
CANADA / JUDGMENT

Lee v. Lee

2014 BCCA 383

COURT

British Columbia Court of Appeal

DECIDED

9 October 2014

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2014 BCCA 383 Lee v. Lee

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Lee v. Lee,

2014 BCCA 383

Date: 20141009

Docket: CA041111

Between:

Victoria Patricia Lee

also known as Victoria P. Jackson

Respondent

(Claimant)

And

Terrence David Lee

Appellant

(Respondent)

Before:

The Honourable Madam Justice Newbury

The Honourable Mr. Justice Groberman

The Honourable Madam Justice Bennett

On appeal from: An order of the Supreme Court of British Columbia, dated July 10, 2013 (Lee v. Lee, 2013 BCSC 1227, Vancouver Docket E112127).

Counsel for the Appellant:

J.A. Thomson

Counsel for the Respondent:

T.L. Mihoc

Place and Date of Hearing:

Vancouver, British Columbia

September 4, 2014

Place and Date of Judgment:

Vancouver, British Columbia

October 9, 2014

Written Reasons by:

The Honourable Madam Justice Newbury

Concurred in by:

The Honourable Mr. Justice Groberman

Dissenting Reasons by: (p. 37, para. 70)

The Honourable Madam Justice Bennett

Summary:

The parties separated after a 20-year marriage without children. Since an accident in 2004, the husband had worked only part time and claimed to make less than \$20,000 per year. The trial judge was unable to determine what his income was in fact. The wife was earning \$120,000 per year and both had lived a fairly extravagant lifestyle, constantly refinancing credit card debt by borrowing against their house. The trial judge allocated family assets almost equally, but found that most of the debt at the end of the marriage had been incurred for the husband's personal purposes and should therefore be allocated against the husband's share of the assets. The trial judge rejected the husband's claim for spousal support on both the compensatory and non-compensatory bases. The husband was living in a new relationship with a woman who earned almost as much as Ms. Lee, and the new couple were living in a condominium comparable to that now being lived in by Ms. Lee. The husband appealed the allocation of family assets and the dismissal of his claim for spousal support.

Held: appeal allowed in part. The trial judge had not erred in allocation of family assets and debts. In connection with the claim for spousal support, the CA reviewed Moge and Bracklow and current BC law with respect to the "needs based" approach in situations involving significant income disparities between the ex-spouses. Although there are appellate decisions to the effect that income disparity alone is not the basis for an award of spousal support, most trial courts have adopted the approach of making an award of support and tailoring the amount or duration thereof to fit the particular circumstances in issue. British Columbia case law would have permitted an award to Mr. Lee given the length of the parties' marriage and the extended meaning of "need" in the family law context. But to rule that it was an error of law to refuse support would lead to lower-earning spouses becoming automatically entitled to the standard of living enjoyed during the marriage, or as much as the payor spouse could afford. This would be incorrect in circumstances where a clean break is clearly possible.

However, since "transitional" awards have been customarily made to women who experience a decline in standard of living, the "principle" of what is 'sauce for the goose is sauce for the gander' indicates that a transitional award to the husband would have been appropriate in this case. Since the wife had made a voluntary payment of \$17,500 in total to Mr. Lee pre-trial, his appeal was allowed to the extent only of ordering that the \$17,500 need not be repaid to Ms. Lee. Otherwise, the appeal was dismissed.

Bennett J.A. dissented only on the return of the \$17,500 to Mr. Lee, and would dismiss the appeal.

Reasons for Judgment of the Honourable Madam Justice Newbury:

- [1] This appeal tests the meaning and limits of the principle of non-compensatory spousal support in a 20-year 'modern' marriage to which neither spouse was found to have sacrificed in any material way, and from which both emerged entirely self-sufficient, albeit with disparate earning abilities. The party seeking spousal support under the Divorce Act - here, the former husband (appellant herein) - argues that the fact of this disparity entitles him to a standard of living that will approach the standard his ex-wife is able to afford for herself. He relies on judicial comments in cases such as *Bracklow v. Bracklow* [1999] 1 S.C.R. 420, *Yemchuk v. Yemchuk* 2005 BCCA 406, and *W. v. W.* 2005 BCSC 1010, for the proposition that his former wife's "obligation flows from the marriage relationship itself" (see *Bracklow*, para. 46, referring to an article by Professor Rogerson) and that "the longer the relationship endures, the closer the economic union, the greater will be the presumptive claim to equal standards of living upon its dissolution." (See *Moge v. Moge* [1992] 3 S.C.R. 813 at 870.) Alternatively, blurring the lines between compensatory and non-compensatory support, counsel for the appellant contends that his client suffered a disadvantage by reason of the breakdown of the marriage - i.e., the loss of his ability to share in Ms. Lee's higher income - such that he should receive spousal support on the compensatory model as well. Counsel suggests that if one assumed the facts of this case but reversed the male and female roles, most courts would award spousal support on some basis to a woman who is facing the future with income that is about half of her former husband's income.

- [2] Mr. Lee also asserts that the trial judge made other errors of law and fact in connection with the support claim and in allocating the family assets and the so-called "family debt" pursuant to the Family Relations Act, R.S.B.C. 1996, c. 128. He seeks an order that various debts incurred in his name should be considered family debts and thus be deducted from the sale proceeds of the matrimonial home (the only significant family asset), and that the remaining proceeds should be shared equally - even though the trial judge re-apportioned the proceeds slightly in Mr. Lee's favour before the debts were deducted.

Factual Background

- [3] Mr. and Ms. Lee (to whom I will refer as the "husband" and "wife" respectively) were married for 20 years until their separation in June 2011. He is now 56 years of age; she is 49. They had no children.
- [4] When they met in about 1987, Mr. Lee had a full-time job as a car man with CN and worked part-time as a doorman at a bar. Ms. Lee was attending university and working at the bar part-time as a bartender. Eventually she earned her bachelor's and master's degrees and a teaching certificate. By 2005, she was a high school principal. There was no suggestion that she relied on assistance from Mr. Lee to obtain her education or that he gave up any opportunity or benefits for that purpose. She now earns approximately \$120,000 per year.
- [5] Mr. Lee continued to work at CN for the first ten years of the marriage, earning up to \$48,000 annually. His employment at CN came to an end, however, when he was in a motor vehicle accident in early 2001. His wrist and neck were injured, making it impossible for him to wear a hard hat. After trying to return to work at CN a few times, he started working part-time as a personal trainer. As the trial judge noted at para. 18 of his reasons:

Mr. Lee had always had an interest in fitness, and in 2004 he started working part-time as a personal trainer. He typically worked from 1:00 to 8:00 pm. He said he did not want to work mornings. He charged \$25 to \$35 per client, but he had to pay a \$10 fee to the gym from that amount. Ms. Lee testified that he never filed tax returns because he said he earned under \$10,000 per year.

- [6] In 2007, Mr. Lee received net funds of approximately \$320,000 as a global settlement from ICBC for his injuries in the accident. He testified that in the interim between the accident and the settlement, he received some disability and other benefits for about three years, and began working as a personal fitness trainer in 2004, earning modest but increasing amounts of between \$3,000 and \$9,000 annually. He continues to work only part-time, being paid in cash, and had no records of his earnings since 2004. In 2021, he will become entitled to a pension from CN of \$1,490 per month.
- [7] The couple bought their first home in late 1994, using \$19,000 provided by Mr. Lee's father for the down payment, and borrowing the balance of approximately \$214,000 secured by a mortgage. The trial judge found that Mr. Lee "did some work on the First Home, replacing linoleum, changing light fixtures and door handles, replacing the water tank, and fixing the

fence." (Para. 15.) In late 2004, the parties borrowed some \$360,000, secured by a second mortgage, in order to pay off consumer debt. After receiving his ICBC settlement, Mr. Lee put \$240,000 towards the second mortgage, reducing the balance to approximately \$65,000. (Paras. 20-1.)

- [8] In the summer of 2007, the couple purchased their second house for \$770,000 plus tax, and sold their first one for \$444,000. After the dust had settled, they had a mortgage on the new house in the amount of some \$433,000. In due course, they also refinanced this house a few times in order to pay off credit card and other consumer debt they had accumulated. The trial judge found that:

On at least two occasions before the sale of the First Home, and on two occasions after the purchase of the Second Home, the homes were refinanced to pay off consumer debt and other sums that were owing on credit cards and lines of credit. Proceeds from the sale of the Second Home were also used to pay off a third round of consumer debt from the Second Home.

Mr. Lee did some work on the Second Home, including painting, replacing linoleum, changing light fixtures, moldings, window blinds, and shower stall.

The parties obtained a line of credit from HSBC against the Second Home in the amount of \$90,000 on July 31, 2009, and the following debts were then paid off:

- (a) ING line of credit in the name of Ms. Lee (\$4,691);
- (b) CIBC Visa in the name of Mr. Lee (\$20,000);
- (c) HBC Card in the name of Ms. Lee (\$2,890);
- (d) BNS line of credit in the name of Mr. Lee (\$17,000);
- (e) BNS Visas, one in the name each party (total of \$38,000); and,
- (f) HSBC line of credit in joint names (\$8,051) (account xxx-150).

