
CANADA / JUDGMENT

Lupien v. LeBlanc

2019 BCSC 431

COURT

Supreme Court of British Columbia

DECIDED

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2019 BCSC 431 Lupien v. LeBlanc

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Lupien v. LeBlanc,

2019 BCSC 431

Date: 20190326

Docket: E50652

Registry: New Westminster

Between:

Melanie Catherine Delma Lupien

Claimant

And

Brien Joseph LeBlanc

Respondent

Before: The Honourable Madam Justice Burke

Reasons for Judgment

Counsel for the Claimant:

J.J. Hittrich

Counsel for Respondent:

P. Cote

Place and Date of Trial:

Vancouver, B.C.

September 10-14, 2018

November 18, 2018

Place and Date of Judgment:

New Westminster, B.C.

March 26, 2019

INTRODUCTION

- [1] This family law matter arises out of the breakdown of a 15-year common-law relationship. The relationship began in September 2000. There is some dispute as to whether it terminated in April or December 2015.
- [2] Melanie Lupien, the claimant, seeks spousal support and equal division of family property.
- [3] Brian LeBlanc, the respondent, filed a counterclaim seeking unequal division of family property. He also maintains that certain property was owned prior to the relationship and is excluded property within the definition of s. 85 of the Family Law Act, S.B.C. 2011, c. 25 [FLA]. In the alternative he argues that the property should be unequally divided based on an oral agreement entered into between the parties at the commencement of their cohabitation that the claimant would make no claim to the property in the event of a separation.
- [4] With respect to spousal support, Mr. LeBlanc says that the parties lived economically independent lives during the relationship. On breakdown, they retained their economic independence and as such, no spousal support should be awarded.

ISSUES

- 1. What is the appropriate division of family assets and debt between the parties?
 - (a) Did the parties enter into an oral agreement that may be considered under s. 95(2)(b) of the FLA?
 - (b) Is equal division of the Family Home "significantly unfair"?
- 2. What is the appropriate spousal support in the circumstances of the case?

BACKGROUND

- [5] Ms. Lupien is presently 50 and Mr. Leblanc is 55.

- [6] Ms. Lupien separated from her husband of five years in 1996 or 1997. She met Mr. LeBlanc on her birthday: July 6, 1998. At the time, Mr. LeBlanc had also separated from his wife and had two young children. Ms. Lupien indicated that she helped Mr. LeBlanc move into the house he had purchased in Surrey in the summer of 1998 and that they commenced an intimate relationship by September 1998.
- [7] Ms. Lupien and Mr. LeBlanc began a marriage-like relationship in September 2000 when Ms. Lupien moved into Mr. LeBlanc's home on 68th Avenue, in Surrey (the "Family Home"). Mr. LeBlanc was of the view that the move-in date was in 2001 or 2002, but could not be more specific. Ms. Lupien recalls the specific move-in date as she had moved her belongings from a duplex in Cloverdale to a storage facility. She was able to locate a receipt from that facility which confirms the date. I therefore conclude the marriage-like relationship began in September 2000.

When did the parties separate?

- [8] There is disagreement as to when the parties separated. Each has a different account of the breakdown in the relationship.
- [9] The relationship deteriorated in early 2015. Amongst other matters, Mr. LeBlanc had not yet obtained a divorce from his wife despite having separated in the 1990s. While Mr. LeBlanc and Ms. Lupien did discuss marriage, Mr. LeBlanc did not wish to provoke his wife with talk of a divorce as he was concerned that she would ask for more child support. This appeared to be a recurring issue throughout the relationship.
- [10] Mr. LeBlanc indicated that in early 2015, he discovered text messages on Ms. Lupien's phone from another male. This caused him concern and suspicion. Ms. Lupien told Mr. LeBlanc that she had an "emotional but not physical attachment" to this man, who she had met through work. This dispute led to Ms. Lupien's departure from the Family Home in April 2015. She left with clothes in a suitcase to live in a friend's basement suite.
- [11] Ms. Lupien testified that she desired counselling and simply wanted to get away for a period of time to figure out the issues between the parties. She was adamant that she did not "move out," although during this period, she stopped paying the utility bills that she had regularly paid - BC Hydro, Terasen Gas, and with one exception, the Shaw cable bills. Mr. LeBlanc said he treated this as the separation date as he assumed she had "left for good". Mr. LeBlanc maintains that he was of the view that the relationship was over and he went on some dates.
- [12] In order to find there has been a separation, jurisprudence requires the Court must find, first, an intention of one spouse to repudiate or end the marital relationship and, second, action consistent with that intention (or a "settled intention"): *Y.T.C. v. J.C.V.*, 2018 BCSC 733 at para. 22. For the reasons that follow, I do not find that Mr. LeBlanc had a settled intention to live separate and apart from Ms. Lupien as of April 2015.

- [13] Ms. Lupien said that after April 2015, she regularly returned to the Family Home, and assisted with administrative tasks for Mr. LeBlanc's landscaping company, Oasis West Land Designs Ltd. ("Oasis"). The parties also went on a camping trip with friends.
- [14] In addition, the parties engaged in regular marriage counselling in September 2015. This continued through the fall. Ms. Lupien testified that their relationship appeared to be improving as a result of the counselling. Mr. LeBlanc did not deny this and willingly participated in all these events. Ms. Lupien said she had invested 17 years in the relationship and did not want to easily leave or lose the relationship.
- [15] The couple travelled to Edmonton in 2015 for Christmas to visit Ms. Lupien's family. However, a major argument concerning the other man arose while the couple were at a hockey game. This precipitated the final separation. Upon returning to Vancouver on December 30, Ms. Lupien left the Family Home. No further attempts at reconciliation took place.
- [16] In view of all the above, I conclude that the parties finally separated on December 31, 2015.

