
CANADA / JUDGMENT

Nearing v. Sauer

2015 BCSC 58

COURT

Supreme Court of British Columbia

DECIDED

16 January 2015

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2015 BCSC 58 Nearing v. Sauer

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Nearing v. Sauer,

2015 BCSC 58

Date: 20150116

Docket: E113910

Registry: Vancouver

Between:

Dasein Nearing also known as Dascin Nearing

Claimant

And

Kirk Sauer

Respondent

Before: The Honourable Madam Justice Fleming

Reasons for Judgment

Counsel for the Claimant:

M.A. Dunnaway

Counsel for the Respondent:

M.M.J. MacLeod

Place and Date of Trial/Hearing:

Vancouver, B.C.

January 13 - 17;

February 3; and

October 16, 2014

Place and Date of Judgment:

Vancouver, B.C.

January 16, 2015

Introduction. 3

Background. 3

Issues. 8

Credibility. 8

Date of Separation. 10

Intention to Separate. 14

Division of Property. 17

Parties' Positions. 17

Do both the FRA and the FLA apply to the Division of Property?. 17

Division of Property under the FRA. 19

Identifying and Valuing the Family Assets. 20

The Division of Property under s. 65 of the FRA. 21

Pension Division under the FLA. 24

Valuing the Claimant's Public Service Pension. 26

Division of the Claimant's Pension under Part 6 of the FLA. 28

Disclosure Issues. 30

Consideration of the s. 95(2) factors under the FLA. 38

Spousal Support. 43

Conclusion. 51

Costs. 52

Introduction

- [1] In this matrimonial action the parties dispute the division of property and the respondent's claim for spousal support. The claimant is a 50 year old lawyer who works as a prosecutor in Vancouver. The respondent is 70. Although he earned minimal employment income during the marriage, focusing instead on his interest in art, he has been teaching full time in northern Manitoba since September 2009.
- [2] The parties were married on May 27, 1999. They disagree about the date of their separation.
- [3] The claimant opposes the respondent's application for a largely equal division of assets. She alleges the respondent has failed to disclose significant financial asset and asks the Court to reapportion her Public Service Pension 100% in her favour. She takes the position that the respondent is not entitled to compensatory or needs-based spousal support.

Background

- [4] The claimant has two children, J., born in 1987, and T., born in 1991. She completed her law degree in 1993 and then practiced privately. The parties met in Ontario in 1994 when the claimant was 30 and the respondent was 50. He was divorced with two adult children. The parties dated until late 1996. Soon after that, the respondent travelled to Florence, Italy, where he stayed for about a year.
- [5] Many years earlier the respondent had obtained a Bachelor of Arts degree and was subsequently employed. Ultimately he worked for about 15 years as a furniture sales representative for a furniture manufacturing company. In 1996, he left that job to study art at Ontario College of Art and Design and pursue his interest in painting. His trip to Florence in 1997 formed part of his art studies. By the time he returned to Ontario in 1998, the claimant was engaged to another man.
- [6] The parties resumed their relationship however and planned to marry. In August 1998, they began living together in Grimsby, Ontario. The respondent agreed to buy the house the claimant had been building with her previous fiancé. At the time the parties married in May 1999, the claimant was practicing law and completing her Master of Laws at the University of Toronto. The respondent was still attending the Ontario College of Art. The respondent had approximately \$425,000 in various investment assets, including significant retirement funds. The claimant had little in the way of assets.
- [7] Both parties finished their educational programs in the spring of 2000. The respondent did not look for employment. The claimant remained in private practice. Given the demands of private practice, the needs of her two children and concerns about her health, medical benefits and job security, the claimant decided to seek a job with Crown counsel.
- [8] The claimant first applied to the Crown in Hamilton, Ontario, but was unsuccessful. She then obtained a job as a prosecutor in Prince George, BC, that started in September 2000.

- [9] Prior to and following the marriage, she suffered from fairly serious medical issues related to her back, knees and right ankle. In 1996, she had surgery to her right knee. In September 1999, she had back surgery to address a herniated disc. She was diagnosed with degenerative disc disease. She had another procedure on her right ankle. The result was that the claimant was suffering from significant pain and discomfort.
- [10] Prior to the move, the claimant's parents provided child care for J. and T. They also did most of the grocery shopping and evening meal preparation. J. and T. had some but not a great deal of involvement with their fathers. T. had scheduled access with his father who at one point had been convicted of assaulting the claimant. Perhaps for this reason, the claimant's father most often took T. to and from access visits. T.'s father had been ordered to pay child support but, except for one year, had failed to do so.
- [11] The respondent had provided the down payment for the parties' house and paid the mortgage, while the claimant paid the other expenses, including most of the groceries, utilities and all of the children's expenses. This arrangement continued. According to the claimant, the parties agreed to keep their finances separate. She saw his assets as his and assumed he was of the same view.
- [12] After the parties' move to Prince George, the claimant's parents lived with them for a few months and continued to provide care for the children when the claimant was at work. The respondent painted and began to teach art history at New Caledonia College. He also obtained a position as the "art director" in a small First Nations' village located some distance from Prince George. He reported no income from that position. The parties rented a nice home for about \$1,300 per month. The respondent paid the rent and the claimant paid the remainder of the expenses. They sold the home they had owned in Ontario. The respondent received the net proceeds of the sale which was about the same amount he had provided for the down payment.
- [13] In 2001, the claimant stopped working for approximately seven months because she was experiencing unbearable physical pain. She received short term disability benefits during that time. In the spring of 2002, she once again became disabled. She did not return to work until about October 2003 and received short term, followed by long term, disability benefits.
- [14] The claimant perceived that the winters in Prince George were causing or contributing to her level of pain. She thought she might be able to regain her health in a warm climate. She discussed with the respondent the idea of moving to Portugal for a year. In preparation for the trip, the claimant negotiated with T.'s father a consent order from the Ontario Superior Court that allowed him to spend the year in Europe. The order also cancelled significant arrears of child support.

- [15] In or about August 2002, the claimant rented a small three bedroom apartment for \$475 per month in an undesirable neighbourhood of Prince George. Shortly before the move, the respondent left on a motorcycle trip. When he returned he said he was not in agreement with the trip to Portugal.
- [16] After that the claimant's mother died suddenly. The claimant became extremely depressed and was hospitalized.
- [17] After the parties' move to the small three bedroom apartment, T. had to enrol in an inner city school where he became involved with an unfortunate peer group. He suffers from serious learning disabilities and had already been struggling at school. He developed mental health problems, including serious insomnia and anxiety. He stopped attending school by grade eight. Instead, a teacher came to the house. His mental health continued to deteriorate. He began to cut himself and was at times suicidal.
- [18] During the summer of 2004, the parties moved to a house where the rent was \$800 per month. It was a modest home and the boys slept in an unfinished basement. In July 2004, the claimant's father, who suffered from Alzheimer's, came from Nova Scotia to live with the family. He died in November of that year. His illness and death had a significant impact on the family, particularly T.
- [19] At the same time, the claimant was being mistreated at work. She took a month off at the end of 2004, returned to work in early 2005, but left again in March 2005. She remained away from work until February or March 2007.
- [20] From 2002 to early 2006, the claimant received medical treatment from for major depression with suicidal ideation. In January 2006, the claimant was diagnosed with moderate to severe major depression, accompanied by panic disorder and agoraphobia. She also continued to suffer from chronic pain.
- [21] Between September 2000 and 2006, the respondent earned very little money from employment. He continued to teach art at the New Caledonia College and spent a significant amount of time in Yekooche but never sought full-time employment. He derived most of his income from his retirement savings.
- [22] The parties and T. moved to Vancouver in the summer of 2006. J. was already living in the Lower Mainland attending a post-secondary program.
- [23] Based on her experiences at the Crown office in Prince George, the claimant filed a discrimination complaint and later a grievance, both of which were ultimately resolved in her favour. In 2007, she returned to work as a prosecutor in Vancouver and she received a cash settlement in October 2009. She has continued to work full time for the Crown, despite ongoing health issues. Certain accommodations have been made for her in the workplace.

- [24] In early 2007, the respondent undertook training as an insurance agent. He worked briefly selling insurance but his business expenses exceeded his earnings. He then worked for six months with a furniture manufacturing company. He also continued to teach art and earned modest amounts of income doing so. His employment with the furniture manufacturing company ended in March 2008, after which he received employment insurance benefits.
- [25] In or about December 2008, the respondent had a pacemaker installed. In the summer of 2009, the respondent obtained a job teaching in northern Manitoba. He held that position until two weeks before the end of the school year in June 2010 when he said he was "thrown out" of the community after the RCMP received a complaint from a boy's mother. He obtained a second teaching job in another northern community, which he began in the fall of 2010. He continued to work there until 2012 when he lost that position. His third and current teaching position began in September 2012.
- [26] On December 16, 2011, the claimant filed a notice of family claim seeking an order for divorce only. She identified the date of the parties' separation as August 15, 2008.
- [27] The respondent was served with the notice of family claim in Thompson, Manitoba on January 3, 2012. He did not file a response until May 11, 2012. He pled that the separation date was on or about December 2011. He agreed with the claim for divorce. The respondent also filed a counterclaim seeking spousal support and making a property claim, seeking a reapportionment of family assets in his favour.
- [28] In her amended notice of family claim, the claimant amended the date of separation to August 15, 2009. She too sought a reapportionment of family assets in her favour or, in the alternative, an order that any claim by the respondent be offset against her payment of family debt since August 2009.
- [29] The court granted an order for divorce on August 30, 2013.
- [30] At the outset of the trial, the respondent sought to amend his counterclaim to ask for an additional order for compensation from the claimant for property she disposed of for the purpose of adjusting the division of assets. I granted the application.

Issues

Credibility

- [31] The claimant urges the Court to find the respondent's evidence not credible and to accept the evidence of the claimant and her son J. where his evidence differs from theirs.
- [32] The factors to be considered when assessing the credibility (and reliability) of a witness were summarized in *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186, *aff'd* 2012 BCCA 296 [Bradshaw]. They include the firmness of the witness's memory, the ability of the witness to resist the influence of interest in modifying her recollection, whether the witness's evidence harmonizes with independent evidence that has been accepted and whether the witness

changes her evidence during direct examination and cross-examination (or between examination for discovery and trial) or is otherwise inconsistent in her recollections. Other factors are whether the witness's evidence seems generally unreasonable, impossible or unlikely and the witness's demeanour. At bottom, the question is whether the witness's evidence is consistent with the probabilities affecting the case as a whole.