On June 24, 2010, a mortgage in favour of ING Bank of Canada in the amount of \$600,000 was registered against the title of the Second Home (the "Fourth Mortgage"). This was used to pay out the Third Mortgage, then in the amount of \$389,102.25, and the secured line of credit at HSBC, then in the amount of \$99,326.

The Fourth Mortgage was also used to pay off the following debts totalling \$78,657:

- (a) ING Bank of Canada in the name of Ms. Lee (\$9,432);
- (b) BNS Visa (\$19,046), unknown in whose name;
- (c) CIBC Card services in the name of Mr. Lee (\$16,639);
- (d) Scotialine balance in the name of Mr. Lee (\$16,110); and,
- (e) BNS Visa Balance (\$17,430), unknown in whose name.

[At paras. 25-9.]

Husband's Income

[9] In June 2011, Mr. Lee told Ms. Lee he was leaving her. Thereafter, she discovered that he had been selling steroids and growth hormones illegally. Mr. Lee admitted to this at trial, testifying that he had made a profit of about \$200 per month from this activity. However, two of his customers said he had boasted he had negotiated a specific deal that would generate sales of \$12,000-\$15,000 per month, from which he would earn one-third as profit. Mr. Lee testified that this was just "false boasting" and that there was no such deal. At his examination for discovery, he deposed that he stopped selling illegal drugs in early 2012 because he was receiving (voluntary) interim support from Ms. Lee. (Para. 32.) The trial judge did not make any specific finding as to whether or how much Mr. Lee continued to earn from this activity.

[10] Since the separation, Mr. Lee has been living with a woman who earns between \$75,000 and \$90,000 base salary, plus overtime. (Para. 33.) Although she is a police officer, she evidently failed to bring to trial the financial records she was subpoenaed to bring.

[11] In addressing Mr. Lee's claim to spousal support on compensatory or non-compensatory grounds, the trial judge expressed considerable scepticism concerning Mr. Lee's assertion that "his only suitable occupation is as an uncertified, part-time personal trainer with an annual income of less than \$20,000 per year." (Para. 90.) In the judge's analysis:

There are a number of difficulties with this submission. In the first place, I am not satisfied that the evidence establishes on a balance of probabilities that Mr. Lee continues to be physically disabled. If he is physically disabled, there is no satisfactory evidence to establish on a balance of probabilities the real extent of that disability. The fact that he was in an accident in 2001 and that he received a monetary settlement in 2007 does not establish that he has a continuing disability.

The only real evidence in this case that Mr. Lee continues to have a disability is his own testimony to that effect. His evidence is not corroborated by any medical evidence, even from his family doctor.

On the other side, there is credible evidence that Mr. Lee is not disabled, or at least, not to the extent that he claims. Mark Quinto, a private investigator, surreptitiously video-recorded Mr. Lee's activities at the gym in December 2011. Amongst other things, he observed Mr. Lee handling a 45 pound plate and bending at the waist. He saw him doing presses with a barbell weighing 135 pounds. He saw him lift 35 pound plates, bending at the waist, and adding the plates to the barbell. He then saw him doing presses with a total weight of 205 pounds. Mr. Quinto did not see Mr. Lee display any physical limitations.

Moreover, even if Mr. Lee does have some continuing physical limitations, the evidence does not establish that he could not find more lucrative employment than what he is presently engaged in. He has not seriously explored the possibility of applying for and trying other occupations. He said that he prefers to work as a personal trainer. Even if he stayed in that occupation, the evidence suggests that as a physical trainer, he could earn more if he were certified, but he has chosen not to become certified. [At paras. 91-4.]

[12] Ehrcke J. noted the testimony of an expert economist to the effect that the average income for a personal trainer without a university degree is approximately \$51,000, while another economist gave evidence that in British Columbia, the average full-time full-year income of personal trainers with high-school educations is about \$68,000. (Paras. 95-6.) The judge continued:

Mr. Lee testified that in 2012 he earned \$11,695. However, it is impossible to know how accurate this is as an indication of Mr. Lee's average earnings. He produced no filed tax returns at trial. He did produce a draft copy of his 2012 return, but he admitted that it was not accurate and that it did not report all of his income. He admits that much of his income comes to him in the form of cash, for which he has no documentation.

Considering all of the evidence, I am not satisfied that Mr. Lee has established what his actual income is for the purpose of assessing his entitlement to spousal support. In any event, I am satisfied on a balance of probabilities that Mr. Lee has chosen to be voluntarily underemployed. Although it is difficult, in the absence of more specific evidence, I am of the view that it would not be inappropriate to attribute to Mr. Lee a potential annual income in the range of \$50,000 to \$60,000 or more. [At paras. 97-8; emphasis added.]

Indebtedness

[13] Following their separation, the parties sold their home for \$790,000 and after paying off all mortgages and other costs of sale, were left with net proceeds of some \$186,000 (Para. 35.) From these proceeds, the balances on five credit card or other consumer loan accounts were paid off, leaving approximately \$100,000 which was held in trust at the time of trial.

[14] One point of contention was Mr. Lee's claim that he and Ms. Lee had borrowed a total of \$60,000 from his father, which should be repaid. Ms. Lee acknowledged that the couple had borrowed \$19,000 from her father-in-law in 1994 which was unpaid, but denied any knowledge of any other loans from Mr. Lee, Sr. The trial judge was not satisfied the remaining \$41,000 balance had been made to "Ms. Lee and Mr. Lee as a couple, as opposed to being loans only to Mr. Lee." He found that if Mr. Lee had borrowed the amounts he claimed, the loan had been made to him alone and that the couple's indebtedness to Mr. Lee, Sr. was \$19,000 rather than \$60,000. (Para. 44.)

Pensions

[15] The parties agreed that their pension plan entitlements from CN and the Teacher's Pension Plan respectively were family assets. Accordingly, Ehrcke J. ordered that the benefits accrued between 1991 and 2011 on the plans were to be divided in accordance with Part 6 of the Family Relations Act. (Para. 49.)

Division of Family Assets

[16] The trial judge turned to the question of division of property (which the parties agreed was governed by the Family Relations Act) beginning at para. 50 of his reasons. He described the parties' respective positions thus:

Ms. Lee takes the position that the \$186,485.67 proceeds of the sale of the family home should be divided equally between them, and the debts that were paid from the proceeds should, for the most part, be treated as the personal debts of the party in whose name the debt was incurred.

Mr. Lee in his counterclaim sought a reapportionment in his favour pursuant to s. 65 of the Family Relations Act. He says that the debts in his name that were paid from the proceeds of sale of the Second Home were incurred for a family purpose and their payment should not come solely out of his share of the proceeds. He therefore submits that of the \$100,091.59 that remains in trust after the payment of the debts, all or most should be awarded to him. [At paras. 52-3.]

[17] The primary argument made by Mr. Lee in favour of reapportionment related to the fact that \$240,000 from his injury settlement had been used to pay down the second mortgage on the first home. The trial judge rejected this submission. Instead he found that:

The force of that argument is undercut ... by the fact that the money that Mr. Lee put into the Second Mortgage was ultimately taken out again to refinance consumer debt, the majority of which was in Mr. Lee's name. That is, the temporary increase in equity that resulted from the \$240,000 payment on the Second Mortgage was quickly used for consumer loans. In July 2009, a new HSBC line of credit was used to pay off almost \$100,000 worth of debt, and that line of credit, then in the amount of \$99,326 was itself paid off in June 2010 by taking out the Fourth Mortgage. The Fourth Mortgage was also used to retire another \$78,657 of credit card and other debt. [At para. 57; emphasis added.]

[18] Mr. Lee admitted in discovery that Ms. Lee had worked full-time and made the mortgage payments and paid for other "essential necessities of life" from her income. (Para. 61.) He contended however that most of the debt that had been incurred in his name had been used for family purposes. This was disputed by Ms. Lee, who testified that:

... Mr. Lee spent lavishly on things for himself from which she derived no benefit. For example, following his receipt of the money from the settlement, Mr. Lee spent approximately \$35,000 for the purchase of a Subaru STI, \$5,000 in modifications for the Subaru STI, \$23,000 plus tax for the purchase of a Corvette, at least \$20,000 in modifications for the Corvette, plus money for another Subaru and a Harley Davidson motorcycle that he modified. He also spent considerable sums on items for athletic activities and body building. [At para. 58.]

The trial judge accepted the wife's evidence on this point, although he noted that neither party had been "particularly careful" about personal spending during the marriage, which resulted in "a large burden of consumer debt, which was continually being refinanced." (Para. 60.) The finances were generally managed by Mr. Lee, and Ms. Lee testified that she had been under the impression they were doing well financially.

[19] In the end, having also reviewed a large number of documents produced by the parties, the judge was not satisfied that Mr. Lee had made a "substantially greater contribution for family purposes, either from his ICBC settlement or elsewhere, than did Ms. Lee from her salary." (Para. 62.) He concluded that Mr. Lee should receive "some modest credit" as a result of the \$240,000 contribution from the ICBC settlement. (Para. 63.) Accordingly, the judge reapportioned the parties' presumptively equal shares in their family property (the net proceeds of sale of their home) such that Mr. Lee would receive \$100,000 and Ms. Lee \$86,485.67, prior to deduction of debt. This reallocation would give Mr. Lee 54% of the value, and Ms. Lee 46%.

