal for the construction of a website for Domicile. He did not authorize the work immediately, because he did not want to incur that expense at the time.
- [233] On December 1, 2014, Mr. Justice Smith approved the sale of the Twin Image for \$270,000 USD, on the basis that the sale would complete in March 2015 and the net sale proceeds would be paid in trust to McLachlan Brown Anderson, solicitors for the Father.
- [234] In early December 2014, at the Mother's request, Modis changed its method of paying Inyanook for the Mother's services from automatic deposit to cheque. Around the same time, the Mother closed her personal bank accounts to avoid garnishment by FMEP.
- [235] The Mother's 2014 Canadian income tax return reports line 150 income of \$197,200. This consists of \$150,000 in employment income and \$47,200 in the taxable amount of dividends from Inyanook.
- [236] The Mother's earnings in 2014, again on the basis of what was received by Inyanook that year, were about \$183,500. Again, that figure does not include any deductions for expenses to earn the income. The Mother's position is that Inyanook incurred expenses of about \$29,500 in 2014 to generate the revenue.

- [237] The Father's 2014 Canadian income tax return reported gross business income of about \$48,500, and net business income of about \$19,000. It also reported about \$52,000 in gross rental income (mostly from the Anne Street Property) and about \$2,000 in net rental income.
- [238] Ms. Ireland's line 150 taxable income in 2014 was a total of about \$70,000, consisting of about \$74,500 in employment earnings, \$1,500 in spousal support, \$5,000 in taxable capital gains, and a rental loss of about \$11,000 on gross rental income of about \$21,000. Of that rental income, \$18,500 related to property in West Vancouver which she apparently owned with her former partner, and about \$2,700 related to the rental of property she shared with the Father.
- [239] The Father claims that he incurred about \$47,000 in expenses for the Twin Image in the period from June 4, 2012 to February 28, 2015. A significant part of that claim is for his own labour. He claims that the Mother should pay him half, being about \$23,500.
- q) 2015
- [240] In February 2015, at the Mother's request, Modis resumed paying Inyanook by direct deposit for the Mother's services.
- [241] Master Scarth made an order on February 13, 2015 ("Scarth Disclosure Order") requiring the Mother to provide certain financial documents within seven days. It also required Modis and Accenture to provide certain financial documents within fourteen days. The Father's application for an order that the Mother pay a fine to him was adjourned generally.
- [242] The Mother's parents became registered owners of property in Pemberton, B.C. ("Pemberton Property") in early March 2015. Their address on title is the Mother's post office box in Lions Bay. The title documentation shows a declared value of \$75,000, although a listing agreement shows a sale price of \$150,000 and describes the lot area as about 15 acres.
- [243] The Father suggested in argument that the Pemberton Property was in reality owned by the Mother. I reject that suggestion. The Mother's post office box address was used for convenience, because the Mother's parents live in Australia most of the time. The financial records do not support the suggestion that the Mother paid the purchase price.
- [244] Between the time the parties separated and the time the Twin Image was delivered to the purchaser, the Father used the Twin Image for pleasure sailing for 30 to 60 days, on trips ranging in length from one day to two weeks.
- [245] The sale of Twin Image completed in March 2015, with a price reduction to about \$224,000 US, owing to deficiencies detected on a survey. The net sale proceeds of about \$224,000 US (\$286,000 CAD) were paid into the trust account of the law firm McLachlan Brown Anderson, solicitors for the Father.

- [246] On March 24, 2015, Mr. Justice Groves ordered that \$30,000 US be paid to the Father from the sale proceeds of the Twin Image as an interim distribution. The Father's application for an order finding the Mother in contempt of the Scarth Disclosure Order was adjourned to trial.
- [247] On March 30, 2015, the Father paid a \$500 deposit for the design of a website for Domicile. The estimate for construction of the website was \$3,000, plus \$240 for one year of hosting the website.
- [248] In mid-April 2015, at the Mother's request, Modis changed its method of paying Inyanook for the Mother's services from automatic deposit to cheque.
- [249] On April 10, 2015, a Master made an order, by consent, which included the following ("Consent Counselling Order"):
1. The parties shall forthwith retain the services of Abby Petterson for up to a total of five sessions, or such other number of sessions as agreed between the parties in writing, to provide guidance to the parties on the appropriate manner to communicate to the Children if the Children ask questions relating to the parties' separation and divorce.
 2. Abby Petterson shall have discretion to determine whether the five sessions are to be individual, joint or with the Children and the parties shall share the costs of Abby Petterson's services in the following manner:
 - (a) any individual counselling session with one party shall be solely paid by that party;
 - (b) any joint counselling session with both parties shall be shared equally between the parties; and
 - (c) any counselling session involving one or both Children shall be shared equally, on a without prejudice basis, and subject to final determination of the parties' respective contribution towards the costs by further order or written agreement between the parties
 3. Without limiting the foregoing, and unless Abby Petterson provides written guidance to the contrary, an Order that neither party shall speak to the Children, or in the presence of the Children, about adult matters relating to the matrimonial litigation.
- [250] At a trial management conference on April 14, 2015, Master Harper made an order ("Harper Negotiations Order") that the Mother "shall provide to counsel for the [Father] a response to the proposed Final Order regarding parenting arrangements for the Children by April 17, 2015." She also ordered the Mother to provide the Father with Inyanook's 2014 financial statement by April 15, 2015.
- [251] The Father visited Ms. Petterson, who said that the counselling could not proceed without the Mother's consent.
- [252] At the time of trial, the Mother had not contacted Ms. Petterson or met with her.

- [253] The parties entered into a written agreement dated for reference April 14, 2015, regarding the Anne Street Property, and regarding visa card indebtedness. It refers to the Anne Street Property as being registered in the name of the Family Trust, as having an appraised value of \$1.05 million NZD, and as being subject to three mortgages totalling about \$620,000 NZD. The parties agreed to put the Anne Street Property up for auction, and agreed to terms if it did not sell at auction. Their agreement provided that the net sale proceeds would be paid in trust to Harper Grey, solicitors for the Mother.
- [254] The Mother did not make any response to the Father's proposal regarding parenting arrangements until April 27, 2015.
- [255] The Father's April 25, 2015 Form 8 Financial Statement included the debt of the mortgage relating to the Anne Street Property. Apart from that, the only significant debt was for legal fees, and was for \$55,000.
- [256] The parties agree that as of May 4, 2015, the Mother was in arrears of \$166,044.34 for child and spousal support.
- [257] At the Father's examination for discovery in May 2015, the Father testified that he could probably have found work paying \$32.50 an hour provided he was prepared to work 40 hours a week. He testified that he could not work 80 hours a fortnight because he has children.
- [258] If the Father had worked 40 hours per week at \$32.50 per hour for 44 weeks, he would have earned \$57,200 per year. If he had done so for 48 weeks, he would have earned \$62,400 per year.
- [259] The Mother's earnings in 2015 prior to trial, again on the basis of what was received by Inyanook, were about \$88,000. This was calculated on the basis of Inyanook's invoices. That represented about six months of earnings. Grossed-up to reflect the full year of 2015, the earnings would be about \$176,000. Again, this figure does not include any deductions for expenses to earn the income.
- [260] The Director under the FMEP Act provided the Father's counsel with a letter dated May 15, 2015 authorizing counsel "to take enforcement action on the *arrears/*pre-enrolment interest pursuant to the order of November 13, 2012".
- [261] The Mother produced many of the documents referred to in the Scarth Disclosure Order on May 22, 2015, the Friday before the Monday on which the trial commenced. Many of the documents bore a date stamp of April 24, 2015.
- r) At Trial in May and June 2015

- [262] At trial, the children continued to live alternate weeks with each parent. They were almost 11 years old. Both children are active and doing well in school. T is a talented dancer who attends many dance classes on Granville Island in central Vancouver each week, and also studies piano. S loves fishing, and is active in track and field.
- [263] Ms. Manley-Casimir, a representative of Accenture, testified at trial, and I accept her evidence. She testified that the Mother had asked her directly for additional work, that the Mother had taken all the work made available to her, that Accenture will not offer the Mother work that can be done by someone earning a lower hourly rate, that the amount of work that can be done by workers at a lower hourly rate than the Mother's is increasing, and that Accenture has developed offshore work groups consisting of workers paid at lower hourly rates.
- [264] I also accept Ms. Manley-Casimir's evidence that the Mother is paid only when work is available, and that her hours of work can vary from zero to 40 or more per week. I accept her evidence that the Mother is not eligible for sick days or payment for statutory holidays or other days worked. Ms. Manley-Casimir also testified, and I accept, that there has been a general slowdown in the utilities sector, reflected by fewer requests for proposals.
- [265] At trial, the Father was working to develop a construction business as Domicile. He is a skilled builder. He still had not purchased the tools he said were required for certain carpentry work. He still did not have a website for his business, but had paid \$1,500 towards the construction of a website, being about half the estimated cost. The Father had not listed himself or Domicile as a builder in the yellow pages telephone directory. Unfortunately, there is another business serving the same area that also uses the name "Domicile".
- [266] At trial, the Father was living in a 3,000 square foot home in West Vancouver with Ms. Ireland, with Ms. Ireland's children most of the time, and with the Father's children on alternate weeks. Ms. Ireland's son is 10 years old and her daughter is six years old, and they attend the same school as the parties' children attend. The Father and Ms. Ireland share all common expenses, including the rent of about \$3,400 per month.
- [267] Ms. Ireland has about \$180,000 in assets, of which about \$100,000 is in RRSPs.
- [268] At trial, the Mother was living in a 1,500 square foot home in Lions Bay (which is close to West Vancouver), and paying \$2,500 per month in rent. She was required to move from that home and had arranged to rent the 1,500 square foot floor of a house for rent of \$3,000 per month.
- [269] At trial, the Mother had not lived with a partner since Mr. Wharton moved out in June 2014. She was not living with her new partner, whose home is in Bellingham, U.S.A., where he lives with his three daughters, two of whom are eight-year old twins, and one of whom is about 12 years old. The Mother had rented an old cabin at Whistler for five months, and had a few weeks of vacations in the Gulf Islands and one week in Mexico.

