

CANADA / JUDGMENT

M.M.P. v. P.S.P.

2009 BCSC 1652

COURT

Supreme Court of British Columbia

DECIDED

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2009 BCSC 1652 M.M.P. v. P.S.P. IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: M.M.P. v. P.S.P, 2009 BCSC 1652 Date: 20091201 Docket: E016237 Registry: New Westminster Between: M.M.P. Plaintiff And P.S.P. Defendant Corrected Judgment: The reasons for judgment were edited for publication purposes on September 16, 2010 Before: The Honourable Madam Justice E.A. Arnold-Bailey Reasons for Judgment Counsel for the Plaintiff: Joan Dreyer Counsel for the Defendant: David H. Goodwin Place and Date of Hearing: June 17, 18, December 18, 2008, January 21, 22, June 29, 30, July 2 and 3, 2009 New Westminster, B.C. Place and Date of Judgment: New Westminster, B.C. December 1, 2009

Introduction

- [1] Since their separation in 2003 M.M.P. (the "plaintiff") and P.S.P. (the "defendant") have been engaged in a bitter dispute arising from the demise of their relationship of 14 years, during which they separated once for ten months and then were married for just over eight years. They have one daughter, C., who is 14 years old.
- [2] The present proceedings are cross-applications for summary judgment brought pursuant to Rules 18A and 51A of the Rules of Court; sections 8(2)(a), 15, 16, and 17 of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.); and sections 65 and 66 of the Family Relations Act, R.S.B.C. 1996, c. 128 ("FRA").
- [3] At issue is the valuation of the defendant's fish brokerage business, Flagship Fisheries Ltd. ("Flagship"), which is agreed to be a family asset; the values of certain other assets; the amount of debt accumulated by the parties prior to separation; the appropriate income to be attributed to or imputed to both parties in the years since separation upon which support is to be based; the payment or cancellation of arrears in spousal support arising from an interim order payable to the plaintiff by the defendant; spousal support for the plaintiff payable by the defendant both retroactively and prospectively; ongoing child support for C.; and a claim by the plaintiff that the defendant owes her retroactive child support for C. It is agreed that once family assets are valued and the appropriate debts taken into account, they are to be divided equally between the parties. Prior Relevant Court History

- [4] A number of previous proceedings have occurred in relation to this matter that have resulted in prior orders, which I will briefly review as follows: · March 13, 2003: Master Nitikman granted orders that prohibited either party from disposing of any family or other assets in issue and restrained the defendant from selling or disposing of the assets of Flagship, save and except in the ordinary course of business. · June 10, 2003: Master Brine (as he then was) granted a number of consent orders, including interim joint custody and guardianship regarding C., with terms that neither party consume alcohol while C. was in their care or within 12 hours of transporting C. in a vehicle. · November 24, 2003: Wedge J. granted an order pursuant to s. 57 of the FRA that there was no possibility of reconciliation between the parties. · April 15, 2004: Master Scarth granted orders that the defendant pay interim child support for C. in the amount of \$300 per month in two equal monthly instalments due on the 1st and 15th day of each month, commencing May 1, 2004; that the defendant pay to the plaintiff \$1,000 per month in interim support, commencing May 1, 2004; that the defendant pay to the plaintiff \$1,000 per month as an advance on the plaintiff's share of family assets, without prejudice to the final division of assets; that the defendant pay \$1,500 into his solicitor's trust account to pay an accountant retained by the plaintiff to review the books and other records of Flagship; and that the defendant provide the plaintiff with copies of documents that verify the use of \$30,000 in proceeds from the RRSP cashed by the defendant in March 2003, as well as copies of documents to establish the non-family asset character of \$5,000 provided by the defendant to the plaintiff for the down payment on her home by May 13, 2004. · September 21, 2004: Humphries J. granted orders that the plaintiff supply to counsel for the defendant a list of all requests for financial documentation by October 5, 2004; that the defendant collect the documents in his possession or control and provide them to the plaintiff by October 19, 2004; that the parties cooperate in arranging a meeting of experts or accountants as soon as possible; that the defendant produce any documentation regarding payment of \$9,000 to the plaintiff prior to the court order of April 15, 2004; that the parties cooperate to have the 1957 truck appraised; and on being given 24 hours notice, the defendant make the truck available for the plaintiff's appraiser to attend. · March 22, 2007: upon the plaintiff's new counsel, Ms. Dreyer, being granted an adjournment of an application brought by the defendant to vary the orders made by Master Scarth mentioned above, Crawford J. ordered that the defendant's Rule 18A application set for hearing on March 30, 2007, be adjourned generally; that the monthly payments of interim spousal support and as an advance on the plaintiff's share of family assets be suspended; that the parties' outstanding applications be reset for hearing approximately eight weeks later at a date and time convenient to both counsel; that the parties complete any further discovery, and disclosure within 30 days; that the plaintiff pay a fixed amount of costs for appearances on March 8 and 22, 2007; and that funds set aside to facilitate the plaintiff's review of financial information be made available to her new counsel. Crawford J. also ordered a schedule for the filing and exchange of affidavit material. · June 16, 2008: Master Donaldson made an order for further specific disclosure by the defendant to the plaintiff of copies of adjusted journal entries and the general ledger of Flagship; his personal Visa statements and those of Flagship; and certain additional invoices. The order was sought and

entered in Vancouver by plaintiff's counsel and Mr. Goodwin was unable to attend. · June 17, 2008: I set aside the order of Master Donaldson discussed above, although I ordered some of the information requested on behalf of the plaintiff to be produced by the defendant over the course of this hearing. By consent, I granted an order of divorce to take effect on the 31st day thereafter, and joint custody and guardianship to the parties in relation to C., with C. to reside with each party as they may agree from time to time, as well as an order that the parties exchange income tax returns on or before June 1st of each year and deliver copies of any notices of assessment within 14 days of receipt of the same. · July 3, 2009: The parties entered into a consent order containing certain terms to address C.'s current circumstances and needs.

- [5] These orders represent only a small portion of the protracted legal wrangling that is the hallmark of this case. A trial had been scheduled to commence February 13, 2006, but was adjourned generally because the defendant was hospitalized and the plaintiff had undergone surgery in late January 2006. The trial was then set to commence on March 5, 2007, but the matter was unable to proceed because of a death in the family of the defendant's counsel. Acting in person, the plaintiff filed an application to have the defendant held in contempt for not complying with Master Scarth's order, which was adjourned to March 22, 2007, and the defendant brought a counter application (the Notice of Motion dated March 6, 2007), in which he sought to cancel the arrears in spousal support and vacate the order that he pay \$1,000 per month to the plaintiff as an advance on her share of family assets. This matter was set down for hearing on March 30, 2007, and the defendant declined to consent to an adjournment, despite Ms. Dreyer having just been retained to act for the plaintiff on or about March 19, 2007. Both matters were adjourned by Crawford J. on March 22, 2007, with the directions and orders set out above.
- [6] Mr. Goodwin has remained as counsel for the defendant throughout, whereas the plaintiff has had a number of legal counsel and has also periodically represented herself. The plaintiff testified as to having considerable financial difficulty in terms of being financially able to retain counsel and to having recently taken out a larger mortgage, in part to permit her to retain her present counsel.
- [7] According to the most recent statement from the Family Maintenance Enforcement Program ("FMEP"), dated December 5, 2008, the defendant is up to date with regards to his interim child support payment of \$300 per month. However, he is in arrears for spousal support owing to the plaintiff in the amount of \$13,672.57 and owes additional fees of \$700. The Present Proceedings
- [8] This matter was originally scheduled for two days, but was eventually heard over nine days, in five segments, spread over a period of 13 months.

- [9] In these proceedings, extensive affidavit and other documentary evidence was filed and both parties were examined briefly in direct, and extensively on cross-examination, on all aspects of their respective claims. The Court had ample opportunity to assess the reliability and credibility of the parties.
- [10] The plaintiff called a business valuator, Mr. Hooge, of Ernst & Young, to testify as to his expert opinion on the defendant's income and the value of his shares in Flagship. He was cross-examined by counsel for the defendant. With the benefit of hind-sight this matter should have been a trial, but both parties had much invested in its completion and through their counsel committed to conclude the present proceedings based on the material before the Court and some additional, late-provided disclosure.
- [11] I find that both parties have provided selective financial disclosure in these proceedings for very different reasons.
- [12] At the time of separation the plaintiff was uneducated, relatively unsophisticated, and without a driver's licence. She tended to ignore requests over the ensuing years from counsel for the defendant for her bank records and credit card statements as, at various times, she had no legal counsel, was disorganized, and was experiencing financial and other stresses. She did however file five relatively complete financial disclosure forms (Form 89s) between May 2003 and February 2009. I find that the plaintiff was candid in court about some limited, additional, previously undisclosed income from cleaning houses and from selling the equipment related to the now defunct African Gray parrot breeding business she had for a time. She did not provide most of her banking records and credit card statements for the years 2003 to 2006, but did provide more complete records for 2007 and 2008.
- [13] The defendant was, until he became an employee of another company in January 2008, an effective fish broker operating through his own company, Flagship, as its sole director, shareholder and employee. Between 2000 and 2007 Flagship's gross revenues ranged between over \$2 million to over \$8 million, except for in 2003 when it was approximately \$1.3 million. The defendant impressed the Court as an intelligent, astute and capable businessman, and someone well acquainted with the tax benefits of writing off expenses through his company and taking money out of the company via a shareholder's loan. He chose to provide late, incomplete or selective financial disclosure, and in some instances no disclosure because he indicated he preferred to deal in cash. He declined to answer the questions of the business valuator, Mr. Hooge, in the course of the latter's attempt to value Flagship. The defendant also refused to cooperate with the person sent to appraise the restored 1957 GMC pickup truck in his possession that is agreed to be a family asset.
- [14] I find that the defendant acted as he did throughout because he was and remains determined to minimize the financial impact of the end of his marriage on his business and his own standard of living. At present, Flagship is dormant and yet to be wound up from a tax point of view. It is able to be easily reactivated should the defendant again decide to become a self-employed fish broker through Flagship, at which point his income is likely to

surpass the amount he makes presently employed as a fish broker for a different company.

Relevant Background The Parties' Backgrounds and Their Years of Cohabitation

- [15] As of the date of hearing the plaintiff was 45 years old and the defendant was 47 years old. They began living together in the spring of 1989, a few months after they met. They lived together until a time in 1993, when they separated for about ten months and then resumed cohabitation. They married on December 31, 1994, and their daughter and only child, C.E.P. was born in early 1995. The parties separated on February 6, 2003. Therefore, their relationship, including their relatively brief separation, lasted for approximately 14 years, of which just over eight years were spent in marriage.
- [16] When the parties met in 1989 the defendant was employed as a fish broker at Ballantyne Pier. He quit that employment and began working for Yamazaki Enterprises Ltd. ("Yamazaki") as a fish broker. By the time the parties resumed cohabitation in 1993, he began working for his own company, Flagship, which he continues to maintain to the present in terms of keeping books, maintaining certain permits and writing off expenses. However, in January 2008, he began to work for Grand Hale Marine Products Co. Ltd. ("Grand Hale") as a fish broker for an annual salary of \$75,000.
- [17] When the parties started to live together in 1989, the plaintiff had completed Grade 10 and had a few courses towards Grade 11. Between the ages of 10 and 16 years, she worked in a hotel run by her parents, and did various tasks, including working at the front desk and as a chambermaid. She took a hairdressing course through the Cranbrook Beauty School and began an apprenticeship in Invermere in 1984, which she did not complete because of allergies to hair products. She then worked at various jobs, including as a nanny, in a day care, as a chambermaid, a booking agent for bands, and inserting flyers in newspapers. Then the plaintiff moved to Vancouver and started working for Bravo Children's Wear in their dye room, where she did quality control and sorted bundles of clothes to pre-dye. She was working in this job when she met the defendant.
- [18] After the parties commenced cohabitation in the spring of 1989, the plaintiff left this employment to find something nearer to where they were living in Richmond, B.C., which was close to the defendant's work. She was unemployed for one month and then she found employment with Gault's Wholesale Distributors in Richmond, where she worked for almost four years as an assistant manager in their factory. She left this job when she was 13 weeks pregnant with C. because the pregnancy was considered high risk. She had a prior history of miscarriages and other gynaecological complications. When the plaintiff left this employment she was earning approximately \$1,200 per month.
- [19] The plaintiff's Canada Pension Plan summary shows her income in the years of 1989 to 1994 (which was the period when she started to cohabit with the defendant to just prior to C.'s birth), as follows: Year Plaintiff's Income 1989 \$11,540 1990 \$11,884 1991 \$17,100 1992 \$18,260 1993 \$19,311 1994 \$10,005

- [20] After C. was born, the plaintiff did not return to work outside the home until after separation. During this time, the plaintiff did operate a home-based business, the African Gray parrot breeding business called "Stealth Aviaries", which she describes as more of a hobby than a business. She was also in receipt of income from Flagship by way of income splitting. The plaintiff disputes that she received a salary per se from Flagship, but agreed that Flagship, via the defendant, did pay her \$1,200 per month, an amount later increased to \$1,500 per month, for household groceries, clothing, cab fares, and expenses related to C. The defendant managed the family's finances.
- [21] There is less evidence before the Court about the defendant's background. Presently 47 years old, his employment history is in the fishing industry. After completing Grade 12 he worked in the fishing industry in various capacities before becoming a self-employed fish broker in 1994 with the creation of Flagship. Separation
- [22] According to the defendant, the parties commenced living separate and apart within the family home on February 6, 2003, when the defendant declared his intention to separate and moved downstairs. On March 13, 2003, the plaintiff brought a court application that resulted in the orders of Master Nitikman, with the balance of the relief sought being adjourned. On May 31, 2003, the family home was sold by consent and each of the parties received approximately \$100,000.
- [23] Each party purchased a new residence within blocks of the other. The plaintiff purchased a townhouse for \$220,000 with a down payment of \$77,000, and obtained a mortgage for \$143,000. This resulted in the plaintiff having a monthly payment for housing costs of \$1,154, including the mortgage payment, property taxes, insurance, and strata fees. The plaintiff indicated that her monthly expenses were approximately \$3,000. Also from the plaintiff's share of the proceeds from the sale of the former family home, she paid her Visa bill of \$3,000, legal fees of \$5,000 and had approximately \$15,000 in savings. The defendant purchased a home nearby for \$336,000, with a mortgage of \$230,000.
- [24] On June 1, 2003 the defendant commenced payment of monthly spousal support to the plaintiff in the amount of \$1,000, which he paid (for 34 months for a total of \$34,000) until April 2006, when he ceased paying due having contracted a life-threatening illness in February 2006. He did not resume the payment of spousal support to the plaintiff following his recovery.
- [25] In addition, the defendant made a number of advances to the plaintiff on account of division of assets from December 2003 to June 2004 that he claims amount to \$13,728.
- [26] Also commencing June 2003, the defendant paid \$300 per month child support for C., in addition to paying extraordinary expenses, including her school fees, medical fees, and clothing expenses. As of December 2006 he commenced payment of approximately \$300 per month to board the horse he purchased for her. The plaintiff also claims to have paid clothing and other expenses for C. since separation.