- [33] With reference to the factors outlined in *Bradshaw*, I found much of the evidence of the respondent not credible or reliable. Throughout his testimony, the respondent was pleasant. However, he often appeared befuddled by the documents he was asked to consider. He expressed confusion at times. The respondent described himself as hard of hearing, but there was little or no indication he struggled to hear in giving evidence. By contrast, I did observe him straining to hear at times while in the gallery of the courtroom. The respondent also testified to suffering from dyslexia, which may explain part of his apparent struggle to respond to questions relating to a range of documents. However, I was also left with the distinct impression that sometimes he was simply trying to avoid difficult questions or interrupt the flow of questioning. The respondent admitted to a very poor memory for dates. But he also often said he could not remember significant events or circumstances at all, particularly when it was not in his interest to do so. I found many of these denials unconvincing.
- [34] One important example of the respondent denying any knowledge of important circumstances was his testimony that he was unaware of the claimant's desire to separate in 2008. He denied ever receiving a note she prepared and left for him which I will discuss further below.
- [35] Another example relates to the plan for the family to move to Portugal for a year in or about 2002. The claimant testified that she discussed the move with the respondent and he agreed to support her and the children in Portugal for a year. She then negotiated a court order with T.'s father that was granted in June 2002, permitting her to remove T. from Canada, and making provision for the father's access for the year 2002-2003, among other terms. As part of the negotiation, the claimant forgave significant child support arrears. The claimant testified and I accept this to reduce the family's expenses, she found a cheap three bedroom apartment in a building called the Spanish Villa which she saw as a place to store their belongings while they were away.
- [36] The respondent acknowledged that the parties talked about going to Portugal. He said that, although he was agreeable at first, he realized living without the claimant's salary and medical benefits would be very difficult. This part of his evidence was believable. But he also testified that he did not know about any arrangements the claimant had made in preparation for moving to Portugal, including the court order she obtained regarding T. Further, he described the move to the Spanish Villa as entirely unrelated to Portugal; he testified that they were simply planning to move. These parts of his evidence were not at all convincing.

- [37] At times the respondent's evidence about events he said he could recall was frankly unreasonable. The most glaring example was his testimony about being served with the notice of family claim. His position throughout the trial was that the parties did not separate until service occurred because, before that, he was unaware of the claimant's desire to end the marriage. The respondent testified he was served in December 2011 at a restaurant in Thompson, Manitoba while he was passing through town on his way to Ontario. At one point, he said he was travelling to Ontario from Gillam, Manitoba for medical treatment related to his pacemaker. He also testified to being on route to visit his sister who had experienced a heart attack and he thought he was "going to a funeral".
- [38] The respondent did not dispute the affidavit evidence of the process server which is that he was served in a Pizza Hut restaurant in Thompson on January 3, 2012. In the face of this evidence, he acknowledged he must have been travelling back to Gillam from Ontario when he was served. The respondent remained adamant, however, that the service occurred spontaneously, without any prior prearrangement. He denied speaking with the claimant or the process server in advance. Although he could not explain how the process server would find him unless they arranged to meet, he refused to acknowledge the absurdity of this evidence.
- [39] I conclude that I must approach the respondent's evidence with considerable caution and be careful in relying upon it when it is not supported by other independent or credible evidence.

Date of Separation

- [40] The parties dispute the date of their separation. The claimant says they separated on August 15, 2009, when the respondent left for his first teaching position in northern Manitoba. The respondent disagrees, stating that he merely left town for a job. He says they did not separate until he was served with the notice of family claim. Describing himself as "shocked by the divorce papers", he says he and the claimant were planning to buy a house on the North Shore of Vancouver, where the claimant would stay on the weekends and he would paint. He also admits, however, that he and the claimant had stopped talking by phone some time before he was served.
- [41] The parties agree that reconciliation was attempted, but failed, in the summer of 2012. There is no suggestion that any other attempts to reconcile were made but the parties continued to spend time together after the respondent's move to Manitoba in August 2009.
- [42] After leaving for Manitoba, the respondent returned "home" during school breaks including Christmas 2009, the summer of 2010, Christmas 2010 and the summer of 2011. In 2010, the parties took out a joint \$25,000 loan to pay consumer debt in the name of the claimant. The respondent paid rent on the rental home in Vancouver from September 2010 to March 2011. The parties also travelled together.

- [43] The respondent states that the claimant's interactions with him were confusing at best. Based on her behaviour, he was of the view that the marriage was continuing, even after these proceedings commenced. The respondent argues that the claimant did not act in a way consistent with an intention to separate.
- [44] The claimant's evidence is that the parties discussed separating in the summer of 2005. She was going to move to Vancouver with T. She wanted to separate because the respondent had been very unhelpful to her and the children, even at crisis points. They had led very separate lives for a long time and, when they did interact, it was unpleasant. However, she said that she simply could not manage physically or emotionally and was still very ill. In 2006, the respondent came to Vancouver with the claimant to look for a place to live. She said he went a bit crazy about the cost of rent in Vancouver and started looking for housing in Chilliwack. He became angry and flew back to Prince George. She then rented a fairly run down house in East Vancouver close to the P.N.E. The respondent returned. Both the claimant and her son, J., testified that she made repeated demands in 2008 that the respondent leave the home. She was back to work full time and feeling better. She saw her frustration with the living situation increase as her ability to function improved. Because the respondent simply ignored her, she wrote him a note dated August 30, 2008, and left it on his computer table. The note reads in part:

Kirk:

I cannot live in this atmosphere I am anxious and unhappy. It's affecting my work and my health. I will not place myself in a position where I could get very ill - not again.

I have been unhappy in this relationship for a long time. I am, and have been, dissatisfied emotionally, mentally and physically.

I can't stay in the same house with you any longer.

You have to look for a place to live and make concrete arrangements. You have to have a move in date by no later than October 1, 2008.

If you don't make alternative arrangements I will

I can't say there is no hope for us. Not yet anyway. It may be possible to salvage our marriage.

[Emphasis in the original.]

- [45] The respondent said he never received the note and he was not aware that the claimant required him to leave. He acknowledged that they had discussed separation at times but, in his view, all couples do that. The claimant's evidence was that he was fully aware that she wanted him to leave. In fact, he asked her to give him until November 1, 2008. In December, he experienced some heart issues and had a pacemaker installed. Consequently, the claimant felt she could not ask him to leave at that point. He stayed for the winter, recovering. He then obtained his first teaching job in northern Manitoba and "was gone" by August 2009. He took three large duffle bags with him. The parties had very little in the way

of household furniture at that time. The respondent had a storage locker prior to leaving where he stored his art. He had also been storing some things in Chilliwack. After he left, T. drove out there and moved those things to his storage locker.

- [46] The claimant's evidence that the parties separated when the respondent left for Manitoba is confirmed by J. He testified that his mother was adamant with the respondent that he move out but he refused to leave. J. described the issue as something the parties discussed frequently and that it was the source of many fights before the respondent finally did leave in 2009.
- [47] According to the claimant, the respondent came back at Christmas 2009 "to visit" for 10 days. She said he had nowhere to go and had a cardiologist appointment in Vancouver.
- [48] During the winter of 2010, the claimant advised the respondent that she was dating someone. She later went alone on a trip planned with the respondent because of her involvement with another man. She said he came back to the house in the summer of 2010. She testified that prior to arriving, he called from Manitoba and said he needed to get out of town right away because a student or the student's mother had made an allegation against him. He then found a different teaching job in another community and left in August 2010.
- [49] The parties took out a joint loan in 2010. The claimant had a line of credit and a high credit card balance. She said T. was costing her a fortune. According to the claimant, the respondent agreed to offset some of the cost of T.'s community college, which he attended from September 2010 until June 2011. The respondent paid the rent on the house, which the claimant says was intended to be his contribution to T.'s care. The claimant says she had told the respondent "gently" that he was liable to pay child support for T. The claimant paid the joint loan.
- [50] In 2011, the claimant was added to a bank account of the respondent's because his employer sent his pay cheques to the Vancouver address and he needed the claimant to deposit them. There was never any intention for her to otherwise use the account. Again he stayed at the house in the summer of 2011. The claimant said she was very clear with the respondent throughout this time about the "parameters" governing the time they spent together: She was seeing other people and she did not want to be married to him or to live with him.
- [51] I do not accept the respondent's claim that he was unaware of the claimant's wish to separate until he was served with the notice of family claim and that, therefore, the date of service should be the date of the parties' separation. This is entirely inconsistent with the evidence of the claimant and J. about the circumstances leading up to the respondent's departure from the home in August 2009.
- [52] During the summer of 2012, the respondent arrived at the house in Vancouver and the two travelled together to Calgary and discussed reconciling. They also spent a few days together in Winnipeg. The claimant says he kept asking her why they were divorcing given that he was now working, etc.

Intention to Separate

[53] Section 8(3) of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.) [Divorce Act] reads:

(3)

- (a) spouses shall be deemed to have lived separate and apart for any period during which they lived apart and either of them had the intention to live separate and apart from the other; and
- (b) a period during which spouses have lived separate and apart shall not be considered to have been interrupted or terminated

(ii) by reason only that the spouses have resumed cohabitation during a period of, or periods totalling, not more than ninety days with reconciliation as its primary purpose.

[54] It is clear that a meeting of the minds on the intention to separate is not required. A physical separation, combined with one party's intention to live separate and apart, is sufficient: *Dhillon v. Dhillon*, [1998] B.C.J. No. 823 (C.A.). Based on the evidence, I am satisfied that the claimant formed the intention to live separate and apart from the respondent well before he left the home in August 2009. This however does not end the matter. The case law also requires that the spouse who wishes to separate take action consistent with that intention.

[55] The respondent relies on the case of *J.L.L. v. G.A.L.*, 2010 MBQB 39, at para. 4, where the court quoted with approval these comments from *Field v. McLaren*, 2009 MBQB 118:

[10] Certainly I accept it is settled law that the intention of one party to separate may be sufficient to sever the relationship. Judged objectively though there must be evidence that an intention to separate was not only held, but was communicated to the other party and acted upon. The person desiring to separate must act in a way consistent with an intention to separate.