POSITIONS OF THE PARTIES

Family Assets

- [17] Two major assets are at issue between the parties.
- [18] The first and most significant asset is the Family Home. The property was purchased in September 1998 by Mr. LeBlanc and his friend, Mr. Peterson, for \$170,000 and encumbered with a \$166,000 mortgage. Mr. LeBlanc and Mr. Peterson were on title as joint owners of the property. While the claimant alleges that Mr. Peterson was on title only for the purposes of securing a mortgage for the original purchase of the property, Mr. LeBlanc says that he purchased the property with Mr. Peterson as a joint investment and that he bought out Mr. Peterson's interest in the property in 2004 for approximately \$20,000. Mr. Peterson agrees with this characterization of the property purchase.
- [19] The parties agree that the fair market value of the property as of August 10, 2018 is \$925,000. At present, the charges against the property are approximately \$109,528, leaving equity in the house of \$815,472.
- [20] The second asset in dispute is Mr. LeBlanc's landscaping business, Oasis. There is a dispute as to the value of Oasis. The claimant maintains that she contributed to the success of the business and is entitled to one-half of its value. Mr. LeBlanc maintains that since all of Oasis's revenue is dependent on himself and the business does not have value without him, any value that the business has should be reflected in Mr. LeBlanc's income for spousal support purposes and not divided as a family asset.

Family Debts

[21] On the date of separation, Ms. Lupien testifies that she had family debts of \$27,800. This included a CIBC Visa debt of \$9,000, a CIBC line of credit debt of \$15,000, an RBC MasterCard debt of \$1,200, a Canadian Tire MasterCard debt of \$2,000, and a Hudson's Bay MasterCard debt of \$600. Ms. Lupien concedes that part of the line of credit was drawn down to assist her elderly father in the amount of about \$800 and that she may personally assume this debt. Ms. Lupien therefore seeks an adjustment of \$13,500, which is half of the remaining \$27,000 in family debt.

1. What is the appropriate division of family assets and debts between the parties?

The Family Home

[22] It is agreed that the main family asset is the Family Home purchased by Mr. LeBlanc and Mr. Peterson in September 1998 for \$170,000 with a mortgage of \$166,000. Ms. Lupien says that Mr. LeBlanc only contributed 50% towards the down payment which means that his portion of the initial equity was as low as \$2,000. Ms. Lupien moved into the home in September 2000. The balance of the mortgage as of December 31, 2000 was \$158,821.29. The equity at that time would therefore be \$11,179 of which Mr. LeBlanc's half was \$5,559.50, or close to \$6,000. Ms. Lupien concedes it is not unreasonable to credit Mr. LeBlanc with this amount from the current equity or net sale proceeds.

[23] At the time of separation on December 31, 2015, the encumbrances on the Family Home, being the mortgage and line of credit, totalled \$109,528.56. The most recent appraisal of the Family Home valued the home at \$925,000 as at April 8, 2018. This results in a net equity of \$815,471. Ms. Lupien states that certain amounts can be deducted from this equity. This includes \$6,000 for Mr. LeBlanc's share in the home equity as of September 2000, \$11,456 for the mortgage payments (being one-half of the payments from the date of separation to present which are \$22,912), \$3,685 for property taxes (being one-half of the payments from the date of separation to 2018 which are \$7,371), and \$2,385 for house insurance (being one-half of the payments from the date of separation to 2018). Thus, the total deductions agreed to by Ms. Lupien are \$23,526. If this amount is deducted from the net equity of \$815,471, then \$791,945 remains. Ms. Lupien seeks compensation for half of this amount, being \$395,972.

[24] Mr. LeBlanc's position regarding the Family Home is that the parties entered into an oral agreement when Ms. Lupien moved in whereby she agreed that she would have no interest in the home and that 100% of the home would be attributed to Mr. LeBlanc in the event of a separation. As will be discussed further in these reasons, Ms. Lupien denies the existence of such an oral agreement.

- [25] Alternatively, Mr. LeBlanc argues that the oral agreement should be taken into consideration in reapportioning the home in his favour under s. 95(2)(b) of the FLA. He argues that a material change took place in 2004 when he bought out Mr. Peterson's interest and became the full owner of the property. At that point, the property was worth \$250,000. Mr. LeBlanc argues that this entitles him to the exclusion of \$250,000 from the equity in the present property.
- [26] In the further alternative, Mr. LeBlanc argues that if the oral agreement is taken into account, then he is entitled to exclude \$170,000 of the equity pursuant to s. 95(2), as that was the value of the Family Home in 2001 when the parties entered into the oral agreement.
- [27] The parties agree that adjustments should be made to the value of the property to be divided that reflect payments Mr. LeBlanc has made on the property since the date of separation and his share in the home equity as of September 2000. These payments total \$47,052 and each party will be responsible for half, or \$23,526. The breakdown of these payments is stated in para. 22, above.
- (a) Did the parties enter into an oral agreement that may be considered under s. 95(2)(b) of the FLA?
- [28] As noted in *Doell v. Prentice*, 2018 BCSC 1115 [Doell], under s. 92 of the FLA, parties are entitled to make agreements to divide family property and family debt:
- [76] Under s. 92 of the FLA parties are entitled to make agreements to divide the family property and family debt:
92. Despite any provision of this Part but subject to section 93 [setting aside agreements respecting property division], spouses may make agreements respecting the division of property and debt, including agreements to do one or more of the following:
- (a) divide family property or family debt, or both, and do so equally or unequally;
- (b) include as family property or family debt items of property or debt that would not otherwise be included;
- (c) exclude as family property or family debt items of property or debt that would otherwise be included;
- (d) value family property or family debt differently than it would be valued under section 87 [valuing family property and family debt].
- [77] There are two classes of agreement under the FLA. If the agreement is in writing and signed by each spouse in front of a witness, s. 93 states that the court may set it aside or replace it with an order. The agreement that is in place here is not in writing and was not witnessed. Section 93 has no application.