- [270] At trial, Inyanook owed about \$94,000 to Canada Revenue Agency ("CRA"), consisting of about \$29,000 for arrears of GST payments, and about \$65,000 for arrears of taxes. The Mother personally owed about \$54,000 to CRA for income tax. Those three figures total about \$148,000. The Mother also owed legal fees of \$63,000, bringing the total to about \$211,000.
- [271] At the time of the trial, the Mother did not have permanent residence in Canada and had not applied for it, but intended to apply following the trial.
- [272] Counsel did not focus on the parties' assets at the time of trial. It appears that the Father has a pension with Cbus in Australia with a value of about \$13,500 AUS as at July 1, 2014. It appears that the Mother has a retirement savings account with Accenture with a value of about 63,000 pounds sterling as at August 21, 2014, which can be divided now by the pension manager.
- [273] In late May 2015, during the period that the trial was heard, Ms. Ireland lent the Father \$11,500 for the purchase of a Ford F-150 truck for his work. Before that, the Father had not asked Ms. Ireland to lend him any money.
- [274] On May 31, 2015, the Anne Street Property was sold for \$1,120,000 NZD, with a completion date in September 2015. The property was subject to three mortgages, with a total indebtedness of about \$615,000 NZD. Therefore, the equity in the home was about \$505,000 NZD, being very roughly the same amount in Canadian dollars. The funds were to be paid to the trust account of the Mother's counsel.
- [275] During submissions at trial, counsel for the Mother sought and obtained liberty to make further submissions regarding the entries on Divorcemate printouts entitled "cautions/overrides" and referring to the Mother's income exceeding \$150,000. Mr. Wiebach subsequently advised that the "caution/overrides" references were not applicable to this case and that the Mother did not need to change her submissions from those made during the trial.

s) Following Trial

- [276] The parties were unable to resolve several issues following trial. On December 7, 2015, I made a number of orders, including the following:
- a) the annual parenting schedule over Christmas would commence on the children's last day of school before the holidays;
 - b) the parties are to discuss significant decisions by email and may discuss them further if necessary;
 - c) each parent shall share information about either child with the other parent;
 - d) by consent, each parent shall advise the other if such parent will be out of the lower mainland of B.C. for more than 12 hours;

- e) the Mother shall provide the Father with copies of any income tax reassessments that she receives, either personally or for Inyanook, within two weeks of receipt;
- f) the Mother shall provide to the Father forthwith a copy of her amended personal income tax return for 2014;
- g) the sum of \$8,000 US shall be paid to the Father from the sum held in trust as an interim distribution of his capital; and
- h) by consent, the parties will cooperate in T receiving speech-language therapy through his school.

[277] The Father, acting in person, brought a number of other post-trial applications.

[278] On February 11, 2015, I made orders regarding the children travelling to the U.S.A. with the Mother, while she held a "Visitor Record", and regarding the Father's intended trip to Australia with the children.

[279] The Father's other applications were adjourned generally, including his second application for a finding that the Mother was in contempt of the Consent Counselling Order. The parties advised at the hearing that the children had attended one counselling session with Ms. Petterson, and had asked to attend another one, so a second session had been scheduled.

ANALYSIS

[280] This analysis addresses the following:

- a) Contentious Facts;
 - b) Divorce;
 - c) Parenting Arrangements;
 - d) Property Division;
 - e) Child Support;
 - f) Spousal Support;
 - g) Contempt;
 - h) Security for Ongoing Support;
 - i) Fine; and
 - j) Costs.
- a) Contentious Facts

[281] The parties gave conflicting evidence on these issues:

- a) whether the Father was the children's primary caregiver at any point, and if so, when?
- b) each time the parties relocated, what was their purpose in doing so?
- c) each time the parties relocated, what was the effect on their respective careers?
- d) did the parties intend that the Father would work when they arrived in the Vancouver area?
- i) whether the Father was the children's primary caregiver at any point, and if so, when?

[282] The parties were both active parents during the period they lived together. From time to time, one parent spent more time parenting than the other. For example, the Father did a greater share of parenting when the Mother was ill after the children's birth or when she worked long hours. The Mother did a greater share of parenting when the Father was sailing out of town.

[283] The parties separated when the children were about 6½ years old. For a few months after that that, the children were primarily with the Father. When he went to Saipan, they were with the Mother. Since then, the children have spent equal time with each parent.

[284] Overall, there has not been a material difference in the amount of parenting by each parent.

ii) each time the parties relocated, what was their purpose in doing so?

[285] As stated previously, it is my view that the purpose of the parties' moves is not relevant to the question of entitlement to spousal support. However, in case I am held to be wrong in that conclusion, my findings are as follows:

- a) the parties moved to Auckland, New Zealand in 1998 both to allow the Father to pursue his sailing career, and because lucrative work was available for the Mother;
- b) the parties moved to Wellington, New Zealand from June 1999 to July 2000 to enable the Mother to work for Andersen's Contracting at a significant salary increase from her previous employment;
- c) the parties returned to Auckland in July 2000 because both preferred living in Auckland over Wellington;
- d) the parties moved to Texas, U.S.A. in March 2001 both so that the Mother could obtain work at an increased salary and so that the Father could pursue new sailing opportunities;
- e) the parties moved to London, U.K., in late 2001 because the Mother received a job offer at an increased salary and both parties saw it as an opportunity for travel and adventure;
- f) the parties travelled broadly in 2003 and early 2004 because of their desire to take a break and visit family;

- g) in around in May 2004, the parties returned to New Zealand to prepare for the birth of the children;
- h) in the spring of 2009, the parties left New Zealand to begin a sailing trip around the world, which was the culmination of their shared dream of many years; and
- i) in May 2010, the parties moved to Vancouver because the Twin Image had been seriously damaged, and the Mother was able to find work in Vancouver, but not in New Zealand.

iii) each time the parties relocated, what was the effect on their respective careers?

[286] The Father was not able to build a career because of frequent relocations. The Mother's career advanced through her various jobs.

iv) did the parties intend that the Father would work when they arrived in the Vancouver area?

[287] As discussed above, I find that the parties did intend that the Father would work when they arrived in the Vancouver area. At that time, the parties were trying to quickly raise the funds needed to resume their sailing trip. Also, the Father's decision to request criminal records checks in Australia and New Zealand shortly after he arrived in Canada is consistent with my finding that the Father was planning to seek work.

b) Divorce

[288] The parties have lived separate and apart for over four years. Reasonable arrangements for the support of the children will be made by the order resulting from these reasons for judgment. The other requirements for a divorce have been proven.

[289] The parties are divorced, with the divorce to be effective 31 days after the release of these reasons for judgment, pursuant to s. 12 of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.) [Divorce Act].

c) Parenting Arrangements

[290] The parties were prepared to agree to parenting terms. The outstanding issue was whether, as sought by the Father, the parties ought to be free to relocate with the children to Deep Cove or Bowen Island, B.C., or if they must be limited to the north shore of the lower mainland of B.C., including Lions Bay, but not as far east as Deep Cove.

[291] The Mother is opposed to the Father relocating with the children to Bowen Island, on the basis that the children would be required to spend too much time on the ferry, sometimes late at night. The children are involved in activities in Vancouver which are not available at their level on Bowen Island, such as T's dance classes, and some of those classes finish late enough that the children would be required to take a late ferry.

[292] The Mother is opposed to the Father relocating with the children to Deep Cove, on the basis that it is too far from the children's school and the homes of their school friends. While the Mother's home in Lions Bay is outside the catchment area for the children's elementary school, it is much closer to the school than Deep Cove, and it is inside the catchment area for the high school.

[293] The children are active, and some of their activities are in central Vancouver. Unless the parties agree otherwise, neither parent shall relocate the children to either Bowen Island or Deep Cove.

d) Property Division

[294] This lawsuit was commenced in 2011 and the parties did not agree that the property issues would be governed by the FLA. Accordingly, the FRA governs the division of assets in this case.

[295] The Father seeks an unequal division of family property and debt in his favour to compensate him for arrears of support, and for expenses he solely incurred after the parties separated for the Twin Image. He relies on s. 65(f) of the FRA, which provides that the court may depart from equal division of assets if such a division would be unfair, taking into consideration "any other circumstances relating to the acquisition, preservation, maintenance, improvement or use of property or the capacity or liabilities of a spouse."

[296] The Father also sought, in the alternative, an order that the Mother pay a lump sum into trust pursuant to s. 170 of the FLA for security for prospective payment of child support and spousal support. I will deal with that claim separately below.

[297] Some of the expenses claimed by the Father are for his labour on the Twin Image. The parties had agreed that he would not charge for that labour. The Father seeks to change that arrangement on the basis that the Mother did not make timely payments of expenses to him. That is not a proper basis for requiring the Mother to pay for the Father's labour.

[298] At the time the Father worked on the Twin Image, he had a work permit which allowed him to work for anyone. Instead, he worked on the Twin Image. As discussed below, I have not imputed income to him for the period in 2011 when he was working on the Twin Image, although I have considered his work history in determining the duration of spousal support.

[299] In these circumstances, the Father is not entitled to payment for his labour on the Twin Image. However, the Mother must pay the Father one-half of the other outstanding out of pocket costs. If the parties cannot agree on the amount, they have liberty to apply to the court for determination.

e) Child Support

i) Ongoing Child Support

a. Basic Ongoing Child Support

[300] The questions regarding child support are first, what are the parties' incomes for the purposes of the analysis, and second, whether the court should use a set-off or some other method for calculating child support.

i. Income for Child Support Purposes

a) Imputing Income

[301] Both parties argued that income should be imputed to the other.

[302] The Court of Appeal summarized the law about imputing income in *Marquez v. Zapiola*, 2013 BCCA 433 at paras. 36-38, as follows:

[36] For the purposes of both child and spousal support, there is a broad judicial discretion to impute income to either or both spouses. However, the party seeking to have income imputed to the other spouse has the burden of establishing an evidentiary basis for such a finding.

[37] The test for imputing income for intentional under-employment or unemployment is one of reasonableness, having regard to the parties' capacity to earn income in light of their age, education, health, work history and work availability. A spouse's capacity to earn income will include that person's ability to work or to be trained to work. See *Van Gool v. Van Gool* (1998), 113 B.C.A.C. 200, 44 R.F.L. (4th) 314 at paras. 28-31, *Barker v. Barker*, 2005 BCCA 177, 45 B.C.L.R. (4th) 43 at para. 19, and *McCaffrey v. Paleolog*, 2011 BCCA 378, 24 B.C.L.R. (5th) 62 at para. 46.

[38] Although the legal foundation for awarding spousal support is different from that of child support (see *Kerr v. Baranow*, 2011 SCC 10, [2011] 1 S.C.R. 269 at para. 208), the test for imputing income for the purpose of fixing the quantum of support is similar

[303] The income of a spouse should take into account the spouse's earning capacity, as summarized by Mr. Justice Wong in *P.K.C. v. J.R.R.*, 2014 BCSC 932 at para. 99, as follows:

It is established law that a payor spouse is required to work to full-capacity whether in the context of child or spousal support:

a) Parents have a legal obligation to earn as much as they are capable of earning to meet their obligation to support their children. The court should consider not only the amount of income a spouse was actually earning, but the amount of income a spouse could earn if working to capacity (*Earle v Earle*, 1999 BCSC 283; and *Van Gool v. Van Gool*, (1998), 59 B.C.L.R. (3d) 395 (C.A.));

- b) A payor has an obligation to make reasonable use of his or her capacity to earn income when the opportunity to do so exists. A voluntary decision to down tools and not work while still having capacity and opportunity to earn income will not meet the test of a change of circumstances (*Watkins v. Watkins*, 2013 BCSC 1983);
- c) The burden of adducing evidence of both the reasonableness of the actions of a self-employed professional must fall, at least in part, on that professional who has unique knowledge of the relevant facts. A parent is intentionally under-employed if that parent chooses to earn less than he or she is capable of earning. Bad faith is not required (*Edwards v. Edwards*, 2004 BCSC 22); and
- d) Where the court concludes that a payor is intentionally unemployed or underemployed, an order for support should be based on earning capacity (*Babowech v. Von Como* (1989), 35 B.C.L.R. (2d) 246, 18 RFL (3d) 365 at 375 (C.A.); *Marzara v. Marzara*, 2011 BCSC 408 at para. 326).

b) **Mother's Income for Child Support Purposes**

[304] The Father argued that the court should determine the Mother's Guideline Income to be \$288,000 per year. That figure was based on the Father's calculations of the average of the Mother's earnings over the last three years. Alternatively, the Father argued that the same figure applies, making calculations on the assumption that the Mother can obtain 40 billable hours of work for 44 weeks at \$163 per hour.