[20] With respect to debt per se, the trial judge began with the proposition that "each party should be responsible for paying the debts in his or her name unless he or she can establish on a balance of probabilities that the debt was incurred for a family purpose", citing *Stein v. Stein* [2008] 2 S.C.R. 263 and *Vitug v. Vitug* 2013 BCSC 405 at para. 66. The Court noted that generally speaking, the use to which Mr. Lee had put the money he had borrowed or assets he had acquired, remained "undocumented or incompletely explained" and that:

... In particular, Mr. Lee gave evidence that he frequently moved money from one account to another in order to take advantage of temporary differences in interest rates. He also testified that he kept large amounts of money in a home safe, and that many of his purchases were in cash. He was unable to produce receipts for purchases or expenditures that he claims were for a family purpose. In the end, no clear picture emerges of how withdrawals were spent, or where deposits came from. [At para. 67; emphasis added.]

[21] As for Ms. Lee, she acknowledged that some \$3,200 of the \$19,208 owing on a credit card account at Scotiabank in her name had been incurred by her and spent for her purposes. She had written a cheque for \$16,000 to Mr. Lee at his request, however, and he provided no "credible account" to show that he had used it for a family purpose. On the basis of this and other evidence, Ms. Lee was held to be responsible for \$3,208.50 of the total indebtedness of \$86,394.08 plus half of the \$19,000 owing to her father-in-law, and Mr. Lee for the remaining \$83,185.58. (Paras. 70-3.) Applying these credits, \$8,814.42 was ordered to be paid to Mr. Lee

from his \$100,000 share of the assets; and \$91,277.17 to be paid to Ms. Lee from her smaller share. (See paras. 107-11.)

- [22] The parties agreed they would keep the vehicles owned by them respectively and that Mr. Lee would pay Ms. Lee \$10,000 to account for the disparity between the value of his cars (a Corvette and a Subaru) over hers (a Nissan and a Porsche).

Spousal Support

- [23] The trial judge turned to the issue of spousal support at para. 74 of his reasons. Again, he succinctly described the parties' respective positions:

Mr. Lee claims spousal support from Ms. Lee. He points to the large disparity in their incomes post-separation. Ms. Lee currently earns \$120,313 annually, and Mr. Lee claims that he earned \$11,695 in 2012. Mr. Lee's counsel has prepared calculations based on the Spousal Support Advisory Guidelines. He submits that even if an income of \$40,000 were attributed to Mr. Lee, the mid-range support based on the Guidelines would be \$2,333 per month. He seeks an order that Ms. Lee pay Mr. Lee \$2,100 per month in spousal support for the next seven and one-half years, after which the support would terminate, since by that date, Mr. Lee would be eligible to access an unreduced pension.

Counsel for Ms. Lee submits that upon divorce, a spouse is not automatically entitled to support from the other spouse simply because there is a disparity in their incomes. Before any question arises as to the amount or duration of support, the person claiming support must demonstrate a basis for entitlement. The Spousal Support Advisory Guidelines are irrelevant in determining that threshold question of entitlement: *L.D.F. v. S.J.F.*, 2007 BCSC 1800; *Hokhold v. Gerbrandt*, 2012 BCSC 1683; *Yemchuk v Yemchuk*, 2005 BCCA 406. [At paras. 74-5.]

- [24] The Court noted the factors to be considered in granting an order for spousal support under s. 15.2(4) of the Divorce Act, and the objectives of such an order as set out in s. 15.2(6), which I reproduce below:

15.2(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.

[25] The judge noted that the Supreme Court of Canada has recognized three conceptual bases, or "models", for entitlement to spousal support, namely compensatory, needs-based, and contractual. (Since the parties did not enter into any agreement in this case, I need not discuss the contractual model.) He cited a long passage from *Moge v. Moge* which ended with the following observations:

The equitable sharing of the economic consequences of marriage or marriage breakdown, however, is not a general tool of redistribution which is activated by the mere fact of marriage. Nor ought it to be. It is now uncontentious in our law and accepted by both the majority and the minority in *Messier v. Delage*, supra, at pp. 416-17, that marriage per se does not automatically entitle a spouse to support. Presumably, there will be the occasional marriage where both spouses maximize their earning potential by working outside the home, pursuing economic and educational opportunities in a similar manner, dividing up the domestic labour identically, and either making no economic sacrifices for the other or, more likely, making them equally. In such a utopian scenario there might be no apparent call for compensation. The spouses are able to make a clean break and continue on with their respective lives. Such cases would appear to be rare. In most marriages in which both partners make economic sacrifices and share domestic responsibilities, or where one spouse has suffered economic losses in order to enable the other spouse to further a career, their roles should be considered in the spousal support order. [At 864-5; emphasis added.]

[26] The compensatory model had, he observed, been "expanded" by the Supreme Court in *Bracklow*, to which I will return below. He also noted the description of this approach given by the Court in *Barton v. Ophus*, 2009 BCSC 858:

The non-compensatory approach is based upon the theory that primary responsibility falls on the former spouse, rather than the government, to provide for his or her former partner. This approach views marriage as a relationship of interdependence and one of permanence and challenges the notion that spouses can cleanly or easily disentangle themselves from the relationship. In certain instances where self-sufficiency is not possible, or compensation is not applicable, "a support obligation may nonetheless flow from the marriage relationship itself": *Bracklow* at para. 37. [At para. 51.]

The wife in *Barton* had carried two jobs for several years and was living in a new common-law relationship from which she was benefiting and in which she was enjoying a "somewhat comparable standard of living as to that she enjoyed while married to the defendant." In light of the division of assets, her income and the evidence of her new relationship, the Court concluded that she had "failed to establish any need which would justify spousal support based on a non-compensatory approach." (Para. 66.)

[27] Invoking the compensatory model first, Mr. Lee relied heavily on the assertion that he had used the bulk of his money from the ICBC settlement to reduce the second mortgage on the first matrimonial home. He argued that he could have simply invested the settlement proceeds in an interest-bearing trust account, in which case it would have been "untouchable" by Ms. Lee based on the case law, the Family Relations Act, and even under the new Family Law Act. Instead, counsel submitted, he had converted those monies into a family asset "in the twilight of a long-term marriage. The funds were used to build equity in the home and eventually to facilitate the new home purchase, and for new furnishings and to pay for vehicles and to satisfy some debt obligations."

[28] The trial judge rejected this argument, given that he had already considered Mr. Lee's use of the money from the settlement and taken it into account in making a "modest reapportionment" of family assets in his favour. As the judge explained:

... I am not satisfied on the facts of this case that in addition to that reapportionment, Mr. Lee should now receive as well an order for spousal support based upon it. I have found, in the discussion above, that Mr. Lee's contribution was a modest one. It must be remembered as well, that Ms. Lee also contributed to the running of the household and the accumulation of equity through making the mortgage payments and paying for other household necessities from her paycheques throughout the marriage.

The evidence does not support the proposition that Ms. Lee benefited unfairly from Mr. Lee's contributions during the marriage. Mr. Lee did not forego any educational or career opportunities to enable Ms. Lee to pursue her career or to raise children. Mr. Lee has not suffered an economic disadvantage arising from the marriage or its breakdown, nor has Ms. Lee enjoyed an economic advantage. [At paras. 87-8; emphasis added.]

Accordingly, the judge found there was no basis on the facts of this case to award spousal support to the husband on compensatory grounds.

[29] The Court was also unpersuaded that Mr. Lee should receive spousal support on the needs-based approach. I have already quoted paras. 91-4 of the Court's reasons for doubting Mr. Lee's purported continuing disability and his purported inability to find more lucrative employment. Nor was the judge satisfied that Mr. Lee had established what his actual income was; rather, he was found to have chosen to be under-employed and the Court attributed income of between \$50,000 and \$60,000 "or more" to him. (Para. 98.) Finally, the fact the husband had entered a new relationship in which he was enjoying the benefits of a standard of living comparable to that being enjoyed by Ms. Lee, militated against a finding of "need" or of an obligation on her part to provide for Mr. Lee in order to avoid that responsibility falling on "the government". (See Bracklow at para. 23.) In all the circumstances, the trial judge was not convinced the wife should be ordered to pay support to the husband on any basis.

[30] As Ms. Lee had voluntarily paid some interim spousal support between August 1, 2012 and June 1, 2013 totalling \$17,500, Mr. Lee was ordered to repay that sum to her. (Para. 102.)