- [78] The question here falls to be determined under s. 95. That provision calls for equal division of family property or family debt unless an equal division would be "significantly unfair". That term was considered by Butler J. in *Remmem v. Remmem*, 2014 BCSC 1552 at para. 44. As he put it, "significantly is understood to mean more than a regular impact - something weighty, meaningful or compelling."
- [79] The factors governing whether it would be significantly unfair to divide family property or debt are listed in s. 95(2):
- (2) For the purposes of subsection (1), the Supreme Court may consider one or more of the following:
 - (a) the duration of the relationship between the spouses;
 - (b) the terms of any agreement between the spouses, other than an agreement described in section 93 (1) [setting aside agreements respecting property division];
 - (c) a spouse's contribution to the career or career potential of the other spouse;
 - (d) whether family debt was incurred in the normal course of the relationship between the spouses;
 - (e) if the amount of family debt exceeds the value of family property, the ability of each spouse to pay a share of the family debt;
 - (f) whether a spouse, after the date of separation, caused a significant decrease or increase in the value of family property or family debt beyond market trends;
 - (g) the fact that a spouse, other than a spouse acting in good faith,
 - (i) substantially reduced the value of family property, or
 - (ii) disposed of, transferred or converted property that is or would have been family property, or exchanged property that is or would have been family property into another form, causing the other spouse's interest in the property or family property to be defeated or adversely affected;
 - (h) a tax liability that may be incurred by a spouse as a result of a transfer or sale of property or as a result of an order;
 - (i) any other factor, other than the consideration referred to in subsection (3), that may lead to significant unfairness.
- [29] As in *Doell*, the alleged agreement between Mr. LeBlanc and Ms. Lupien is not in writing. As such, s. 93 of the FLA has no application. The question of whether the alleged oral agreement has an impact on the division of family property falls to be determined under the "significantly unfair" analysis in s. 95 of the FLA. Per s. 95(2)(b), the court may consider the terms of any agreement between the spouses, other than a written agreement as defined in s. 93(1).

- [30] I will now turn to whether there actually existed such an oral agreement between the parties.
- [31] Mr. LeBlanc says that when Ms. Lupien moved into the residence, the two discussed the parties' relative contributions to the Family Home. Mr. LeBlanc says that "from day 1," he made clear that this was his house and that he wanted to transfer the value of the house to his kids. Mr. LeBlanc's evidence is that the co-owner, Mr. Peterson, was concerned about Ms. Lupien making a claim on the residence and asked to have a meeting with her before she moved in. Mr. Peterson met with both Ms. Lupien and Mr. LeBlanc in the living room sometime before Ms. Lupien moved into the Family Home. In the conversation between the three of them, Mr. LeBlanc said it was clarified that Ms. Lupien would have "no interest whatsoever" in the Family Home and Mr. LeBlanc would pay all the mortgage and other expenses associated with the Family Home. Mr. LeBlanc said Ms. Lupien "had no reaction" to this and "accepted right away". She did not argue and did not indicate this was unfair. Mr. LeBlanc said he abided by the agreement by paying all of the mortgage, tax and insurance expenses associated with the Family Home.
- [32] Ms. Lupien denied that any conversation occurred with Mr. LeBlanc to the effect that he would take care of the mortgage and property taxes, wished to bestow the property to his children, and she would thereby give up any claim to the property.
- [33] Mr. LeBlanc called a number of other witnesses in support of his claim that this oral agreement existed.
- [34] It is difficult in this case to determine if an oral agreement existed. There is no doubt Ms. Lupien did not contribute to the mortgage payments, property taxes, or insurance. She did, however, pay for the groceries, utilities and assisted with renovations. There is no evidence of a conversation as to what should occur should the parties separate. Rather, the witnesses called on this point affirmed an arrangement where Ms. Lupien paid for things such as groceries but did not pay for the mortgage. None of these witnesses, however, indicated that Ms. Lupien ever said to them, or stated in their presence, that she was giving up any claim to the house.
- [35] From his testimony, Mr. Peterson's concern appeared to be whether he would be getting any rent proceeds from Ms. Lupien as he was, at the time, the part owner of the property. It was in that context that a conversation took place, the full details of which he was not clear on in his evidence. The one aspect of the conversation that he did recall was Mr. LeBlanc saying that he would pay everything associated with the cost of the home - "Melanie" would not have an interest and the house would go to the kids. Mr. Peterson noted that Ms. Lupien had no reaction to this statement, did not protest, and just nodded her head.
- [36] As noted in Doell at para. 71, an agreement under s. 95(2)(b) of the FLA has to be clearly established by the evidence. The evidence in this case does not clearly establish the existence of an agreement. As noted, Ms. Lupien denies the agreement. Her conduct in paying for groceries, utilities and assisting with renovations also belies a clear

understanding that she had no interest in the home. Throughout the relationship, she expressed concerns about maintaining her interest in the property from the perspective of a potential claim from Mr. LeBlanc's wife, to whom he was still married, although separated. This was the nature of her concern.