[Emphasis added.]

[56] In *Sachdeva v. Sachdeva*, 2013 BCSC 313 [Sachdeva], this Court took a similar approach, relying primarily on *Rose v. Guiguet*, 2008 BCSC 1225, where Madam Justice Dorgan looked at both the husband's intention to live separate and apart and his actions. Typically when the parties dispute the date of separation, the court's analysis focuses on the generally accepted characteristics of marriage including the intention to remain married, having sexual involvement, carrying on activities in public, sharing financial resources and sharing significant family events: *Sachdeva* at para. 87. The court will also consider a range of other factors, including a clear statement by one of the parties of his or her desire to terminate the relationship. Sexual involvement, or lack thereof, is not conclusive: *Newth v. Booth*, 2011 BCSC 317 at para. 17.

- [57] In *Oswell v. Oswell* (1990), 74 O.R. (2d) 15 (H.C.), aff'd 12 O.R. (3d) 95 (C.A.), the court considered the method by which the spouse filed income tax returns in determining his true intention. Here the claimant continued to identify herself as married until she filed her 2012 tax return. She states that this was an oversight, much like her payment of premiums for extended health benefits for the respondent well into 2013. I accept her evidence on this point.
- [58] In this case, the parties' marriage did not include many of the "generally accepted" characteristics. They led relatively separate lives, they did not integrate their finances, they had little, if any, social life together and most family events did not involve the respondent.
- [59] Taking the evidence as a whole, and giving little weight to the respondent's evidence regarding this issue, I am satisfied, on a balance of probabilities, that the claimant made it clear to the respondent she wanted to separate and asked him to leave the home well before he actually left on or about August 15, 2009. I accept that he saw the note she prepared in 2008 and he was well aware of her demand that he move out, and that he took the teaching job in Northern Manitoba as a result. The brief reference in the note to the possibility the marriage may be salvaged does not defeat the claimant's clearly stated insistence that the parties live separate and apart. I do not interpret the authorities as requiring the spouse who intends to separate to demonstrate absolute certainty that the marriage is at an end. Such a view would be inconsistent with the express language of s. 3(b)(ii) of the Divorce Act. It is enough to communicate an intention to separate, accompanied by actions consistent with that intention, assuming, of course, there is a form of physical separation between the spouses.
- [60] The respondent's view that the parties did not separate in August 2009 and that he simply left for an out of town job reflects his own wish for the marriage to continue, despite the position and actions of the claimant. Although it is true the respondent continued to stay in the home during some school breaks, I do not interpret these stays as attempts at reconciliation or as proof that there was, in fact, no separation until a later date. Fairly soon after the respondent left the home in August 2009, the claimant began to date other people and told him so. She continued to make him aware of her involvement in other relationships.
- [61] I also accept that she told him, despite the time they were spending together, she did not want to be married to him. Although he says he was confused by her behaviour toward him, in my view, any such confusion was the result of his own desire to continue the relationship. In my view, his willingness to enter into a joint loan and to pay rent, whether or not it was in lieu of support for T., were attempts to improve his behaviour and thereby persuade the claimant to reconcile, contrary as those attempts were to his approach to financial issues prior to separation.
- [62] Accordingly, I find that the parties' date of separation was on and about August 15, 2009.

Division of Property

Parties' Positions

- [63] In addition to seeking a 100% reapportionment of her pension, the claimant proposes that each party keep the remaining assets in his or her own name and that she be responsible for payment of the remaining balance on the joint loan. In the alternative, she asks that she be permitted to keep the whole of her pension and that the family assets be divided equally, with the balance of the joint debt to be paid by both parties in equal contribution.
- [64] The respondent seeks an equal division of the claimant's pension and most of the remaining assets. With respect to the parties' RRSP funds, he proposes that the claimant transfer to the respondent approximately \$10,672 to equalize the non-pension retirement assets, taking into account her \$50,000 withdrawal of RRSP funds after separation and prior to the triggering event. He seeks an order requiring the claimant to be responsible for the remaining balance on the joint debt in lieu of reimbursement to the respondent for the funds she removed from the joint bank account.

Do both the FRA and the FLA apply to the Division of Property?

- [65] The first question to be answered is, what statutory regime applies to the division of the parties' property?
- [66] Part 13 of the Family Law Act, S.B.C. 2011, c. 25 [FLA], sets out a number of transitional provisions. Section 252 provides that the Family Relations Act, R.S.B.C. 1996, c. 128 [FRA], continues to govern property division in cases such as this one where a proceeding regarding property division was brought before the section was in force.
- [67] One of the main issues in this case, however, is the division of the claimant's Public Service Pension Plan. Pension benefits are treated differently under the transitional provisions. The Ministry of Justice explains the difference in the Family Law Act Transition Guide, loose-leaf, (Vancouver, BC: Moore Canada, 2012) at 3-316 as follows:

This is different than the transition proposed for other property division. The difference is that the changes to the pension regime are minor and will not likely result in very different decisions. The property division scheme is entirely different and will result in different decisions.

Since the Act provides greater clarity regarding pensions and is used mostly by administrators who are experts in this area of law, providing for the Act's immediate application will streamline the process rather than complicate it.

- [68] Pursuant to s. 253, it is only if forms prescribed under the FRA were delivered to the pension administrator before Part 6 of the FLA came into force that the FRA will apply to the division of a spouse's pension.

- [69] Here the only evidence regarding when the respondent may have delivered the prescribed forms to the pension administrator is an unsigned Form P6 entitled "Administrator Issuer Response". The form identifies the respondent as a limited member or a spouse claiming an interest and purports to confirm the administrator's receipt of a notice in Form P1. The Form P6 is dated 2013-09-03 but there is no indication when the Form P1 was received. In the absence of evidence showing forms were delivered prior to March 18, 2013, I conclude that the FLA applies to the division of the claimant's pension. I also conclude the FLA applies to the division of the parties' CPP pensions.
- [70] The respondent's assets include three other employment pensions. The first is a College Pension Plan related to his employment with the College of New Caledonia, with an effective date of September 1, 2013, that provides him with three options for monthly payments ranging from \$31 to \$34. The second he described as an RRSP/defined contribution benefit plan held with SunLife arising from his recent employment in Manitoba with the Northlands Dene Education Authority. The last is a pension he is now contributing to through his current teaching position in Gillam, Manitoba referred to as the Teachers' Allowance Retirement Fund Pension. The respondent takes the position, as set out in his amended Scott Schedule, that his College Pension Plan is subject to division pursuant to Part 6 of the FLA. The SunLife pension relates to the respondent's employment in another province and therefore is not a local plan as clarified by the FLA. Nothing in the documents before the Court regarding this asset enables me to determine whether this pension meets the definition of an extra-provincial plan in s. 110 of the FLA which requires that it be a plan registered under legislation, equivalent to the Pension Benefits Standards Act, S.B.C. 2012, c. 30, of another jurisdiction. I will therefore deal with the SunLife pension pursuant to the FRA.

Division of Property under the FRA

- [71] Section 56(2) of the FRA provides that each spouse is entitled to an undivided half interest as tenants in common in each family asset at the time of the triggering event. Here the triggering event occurred when the court made a declaration pursuant to s. 57 of the FRA on May 3, 2013. A spouse's half interest in each family asset is subject to an order for reapportionment if the court finds an equal division would be unfair based on the factors set on s. 65(1) of the FRA which are as follows:
- (a) the duration of the marriage;
 - (b) the duration of the period during which the parties have lived separate and apart;
 - (c) the date when property was acquired or disposed of;
 - (d) the extent to which property was acquired by one spouse through inheritance or gift;
 - (e) the needs of each spouse to become or remain economically independent and self-sufficient; or

- (f) any other circumstances relating to the acquisition, preservation, maintenance, improvement or use of property or the capacity or liabilities of a spouse.
- [72] To be clear, the question is whether an equal division would be unfair and not whether an unequal division would be fair: *Whitaker v. Whitaker*, 2010 BCCA 248. The onus of proof rests on the spouse seeking reapportionment: *W. v. W.*, 2005 BCSC 1010 at para. 33.
- [73] Underlying most of the s. 56 factors is the notion of spousal contribution in the broad sense of the word. An application for reapportionment, however, does not invite a forensic accounting style of analysis of contribution: *Vander Ende v. Vander Ende*, 2010 BCSC 597 at para. 110. As Dardi J. observed in *A.H. v. F.L.*, 2013 BCSC 1444:
- [24] The determinative factor is whether equality is offensive to a sense of fairness and justice, having regard to the circumstances of the parties. The issue is not to be determined on the basis of narrow distinctions: *Lockhart v. Lockhart* (1989), 19 R.F.L. (3d) 359 at 362 (B.C.C.A.).
- [74] The court may reapportion individual assets or all family assets upon finding an equal division unfair.

Identifying and Valuing the Family Assets

- [75] The following assets, along with their values as of the date of the triggering event, have been identified by the parties as family assets and I agree:
1. Respondent's TFSA (Nesbitt Burns)- \$14,877.64;
 2. Respondent's LIF (Nesbitt Burns) - \$26,317.17;
 3. Respondent's RRSP (Nesbitt Burns) - \$32,261.65;
 4. Respondent's RRSP/Pension Plan (Sun Life) - \$11,456.70;
 5. Claimant's Canada Savings Bonds - \$31,402.40; and
 6. Claimant's RRSP (Nesbitt Burns) - \$15,933.01 (\$16,183.71 as of October 31, 2013).
- [76] The claimant disputes that the whole of her RRSP and her Canada Savings Bonds are family assets. In December 2009, a contribution of \$11,139 was made to her RRSP as part of her grievance settlement. She says that portion is not a family asset. The value of her Canada Savings Bonds at separation was \$10,000. The increase in value, she says, is not a family asset.
- [77] I am not prepared to accept that only part of an asset may be regarded as a family asset. An asset is either a family asset or it is not. Accordingly, I find all of the above listed assets to be family assets.