On Appeal

[31] On appeal, the husband asserts the following errors on the part of the court below:

The Trial Judge made a material error in dismissing the claim by Mr. Lee for permanent spousal support in an amount in accordance with the Divorce Act (Canada) and the Spousal Support Advisory Guidelines. By ordering that Mr. Lee repay the interim spousal support received the Judge made a further material error. In particular:

- a. The Judge erred in law by focusing on the physical limitations or disabilities of Mr. Lee and whether or not he was working to full capacity rather than focusing on the fact that throughout the marriage Mrs. Lee's income far exceeded that of Mr. Lee and that he was unable to return to his former long time employment with CN Rail after the motor vehicle accident.
- b. The Judge disregarded the evidence that supported Mr. Lee's claim for permanent spousal support, including the evidence that:
 - i. All of the settlement monies received as a result of the motor vehicle accident were used by the parties to pay down the mortgage, pay various debts and purchase new cars;
 - ii. No settlement monies were "held back", saved or invested to cover ongoing medical treatment or other costs or expenses; and,
 - iii. There were no other family savings.
- c. Although Mr. Lee is not completely physically disabled or unemployable, his capacity to earn the same income as he had before the accident was compromised or diminished. The Respondent continues employment in a secure, well-paying job and there is no evidence to suggest her current employment could not continue until retirement.

The Trial Judge made a material error in finding that Mrs. Lee was not equally responsible to repay all of the various debts incurred by the parties, including debts solely in the name of Mr. Lee or Mrs. Lee and the loan that was advanced by Frank Lee, to Mr. Lee at various times during the marriage, in particular:

- a. The Judge erred in law by ignoring the evidence that throughout the marriage the parties led an extravagant lifestyle and that managing the finances was a balancing act between various lines of credit, low interest credit card accounts and many refinances of mortgages over two homes.

- b. The Judge erred in law by finding that the outstanding debts of the parties that existed at the time the Second Home was sold were to be treated differently from all of the previous debts incurred by the parties. By allocating debts so that each party would pay only those debts in his or her name, including a loan from Mr. Frank Lee to Mr. Lee, the Judge made a material error.

[32] The husband acknowledges that in order to succeed, he must demonstrate a "material error" in the trial judge's reasons. As stated in *Van de Perre v. Edwards* [2001] 2 S.C.R. 1014:

... If there is an indication that the trial judge did not consider relevant factors or evidence, this might indicate that he did not properly weigh all of the factors. In such a case, an appellate court may review the evidence proffered at trial to determine if the trial judge ignored or misdirected himself with respect to relevant evidence. This being said, I repeat that omissions in the reasons will not necessarily mean that the appellate court has jurisdiction to review the evidence heard at trial. As stated in *Van Mol (Guardian ad Litem of) v. Ashmore* (1999), 168 D.L.R. (4th) 637 (B.C.C.A.), leave to appeal refused [1999] 1 S.C.R. vi, S.C.C.A. No. 117, an omission is only a material error if it gives rise to the reasoned belief that the trial judge must have forgotten, ignored or misconceived the evidence in a way that affected his conclusion. Without this reasoned belief, the appellate court cannot reconsider the evidence. [At para. 15.]

An equally narrow scope of appellate review was enunciated in *Hickey v. Hickey* [1999] 2 S.C.R. 518 in connection with support orders, where it was said that such orders should not be overturned "unless the reasons disclose an error in principle, a significant misapprehension of the evidence, or unless the award is clearly wrong." (At para. 11.)

Family Assets and Debts

[33] With respect to the apportionment or reapportionment of family assets, the trial judge was of course governed by s. 65(1) of the Family Relations Act, which states that the presumption of equality in the division of assets may be varied where it would be unfair having regard to:

- (a) the duration of the marriage;
- (b) the duration of the period during which the spouses have lived separate and apart;
- (c) the date when property was acquired or disposed of;
- (d) the extent to which property was acquired by one spouse through inheritance of gift;
- (e) the needs of each spouse to become or remain economically independent and self-sufficient, or
- (f) any other circumstances relating to the acquisition, preservation, maintenance, improvement or use of property or the capacity or liabilities of a spouse ...

In this case, the marriage was a long one and the parties had not lived separate for a particularly long period. However, the factors described at subparas. (e) and (f) were the focus of the trial judge's reasoning.

[34] With respect of the treatment of debts of divorcing parties, the purpose for which they were incurred was clearly relevant. In *Stein v. Stein*, Bastarache J., speaking for the majority, observed in connection with s. 65(1) that:

Many trial courts have recently determined that "family debts", which are incurred for maintenance costs relating to the family, should be considered when determining reapportionment of assets. I agree that, where a debt has been incurred for use within the family unit, it is more likely appropriate to reapportion assets to account for that debt than if it were accumulated solely for use outside of the marriage. The presence of debt (regardless of whether it is "family debt") is only one factor mentioned under s. 65(1); however, and it is, in my view, necessary for a judge to consider all of the relevant factors in order to determine whether or not the presumptive division of assets leads to unfairness. [At para. 16; emphasis added.]

[35] Thus while all debts of the parties may be considered as part of the analysis under s. 65(1), it is generally those that were incurred for the benefit of the family that are likely to lead to adjustments in the apportionment of assets in order to ensure a fair division. Again, as stated in *Stein*, the use of the term "family debt" to describe "a liability of either or both of the spouses which has been incurred during the marriage for a family purpose" is appropriate, even though the phrase is not used in the Act. As well, Bastarache J. noted, the very existence of the term "underlines the reality that in order to ensure fairness, both debts and assets must be considered after the breakdown of a marriage." (At para. 10.)

[36] This principle was also enunciated by Mr. Justice Lambert in his reasons in an earlier decision of this court, *Mallen v. Mallen* (1992) 65 B.C.L.R. (2d) 241. He reasoned that:

The proper focus for the examination of a debt should be a focus on the nature and purpose of the borrowing and on the expenditure of the borrowed funds. If the funds were used to acquire a family asset, to maintain a family asset, to discharge a family burden, or to maintain the family members, then it is likely that equality and fairness will require an equal sharing of the debt or liability and its adjustment in the division of the assets in such a way as to carry out the principles of equality and fairness. If the funds were used entirely for the personal purposes of the spouse who borrowed them it is likely that equality and fairness will require that spouse to bear the whole burden of the debt after the triggering event. [At 243-4; emphasis added.]

More recently, this court stated in *Bryan v. Chapman* 2011 BCCA 278:

Whether any particular debt is a family debt or not depends upon whether there is a discernable nexus between the debt itself, and some family purpose or benefit. A debt that is incurred to acquire a family asset, to discharge a family burden, or to maintain the family will likely be considered to be a family debt, and [be] apportioned on the breakdown of the marriage: see *Mallen v. Mallen* (1992), 40 R.F.L. (3d) 114 (B.C.C.A.). [At para. 43.]

[37] Turning to the errors alleged in the trial judge's treatment of the parties' indebtedness, I do not agree that the trial judge 'ignored' the evidence of the parties' free-spending lifestyle or the "balancing act" this required in terms of various lines of credit and other forms of borrowing. Indeed, the evidence of the parties' spending habits and repeated refinancings was reviewed in some detail by the trial judge, who then summarized the pattern thus:

The fact that emerges from the evidence is that neither of the parties was particularly careful about personal spending during the marriage, and this resulted in a large burden of consumer debt, which was continually being refinanced. [At para. 60.]

This description is fully supported by the evidence.

[38] At the same time, it was neither necessary nor desirable to carry out an accounting of 'who paid what' during the marriage: the Act does not mandate a 'balance sheet' approach. (See *Louie v. Louie* (1996) 92 A.C.W.S. (3d) 115 (B.C.S.C.), per Huddart J., as she then was.) In this marriage, as in most, each party contributed and benefited in various ways from the relationship. And, as the trial judge found, both parties here spent freely on consumer goods for their personal use - spending made possible by Ms. Lee's covering the necessities, and by continuous borrowing orchestrated by the husband.

[39] As we have seen, Mr. Lee contended that the family assets (the net proceeds of sale of the house) should be reapportioned in his favour because he had contributed \$240,000 to the parties' equity in the first house. However, the Court found that this contribution was largely offset by the fact that the resulting equity had been again drawn out and used by the husband, mainly for purposes of his own enjoyment. Also weighed in the balance was the fact that Ms. Lee had made the monthly mortgage payments and paid for the other necessities of life during the marriage, including the period when Mr. Lee's earnings were very low. Again, these findings are supported by the evidence, and no "material error" has been shown in the Court's conclusion that Mr. Lee failed to show he made any substantially greater contribution for family purposes, than did Ms. Lee. I would dismiss this ground of appeal.

[40] Mr. Lee also contends that the trial judge erroneously treated the debts outstanding at the end of their marriage "differently" in principle from the debts previously incurred, suggesting that he simply allocated the former debts according to the person in whose name they stood. I do not agree that the Court analyzed the debts in this way. The judge did apply the principle that the onus was on the person in whose name the debt stood, to show that it had been incurred for a family purpose. This placement of the onus was in accordance with the case law (see in particular *Popp v. Popp* (1985) 46 R.F.L. (2d) 441, cited in *Vitug v. Vitug*, supra, at para. 118.) The Court found that "no clear picture" emerged as to how Mr. Lee had spent the various withdrawals of money made by him from family accounts. Thus Mr. Lee had not met the onus on him. The same is true of the \$16,000 which the wife handed over to him at his request three months before the separation, and the ING line of credit discussed at para. 69. As a consequence, Mr. Lee was effectively taken to have incurred most of the

debt that stood in his name, as well as some of the debt in Ms. Lee's name, for personal rather than family purposes. I am not persuaded the Court erred in fact in so finding, or that it was otherwise unfair to allocate this indebtedness to the husband in determining how the family assets should be apportioned.