[37] I therefore find there was no oral agreement and as such, s. 95(2)(b) has no application.

(b) Is equal division of the Family Home "significantly unfair"?

[38] I must now consider whether equal division of the Family Home would be "significantly unfair" under the remaining factors listed in s. 95(2). As stated in Doell, "significant" is understood to mean more than a regular impact, but something weighty, meaningful, or compelling.

[39] The Family Home underwent two significant renovations during the relationship that were paid for in full by Mr. LeBlanc.

[40] In 2004 and 2005, renovations to the upstairs of the house took place including replacing the windows and doors, installing new tiles and flooring, new kitchen countertops and appliances, and new electrical. While Mr. LeBlanc does not have receipts for this work and did much of the work himself, he estimated the cost of this to be about \$20,000.

[41] In 2008 and 2009, more extensive renovations took place to the downstairs of the house. This included all new windows, doors, and flooring, a bathroom, a deck, and the construction of a room, adding 200 square feet to the house. In addition, the front and back yards were landscaped, a new driveway and patio built, and a hot tub installed. Mr. LeBlanc estimated the cost of these renovations to be about \$128,000. Mr. LeBlanc did much of the renovation work himself but also paid his brother and Mr. Peterson for work. He claims that his estimations of the renovation costs are accurate given his experience in the landscaping industry.

[42] Ms. Lupien testified that while she did not contribute funds to the renovation, she did contribute by making lunch for the workers, doing some painting, and cleaning up regularly during the renovation. She found this to be a lot of work.

[43] After separation, Mr. LeBlanc did further renovations. He replaced the roof of the house and shed, improved the backyard, and renovated the upstairs bathroom. He estimates these costs to be about \$24,000.

[44] Mr. LeBlanc argues that his efforts in renovating the Family Home during the relationship and after separation, and his bearing the costs for these renovations, demonstrate that an equal division of property would be significantly unfair and that he should be apportioned a larger share of the house.

[45] Although it is clear that Mr. LeBlanc funded these extensive renovations, it is well-established in the law that the parties' relative contribution to family assets and debts during the relationship is not relevant to the enquiry under s. 95(2) of the FLA. In *Jaszczewska v.*

Kostanski, 2016 BCCA 286 [Jaszczewska] at para. 38, the Court of Appeal noted that it is clear that "the Legislature intended to limit the circumstances in which a departure from equal division of family property could be justified because of unequal contributions to its acquisition, preservation, maintenance or improvement." This is further illustrated in paras. 41 to 44:

- [41] Clearly, the statutory intent is to constrain the exercise of judicial discretion. The test of "significant unfairness" imposes a more stringent threshold than the mere "unfairness" test of the FRA to allow unequal division by a court. As Mr. Justice Butler observed in *Remmem v. Remmem*, 2014 BCSC 1552, "significant" is defined as "extensive or important enough to merit attention" and the term refers to something that is "weighty, meaningful or compelling." He concluded that to justify an unequal distribution "[i]t is necessary to find that the unfairness is compelling or meaningful having regard to the factors set out in s. 95(2)": *Remmem* at para. 44. As the judge here noted at para. 162 of her reasons, the Legislature intended the general rule of equal division to prevail unless persuasive reasons can be shown for a different result. I agree.
- [43] The determination of whether an equal division would be significantly unfair is also guided by a more precise identification of relevant factors than was found in the FRA. Importantly, the Legislature did not include in s. 95(2) the principle of relative contribution found in s. 65(1)(f) of the FRA. Under s. 65(1)(f), a court could consider circumstances relating to the acquisition, preservation, maintenance, improvement or use of property. Section 95(2), by comparison, refers rather narrowly to career contributions (95(2)(c)) and to post-separation increases in value beyond market trends caused by one spouse (95(2)(f)). I agree with the judge's view that if relative contribution to the acquisition, preservation, maintenance or improvement of family property during the relationship was intended to be a significant factor or one frequently relied on in justifying the conclusion that the equal division of family property is significantly unfair, the Legislature would have said so. Allowing relative contribution to become a regular consideration in the context of s. 95 would likely create uncertainty and complexity. This would be contrary to the legislative objectives discussed earlier that underlie the FLA division of property regime.
- [44] Having said that, in enacting s. 95(2)(i) the Legislature recognized that there may be factors other than those listed that could ground significant unfairness. Hence, while the Legislature intended to limit and constrain the exercise of judicial discretion to depart from equal division, it did not provide a closed list of factors and it did not eliminate the discretion. Accordingly, in my view, one cannot read the FLA as abolishing unequal contribution as a factor that may be relevant to reapportionment, although the circumstances in which it may be considered and relied on are intended to be much constrained.
- [46] Cases in which unequal contribution to family expenses and burdens were found to make it significantly unfair to divide family property equally have involved marked, prolonged, and intentional or unexplained disparities in contribution to family burdens: *Nanara v. Nanara*,

2017 BCSC 1447. In Nanara, the trial judge awarded 60% of the family property to the claimant wife based on the respondent husband's unequal contribution. Throughout the 33-year marriage with three children, the wife worked multiple full-time, low-paying jobs, often working 16-hour days. After separation, she maintained both family residences and continued to support one son. In contrast, the husband was continually underemployed throughout the relationship without explanation, made no contributions to the residences after separation, and did not support the children.