[305] The Mother argued that the income of \$347,000 per year which Master MacNaughton imputed to her to calculate interim support was overstated, particularly in the years 2013 and following, when the arrears were accumulated. The Mother argued that for ongoing calculations, her income should be considered to be \$150,000 per year.

[306] The Federal Child Support Guidelines, S.O.R./97-175 [CSG] include the following at sections 16-19:

Calculation of annual income

16 Subject to sections 17 to 20, a spouse's annual income is determined using the sources of income set out under the heading "Total income" in the T1 General form issued by the Canada Revenue Agency and is adjusted in accordance with Schedule III.

Pattern of income

17 (1) If the court is of the opinion that the determination of a spouse's annual income under section 16 would not be the fairest determination of that income, the court may have regard to the spouse's income over the last three years and determine an amount that is fair and reasonable in light of any pattern of income, fluctuation in income or receipt of a non-recurring amount during those years.

Shareholder, director or officer

18 (1) Where a spouse is a shareholder, director or officer of a corporation and the court is of the opinion that the amount of the spouse's annual income as determined under section 16 does not fairly reflect all the money available to the spouse for the payment of child support, the court may consider the situations described in section 17 and determine the spouse's annual income to include

- (a) all or part of the pre-tax income of the corporation, and of any corporation that is related to that corporation, for the most recent taxation year; or
- (b) an amount commensurate with the services that the spouse provides to the corporation, provided that the amount does not exceed the corporation's pre-tax income.

Adjustment to corporation's pre-tax income

- (2) In determining the pre-tax income of a corporation for the purposes of subsection (1), all amounts paid by the corporation as salaries, wages or management fees, or other payments or benefits, to or on behalf of persons with whom the corporation does not deal at arm's length must be added to the pre-tax income, unless the spouse establishes that the payments were reasonable in the circumstances.

Imputing income

19 (1) The court may impute such amount of income to a spouse as it considers appropriate in the circumstances, which circumstances include the following:

- (a) the spouse is intentionally under-employed or unemployed, other than where the under-employment or unemployment is required by the needs of a child of the marriage or any child under the age of majority or by the reasonable educational or health needs of the spouse;
- (d) it appears that income has been diverted which would affect the level of child support to be determined under these Guidelines;
- (e) the spouse's property is not reasonably utilized to generate income;
- (f) the spouse has failed to provide income information when under a legal obligation to do so;
- (g) the spouse unreasonably deducts expenses from income;
- (h) the spouse derives a significant portion of income from dividends, capital gains or other sources that are taxed at a lower rate than employment or business income or that are exempt from tax; and

[307] I first address the Mother's actual earnings.

- [308] Calculation of the Mother's actual earnings was more difficult than in most cases, because she and Inyanook received payments which included reimbursement for expenses, and because of the effect of payment to Inyanook, an entity with a different year-end than an individual.
- [309] The most appropriate way to determine the Mother's income is the way in which she presented her income at trial. That is, to first consider the amounts actually paid to the Mother or Inyanook as applicable, adjusted to exclude payments for out-of-pocket expenses, GST and HST, and to separately calculate the housing allowance. Taking into account the payments when made avoids the complications arising from Inyanook having a different year end from the calendar year end used in Canada for individuals.
- [310] In addition, I accept that the Mother and Inyanook, as applicable, incurred expenses for the purposes of earning income. The biggest expenses were the dividends paid to Mr. Wharton. They were presumably taxed in his hands at the lesser amount appropriate for dividends from Canadian corporations. The money was used for the household expenses of the Mother and Mr. Wharton, and the children when staying with them.
- [311] For the purposes of this case, the portion of the dividends to Mr. Wharton which was income-splitting can be considered part of the Mother's earnings. The balance can be considered an expense for the Mother to earn the income. The fact that Mr. Wharton earned the dividends while he was living with the Mother can be considered in the same way that the Court considers the income Ms. Ireland has earned since she started living with the Father, which is as part of the respective parties' means.
- [312] Including a grossed-up figure for the tax-free housing allowance, the Mother's gross 2010 income was about \$217,000.
- [313] The Mother's gross earnings in 2011, both received by her personally that year and received by Inyanook that year, were about \$343,500. That includes an amount for the housing allowance which has been grossed-up in respect of income tax.
- [314] The Mother's position is that Inyanook incurred expenses of about \$2,400 to generate its revenue. The Mother's calculations also attribute \$19,531 of the dividend paid to Mr. Wharton in 2012 to the work he performed in 2011. The Mother's position is that about 25% of that payment reflected income splitting, but the remaining 75% reflected work that Mr. Wharton did for the benefit of Inyanook, essentially by enabling the Mother to maximize her billable hours.
- [315] I calculated the Mother's income by considering the 2012 dividend of \$62,500, reducing it to \$46,875 to reflect 25% of income splitting rather than actual work, and apportioning it for the five months of work in 2012.

- [316] The evidence did not include timesheets setting out the time Mr. Wharton devoted to assisting the Mother in her work. However, I accept that Mr. Wharton had skills which assisted the Mother in maximizing her billings, and that he spent 800 to 900 hours per year working for her. I accept her estimate that 75% of the dividends payable to Mr. Wharton reasonably reflected the value of his work.
- [317] For 2011, it is reasonable to deduct the rounded figure of \$2,500 in general expenses, plus \$19,500 in respect of Mr. Wharton's work. For the purposes of this analysis, I consider that the Mother's net earnings in 2011 were about \$321,500 (\$343,500 less \$2,500, less a further \$19,500).
- [318] The Mother's gross earnings in 2012, on the basis of what was actually received by Inyanook that year, were about \$344,500. That includes an amount for the housing allowance, which ended after August 2012, and which has been grossed-up in respect of income tax.
- [319] The Mother's position is that Inyanook incurred expenses of about \$21,500 in 2012 to generate its revenue. In addition, the Mother's calculations attribute about \$43,000 of dividend payments in 2012 and 2013 as applicable to the Mother's 2012 income. Again, the calculation was made by considering 75% of the dividend to be an expense (because the balance of the dividend was income-splitting), and attributing the net dividend to the months of work.
- [320] The \$21,500 in expenses that the Mother seeks to deduct consist include about \$1,500 for meals and entertainment, about \$1,000 for office expense, about \$4,500 for professional fees, about \$4,500 for rent, about \$4,900 for telephone and telecommunications, and about \$2,800 for motor vehicle expenses. Some portion of those expenses, particularly for rent and telephone, may have provided a personal benefit to the Mother as well. For the purposes of this analysis, I am prepared to consider \$20,000 in expenses.
- [321] For the purposes of this analysis, I consider that the Mother's net earnings in 2012 were \$281,500 (\$344,500 less \$43,000, less a further \$20,000).
- [322] The Mother's gross earnings in 2013, again on the basis of what was received by Inyanook that year, were about \$255,500.
- [323] The Mother's position is that Inyanook incurred expenses of about \$28,500 in 2013 to generate its revenue. In addition, her calculations attribute about \$22,000 of the dividends paid to Mr. Wharton as reflecting work performed in 2013.
- [324] Again, it is reasonable to deduct \$22,000 in respect of the dividends for Mr. Wharton. I consider that it is reasonable to deduct \$25,000 of the claimed expenses.
- [325] For the purposes of this analysis, the Mother's net 2013 income will be considered to be \$208,500 (\$255,500 less \$22,000, less a further \$25,000).

- [326] The Mother's gross earnings in 2014, on the basis of what was received by Inyanook that year, were about \$183,500.
- [327] The Mother's position is that Inyanook incurred expenses of about \$29,500 in 2014 to generate its revenue. I consider that it is reasonable to deduct \$26,000 in respect of the expenses.
- [328] For the purposes of this analysis, the Mother's net 2014 income will be considered to be \$157,500 (\$183,500 less \$26,000).
- [329] The Mother's gross earnings in 2015 prior to trial, again on the basis of what was received by Inyanook that year, were about \$88,000. This was calculated on the basis of Inyanook's invoices. That represented about six months of earnings, which, grossed-up to reflect the full year of 2015, would be about \$176,000.
- [330] I will assume that, as in 2014, Inyanook would incur about \$26,000 in expenses in 2015 to generate its revenue. As a result, I will consider the Mother's 2015 net income to be about \$150,000 (\$176,000 less \$26,000).
- [331] For the purposes of this analysis, the Mother's actual income, net of appropriate expenses, was as follows:
- a) \$217,000 in 2010;
 - b) \$321,500 in 2011;
 - c) \$281,500 in 2012;
 - d) \$208,500 in 2013;
 - e) \$157,500 in 2014; and
 - f) \$150,000 in 2015.
- [332] The average of the Mother's income on that basis for the six calendar years of 2010 to 2015 was about \$222,500. The average of the last three years, from 2013 to 2015, was about \$172,000.
- [333] I am not prepared to impute income to the Mother for any of the years suggested by the Father. The Mother accepted all the work offered to her by her Modis, and requested more work. There was no evidence that she could have obtained further work from Modis, and she was limited by her work visas in those years to working for Modis.
- [334] The Mother advised her employer that she wanted to be able to parent her children in alternate weeks. It is possible that she was not offered some work because those who controlled the work knew that she did not wish to travel on her parenting weeks. However, that explanation is speculative. In any event, it was reasonable in the circumstances for the Mother to try to avoid travel during her parenting weeks.

- [335] In addition, the Mother often worked on holidays and weekends. She often travelled when she was not parenting the children. She spent most of 2012 working for SaskPower, working from Vancouver during the weeks she was caring for the children, and travelling to Saskatchewan and working long hours there in the weeks she did not have the children. This was a difficult lifestyle and demonstrates her willingness to work hard.
- [336] Periodically, and particularly in 2011, the Mother worked especially long hours. The Mother is obligated to earn what she is reasonably capable of earning, but that does not require her to work at an unsustainable pace. There is no evidence that there was work available for the Mother to work as many hours in the recent years as she worked in 2011. If she had been offered work requiring her to work as many hours as she worked in 2011, it would have been reasonable for her to decline some of those hours on the basis that it was not sustainable for her to work at that pace.
- [337] As a result, in the relevant calculations, I will use the Mother's actual net earnings, as set out above.

c) Father's Income for purposes of Child Support

- [338] The Mother's position is that income should be imputed to the Father. Mr. Wiebach argued on her behalf that it is "inconceivable" that the Father would have earned the "paltry" amounts he earned in the period of over four years since separation if he had not been receiving spousal support.
- [339] Mr. Wiebach argued that the Father is capable of earning at least \$62,400 per year, and in addition, will receive child support from the Mother. The Mother's position is that for the years from 2011 to 2013, the annual income of \$48,400 should be imputed to the Father, being the figure used in the calculations leading to the MacNaughton Interim Support Order. Her position is that for the years 2014 and 2015, income of \$65,000 per year should be imputed to the Father.
- [340] In contrast, the Father's position is that he has acted reasonably throughout his time in Canada. He argued that his net business earnings for 2015 would likely be \$35,000 to \$40,000, and that his actual earnings for the prior years should be used in calculating his income.
- [341] I will first summarize the Father's actual earnings.
- [342] The Father did not earn any income in 2010 or 2011. The Father's First Work Permit permitted him to work without restriction from June 11, 2011 until April 21, 2012. In 2011, he spent a significant amount of time working on the Twin Image, but he did not work for anyone else.