Spousal Support: Compensatory

[41] I turn finally to the errors alleged in the trial judge's dismissal of Mr. Lee's claim for spousal support. Although this first ground of appeal was framed in his factum in very specific terms relating to the Court's treatment of particular evidence, counsel for Mr. Lee framed the issue more broadly at the hearing of the appeal, submitting at the outset that the appeal was essentially about the husband's entitlement to the standard of living which Ms. Lee will continue to enjoy post-divorce. Mr. Thomson relied heavily on *Yemchuk*, which he described as being "on all fours" with the case at bar. I will deal with the latter submission first.

[42] There are certainly some similarities between this case and *Yemchuk*: although Mr. and Mrs. *Yemchuk* had had a child, the child was self-supporting by the time of separation, and like Mr. and Ms. Lee, Mr. and Mrs. *Yemchuk*, who were in their early 60s at the time of trial, had lived somewhat beyond their means. However, there are also important differences between the two cases. In *Yemchuk*, the husband was found to have taken early retirement "in large part because his wife had to relocate in order to maintain her employment with the Federal Government and had been offered employment in Manitoba. Subsequently, she was offered similar employment in British Columbia. The parties sold their homes and moved to accommodate the wife's employment situation on both occasions." (Para. 31.) As Madam Justice Prowse stated for the Court:

... There is no suggestion that Ms. *Yemchuk* objected to Mr. *Yemchuk*'s retirement, or that he had the opportunity which she enjoyed of readily finding employment in a new jurisdiction, particularly given the fact that he was 57 years of age at the time of their first move.

At the time of his retirement, Mr. *Yemchuk* received a pay-out of \$60,000 and a generous pension reflecting his 32 years of service. Ms. *Yemchuk* received the benefits from his retirement during the time they continued to live together, and from the division of assets upon their marriage breakdown.

As a result of the marriage breakdown, there is no question that Mr. *Yemchuk* was significantly disadvantaged in relation to Ms. *Yemchuk*. She continued to enjoy the benefit of a full salary, the ability to continue to contribute to her pension and other benefits, and, in addition, the benefit of sharing in Mr. *Yemchuk*'s pension upon the division of assets. Her income of \$75,000 was more than twice that of Mr. *Yemchuk* at \$37,000. (I have already referred to her disproportionately higher level of monthly expenses.) She was also enjoying a higher standard of living than was Mr. *Yemchuk*. To reiterate, the breakdown of the marriage had a disproportionately negative effect on Mr. *Yemchuk* than it did on Ms. *Yemchuk*.

Thus, after considering the objectives and factors mandated by the Act, and having particular regard to the length of the marriage, and the working partnership the parties enjoyed during the marriage (as best that can be determined from the evidence), it is difficult to rationalize the trial judge's conclusion that Mr. Yemchuk was not entitled to spousal support. [At paras. 31-4.]

[43] In so ruling, the Court was clearly applying the compensatory model of support. At para. 37, the trial judge was found to have erred in accepting Ms. Yemchuk's argument that "need" was the sole basis upon which a spousal support order could be based in the circumstances. Mr. Yemchuk's early retirement was said to be the "single most important factor which resulted in the disproportionate effect of the marriage breakdown on the parties." Prowse J.A. continued:

Had Mr. Yemchuk foreseen that marriage breakdown was on the not-so-distant horizon at the time he retired, he may well have reconsidered his decision to forego his full salary and benefits and follow Ms. Yemchuk to Manitoba and British Columbia so that she could further her career. While this event happened in the late stages of the marriage, it is no less relevant to the fact that upon the termination of the marriage, Ms. Yemchuk retained her employment and ongoing earning power, while Mr. Yemchuk did not. The subsequent equal division of assets did not make up for that loss, as is evident from the parties' respective financial circumstances following their separation. In my view, the cause and effect between Mr. Yemchuk's retirement and the subsequent disparity in economic circumstances of the parties is obvious and should have been taken into consideration by the trial judge.

This is so whether or not Ms. Yemchuk actively encouraged Mr. Yemchuk to retire. She took the benefits of his retirement and, in my view, she must also share in the drawbacks.

The circumstances and effect of Mr. Yemchuk's retirement raised a compensatory aspect to his claim for spousal support which was overlooked by the trial judge, perhaps because it was not the focus of the submissions before him. [At paras. 38-40.]

[44] In contrast, we have seen that Mr. Lee did not forgo any educational or career opportunities or make other 'sacrifice', and that he did not make any "substantially greater" contribution to the family than did Ms. Lee. The trial judge did recognize the use of his ICBC settlement funds, or more particularly the portion thereof that was not withdrawn for Mr. Lee's personal use, by re-apportioning the family assets slightly in his favour.

Income Disparity

[45] I return, then, to the question of principle raised by Mr. Lee, namely whether it can be said that by virtue only of the disparity between his and Ms. Lee's income going forward, he can be said either to have suffered a disadvantage by reason of the breakdown of the marriage, or to have a claim to spousal support on the basis of need.

[46] There are certainly some generalized comments in the case law that may be read as suggesting an affirmative answer to both questions. One thinks first of the remarks of L'Heureux-Dubé J., speaking for the majority in *Moge*. She began by analyzing the position of women in traditional marriages in Canada, noting that the value of work done in the home had been discounted by courts, and concluding that the "self-sufficiency" or "clean break" model of divorce could not be supported as a matter of statutory interpretation. (At 857-8.) The Court discussed the doctrine of equitable sharing of the economic consequences of marriage or marriage breakdown, emphasizing what we now refer to as the compensatory model. L'Heureux-Dubé J. wrote that this doctrine:

... 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. Significantly, it recognizes that work within the home has undeniable value and transforms the notion of equality from the rhetorical status to which it was relegated under a deemed self-sufficiency model, to a substantive imperative. In so far as economic circumstances permit, the [Divorce] Act seeks to put the remainder of the family in as close a position as possible to the household before the marriage breakdown. [At 864.]

At the same time, it was said that "marriage per se does not automatically entitle a spouse to support." In the Court's analysis:

Presumably, there will be the occasional marriage where both spouses maximize their earning potential by working outside the home, pursuing economic and educational opportunities in a similar manner, dividing up the domestic labour identically, and either making no economic sacrifices for the other or, more likely, making them equally. In such a utopian scenario there might be no apparent call for compensation. The spouses are able to make a clean break and continue on with their respective lives. Such cases would appear to be rare. In most marriages in which both partners make economic sacrifices and share domestic responsibilities, or where one spouse has suffered economic losses in order to enable the other spouse to further a career, their roles should be considered in the spousal support order. [At 864-5; emphasis added.]

Further, L'Heureux-Dubé J. noted that ss. 15(7)(c) and 17(7)(c) of the Divorce Act might not be "exclusively compensatory" and that they:

may embrace the notion that the primary burden of spousal support should fall on family members not the state. In my view, an equitable sharing of the economic consequences of divorce does not exclude other considerations, particularly when dealing with sick or disabled spouses. While the losses or disadvantages flowing from the marriage in such cases may seem minimal in the view of some, the effect of its breakdown will not, and support will still be in order in most cases. [At 865; emphasis added.]

[47] The Court advocated a "broad approach" to spousal support which recognizes and incorporates "any significant features of the marriage or its termination which adversely affect the economic prospects of the disadvantaged spouse." (At 866-7; my emphasis.) Obviously, the most significant of such factors related to the care of children although, it was

said, even in childless marriages, "couples may also decide that one spouse will remain at home. Any economic disadvantage to that spouse flowing from that shared decision in the interest of the family should be regarded as compensable." (At 869.) Spousal contributions to the operation of a business, or the taking on of increased domestic and financial responsibilities in order to enable the other spouse to pursue educational opportunities, were also cited as examples. L'Heureux-Dubé J. then made the following oft-cited observations concerning disparities in standards of living post-divorce:

Although the doctrine of spousal support which focuses on equitable sharing does not guarantee to either party the standard of living enjoyed during the marriage, this standard is far from irrelevant to support entitlement. Furthermore, great disparities in the standard of living that would be experienced by spouses in the absence of support are often a revealing indication of the economic disadvantages inherent in the role assumed by one party. As marriage should be regarded as a joint endeavour, the longer the relationship endures, the closer the economic union, the greater will be the presumptive claim to equal standards of living upon its dissolution (see Rogerson, "Judicial Interpretation of the Spousal and Child Support Provisions of the Divorce Act, 1985 (Part I)", *supra*, at pp. 174-75). [At 870; emphasis added.]

[48] In *Bracklow*, decided in 1999, the Supreme Court adopted very different terminology and reasoning. As noted by Professor Carol Rogerson, ("Spousal Support Post-*Bracklow*", (2001) 19 C.F.L.Q. 185) at 198, the facts of *Bracklow* were atypical: the parties had married (each for the second time) in 1989 after cohabiting for four years. They separated in 1992, at which time the wife was 43 years old. At the beginning of their relationship at least, they had structured their expenses fairly separately. The wife ceased full-time employment in 1989 because of health problems and became seriously ill after 1991. By the time of the divorce in 1995, she was subsisting on support payments of \$400 per month and CPP disability benefits of \$787, while Mr. *Bracklow* was earning approximately \$44,000 per annum.