- [47] I do not find that the facts of the case at bar involve such a marked, prolonged, and intentional or unexplained disparity and contribution that would lead to a finding of unequal division. The parties lived in a marriage-like relationship in the Family Home from 2000 to the end of 2015. They each contributed to the day-to-day maintenance of the home and enjoyed the renovations carried out by Mr. LeBlanc. Given my prior finding that no oral agreement existed between the parties, there is no basis to find that Ms. Lupien was increasingly "indebted" to Mr. LeBlanc with each enhancement to the Family Home, which they shared as a couple. Similarly, Mr. LeBlanc is not "indebted" to Ms. Lupien for each bill payment that she made. As stated in Jaszczewska, allowing relative contributions to become a regular consideration under s. 95 introduces uncertainty and complexity. I do not find that this is an exceptional circumstance where relative contribution during the relationship should factor into the s. 95(2) enquiry.
- [48] However, a relevant factor is s. 95(2)(f) - whether a spouse, after the date of separation, caused a significant change in the value of the family property or family debt beyond market trends. It is not disputed that Mr. LeBlanc spent about \$24,000 on renovations after separation. Although no evidence was led on the impact of these renovations on the value of the home, I find that it likely had some positive effect.
- [49] I conclude that it is fair in the circumstances that the Family Home be divided equally between the parties.
- [50] I turn now to the amount to be divided. Under s. 85 of the FLA, property that is acquired by a spouse before the relationship between the spouses began is excluded property. However, under s. 84(g)(i), the amount by which the value of excluded property has increased since the start of the relationship is family property subject to the presumption of equal division. The Family Home was purchased in 1998 for \$170,000 and this is the closest estimate of its value in September 2000, when Ms. Lupien moved in. That value should therefore be excluded from the present equity amount of \$815,471, leaving an amount of \$645,471 to be divided between the parties. From any compensation payment to Ms. Lupien, \$23,526 will be deducted, representing half of the payments made by Mr. LeBlanc on the home after separation. I also deduct \$24,000 which Mr. LeBlanc spent on renovations after the separation,

Mr. LeBlanc's Business

Background

- [51] Mr. LeBlanc started his business, Oasis, in 1990. This landscaping business also includes snow clearing and salting in the wintertime. Oasis enters into contracts with property management companies that manage townhouses and condominiums. That business is weather dependent. The tax filings included in Mr. LeBlanc's disclosure indicate that Oasis is a corporation with Mr. LeBlanc as the sole shareholder.
- [52] Ms. Lupien said she assisted Mr. LeBlanc with his business. In the early part of the relationship, Mr. LeBlanc had a number of issues with respect to the Canada Revenue Agency and had not paid his taxes in some time. Ms. Lupien sorted the receipts, entered them into spreadsheets, and worked with an accountant to file taxes for the years 1997 through to 2001. Ms. Lupien said, however, that the business continued to have cash transactions likely between \$7,000 and \$30,000 annually which were not reflected in the financial statements of the company.
- [53] Ms. Lupien also undertook the bookkeeping function for Oasis, where she would prepare the accounts for the accountant and ensure contracts for snow removal were signed and sent out annually. She said she was not paid for that with the exception of four times in the 15 to 17 years of their relationship. Ms. Lupien estimated that this job took up approximately 15 to 20 hours per week. Ms. Lupien also said she occasionally did physical work on job sites for which she was paid \$20 an hour by Mr. LeBlanc.
- [54] In 2008, an outside bookkeeper, Ms. Wanda MacNamara, assisted with the bookkeeping because Ms. Lupien was a juror on a lengthy trial and unable to fully complete these duties.
- [55] Mr. LeBlanc disagreed with this characterization. He said that Ms. Lupien did not have a significant role in the administrative aspect of the business. While he agreed that she typed out invoices and quotes, sent out the snow clearing contracts, and cheques, he was adamant that he did not want Ms. Lupien to organize the company's receipts and perform other tasks for tax season. This was a source of conflict between them during the relationship as Ms. Lupien insisted on helping, but her doing so caused delays. Mr. LeBlanc also denied that Ms. Lupien assisted him on occasion with snow clearing.
- [56] Since the date of separation, Mr. LeBlanc has employed his niece to undertake a similar administrative function that was performed by Ms. Lupien during the relationship. While the niece's hours of employment are limited, her tasks include tasks that Ms. Lupien indicate that she performed during the relationship, including physically working on certain jobs, fetching supplies, and dealing with trades. I therefore conclude Ms. Lupien did assist Mr. LeBlanc in some capacity with his business during the relationship.
- [57] In his 2016 Form 8 Financial Statement, Mr. LeBlanc estimated the value of Oasis's assets at \$75,000. These assets included two bobcats, an excavator, an ATV, two trucks, and various tools and equipment. However, there was no breakdown of the values and no attachments to the 2016 financial statement. Furthermore, no expert valuation or any other documents

were adduced to establish the value of the business as at the date of trial. Mr. LeBlanc's most recent financial statement filed on March 29, 2018 lists Oasis as a business interest but does not state a value.