- [343] The Father's 2012 income tax return reports gross business income of about \$23,000, consisting of about \$5,000 for sailing and about \$18,000 for construction work, mostly for BBPR and its related company, Clear Impact. The expenses the Father deducted for income tax purposes included about \$3,000 for rent, about \$3,000 for motor vehicle expenses, about \$1,200 for cellular telephone expenses, and about \$1,000 for office expenses. A portion of those expenses likely provided some personal benefit to the Father.
- [344] Taking into account the personal value of the expenses he deducted, for the purposes of this analysis, the Father's actual net earnings for 2012 were \$15,000.
- [345] The Father's Third Work Permit, for the period from January 9, 2013 to January 8, 2016, restricted him to working only for BBPR. The Father did not work for any other employer until he achieved permanent resident status, on the basis that it might affect his application for Canadian permanent residence.
- [346] In 2013, the Father reported gross business income of about \$16,500, and net income of about \$2,500. Again, the expenses deducted from his income include rent, motor vehicle, telephone, and utilities expenses. For the purposes of this analysis, the Father's actual earnings for 2013 were \$5,000.
- [347] The Father obtained permanent residency on March 8, 2014, which permitted him to work for anyone. He reported gross business income in 2014 of about \$48,000, and net business income of about \$19,000. Again, considering his expenses, I will consider his actual 2014 income to have been the slightly greater figure of \$20,000.
- [348] The Father estimated that he would earn \$35,000 to \$40,000 net from his business in 2015. I will use the midpoint figure of \$37,500 for the purposes of analysis.
- [349] For the purposes of this analysis, the Father's actual income, net of appropriate expenses, was as follows:
- a) nil in 2010;
 - b) nil in 2011;
 - c) \$15,000 in 2012;
 - d) \$5,000 in 2013;
 - e) \$20,000 in 2014; and
 - f) \$37,500 in 2015.
- [350] The Mother argued that the Father ought to have accepted her offer to go into the renovation business with her, by living in a home while renovating it. This appears to be something the Father could have done even without a Canadian work permit.

- [351] However, in my view, the degree of hostility between the parties would have made this venture so difficult that it was reasonable for the Father to decline this suggestion.
- [352] I am not prepared to impute income to the Father for 2010, because he did not have a work permit.
- [353] I am not prepared to impute income to the Father for 2011, because he worked on the Twin Image, as agreed between the parties. Even though he had a work permit which permitted him to work for anyone, it was reasonable for him to work on the Twin Image.
- [354] Master MacNaughton imputed \$48,400 of annual income to the Father in her decision of January 13, 2012. The Father's work permits in effect in 2012 permitted him to work without restriction. However, he only earned the net amount of \$15,000.
- [355] I will impute income to the Father for 2012. He knew in January 2012 that the court was imputing income of \$48,400 to him. He earned some sailing income that year, which suggests that he was not focussed on building a career in the construction industry for himself at that time. The Father could have earned more for his family in 2012 if he had devoted himself to doing so.
- [356] The Father agreed that he could likely have found work for \$32.50 per hour provided he was prepared to work 40 hours per week. If he earned \$32.50 per hour for 40 hours per week for 40 weeks, he would have earned \$57,200. It is reasonable to expect parents to work 40 hours a week, and if they choose not to do so, they risk a finding that income will be imputed to them for the purposes of calculating support.
- [357] The figure used by Master MacNaughton is a reasonable figure for imputing income to the Father. It is less than the \$57,200 figure obtained using the calculation above, but it permits consideration of seasonal disruptions and other reasons that work may not have been available.
- [358] I will impute \$48,400 in income to the Father for 2012.
- [359] The Father's Third Work Permit, for the period commencing on January 9, 2013, restricted him to working for BBPR. He accepted all of the work offered to him by BBPR. There was no evidence that he could have changed his sponsor employer to an entity other than BBPR without jeopardizing his application for permanent residence. As a result, I am not prepared to impute income to the Father for the period that his work permit restricted him to working only for BBPR, including all of 2013.
- [360] It is likely that the Father did not know exactly when he would obtain permanent residency, and as a result, he would have had a limited ability to plan for a new business. I am not prepared to impute income to the Father for 2014, because it was reasonable for him to endeavour to start his own business, and it is normal for a new business to earn a smaller amount in the beginning. For the purposes of analysis, I will use the Father's actual net income of \$20,000 for 2014.

[361] The Father should have been able to earn \$48,400 by 2015. If he was not able to do so in his own business, he should have tried to supplement his earnings by working for someone else. For the purposes of the analysis, the Father's imputed earnings for 2015 are \$48,400.

[362] For the purposes of this analysis, the Father's net income is considered to be as follows:

- a) nil in 2010;
- b) nil in 2011;
- c) the imputed amount of \$48,400 in 2012;
- d) \$5,000 in 2013;
- e) \$20,000 in 2014; and
- f) the imputed amount of \$48,400 in 2015.

[363] The average of the Father's income on that basis for the six years of 2010 to 2015 was about \$20,300. The average of the last three years, 2013 to 2015, was about \$24,500.

ii) Calculation of Basic Child Support

[364] The Father's position is that child support should be calculated using a straight set-off.

[365] The Mother's position is that she should pay the Father substantially less child support than the CSG table amount determined on a set-off basis. She relies on s. 9(c) of the Guidelines, and argued that the Father's "means" improved after January 2013, when the Father commenced cohabitation with Ms. Ireland.

[366] Section 9 of the CSG is as follows:

9. Where a spouse exercises a right of access to, or has physical custody of, a child for not less than 40 per cent of the time over the course of a year, the amount of the child support order must be determined by taking into account
- (a) the amounts set out in the applicable tables for each of the spouses;
 - (b) the increased costs of shared custody arrangements; and
 - (c) the conditions, means, needs and other circumstances of each spouse and of any child for whom support is sought.

[367] Section 9(c) of the CSG provides the court with a broad discretion for conducting an analysis of the resources and needs of both the parents and the children, which includes an examination of the relative standards of living in each household. See *Contino v. Leonelli-Contino*, 2005 SCC 63 at paras. 68-71 [Contino].

[368] In *Contino*, the Court found that it was a reasonable starting point to consider the amount of child support by setting off the table amounts payable on the basis of the respective incomes of the parents. However, the Court is required to consider the increased costs of

shared custody arrangements, and the condition, means, needs and other circumstances of the parties. The Court's discretion can be used to ensure that the standard of living experienced by the children does not vary too greatly from one household to another, taking into consideration the financial realities of the parents (para. 51).

- [369] In considering the increased costs of shared custody arrangements, the Court can examine the parties' budgets and expenses to determine whether shared custody has in fact resulted in increased costs.
- [370] Analysis of the condition, means, needs and other circumstances of the parents includes analyzing the standard of living of the children in each household, including the income of a parent's spouse and the ability of each parent to absorb the costs required to maintain an appropriate standard of living.
- [371] Both parents lived with a new partner during the period from January 2013 to June 2014. The Father's partner was employed and had greater means than the Mother's partner, although, as discussed above, the Mother's partner earned some dividend income which is properly considered an expense for the Mother to earn income. Prior to that period, the Mother lived with a new partner while the Father did not. Since that period, the Father has lived with a new partner while the Mother has not.
- [372] The children are spending alternate weeks with each parent. The cost to the parents of providing a home for the children are essentially equal, although the costs may vary somewhat depending on whether the applicable parent lives with a new partner who has children.
- [373] These parties met as mature adults. Both are capable of achieving self-sufficiency. It is likely that both parties will live with new partners in the future.
- [374] In these circumstances, it is appropriate to calculate the basic table amount of child support on the basis of setting-off the respective CSG amounts. This achieves fairness, and avoids the need to continually re-assess the parties' circumstances on the basis of the circumstances of their partner.
- [375] On my calculations, using the figure of \$150,000 for the Mother's 2015 income and \$48,400 for the Father's 2015 income, the set-off amount of child support is \$1,370 per month payable by the Mother.
- [376] The parties have liberty to correct the figures used in this judgment if they disagree with my calculations. If the parties have not requested a hearing date within one month of the release of these reasons for judgment, they will be considered to have accepted the accuracy of my calculations.

[377] The parties must each provide the other with a copy of their filed Canadian income tax return by June 1 of each calendar year, and with a copy of their Notice of Assessment within 30 days of receipt of it. This will enable the parties to calculate and revise child support on an ongoing basis.

b. Ongoing Special and Extraordinary Expenses

[378] As stated, for 2015, the Mother's income is calculated to be \$150,000 per year, and the Father's income is imputed to be \$48,400. The total family income is \$198,400, of which the Mother earns about 76% and the Father earns about 24%. The parties are to share ongoing special and extraordinary expenses in those proportions.

iii) Arrears of Child Support

[379] The Mother's position is that the court should recalculate what the Mother ought to have paid, taking into account her actual income and a higher income imputed to the Father. The Mother's position is that over the period from October 1, 2011 to May 2015, she was ordered to pay about \$78,000 more in child support than she ought to have been ordered to pay.

[380] It is appropriate to recalculate child support taking into account the figures discussed above. However, in this case, calculating child support using the set-off basis is reasonable.

[381] Using the income figures for the parties set out above, my calculations produce the following monthly basic child support amounts payable by the Mother to the Father:

- a) \$4,265 in 2011;
- b) \$3,027 in 2012;
- c) \$2,841 in 2013;
- d) \$1,878 in 2014; and
- e) \$1,370 in 2015.
- f) Spousal Support

[382] The major questions regarding spousal support are whether the Father is entitled to spousal support, and if so, what are the parties' incomes for the purposes of the analysis, and what is the appropriate quantum and duration of spousal support.

i) The Father's Entitlement to Spousal Support

[383] The Father argued that he is entitled to both compensatory and non-compensatory spousal support.

[384] The Mother's position is that the Father is not entitled to any compensatory spousal support, and at best, was previously entitled to non-compensatory support for a transitional period only. She argued that she has more than fulfilled any obligation she might have to provide spousal support, and is entitled to reimbursement for overpayment.

[385] The Father seeks spousal support pursuant to Divorce Act. The basis for spousal support under the Divorce Act is found in the objectives of spousal support enumerated in s. 15.2(4) and (6).

[386] Subsections 15(1), (3), (4), and (6) of the Divorce Act are as follows:

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.