- [27] Upon separation C. commenced residing with each parent on alternating weeks, which continued until mid-2006 when C. resided with her mother for a time, and then resumed the alternating arrangement. In June 2008, C. decided to reside full-time with her father and have no contact with her mother. This continued until June 2009, when C. returned to reside with her mother after an argument with her father. As was discussed during the last days of hearing and which gave rise to a consent order, C. appears to be in need of counselling and improved communication between herself and both of her parents as to what arrangements are best for her. The Plaintiff's Circumstances Post-Separation to the Present
- [28] After the parties separated, the plaintiff did a number of things to become employable. Between September and December 2003 she took math upgrading courses through Kwantlen College. In August 2003 she began taking driving lessons to get her driver's licence, which she did. She stopped smoking. She took a "Foodsafe" course. In December 2003 she was offered work at minimum wage at Western Inventory after completing a company training program. She declined work there when it became apparent that she was required to do shift work at night that interfered with caring for C., who was alternating her residence between the parties on a weekly basis.
- [29] In January 2004, the plaintiff wrote five subjects for her GED and passed all but math. She studied and rewrote math again in March 2004, but failed again. She took a three week adult career preparation course and with her upgraded resume she continued to look for employment. The plaintiff worked at Coast Spas for \$10 per hour from January to August 2005, when she quit because of the dust and her allergies.
- [30] The plaintiff also continued to work breeding parrots, but by 2004 it was apparent to her that the return was minimal for the effort required. She says she sold five parrots in 2003 and generated \$6,200. She sold further parrots in 2004 and generated about \$4,000. She did not keep track of her expenses but they would have served to reduce her net income from this endeavour. In 2006, she sold the cages and the breeding parrots and agrees that the defendant is entitled to half of what she received. She denies that she raised significantly more parrots than she has disclosed, and that this substantially supplemented her income after separation in 2003.
- [31] In February 2006 the plaintiff started a seven month resident care attendant program through Stenberg College. She took out a Canada Student Loan and a BC Student Loan to pay her tuition fees of \$6,950 and support herself, and to assist in supporting C. As of February 13, 2008, she owes over \$11,000 on these loans. Shortly after she took out these loans, the defendant ceased paying her the interim spousal support of \$1,000 per month as previously ordered.
- [32] After the plaintiff completed the care aide course she obtained employment at Peace Portal Lodge in September 2006, where she continues to work. She is currently making \$16.38 per hour, and works night shifts from 11 p.m. to 7 a.m., five days on and two days off. Previously, she worked a mix of night and afternoon shifts.

- [33] In addition, in January 2007 the plaintiff got a second job as a care aide at Langley Gardens, which she had to quit by May 2007, because it was casual and on-call, and the hours offered often conflicted with the hours at Peace Portal Lodge. For a brief time she also had an additional job for Just Care Ltd. at \$13 per hour, but she quit that job for the same reasons she quit Langley Gardens.
- [34] The following table sets out the plaintiff's income by year since separation: Year Plaintiff's Income (figures rounded) 2003 \$5,408, which comprised of employment income of \$1,948 and net self-employment income from the sale of parrots of \$3,460. 2004 \$12,231, which included \$8,000 in spousal support according the Master's order that took effect May 2004, in addition to \$19 in income from employment and net self-employment income from the sale of parrots of \$4,212. 2005 \$22,046, which was comprised of \$12,000 in spousal support and \$10,046 in income from employment. 2006 \$9,185, which was comprised of income from employment of \$6,185 and \$3,000 in spousal support. 2007 \$31,250, which was comprised of \$27,126 from Peace Portal Lodge and \$4,123 from Just Care Ltd. Her union dues were \$480. Her Guideline Income was \$30,769. 2008 \$29,047, which was comprised of \$27,784 from Peace Portal Lodge, EI earnings of \$1,735. Her union dues were \$472. Her Guideline Income was \$29,047.
- [35] The plaintiff was involved in a single vehicle accident on January 1, 2008, on her way to work, in which she was injured and was then off work. She returned to work about the third week of February 2008. She deposed that the only income she had during that period was \$1,736.76, which appears to be the Employment Insurance ("EI") benefits set out above, as she had not been employed long enough to qualify for short term disability benefits. In 2009 she has also had to take some time off work for illness, which has reduced her present income.
- [36] Since separation, the plaintiff's expenses have significantly exceeded her income, which has been very minimal until 2007. Without the ability to borrow, except from friends and family, which she claims she has done to a total of \$114,000, the plaintiff has further mortgaged her townhouse. In October 2006, after she finished school, she borrowed \$48,300 by way of a mortgage from Capital Direct at a rate of 8.65%, and with a monthly payment of \$424. During cross-examination, the plaintiff indicated that she obtained this mortgage to pay credit card expenses she had incurred while in school at a time when she had no income and the defendant had stopped paying spousal support, as well as to pay additional expenses for C. who was living with her for additional time while the defendant was ill.
- [37] In February 2007, in order to retain legal counsel, the plaintiff obtained a new TD Bank first mortgage on her townhouse for \$212,000 with an interest rate of 5.35% and monthly payments of \$1,109.65. After paying out the first and second mortgages and legal fees she received \$28,414. She also obtained a \$13,000 line of credit with the TD Bank that she maintains was necessary for additional costs associated with C. as she got older.

- [38] In February 2008, prior to the February 2008 date for a summary trial when the plaintiff expected this matter to conclude, she obtained a second mortgage of \$52,080 from Alpine Credit Ltd. at an interest rate of 13.25% for the first year and monthly payments of \$576. This occurred when the plaintiff was not able to work as a result of the motor vehicle accident and was awaiting EI benefits. After replacing her car and paying various fees, a holdback for six months of mortgage payments, and paying out the \$13,000 TD Bank line of credit, the plaintiff received \$28,506.
- [39] Then in September 2008 when the monthly payments were due to start on the Alpine Credit second mortgage, she obtained a new first mortgage with the Royal Bank for \$296,000 at prime less 0.15% and a monthly payment of \$1,349.81. These mortgage proceeds were used to pay out the existing TD Bank first mortgage, the Alpine Credit mortgage, the TD Bank line of credit, the overdraft on her TD Bank account, her RBC Visa, her TD Visa and legal fees.
- [40] Counsel for the plaintiff has calculated how much additional money the plaintiff has had to borrow since she placed the initial first mortgage on her townhouse in May 2003 after separation, after factoring out broker, discount and legal fees. She submits that \$137,901.57 is the amount of debt incurred by the plaintiff since separation, an amount that, in the main, the plaintiff could have avoided borrowing had the defendant paid proper spousal support over the last six years.
- [41] In response, counsel for the defendant has not challenged the amount borrowed but seeks to portray the plaintiff as very poor at managing money, very inclined to spending beyond her means, and based on the portions of her bank records that she has produced, very inclined to make multiple cash withdrawals in erratic patterns, which when totalled, amount to significant amounts, consistent he submits with some sort of personal problem or addiction. At various times in the history of these parties, the defendant has alleged that the plaintiff abuses alcohol. The Defendant's Circumstances Post-separation to the Present
- [42] Since separation the defendant has continued to work in the fish brokerage business. He has maintained his residence near that of the plaintiff and C. has resided with him periodically as previously described.
- [43] The defendant maintains that he is under great financial stress due to his separation and divorce. However, his life style appears to be somewhat affluent to the extent that he has incurred and paid certain discretionary personal expenses through Flagship, or otherwise, that are not consistent with his claims of reduced income. The defendant made some of these discretionary expenditures after he ceased paying the advance on family assets and/or interim spousal support to the plaintiff as ordered by the court.
- [44] It is the position of the plaintiff that the declared personal incomes of the defendant for the years since 2000, but in particular since separation in 2003 are artificially low for a number of reasons as taken into account by Mr. Hooge.

- [45] The evidence reveals that the defendant incurred the following discretionary personal expenses, often paid for by cheques from Flagship: · Payments of money to a female companion ("C.M.") from August 2004 to September 2005, totalling \$10,700; · The purchase of a vehicle for C.M. for \$17,550.30, towards which C.M. contributed \$4,000 in a "trade in", and which the defendant insisted C.M. transfer to him when they separated, upon his payment to her of \$3,000; · The purchase of a ring for C.M. in June 2004, valued at \$6,050; · The purchase of a "Wave Runner" for \$6,500 by Flagship, apparently to be used in the business and then not, according to the defendant; · Numerous cheques totalling \$14,350 from Flagship, dated between February 15, 2006 and May 1, 2008, to a female companion ("M.P.") who then became involved in giving riding lessons and boarding horses for the defendant; · The purchase of the horse Sahara and riding gear for C. on December 3, 2006, for \$600, as well as the payment of vet and farrier bills; and · The purchase of a Hummer motor vehicle during the course of this litigation in summer of 2008 for \$35,000 for his personal use.
- [46] Also of note in the general ledger for Flagship in 2004 and 2005 are the eight cheques written by the defendant to "cash" in round figures, ranging from \$25,000 to \$75,000, for a total of \$375,000. The defendant did not present any invoices or receipts in relation to these cash amounts. In his re-examination, the defendant explained that he sent cash to the "buying fields" via a truck driver to buy fish and that he can account for all the cash spent. Without proof that these funds were used for business purposes I am not inclined to accept the defendant's explanation in this regard. It is more likely that some or all of these cheques payable to cash went towards personal expenditures made by the defendant, unrelated to Flagship. Given that in the past, the defendant via Flagship has been audited by the Canada Customs and Revenue Agency to negative effect, he fails to keep accurate business records at his own peril. The defendant admits that he liked to operate in cash "so as to never leave a paper trail."
- [47] Thus, the defendant's actual income over the years is difficult to accurately determine. Between 1994 and 2007 he worked for his own company, Flagship, as an independent fish broker, and prior to that he was employed as a fish broker with Yamazaki. Subsequently, in January 2008 he again became employed as a fish broker with Grand Hale Marine Products Company Ltd. ("Grand Hale").
- [48] The defendant's income in past years will be considered later in these reasons. Positions of the Parties and Relief Sought The Plaintiff
- [49] Counsel for the plaintiff asks the Court to accept the various findings of fact contained in the lengthy written submissions provided. Where the defendant has failed to provide satisfactory or indeed any explanation for gaps or ambiguities in his financial records primarily related to Flagship, counsel for the plaintiff urges the Court to accept the reasonable inferences drawn by the plaintiff on the basis of the information that is available, and to accept in its entirety the evidence of Mr. Hooge. Where the accounts of the plaintiff and the defendant differ, counsel urges the Court to accept the evidence provided by the

plaintiff. Counsel submits that although the plaintiff has struggled with finances and life generally since separation, she has been forthright and candid about the matters before the Court, which is in stark contrast to the defendant's persistently evasive, misleading, and at times, openly hostile answers to the questions posed to him on examination for discovery and in cross-examination at the hearing.

- [50] The plaintiff seeks orders in her favour in relation to the following: · A half share in Flagship in the amount of \$131,000, which represents its value as of June 30, 2006 (before the defendant decided to wind down its operations), to which the plaintiff submits that an additional undocumented expenditure of \$514,000 in 2004 to purchase fish licences ought to be added, for a total value of \$645,000; or alternatively the fair market value of the shares as at June 30, 2007 of \$88,000 as determined by Mr. Hooge, less advances paid on family assets in the amount of \$7,228 as confirmed by Flagship ledgers; · No order be made as to the plaintiff's liability for family debt in relation to the defendant's potential tax liability regarding the amount owing to Flagship on the shareholder's loan given the history of transactions in relation to the shareholder's loan and the defendant's unreliable and suspect accounting in relation to the same; and in particular that the amount of \$100,000 originally borrowed from Flagship by the defendant to purchase the former matrimonial home was likely repaid prior to separation. Alternatively, in the event that the court determines that the shareholder's loan owing to Flagship by the defendant as at June 30, 2003, in the amount of \$166,174 is a family debt, then the plaintiff should be responsible for her share of the same only as and when this debt is actually due and owing, at which time the defendant may apply to court for readjustments; · \$7,500 as the amount due and owing to the plaintiff as half of \$15,000 originally advanced to the parties from Flagship, a family asset, to assist each of them to purchase new residences upon separation, and a further amount representing her half of the proceeds from a horse she sold, which the defendant insisted she pay to him from her share of the proceeds from the sale of the family home; · An order for the value of a half interest in the 1957 GMC pickup truck owned and apparently sold by the defendant; · An order for \$6,095.35, which represents half the monies the defendant had on deposit in his bank account as at March 10, 2003; · An order for half the RRSPs held by the defendant at the time of separation (\$61,774.27 as at March 31, 2003) and valued at \$71,473.34 as at December 31, 2006; · A compensation order in the amount of \$15,000 in relation to the \$30,000 of RRSP funds (valued just prior to separation at \$92,331.12) that the defendant withdrew from the RRSP account at the time of separation (March 11 and 12, 2003) allegedly to repay a debt owing by Flagship to Yamazaki because they became concerned about his marital situation; · No order be made in favour of the defendant in relation to the \$1,900 that the plaintiff received from the sale of the bird cages given that upon separation the defendant took birds, horse gear, tools and the majority of the household contents that were never valued, as well as the family's only vehicle given that the plaintiff did not drive; · A division of Canada Pension Plan credits generated during the course of the marriage; · Retroactive spousal support payable by the defendant determined on income amounts imputed to him, based on the Spousal Support Advisory Guidelines at the level of the middle

range from June 2003 to June 2009 in the amount of \$167,125, less the amount of \$34,000 interim spousal support already paid, for a total of \$133,125; · Retroactive child support payable by the defendant in relation to C., based on shared custody Federal Child Support Guideline's table amounts from June 2003 to June 2009 in the amount of \$46,112 (and excluding those months when C. lived exclusively with the defendant), less the amount of \$21,900 that the defendant has already paid, for a total of \$24,212; · On-going child support for C. payable by the defendant based on the Federal Child Support Guidelines and the parties' incomes as imputed and determined in the amount of \$783 per month; · An order for special costs.