- [58] Ms. Lupien says that accounting for depreciation, it is not unreasonable to assume that the business assets have a current value of \$60,000. Oasis also has a business bank account at Coast Capital Savings which had a value of \$93,547 as at December 29, 2015, and \$58,766 as at March 9, 2018. There is no evidence of the value of this bank account as at the date of trial. Ms. Lupien says that due to the fluctuating value of the bank account, it should be treated as income for spousal support purposes, and not as a family asset to be divided. Ms. Lupien also testifies that Mr. LeBlanc owns a 2010 Jeep Wrangler with a value of \$15,000 that was not disclosed on the financial statement of Oasis. Ms. Lupien concedes that she owns a 2010 Dodge Caliber that she estimates is worth about \$1,250, though no actual documents were produced to verify the vehicle's value. In all, Ms. Lupien seeks compensation of half of Oasis's purported value less the value of the Dodge Caliber, being \$36,875.
- [59] Mr. LeBlanc maintains that the business cannot be valued separately from the income that he generates through it. He says that the business should not be divided as an asset but only used to calculate his income for spousal support purposes.
- [60] I reject Mr. LeBlanc's characterization of his business and find that Oasis is family property under s. 84(2)(a) of the FLA. Despite the poor disclosure of information and records, I must attempt to value the business to permit the parties finality in this dispute: *Oleksiewicz v. Oleksiewicz*, 2017 BCSC 228 at para. 134.
- [61] Per s. 87 of the FLA, family property must be determined as of the date of trial. It is clear that there is a paucity of evidence to inform me about the value of Oasis at the time of trial. Though Mr. LeBlanc estimated the value of Oasis's equipment at \$75,000 in 2016, he did not disclose a current inventory or equipment list. There is no evidence about the value of the business bank account at the time of trial. The value of the bank account is admitted to fluctuate.
- [62] Mr. LeBlanc has provided a T2 Corporation income Tax Return for Oasis for the 2016 tax year. He reports assets totalling \$65,508, including "machinery, equipment, furniture and fixtures" worth \$6,362 and "construction and excavating equipment" worth \$41,769. The reported liabilities total \$32,131 and include a "chartered bank loan" of \$21,349. It is clear that the assets of Oasis, including equipment and inventory, have some value. On all the evidence, I arrive at a conservative estimate of the value of Oasis of \$30,000. Ms. Lupien is entitled to a 50% compensation payment of \$15,000.
- [63] On the evidence, I cannot fairly or reasonably estimate a value for the business bank account, the Jeep Wrangler, or the Dodge Caliber. I am unable to award a compensation payment in respect of these assets. There are no grounds for me to include the fluctuating value of the bank account into Mr. LeBlanc's income for spousal support purposes.

Family Debt

[64] I accept Ms. Lupien's characterization of the family debts. It is not unfair to divide these debts equally. Ms. Lupien is therefore entitled to a compensation payment of \$13,500 in respect of these debts.

2. What is the appropriate spousal support in the circumstances of the case?

Legal principles

Entitlement

[65] Entitlement to spousal support can be established on three bases: compensatory; non-compensatory; and contractual. In determining entitlement to support s. 161 of the FLA sets out the objectives which include: recognizing any economic advantage or disadvantage; apportioning financial consequences arising from the care of children; relieving any economic hardship of the spouses arising from the breakdown of the relationship; and promoting the economic self-sufficiency of each spouse.

[66] Mr. LeBlanc argues that *Moge v. Moge*, [1992] 3 S.C.R. 813 affirms that marriage does not automatically entitle a spouse to support or guarantee to either party the standard of living enjoyed during the marriage. Furthermore, as per *Chutter v. Chutter*, 2008 BCCA 507, 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. Non-compensatory support is grounded in the "social obligation model" of the marriage in which the marriage is seen as an interdependent union. It embraces the idea that upon dissolution of a marriage, the primary burden of meeting the needs of the disadvantaged spouse falls on his or her former spouse, rather than the state.

[67] In this case, Mr. LeBlanc argues that the parties had independent economic lives with similar incomes. He argues that Ms. Lupien did not provide any economic advantage to Mr. LeBlanc and suffered no economic disadvantage. As a result, he maintains she is not entitled to any spousal support. In support of this proposition, he maintains the parties kept their finances completely separate from each other, the parties incurred debts without the permission or consultation with the other, and the parties did not ask the other to contribute any portion to their respective debt. Mr. LeBlanc also points out that while Ms. Lupien said she paid for the majority of the groceries, Mr. LeBlanc also made bulk purchases at Costco.

[68] Ms. Lupien indicated, however, that she assisted Mr. LeBlanc with preparing the invoices, typing quotes and other "running around" for Oasis. As a result, she could not pick up extra shifts at her workplace. In addition, in August of each year, she would largely be taking care of Mr. LeBlanc's children and therefore was unable to pick up extra shifts.

[69] While there is no doubt that the parties did not mingle their finances or bank accounts, Ms. Lupien paid for the bulk of the groceries during the relationship. In addition, she paid for the Hydro, Terasen Gas, Shaw cable, and water delivery bills. She did the cooking and

cleaning throughout the relationship, contributed to the business, and looked after Mr. LeBlanc's children when they were present during the summer and other visitations. The couple camped and travelled together, visiting Mexico 3 to 4 times together, travelled to Ottawa in the mid-2000s and to Edmonton in 2015. At one point the couple shared a joint bank account to save for a trip to Mexico and rented a vehicle in Mexico together.