(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.

(4) In making an order under subsection (1) ..., 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.

(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.

[387] Entitlement to support is a threshold issue in the consideration of spousal support, and must be found before the Court analyzes the quantum and duration of spousal support. See *B.M.D. v. C.N.D.*, 2010 BCSC 1785 at para. 96.

- [388] In order to be entitled to spousal support, a spouse must meet one or more of the three grounds for entitlement, which are described at para. 47 of *Chutter v. Chutter*, 2008 BCCA 507 [Chutter], as follows:
- [47] Based on the statutory provisions and the case authorities, the Supreme Court of Canada has identified three grounds for entitlement to spousal support: (1) compensatory support, which primarily relates to the first two objectives of the Divorce Act; (2) non-compensatory support, which primarily relates to the third and fourth objectives; and (3) contractual support (*Bracklow v. Bracklow*, [1999] 1 S.C.R. 420 at paras. 15, 41-42).
- a. Compensatory Spousal Support
- [389] In *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420 [Bracklow] at para. 1, Madam Justice McLachlin (as she then was), explained on behalf of a unanimous Court that compensatory spousal support is not based on fault:
- [1] It is now well-settled law that spouses must compensate each other for foregone careers and missed opportunities during the marriage upon the breakdown of their union
- [390] Madam Justice McLachlin went on to explain at paras. 24-29 that compensatory spousal support is grounded in the "independent" model of marriage:
- [24] At the other end of the spectrum lies what may be termed the "independent" model of marriage. This model sees each party to a marriage as an autonomous actor who retains his or her economic independence throughout marriage. The parties, while they "formally" commit to each other for life at the time of their vows, regard themselves as free agents in an enterprise that can terminate on the unilateral action of either party. The theory of spousal support that complements this model is the "clean-break" theory, in which a former spouse, having compensated in a restitutionary sense any economic costs of the marriage on the other spouse, moves on with his or her life, possibly to enter into more such relationships. Again, the proponents vary in their degree of allegiance. Some prefer to characterize the clean-break model as encompassing "transitional support", in addition to straight restitution, due to the general dislocation costs of unwinding the partnership.
- [25] The independent, clean-break model of marriage provides the theoretical basis for compensatory spousal support. The basic social obligation model equally undergirds what may be called "non-compensatory" support. Both models of marriage and their corresponding theories of spousal support permit individual variation by contract, and hence provide a third basis for a legal entitlement to support.

[]

- [28] The independent, clean-break model of marriage and marriage breakdown reflects a number of important policies. First, it is based on the widely accepted modern value of the equality and independence of both spouses. Second, it encourages rehabilitation and self-maximization of dependent spouses. Third, through its acceptance of a clean break terminating support obligations, it recognizes the social reality of shorter marriages and successive relationships.
- [29] These values and policies support the compensatory theory of support (and, to some extent, the contractual theory as well). The basic premise of contractual and compensatory support is that the parties are equal. As such, when the relationship ends, the parties are entitled to what they would receive in the commercial world -- what the individuals contracted for and what they have lost due to the marriage, and its breakdown. Insofar as marriage may have created dependencies, it is the duty of dependent spouses to strive to free themselves from their dependencies and to assume full self-sufficiency, thereby mitigating the need for continued compensation.
- [391] Compensatory spousal support is frequently awarded when one spouse (usually the wife) has left the workforce to care for children or to support the other spouse's career or both (e.g., *C.K.S. v. D.K.G.P.*, 2004 BCSC 1609). In those cases, the spouse who left the workforce is often less employable and has suffered clear economic disadvantages, while the spouse who remained in the workforce has enjoyed the advantages of career advancement and a lesser burden of childcare.
- [392] However, in order to justify an award of compensatory spousal support, it is not necessary that the recipient spouse has both suffered a disadvantage and that the other spouse has enjoyed a corresponding advantage. As the Court of Appeal explained in *Chutter*:
- [50] Compensatory support is intended to provide redress to the recipient spouse for economic disadvantage arising from the marriage or the conferral of an economic advantage upon the other spouse. The compensatory support principles are rooted in the "independent" model of marriage, in which each spouse is seen to retain economic autonomy in the union, and is entitled to receive compensation for losses caused by the marriage or breakup of the marriage which would not have been suffered otherwise (*Bracklow*, at paras. 24, 41). The compensatory basis for relief recognizes that sacrifices made by a recipient spouse in assuming primary childcare and household responsibilities often result in a lower earning potential and fewer future prospects of financial success (*Moge*, at 861-863; *Bracklow*, at para. 39). In *Moge*, the Supreme Court of Canada observed, at 867-868:

The most significant economic consequence of marriage or marriage breakdown, however, usually arises from the birth of children. This generally requires that the wife cut back on her paid labour force participation in order to care for the children, an arrangement which jeopardizes her ability to ensure her own income security and independent economic well-being. In such situations, spousal support may be a way to compensate such economic disadvantage.

[51] In addition to acknowledging economic disadvantages suffered by a spouse as a consequence of the marriage or its breakdown, compensatory spousal support may also address economic advantages enjoyed by the other partner as a result of the recipient spouse's efforts. As noted in *Moge* at 864, the doctrine of equitable sharing of the economic consequences of marriage and marriage breakdown underlying compensatory support "seeks to recognize and account for both the economic disadvantages incurred by the spouse who makes such sacrifices and the economic advantages conferred upon the other spouse" (emphasis by Rowles J.A.).

[Underlining added.]

[393] Therefore, an award of compensatory spousal support can be justified by the existence of either an economic disadvantage to the payee spouse or an economic advantage to the payor spouse, or both. Practically speaking, where both factors are present, the award is likely to be higher. This is because the process of determining entitlement to compensatory spousal support should involve looking at the marriage as a whole, rather than performing a minute accounting (*Moge v. Moge*, [1992] 3 S.C.R. 813 at 849 [*Moge*]):

Fair distribution does not, however, mandate a minute detailed accounting of time, energy and dollars spent in the day to day life of the spouses, rather, it involves the development of parameters within which to assess the respective advantages and disadvantages of the spouses as a result of their roles in the marriage, as a starting point in determining the degree of support to be awarded.

[394] Therefore, the Father does not need to show that the Mother gained an advantage from the marriage to justify an award of spousal support on a compensatory basis. However, the absence of an advantage to the Mother corresponding to the disadvantages suffered by the Father may lead to a reduced award of compensatory support to the Father.

[395] *Colquhoun v. Colquhoun*, [2007] O.J. No. 9 (Sup. Ct. J.) provides an example of a case where compensatory spousal support was awarded even though the husband had not clearly gained an economic advantage from the wife's sacrifices. This was discussed in para. 263 as follows:

[263] While the parties were together, they formed an effective entrepreneurial team. The respondent had a job that would have supported them at a moderately comfortable standard. The applicant might have continued her career path as a design consultant, and might have developed an income similar to the respondent's. However, by mutual agreement they decided to seek fortune through entrepreneurial pursuits, and it was the applicant who gave up a conventional career path. She was the one of the two who was good at marketing, had people skills and probably a design eye that was useful in property development. The separation has left her without an established career path or the means to pursue further enterprises. She is at an age where it will be difficult to recover. She has therefore suffered some economic disadvantage because of the marriage breakdown.
[Emphasis added.]

[396] It is also important to note that only economic advantages and disadvantages can be considered in this analysis. As L'Heureux-Dubé J. explained in *Moge* at 848:

The second observation I wish to make is that, in determining spousal support it is important not to lose sight of the fact that the support provisions of the Act are intended to deal with the economic consequences, for both parties, of the marriage or its breakdown. Marriage may unquestionably be a source of benefit to both parties that is not easily quantified in economic terms. Many believe that marriage and the family provide for the emotional, economic, and social well-being of its members. It may be the location of safety and comfort, and may be the place where its members have their most intimate human contact. Marriage and the family act as an emotional and economic support system as well as a forum for intimacy. In this regard, it serves vital personal interests, and may be linked to building a "comprehensive sense of personhood". Marriage and the family are a superb environment for raising and nurturing the young of our society by providing the initial environment for the development of social skills. These institutions also provide a means to pass on the values that we deem to be central to our sense of community.

Conversely, marriage and the family often require the sacrifice of personal priorities by both parties in the interests of shared goals. All of these elements are of undeniable importance in shaping the overall character of a marriage. Spousal support in the context of divorce, however, is not about the emotional and social benefits of marriage. Rather, the purpose of spousal support is to relieve economic hardship that results from "marriage or its breakdown". Whatever the respective advantages to the parties of a marriage in other areas, the focus of the inquiry when assessing spousal support after the marriage has ended must be the effect of the marriage in either impairing or improving each party's economic prospects.

[Emphasis in original and added.]

[397] Therefore, any "benefit" the Father gained from being able to pursue competitive sailing should only be considered to the extent that it conferred an economic advantage upon him, which it did not.

[398] Considering entitlement to compensatory spousal support does not require the Court to apportion blame between the spouses for the economic position of the disadvantaged spouse. For example, in *Kaluza v. Kaluza*, 2003 BCSC 1879, the wife relocated on several occasions to support her husband's employment, and the relocations rendered her less employable. The husband argued that he had always encouraged the wife to further her education, but she chose not to. Nevertheless, the court awarded compensatory support to the wife.

[399] As Harvison Young J. noted at para. 14 of *Borger v. Jan*, [2006] O.J. No. 2075 (Sup. Ct. J.): "it is trite to note that fault has been very clearly rejected as a basis for our family law system."

- [400] It is therefore not relevant whether the Father is partly to "blame" for the economic disadvantages he suffered, so long as those disadvantages arose as a result of the marriage or its breakdown: *Gosset v. Gosset* (1997), 38 B.C.L.R. (3d) 289 (S.C.).
- [401] In this case, the parties made choices about where to live, taking into account a number of factors, including the following:
- a) their joint desire to sail around the world;
 - b) the Father's desire to pursue a professional sailing career;
 - c) the Mother's ability to find lucrative work in various locations and therefore to accommodate the development of the Father's sailing career without loss to her own career; and
 - d) the Father's ability to find construction work anywhere.
- [402] Now that the parties have separated, the Father no longer has access to the Mother's ability to find lucrative work. He is the one who is disadvantaged by the marriage breakdown. The choices the parties made during their cohabitation had the effect that the Father was not able to develop a career in construction, which would ordinarily require a person to stay in one place for an extended period of time.
- [403] The factor that supports a compensatory spousal support award is that the Father has not stayed in one place long enough to develop a construction business.
- [404] The factors that do not support a compensatory spousal support award are that the parties made relatively equal contributions to child-rearing and the household, both pursued the dream of an extended sailing trip and of living in different places in the world, and the Father pursued a competitive sailing career rather than developing a business while the Mother's income primarily supported the family.
- [405] The Father is entitled to compensatory spousal support, not on the basis that the Mother has developed her career at his expense, but on the basis that the choices the parties made as a couple did not enable the Father to develop his construction career.
- [406] This case differs from *Merth v. Merth*, [1993] B.C.J. No. 2782 (S.C.) (cited in *Salminen v. Garvie*, 2012 BCSC 407 at para. 158), where a husband's claim to compensatory support was dismissed. In *Merth*, the wife was a doctor, and the husband was an architect. The court concluded that the husband chose a professional career "in which income expectations are somewhat modest and employment is uncertain." In *Merth*, the husband was earning an income commensurate with his training, ability, and experience, and neither the marriage nor its breakdown had adversely affected his economic opportunity. In contrast, here, the Father has not achieved income commensurate with his training and ability, because he has not stayed in the same place long enough to develop his career.