- [51] The plaintiff relies upon the following cases in support of these claims: *Stein v. Stein*, 2008 SCC 35 [Stein]; *Cunha v. Cunha* (1994), 99 B.C.L.R. (2d) 93 (S.C.) [Cunha]; and *D.B.S. v. S.R.G.; L.J.W. v. T.A.R.*; *Henry v. Henry*; *Hiemstra v. Hiemstra*, 2006 SCC 37 [Hiemstra]. The Defendant
- [52] Counsel on behalf of the defendant has provided the Court with detailed written submissions regarding all the points in issue. He submits that the plaintiff has played a significant role in the protracted nature of the present proceedings. He also submits that she has earned more income since separation than she has disclosed, and that the Court ought to impute an annual income to her of \$50,000. This includes undisclosed income raising parrots before she sold that business and undisclosed work as a cleaning person. He stresses that the fact that the plaintiff is in considerable debt is due to her own pronounced inability to manage money and her propensity to live well beyond her means on borrowed funds, and that fact ought not to reflect adversely on the defendant in terms of an increased obligation to pay spousal support. He also submits that the plaintiff engages in the frequent, strange practise of multiple cash withdrawals on the same date that is indicative of an addiction. With regards to Flagship, Mr. Goodwin submits that the defendant's valuation of the shares in the amount of \$23,824 ought to be accepted by the Court, and failing that, the Court ought to accept the lowest valuation by Mr. Hooze as of June 30, 2007, of \$88,000, but less the value of a vehicle that has been sold and the "Norqueen" receivable. He submits that the debt represented by the shareholder's loan is a family debt and ought to be shared equally in conjunction with the family assets.
- [53] The defendant seeks the following orders: · the determination of the date of the triggering event; · the determination and valuation of family assets to be divided equally, including Flagship; · a declaration as to family debt and the income tax consequences related to the Flagship shareholder's loan; · an order vacating Master Scarth's order that the defendant pay the plaintiff \$1,000 per month as an advance on family assets; · an order seeking that the arrears in relation to interim spousal support payable by the defendant to the plaintiff be cancelled retroactively to February 1, 2006, or in the alternative, that no interim spousal support was payable due to the defendant's illness from March 1, 2006 up to and including August 1, 2006; · a determination of the entitlement and/or quantum of spousal support payable by the defendant to the plaintiff in accordance with the Spousal Support Advisory

Guidelines, imputing an income to the plaintiff of \$50,000 per annum; · a determination of the amount of child support to be paid for C. when her residency is in a state of flux; and · an order that the defendant is entitled to costs or a portion of the costs of this proceedings, or in the alternative that each party bear their own costs.

- [54] Counsel for the defendant relies upon the following authorities in support of his position: *Newson v. Newson* (1993), 78 B.C.L.R. (2d) 35 (C.A.); *Re Spoklie* (1996), 18 B.C.L.R. (3d) 229 (S.C.); *Blackett v. Blackett* (1989), 40 B.C.L.R. (2d) 99 (C.A.); *Mallen v. Mallen* (1992), 65 B.C.L.R. (2d) 241 (C.A.); *Stein; Van Deventer v. Van Deventer*, 2000 BCCA 9; *Kuznecov v. Kuznecov*, 2006 BCSC 748; and *Eng v. Eng*, [1998] B.C.J. No. 2574 (S.C.). Findings of Fact and Analysis Overall Findings of Reliability and Credibility
- [55] This is a case where a significant portion of the relevant evidence is documentary but may be open to differing interpretations or dispute between the parties as to its accuracy or completeness.
- [56] In terms of the viva voce testimony, I find the testimony of Mr. Hooge, the business evaluator called by the plaintiff, to be accurate, unbiased, and overtly fair and professional. I accept without hesitation his evidence in its entirety, and in particular as to the valuation of Flagship, its shareholder loan account, his evidence as to the potential tax issues for Flagship, and his imputation of personal income to the defendant. To the extent that the defendant disagreed with the analysis of Mr. Hooge, or wished to show a real and pressing tax liability for Flagship in terms of the shareholder's loan, it was incumbent upon him to put the relevant evidence before the court to counter Mr. Hooge's analysis, which he did not do.
- [57] In terms of the evidence of the plaintiff and the defendant, both as deposed to and as testified to, I find that where the evidence of the plaintiff and defendant conflicts in areas without corroborative evidence, the plaintiff is a more honest and reliable witness than the defendant. This is in part because she is a much less sophisticated and less calculating person than the defendant. I find that she is also considerably less inclined than the defendant to be selective or exaggerate her testimony, and thus overall, is a considerably more honest witness.
- [58] I make this finding mindful of the plaintiff's provision of an incomplete record of her spending and borrowing since separation, and fully appreciative of her less-than-satisfactory answers when she was being cross-examined about her frequent multiple cash withdrawals from her bank accounts on the same day, her level of expenses, and her accumulation of debt. However, I find that she has not significantly misled the Court as to her circumstances prior to or post separation, including her income. To the extent that she forgot to disclose that she cleaned houses for a brief time with a friend or had a second job for a brief time with untenable hours in terms of her childcare responsibility, she made relatively little money in these endeavours and was very honest about them at the hearing. I find that her activities must be viewed against a back drop of being financially stressed after

separation, the limited interim spousal support she received, and her lack of job skills. She then found herself without any form of spousal support from April 2006 onwards, during a time when she was re-training and struggling to get on her feet financially.

- [59] Parenthetically, I note that the plaintiff is entitled to live as she chooses after separation, and that this includes the right to poorly manage some funds available to her as she incurred certain expenses. More importantly, I am mindful that the financial consequences of her lack of judgment in this regard are not to be visited upon the defendant. However, I note that since separation, the defendant has also expended funds on items that were not consistent with good judgment and meeting his court-ordered family obligations.
- [60] I find, without hesitation, that the defendant has been less than honest with the Court in relation to matters pertaining to his income and employment, and his purchase of items indicative of a higher standard of living. A review of the general ledgers of Flagship reveal that the defendant writes himself or others many cheques for a wide-variety of things, many of which have little or nothing to do with the business of Flagship. He has total control over how he accounts for money received and spent through Flagship, and in those areas where he is unable to provide corroborative documentation, I find that I am unable to accept him at his word.
- [61] I also note that I found the defendant's manner throughout to be variously argumentative, reluctant, evasive, surly, and fundamentally uncooperative; somewhat less so when being questioned by his own counsel. He made a great deal out of the disclosure that he had provided, while assiduously avoiding past requests made to him through his counsel to provide documentation to address the specific issues and concerns raised on behalf of the plaintiff, which would have expedited or resolved those concerns. He unilaterally terminated interim spousal support after becoming ill in February 2006 and then did not reinstate payment to the plaintiff upon his recovery. Nor did he comply with the court order as to payments to the plaintiff as a "without prejudice" advance on family assets. When pressed on cross-examination, it became clear that the defendant was willingly paying certain significant expenses pertaining to other persons with whom he had relationships, while declining to pay the amount of interim spousal support ordered. To his credit, he has paid the modest amount of interim child support for C. as previously ordered, and has paid expenses for her that he considered appropriate.
- [62] Throughout these proceedings there were numerous incidents in which I find the dishonesty and/or the unreliability of the testimony or prior assertions of the defendant were manifest. Some notable instances are: · The defendant ceased paying the \$1,000 interim spousal support to the plaintiff and the evidence was that he had been threatening to "cut her off" prior to becoming ill. He testified could not write cheques while ill but was then shown to be writing cheques to others, including to his female companion at the time because, according to him, she was looking after his daughter; · From August 2004 to September 2005 the defendant was living with another person to whom he was issuing cheques from Flagship, including the payment of her legal fees and the purchase of a Trans

Am vehicle for her; · The defendant sold the 1957 GMC Pickup truck, a family asset, and kept the proceeds in violation of a court order; · The defendant failed to disclose in his Form 89, sworn December 3, 2008, that he had used the sale proceeds from the 1957 GMC Pickup truck to pay down a line of credit that he had used to purchase the Hummer vehicle in the summer of 2008, of which he is the registered owner, which he currently drives, and which is apparently not leased or financed, but owned by him outright; · The defendant commenced employment with Grand Hale on January 16, 2008, but in his Form 89, sworn February 1, 2008, he made no reference to that employment or his prospects in that regard. Rather, he referred to losses of Flagship for the year ending June 2007, and a gross income to him from Flagship of \$48,000 for that year. He indicated that he planned to take up employment as a trucker after upgrading the class of his driver's licence; and · The defendant's assertion that Flagship has ceased operation and is no longer a viable commercial vehicle, in the face of his continued recording of his current expenses in its books, his maintenance and purchase of some items consistent with resuming operations, and without him having taken any steps to wind up the company. The Relevant Dates

- [63] According to the pleadings, the parties separated on February 6, 2003. I accept that date as the date of their separation. The plaintiff brought an application in court on March 13, 2003, which the defendant attended and opposed. They continued to reside in the matrimonial home until it sold in May 2003. The situation was an unhappy one with the plaintiff alleging the defendant was abusive and the defendant alleging the plaintiff was abusing alcohol.
- [64] In the present case I find the triggering event to be May 31, 2003, at which time the parties divided the proceeds of the sale of their former matrimonial home and purchased separate residences based on an oral agreement, in accordance with the holding in *Re Spoklie*. This predates the November 24, 2003 order made pursuant to s. 57 of the FRA.
- [65] I find the valuation date for family assets to be the date of the start of the present hearing on June 17, 2008, or as close to that date as the evidence permits for all assets except Flagship, which I find is appropriately valued as of its year end of June 30, 2006, based on the specific findings that follow. Family Assets
- [66] The assets alleged to be family assets at the triggering date of May 31, 2003, are the defendant's shares in Flagship; the defendant's RRSPs at the Bank of Nova Scotia; the defendant's 1957 GMC Pickup truck, which he sold; the African Gray parrot aviary business in the possession and control of the plaintiff; savings accounts in the names of either party not yet divided; and Canada Pension Plan credits. The parties agree that family assets are to be divided equally. The Defendant's Shares in Flagship
- [67] The defendant owns 100 percent of the shares in Flagship, the private company he has used in his fish brokerage business since 1994. It is agreed that Flagship is a family asset.
- [68] In determining the value of the defendant's interest in Flagship, the only reliable evidence of its value is the evidence of Mr. Hooge, the business valuator called on behalf of the plaintiff. I have carefully reviewed a transcript of his testimony from June 18, 2008; his report dated

December 21, 2007 (Exhibit 2); his revised calculation of Flagship's fair market value as at June 30, 2006 (Exhibit 3); his revised calculation as at June 30, 2006 and June 30, 2007 (Exhibit 4); the proposed division of assets and liabilities prepared on behalf of the defendant and put to Mr. Hooge on cross-examination (Exhibit 5); and a table of 2007 combined federal and provincial income tax rates for individuals referred to by Mr. Hooge (Exhibit 7). The revised calculations were as a result of further financial information being revealed by the defendant closer to the hearing date.

- [69] Mr. Hooge's task was to value the defendant's 100 percent shareholdings in Flagship. His report is a "calculation of value" report, which is a type of report where there are limitations in the scope of the work undertaken. Mr. Hooge valued Flagship at the highest price available for the shares in an open and unrestricted market between informed prudent parties acting at arm's length and under no compulsion to act, expressed in terms of cash. In determining the "fair market value" for Flagship, Mr. Hooge did not consider personal goodwill or the unique advantage experienced by someone such as the defendant, despite there being considerable value in the defendant's goodwill given the many years of operation of Flagship in the fish brokerage business.
- [70] The plaintiff's position is that Flagship has more value than is reflected on its financial statements as long as the defendant operates it with the same diligence and commitment he has shown in past years of its operation, when he has not been facing the prospect of this litigation. When Flagship's profitability dipped in 2003 (post-separation) and in 2007 (when the present litigation was pending), the plaintiff asserts that the defendant was seeking to reduce his income from Flagship in order to reduce his exposure with regards to the division of assets and the amounts of child and spousal support payable.
- [71] Mr. Hooge's review ultimately included unaudited financial statements for Flagship from the years ending June 30, 2000 to June 30, 2007. His approach was to "take the balance sheet at June 30th, 2006 and June 30th, 2007, and just adjust the assets and liabilities on that balance sheet, adjust them from their reported book values to market values." After taking into account the recent financial information received after his report, Mr. Hooge then made certain adjustments to reach the figures of \$131,000 as of June 30, 2006, and \$88,000 as of June 30, 2007, as the fair market value of the defendant's shareholdings in Flagship.
- [72] This decrease in value is noteworthy in light of the defendant's evidence that Flagship was no longer doing business as of October 26, 2007 (which was four months into the next financial year), as the fishery was down and he was planning to pursue other employment as a trucker. However, the defendant then became employed by Grand Hale as a fish broker in January 2008, which he did not disclose until December 2008. This tends to discredit his assertion that he could no longer operate Flagship profitably in the fish brokerage business.
- [73] According to Mr. Hooge, the decrease in value of Flagship between June 30, 2006 (\$131,000) and June 30, 2007 (\$88,000) is as a result of a loss of \$120,000 to Flagship reported in 2007. I find that the defendant has not provided a satisfactory explanation for this loss, and the only

reasonable inference to be drawn is that he deliberately chose to do less business in order to show Flagship as a less profitable company. I therefore accept that the correct value for the defendant's 100 percent interest in Flagship is its fair market value as of June 30, 2006 (\$131,000), and I find that the plaintiff is entitled to an equal division of the family asset represented by Flagship in the amount of \$65,500.