- [70] Overall, the evidence shows that the couple spent over 15 years in what could be characterized as an economically interdependent relationship. Ms. Lupien did not pay rent to Mr. LeBlanc for living in the family house and did not own any property. This, as argued by Ms. Lupien, was not a business relationship, but rather an organic marriage-like relationship based on long-term commitment and mutual reliance.
- [71] While Ms. Lupien maintains she would have pursued other career opportunities but for her obligations to the relationship, this has not been sufficiently established on the evidence. Ms. Lupien did, however, make a sufficient contribution to Mr. LeBlanc's business such that there are compensatory grounds for spousal support. While Mr. LeBlanc minimized her contributions to the bookkeeping and other administrative tasks of Oasis, there is no doubt she helped him out of an initially difficult situation where he had failed to keep up with his business's tax obligations. She continued to assist generally in this regard. Ms. Lupien's efforts contributed to Mr. LeBlanc's ability to develop his business. This is further reflected by the fact that he now hires his niece to undertake some of the tasks previously undertaken by Ms. Lupien during the relationship. Furthermore, Ms. Lupien made herself available in the summers to take care of the children in order for Mr. LeBlanc to pursue his landscaping business.
- [72] The Spousal Support Advisory Guidelines ("SSAG") assumes the current law of spousal support leaves a very expansive basis for entitlement to spousal support, leaving quantum (amount and duration) as the main issue to be determined. A compensatory basis to Ms. Lupien's spousal support claim is therefore established.
- [73] Furthermore, Mr. LeBlanc was the higher income earner and covered the majority of the couples' living expenses in their interdependent union. Ms. Lupien moved out and received no support from Mr. LeBlanc to assist with her post-separation adjustment. I therefore find that Ms. Lupien is also entitled to some non-compensatory spousal support to recognize the economic hardship arising from the breakdown of the relationship and to narrow the financial gap between the parties after separation.
- [74] Mr. LeBlanc relied upon a number of cases, including *Brown v. Brown*, 2016 BCSC 1037; *P.N.K. v. C.L.*, 2013 BCSC 1856; *Doell*; and *J.C. v. A.W.*, 2016 BCSC 1012. However, these cases can be distinguished in that they all involve situations where the parties entered into explicit agreements that provided for the detailed separation of finances. As I have stated previously, I find that no such agreement existed between Mr. LeBlanc and Ms. Lupien.

Income

- [75] Ms. Lupien's position is that her income should be found to be \$25,000 per annum. She submits that Mr. LeBlanc should be imputed income of \$100,000 per annum and that spousal support should be \$1,500 per month commencing on January 1, 2016 and payable on the first day of each month for 10 years from the date of the judgement. Ms. Lupien states that these are the "midpoint" figures of spousal support according to the SSAG.
- [76] Ms. Lupien worked as a server during the relationship. Mr. LeBlanc argues that Ms. Lupien's income ranges between \$50,000 and \$70,000 when accounting for tip income. Mr. LeBlanc points to Ms. Lupien's own evidence that her hourly wage is \$13 an hour and her monthly tips are \$1,300. This would result in a total income of \$42,000. Mr. LeBlanc says that the minimum income imputed to Ms. Lupien should be \$50,000 given his position that she underreports her tip income. Mr. LeBlanc also points to a statement made by Ms. Lupien in her testimony that her hourly earnings could be up to \$35 per hour, including tips, to arrive at the \$70,000 estimate of her annual income.
- [77] Ms. Lupien submitted her T4 income from 2012 to 2017 and the business records of her place of employment that reflect her annual sales as a server. She states that from her annual sales, she applies an 8% tip which is reported as her income. The 8% reflects the fact that she is required to tip out a number of other restaurant workers, including the kitchen and the bar. Her minimum wage income over the years has varied from approximately \$12,000 to \$17,000. Her 2017 numbers indicate a T4 income of \$15,314.28 and gross sales of \$106,888.78 with an estimated 8% tip income of \$8,551.10. Her estimated total income for 2017 is therefore \$23,865.38. From a review of Ms. Lupien's financial statements, I find that she made similar amounts in previous years and that she earned an annual income of about \$25,000 throughout the relationship.
- [78] There is 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: *P.K.F. v. J.R.R.*, 2014 BCSC 932 at para. 98. I do not find that such an evidentiary basis has been established to impute an income of \$50,000 to \$70,000 to Ms. Lupien. In cross-examination, Mr. LeBlanc sought to establish that Ms. Lupien was substantially underreporting her tip income. However, the financial material provided by Ms. Lupien was obtained from her employer and included the employer's record of gross sales figures upon which she "tipped out". While ultimately, this can only be used as an estimate of her income, I find the evidence to be credible and there is nothing to suggest that her tips were underreported.
- [79] Ms. Lupien often took time off during the summer to care for Mr. LeBlanc's children. It is clear that Ms. Lupien no longer has these summer commitments and can now work full-time throughout the year. Her evidence is also that her hourly wage will be increasing from \$11 to \$13 per hour going forward. Though this is not an exact science, I find based on all of these factors that Ms. Lupien's income going forward should be imputed at \$35,000 annually.

[80] With respect to Mr. LeBlanc's income: Mr. LeBlanc maintains that a reasonable income would be \$60,000 a year. He says that this is his average income from 2014 to 2017 as reflected in his income tax statements and financial statements of the company. Ms. Lupien argues for a significantly higher income in the range of \$75,000 to \$120,000 year based on "everything she knows."

[81] In determining income for spousal support purposes, the Court must first determine, on the most current sources of income available, whether s. 16 of the Child Support Guidelines (the "CSG") would fairly determine a payor's 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.