[407] This case also differs from *Dubey v. Dubey*, 2008 BCSC 413, where a husband's claim for compensatory spousal support was dismissed. In that case, the Court concluded that each party had suffered some economic hardship as a result of the breakdown of the marriage, but it could not be said that the hardship suffered by the husband was any greater than that of the wife, and both parties were economically self-sufficient. Here, the Father has suffered greater economic hardship than the Mother from the breakdown of the marriage, and he is not yet economically self-sufficient.

b. Non-Compensatory Spousal Support

[408] The Father's position is that he is entitled to non-compensatory support, and he relies in particular on the disparity in the parties' incomes.

[409] The Mother's position is that the Father is not entitled to non-compensatory spousal support, or alternatively, that he was entitled to only a modest, transitional amount of such support. Her position is that the Father has made inadequate efforts to achieve self-sufficiency, and has been content to live on the interim support he has received from the Mother, while sharing expenses with Ms. Ireland. The Mother's position is that, in fact, the Father's lifestyle has been richer than her lifestyle since the parties separated.

[410] The parties made different choices about how to spend the money available to them at various times. It is not appropriate to try to compare the parties' standard of living by comparing their homes and vacations and the like. Their standard of living is appropriately reflected in the funds which were available to them.

[411] Non-compensatory spousal support is grounded in the "social obligation model" of marriage. It endeavours to narrow the gap between the needs and means of the spouses upon relationship breakdown. The term "need" in the context of non-compensatory spousal support goes beyond basic necessities of life and varies according to the circumstances of the parties. Self-sufficiency is one of the spousal support objectives related to non-compensatory support, and must be viewed in the context of the marital standard of living, as well as the standard of living of the recipient spouse after the marriage: *Chutter* at paras. 54-61.

[412] In considering non-compensatory support, the Court must consider a spouse's actual ability to support himself or herself, and the effort that has been made to do so: *Bracklow*, at para. 40.

[413] For a party relying on the non-compensatory basis for support, the Court may examine the extent of the spouse's need, taking into consideration the means of the new partner: *Kelly v. Kelly*, 2007 BCSC 227 at para. 49; *Barton v. Ophus*, 2009 BCSC 858 at paras. 63-66. A recipient spouse has an obligation to disclose any circumstance that may have a bearing on support, including re-partnering: *Redpath v. Redpath*, 2006 BCCA 338 at para 88.

- [414] A party who experiences a marked decline in his or her standard of living due to divorce should receive some financial assistance in the form of a "transitional award": *Lee v. Lee*, 2014 BCCA 383 at para 66. In that case, the Court of Appeal considered non-compensatory support for less than one year to have been appropriate.
- [415] In long marriages, equality of standard of living, which may or may not be the same as the equality of income, may be a just result: *Yemchuk v. Yemchuk*, 2005 BCCA 406.
- [416] Factors which suggest that the Father should not receive non-compensatory spousal support include the fact that he is 45 years old, in good health, and pursuing work which he is qualified to do, and should be able to develop his business to provide a suitable standard of living.
- [417] The factors which suggest that the Father should receive non-compensatory spousal support include the fact that the parties' relationship included about 11½ years of cohabitation, and the parties both have the ongoing financial responsibility to care for the children.
- [418] In the circumstances, on separation, the Father was entitled to some non-compensatory support.

ii) Income for Spousal Support Purposes

- [419] Income for the purposes of spousal support is adjusted for the applicable child support. That adjustment is made automatically in Divorcemate calculations. As a result, I will simply rely on Divorcemate calculations based on the incomes described above, and on the basis that the parties have liberty to make submissions about my calculations, as set out earlier.

iii) Quantum and Duration of Spousal Support

- [420] The question of quantum and duration of spousal support is a matter of judgment upon considering the relevant factors. However, the Court must consider the SSAG. The Mother's position is that the SSAG figures are seriously flawed where parenting is shared.

a. Quantum of Spousal Support

- [421] The Mother argued that the middle of the SSAG range is not appropriate, because the effect is that the Mother would receive significantly less than half of the net disposable income, even though the parties have equal parenting expenses and responsibility.
- [422] The Court must consider the SSAG, but the Court may find that they are not of assistance in a particular case. They are a useful tool in determining the appropriate range of awards in most cases: see *Redpath and McEachern v. McEachern*, 2006 BCCA 508.

[423] The MacNaughton Interim Support Order was based on the midpoint of the range, using the imputed income of \$48,400 for the Father and \$347,000 for the Mother. The effect was that the Father would receive 54.4% of the figure assumed to be the net disposable income, and the Mother would receive 45.6%. The difference was \$1,896 per month, being \$22,752 per year.

[424] The authors of the SSAG wrote as follows at 8.6.3:

In these latter cases, where there are two or more children subject to shared custody and the recipient has little or no income, the formula will produce a range with a lower end that leaves the lower-income recipient with 50 per cent of the family's net disposable income and the rest of the range will obviously go higher. During the feedback process, some criticized this range of outcomes, suggesting that a shared custody recipient should never receive spousal support that would give him or her more than 50 per cent of the family's net disposable income. After all, they suggested, under this arrangement, both parents face the same ongoing obligations of child care going into the future, with neither parent experiencing more disadvantage.

The answer to these criticisms is that the past is relevant in these cases, as there is a reason the recipient has little or no income, usually explained by that parent's past shouldering of the bulk of child care responsibilities. In most shared custody cases, both parents have shared parenting during the relationship, so that there is less disadvantage and less disparity in their incomes at the end of the marriage. Where the recipient has little or no income, she or he will have a greater need for increased support in the short run. But the shared custody arrangement will reduce the impact of ongoing child care upon the recipient's employment prospects, such that progress towards self-sufficiency should occur more quickly. In these cases, spousal support will likely be reduced in the near future on review or variation, and the duration of support may be shorter.

[Underlining added.]

[425] In other words, the SSAG assume that if there is a significant difference between the parents' incomes in a shared custody relationship, it reflects a significant compensatory claim by the recipient spouse. Even so, the SSAG anticipate a shorter duration of such compensatory support, or a prompt reduction in the amount of the spousal support.

[426] The authors of the SSAG wrote as follows at 8.6 under the heading "Shared Custody":

If the straight set-off of child support is calculated as above, it turns out that the spousal support ranges are basically the same in these shared custody situations as in sole custody situations. Shared custody arrangements do not result in any automatic lowering of spousal support. It was important that the shared custody formula not provide any false financial incentives to encourage shared custody litigation, while at the same time providing ample room within the range to adjust for the realities of shared parenting.

- [427] In this case, there is no concern about a formula providing false financial incentives to encourage shared custody litigation. Both parties have been active parents throughout their children's lives.
- [428] The Father's compensatory claim reflects the fact that the choices the parties made as a couple did not permit him to develop his career, although it cannot be said that the Mother developed her career at his expense. The Father's non-compensatory claim does not require that he retain more of the family income than the Mother.
- [429] The parties both devoted significant time to parenting during the relationship, and they have shared parenting roughly equally since about four months after their separation. While the Father's career in construction was impaired by the parties' frequent relocations, he should be able to establish a career and earn an appropriate amount within a reasonable period. Some of the disparity in the parties' incomes reflects the impact of frequent relocation on the Father's career, but most of the disparity reflects the nature of the work each party is able to obtain.
- [430] Here, where each parent has equal parenting time and expense, it is not reasonable for the Father to receive significantly more of the parties' net disposable income than the Mother. The unfortunate result of the MacNaughton Interim Support Order here was that it may have provided an incentive for the Father to make inadequate efforts to become self-sufficient.
- [431] In this case, spousal support which gives each party roughly one-half of the net disposable income is appropriate. At some income levels, that is the lower end of the SSAG range, while at other income levels, it is the midpoint.
- [432] Using the income figures for the parties set out above, and applying the part of the range which allocates net disposable income roughly equally, my calculations produce the following spousal support monthly amounts payable by the Mother to the Father:
- a) \$5,742 in 2011;
 - b) \$4,295 in 2012;
 - c) \$3,699 in 2013;
 - d) \$2,675 in 2014; and
 - e) \$1,996 in 2015.
- b. Duration of Spousal Support
- [433] The Father argued that spousal support should continue indefinitely.
- [434] The Mother argued that the Father has already received as much or more than he would be entitled to receive for spousal support. Alternatively, she argued that he should receive at most one further year of spousal support.

- [435] The SSAG suggest spousal support of a minimum duration of six years and a maximum duration of 12 years.
- [436] In this case, the amount of spousal support paid by the Mother has been substantial. I imputed income to the Father for the years 2012 and 2015, on the basis that he did not make adequate efforts to find work, and that he was not restricted by a work permit to working for BBPR. As stated in s. 15(6)(d) of the Divorce Act, the spousal support order should, in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable time.
- [437] In all the circumstances, the Father is entitled to spousal support until the end of 2016. That is support for about six years after separation, for about five years following the imputation of income to the Father by Master MacNaughton, and for almost two years after the Father obtained permanent residency in Canada and was able to work for anyone. That period of spousal support will satisfy the Father's claims to both compensatory and non-compensatory spousal support.
- g) Arrears of Spousal and Child Support
- [438] The Father seeks to recover the amounts outstanding pursuant to the MacNaughton Interim Support Order. It is his position that the parties' assets should be redistributed entirely to him, to pay the arrears and to provide security for ongoing support payments.
- [439] The total in arrears for both spousal and child support to May 2015 was about \$166,000.
- [440] The Mother's position is that the Court should retroactively re-adjust the amount of support which she should have paid the Father for the period commencing October 1, 2011. The Mother argued that for the period from October 1, 2011 to May 2015, she was ordered to pay about \$185,000 more than she should have been ordered to pay, using her calculations.
- [441] The Father argued that the Mother must establish a material change of circumstances to "vary" the MacNaughton Interim Support Order.
- [442] The MacNaughton Interim Support Order was intended to be interim, and is not subject to the requirements which relate to varying a final order.
- [443] As discussed by Mr. Justice N. Smith, interim support orders are intended to be temporary, until issues can be decided on their merits. He wrote as follows in *Paisley v. Paisley*, 2014 BCSC 1752 at paras. 13 and 14:
- [13] Interim orders are intended to be temporary until issues can be decided on their merits. *M. (D.R.) v. M. (R.B.)*, 2006 BCSC 1921 at para 7, citing *Randhawa v. Randhawa* (1999), 49 R.F.L. (4th) 144 (B.C.S.C.). Interim proceedings are summary, provide "rough justice at best" and should not be "bogged down with the merits of the case." *Newson v. Newson* (1998), 65 B.C.L.R. (3d) 22 (SC) at para 11, citing *B. (R.) v. B. (M.)* (1989), 19 R.F.L. (3d) 92 (O.N.S.C.).