- [74] In this regard, I note that the defendant placed before the Court his own calculation of the value of Flagship (Exhibit 5) in which he determined the "Total Company Funds" as of June 30, 2007 (which is Flagship's 2006 year end) to be \$41,433, from which he then deducted an amount of \$17,816, to represent income tax payable upon the winding up of Flagship at a rate of 43%, resulting in a final proposed value for Flagship of \$23,616. This information was placed before Mr. Hooge, who found it lacking and stated: But those are the only two amounts you see on Schedule A. For the purpose of valuing the - the shares themselves, all the rest of the assets are - are not included, and none of the liabilities are reflected in there either. So if you want a direct apples-to-apples correspondence, Schedule A, I suppose, has a value for the shares of \$41,433 as compared to my calculation of 88,000.
- [75] In relation to the defendant's deduction of \$17,816 for anticipated income tax payable, Mr. Hooge indicated that a rate of 43% is the top marginal rate only applicable to situations where "the individual has other income of about \$120,000" and that normally if a company is to be wound up the surplus is paid out as a taxable dividend at a much lower rate of 23%. Mr. Hooge also indicated that the personal tax liability proposed by the defendant and used to reduce his calculation of the value of Flagship would only occur if in fact Flagship is wound up. In this regard, when asked if it is necessary to wind up the company to realize a benefit, Mr. Hooge stated: Well, in most circumstances, if it's a going-concern business, you don't wind it up. I mean, that could be something that would never happen, or happen at some point way in the future. I don't - at this point, I don't know what the reasons for winding up the company is. You could leave the funds in the company and use it to start another business, for example. But it depends on the circumstances whether it is necessary to wind up the company.
- [76] Based on the testimony of Mr. Hooge and the lack of a cogent explanation by the defendant for the loss that results in a much lower value for Flagship as at June 30, 2007, I reject the assessment of value offered by the defendant in Exhibit 5, which includes the personal tax liability projected by the defendant incumbent upon winding up Flagship and paying the highest possible tax rate, neither of which I am satisfied will ever occur.
- [77] Among the assets included in the value of Flagship by Mr. Hooge and disputed by the defendant is a receivable for "The Norqueen", a ship that was involved in litigation. In his testimony the defendant advised that this matter related to a ship that had lost a load of fish. When it was put to him that the matter had been set for trial in May 2009 and had concluded in a default judgment he reluctantly agreed. He asserted that the judgment was likely to be uncollectable, although he did not provide any additional details or independent confirmation of that claim. I do not accept the defendant's uncorroborated assertion in this

regard. I do accept Mr. Hooge's inclusion of the assumed receivable pertaining to "The Norqueen" of \$13,086 in the fair market value of Flagship.

- [78] Another area of contention raised by the defendant was Mr. Hooge's inclusion of an automobile among Flagship's capital asset, which the defendant advises the company did not own. Mr. Hooge maintained that he had wanted the Flagship accountant to provide a proper explanation of what was going on with this asset as it continued to remain on the books for the years ending June 30, 2006, and June 30, 2007. Despite his inquiries no information about the vehicle was forthcoming. This was part of a pattern of non-cooperation by the defendant that was evident in the report and testimony of Mr. Hooge. Therefore, I decline to accept the defendant's uncorroborated assertion that the amount representing an automobile as an asset of Flagship (\$8,354) ought to be deducted from the fair market value of Flagship as determined by Mr. Hooge.
- [79] In summary, I reject the defendant's attempt to reduce Mr. Hooge's valuation of Flagship by "The Norqueen" receivable of \$13,086 and the "non-existent" company vehicle of \$8,354, as well as his attempt to further reduce the lesser values that he ascribes to Flagship by a substantial tax liability.
- [80] Lastly, with regards to the fair market value of Flagship, the plaintiff submits that the value of the fish licence (not herring leases as claimed by the defendant), represented by the payment of a cheque from Flagship in 2004 in the amount of \$514,000 payable to Alaska Trading Inc., be added to the fair market value of Flagship of \$131,000 as determined by Mr. Hooge, resulting in a total value for Flagship of \$645,000, of which the plaintiff claims half.
- [81] Because the defendant consistently failed to provide any documentation to support this large expenditure by Flagship, the plaintiff submits that the value of this asset ought to be added to the value of Flagship. Counsel submits that this ought to occur as the Court can have no confidence in the defendant's disclosure regarding his financial dealings, as in *Cunha*, where Fraser J. held, at para. 11: I conclude that where there has been concealment of assets, it ordinarily should be held that the concealment is ongoing, that there are assets still undisclosed, and that the division of assets should be affected accordingly.
- [82] The plaintiff submits that the defendant ought not to be permitted to avoid the proper division of family assets by such conduct.
- [83] While I have the obvious and serious concerns regarding the overall reliability and credibility of the testimony of the defendant as I have previously stated, I find that in this particular instance I am not inclined to simply add this large amount to the otherwise considerably more modest total fair market value of Flagship as determined by Mr. Hooge. The potential unfairness to the defendant of doing so is simply too great. Given the overall significant financial consequences to the defendant arising from the dissolution of the marriage, while I accept that there is a temptation to accede to the plaintiff's submission as a consequence of his non-disclosure in this instance, I decline to take this approach.

- [84] Therefore, the defendant owes the plaintiff \$58,272 (50% of \$131,000, less the \$7,228 he has paid to the plaintiff as advances on her share of Flagship as a family asset) as her half interest in his shares of Flagship. In the latter regard I accept the submissions of plaintiff's counsel tracking the \$7,228 as previously paid to the plaintiff by the defendant in this regard, and not the greater payment of \$13,728 as he claimed. Net Sale Proceeds from the Sale of the Matrimonial Home
- [85] The defendant advanced himself \$15,000 from Flagship to pay the initial deposits of himself and the plaintiff when they purchased their separate residences upon the sale of their former matrimonial home on May 29, 2003. The plaintiff was required to put down a deposit of \$5,000 and the defendant was required to put down a deposit of \$10,000. The plaintiff asserts, and I accept, that the defendant threatened to collapse the sale of the matrimonial home unless the plaintiff repaid him this \$5,000 from the proceeds of the sale, which she did. When asked about this by the plaintiff's former counsel on examination for discovery his answers, comprised of "haven't you ever played poker" and that it was a "negotiation ploy", are indicative of his attitude in this regard and support the plaintiff's claim.
- [86] The defendant also insisted that the plaintiff repay him \$700 that she had received as her share of the sale of a family horse. The Direction to Pay pertaining to the sale of the former matrimonial home confirms the deduction of a \$5,000 loan and \$700, representing half the sale proceeds of the horse, from the plaintiff's share of the sale proceeds. I find that the plaintiff is entitled to \$7,500 as half of the \$15,000 amount taken from Flagship, having repaid to the defendant the \$5,000 advanced to her. She is also entitled to \$700 relating to the sale of the horse. Therefore, I find that the plaintiff is owed \$8,200 by the defendant in relation to this transaction. The Defendant's RRSPs
- [87] As of December 13, 2002, the defendant indicated that he had \$92,331 in RRSPs. There is no suggestion that these RRSPs, or a portion of them, were acquired except during the marriage. The defendant confirmed that he cashed out \$15,000 from his RRSP on March 11, 2003 and another \$15,000 on March 12, 2003. It must be remembered that the parties were in court before Master Nitikman on March 13, 2003, at which time an order was made restraining either party from dealing with family assets.
- [88] The defendant's remaining RRSPs were valued at \$61,774 as of March 31, 2003, and at \$72,220 as of December 31, 2006, according to the statement he provided. Although the defendant did not provide any more current statements, in the Form 89 Financial Statement sworn on December 3, 2008, he stated the same value of \$72,220 for his RRSPs.
- [89] I find that the plaintiff is entitled to \$36,110 as half of the defendant's RRSPs most recently valued at \$72,220, which are a family asset.
- [90] I specifically reject the testimony of the defendant that he cashed the \$30,000 out of his RRSP in March 2003 to repay a debt owing by Flagship to Yamazaki. He indicated that in March 2003 he was on a business trip with Yamazaki, and their representative, learning of his marital situation, became concerned that Yamazaki might not be repaid the money it

was owed by Flagship. The defendant's testimony surrounding why he had never disclosed a loan agreement between Flagship and Yamazaki, and the amount and circumstances of the purported loan I find to be wholly unsatisfactory. In particular, I note that if Yamazaki was concerned about the security of Flagship because of the defendant's marital breakdown those concerns are inconsistent with Yamazaki depositing \$79,985 by wire transfer into Flagship's U.S. bank account on March 10, 2003. Furthermore, given that Flagship had \$225,947 on deposit in its U.S. bank account on March 3, 2003, and a GIC worth \$165,546 as of June 30, 2003 to secure a \$135,000 line of credit, it is clear that Flagship had other means at that time of repaying \$30,000 to Yamazaki.

- [91] In this regard I reject the letter ostensibly provided by Yamazaki addressed "To whom it may concern" and dated May 12, 2004, as proof of the legitimacy of this business debt. In any event, given the state of Flagship's finances at this time, there was no need for the defendant to cash in personal RRSP funds to satisfy a Flagship debt. Thus, I find that the plaintiff is entitled to a compensation order in the amount of \$15,000 pursuant to ss. 66(1) and (2)(c) of the FRA, which represents half of the \$30,000 taken by the defendant from his RRSP in March, 2003.
- [92] To conclude in relation to the division of the defendant's RRSPs as family assets, the plaintiff is entitled to \$36,110 as half of his current RRSP, and \$15,000 in compensation for the \$30,000 withdrawn by the defendant just prior to the first court application in March 2003, for a total of \$51,110. The 1957 GMC Pickup
- [93] This family asset was sold by the defendant contrary to a prior order of the Court and without prior notice to the plaintiff. It was a restored vehicle, carefully and painstakingly worked on by the defendant, and a vehicle upon which family funds had been spent on parts and enhancements.
- [94] The defendant refused to fully cooperate with the appraiser, Malcolm Brumpton of Total Appraisals, when Mr. Brumpton attended at his residence on September 23, 2004. He also refused to pay his half of the cost of the joint appraisal as previously agreed. In his evidence, the defendant said "I was as cooperative as I had to be" and "to the extent that I felt I had to be", but he stated that he refused to start the truck for the appraiser as "it was not a licensed vehicle."
- [95] In his report Mr. Brumpton writes the following (at p. 403): On September 23, 2004, the appraiser attended the residence of Mr. [P.] and made an inspection of the vehicle. Questions with regard to the truck and parts were directed to Mr. [P.], who declined to answer the majority of my questions as per instructions from his legal counsel. Inspection was carried out in Mr. [P.]'s garage with his supervision.
- [96] Given the type of vehicle, the correct approach to value it according to Mr. Brumpton was the market approach and he noted the following (at p. 403): In making our evaluations we talked with dealers, new and used, reviewed our internal sales information, and discussed transactions with other Classic/Hot-Rod automobile dealers. A unit such as this 1957 GMC

Pick-up truck that has been built to specifications of the present owner, when selling this unit the value depreciates considerably when compared to the cost of building. The main reason for this depreciation is the limited amount of use for the vehicle; this greatly reduces the segment of the market for buyers who would be interested in investing this amount of money in a unit such as this. We spoke to companies that are capable of building this type of truck and the general consensus is that the cost to reproduce this truck could run in the \$60,000.00 to \$80,000.00 range, depending on the amount of machining and rebuilding that went into the major components such as, engine, transmission, rear-end and suspension.

- [97] Mr. Brumpton's professional opinion was that this truck would sell in the range of \$32,000 to \$37,000. The defendant claims to have sold the truck for \$32,000 but has not provided any documentation relating to the sale. Without hesitation, I find the truck to be valued at \$37,000, and the plaintiff to be entitled to half that amount, \$18,500, payable by the defendant, given that he kept all the sale proceeds. The African Gray parrot breeding business, referred to as Stealth Aviary
- [98] The defendant claims that this business sold by the plaintiff (cages and two breeding pairs of African Gray parrots) for \$1,900 in September 2006 was seriously undervalued. In 2002, the parties started this project as a home-based business for the plaintiff for a cost in excess of \$9,300. The defendant submits that the plaintiff made significant extra income from this business as baby parrots sell for \$750 to \$1,500 each and the breeding pairs may have up to four or five hatchings a year with four to five eggs per hatching.
- [99] The plaintiff testified that it was not a successful business, particularly in the latter years, as many of the eggs or the young did not make it and as the breeding pairs got older, they did not breed as often. She also said that noise in the neighbourhood disrupted them. Her Form 89 Financial Statements make reference to some income from the parrot business.
- [100] On the evidence, I find that it is likely that the plaintiff no longer wanted to continue the parrot business as the related expenses and effort on her part were high and the return to her was low. She may have significantly undervalued the breeding pairs and the associated equipment at the time of their sale in 2006 but there is no evidence before the court to that effect, except the defendant's assertion. Assuming depreciation in the aging birds, somewhat arbitrarily, I assign a value to the aviary business of \$5,000 at the time of its sale. Therefore, as a family asset, the defendant is entitled to receive \$2,500 to represent his half interest in the value of the aviary business at the time of its sale.
- [101] I decline to accede to the submission of the plaintiff that because the defendant took all manner of other items upon separation that she ought not to be required to compensate him for the sale of the aviary assets. No claims were advanced by her for those other items and therefore it is not appropriate to indirectly take them into account. Savings in Defendant's name

- [102] As of March 10, 2003, three days prior to the court application before Master Nitikman on March 13, 2003, the defendant had \$12,191 on deposit in his personal bank account with the Scotia Bank. I find that amount to be a family asset and rule that the plaintiff is entitled to \$6,096 as her half interest in those funds. Canada Pension Plan Credits
- [103] The Canada Pension Plan credits generated during the course of the cohabitation of the plaintiff and the defendant are to be split to result in an equal division between the parties. Their cohabitation commenced in "the spring of 1989" and so I find, somewhat arbitrarily, that it commenced May 1, 1989, and ended on February 6, 2003, when they separated.
Family Debts
- [104] The plaintiff is not advancing any family debts to be shared.
- [105] Upon separation, the defendant had no debts except the shareholder's loan in Flagship in the amount of \$166,174 as of June 30, 2003. He seeks to have the plaintiff held responsible for half of this amount, as he claims on his Form 89 Financial Statement that he withdrew an amount of approximately \$169,000 from Flagship to purchase the parties' former matrimonial home. When the defendant was cross-examined about this, he was only able to confirm that Flagship issued two cheques to him (one for \$20,000 on June 21, 1999, and a second for \$80,000 on July 3, 1999) to enable him to purchase the former matrimonial home. Therefore, the available evidence only supports a potential family debt in this regard of \$100,000.
- [106] The evidence before the court in relation to the shareholder's loan of funds to the defendant from Flagship in the context of the Canada Revenue Agency ("CRA") audit shows that the amount of the shareholder's loan increased to \$372,477 in 2000 as a result of the defendant renewing Flagship's GIC, which was valued at \$130,000 in his own name, and further withdrawals of funds from Flagship by him. The amount of the shareholder's loan was then reduced to \$279,977 because a management fee of \$92,500 due to the defendant was credited against the shareholder's loan account on June 30, 2000. The CRA audit documents show that contrary to the defendant's assertion that the GIC was worth \$150,000 when it was transferred back into the name of Flagship as directed by the CRA, it in fact had a value of \$141,555.18.
- [107] The plaintiff submits that the \$100,000 that the defendant took by way of a shareholder's loan to purchase the former matrimonial home in June 1999 was repaid by the \$92,500 management fee and the increase in the value of the GIC between when it was renewed in the defendant's name and the time it was transferred back to Flagship.
- [108] I accept this interpretation of the evidence. I find that the defendant has not established by any satisfactory means that the amount of the Flagship shareholder's loan account, \$166,174 as of June 30, 2003, as owed by the defendant to Flagship, ought properly to be considered to be family debt.