[82] Because Mr. LeBlanc controls a corporation and earns income through that corporation, his income must be determined with reference to sections 18 and 19 of the CSG which state as follows:

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 of 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 the 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:

- (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;
- (2) For the purpose of paragraph (1)(g), the reasonableness of an expense deduction is not solely governed by whether the deduction is permitted under the Income Tax Act.
- [83] Section 18 of the CSG permits the court to "lift the corporate veil" in appropriate circumstances in order to ensure that the money the payor lists as income actually reflects all of the money available for support: *D.M.B. v. D.W.A.L.*, 2018 BCSC 1254 [D.M.B.] at para. 150. I find that this is an appropriate case to do so, and that an evidentiary basis has been established to impute income to Mr. LeBlanc that more accurately reflects the income available to him for support purposes.
- [84] The approach set out in s. 18(1)(a) - the pre-tax income approach, as opposed to the personal services approach - applies where the nature of the spouse's relationship with the corporation is such that they have control over the corporation and thus should receive a financial return for their "entrepreneurial capacity and investment." This applies to the present case as Mr. LeBlanc has sole control of Oasis.
- [85] The burden of proving the reasonableness of deductions from business income, whether in the context of self-employment or within a wholly-owned corporation, lies with the spouse making the deduction. Under s. 18 of the CSG, the onus is on the payor to provide evidence that some or all of the corporation's pre-tax income is not available to the payor for the purposes of support. Deductions from corporate income must be reasonable and for legitimate business purposes, and so even deductions such as charitable donations must be added back in to the pool of available income. As apparent from s. 18(2), where deductions include expenses which provide a personal benefit or constitute ordinary living expenses of a shareholder, officer or director, those expenses should also be added back to the pre-tax corporate income that thus becomes available for support purposes. This includes telephone, internet, and vehicle expenses, along with food, meals and entertainment. Importantly, per s. 19(2) of the CSG, the reasonableness of an expense deduction is not solely governed by whether the deduction is permitted under the Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.). "Add back" for expenses, even in a corporate situation, can take place under either s. 18 or s. 19 of the CSG. See *D.M.B.* at para. 150, citing *Ursel v. Ursel*, 2014 BCSC 1219.
- [86] As stated previously, there was a dearth of evidence at trial surrounding the value of Oasis. Moreover, the reasonableness of the deductions from Oasis's corporate income was not explored and no evidence was adduced on the point. I must therefore employ common sense when analysing the financial information before me: *D.M.B.* at para. 150.
- [87] In 2015, Mr. LeBlanc's Line 150 income was \$25,000. In 2016, his Line 150 income was \$49,890, comprised of \$30,000 employment income and \$19,890 dividend income. In 2017, his Line 150 income was \$54,380 comprised of \$38,000 employment income and \$16,380 dividend income. It is difficult to ascertain how the reported Line 150 income in a given year relates to the business income in the same year. Mr. LeBlanc disclosed the T2 Corporation

Income Tax Returns for the 2015 and 2016 tax years. In 2015, Oasis's gross revenue was \$388,569. After deducting operating expenses and costs of sales, its net revenue was \$76,209. In 2016, Oasis's gross revenue was \$146,492 and it reported a loss of \$16,130 after expenses. I am unable to take these figures at face value, per s. 19(2) of the CSG. In his evidence, Mr. LeBlanc did not address the reasonableness of the reported operating expenses and costs of sales, or how some or all of the corporation's pre-tax income is not available to him.

- [88] Again, when faced with these difficulties, the Court has discretion to employ a common sense approach to analysing financial information. I intend to do that here. Mr. LeBlanc's Form 8 Financial Statement filed on March 29, 2018 discloses annual expenses of \$55,862. He discloses minimal debts, apart from his mortgage payment, and so it can be assumed that he earns a net income of at least \$55,862 annually. I find that it is likely that at least a portion of the operating expenses listed in Oasis's tax return, such as food, telephone, and vehicle expenses, are personal in nature. Significantly, Mr. LeBlanc testified that he regularly accesses significant cash from his business account for personal use. Oasis also earns more income in years where there is heavy snowfall and this is reflected in the gross revenues reported in its tax returns. Although it is clear that Mr. LeBlanc is not living lavishly, it is reasonable to say that he can access more than \$55,000 annually.
- [89] In view of all of the evidence, I consider it reasonable to impute an annual income of \$75,000 to Mr. LeBlanc.
- [90] According to the SSAG, the range of monthly spousal support payable by Mr. LeBlanc is \$750 on the low end, \$875 in the mid-range, and \$1,000 on the high end for a period of 7.5 to 15 years from the date of separation. As stated previously, Ms. Lupien's spousal support claim is largely compensatory with some non-compensatory elements. She is currently employed and does not have financial need. Though she contributed to Mr. LeBlanc's business during the relationship, I do not find that her role in the relationship caused her to forgo career opportunities or limited her earning potential. Accordingly, I find it appropriate to award spousal support at the low end of the range. Mr. LeBlanc will pay Ms. Lupien the sum of \$750 per month, commencing on January 1, 2016 and continuing on the 1st day of each and every month thereafter up to and including January 1, 2024, at which time spousal support will be terminated.
- [91] In summary I conclude:
- 1) There will be a 50% division of family assets and debts.
 - 2) \$170,000 should be excluded from the value of the family home of \$818,471, leaving \$648,471 to be divided equally between the parties. From any compensation payment to Ms. Lupien, \$23,526 will be deducted, representing half of the payments made by Mr. LeBlanc on the home after separation. In addition, \$24,000 should also be deducted from that amount which is the amount Mr. LeBlanc spent on renovations after separation.

- 3) A conservative estimate of the value of Oasis is \$30,000. Ms. Lupien is entitled to a 50% compensation payment of \$15,000.
- 4) Ms. Lupien is entitled to a compensation payment of \$13,500 with respect to family debt payments.
- 5) Mr. LeBlanc will pay spousal support of \$750 per month from the date of separation to January 1, 2024 to Ms. Lupien.

The Honourable Madam Justice E. Burke

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