[49] At trial, the wife was found not to have a compensatory claim since her hardship had not been caused by the marriage or its breakdown; nor had she given up financial opportunities because of child-rearing responsibilities. The trial court ordered that spousal support should continue for another 18 months, but only because Mr. *Bracklow* had agreed to it.

[50] Professor Rogerson summarizes the circumstances that accrued by the time of the final appeal and characterizes the issue before the Supreme Court thus:

although the case was technically one in which no entitlement to support was found, *de facto* it was a case of transitional or time-limited support for approximately four years after the date of the separation. An appeal to the British Columbia Court of Appeal was dismissed, and the case then made its way to the Supreme Court of Canada. Mr. *Bracklow* had remarried and, as a result of a move to gain new employment, his wife had been required to terminate her long-term employment. At the time of the hearing before the Supreme Court of Canada, although employable, she was still unemployed. Mr. *Bracklow*'s income, however, had increased significantly to approximately \$70,000 per year.

Given the nature of the trial judge's ruling, the issue that the Bracklow case placed before the Supreme Court of Canada was one of entitlement. Narrowly framed the issue was whether a sick or disabled spouse was entitled to spousal support. However, the Court clearly chose to frame the issue more broadly in terms of non-compensatory support in general: was there a non-compensatory basis for spousal support? Could a spouse experiencing economic need claim spousal support even if he or she could make no claim that financial opportunities were given up because of the relationship and the roles adopted during its course or that he or she had contributed to the other spouse's financial success? The focus of the judgment is not only on sick and disabled spouses, but on needs-based support more generally. [At 197-8.]

[51] I do not propose to attempt to describe all the important aspects of the Court's reasons, given by McLachlin J., as she then was, in Bracklow. It has been the subject of much judicial comment and of many learned articles, including Rogerson, *supra*; V. Jennifer MacKinnon and E. Jane Murray, "Magical Mystery Tour': Seeking Consistency in Spousal Support Awards", (2004) 22 CFLQ 215; and Miriam Grassby, "Two Income Couples: Presumption of Need for the Lower Income Spouse", (2004) 20 Can. J. Fam. L. 321. Two important aspects of Bracklow, however, are noteworthy for purposes of the case at bar. First, as is well-known, the Court found support for the non-compensatory model of support in s. 15.2 of the Divorce Act and s. 89(1)(d) and (e) of the Family Relations Act. McLachlin J. reasoned that:

... Even if a spouse has foregone no career opportunities or has not otherwise been handicapped by the marriage, the court is required to consider that spouse's actual ability to fend for himself or herself and the effort that has been made to do so, including efforts after the marriage breakdown. Similarly, "economic circumstances" (s. 89(1)(e)) invites broad consideration of all factors relating to the parties' financial positions, not just those related to compensation. The same may be said for the broad injunction of the Divorce Act that the court consider the "condition, means, needs and other circumstances of each spouse". To be sure, these factors may support arguments based on compensation for what happened during the marriage and its breakdown. But they invite an inquiry that goes beyond compensation to the actual situation of the parties at the time of the application. Thus, the basic social obligation model may equally be seen to occupy the statutory provisions.

Section 15.2(6) of the Divorce Act, which sets out the objectives of support orders, also speaks to these non-compensatory factors. The first two objectives -- to recognize the economic consequences of the marriage or its breakdown and to apportion between the spouses financial consequences of child care over and above child support payments -- are primarily related to compensation. But the third and fourth objectives are difficult to confine to that goal. "[E]conomic hardship . . . arising from the breakdown of the marriage" is capable of encompassing not only health or career disadvantages arising from the marriage breakdown properly the subject of compensation (perhaps more directly covered in s. 15.2(6)(a): see Payne on Divorce, *supra*, at pp. 251-53), but the mere fact that a person who formerly enjoyed intra-spousal entitlement to support now finds herself or himself without it. Looking only at compensation, one merely asks what loss the marriage or marriage breakup caused that would

not have been suffered but for the marriage. But even where loss in this sense cannot be established, the breakup may cause economic hardship in a larger, non-compensatory sense. Such an interpretation supports the independent inclusion of s. 15.2(6)(c) as a separate consideration from s. 15.2(6)(a). Thus, Rogerson sees s. 15.2(6)(c), "the principle of compensation for the economic disadvantages of the marriage breakdown as distinct from the disadvantages of the marriage", as an explicit recognition of "non-compensatory" support ..

Similarly, the fourth objective of s. 15.2(6) of the Divorce Act -- to promote economic self-sufficiency -- may or may not be tied to compensation for disadvantages caused by the marriage or its breakup. A spouse's lack of self-sufficiency may be related to foregoing career and educational opportunities because of the marriage. But it may also arise from completely different sources, like the disappearance of the kind of work the spouse was trained to do (a career shift having nothing to do with the marriage or its breakdown) or, as in this case, ill-health.

In summary, nothing in the Family Relations Act or the Divorce Act suggests that the only foundations for spousal support are compensatory. Indeed, I find it difficult to confine the words of the statutes to this model. It is true that in 1986 the Divorce Act was amended to place greater emphasis on compensation. This represented a shift away "to some degree" from the "means and needs" approach of the 1968 Act: *Payne on Divorce*, supra, at p. 267. But while the focus of the Act may have shifted or broadened, it retains the older idea that spouses may have an obligation to meet or contribute to the needs of their former partners where they have the capacity to pay, even in the absence of a contractual or compensatory foundation for the obligation. Need alone may be enough. More broadly, the legislation can be seen as a sensitive compromise of the two competing philosophies of marriage, marriage breakdown, and spousal support.

. . .

. . . contract and compensation are not the only sources of a support obligation. The obligation may alternatively arise out of the marriage relationship itself. Where a spouse achieves economic self-sufficiency on the basis of his or her own efforts, or on an award of compensatory support, the obligation founded on the marriage relationship itself lies dormant. But where need is established that is not met on a compensatory or contractual basis, the fundamental marital obligation may play a vital role. Absent negating factors, it is available, in appropriate circumstances, to provide just support. [At paras. 40-3, 49; emphasis added.]

[52] The second meta-principle relevant here is the Court's emphasis - in contrast to the analysis in *Moge* - on the need to weigh and balance various factors, not choosing one theory of support over the other. Thus the Court stated in *Bracklow*:

Both the mutual obligation model and the independent, clean-break model represent important realities and address significant policy concerns and social values. The federal and provincial legislatures, through their respective statutes, have acknowledged both models. Neither theory alone is capable of achieving a just law of spousal support. The importance of the policy objectives served by both models is beyond dispute. It is critical to recognize and encourage the

self-sufficiency and independence of each spouse. It is equally vital to recognize that divorced people may move on to other relationships and acquire new obligations which they may not be able to meet if they are obliged to maintain full financial burdens from previous relationships. On the other hand, it is also important to recognize that sometimes the goals of actual independence are impeded by patterns of marital dependence, that too often self-sufficiency at the time of marriage termination is an impossible aspiration, and that marriage is an economic partnership that is built upon a premise (albeit rebuttable) of mutual support. The real question in such cases is whether the state should automatically bear the costs of these realities, or whether the family, including former spouses, should be asked to contribute to the need, means permitting. Some suggest it would be better if the state automatically picked up the costs of such cases. However, as will be seen, Parliament and the legislatures have decreed otherwise by requiring courts to consider not only compensatory factors, but the "needs" and "means" of the parties. It is not a question of either one model or the other. It is rather a matter of applying the relevant factors and striking the balance that best achieves justice in the particular case before the court.

...

Moge, *supra*, sets out the method to be followed in determining a support dispute. The starting point is the objectives which the Divorce Act stipulates the support order should serve: (1) recognition of economic advantage or disadvantage arising from the marriage or its breakdown; (2) apportionment of the financial burden of child care; (3) relief of economic hardship arising from the breakdown of the marriage, and (4) promotion of the economic self-sufficiency of the spouses: s. 15.2(6). No single objective is paramount; all must be borne in mind. The objectives reflect the diverse dynamics of the many unique marital relationships.

Against the background of these objectives the court must consider the factors set out in s. 15.2(4) of the Divorce Act. Generally, the court must look at the "condition, means, needs and other circumstances of each spouse". This balancing includes, but is not limited to, the length of cohabitation, the functions each spouse performed, and any order, agreement or arrangement relating to support. Depending on the circumstances, some factors may loom larger than others. In cases where the extent of the economic loss can be determined, compensatory factors may be paramount. On the other hand, "in cases where it is not possible to determine the extent of the economic loss of a disadvantaged spouse . . . the court will consider need and standard of living as the primary criteria together with the ability to pay of the other party": *Ross v. Ross* (1995), 168 N.B.R. (2d) 147 (C.A.), at p. 156, per Bastarache J.A. (as he then was). There is no hard and fast rule. The judge must look at all the factors in the light of the stipulated objectives of support, and exercise his or her discretion in a manner that equitably alleviates the adverse consequences of the marriage breakdown.