- [109] In addition, I accept the testimony of Mr. Hooge, elicited on cross-examination by counsel for the defendant, that the defendant may not face tax liabilities and penalties from the CCRA as a result of his not claiming the shareholder's loan as income on his personal tax return given that it has been outstanding for five years. Therefore, a tax liability to the defendant in relation to the shareholder's loan amount as claimed is at best speculative and contingent. It must be remembered that Mr. Hooge's expertise is in business valuation, not tax, and the defendant did not put evidence from a tax expert before the Court to support his claim of possible negative tax consequences to him arising from income taken by way of the shareholder's loan. Without such evidence the Court cannot assess the impact, if any, on the defendant's potential tax liability or on the significance of a total of \$14,929 in taxes that he has paid for the years of 2003 to 2008 inclusive, on amounts deemed to be benefits to him from the shareholder's loan. The discount letter by defendant's accountant does not constitute expert opinion evidence. A range of possible tax rates exists and there may be real penalties assessed against the defendant in this regard, or there may be no adverse tax consequences to him at all.
- [110] For these reasons, I do not find that there are any family debts in existence at the time of the triggering event to be deducted from the value of family assets prior to division. As I do not find the 2003 shareholder's loan account to be a family debt, no associated future or contingent tax liabilities that the defendant may experience as a result of that loan account are to be considered family debt. The Parties' Past and Present Incomes The Plaintiff's Income
- [111] On the evidence, I find that there is no reason to find that the plaintiff's annual income is other than she has reported it for past years. Going forward it should be based on her actual reported annual income for income tax purposes. To the extent her expenditures exceed her income, I find that it is a reflection of the considerable debt she has incurred since separation, and that any previously undisclosed income earned by her, either from the parrot business or from occasionally cleaning houses, is very minimal and of no real import. I also note that during the period that this income may have been earned, the plaintiff was receiving no interim spousal support from the defendant and was in dire straits financially, and nor did she regularly receive the advance on family assets.
- [112] Therefore, I decline to accede to the defendant's submission that I ought to impute to her an annual income of \$50,000 for past years or going forward, and the plaintiff's annual income for the purposes of determining spousal support and child support will be based on her reported annual income. The Defendant's Income
- [113] The defendant's income, past and present, is a much more complicated matter, given the fluidity and lack of proper separation between the business of Flagship and the defendant's personal business. This matter was inquired into at some length by Mr. Hooge.

- [114] The defendant's income as reported on his personal tax returns is as follows Year Defendant's Income 1996 \$39,127 1997 \$17,513 1998 \$46,152 1999 \$52,416 2000 \$62,513 2001 \$112,081 2002 \$65,879 2003 \$88,950 2004 \$64,400 2005 \$67,289 2006 \$49,227 2007 \$58,279 The defendant's declared personal income set out above was derived from Flagship's significant gross business revenues for the years of 2000 to 2007, and for four additional months, from July 1 to October 26, 2007, into the next financial year, as Flagship's year end is June 30.
- [115] Flagship's gross business revenues are as set out below. 2000 - \$8,353,686 2001 - \$7,640,199 2002 - \$3,255,731 2003 - \$1,315,491 2004 - \$3,654,566 2005 - \$6,871,309 2006 - \$4,794,199 2007 - \$2,209,429 2008 - \$720,553 (four months)
- [116] October 26, 2007 is the last time that the defendant through his bookkeeper indicates that he sold fish. To the extent that the defendant's income has declined since 2003 when the parties separated, he attributes that to an overall decline in the fishery. However, I note that the defendant's own figures show gross sales in 2004, 2005, 2006, 2007, and even for the four months into the 2008 financial year, if projected at the same level for the balance of the financial year, are all in excess of the amount of gross sales in 2003. In fact, although variable, the gross business revenue for recent years does not support the defendant's assertion that he cannot make a good living as a fish broker via Flagship.
- [117] Also relevant to the defendant's income are the amounts over the years that he "income-split" with the plaintiff, which are as follows: Year Income allocated to the Plaintiff as per her CPP summary on Income Split with the Defendant 1995 \$14,000 1996 \$20,989 1997 \$19,200 1998 \$16,500 1999 \$17,999 2000 \$18,000 2001 \$19,150 2002 \$31,152
- [118] The following history, based on a summary prepared by counsel for the plaintiff, shows additional monies taken by the defendant from Flagship that properly ought to be considered as income:
- a. In 2000, the defendant takes out a shareholder's loan of \$279,835.00 (Tab 17, p. 5)
 - b. In 2001, his shareholder's loan has increased to \$292,231.00 (See carry forward balance for shareholder's loan at Tab 17, p. 11), with the result that the defendant has taken another \$12,396.00 out of Flagship.
 - c. In 2002, the shareholder's loan drops to \$140,911.00 (Tab 17, p. 11).
 - d. Although during his re-examination on June 29, 2009, the defendant explained that the shareholder's loan increased from \$0.00 to \$279,835.00 between 1999 and 2000 and then decreased to \$140,911.00 in 2002. He explained that because Flagship had a GIC of \$150,000.00 that he renewed in his own name when it came up for renewal and later put back into Flagship as a result of the tax audit. However, the CRA audit documents do not support this explanation. These documents show the shareholder loan increased up to \$373,576.03 in 2000 as a result of Mr. [P.]'s renewing the Flagship GIC valued at \$130,000.00 in his own name and various withdrawals made by him of monies from Flagship. The shareholder's loan account then reduced to \$279,835.00 because a \$92,500.00 management

fee due to the shareholder on June 30, 2000 was credited against the shareholder's loan account. (Tab 31, pp. 235 to 244). Contrary to the defendant's assertions during his re-direct examination that the GIC was worth \$150,000.00 when it was transferred back into Flagship's name, the defendant's document (No. 27, Defendant's List of Documents) shows the value of the GIC to be \$141,555.18 when it was transferred back into Flagship's name.

- e. In 2003, the shareholder's loan increases to \$166,174.00 (Tab 17, p.16). In addition to what he reports as income, the defendant received a further \$25,263.00.
- f. In 2004, the shareholder's loan increases to \$188,629.00 (Tab 23, p. 71). In addition to what he reports as income, the defendant received a further \$22,455.00.
- g. In 2005, the shareholder's loan increases to \$246,676.00 (Tab 23, p. 95). In addition to what he reports as income, the defendant received a further \$58,047.00.
- h. In 2006, the shareholder's loan increases to \$259,206.00 (Tab 23, p. 102). In addition to what he reports as income, he received a further \$12,530.00.
- i. In 2007, the shareholder's loan decreased to \$200,056.00 (Tab 24, p. 47). In addition to the \$48,000.00 he reports on his income tax return, the shareholder's loan reduces by \$59,150.00 because of monies for expenses paid for personally by the Defendant opposed to through the business, refunds received by the business etc. are against the loan.

[119] Of note in terms of the defendant's income is the fact that he was reassessed by Revenue Canada for past income in January 2002, which was just over a year prior to separation. In particular, again relying on the summaries compiled by counsel for the plaintiff, the following is relevant:

- (a) In January, 2002, the defendant was reassessed with respect to income tax for 1998, 1999, 2000 (Tab 31, pp. 235-244). In the CRA reassessment at pp.235 to 237, CRA takes issue with certain categories of expenses that Mr. [P.] has deducted through the business (see notes 2, 5, 6 and 7 and 8). They take issue with expenses deducted twice by Mr. [P.] - once at the corporate level and a second time at the personal level (see notes 3 and 4). They also take issue with an expense that is wrongfully included as a deduction (see note 9). CRA assesses interest on the shareholder's loan (see note 1 at p. 237).
- (b) As a result of CRA reassessment regarding, a further \$25,795.00 was added back into Mr. [P.]'s income for 1999. As a result of the CRA reassessment, a further \$24,009.00 was added back into Mr. [P.]'s income for 2000. According to the defendant's evidence during redirect examination on June 29, 2009, these taxes reassessments were paid through Flagship.

[120] Mr. Hooge prepared an initial opinion as to the defendant's income, dated December 21, 2007. In order to determine the defendant's income, Mr. Hooge took the monies available to Flagship for the years 2000 to 2006 and then added back in the management salaries, home office rental and expenses, and the disallowed CRA expenses from the 2000 audit. I have declined to set out those amounts because he subsequently amended them.

- [121] At the time he prepared his first opinion, Mr. Hooge did not appreciate that the plaintiff and the defendant were income splitting in 2000, 2001 and 2002, and therefore neglected to include the income that had been allocated to the plaintiff as income attributable to the defendant. In addition, he did not appreciate that home office expenses, or at least a portion of them, were legitimately deducted by the defendant from 2003 to 2006 as business expenses, and that interest generated on the shareholder's loan was not properly "other income" for the defendant.
- [122] After the defendant provided his February 1, 2008 Form 89 Financial Statement and additional facts became known to Mr. Hooge, he corrected the schedules to his December 21, 2007 report. The adjusted figures for Mr. P.'s income for the years 2000 - 2007 as per these revisions to his report are as follows: 2000 \$199,971 2001 \$203,700 2002 \$135,538 2003 [\$41,187] 2004 \$87,392 2005 \$126,732 2006 \$63,371 2007 [\$74,136]
- [123] The foregoing table represents the money that the defendant received from Flagship without considering the other benefits he received by writing off various personal expenses as business expenses. Mr. Hooge noted that personal expenses can be concealed in a variety of ways in a company's financial records. In rendering his opinion, Mr. Hooge looked at some of the typical expenses small businesses will deduct even though they are expenses not really necessary to generate sales or revenue. He stated that these types of expenses would typically include automotive expenses, advertising, promotional costs, meals and entertainment expenses.
- [124] Mr. Hooge summarized the expenses that Flagship recorded in its financial statements from 2000 to 2007 and noted that some of the expenses fluctuated significantly from year to year. Automotive expenses, for example, were only \$2,222 in 2001, increased to \$35,460 in 2002, and again dropped to \$5,144 in 2004. As well, Mr. Hooge noted that the accounting and legal expenses fluctuated significantly.
- [125] As a result of these fluctuating expenses, Mr. Hooge had a number of questions that were posed to the defendant by way of Interrogatories:
- a. Question 25 asks "Provide the amounts that were personal, discretionary, unusual or non-recurring in nature, the absence of which would not have affected revenue of the company for the fiscal years 2004 to 2006".
 - b. Question 27 asks "Why do accounting and legal expenses fluctuate so much from year to year. What is the estimated normal level of annual accounting and legal costs required to operate the business".
 - c. Question 28 asks "What is the nature of automotive expenses. What vehicles do these expenses relate to. How is the vehicle used in the business".
 - d. Question 32 (b) asks "Why does fuel increase from \$10,990 in 2004 to \$101,235 in 2007".
 - e. Question 32(g) asks "Why do wages and benefits fluctuate so much from year to year".

[126] The defendant provided the following answers to those questions:

- a. Answer 25: This question is unclear. In response, all of the expenses claimed are expenses claimed in the ordinary course of the business operations.
- b. Answer 27: The financial statements reflect the normal level of annual accounting and legal costs required to operate the business which fluctuate from year to year.
- c. Answer 28: The automotive expenses relate to the operation of a motor vehicle used in the ordinary course of business picking up payments, checking on fish and related activities.
- d. Answer 32(b): The fuel costs represent the costs incurred by the "tenders" which are the boats which transport the fish from the fishing vessels to the processor. The company payment to the tenders will in some cases include the fuel costs and in other cases the fuel costs will be billed separately to the company.
- e. Answer 32(g). I will review with the accountant the fluctuation in wages and benefits from year to year.

[127] After a number of requests and a direction from the Court in relation to the years 2007 and 2008, the defendant provided Flagship's general ledgers for the years 2004, 2005, 2006, 2007, and 2008, providing the records for the last two years on January 22, 2009 during the hearing. A review of those ledgers reveals that the defendant tended to write off many personal expenses as Flagship business expenses.