- [78] The respondent argues his Teachers Allowance Retirement Fund Pension to which he now contributes is not a family asset. There are no documents related to this asset in evidence. I do not know whether or not he held it prior to the triggering event. Its value is unknown but presumably very modest. Given the absence of evidence and submissions regarding this pension, I am unable to find that it is a family asset susceptible to division under the FRA.
- [79] Both parties rely upon the value of assets on the date of the triggering event. The trial date is generally regarded as the appropriate date for the valuation of family assets; however, there is discretion to fix another date, not earlier than the triggering event, if that is necessary to achieve fairness: *N.M.M. v. N.S.M.*, 2004 BCSC 346 at para. 76. Here I have not been provided with evidence as to the value of the family assets as of the date of trial and, therefore, I am left to rely upon the values set out above, using the value of the claimant's RRSP on the most recent date.
- [80] The Claimant's argument that the increase in value of her Canada Savings Bonds since separation should not be considered part of the family asset would likely succeed under the new FLA, however, under the FRA regime which governs its division, the valuation date cannot precede the triggering date of May 3, 2013. Any such argument must be considered only during a reapportionment analysis.

The Division of Property under s. 65 of the FRA

- [81] In effecting the property division, the claimant asks the Court to consider a number of circumstances which have impacted her financially. Among them is the cost she incurred following separation related to providing extended health coverage to the respondent until April 30, 2013. She estimates she paid \$450.31 per month (totalling \$8,555.89). The claimant also points to the increase in her auto insurance resulting from an accident the respondent had while driving her car. He was found 100% responsible. T. had a subsequent accident with the claimant's vehicle in 2013, with the result that the claimant lost her safe driver discount and will pay increased insurance costs of \$14,562 over the next six years. Finally she submits that T. was arguably a child of the marriage when he attended Vancouver Community College (VCC). She asks the Court to consider notional child support in calculating any compensation the claimant might otherwise owe to the respondent.
- [82] In the absence of specific submissions or any authority addressing how these circumstances are captured by a particular factor set out in s. 65(1) of the FRA or s. 95(2) of the FLA, I am not able to conclude that these circumstances ought to impact on the division of family assets or the claimant's pension which will be discussed below.
- [83] As mentioned above, the facts the claimant outlines regarding her RRSP and Canada Savings Bond could be relevant to the issue of reapportionment, rather than the identity of the asset itself, pursuant to s. 65(1)(f). In December 2012 and January 2013, however, the claimant cashed in \$50,000 in her RRSP funds which, at that time, were potential family assets. In May 2013, she unilaterally transferred a total of \$8,000 from the parties' joint account, which

she agreed was, in fact, the respondent's account. She applied \$4,000 of that amount to a joint loan I will discuss below and used some of the remainder to pay credit card debt. She testified that debt included a charge of \$1,021.65 which she described as the respondent's share of the cost of junk removal from the rental home in East Vancouver. In my view, her disposition of the \$50,000 in RRSPs and withdrawal of the \$8,000 overtake any suggestion of unfairness arising from the fact she contributed settlement funds to her RRSP.

- [84] The parties have one joint debt they both identify as "family debt", that being a loan obtained in 2010 in the amount of \$25,000. The claimant's evidence is that at the time of separation her credit card debt, which she describes as potential family debt, was \$47,000. The respondent agreed to share in the repayment of \$25,000 of that amount. The claimant testified that he also agreed to share in a portion of T's educational expenses while he completed an automotive program at VCC between September 2010 and June 2011. She stated the arrangement was that she would make the loan payment and he would pay the rent of \$1,695. He stopped paying rent in March 2011. The balance on the joint loan at the time of the triggering event was \$14,058.16.
- [85] The FRA does not define family debt and has no mechanism for the division of debt. However, the term "family debt" has evolved in the case law such that debt incurred for a family purpose must be considered alongside assets when trying to determine fairness in the division of property.
- [86] I note that the parties' arguments about reapportionment centred on the claimant's pension. The positions of the parties on the remaining assets and joint debt had little to do with why or why not the claimant's pension should be reapportioned, leaving aside the question of undisclosed assets.
- [87] Accordingly, anticipating my analysis below pursuant to the FLA which reapportions the respondent's interest in the claimant's pension entirely to her, and a finding I make later in these reasons that the respondent has undisclosed financial assets of not less than \$225,000, but dealing only with the division of family assets under the FRA, I conclude the division sought by the claimant best addresses the unfairness that would result from an equal division is most consistent with fairness. Therefore, I order each party to keep the family assets he or she owns in his or her own name. I further order the claimant is responsible for payment of the remaining balance on the joint loan which had a balance of \$14,058.16 as of the date of the triggering event.
- [88] The effect of this division is that the respondent retains family assets with an approximate value of \$84,913 and the claimant \$47,586, less the family debt. Fairness here is affected by the claimant's use of her RRSP funds post separation and her withdrawal of \$8,000 from the joint account which she acknowledged is beneficially owned by the respondent, bearing in mind s. 65(1)(f)

[89] I turn now to consider the division of the claimant's public pension, the respondent's College Pension Plan and the parties' CPP.

Pension Division under the FLA

[90] The regime for property division found in the FLA is based on an excluded property model. Section 81 of the FLA provides that each spouse is entitled to an undivided half interest in all family property upon separation, except as set out in Part 6 dealing with pension division, and subject to an agreement or order that provides otherwise. Pursuant to s. 84, family property includes all real and personal property owned by one or both spouses at the date of separation, unless the asset in question is excluded, in which case only the increase in the value of the asset during the relationship is family property.

[91] Broad categories of property are excluded from division under s. 85; those exclusions include property acquired before and some after the relationship. Pursuant to s. 84(2)(e), a spouse's entitlement to a pension is family property, subject to prima facie division under Part 6 and reapportionment pursuant to s. 95. Family debt is defined in s. 86 and subject to division along with family property.

[92] The Court may order an unequal division of family property and/or family debt if it would be significantly unfair to divide it equally, or in the case of pension benefits, to divide them as required by Part 6, based on a new set of criteria found in s. 95(2) and (3) including the following:

(2) For the purposes of subsection (1), the Supreme Court may consider one or more of the following:

- (a) the duration of the relationship between the spouses;
- (c) a spouse's contribution to the career or career potential of the other spouse;
- (f) whether a spouse, after the date of separation, caused a significant decrease or increase in the value of family property or family debt beyond market trends;
- (g) the fact that a spouse, other than a spouse acting in good faith,
- (i) substantially reduced the value of family property, or
- (ii) disposed of, transferred or converted property that is or would have been family property, or exchanged property that is or would have been family property into another form, causing the other spouse's interest in the property or family property to be defeated or adversely affected;
- (i) any other factor, other than the consideration referred to in subsection (3), that may lead to significant unfairness.

- (3) The Supreme Court may consider also the extent to which the financial means and earning capacity of a spouse have been affected by the responsibilities and other circumstances of the relationship between the spouses if, on making a determination respecting spousal support, the objectives of spousal support under section 161 [objectives of spousal support] have not been met.
- [93] In *L.G. v. R.G.*, 2013 BCSC 983, Mr. Justice Brown considered the meaning of the "significantly unfair" standard set out in s. 95(2). He concluded as follows:
- [71] In my view, the term 'significantly unfair' in s. 95(1) of the FLA essentially is a caution against a departure from the default of equal division in an attempt to achieve 'perfect fairness'. Only when an equal division brings consequences sufficiently weighty to render an equal division unjust or unreasonable should a judge[s] order depart from the default equal division.
- [94] In *Remmem v. Remmem*, 2014 BCSC 1552, with reference to s. 95(2), Mr. Justice Butler found that the word "significant" is understood to mean more than a regular impact - something weighty, meaningful or compelling. He then concluded as follows:
- [44] In other words, the legislature has raised the bar for a finding of unfairness to justify an unequal distribution. It is necessary to find that unfairness is compelling or meaningful having regard to the factors set out in s. 95(2).
- [95] Mr. Justice Butler also held that in order to determine if it would be significantly unfair to divide the family property equally, the court must first notionally divide the family property, taking into account the exclusions as provided for in the FLA (para. 47).

Valuing the Claimant's Public Service Pension

- [96] At the trial the only evidence adduced as to the value of the claimant's Public Service Pension was the information contained in her benefit statements, the most recent being for the period of April 1, 2012 to March 31, 2013. The statements estimate her monthly pension benefit based on the assumption that she will continue to work as she did in the past year and retire on one of three dates. The earliest date for her retirement is age 55 which would provide the claimant with a lifetime monthly income of \$3,462 and an additional bridging amount of \$432 per month until age 65. At age 60, the lifetime monthly amount rises to \$5,182 with a bridging amount of \$646. By 65, she would receive \$6,292 monthly.
- [97] The actuarial report of Michael Demner, dated September 15, 2014, which sets out valuations of the pension based on various entitlement periods and assumed retirement dates, was admitted in evidence following a re-opening of the trial. Three separate actuarial values including total actuarial value, pre-tax capitalized value and after-tax lump sum value, which he also seems to refer to as cash settlement value, are set out for three assumed retirement dates and three different marriage end dates. Mr. Demner's report provides the following range of actuarial values for the end date of September 1, 2009 at p. 2:

Assumed Retirement Ages

Actuarial Values:

Total Actuarial Value

Pre-tax Capitalized Value

After-tax Lump-sum Value

Earliest Reduced Retirement - age 55

\$449,000

\$224,500

\$168,400

Earliest Unreduced Retirement - age 60

\$445,100

\$222,600

\$166,900

Normal Retirement - age 65

\$361,500

\$180,800

\$135,600

[98] Mr. Demner explains that the total actuarial value represents the gross pension asset earned by the claimant before any tax deduction. The pre-tax capitalized value equals 50% of the total actuarial value before any tax deduction and the cash settlement value, or after-tax lump sum value, equals the pre-tax capitalized value less assumed income tax. Neither party made any clear submissions about how the Court ought to make use of the different actuarial values. I infer, based on the limited explanation provided in Mr. Demner's report, that the pre-tax capitalized values and the after-tax lump sum values reflect the actuarial value of a half interest prior to and after the deduction of income tax.

[99] As part of her initial submissions in support of reapportioning her pension under s. 65 of the FRA, the claimant argued that serious ongoing medical conditions will make it unlikely that she will be able to continue working full-time to retirement age. Therefore, her pension income will be less likely to meet her future expenses. The question of when she is likely to retire is relevant to choosing the appropriate assumed retirement age which, in turn, contributes to the actuarial values at issue. Most of the multitude of medical records relied upon by the claimant are not in the form of admissible opinion evidence. They are properly characterized as clinical records which are admissible as business records to prove a

physician's observations of a patient's medical condition, the results of tests ordered or performed by a physician, medications prescribed and medical advice given: Edmondson v. Payer, 2011 BCSC 118 at para. 26, aff'd 2012 BCCA 114.