... The judge must consider them all, and any or all of them may figure in the ultimate order, as may be appropriate in the circumstances of the case. [At paras. 32, 35-7; emphasis added.]

Similar remarks were made at 450-2 concerning the determination of quantum and duration of spousal support.

[53] Professor Rogerson is critical of both of these broad aspects of Bracklow, suggesting inter alia that it provides a "confused grounding for non-compensatory support" (at 203); that "discretion rules the day" (at 219); that the "institutional" view of spousal support enunciated in Bracklow is at odds with "the clear statement in Moge that marriage itself does not create an entitlement to support" (at 203); and that if a degree of interdependency in the spouses' finances during the marriage is to trigger non-compensatory support, support will be ordered in virtually every case: no 'clean break' will occur. In Professor Rogerson's words:

... most relationships will demonstrate some degree of interdependency during the course of cohabitation, and this analytic step will be almost meaningless and redundant. Indeed McLachlin J. establishes a presumption of interdependency during the on-going relationship, and it will be the rare relationship where there has been no interdependency during the course of the relationship.

However, there is little explanation of why these obligations and expectations of mutual support that one finds in most on-going marriages should continue after the marriage is over. Indeed this is a crucial question that has been at the centre of theoretical debates about the legitimacy of imposing spousal support obligations after a marriage has been terminated. Nor is anything said about what one should be looking for in particular relationships that will determine the extent of the post-marital obligation of mutual support. Is it the length of the relationship? Is it the degree of interdependency that existed? Is it, as the Court suggests in some of its language, a set of expectations and understandings between the parties with respect to the permanency of their obligations of mutual support? ...

The implication of [the] shift in focus from marriage in the abstract to individual marriages is that the difficult choices or balances to be made between competing support principles will be resolved simply by looking at the individual marriage itself, to determine its particular mix of elements of independent and interdependency. However ... the facts of individual marriages, in particular the presence of interdependency during the course of the marriage - which most marriages will manifest - will not determine support outcomes. Decisions will still have to be made about the applicable principle or mix of principles post-divorce - promoting self-sufficiency, compensating spouses for the economic impact of the marriage, and recognizing prior patterns of interdependency. And what is clear in the Bracklow judgment is that the Court wants to say as little as possible about how the appropriate mix or balance of principles is determined. [T]he situation we are left with post-Bracklow is that, to the extent that the facts of particular cases are not as determinative of support outcomes as the Court would have us believe, the significant decisions involving the appropriate "balancing" of competing values and policies are to be made by trial judges in an almost unreviewable exercise of discretion. [At 204-7; emphasis added.]

[54] It is not for me to comment on such criticisms, and indeed, it may be that an approach based on a court's view of fairness in the particular case before it is preferable to reliance on some model or doctrine designed for 'typical' cases. However, I think I may properly agree with Rogerson's observation that Canadian courts post-Bracklow have tended to "simply fall

back on the conventional concepts of needs and means and self-sufficiency in a search for results that appear fair and just" and essentially to resolve the question of entitlement to support as a matter of principle, by making an award and adjusting it in terms of amount or duration to fit the court's view of what seems fair in the circumstances. Again as Rogerson observes:

The extent of the support awarded under the Bracklow framework will ultimately depend on how need is interpreted and how need is balanced with a host of other factors, such as the length and nature of the relationship and the value of allowing the payor to move on with his life and take on new commitments.

...

With Bracklow's clear recognition of non-compensatory support, entitlement is effectively no longer a serious issue in spousal support. Even if there is no compensatory basis for support, "need alone may be enough" to ground an award of support; and if need is interpreted broadly to cover any significant drop in standard of living, the basis for entitlement is very broad. Spousal support law was already moving in this direction after Moge, but Bracklow has confirmed the trend. Quinn J. of the Ontario Superior Court of Justice recognized the disappearance of entitlement as a serious issue in the following statement from his judgment in *Keller v. Black* [(2000) 182 D.L.R. (4th) 690]:

It seems that Bracklow has taken us to the point where any significant reduction in the standard of living of a spouse, resulting from marriage breakdown will warrant a support order - with the quantum and/or duration of the support being used to tweak the order so as to achieve justice in each case.

[At 223; emphasis added.]

[55] In my view, the Court's comments in *Keller v. Black* aptly describe the approach that has been adopted in this province as well. In addition, this court, like many other provincial appellate courts, has expanded the concept of "need" far beyond what is necessary to ensure that the applicant for support will not become a burden on "the government". (Bracklow, at para. 23.) In *Yemchuk*, for example, the Court reasoned:

In considering the concept of "need" in the context of a long-term marriage involving a sharing of resources, I am satisfied that it should take into account the relative standards of living of the spouses following the marriage breakdown. In many cases, like this one, where the parties have relatively modest assets at their disposal and no realistic prospect of increasing those assets given their retirement (and pending retirement), it is often not possible to replicate the standard of living enjoyed by the parties when they were living together. The most a support order can do is to attempt to alleviate a significant disparity in their relative standards of living following marriage breakdown.

While equalization of the standards of living of the parties is not a stated objective of spousal support, in long-term marriages in which the parties have approached their roles as a partnership where each contributed their various resources, both economic and non-economic, to the relationship, equality of standard of living (which is not the same as equality of income) may well be the just result. (I leave aside those cases in which the parties, or one of them, are wealthy, since other considerations may apply.)

In the result, I am satisfied that, not only was there a compensatory aspect to Mr. Yemchuk's claim for support which was overlooked by the trial judge, but that Mr. Yemchuk also demonstrated a need for support, taking into account the economic consequences of the marriage breakdown, and the significant disparity in the relative standards of living of the parties following the breakdown. [At paras. 49-51; emphasis added.]

[56] In *Chutter v. Chutter* 2008 BCCA 507, the parties had been married for 28 years. The wife had qualified as a dental hygienist and the husband as a chartered accountant, but in 1981, both quit their jobs and embarked on what became a very successful business. Both devoted substantial time and effort to the business and in 1982, their son was born. In 1985, the wife returned to work as a dental hygienist for one day per week and also continued on with the parties' practice of buying old homes and renovating them. She later increased her hygienist work to three days per week (para. 17) and the parties separated permanently in 2003. Their financial affairs had been 'intertwined', in that both had deposited their paycheques from time to time into a joint account during the marriage. They agreed on the division of their assets, the husband receiving 70% of the operating business (which was valued at over \$2,000,000 as a whole) and the wife 30%, and the wife receiving the former matrimonial home, valued at \$1,950,000.

[57] The wife in *Chutter* sought spousal support on the basis that she had been economically disadvantaged by her role in the marriage and by its breakdown, and that she was entitled to support on the basis of need "because her standard of living was not equivalent to that which she enjoyed in her marriage and was far below that of the respondent's because of his ability to earn and the nature of the assets he received." The trial judge rejected this claim. He observed that since each party had assets worth over \$4,000,000, the property settlement could provide both parties with a "comfortable standard of living equivalent to the marital standard of living." He also ruled that although the wife had interrupted her career as a hygienist for several years to take care of the parties' son, she had resumed that career and there was "no basis to conclude that she lost the opportunity to train for a higher paying job because of her contribution to the marriage."

- [58] On appeal, Madam Justice Rowles for the Court reviewed Bracklow, Yemchuk, Tedham v. Tedham 2005 BCCA 502, Hodgkinson v. Hodgkinson 2006 BCCA 158, and a decision of the Ontario Court of Appeal, Fisher v. Fisher 2008 ONCA 11. All of these had suggested that "need" and "self-sufficiency" are relative terms to be assessed "in relation to the economic partnership the parties enjoyed and could sustain during cohabitation, and that they can reasonably anticipate after separation" (Fisher, at para. 53).
- [59] This court held in Chutter that the wife was entitled to compensatory support on the basis that she had been economically disadvantaged, and her husband advantaged, by the marriage and its breakdown. (Para. 82.) At the same time, the Court went on to comment with respect to non-compensatory support that the trial judge had taken an "impermissibly narrow" view of need, contrary to cases such as Yemchuk and Hodgkinson. (Para. 88.) Rowles J.A. emphasized that the wife would have to encroach on her capital to maintain a standard of living comparable to that enjoyed during the marriage, and that because of her medical problems, she was prevented from working more than three days per week. By contrast, the husband's income and income-earning capacity were substantial. (Para. 96.) Thus, the Court ruled, the wife had made out a case for spousal support on a non-compensatory basis as well. The Spousal Support Advisory Guidelines were referred to in determining that an award of \$2,800 per month would be appropriate.
- [60] We have not been referred to any decision of this court, however, in which spousal support was awarded solely on the basis of disparity in incomes, or even solely on the basis of the non-compensatory model. (Here I am setting aside cases such as Hodgkinson, supra, in which one spouse is very wealthy or earns a very high income and can easily contribute to the other's support without affecting his or her standard of living in any significant way.) I do note one decision of the Ontario Court of Appeal, Farrar v. Farrar (2003) 63 O.R. (3d) 141, in which the husband claimed spousal support for a period of approximately 12 months between the date of separation and his wife's retirement. (See para. 55.) During that period, he was living in a one-bedroom basement apartment on pension income of \$37,000 per year while his wife was still earning approximately \$74,000 as a teaching instructor. The trial judge had ordered the wife to pay her former husband the sum of \$12,000 solely on the basis that Mr. Farrar "was in need and [the wife] had the ability to pay." The Court of Appeal, per Charron J.A., as she then was, allowed the wife's appeal from this part of the award, stating that "the differential in income alone did not provide a basis for awarding spousal support." (See para. 60.)
- [61] The question of equalization of incomes was addressed more fully by the Alberta Court of Appeal in Griffiths v. Griffiths 2011 ABCA 359. The facts of that case had many similarities to the facts here: after a 24-year marriage without children, the husband sought spousal support in order to maintain the "comfortable lifestyle and spending habits which he had before the couple separated." (Para. 2.) Like the trial court, the Court of Appeal rejected this claim. In the analysis of the Court:

We cannot find any principled way to support his claim. Nor could the chambers judge, to whom we owe appellate deference. Equalization of incomes, or even of lifestyles, is not a basis alone for non-compensatory spousal support. Still less is equalization of incomes each year. See *Luke v. Luke* [1997] 10 W.W.R. 68, 118 Man. R. (2d) 68, paras. 19-20 (C.A.). Loss of access to the fruits of the respondent's future labour is not a recognized underpinning to entitlement to spousal support, absent other considerations.