[128] For example, I note in reviewing the automotive expenses being deducted by Flagship as business expenses, that the defendant deducts 80 percent of the fuel, repair, insurance and loan/lease payment expenses he incurs. However, in various instances, repair bills are excessive and include repair bills to more than one vehicle. It is also in evidence that his hobby is buying vehicles from time to time, rebuilding them into performance vehicles, and selling them. I find that I accept the submissions of plaintiff's counsel that his recording of a 20 percent deduction to those expenses for personal use constitutes under-recording the personal nature of those expenses. It is noteworthy that during this time, the defendant operated his business from his home, and when he went on buying trips to Alaska or San Francisco, he flew and rented vehicles. His evidence in re-direct was that he often paid truck drivers to take suitcases of cash to the buying fields. Accordingly, were I inclined to accept this evidence, it appears that the defendant was not likely to incur significant automotive expenses while conducting the business of Flagship. Therefore, I accept the submission of counsel for the plaintiff that automotive expenses of Flagship should be discounted by 70 percent, as opposed to 20 percent. Similarly, I accept that meals and entertainment expenses ought to be written off at the rate of 50 percent because of the personal benefit to the defendant.

- [129] With regards to business expenses for 2008, the defendant conceded during his cross-examination that notwithstanding his evidence that he was no longer engaged as a fish broker through Flagship, and is now employed as an employee of Grand Hale, he was still writing off, as Flagship business expenses, his vehicle fuel, repairs, insurance and lease payments, restaurant meals, travel expenses, home phone and cell phone expenses, and miscellaneous expenses under the category "office".
- [130] When reviewing the following expenses claimed by the defendant as Flagship business expenses, it is useful to recall that reference to legal fees payable to the firm that includes "Gould" in its name refer to the defendant's personal legal fees in relation to this litigation, payments to Stikeman Elliot refer to the payment of legal fees of a former companion, C.M., "management fees" paid to the plaintiff after separation in February, 2003, refer to payments of interim spousal support and/or advances on family assets, and the payment of "casual wages" to M.P., another former companion, apparently refer to costs related to boarding horses or other horse-related expenditures. Given the defendant's proclivity to attribute to Flagship expenses that are in reality his personal expenses, I find that the following amounts claimed by him as Flagship business expenses are properly to be considered as additional income (the numbers in brackets represent the category of expense in Flagship ledgers): 2003 Ledger for year ending June 30, 2003 Management Fees - to the plaintiff (5215) (Exhibit 9, Tab 1, p. 27) \$1,000.00 Total \$1,000.00 2004 Ledger for year ending June 30, 2004 Legal (6000) July 30, 2003 Baumgartel Gould (Cheque # 2514) (Tab 40, p. 37) Management Fees-to the plaintiff (5215) (Tab 40, p. 37) Vehicle Expenses (6004) fuel, insurance and repair expenses (rental expenses deducted from ledger total) \$6,968.59 x 50% (ie. 70% minus 20% already claimed by the defendant) (Tab 40, pp.43-44) Meals (6008) \$5,366.92 x 50% (Tab 40, p. 45) \$3,255.51 \$17,500.00 \$3,484.30 \$2,683.46 Total \$26,923.27 2005 Ledger for year ending June 30, 2005 Legal (6000) April 30, 2005 Gould & Company (Adjustment) (Tab 40, p. 88) Management Fees - to the plaintiff (5215) (Tab 40, p. 88) Vehicle Expenses (6004) Fuel, insurance and repair expenses (parking expenses deducted from ledger total) \$14,747.96 x 50% (Tab 40, missing p. 44 of ledger) Meals (6008) \$3,438.10 x 50% (Tab 40, missing p.44 of ledger) \$14,349.13 \$12,000.00 \$7,373.95 \$1,719.05 Total \$35,442.13 2006 Ledger for year ending June 30, 2006 Management Fees - to the plaintiff (5215) (Tab 40, p. 131) Vehicle Expenses (6004) Fuel, insurance and repair expenses (parking expenses deducted from ledger total) \$13,668.29 x 50% (Tab 40, p. 135-136) Meals (6008) \$3,163.44 x 50% (Tab 40, p. 138) \$9,000.00 \$6,834.15 \$1,581.72 Total \$17,415.87 2007 Ledger for year ending June 30, 2007 Legal (6000) January 29, 2007 Gould Goodwin & Company April 12, 2007 Gould Goodwin & Company April 30, 2007 Gould Goodwin & Company June 29, 2007 Gould Goodwin & Company (Exhibit 9, Tab 4, p. 25) Casual Wages- to M.P. (former female companion) (5151) (Exhibit 9, Tab 4, p. 24) Vehicle Expenses (6004) including sub-categories (500) and (6005) Fuel, insurance, repair and loan payments (parking expenses deducted from ledger total) \$11,803.30 x 50% (Exhibit 9, Tab 4, p. 30) Meals (6008) \$2,201.25 x 50% (Exhibit 9, Tab 4, p. 30) \$391.41 \$3,528.65 \$851.28 \$980.31 \$10,050 \$5,901.65 \$1,100.63 Total \$23,258.93 2008 Ledger for year ending June 30, 2008 Legal (6000) October 28, 2007 Gould

Goodwin & Company February 1, 2008 Gould Goodwin & Company June 9, 2008 Gould Goodwin & Company June 30, 2008 Gould Goodwin & Company (Exhibit 9, Tab 3, p. 13) Casual Wages - to M.P. (former female companion) (5151) (Exhibit 9, Tab 3, p. 13) Vehicle Expenses (6004) \$7,105.71 x 50% January 1, 2008 to June 30, 2008 \$3,242.54 x 100% (Exhibit 9, Tab 3, pp. 14-15) Vehicle Lease (6008) July 1, 2007 to December 31, 2007 \$2,654.22 x 50% January 1, 2008 to June 30, 2008 \$2,022.54 x 100% Meals (6008) \$804.87 x 50% \$815.62 x 100% (Exhibit 9, Tab 3, p. 15) Travel (6009) January 1, 2008 to June 30, 2008 \$3,940.99 x 100% (Exhibit 9, Tab 3, p. 16) Office Expenses (6010) January 1, 2008 to June 30, 2008 \$1,097.32 x 100% (Exhibit 9, Tab 3, p. 16) Telephone (6014) \$2,918.15 x 100% (Exhibit 9, Tab 3, p. 3 [sic] 16) \$244.70 \$3,000.00 \$1,000.00 \$2,500.00 \$4,590.00 \$3,552.86 \$3,242.54 \$1,327.11 \$2,022.54 \$402.44 \$815.62 \$3,940.00 \$1,097.32 \$2,918.15 Total \$30,653.28

- [131] The relevant sections of the Federal Child Support Guidelines, S.O.R./97-175 (the "Guidelines") for determining a party's "Guideline Income" for child support purposes are as follows: 18 (1) Where a spouse is a shareholder, director or officer of a corporation and the court is of the opinion that the amount of the spouse's annual income as determined under section 16 does not fairly reflect all the money available to the spouse for the payment of child support, the court may consider the situations described in section 17 and determine the spouse's annual income to include
- (a) all or part of the pre-tax income of the corporation, and of any corporation that is related to that corporation, for the most recent taxation year; or
 - (b) an amount commensurate with the services that the spouse provides to the corporation, provided that the amount does not exceed the corporation's pre-tax income.
- (2) In determining the pre-tax income of a corporation for the purposes of subsection (1), all amounts paid by the corporation as salaries, wages or management fees, or other payments or benefits, to or on behalf of persons with whom the corporation does not deal at arm's length must be added to the pre-tax income, unless the spouse establishes that the payments were reasonable in the circumstances. 19 (1) The court may impute such amount of income to a spouse as it considers appropriate in the circumstances, which circumstances include the following:
- (a) the spouse is intentionally under-employed or unemployed, other than where the under-employment or unemployment is required by the needs of a child of the marriage or any child under the age of majority or by the reasonable educational or health needs of the spouse;
 - (b) the spouse is exempt from paying federal or provincial income tax;
 - (c) the spouse lives in a country that has effective rates of income tax that are significantly lower than those in Canada;

- (d) it appears that income has been diverted which would affect the level of child support to be determined under these Guidelines;
 - (e) the spouse's property is not reasonably utilized to generate income;
 - (f) the spouse has failed to provide income information when under a legal obligation to do so;
 - (g) the spouse unreasonably deducts expenses from income;
 - (h) the spouse derives a significant portion of income from dividends, capital gains or other sources that are taxed at a lower rate than employment or business income or that are exempt from tax; and
 - (i) the spouse is a beneficiary under a trust and is or will be in receipt of income or other benefits from the trust.
- (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.

[132] Given the defendant's pattern of withdrawing the retained earnings of Flagship under the guise of a shareholder's loan and not paying tax on this money, I find, in accordance with sections 18(1) and 18(2) of the Guidelines that, in accord with the analysis of Mr. Hooge, all the monies available to the defendant in the various tax years in issue should be attributed to a determination of the defendant's Guideline Income. Thus, in accordance with section 18(2) of the Guidelines, I find that the various amounts the defendant has expensed to Flagship as salaries, wages, management fees and other payments or benefits on his behalf or to his benefit are to be added back into his personal income for the year to which they pertain.

[133] Therefore, I accept that Mr. Hooge's adjusted income for the defendant for the years of 2000 to 2007 is correct, and that the foregoing expense amounts are properly added to the amounts determined by Mr. Hooge, resulting in the adjusted income amounts for the defendant for the years 2003 to 2007, as set out below: Year Mr. Hooge's Determination of Income Personal Expenses Written Off Adjusted Income 2000 \$199,971.00 + 2001 \$203,700.00 + 2002 \$135,538.00 + 2003 [\$41,187.00] + \$1,000.00 [\$40,187.00] 2004 \$87,392.00 + \$26,923.27 \$114,315.27 2005 \$126,732.00 + \$35,442.13 \$162,174.13 2006 \$63,371.00 + \$17,415.87 \$80,786.87 2007 [\$74,136.00] + \$23,258.93 [\$50,877.05]

[134] It is noteworthy that in 2003 and 2007 the defendant's income is recorded as a loss. Based on the above amounts, the defendant's average adjusted income for 2002, 2004, 2005 and 2006 (and not including 2003 and 2007) is \$123,203.56.

[135] Further, pursuant to s. 19 of the Guidelines, I find that the average earnings of the defendant for the years 2002, 2004, 2005 and 2006 when he actually worked, namely \$123,203.56, is to be imputed as income to the defendant for 2003 and 2007 when he was capable of generating an income but decided not to work.

- [136] In fact, in 2003 the defendant supported himself on a line of credit and did not work. Mr. Hooge notes the fact that the management salary and shareholder's draw were financed by the \$135,000 company line of credit (Exhibit 4, Schedule 2.0). The defendant blamed his low revenue in 2003 on the divorce proceedings which, he maintained, adversely affected his ability to work.
- [137] In 2007, using various excuses, the evidence shows that the defendant deliberately chose not to carry on business in Flagship despite generating \$2,209,429 in gross revenue in 2007, and significant revenue for the four months into the 2008 financial year. When asked about opportunities for growth in his business, the defendant maintained that the business of fish brokerage is on the decline due to declining fish stocks and there was no opportunity for growth (Tab 40, Interrogatories, Tab 40, p. 149, A 9). He maintained that as a result, he may find it necessary to close down Flagship.
- [138] Despite his various answers to Interrogatories, during the defendant's cross-examination, when he was asked why Flagship maintained its status as an Active Buyer and Exporter with the Alaska Department of Fish and Game in both 2007 and 2008 if he had no intention of operating it, he became very evasive. Similarly, when asked why Flagship was listed in both the 2007 and 2008 Preliminary Processors & Buyers (Intent to Operate) Listing published on-line by the Alaska Department of Fish and Game Division of Commercial Fisheries, the defendant became evasive and argumentative, maintaining that he lived in British Columbia and should be able to make a living in British Columbia. This was his position despite that in all years that Flagship has been in operation, it has pursued and generated significant revenues from fisheries in Alaska and California. During cross-examination, the defendant conceded that the Alaska Salmon Fishery was re-certified as sustainable by the Marine Stewardship Counsel in November, 2007, and that commercial salmon fishermen in Alaska caught more than 200 million salmon in 2006, which was the fourth year in the last ten with a catch that high.
- [139] I find that these answers by the defendant must be viewed in the context of the very significant gross sales of Flagship in 2007; the defendant misleading the Court with his proposed plans to become a truck driver; and then his non-disclosure in June 2008, during this litigation, that he was actually employed by Grand Hale as a fish broker as of January 2008. It is obvious that there is work to be had in the fish brokerage business for the defendant, despite the reported general decline in certain fish stocks.
- [140] When viewing the performance of the defendant and Flagship from 2000 to 2007 in the context of the marital breakdown in 2003 and the timing of phases of the present litigation, I am drawn to the inescapable conclusion that the defendant was capable of earning incomes in 2003 and 2007 similar to those earned in other years. It is noteworthy that in 2006, when he had a life-threatening illness from which it took a number of months for him to recover, he continued to operate Flagship in a manner so as to generate income. I also note that in the periods when Flagship reported negative earnings the defendant continued to take management fees and claim business expenses via Flagship. Thus, I find that the

previously cited criteria for imputing income to the defendant in accordance with the provisions of section 19 of the Guidelines have been met.

[141] For these reasons I find that the defendant's Guideline Income for the purposes of determining past and present spousal and child support is as set out in the table at para. 133 of these reasons, based on the amounts determined by Mr. Hooge and the addition of the amounts of certain expenses for some years) except that I impute to the defendant an income of \$123,204 for the years of 2003 and 2007. Spousal Support

[142] Section 15.2 of the Divorce Act is the main provision governing entitlement to spousal support. Section 15.2(1) gives broad discretion to the Court to order lump sum and/or periodic payments as it sees fit. This section and its guiding principles were addressed by Madam Justice Rowles of the British Columbia Court of Appeal in *Chutter v. Chutter*, 2008 BCCA 507, at paras. 45-49:

[45] Section 15.2 of the Divorce Act is the main provision governing entitlement to spousal support. Subsection 15.2(6) provides that a spousal support order should meet the following objectives:

- (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.

[46] In order to achieve a fair and equitable distribution of resources, all four of these objectives should be examined: *Moge v. Moge*, [1992] 3 S.C.R. 813 at 850-853, 43 R.F.L. (3d) 345. Having regard to these policy objectives, courts must consider the condition, means, needs and other circumstances of each spouse, including the factors set out in s. 15.2(4):

- (a) The length of time the spouses cohabited;
- (b) The functions performed by each spouse during cohabitation; and
- (c) Any order, agreement or arrangement relating to support of either spouse.