- [100] The medical legal report prepared by her family physician, Dr. Steinson, was also in evidence. He offers the opinion that, although the claimant currently functions well at her job, given her medical history, it is "impossible to say" if she is going to be able to work full-time to the date of her expected retirement. The language of this prediction is difficult to interpret.
- [101] In any event, the claimant's testimony and the medical evidence establish that she has suffered and continues to suffer from chronic pain and osteoarthritis in her knees and ankles, chronic pain in her low back, degenerative disc disease and chronic episodic depression. She continues to take medication to address these issues as needed and to receive various treatments, including chiropractic treatment, physical therapy, counselling and psychiatric treatment. The respondent does not dispute the claimant's history of significant medical issues or her assertion that her ongoing multiple health concerns may well impact on her ability to work full time to the age of retirement.
- [102] It was not made clear to me, however, why, in the face of worsening health problems, she would not take a medical leave from her job and receive short term, and perhaps long term, disability benefits. Although the claimant suggested her past leaves from work may have had an impact on her pensionable earnings, there is no evidence to confirm this. Instead, her pension statements provide that a member's contributions do not reflect the value of the pension and that the lifetime pension is based on a formula that uses the five year highest average salary and years of pensionable service. The statements indicate that her years of pensionable service were not affected by the time she spent away from work for medical reasons; the claimant's start date for her pension contribution is September 2000, when she began her position with the Crown in Prince George.
- [103] The claimant strikes me as a particularly determined person. She has overcome enormous challenges that include not only an array of chronic health issues but also significant personal losses and the heartbreak of watching her youngest child suffer from profound difficulties. Given all of the circumstances, I am not satisfied that the claimant will likely retire early. I expect, in fact, that she will manage to continue her work with the Crown until age 60, if not longer, in part because of the job security offered by the position and the availability of short and long term disability benefits in the event that her health conditions worsen.
- [104] I find that the value of the claimant's pension, using the amounts provided by Mr. Demner based on a marriage end date of September 1, 2009 and the earliest unreduced retirement age of 60, is \$445,100 before taxes. Doubling the after-tax lump sum value (which is based on 50% of the total actuarial value), the after-tax lump-sum value of the pension is approximately \$333,800.

Division of the Claimant's Pension under Part 6 of the FLA

[105] The claimant's public pension is a local defined benefits plan as defined by s. 110 of the FLA. Again, s. 81(b) provides that each spouse becomes entitled to an undivided half interest in family property on separation, except as set out in Part 6 on Pension Division. Section 95(1) provides that the court may order an unequal division of family property or debt or both if it would be significantly unfair to divide pension benefits as required by Part 6. What does Part 6 require?

[106] Section 115 of Part 6 provides that the limited member is entitled, upon giving requisite notice, to a proportionate share of the pension benefits by separate pension or transfer to the credit of the limited member. Section 17(3) of the Division of Pensions Regulations, B.C. Reg. 348/2012 [Regulations], sets out the formula for calculating the proportionate share as follows:

- (3) Subject to sections 18 and 19, the proportionate share referred to in subsection (1) of this section must be calculated in accordance with the following formula:

proportionate share = $1/2$ (pensionable service during entitlement period ÷ total pensionable service)

where

"pensionable service during entitlement period" means the pensionable service accumulated under the plan by the member in the entitlement period;

"total pensionable service" means the pensionable service accumulated by the member to the earliest of

- (a) the date that the limited member's share is transferred from the plan,
- (b) the beginning of the month in which the limited member begins to receive a separate pension,
- (c) the beginning of the month in which the limited member begins to receive a payment of benefits from the member or the administrator, and
- (d) the day immediately preceding the day of the member's death.

[107] Section 1 of the Regulations defines the entitlement date for pension benefits as the date in a Part 6 FLA order on which the spouse became entitled under s. 81(b) to an interest in the member's benefits under the plan, that is, the date of separation, subject to an agreement or order that provides otherwise.

- [108] Section 115(3) of the FLA requires that a separate pension or transfer be made no earlier than the earliest date that the member could elect to have the member's pension commence. Neither the Regulations nor the FLA appear to specify whether that date is the earliest date for a reduced pension or an unreduced pension, which in this case are May 1, 2019 or May 1, 2024, respectively.
- [109] Based on Mr. Demner's report, the length of pensionable service during the entitlement period is 8.7 years, assuming September 1, 2009 as the separation date. I assume the result would not change in any significant way based on the separation date I have found of August 15, 2009. Using May 1, 2019 as the earliest date the claimant could elect to have her pension commence, and assuming full time employment until age 60, I calculate the length of total pensionable services to be 23.4 years. Applying the formula set out in s. 17(3) of the Regulations, the respondent's proportionate share would be 0.186 or 18.6%. Before further discussing the division of the claimant's pension, I will consider the issue of non-disclosure raised by the claimant.

Disclosure Issues

- [110] The claimant alleges the respondent has significant financial assets that he has deliberately failed to disclose. She also complains of the very late disclosure of records regarding his known financial assets. Indeed many of those financial records were not received until the time of trial. They are voluminous and are not well indexed, for which I do not fault his counsel in any way.
- [111] The respondent takes the position that both parties were slow to exchange documents but this matter proceeded to trial more expeditiously than most family law cases. He characterized himself as disorganized and rather inept at paperwork as a further explanation for his delay in providing disclosure of financial records, along with the remote location of his residence. He submits that, in the end, the necessary documents were before the Court.
- [112] The evidence of both parties is that the respondent had approximately \$425,000 in financial assets when they married. The respondent has disclosed the existence of two investment accounts with Nesbitt Burns at that time, one being his main RRSP account and the second a LIRA account which contained funds he received from his last employer prior to attending art school. The disclosed records regarding the LIRA account start in 2006. The records regarding his main RRSP account contain some documents that refer to financial transactions in 1999.
- [113] The notice of family claim was filed December 16, 2011 (amended May 6, 2013). The respondent filed a counterclaim for spousal support and property division on May 14, 2012. The claimant filed her required financial statement on August 8, 2012. Fourteen months later, on October 15, 2013, the respondent filed his first financial statement.

- [114] The claimant delivered a "notice to produce" to the respondent dated November 28, 2013, requiring him to provide all documents related to the respondent's \$425,000 in investment assets as of the date of the marriage, as well as bank and other records showing dispositions of these assets.
- [115] On or about January 9, 2014, the respondent listed for the first time the following documents:
1. Transaction History for his main RRSP account;
 2. Statements of account for his main RRSP;
 3. Transaction History Report for his LIF account; and
 4. Statements of Account for a LIRA account.
- [116] The claimant submits that those documents demonstrate that the respondent has failed to account for approximately \$225,000 of the initial \$425,000 in assets and has failed to produce documents with respect to other investment accounts he admitted to having during cross-examination. Indeed, the respondent's financial records show the investments held in his main RRSP account had a market value of \$143,515 in 1999. His LIF account into which he transferred funds held in his LIRA account from prior to the date of the marriage showed a balance of \$56,590 in 2006. In cross examination the respondent agreed that the value of those funds would have been something less, not more than that amount in 1999, given that they had been held in his LIRA account until the transfer in 2008. Together those amounts equal just less than \$200,000. The respondent provided no explanation for where the remainder of the \$425,000 might be. He simply denied he had not disclosed all of his assets while at the same time agreeing he had about \$425,000 in financial assets at the beginning of the marriage.
- [117] The respondent's 2001 tax return shows taxable capital gains of \$4,085 arising from the sale of shares in the amount of \$65,211 from an account other than his RRSP or LIRA accounts. The respondent's financial records do not show a deposit of that amount. The respondent could not recall what happened to those funds, stating he might have reinvested them through another account or perhaps he spent all or part of them. I find the later scenario to be somewhat probable given that his tax return shows an absence of any RRSP income in that year. The respondent also acknowledged, however, that he had other accounts into which the funds could have been deposited for the purpose of reinvestment, although he did not identify where they were held. I note that attached to his 2000 tax return is a document entitled Statement of Investment Income that lists the Toronto Dominion Bank as an issuer as well as Nesbitt Burns. The respondent has produced no records from the Toronto Dominion Bank.
- [118] On or about March 2008, the respondent entered into a client account agreement with Nesbitt Burns. At page five of that agreement, he answered "yes" in response to the question: "Do you have investment accounts anywhere else?" The document then states, if

yes, please tell us where. His hand-written response is difficult to decipher; it is either n/a or h/a. As much as the respondent presented himself as disorganized and sloppy with paper work, in two separate documents he completed in 2008 and 2011 for his investment advisor, Leah Stasik, the respondent rated himself as having a good knowledge of investing and moderate to extensive experience with different types of investments and strategies. In the 2011 document, he added real estate to a wide range of previously listed investment experiences.

- [119] Despite denying there were financial records missing when he testified, in submissions the respondent acknowledged the extent of his financial disclosure was "not perfect". He argued, however, that he cannot account for \$70,000 in financial assets rather than over \$200,000. He points to the amount of income derived from retirement and investment funds between 1999 and 2009, which totals \$303,723.15, to show that the missing assets never amounted to \$200,000. However, the claimant correctly identifies that the total amounts withdrawn reflect not only the value of the disclosed assets as of 1999 but also significant subsequent growth.
- [120] The respondent testified that one of the reasons he was shocked when he was served with the notice of family claim was that he and the claimant had been discussing a plan to buy a house on the North Shore where he would have a studio for painting, while the claimant continued to work three or four days a week. When asked in cross-examination how he could possibly afford to purchase such a house and whether he had money to invest in real estate, his answer was nonsensical. In an affidavit sworn August 21, 2013 which formed part of the evidence at trial, the respondent said he hoped to retire in Ontario in the next year, if he could afford it, to be nearer his family. His own disclosed financial assets at that time had an approximate value of \$90,657, making retirement, absent other assets, an entirely unrealistic option. During the marriage, he relied on not less than \$40,000 in most years.
- [121] Rule 5-1 of the Supreme Court Family Rules, B.C. Reg. 169/2009 [Rules] is the starting point for financial disclosure in family law proceedings where support and property division claims are made. An exchange of sworn Form F8 financial statements provides the method of financial disclosure required by Rule 5-1. The Rule does not require a party to produce underlying source documents to the financial statement; however, Rule 5-1(13) allows the other party to demand particulars if the Form F8 financial statement lacks sufficient information. If a party fails to provide the particulars within 7 days of receiving the demand, the Court may make an order under Rule 5-1(14) that the particulars or an updated financial statement be served within a specified time.
- [122] Rule 9-1 governs each party's obligation to list and produce documents. It requires parties to prepare a list of documents that are or have been in the party's possession or control and could be used by a party at trial to prove or disprove a material fact, as well as any document the party intends to refer to at trial. Rule 9-1(8) provides that a party may, by written demand, require the other party to amend a list of documents received to include additional documents or classes of documents and make the newly listed document

available for inspection. Pursuant to Rule 9-1(9), the party who receives the demand has 35 days to comply or respond with an explanation as to why the supplemental list is not being prepared.