- [14] The Court of Appeal in *Newson* cited *Kolia v. Kolia*, [1981] 5 W.W.R. 540 (B.C.S.C.) for the proposition that interim support should be ordered without adjudicating issues between the parties where the marriage is admitted and need is proved unless the action is frivolous or vexatious.
- [444] The considerations for calculating and cancelling arrears which have accrued on an interim order are therefore different from the considerations applicable to recalculating and cancelling arrears from a final order which was decided on its merits.
- [445] The Father relied on the following passage in reasons for judgment of Madam Justice Fleming in *P.L. v. J.D.L.*, 2013 BCSC 1492 at para. 42 [P.L.]:
- [42] I note in addition the respondent provided no authority to establish that the court can retroactively calculate child support payments based upon the payor's line 150 income, and then set the arrears based upon the difference between what was paid and what should have been paid according to the line 150 income. In similar circumstances, the Provincial Court in *L.B. v. J.K.*, 2012 BCPC 0231, refused to adopt this approach in part because to do so encourages payors to do nothing in the face of a reduction in income and disobey a court order over an extended period of time, allowing significant arrears to accumulate. Then, when it suits the payor, he or she may bring an application for an order that deprives the children in question of child support that they were entitled to receive and relied upon receiving (para. 42). It is appropriate to reconsider the spousal support payable using the incomes discussed above for the parties. It is also appropriate to consider the SSAG using the "without child" formula, and the low end of the "with child formula" (which is designed to distribute net disposable income equally).
- [446] In *P.L.*, Madam Justice Fleming was considering the variation of a support order which was part of a divorce order. It was therefore a final order, not an interim order.
- [447] Once the Court has made a final divorce order, a payee parent is entitled to expect that the support will continue as ordered unless there is a material change in circumstances. Here however, the *MacNaughton* Interim Support Order was an interim order, and subject to variation when all the evidence was available at trial.
- [448] The Court may reduce or cancel arrears owing under an order if it would be "grossly unfair not to reduce or cancel the arrears". This is set out in s. 174 of the FLA, as follows:
- 174 (1) On application, a court may reduce or cancel arrears owing under an agreement or order respecting child support or spousal support if satisfied that it would be grossly unfair not to reduce or cancel the arrears.
- (2) For the purposes of this section, the court may consider
- (a) the efforts of the person responsible for paying support to comply with the agreement or order respecting support,

- (b) the reasons why the person responsible for paying support cannot pay the arrears owing, and
- (c) any circumstances that the court considers relevant.
- (3) If a court reduces arrears under this section, the court may order that interest does not accrue on the reduced arrears if satisfied that it would be grossly unfair not to make such an order.
- (4) If a court cancels arrears under this section, the court may cancel interest that has accrued, under section 11.1 of the Family Maintenance Enforcement Act, on the cancelled arrears if satisfied that it would be grossly unfair not to cancel the accrued interest.

[449] I have obtained Divorcemate calculations on the basis of the incomes I accepted as described above, and on the basis of spousal support being calculated as about 50% of the net disposable family income. Copies of those calculations are attached to these Reasons for Judgment as an Appendix.

[450] The MacNaughton Interim Support Order required payment of \$3,852 per month for child support, and \$6,783 per month in spousal support, for a total monthly payment of \$10,635, being \$127,620 per year.

[451] The period from October 1, 2011 to May 31, 2015 is 44 months. Pursuant to the MacNaughton Interim Support Order, the amount payable by the Mother over that period was \$467,940 (44 times \$10,635).

[452] The arrears pursuant to the FMEP calculations were \$166,044. As a result, the Mother paid \$301,896 (\$467,940 less \$166,044) over that period.

[453] On my calculations, using the incomes discussed above, the Mother ought to have paid the Father the following in the following years:

- a) in 2011, \$4,265 in child support, plus \$5,742 in low-range spousal support, being a total of \$10,007 per month and \$30,021 for the three months of October through December 2011;
- b) in 2012, \$3,027 in child support, plus \$4,295 in low-range spousal support, being a total of \$7,322 per month and \$87,864 for the twelve months of 2012;
- c) in 2013, \$2,841 in child support, plus \$3,699 in low-range spousal support, being a total of \$6,540 per month and \$78,480 for the twelve months of 2013;
- d) in 2014, \$1,878 in child support, plus \$2,675 in low-range spousal support, being a total of \$4,553 per month and \$54,636 for the twelve months of 2014; and
- e) in 2015, \$1,370 in child support, plus \$1,996 in mid-range spousal support, being a total of \$3,366 per month and \$16,830 for the first five months of 2015.

- [454] On my calculations, the amount that the Mother ought to have paid for spousal and child support over the period from October 1, 2011 to May 31, 2015 was \$267,831. That is \$34,065 less (\$301,896 less \$267,831) than she actually paid.
- [455] In this case, it would be grossly unfair not to modify the arrears to reflect the recalculation I have done concerning what the Mother ought to have paid for child and spousal support. The arrears arose on the basis of income which was imputed to the Mother, on an interim basis, and which has turned out to be far more income than she has actually earned, acting reasonably.
- [456] As a result, all of the arrears of child and spousal support are cancelled.
- h) Contempt
- [457] The Father argued that the Mother was in contempt of the following four orders:
- a) the MacNaughton Interim Support Order, with respect to the payment of child support and spousal support;
 - b) the Scarth Disclosure Order, with respect to disclosing documents;
 - c) the Consent Counselling Order, with respect to retention of Abby Petterson; and
 - d) the Harper Negotiations Order, with respect to responding to the Father's settlement offer regarding parenting arrangements.
- [458] To establish the contempt alleged, the Father must prove beyond a reasonable doubt that the Mother knew of the applicable terms of the order, and that she deliberately engaged in conduct that disobeyed the order. This was discussed in the recent Supreme Court of Canada decision in *Carey v. Laiken*, 2015 SCC 17 at para. 38, as follows:
- [38] It is well settled in Canadian common law that all that is required to establish civil contempt is proof beyond a reasonable doubt of an intentional act or omission that is in fact in breach of a clear order of which the alleged contemnor has notice. The Court of Appeal followed this approach. As it noted, to require a contemnor to have intended to disobey the order would put the test "too high" and result in "mistakes of law [becoming] a defence to an allegation of civil contempt but not to a murder charge" (2013 ONCA 530, at para. 59). Instead, contumacy or lack thereof goes to the penalty to be imposed following a finding of contempt.
- [459] In the context of contempt of support orders, the Court of Appeal described the elements as follows at para. 10 of *Swann v. Swann*, 2009 BCCA 335:
- [10] With respect to the principal argument on this appeal, I am not persuaded that the judge misstated the elements that the plaintiff had to prove in order to establish contempt of court for non-payment of maintenance ordered by the court. There are four elements that must be established: that the debtor had notice of the order, that he or she did not comply with the order, that the non-compliance was "wilful" (i.e., deliberate, as opposed to accidental or unintentional), and that the debtor was, in fact, capable of complying with the order (i.e.,

that he or she had the means to make the required payments).

- i) the MacNaughton Interim Support Order, with respect to the payment of child support and spousal support

[460] The Father has enrolled with FMEP. Pursuant to s. 5 of the FMEP Act, the Director has exclusive jurisdiction to enforce a maintenance order, absent authorization. The letter dated May 15, 2015, from the Director provided the Father with that authorization.

[461] The evidence clearly establishes that the Mother knew of the MacNaughton Interim Support Order, as varied by the Cullen Contempt Order, and that she failed to make all the payments required by that order.

[462] The real question in this case is whether the Father has proven beyond a reasonable doubt that the Mother was, in fact, capable of complying with the MacNaughton Interim Support Order (i.e., that she had the means to make the required payments).

[463] The Mother started falling into arrears in December 2013, even though her income declined sharply before then. Her position is that she did not have the ability to pay the amounts ordered after July 2014, and that she properly devoted all of her funds to the support of her children (when they were with her) and to herself.

[464] The Mother did not make any support payments to the Father after April 28, 2014, except for three payments of \$1,000 each. The last payment of \$1,000 was in November 2014.

[465] The Mother was supporting Mr. Wharton over the period February 2011 to June 2014, apart from his contribution reflected in 75% of the \$105,000 in the dividends payable to him. The Father argued that the Mother should not have supported Mr. Wharton, and that essentially she was supporting Mr. Wharton in preference to supporting her own children.

[466] It is troubling that the Mother ceased paying the Father support altogether, especially in the context of her assurance in her 5th Affidavit dated May 2, 2014 that "It [the self-help approach she adopted] will not happen again ".

[467] At trial, the Mother was over \$210,000 in debt, either personally, or through Inyanook. That figure includes \$94,000 of Inyanook's indebtedness for taxes and GST, about \$54,000 for the Mother's personal indebtedness for taxes, and about \$63,000 in respect of her indebtedness for legal fees.

[468] The Mother's funds went to support herself, the children, and the Father in preference to payment of taxes and other debts.

[469] It is troubling that the Mother did not make any payments to the Father, even for child support, after November 2014. I accept that the Mother was not able to pay the full amounts required by the MacNaughton Interim Support Order, but I am satisfied beyond a reasonable doubt that she had the ability to make some payments to the Father.

[470] As a result, I conclude that the Mother has been in contempt of the MacNaughton Interim Support Order.

[471] As discussed above, I have determined that the Mother has in fact overpaid what she ought to have paid for spousal and child support. As a result, she can purge her contempt by making full payment of the amounts required by this order for the period ending December 31, 2016. If she fails to make the required payments, the matter can be scheduled for sentencing.

ii) the Scarth Disclosure Order with respect to disclosing documents

[472] This order required the Mother to produce her financial documents within seven days of February 13, 2015.

[473] The Mother produced most of those documents on May 20, 2015, the Friday before the Monday that the trial commenced.

[474] The Mother did not produce the documents when required. However, it appears that many of these documents were not in her hands, but rather were in the hands of her bank.

[475] I am not satisfied beyond a reasonable doubt that the Mother had the ability to produce her financial documents within the period ordered. As a result, I must dismiss the application that the Mother be found in contempt of the Scarth Disclosure Order.

iii) the Consent Counselling Order, with respect to retention of Abby Petterson

[476] The Father argued that the Mother was in contempt of the Consent Counselling Order, because she did not meet with or make any payments to Abby Petterson.

[477] As stated, the Father brought a second application following the trial for an order that the Mother be found in contempt of the Consent Counselling Order, and that application was adjourned generally on February 11, 2016.

[478] In the circumstances, I am adjourning this application to be heard with the post-trial application.

iv) the Harper Negotiations Order, with respect to responding to the Father's settlement offer regarding parenting arrangements.

[479] The Harper Negotiations Order required the Mother to respond by April 17, 2015 to the Father's proposal regarding parenting arrangements.

[480] The Mother did not make any response until April 27, 2015.

[481] Mr. Wiebach argued on behalf of the Mother that by making no response, the Mother indicated that she did not accept the offer. The Mother did not have legal counsel acting for her at the time.