- [47] Based on the statutory provisions and the case authorities, the Supreme Court of Canada has identified three grounds for entitlement to spousal support: (1) compensatory support, which primarily relates to the first two objectives of the Divorce Act; (2) non-compensatory support, which primarily relates to the third and fourth objectives; and (3) contractual support (*Bracklow v. Bracklow*, [1999] 1 S.C.R. 420 at paras. 15, 41-42, 44 R.F.L. (4th) 1).
- [48] The claim for spousal support in this case was advanced on compensatory and non-compensatory support principles.
- [49] Although the compensatory and non-compensatory grounds for spousal support are animated by different models of marriage, the case authorities hold that there is no single basis of support or objective under the Divorce Act that supersedes the other, and that many claims involve aspects of both compensatory and non-compensatory principles (*Bracklow*, at para. 27; *Moge*, at 852). A court is not called upon to decide on one basis for support to the exclusion of the other but rather to "[apply] the relevant factors and strik[e] the balance that best achieves justice in the particular case" (*Bracklow*, at para. 32). Moreover, the doctrine of equitable sharing is the overarching principle that must be borne in mind (*Moge*, at 864).
- [143] Once a decision has been reached that a spouse is entitled to spousal support, the quantum and duration should be determined with reference to the Spousal Support Advisory Guidelines: A Draft Proposal, (Ottawa, Dept. of Justice: 2005) ("SSAG"). There has been repeated endorsement of the SSAG by the Court of Appeal in recent years. In *Yemchuk v. Yemchuk*, 2005 BCCA 406, Prowse J.A. stated at para. 64, that "I have no hesitation in viewing the Advisory Guidelines as a useful tool to assist judges in assessing the quantum and duration of spousal support." In *Redpath v. Redpath*, 2006 BCCA 338, Newbury J.A. observed, at para. 42, that while using the SSAG is not mandatory as a matter of law, if the quantum of the award was substantially outside the range provided for by the SSAG it could, in the absence of some explanation for the difference, constitute an error of law reversible on appeal.
- [144] The broad discretion given to the Court with regard to spousal support payments under s. 15.2 extends to the ability to make retroactive support orders. The law concerning these orders was recently discussed by Gray J. of this Court in *Fearnside v. Fearnside*, 2008 BCSC 1072, at paras 137-138:
137. The factors to consider include those discussed in *S.(D.B.)* regarding retroactive child support orders, and in addition, those discussed by the Court of Appeal in *S.(L.) v. P.(E.)*, 1999 BCCA 393, 67 B.C.L.R. (3d) 254 at paras. 66-67, leave to appeal dismissed [1999] S.C.C.A. No. 444. The factors that the court will consider to weigh in favour of ordering retroactive support include the following:
- (a) a need on the part of the claimant and the corresponding ability to pay on the part of the proposed payor;

- (b) some blameworthy conduct on the part of the intended payor such as incomplete or misleading financial disclosure;
 - (c) necessity on the part of the claimant to encroach on her capital and to incur debt to meet expenses;
 - (d) an excuse for a delay in bringing the application, when the delay is significant; and
 - (e) notice to the intended payor of an intention to pursue support followed by negotiations to that end.
138. The factors that the court has considered to weigh against ordering retroactive support include the following:
- (a) an order would cause an unreasonable unfair burden to the intended payor, especially to the extent that such a burden would interfere with on-going support obligations;
 - (b) the only purpose of the award would be to redistribute capital; and
 - (c) a significant, unexplained delay in bringing the application.

[145] In the present case, the defendant commenced paying interim spousal support to the plaintiff in the amount of \$1,000 per month as of June 1, 2003. An interim order was made on May 1, 2004, in the same amount. These payments were suspended by court order on March 22, 2007, although the defendant had already stopped paying as of April 2006, having paid a total of \$34,000 over 34 months. The defendant indicated that he ceased paying due to having to recover from a life-threatening illness he contracted in February 2006. It is not disputed that he had a life-threatening illness, but he did not resume the payment of spousal support to the plaintiff following his recovery.

[146] During their relationship, the parties had one child and the plaintiff interrupted her working career to devote herself to her high-risk pregnancy and then to caring for C. and running the household. While it is unlikely that the plaintiff ever would have achieved an income level comparable to that of the defendant given the kind of work she pursued, prior to becoming pregnant she had shown a steady pattern of self-sustaining employment. Her limited job skills prior to marriage atrophied during the marriage. At separation, the plaintiff did not have a driver's licence. Then and since, she has experienced some health difficulties and problems with her self-esteem. Once her marriage ended with the defendant, the plaintiff had much to do to achieve a measure of economic self-sufficiency. When the parties first separated she had an eight year old child in her care for at least half of the time. At that time, C. was too young to be left alone at night, which prevented the plaintiff from taking the various shifts at the jobs that were then being offered to her. The plaintiff also needed to be available to accommodate the defendant and his work schedule, which included a significant amount of travel that resulted in him being unavailable at times to look after C. In the circumstances of this separated family, daycare did not offer a solution.

- [147] It is unlikely that the plaintiff will achieve an income level at all comparable to that of the defendant. Even now, having attempted to complete her G.E.D. and securing employment as a care aide, the plaintiff is limited in terms of what she can expect to earn. She has fallen far behind the defendant insofar as she has had to use her capital assets to support herself and, to some extent, C. from 2003 to 2006 while she struggled to reorganize her life, retrain, and find employment.
- [148] Thus, I find that the plaintiff is economically disadvantaged from the marriage and its breakdown in terms of her ability to earn an income from employment. This arises because of the arrangements within the marriage in terms of child care and household responsibilities. Explicitly or implicitly, the parties decided that the defendant would work in the relatively lucrative business of being a fish broker and the plaintiff would stay at home and look after C. It is obvious that the plaintiff is experiencing economic hardship arising from the breakdown of the marriage disproportionate to that of the defendant, although she has worked hard at becoming more economically self-sufficient. The defendant's significantly higher-paying employment and future prospects have not been adversely affected to nearly the same extent. The principle of compensatory spousal support is clearly applicable here.
- [149] As I appreciate the submissions made on behalf of the defendant, he is opposed to paying retroactive spousal support to the plaintiff because he considers what he paid on the interim order sufficient; because the plaintiff has more income than she discloses; because she had a role to play in delaying the proceedings, which included not providing all her bank and credit card records from separation to the date of the hearings; because she manages money poorly and is in debt; and, ostensibly, because he is unable to afford such payments.
- [150] My prior findings address the issues relating to past and present incomes of the parties. Based on the disparity in their incomes and the SSAG, the defendant has not paid adequate spousal support to the plaintiff since separation. He has also controlled the family assets and resisted their fair division. He discontinued paying interim spousal support and the advance on the assets ordered by the court when it suited him. In this hearing, through his counsel, he took the plaintiff to task for debt and some apparently foolish expenditures, while he sold the GMC pickup and pocketed the proceeds (contrary to a court order) and purchased himself a Hummer, while also paying significant amounts to female companions for various non-essential items. To accede to any of these submissions on behalf of the defendant would be to ignore the facts, the law, and what is fair. It would encourage others to simply ignore court orders, underpay spousal support to their former spouses, and resist a division of valuable family assets until they have been dissipated or become inactive, and therefore less valuable.

- [151] In all the circumstances, based on a recognition of the objectives of a spousal support order as set out in s. 15.2(6) of the Divorce Act, and the principles of spousal support payable on a compensatory and non-compensatory basis, I find that the plaintiff is entitled to a reasonable amount of spousal support, which the defendant, should he choose to accord the matter the priority it deserves, has the means to pay. This includes retroactive and prospective spousal support.
- [152] I also find that there is no reason not to look to the SSAG for an appropriate range of spousal support, both retroactively and prospectively, giving the defendant credit for past amounts paid.
- [153] The SSAG reflect both a quantum and a range for spousal support, as well as a suggested duration. Given all the circumstances of this case, including the parties present and past incomes, their present and past standards of living, and the division of assets, I have decided that a spousal maintenance amount in the lower range is appropriate. For the purposes of this calculation, I rely on my previous findings to impute an income of \$123,203.56 for 2003 and 2007 to the defendant and use his income, as imputed, for the other years. I find the defendant's obligation to pay spousal support commenced when the parties separated their physical residences at the end of May 2003. Thus, I find the defendant is responsible to pay arrears in spousal support to the plaintiff based on the following calculation: SPOUSAL SUPPORT Table for Calculation Year Months Payable
- | Number of Months | Monthly Amount | Total |
|-------------------------------|----------------|-----------|
| May/97 2003 June - Dec. 7 | \$2,778 | \$19,446 |
| May/97 2004 January - Dec. 12 | \$2,577 | \$30,924 |
| May/97 2005 January - Dec. 12 | \$3,697 | \$44,364 |
| May/97 2006 January - May 5 | \$1,393 | \$6,965 |
| May/06 2006 June - Dec. 7 | \$1,326 | 9,282 |
| May/06 2007 January - Dec. 12 | \$2,038 | \$24,456 |
| May/06 2008 January - May 5 | \$507 | \$2,535 |
| May/06 2008 June - Dec. 7 | \$554 | \$3,878 |
| May/06 2009 January - June 6 | \$554 | \$3,324 |
| May/06 2009 July - Nov. 5 | \$507 | \$2,535 |
| Total | | \$147,709 |
- [154] In view of the fact that the defendant has paid \$34,000 in spousal support to the plaintiff, I find that he owes the plaintiff \$113,709 in arrears for spousal support up to November 30, 2009. This amount subsumes the \$39,000 of arrears owed pursuant to the interim order of Master Scarth, which accrued when he stopped paying the \$1,000 per month to the plaintiff as of April 1, 2006. I cancel all past penalties, interest and fees associated with the same. A portion of these arrears is represented by the \$13,672.57 in arrears for interim spousal support and associated fees of \$700 owing to the plaintiff, according to FMEP. These arrears and the associated fees are subsumed in the retroactive order for spousal support payable by the defendant in favour of the plaintiff in the amount of \$113,709 that I now make.

- [155] I turn now to prospective spousal support. The defendant is to pay spousal support to the plaintiff in the amount of \$700 per month, commencing December 1, 2009, payable on the first day of every month until a further order of the Court. This amount is based on present income levels as per the Cheque-Mate Calculator and an amount between the lower and mid-range. I note that it is the same amount whether C. lives primarily with the plaintiff or in a shared parenting arrangement.
- [156] It is proposed by counsel for the plaintiff that spousal maintenance be payable for an indefinite period with a review date built into the order. With regards to duration of spousal support, I note that the SSAG suggests a minimum duration of six years and a maximum of 12 years from the date of separation in the circumstances of these parties. The parties have been separated for six and a half years. In my view, a review of spousal support should occur after three years from the date of the filing of these reasons, should either party seek such a review. I seize myself of any such application. At that time, C. will be approaching the end of high school and the plaintiff will have had several more years in the work force. It is also likely that the defendant will have continued to work as a fish broker, either as an employee or through Flagship or some other private company held by him. Child Support
- [157] This Court is given jurisdiction to make an order for child support under s. 15.1(1) of the Divorce Act. Section 15.1(3) of the Divorce Act requires the court to make that order in accordance with the Guidelines.
- [158] The objectives of the Guidelines are set out in s. 1:
1. The objectives of these Guidelines are
 - (a) to establish a fair standard of support for children that ensures that they continue to benefit from the financial means of both spouses after separation;
 - (b) to reduce conflict and tension between spouses by making the calculation of child support orders more objective;
 - (c) to improve the efficiency of the legal process by giving courts and spouses guidance in setting the levels of child support orders and encouraging settlement; and
 - (d) to ensure consistent treatment of spouses and children who are in similar circumstances.
- [159] A "child" for Guidelines purposes means "a child of the marriage", which is defined in s. 2(1) of the Divorce Act as follows: "child of the marriage" means a child of two spouses or former spouses who, at the material time,
- (a) is under the age of majority and who has not withdrawn from their charge [...]
- [160] Section 3(1) of the Guidelines sets out the approach for children under the age of majority:
- 3(1) Unless otherwise provided under these Guidelines, the amount of a child support order for children under the age of majority is

- (a) the amount set out in the applicable table, according to the number of children under the age of majority to whom the order relates and the income of the spouse against whom the order is sought; and

- (b) the amount, if any, determined under section 7.

[161] In addition to an order for child support, the court may make an order in relation to s. 7 expenses. Section 7 expenses are "special or extraordinary" expenses that may be included in a child support order, depending on their nature, reasonableness and the spending habits of the family prior to separation, according to the following: 7(1) In a child support order the court may, on either spouse's request, provide for an amount to cover all or any portion of the following expenses, which expenses may be estimated, taking into account the necessity of the expense in relation to the child's best interests and the reasonableness of the expense in relation to the means of the spouses and those of the child and to the family's spending pattern prior to the separation:

- (a) child care expenses incurred as a result of the custodial parent's employment, illness, disability or education or training for employment;
- (b) that portion of the medical and dental insurance premiums attributable to the child;
- (c) health-related expenses that exceed insurance reimbursement by at least \$100 annually, including orthodontic treatment, professional counselling provided by a psychologist, social worker, psychiatrist or any other person, physiotherapy, occupational therapy, speech therapy and prescription drugs, hearing aids, glasses and contact lenses;
- (d) extraordinary expenses for primary or secondary school education or for any other educational programs that meet the child's particular needs;
- (e) expenses for post-secondary education; and
- (f) extraordinary expenses for extracurricular activities. (1.1) For the purposes of paragraphs (1) (d) and (f), the term "extraordinary expenses" means
 - (a) expenses that exceed those that the spouse requesting an amount for the extraordinary expenses can reasonably cover, taking into account that spouse's income and the amount that the spouse would receive under the applicable table or, where the court has determined that the table amount is inappropriate, the amount that the court has otherwise determined is appropriate; or
 - (b) where paragraph (a) is not applicable, expenses that the court considers are extraordinary taking into account

- (i) the amount of the expense in relation to the income of the spouse requesting the amount, including the amount that the spouse would receive under the applicable table or, where the court has determined that the table amount is inappropriate, the amount that the court has otherwise determined is appropriate, (ii) the nature and number of the educational programs and extracurricular activities, (iii) any special needs and talents of the child or children, (iv) the overall cost of the programs and activities, and
 - (v) any other similar factor that the court considers relevant.
- (2) The guiding principle in determining the amount of an expense referred to in subsection (1) is that the expense is shared by the spouses in proportion to their respective incomes after deducting from the expense, the contribution, if any, from the child.