[123] Here, the respondent continued to amend his list of documents and produce additional documents up to the date of trial. He says he did his best to comply with the claimant's demands.

[124] The claimant asks the Court to draw the inference that the respondent's failure to disclose financial records is deliberate and to conclude that he does, in fact, have significant funds available to him both for present support and retirement. She argues that the amount missing, up to \$225,000 as of May 1999, if retained and invested, would have grown substantially by the date of separation. She further submits that it would be unfair for the respondent to share in the claimant's pension in these circumstances.

[125] The claimant relies on the approach taken by Mr. Justice Fraser in *Cunha v. Cunha* (1994), 99 B.C.L.R. (2d) 93 (S.C.) [Cunha], where he referred to the non-disclosure of assets as "the cancer of matrimonial property litigation". He determined it was not sufficient for the court to respond to such conduct with an award of costs or by dealing only with the known assets. Instead, he divided the parties' family assets on the basis that the husband's undisclosed assets had an imputed value equal to the disclosed assets. He then vested all the known assets in the name of the wife. At paras. 11 and 13, he said as follows:

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

Once non-disclosure at any stage has been established, the onus of satisfying the Court that afterwards there has been full disclosure [is] on the non-disclosing party.

[126] In *Laxton v. Coglon*, 2008 BCSC 42 [Laxton], Mr. Justice Kelleher clarified that the *Cunha* approach does not constitute reapportionment (at para. 29). Where the non-disclosing party has not satisfied the court that full disclosure has been made, the court may infer the value of the undisclosed assets is at least equal to the value of the disclosed assets. The inference simply operates to ensure equal division between the parties. The court in *Laxton* also observed that the principle in *Cunha* applies only where there is a strong evidentiary basis for the proposition that one of the parties to the litigation has hidden assets: *Eng v. Eng*, [1998] B.C.J. No. 2574 (S.C.) [Eng]. In *Eng*, Justice Humphries' expressed this concern as follows:

[45] Obviously a party cannot hide behind disorganization and sloppiness to rebut an allegation that assets are undisclosed, but neither can the other party establish concealment simply by pointing to poor business practices. There must be some basis upon which the court can reach the conclusion that the party is probably concealing assets. This will differ from case to case, depending on the available evidence and the court's impression of the witnesses.

- [127] More recently in *Wu v. Sun*, 2011 BCCA 239 [Wu], the Court of Appeal made a similar point. It affirmed that strong measures are justified in discouraging non-disclosure, but cautioned that there must be some evidence of the value of the undisclosed assets before the inference is appropriate: para. 41. The evidence may, however, be sparse: para. 45.
- [128] In a nutshell, the respondent's testimony was that he did have \$425,000 when the marriage began, that he could not explain what has happened to all of it, that he is not hiding anything, and that he has produced all of his financial records. Taken together, this evidence simply does not make sense.
- [129] I find that the respondent had \$425,000 in financial assets at the time of the marriage and he has not accounted for approximately \$225,000 of that amount.
- [130] The claimant suggests the Court ought to impute a value greater than that amount, given the likelihood of significant growth since 1999. The current value of the undisclosed assets or their increase in value between the date of marriage and the triggering date or the date of trial is entirely unknown. The evidence as a whole, and the claimant's testimony in particular, make it clear that the respondent spends his money very carefully. During the marriage, he talked to the claimant about needing to make his money last and that he took a frugal, if not parsimonious, approach to all expenditures. He complained about the high cost of rent for the family. He did not contribute to the children's direct expenses. He investigated and researched the cost of any significant item he wanted for himself before making a purchase. I can see no reason why he would not take the same approach to the use of his undisclosed financial assets. Given the caution expressed in *Eng* and *Wu*, I conclude that the respondent continues to own significant financial assets he has not disclosed that are not less than \$225,000.
- [131] One of the claimant's main arguments is she should be entitled to keep her pension because the respondent's has significant concealed assets which he can use to remain self-sufficient. She suggests that the missing assets be considered as a form of set off against her pension. It goes without saying that the *Cunha* approach was developed in the context of the FRA where the court is required to identify and effect the division of family assets. Should the approach continue to apply in the same manner in light of the new regime for property division under the FLA?
- [132] I have considered that, under the FLA, the respondent's financial assets at the time of marriage would be excluded property. It is their increase in value that would be family property to which the claimant would have a claim to a one half interest. Section 95(2)(g) allows for reapportionment of family property where a spouse, in the absence of good faith, substantially reduces the value of family property or deals with property that would have been family property in such a way as to defeat or adversely affect the other spouse's interest in that property. The respondent's failure to disclose all of his present financial assets deprives the claimant of an argument pursuant to this provision, leaving her the "*Cunha*" remedy, if available, or something similar under the FLA.

- [133] The thrust of the Cunha authorities is that the court must not allow material non-disclosure of assets to prejudice the innocent spouse's entitlement to a fair division of property. In Hansard, the Honourable Shirley Bond described one of the major goals of the FLA as promoting the resolution of family law disputes outside the courtroom in part by encouraging fulsome disclosure very early in the process: British Columbia, Legislative Assembly, Official Report of Debates (Hansard), Vol. 28, No 5 (21 November 2011) at 1505.
- [134] Consistent with this goal, s. 213 of the FLA provides remedies for non-disclosure in a wider range of circumstances than previously found in s. 92 of the FRA. Those circumstances include where a party has provided incomplete, false or misleading information. The range of available remedies is also wider. Pursuant to s. 213(2)(b), the Court may draw an adverse inference against a person, including attributing income to that person in an amount that the Court considers appropriate, and make an order based on that inference. Although s. 213(2)(b) does not prevent the Court from drawing other inferences, it is not my view that the legislature intended for this provision to replace the common law. I concur with Mr. Justice Punnett in *J.D.G. v. J.J.V.*, 2013 BCSC 1274, where he comments at para. 19 upon the court's ability to draw an adverse inference as a remedy already available with reference to *Wu* in discussing and interpreting s. 213. I conclude, therefore, that while s. 213(2)(b) may be interpreted as allowing the Court to impute property as well as attribute income to a person, I may continue to consider the respondent's concealed financial assets and draw a negative inference as provided for by Cunha and the subsequent authorities discussed above in determining an appropriate division of the claimant's pension under the FLA.
- [135] Turning to the value of the respondent's interest in the claimant's public pension, given that I have found the claimant is likely to continue working until at least age 60, and the separation date is August 15, 2009, I conclude the value of the respondent's 18.6% interest is either \$82,788.60 (pre-tax) or \$62,086.80 (after tax). Based on the inference that the respondent continues to own undisclosed financial assets of not less than \$225,000, allowing the claimant to keep the whole of her pension does not necessarily require an unequal division of family property in her favour.
- [136] In the event that I am incorrect in so concluding, arising from the required application of the two legislative regimes or because the respondent's undisclosed assets are excluded property under the FLA, I will also consider whether it would be significantly unfair to the claimant to divide her pension benefits as required by Part 6, according to the criteria set out in s. 95(2).

Consideration of the s. 95(2) factors under the FLA

- [137] I pause to note that, before it was submitted that the division of her pension must be decided under the FLA, the claimant made two arguments in support of keeping her whole pension pursuant to the grounds for reapportionment enumerated in s. 65 of the FRA. First, she relied on s. 65(1)(e) which allows the court to consider the needs of each spouse to become or remain economically independent and self-sufficient in determining whether

an equal division would be unfair. The claimant argued that her medical conditions make it likely she will be forced to retire early, impacting her monthly pension benefits and her ability to meet her expenses at that point. I have largely dismissed this argument by concluding that, in all likelihood, she will continue to work until age 60 or later given the nature of her employment, at which point she will be eligible for an unreduced pension. (She may well however struggle to work after retirement if wished or needed to supplement her pension income.)

[138] Section 95(2) does not contain a ground wholly comparable to s. 65(1)(e). Instead s. 95(3) allows the court to consider the extent to which the financial means and earning capacity of a spouse have been affected by their role in the relationship, if, upon determining a claim for spousal support, the objectives of spousal support have not been met. It is the respondent, and not the claimant, who seeks spousal support in this case and so this provision does not assist her. Given the language of s. 95(3), and in the absence of argument to the contrary, I also do not consider the claimant's argument on this point to be captured by the catch-all grounds for significant unfairness set out in s. 95(2)(i).

[139] The claimant's other argument in support of reapportionment was pursuant to s. 65(1)(f) and was based on respondent's alleged failure to contribute to the development of the family assets throughout the marriage, both practically and financially. The claimant relied upon *Johnstone v. Johnstone* (1982), 33 B.C.L.R. 368 (S.C.) [Johnstone], where Mr. Justice Dohm discussed when an equal division will be unfair owing to a spouse's failure to contribute at 388-389:

The conduct between the parties is not relevant, but what can be relevant are the activities of each spouse in developing the assets. If one spouse conscientiously and carefully works to develop the assets, whether by contribution of money or labour or time and the other by whatever contribution he or she is capable of or does make, actively decreased and devalues the assets it would be unfair to divide them equally. This consideration does not relate to the salaries earned by the spouses, but to their contributions, considering their abilities, opportunities, capabilities, etc. If spouses each contribute positively to the development of the family assets s. 51(f) will not apply. If, on the other hand, one spouse tries to build up the assets and the other to acquire "experiences" this must be a factor to consider whether or not it would be unfair to divide the assets equally.