The Court also addressed the husband's assertion of "need", stating:

To call the small and temporary drop in lifestyle now experienced by the appellant a disadvantage stemming from the breakup of the marriage, first inflates the notion of need. And then it blurs the distinction between compensatory and non-compensatory support. In some divorces, indeed many, both grounds may operate together. But not here; this is not a claim to compensatory spousal support. That some divorces feature both elements does not mean that the two elements are not distinct.

And desire to keep up the full lifestyle enjoyed before separation is not the same as enough need to justify non-compensatory support.

Why would one spouse here be entitled to support and the other not? Only because the respondent's income is bigger. If the identical arguments did not apply to each former spouse here, then in considerable part it would be because the two spouses made different choices as to how to receive and then to invest their respective shares of the matrimonial property. There should be no penalty for that. The whole point of such a property division is to end the sharing in each other's property, and let each plan for the future. [At paras. 10-12.]

[62] Obviously, the question of 'equalization of lifestyles' is one on which trial and appellate courts across Canada hold differing views.

The Case at Bar

[63] Perhaps understandably, counsel in the case at bar did not attempt in their arguments to resolve the competing principles as they might apply to Mr. Lee's claim for support. In his factum, Mr. Lee relied on *De Beeld v. De Beeld* 1999 BCCA 515, *McEachern v. McEachern* 2006 BCCA 508, and *W. v. W.*, all of which clearly invoked the compensatory model in awarding support. Martinson J. noted at para. 12 of *W. v. W.* that "the rough equivalency of standard of living approach has operated as a workable substitute to assess compensatory claims." If nothing else, counsel's references to these cases illustrates the rarity of instances in which this court has relied solely on a disparity in incomes to award spousal support.

[64] For her part, counsel for Ms. Lee relied strongly on the facts as found by the trial judge, as well as his inability to reach firm conclusions regarding Mr. Lee's income or what had become of much of the money he had borrowed. Ms. Mihoc also submitted that in fact the standard of living enjoyed by the Lees during their marriage was "illusory" - it was built on a continuing cycle of debt and refinancing which Mr. Lee managed, evidently without his

wife's knowledge. I would add that Mr. Lee was not paying income tax on his earnings - a state of affairs that we should not assume will continue. As well, Ms. Mihoc submitted that in practical terms, Mr. and Ms. Lee are living in comparable circumstances, thanks in Mr. Lee's case to his relationship with a new partner with whom he lives in a condominium in Surrey and who earns \$70,000 to \$90,000 in base pay. (Ms. Lee lives in a condominium of similar size and location, having borrowed the down payment from her mother.)

- [65] If Mr. Lee had not formed this new relationship, the case law in British Columbia would have permitted an award of spousal support to him, given the length of the parties' marriage (which presumably creates interdependence) and the expansion of the meaning of "need" in the family law context. But whether it would have been a "material error" in law or a wrong exercise of discretion to refuse support in such circumstances is another matter. To rule as a matter of law that Mr. Lee should be compensated indefinitely for the "loss" of the ability to share in Ms. Lee's income and lifestyle would, taken to its logical conclusion, mean that support must be ordered on one model or the other in virtually every case that comes before the court. The concept of need (in the true sense) of the applicant spouse would be supplanted by the sole criterion of the respondent spouse's ability to pay. Marriage would, contrary to what was said in *Moge*, automatically entitle a spouse to the standard of living enjoyed during the marriage, or as much as the payor could afford. I respectfully agree with Professor Rogerson's suggestion, and with the Court in *Griffiths*, *supra*, that this cannot be correct. A 'clean break' is clearly possible in this case, and again as stated in *Moge*, the mere fact of marriage or its breakdown does not activate a "general tool of redistribution." As far as I am aware, this principle has not been overruled.
- [66] At the same time, the case law of this province referred to above does indicate that a party who experiences a marked decline in standard of living due to divorce should receive some financial assistance (either in the form of re-apportionment of assets or maintenance) in adjusting to his or her new situation - hence the concept of a "transitional" award, which is recognized by the SSAG. Such awards have regularly been made in favour of women, but rarely in favour of men, perhaps reflecting that, as Rogerson suggests, "Non-compensatory support is significantly structured by social norms of what is fair and just. The economic dependency of husbands on wives is not reinforced and naturalized by strong cultural norms, as is the dependency of wives on husbands ...". (At 234-5.) It seems to me that, setting aside for the moment the support already paid by Ms. Lee from August 1, 2012 to June 1, 2013, Mr. Lee could have expected some transitional award, if only on the "principle" that what is sauce for the goose is sauce for the gander. As it is, Ms. Lee did pay a total of \$17,500 to Mr. Lee, presumably assisting him in adjusting to his new circumstances.
- [67] Normally, one would refer to the SSAG to help determine an appropriate amount and duration of a transitional order. In this case, however, I am inclined simply to order that Mr. Lee not be required to repay the \$17,500 to Ms. Lee (assuming that it has not been repaid.) As noted earlier, Mr. Lee is in fact enjoying a standard of living very similar to Ms. Lee's at present, and the standard enjoyed during the marriage was at best "illusory" and doomed to

come to an end sooner or later. A slight re-apportionment of the assets was made in the husband's favour, and he continues, I gather, to work only part-time. In all the circumstances, I conclude that the trial judge should not have ordered the repayment of this amount to the wife. In effect, this equates to a transitional award of \$17,500 - the rough equivalent of what Mr. Lee claims to earn in 18 months. With this one exception, I am unable to say the court below erred in declining to order the payment of spousal support to the husband or in the re-apportionment of the family assets and debts of the parties.

[68] Subject to the exception I have mentioned, I see no material error in the trial judge's reasoning and I am satisfied his order effected a result that is within the bounds of fairness and reasonableness. I would allow the appeal only to the extent of deleting the obligation of Mr. Lee to repay the \$17,500 to Ms. Lee.

[69] In recognition of the fact Ms. Lee has been the substantially successful party on this appeal, I would suggest that she should receive 90% of her costs unless counsel choose to make written submissions to us within 30 days.

"The Honourable Madam Justice Newbury"

I AGREE:

"The Honourable Mr. Justice Groberman"

Reasons for Judgment of the Honourable Madam Justice Bennett:

[70] I have had the opportunity to review the reasons for judgment of Madam Justice Newbury. I agree with her reasons and conclusions with one exception. I would not interfere with the trial judge's order that Mr. Lee repay the \$17,500 in voluntary spousal support to Ms. Lee.

[71] The trial judge was not satisfied that Mr. Lee was entitled to spousal support on any basis. There are, however, cases that suggest that one spouse, who is not otherwise entitled to spousal support but will suddenly have a reduced income, should, in some circumstances, receive a payment of spousal support for a short period in order to ease the transition from two incomes to one.

[72] I take no issue that such an order is appropriate, depending on the facts of the case.

[73] In this case, the trial judge attributed income to Mr. Lee in the amount of \$50,000 to \$60,000. If that was the end of the evidence, I would agree that Mr. Lee should have a period of transitional spousal support. I agree with Newbury J.A.'s comment that what is sauce for the goose is sauce for the gander.

[74] In my respectful opinion, however, there is an additional factor that should weigh against Mr. Lee in terms of receiving temporary "needs" based support. Mr. Lee has been living with another woman since the time he left Ms. Lee. This woman, a police officer, has her own home and earns in the range of \$75,000 to \$90,000 base pay. The exact sum is unknown, as she would not disclose it to the court. The trial judge concluded that "the economic effect of

a new relationship should be taken into account when assessing a needs-based application for support" (para. 100).

[75] In my respectful view, the reasons of the trial judge do not "disclose an error in principle, a significant misapprehension of the evidence, [nor is the award] clearly wrong" (Hickey at para. 11).

[76] I would dismiss the appeal.

"The Honourable Madam Justice Bennett"

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