[162] The Supreme Court of Canada discussed the principles of child support, with specific reference to retroactive child support, in *Heimstra*. There, Bastarache J., for the majority, determined that the payor parent always has the obligation to pay child support in an amount commensurate to his or her income, and stated at para. 68, that: This obligation is independent of any court order that may have been previously awarded. Accordingly, even where the payor parent has made payments consistent with an existing court order, (s)he would not have been fulfilling his/her obligation to his/her child if those payments did not increase when they should have, according to the applicable law at the time. Thus, the support obligations of a payor parent, while presumed to be the ordered amount by a court, will not necessarily be frozen to the amount ordered by a court. It is the responsibility of both parents to ensure that the payor parent fulfills his/her actual obligation, tailored to the circumstances at the relevant time.

[163] Bastarache J. went on at para. 71, to hold that this interpretation is in accordance with the Divorce Act, as "Section 17 unambiguously states that an award may be varied "prospectively or retroactively".

[164] In *Heimstra* and the companion cases before the Supreme Court, the issue considered was whether to retroactively vary a "final" order, whereas the issue in the case at bar is whether to vary an interim order established before the Court had a full and accurate picture as to the defendant's income and earning ability. The argument in support of retroactively varying the defendant's child support obligation on the basis of proper quantification of his Guideline Income is made stronger given the present findings of the Court regarding his protracted efforts to obscure his true past income.

[165] *Heimstra* also set out the factors to determine whether retroactive child support should be ordered. The Court considered the issue of delay by the recipient parent as a factor that may preclude a retroactive variation. Although it is clear that the plaintiff has contributed to the delay in this case given her role in the adjournments, and other aspects of her conduct, I am of the view that the financial inequality between the parties has put the plaintiff at a real disadvantage in terms of mounting her case. As she was receiving some child support and inadequate or no spousal support depending on the time period, she did

not have the financial ability to independently address the inadequacy of child support prior to this hearing. The delays were a result of a wide variety of circumstances discussed earlier in these reasons. It is also clear that the plaintiff has also been mindful of the effect that returning to court to re-canvas the interim order would have had on C., who has been adversely affected by this litigation and the already strained relationship between her parents.

- [166] In *Heimstra*, the Court also considered the conduct of the payor parent and stated the following at para. 106: Courts should not hesitate to take into account a payor parent's blameworthy conduct in considering the propriety of a retroactive award... a payor parent cannot hide his/her income increases from the recipient parent in the hopes of avoiding larger child support payments... A payor parent cannot intimidate a recipient parent in order to dissuade him/her from bringing an application for child support... a payor parent cannot mislead a recipient parent into believing that his/her child support obligations are being met when (s)he knows that they are not.
- [167] The Court also considered the issue of "potential hardship" occasioned by a retroactive award and the date of retroactivity. In this last regard, at para. 124, the Court states that the material date for retroactive assessment would include dates wherein it becomes apparent that the payor parent has intimidated or lied to the recipient parent, withheld information, or failed to disclose a material change in circumstance. In this case, at the time of the first court application in March 2003, proper disclosure by the defendant of his financial information would have warranted a higher interim amount for child support. Instead, he preferred to pay the lesser amount of interim child support he was later ordered to pay, while preferring to provide money to his female companions and purchasing various luxury-type items for them and himself. To place the matter of retroactive arrears in child support in perspective, I note that the amount presently sought is considerably less than the amount the defendant received upon the sale of the GMC pickup, or the cost of his new Hummer.
- [168] In terms of varying the amount of the prior interim order, I am satisfied that a fulsome review of the defendant's past and present income and the amounts determined thereby constitutes a "change of circumstances" pursuant to s. 14(4) of the Divorce Act.
- [169] Having found the defendant to have a Guideline Income of \$123,203.56 for 2003 and 2007, and using his income for the years 2002, 2004, 2005, 2006, and 2008 as previously determined, in combination with the plaintiff's declared incomes, the defendant's child support obligation can thus be calculated for past years. These amounts vary depending on C.'s custodial situation at the time and the new table amounts introduced in May 2006.
- [170] I turn now to the calculation of retroactive child support for C. I note that counsel for the plaintiff used the simple offset method for these calculations, which I will adopt. Calculated in this manner, the amounts of child support owing retroactively is: CHILD SUPPORT(SHARED CUSTODY) Table for Calculation Year Months Payable Number of

Months Monthly Amount Payable by Defendant Total May/97 2003 June - Dec. 7 \$908 \$6,356
 May/97 2004 January - Dec. 12 \$852 \$10,244 May/97 2005 January - Dec. 12 \$1,073 \$12,876
 May/97 2006 January - May 5 \$642 \$3,210 May/06 2006 June - Dec. 7 \$746 \$5,222 May/06 2007
 January - Dec. 12 \$801 \$9,612 May/06 2008 January - May 5 \$427 \$2,135 May/06 2008 June -
 Dec. 7 -\$271 -\$1,897 May/06 2009 January - June 6 -\$271 -\$1,626 May/06 2009 July - Nov. 5 \$427
 \$2,135 Total \$48,267

- [171] I assume that for all of the 78 months in issue (June 2003 to November 2009 inclusive), the defendant has paid child support in the amount of \$300 per month, for a total of \$23,400. This includes six additional months to the amounts calculated by counsel for the plaintiff, namely from July to November 2009 inclusive. Using what I have found to be the correct income figures to recalculate the child support payable by the defendant as set out above, and recognizing the payments already made by the defendant, I find that the defendant owes the plaintiff a further \$24,867 in retroactive child support.
- [172] However, I also find that the defendant has paid considerable s. 7 expenses for C. over the years, including costs relating to her medical and dental care, clothing, and other amenities, for which he is entitled to credit. Apart from a bill for costs associated with C.'s horse, the defendant has not submitted an accurate accounting of these expenses. To my mind, a reasonable estimate of those expenses amounts to \$1,500 per year for 2004 through 2008, \$750 for the half year of 2003, and \$1,375 for 11 months of 2009, resulting in a credit of \$8,125 to be deducted from \$24,867, yielding a total amount of retroactive child support payable by the defendant to the plaintiff of \$16,742.
- [173] I turn now to the matter of on-going child support for C. As of the hearing in July 2009, C had moved to reside with the plaintiff. Thus, based on the current annual Guideline Incomes of \$29,047 for the plaintiff and \$75,000 for the defendant, the defendant's child support obligation is fixed at \$698 per month. In the event that arrangements are made for continuing shared custody and the correct offset is recognized (the plaintiff's amount is \$271), the defendant's child support obligation is \$427 per month payable to the plaintiff on or before the first day of every month, commencing December 1, 2009.
- [174] The parties are to exchange their filed annual personal income tax returns and their corresponding assessments no later than July 31 of each year in order that appropriate ongoing child support for C. may be determined pursuant to the Guidelines.
- [175] The Court has not received detailed submissions regarding s. 7 expenses for C. going forward. Given that the parties consented to an order for joint custody and guardianship regarding C., one may reasonably assume that each party will bear their proportionate share based on their current incomes, and the Court so orders.

- [176] However, given the past history between these parties, I also order for an expense to qualify as a s. 7 or special expense, but only where the expense relates to C.'s extracurricular activities, both parties are to agree, in writing, in advance to the expenditure. This serves to prevent either party from unilaterally incurring amounts for extracurricular activities that they then seek to have shared by the other party.
- [177] In the past, the defendant has been inclined to view his payment for C.'s riding activity as reducing his need to provide proper child support. His refusal in the past to contribute to counselling that C. was apparently seeking, and yet to seek credit for the significant amounts he has paid towards the purchase of the horse "Sahara" for C., and all the associated costs with boarding and riding the horse, is indicative of a lack of insight. The defendant may choose to incur and pay for any such expenses as long as he first meets his other legal obligations in relation to the payment of court-ordered spousal and child support, including other s. 7 necessary expenses.
- [178] Prior to concluding I wish to include the following comments in relation to C. and her best interests. I note that despite the parties consenting to joint custody and joint guardianship orders in relation to C. at the beginning of the hearing, the Court was advised during the July 2009 hearing dates that the parties had not communicated, except for very limited purposes, since the order was made on June 17, 2008. These occasions were to engage the assistance of the other with the removal of C. from their respective homes when she had been physically violent with each of them in turn, and most recently to try to address an alleged incident of C. bullying another girl, brought to their attention by staff at C.'s school.
- [179] On the last day of the hearing, July 3, 2009, the parties were urged by the Court to communicate about matters relating to C. to ensure that things improved for her. A number of additional terms were agreed to, to be reflected in a consent order, relating to the manner and timing of the parties' communication about C., her whereabouts, her summer plans and a schedule. It is also clear that more stable living arrangements for C. as between her parents' residences are likely to be in her best interests, so as to reduce her opportunity to manipulate the present situation to her increasing detriment. To this end, the parties agreed to several sessions of family counselling to try to come up with a workable plan for C. for the fall, with the parties to share the cost equally.
- [180] I am of the view that C. may still need ongoing psychological counselling, which she has apparently asked for, and in the past the defendant has refused to consent to or contribute payment towards. It is likely that the protracted difficulties and acrimony between the parties since their separation have had a considerable negative impact on C.'s well-being.
- [181] I have indicated to the parties that I remain seized of matters pertaining to C., and state now that I do so for a period of at least three years from the date of filing of these reasons.
- Conclusion and Orders

- [182] During these proceedings, on June 17, 2008, the Court granted an order of divorce to take effect on the 31st day thereafter and the parties consented to joint custody and joint guardianship of their daughter, C., with C. to "reside with each of the parties as they agree from time to time, by consent."
- [183] The defendant is hereby ordered to pay the plaintiff the following amounts: · \$58,272 for the plaintiff's share of Flagship as a family asset; · \$8,200 in relation to the sale of the matrimonial home and family horse; · \$36,110 as the plaintiff's share of the defendant's current RRSP value; · \$15,000 in the form of a compensation order in relation to money withdrawn from the defendant's RRSP immediately prior to separation; · \$18,500 in relation to the 1957 GMC pickup truck that was sold; · \$6,096 as the plaintiff's share of the defendant's savings account; · \$113,709 for retroactive spousal support to November 30, 2009; and · \$16,742 for retroactive child support to November 30, 2009.
- [184] These amounts total \$272,629, and the defendant is entitled to a credit of \$2,500 in relation to the plaintiff's sale of the African Gray parrots and the equipment associated with the parrot-breeding business, resulting in a net amount of \$270,129 payable to the plaintiff by the defendant.
- [185] Based on the current annual Guideline Incomes of \$29,047 for the plaintiff and \$75,000 for the defendant, the defendant's child support obligation is fixed at \$698 per month. In the event that arrangements are made for continuing shared custody and the correct offset is recognized (the plaintiff's amount is \$271), the defendant's child support obligation is \$427 per month payable to the plaintiff on or before the first day of every month, commencing December 1, 2009. The defendant is therefore ordered to commence paying child support to the plaintiff in the amount of \$698, payable on the first day of each month, commencing December 1, 2009, to be reduced to \$427 if the custody of C. is shared.
- [186] The defendant is also ordered to commence paying spousal support to the plaintiff in the amount of \$700, payable on the first day of each month, commencing December 1, 2009, until the order is varied by the court, and it is reviewable after three years from the date of filing of these reasons.
- [187] The parties are to exchange their filed annual personal income tax returns and their corresponding assessment no later than July 31st of each year in order that appropriate ongoing child support for C. may be determined pursuant to the Guidelines.
- [188] The Canada Pension Plan credits generated during the course of the cohabitation from May 1, 1989 and February 6, 2003, are to be split to result in an equal division between the parties upon either party making the necessary application.
- [189] The defendant shall be entitled absolutely to his shares in Flagship but is required to pay the plaintiff \$58,272 as set out above to represent her half interest in the defendant's Flagship shares.

- [190] Except as ordered herein, each party is entitled absolutely to all property now registered in his or her name or in his or her possession, and without limiting the generality of the foregoing, each party shall keep his or her own monies, savings, investments, chattels, insurance, RRSPs, pensions and the like.
- [191] The defendant is solely responsible for repayment of the shareholder's loan to Flagship and for any tax consequences in relation to the same, and he shall save harmless and indemnify the plaintiff for any amounts claimed against her in relation to the same.
- [192] Each party is to be responsible for those debts in their respective names.
- [193] I remain seized of matters arising with regards to spousal and child support, and in relation to C. for three years from the date of the filing of these reasons. Costs
- [194] I have reviewed the written submissions from both parties as to costs.
- [195] The plaintiff seeks an award of special costs. The defendant seeks that costs be awarded to him in light of the delays in these proceedings caused by the plaintiff's conduct and failure to comply with various requests for documents, or alternatively, an order that each party bear their own costs.
- [196] While it is tempting in light of the defendant's overall conduct to award the plaintiff special costs, particularly in terms of his ceasing to pay interim spousal support and selling the GMC pickup and keeping the proceeds contrary to the court order, I have concluded somewhat reluctantly that the plaintiff has to bear a measure of responsibility for the protracted nature of these proceedings, which in turn contributed to their cost and complexity. Thus, I decline to award the plaintiff special costs.
- [197] However, the plaintiff is definitely the successful party in this litigation and pursuant to Rule 57(9) of the Rules of Court I find that she is entitled to her costs payable at Scale C, as this matter was clearly of more than ordinary difficulty. I also find that in addition to compensation for other disbursements claimed in the usual manner, the plaintiff is entitled to be fully reimbursed for all reasonable costs associated with Mr. Hooge, including his preparation of his report and amendments to his opinion and his attendance at court. The defendant is to receive a credit against this disbursement for the \$1,500 previously advanced to the plaintiff under the order of Master Scarth, but he is required to pay the additional reasonable costs incurred by the plaintiff associated with Mr. Hooge, due to the extreme difficulty caused by the defendant's business practices in the context of accurately determining his income between 2003 and 2008. "The Honourable Madam Justice Arnold-Bailey"

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