[140] *Johnstone* has been followed in subsequent authorities, most recently in *Sarmiento v. Villarico*, 2014 BCSC 455. I note that the courts have also held that the extent to which spouses contribute financially to household expenses is not a basis for reapportionment pursuant to s. 65: *Girard v. Girard* (1983), 42 B.C.L.R. 305 (C.A.). The claimant contends that the respondent essentially did what Dohm J. described in *Johnstone*: he actively decreased the family assets, namely his retirement assets, and, therefore, it would be unfair to provide him with any share of her pension.

- [141] Section 95(2) does not appear to allow for the wide ranging examination of each spouse's contribution to the accumulation of family assets and their respective capacities that occurred pursuant to s. 65(1)(f). Instead the court may consider a spouse's contribution to the career or career potential of the other spouse under s. 95(2)(c) or a spouse's detrimental impact on to the value of family property or potential family property under s. 95(2)(g) which appears focused on the spouse's direct actions vis-à-vis the value of family property. I interpret the words "spouse's contribution" in s. 95(2)(c) as including the full spectrum of all levels of contribution from one spouse negatively impacting on the other spouse's career to greatly enhancing the career or career potential of the other spouse.
- [142] The claimant's pension is as a result of her employment with the Crown since 2000. The evidence regarding the respondent's contribution to the claimant's career or career potential under s. 95(2)(c) is as follows: Prior to seeking employment with the Crown, the claimant was practicing law privately. Concerned about her failing health, she asked the respondent if he would be willing to support her and the children through her medical problems if she could not work in the future. He refused. She then unsuccessfully sought a job with the Crown in Ontario before being hired in Prince George.
- [143] To the disappointment of the claimant, the respondent participated very little in caring for the children or in the running of the household during their relationship. The claimant's parents provided childcare and housekeeping support to the family prior to the family's move to Prince George and for a few months afterward. While working, the claimant essentially parented by phone and continued to be almost entirely responsible for meal preparation, homework monitoring and the plethora of tasks required to care for two children full-time. The claimant did attend out of town educational and other law related conferences. At those times, the children were left with the respondent. The evidence does not establish when or how often the claimant was away but there was no suggestion that it was frequent.
- [144] By the time the family was living in Prince George, J. was a teenager and T. was a pre-teen. For approximately four of the six years the family spent in Prince George, the claimant was not working and so was at home struggling with an array of difficult health issues, as well as T.'s significant learning and mental health problems.
- [145] During this same period, the respondent spent a great deal of his time painting, often away from the home at his art studio or elsewhere. In 2001, the respondent rented a studio in Wells, BC, where he stayed for prolonged periods. In 2002, he rented a separate apartment in the Spanish Villa as an art studio. He went on various trips related to his art and painting. He taught art only part time at a local college. He also travelled out of town regularly - two to three days a week or every other week - to a First Nations community where he worked as an art director. He could not recall if he earned any income from this latter position or if he was paid under the table; at one point, he mentioned a grant obtained by the Band to pay him.

- [146] The respondent never looked for a full time job in Prince George. I accept the claimant's evidence that the parties argued often about his under employment. She told him she wanted him to find a full time job, but he refused. Indeed both parties testified that he saw himself as already working full time as an artist and art teacher. The claimant's job with the Crown and the income it provided was all the more important to the family given the respondent's lifestyle and opposition to seeking regular employment.
- [147] The claimant's health issues which lead to her various extended leaves from work included chronic pain, severe depression and other mental health issues for income was reduces during those times. The respondent testified to attending medical appointments with the claimant and assisting her when she experienced a mental health emergency. He also portrayed himself as helpful and supportive to T. I find this evidence very difficult to accept. It is entirely inconsistent with other evidence of the claimant and J. which I do accept. In addition, during his own testimony, the respondent displayed very little knowledge and understanding of T's difficulties and needs. He was unaware, for example, of what T's learning disabilities were and that he had been cutting himself.
- [148] The evidence also reveals that the respondent was decidedly unhelpful to family at particularly stressful times. For example he chose to travel just as the family was about to move in 2002 and again in 2005 when both the claimant and T. were in the midst of serious medical crises. I was left with the very distinct impression that the parties led very separate lives, that the respondent was often not present, and that his contribution, either directly or indirectly, to the support of the claimant so she could return to work was negligible at best. The same is true during the times she was able to work.
- [149] When the parties moved to Vancouver in 2006, the respondent again taught art but he also attempted to find other employment, first in insurance and then in his previous field of marketing for a furniture manufacturer. Both ventures were short lived and largely unsuccessful. He continued to rely on income from his RRSPs until obtaining his first full time teaching position just prior to separation. In 2007, when the claimant returned to work full time, the children were grown. The parties continued to live relatively separate lives.
- [150] I conclude that the respondent made essentially no contribution to the claimant's career or career potential during their relationship except for providing limited care to the children while she attend law-related conferences. At the same time, the claimant urged the respondent to seek full time employment and, given her role in caring for the children and the household, he was entirely free to do so. His preference, however, was to pursue his interest in art, and teaching art was a part of his vision of an artist's lifestyle.
- [151] In the circumstances, on the grounds of s. 95(2)(c), I find it would be significantly unfair, to divide the claimant's pension benefits as required by s. 115, bearing in mind the meaning given to the threshold of significant unfairness in L.G. and Remmen.

- [152] Section 95(2)(i) provides that the court may also consider any other factors, except as found in s. 95(3), that may lead to significant unfairness. As an alternative to analyzing the respondent's undisclosed financial assets as a form of set off against his interest in the claimant's pension, I have considered those assets under this factor, and I find it would be significantly unfair for the respondent to receive his proportionate share of the claimant's pension, bearing in mind the financial assets he has not disclosed and has available to him to use as he sees fit, as well as the division of the parties' other assets set out above.
- [153] Based on my findings of significant unfairness pursuant to s. 95(2)(c) and (i), and the inference I have drawn that the respondent continues to own undisclosed financial assets of not less than \$225,000, I order that the claimant's Public Service Pension be reapportioned 100% in her favour.
- [154] The parties made no real submissions about their respective CPP pensions apart from the respondent stating his position. The respondent asks the Court to equalize their contributions to CPP. I infer, from the claimant's overall position that the parties should retain their own assets, that she opposes the respondent's request. There is no evidence of the parties' respective contributions during the period of cohabitation or otherwise. Having been provided with no arguments to the contrary, I conclude the parties' entitlements to their respective CPP pensions should be divided in accordance with Part 6 of the FLA from the date of cohabitation or the date the pension began accruing, whichever is later, to the date of separation.
- [155] Given the extremely modest monthly benefit the respondent receives pursuant to his College Pension Plan, I order that the claimant's interest in that plan be reapportioned entirely to him.

Spousal Support

- [156] The respondent seeks spousal support based on compensatory and non-compensatory grounds. The claimant disputes his entitlement.
- [157] Section 15.2(6) of the Divorce Act 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.

[158] No single objective is paramount; all must be borne in mind: *Bracklow v. Bracklow*, [1991] 1 S.C.R. 420 [Bracklow] at para. 35.

[159] Section 15.2(4) further provides the court must consider the condition, means, needs and other circumstances of each spouse when dealing with an application for spousal support, including these factors:

- (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.

[160] Compensatory support is intended to provide redress to the recipient spouse for his or her efforts during the marriage which conferred an economic benefit or advantage on the other spouse and for his or her economic disadvantage arising from the marriage or its breakdown: *Chutter v. Chutter*, 2008 BCCA 507 at paras. 50 - 51, leave to appeal ref'd [2009] S.C.C.A. No. 41 [Chutter]. The courts recognize that assuming primary child care and household responsibilities, in particular, often results in lower earning potential and fewer prospects for financial success in the future: *Chutter* at para. 50.

[161] Where non-compensatory principles also apply, spousal support aims to narrow the gap between the needs and means of the spouses. The concept of need, however, goes beyond the basic necessities of life and varies according to the circumstances of the parties. In longer marriages, the courts have measured need against the marital standard of living or the payor's post-separation standard of living: *Chutter* at para. 59; *Hodgkinson v. Hodgkinson*, 2006 BCCA 158 at paras. 68 - 69. In *Moge v. Moge*, [1992] 3 S.C.R. 813 [Moge], the court said at 870:

Although the doctrine of spousal support which focuses on equitable sharing does not guarantee to either party the standard of living enjoyed during the marriage, this standard is far from irrelevant to support entitlement. As marriage should be regarded as a joint endeavour, the longer the relationship endures, the closer the economic union, the greater will be the presumptive claim to equal standards of living upon its dissolution.

[162] The respondent's claim for compensatory support is based upon the roles he says the parties assumed during their relationship. He submits there was an implied agreement he would subordinate his career to that of the claimant and the claimant would support him. He says he gave up employment opportunities by moving from Ontario to Prince George and again to Vancouver. He also asks the Court to consider his contributions to the care of T. and J. and to the operation of the family home over the years, as giving rise to an economic benefit to the claimant and corresponding disadvantage to him.

- [163] The evidence simply does not support the respondent's version of events. Four years prior to the family's move to Prince George, and while the parties were dating, the respondent gave up long term well-paid employment to study art and painting. He acknowledged that after completing art school in the spring of 2000 he did not look for a job. He said he was "assessing". As set out above, before the claimant decided to pursue a job with the Crown, the respondent refused her request that he support her private practice during periods of illness. After the family moved to Prince George, he refused to seek a full time job because he saw himself as engaged full time in an artist's life. He testified that he taught art because, in his view, doing so is an important if not necessary part of being an artist.
- [164] I have already reviewed the evidence regarding the respondent's lack of involvement in the day to day lives of the children, their care and the running of the household during the relationship. I reject his suggestion to the contrary.
- [165] The respondent testified that by moving from Prince George to Vancouver in 2006 along with the claimant, he lost out on an opportunity for significant career advancement within the College of New Caledonia. His evidence on this point was vague and unconvincing. Further, I accept that he was under no pressure from the claimant to move with her to Vancouver. Initially, it seemed he would not, angered as he was by the cost of housing.
- [166] Consequently, there is no basis on which to find that the respondent has suffered an economic disadvantage, or conferred upon the claimant an economic advantage, as a result of the marriage or its breakdown. I conclude, therefore, that the respondent is not entitled to spousal support on compensatory grounds.
- [167] The respondent made few submissions in support of his entitlement to non-compensatory support, focussing instead on the amount of support that ought to be awarded. He did ask the Court to consider his age and health concerns, his qualifications (which limit where he can teach) and his desire to retire.
- [168] The claimant is much younger at age 50 and earns a much higher income than the respondent, although her expenses are also significantly greater.
- [169] The parties lived together for about 11 years prior to separation. During that time, their standard of living varied. Initially they owned a new home in Ontario and the claimant worked full time as a lawyer in private practice. Childcare and household support were provided by her parents. After the move to Prince George, the parties lived, initially, in a nice rental home but, after that, they lived in less than desirable accommodation and their standard of living was very modest, negatively affected by the claimant's reliance on disability benefits. The family's lifestyle in Vancouver included rental housing that was in a poor state of repair and, at times, infested with mice, despite the claimant's returned to a full time employment as a Crown prosecutor.
- [170] The claimant remained in the Vancouver home until 2013. She now shares housing with a new partner.