[482] It would have been better if the Mother had advised the Father that the offer was not acceptable within the time prescribed. She did not comply with the spirit of the order, which was intended to assist the parties to reach settlement, at least on the parenting arrangements.

[483] I am not satisfied beyond a reasonable doubt that the Mother acted in contempt of the Harper Negotiations Order, and I must dismiss that application.

v) Conclusions about Contempt

[484] The Mother is found to have been in contempt of the MacNaughton Interim Support Order. She can purge that contempt by making all of the required payments pursuant to this order for the period ending December 31, 2016.

[485] The Father's application for an order that the Mother be found in contempt of the Consent Counselling Order is adjourned. His other applications for orders that she be found in contempt are dismissed.

i) Security for Ongoing Child and Spousal Support and Asset Division

[486] The Father argued that the Mother's conduct, in failing to comply with the MacNaughton Interim Support Order, taking steps to avoid collection by FMEP, and failing to make timely payment of amounts owing to CRA, establish that it is appropriate to order her to post security for future support payments.

[487] The Mother is opposed.

[488] Apart from this question of security, counsel did not make submissions about division of assets. I assume that the parties agree to equal division of family assets, including the funds held in trust from the sale of the Twin Image and the Anne Street Property, and the parties' respective pensions.

[489] A proper division of assets will require consideration of the advances the Father obtained from the proceeds of sale of the Twin Image, the Mother's overpayment in support of \$34,065 as at May 1, 2015, the support payable since May 1, 2015, the \$1,500 that the Father owes the Mother for the vehicle he retained on separation, and the amount the Mother owes the Father for expenses of repairing and maintaining the Twin Image.

[490] The parties have liberty to apply if they cannot agree on the calculations for asset division, or if they require further orders in respect of asset division.

[491] Section 170 of the FLA is as follows:

170 In an order respecting child support or spousal support, the court may provide for one or more of the following:

- (a) that payments be made periodically, annually or otherwise, for an indefinite or limited period or until a specified event occurs;

- (b) that child support or spousal support be paid respecting any period of time before the date the application for the order is made;
- (c) that payment of a lump sum be made, directly or in trust;
- (d) that a charge be registered against specific property to secure payment;
- (e) that a person who has a contract of life insurance within the meaning of Part 3 of the Insurance Act
- (i) designate his or her spouse or child as a beneficiary, irrevocably or for the period designated by the court, and
- (ii) either pay all premiums on the policy, or authorize his or her spouse to pay all premiums on the policy and to compensate the spouse for doing so;
- (f) that expenses arising from and incidental to prenatal care of a mother or child, or the birth of a child, be paid, except in relation to the prenatal care of a surrogate within the meaning of section 29 (1) [parentage if surrogacy arrangement];
- (g) subject to section 171 (1) [support obligations after death], that a duty to pay child support or spousal support continues after the death of the person having the duty, and is a debt of his or her estate for the period fixed by the court.

[492] This has been an acrimonious case. As set out above, I have concluded that the amounts the Mother was ordered to pay were significantly higher than she ought to have paid, and that she in fact overpaid by \$34,065 as at May 1, 2015.

[493] However, the Mother did not make any payments of support whatsoever after November 2014. She also took steps to avoid garnishment. She has twice been found in contempt of the MacNaughton Interim Support Order.

[494] In these circumstances, it is appropriate for the Mother to post security for future support. It is appropriate to require the Mother to use some of the funds which would otherwise be payable to her from the sale of the Twin Image and the Anne Street Property as security.

[495] As stated, the monthly amount payable in 2015 for both child and spousal support is \$3,366. The final payment for spousal support will be December 1, 2016. Considering these amounts, the Mother must post security of \$50,000. If the parties cannot agree on how the security will be held, they have liberty to apply.

j) Fine

[496] The Father asks that the Mother be fined \$5,000 for the non-disclosure of information.

[497] Section 213 of the FLA is as follows:

213 (1) This section applies if a person

- (a) fails to comply with
 - (i) an order for disclosure made under section 212 [orders respecting disclosure], or
 - (ii) a requirement to disclose information in accordance with the Supreme Court Family Rules or the Provincial Court (Family) Rules,within the time or in the manner required by the order or Rules, or
 - (b) provides information that is incomplete, false or misleading.
- (2) In the circumstances set out in subsection (1), the court may do one or more of the following:
- (a) make an order under section 212;
 - (b) draw an inference that is adverse to the person, including attributing income to that person in an amount that the court considers appropriate, and make an order based on the inference;
 - (c) require a party to give security in any form that the court directs;
 - (d) make an order requiring the person described in subsection (1) to pay
 - (i) a party for all or part of the expenses reasonably and necessarily incurred as a result of the non-disclosure of information or the incomplete, false or misleading disclosure, including fees and expenses related to family dispute resolution,
 - (ii) an amount not exceeding \$5 000 to or for the benefit of a party, or a spouse or child whose interests were affected by the non-disclosure of information or the incomplete, false or misleading disclosure, or
 - (iii) a fine not exceeding \$5 000;
 - (e) make any other order the court considers appropriate.

[498] Non-disclosure or delayed disclosure of financial information is a costly impediment to the timely and just disposition of family disputes, and has been described as the "cancer of matrimonial property litigation". See *Cunha v. Cunha* (1994) 99 B.C.L.R. (2d) 93 (SC) and *J.D.G. v. J.J.V.*, 2013 BCSC 1274 at para. 1.

[499] In *J.D.G.*, Mr. Justice Punnett wrote as follows at paras. 25-30:

The goal of proper disclosure is to enable the parties to resolve their dispute. In my opinion s. 213 is to be used to secure proper disclosure in a timely and cost efficient way. It therefore requires a robust application to accomplish that end. That should increase the awareness of the importance of timely and complete disclosure and over time lead to fewer applications. In order words, punishment per se is not the end, but rather the means, as the information is required to resolve matters in a just manner. Section 213 provides a mixture of tools to be applied creatively in a manner sensitive to the issues of a particular case. For example where implementation of a

payment or a fine may be ineffective the drawing of an adverse inference or a requirement for security may be effective. In addition its application should recognize the increased level of judicial case management inherent in the FLA and in particular the obligation imposed on the court under s. 199:

199 (1) A court must ensure that a proceeding under this Act is conducted

- (a) with as little delay and formality as possible, and
- (b) in a manner that strives to
 - (i) minimize conflict between, and if appropriate, promote cooperation by, the parties, and
 - (ii) protect children and parties from family violence.
- (2) If a child may be affected by a proceeding under this Act, a court must
 - (a) consider the impact of the proceeding on the child, and
 - (b) encourage the parties to focus on the best interests of the child, including minimizing the effect on the child of conflict between the parties.

[26] As noted in the White Paper the FLA is intended to give the court more powers to make orders as to the conduct of parties in the litigation and in turn more mechanisms by which to enforce those orders (pp. 132-133).

[27] While an application to hold a party in contempt is still available, presumably in all but the most egregious cases an application under s. 213 should be made initially. This recognizes the seriousness of a contempt application with its more onerous procedural and evidentiary requirements. It also recognizes that the FLA adds to the arsenal for enforcement available to the courts rather than subtracting from the court's remedies.

[28] Both the issue of non-disclosure and the severity of any order made under s. 213 will, as was the case under s. 92 of the FRA, depend on the facts. It should depend on the circumstances of the case, the degree of non-disclosure, the reasons for the late disclosure and when it is made. Likewise the need for the information in order to resolve the matter may be a factor. In addition, while in most cases disclosure may not be either complex or onerous there will be such cases where disclosure is. That should be recognized as well.

[29] If for example an application is brought under s. 213 and the responding party makes disclosure prior to the hearing that may justify a lesser penalty. That said, the fact that the applicant had to bring the application should, notwithstanding the late production, be addressed both because of the expense incurred but as well the delay itself. The latter impedes the timely resolution of proceedings. In such a case the remedy brought might be a fine. If however production does not occur until after an application then an order for costs thrown away may be appropriate and depending on the circumstances, imposition of a penalty as well.

[30] The court in my view should approach the application of the rule so that the significance of timely disclosure is brought home. It should not be taken lightly. Proper and timely disclosure will be enforced.

[500] Pre-trial orders were made which required both parties to produce documentation. It was apparent at trial that neither party had made full disclosure of documents. It appeared that the Mother's failure to produce documents was greater, and that most of her failure to provide documents arose in periods where she was acting without legal counsel.

[501] I am not satisfied that the Mother's failure to produce documents was sufficiently egregious that it is deserving of a fine. I dismiss this application.

k) Costs

[502] The Father sought an order for special costs, in the amount of \$25,000.

[503] In this case, it is appropriate for the parties to make submissions regarding costs following the release of these reasons for judgment.

SUMMARY

[504] In summary:

- a) the parties are divorced, with the divorce to be effective 31 days after the release of these reasons for judgment, pursuant to s. 12 of the Divorce Act;
- b) unless the parties agree otherwise, neither parent shall relocate the children to either Bowen Island or Deep Cove;
- c) the Father is not entitled to payment from the Mother for his labour on the Twin Image, but the Mother must pay the Father one-half of the other outstanding out-of-pocket costs for the repair and maintenance of the Twin Image. If the parties cannot agree on the amount, they have liberty to apply;
- d) the parties have liberty to apply in respect of my calculations. If the parties have not requested a hearing date within one month of the release of these reasons for judgment, they will be considered to have accepted my calculations as accurate;
- e) on my calculations, for the period commencing June 1, 2015, the Mother must pay the Father child support in the amount of \$1,370 per month;
- f) on my calculations, for the period commencing June 1, 2015, the Mother must pay 76% and the Father 24% of special and extraordinary expenses;
- g) the parties must each provide the other with a copy of their filed Canadian income tax return by June 1 of each calendar year, and with a copy of their Notice of Assessment within 30 days of receipt of it;
- h) the Father is entitled to spousal support until December 31, 2016;

- i) on my calculations, as at May 1, 2015, the Mother had overpaid spousal and child support over the period October 2011 to May 1, 2015 by \$34,065. All the arrears of child and spousal support are cancelled, and the Mother has a credit which she can apply to support accruing due in the period commencing June 1, 2015;
- j) the Mother is found to have been in contempt of the MacNaughton Interim Support Order. She can purge that contempt by making all the required payments pursuant to this order for the period ending December 31, 2016;
- k) the Father's application for an order that the Mother be found in contempt of the Consent Counselling Order is adjourned. His other applications for orders that she be found in contempt are dismissed;
- l) the Mother must post security of \$50,000 for her obligation to pay spousal support to the end of 2016 and her continuing obligation to pay child support. If the parties cannot agree on how the security will be held, they have liberty to apply; and
- m) the Father's application for an order that the Mother pay a fine for non-disclosure of documents is dismissed.

[505] The parties have liberty to apply for an order in respect of costs. They should estimate the time required for the hearing, and contact the registry to schedule the hearing.

[506] I am seized of further applications in this case, except in cases of emergency or when I cannot be available within a reasonable time. Counsel should request further hearing dates before me through the registry.

"Gray J."

APPENDIX "A"

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