- [171] Throughout the relationship, the parties travelled.
- [172] Post separation, the respondent's income has been significantly higher than it was during the marriage. In 2010, the respondent earned \$74,793; in 2011, \$100,675; and, in 2012, \$92,242. His income for those years included employment income and CPP, which ranged from approximately \$7,000 to \$7,300, as well as other investment income. In 2012, the respondent also received just over \$9,000 in Old Age Security (OAS).
- [173] The respondent's Form F8 financial statement sworn October 12, 2013, sets his Guideline income at \$56,095.60, including employment income of \$45,500 and pension income of \$10,992. A letter from his employer, Frontier School Division, dated March 12, 2013, provides, however, that his basic annual salary is \$49,246.19 plus isolation allowance of \$1,853.37 for a total of \$51,099.56 in employment income. His 2012 tax return shows pension income in the form of CPP and OAS of \$17,092.71. Thus his total income is approximately \$68,190 rather than \$56,095.60, leaving aside the issue of what income he might be earning from his undisclosed assets.
- [174] The respondent's financial statement estimates his annual expenses at \$68,901.60. The respondent admits, however, that he significantly overstated the compulsory deduction expenses for income tax, CPP, EI premiums, TRAF pension contributions and rent, by \$15,825.24 per year. He also admits that he was not actually making the debt payments he lists in the financial statement, thus reducing his annual expenses by \$10,490.28. Consequently his total actual expenses are \$42,586.
- [175] The claimant's sworn financial statement sworn January 3, 2014, sets out a Guideline income of \$146,006.17. Her total income for 2013 included however \$25,000 from her RRSPs which she used to pay debt. Her total annual expenses are \$141,987.48 about which she was not challenged.
- [176] The respondent has not provided any medical evidence that would support the suggestion that he suffers from a health problem that interferes with his ability to work full time. He did receive a pacemaker in 2008 after which he said he was suddenly able to think, reason and be very active. The respondent complained of poor teeth and numbness in his feet. The only evidence he presented is a letter written to another physician by Dr. Bourque, a neurologist in Winnipeg, dated December 4, 2013, which is not admissible opinion evidence. In any event, based on an attached neurophysiology report and the respondent's complaint of vague numbness and tingling affecting his feet and variable heaviness in his legs for the year prior, Dr. Borque referred to his condition as involving relatively minor abnormalities consistent with mild sensorimotor peripheral neuropathy. Dr. Borque stated that he expects a gradual progression over a long time.
- [177] Apart from evidence as to their income and expenses, the parties provided very little in the way of evidence about their current lifestyles and how they may or may not differ from before separation.

- [178] The respondent has not referred me to any authority that would suggest his wish to retire is a factor in determining his entitlement to non-compensatory spousal support.
- [179] That leaves, then, a fairly significant difference in the parties' incomes.
- [180] In *Lee v. Lee*, 2014 BCCA 383 [Lee], the Court of Appeal considered the question of entitlement to non-compensatory spousal support based on a disparity of income between the spouses. The facts involved a 20 year "modern" marriage without children. Following an accident in 2004, the husband worked only part-time and claimed he earned less than \$20,000. There was some uncertainty about this. The wife earned \$120,000 a year. The husband was in a new relationship with a partner who earned between \$75,000 and \$90,000 plus overtime. The trial judge dismissed the husband's claim for spousal support on both compensatory and non-compensatory grounds. A majority of the Court of Appeal upheld the decision for the most part. They allowed the appeal only to the extent of reversing the trial judge's order that the wife's pre-trial voluntary payment of spousal support be repaid, which the dissent also would have upheld .
- [181] The reasons of Madam Justice Newbury for the majority include a very careful examination of the jurisprudence regarding non-compensatory support and in particular Bracklow, the facts of which she describes as atypical: the parties had a seven year relationship that included a second marriage for both of them. During the marriage, the wife stopped working because of health issues. She became seriously ill in the year prior to separation. In Bracklow the Court concluded the wife was eligible for support based on the length of cohabitation, the hardship imposed on her by the marriage breakdown, her palpable need, and the respondent's financial ability to pay. By the time of their divorce, she was subsisting on modest support payments and CPP disability benefits. The husband earned \$44,000 per year from employment.
- [182] Newbury J.A. observed that in Bracklow found support for the non-compensatory model of spousal support in s. 15.2 of the Divorce Act. The decision emphasized, in contrast to the earlier analysis in Moge, the need to weigh and balance the various factors in s. 15.2(4) of the Divorce Act, and consider both the mutual obligation and the clean break models of marriage, marriage breakdown and spousal support without preferring one over the other. Newbury J.A. then reviewed Professor Carol Rogerson's Criticisms of "these broad aspects" of Bracklow, and she views as eroding entitlement as a serious issue in spousal support as follows:

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

With Bracklow's clear recognition of non-compensatory support, entitlement is effectively no longer a serious issue in spousal support.

Even if there is no compensatory basis for support, "need alone may be enough" to ground an award of support; and if need is interpreted broadly to cover any significant drop in standard of living, the basis for entitlement is very broad. ("Spousal Support Post-Bracklow", (2001) 19 C.F.L.Q. 185 at 223 and para. 54 of Lee).

[183] Newbury J.A. concluded that post Bracklow, our Court of Appeal, like many other provincial appellate courts, has expanded the concept of "need" far beyond what is necessary to ensure that the applicant for support will not become a burden on "the government", referring expressly to both Chutter and Yemchuk, 2005 BCCA 406. In the latter case, the Court of Appeal's reasoning with respect to non-compensatory support included the following:

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

Despite the expansive approach to need, Newbury J.A. noted an absence of authority from our Court of Appeal involving spousal support awards solely because of income disparity, or even solely based on the non-compensatory model. She then considered *Farrar v. Farrar* (2003), 63 O.R. (3d) 141 (C.A.), where the Ontario Court of Appeal concluded a differential in income alone did not provide a basis for awarding spousal support.

[184] In *Lee* Newbury J.A. ultimately held that if the husband had not formed his new relationship, the case law in British Columbia would have permitted an award of spousal support to him, given the length of the parties' marriage and the expansion of the meaning of "need". Refusing support in such circumstances, however, would not have been a "material error" in law or a wrong exercise of discretion. At para. 65, Newbury J.A. reasoned as follows:

To rule as a matter of law that Mr. Lee should be compensated indefinitely for the "loss" of the ability to share in Ms. Lee's income and lifestyle would, taken to its logical conclusion, mean that support must be ordered on one model or the other in virtually every case that comes before the court. The concept of need (in the true sense) of the applicant spouse would be supplanted by the sole criterion of the respondent spouse's ability to pay. Marriage would, contrary to what was said in *Moge*, automatically entitle a spouse to the standard of living enjoyed during the marriage, or as much as the payor could afford. I respectfully agree with Professor Rogerson's suggestion, and with the Court in *Griffiths*, *supra*, that this cannot be correct. A 'clean break' is clearly possible in this case, and again as stated in *Moge*, the mere fact of marriage or its breakdown does not activate a "general tool of redistribution." As far as I am aware, this principle has not been overruled.

See also: J.J.G. v. K.M.A., 2009 BCSC 1056.

[185] Similarly, in *Elias v. Elias*, 2006 BCSC 124 [Elias], the husband sought spousal support arguing that the wife's income was twice as much as his and, therefore, an equalization payment should be effected. The parties had been married for 24 years and their youngest child was almost 19 at the time of trial. Both parties had worked throughout the marriage and were self-supporting. The court found the husband was not entitled to spousal support and held that even with a long-term marriage, equalization of lifestyle or income is not required: "While a disparity in lifestyle will need to be addressed, no cases have held that lifestyle or incomes have to be equalized" (para. 65).

[186] Here the parties' relationship was much shorter than those in *Elias* and *Lee*, eleven years as opposed to more than twenty. It was also a second marriage for the respondent and the claimant had two children from two previous relationships. Until separation, the parties had separate finances. There really was no economic union as described by the court in *Moge*. The respondent has been entirely self-sufficient since the parties separated. His income exceeds his expenses by approximately \$24,000 per year, again leaving aside what other income he may earn from undisclosed assets. He continues to contribute to his retirement savings. Accordingly, I conclude he is not entitled to non-compensatory support and dismiss his claim to spousal support. Given his advanced age, however, I do consider it appropriate to grant him liberty to apply for non-compensatory spousal support in the event of a change of circumstances: *Gill-Sager v. Sager*, 2003 BCCA 46 and J.J.G.

Conclusion

[187] In summary:

- 1) The respondent's TFSA, LIF and RRSP accounts with Nesbitt Burns, as well as his Sun Life RRSP, will remain his sole assets.
- 2) The claimant's interest in the respondent's College Pension Plan is reapportioned 100% in his favour.
- 3) The claimant's Canada Savings Bonds and RRSP (Nesbitt Burns) will remain her sole assets.
- 4) The parties' respective Canada Pension Plans will be divided in accordance with Part 6 of the FLA.
- 5) The claimant is responsible for payment of the remaining balance on the joint loan. She shall indemnify and hold harmless the respondent for any and all payment under that loan.
- 6) The respondent's interest in the claimant's Public Service Pension is reapportioned 100% in her favour.
- 7) The respondent's claim for spousal support is dismissed with liberty to apply for non-compensatory spousal support upon a change of circumstances.

Costs

[188] The parties may appear before me to speak to the issue of costs.

"Fleming J."

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/SC/15/00/2015BCSC0058.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/nearing-v-sauer-2015>

Prepared on 28 October 2026 · Esheria