

CANADA / JUDGMENT

Parton v. Riecker

2023 BCSC 389

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Supreme Court of British Columbia

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2023 BCSC 389 Parton v. Riecker

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Parton v. Riecker,

2023 BCSC 389

Date: 20230315

Docket: E122474

Registry: Kelowna

Between:

Mary Kathryn Parton

Claimant

And

Florian Riecker

Respondent

Before: The Honourable Mr. Justice Veenstra

Reasons for Judgment

Counsel for the Claimant:

D.R. Bloor

B. Hunt

Counsel for the Respondent:

B.J. Hardwick

(on January 28, 2022)

J.W. Robinson

(for written submissions)

Place and Date of Hearing:

Kelowna, B.C.

January 28, 2022

Written Submissions of the Respondent Received:

February 21, 2023

Written Submission of the Claimant Received:

March 2, 2023

Place and Date of Judgment:

Kelowna, B.C.

March 15, 2023

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Introduction

- [1] In this action, the claimant, Ms. Parton, seeks orders for division of property and spousal support. She argues that a cohabitation agreement entered into in 1996, and amended in part in 2004, is unfair and should be varied by the court under either Part 5 of the Family Law Act, S.B.C. 2011, c. 25 [FLA], or Part 5 of the Family Relations Act, R.S.B.C. 1996, c. 128 [FRA].
- [2] On the present application, the respondent, Mr. Riecker, seeks declarations that the claimant has no standing to seek remedies with respect to property division under either statute, and an order dismissing those parts of her claim.
- [3] The application was initially argued in January 2022. At that time, an appeal from one of the key cases referenced in the parties' submissions had been argued before the Court of Appeal and judgment reserved. It was agreed that a decision on this application would be delayed until after judgment of the Court of Appeal in that matter. As it turned out, the appeal from another of the key cases was subsequently argued and decided as well.
- [4] In February 2023, the Court of Appeal released judgments in the following two matters:
- a) Sperring v. Shutiak, 2023 BCCA 54 [Sperring]; and
 - b) Bingham v. Bingham, 2023 BCCA 69 [Bingham].
- [5] The parties provided written submissions setting forward their positions in light of what was said by the Court of Appeal in these two judgments.

Background Facts

- [6] The facts that underlie this application are straightforward and are not in dispute.
- [7] The parties began living together in a marriage-like relationship in either October or November of 1994.
- [8] On October 7, 1996, they entered into a cohabitation agreement (the "1996 Agreement"). The 1996 Agreement provided that each party would retain their own property and be responsible for their own debts. Each waived any claim to the property of the other and to any claim for spousal support. Each had independent legal advice in respect of the 1996 Agreement.
- [9] On October 21, 2004, the parties entered into an Amending Agreement which amended the 1996 Agreement by providing that the claimant would have a 50% interest in the property that the parties then lived in. Otherwise, it made no changes to the separate property regime. Recitals C and D to the Amending Agreement stated:
- C. Except to the extent that this Amending Agreement is inconsistent with the 1996 Agreement, the 1996 Agreement shall remain in full force and effect.

D. To the extent that this Amending Agreement is inconsistent with the 1996 Agreement, this Amending Agreement shall prevail.

[10] Each of the parties had independent legal advice in respect of the Amending Agreement.

[11] On February 10, 2019, the parties separated.

[12] The claimant commenced this action on February 13, 2019.

The Changing Statutory Regime

[13] At the time the parties commenced their relationship, and at the time of the 1996 Agreement, the FRA was in force. At those times, the property division scheme found in Parts 5 and 6 of the FRA did not generally apply to unmarried spouses. This was by virtue of the definition of "spouse" in s. 1 of the FRA, part (b) of which defined that term to include someone who:

- (b) except under Parts 5 and 6, lived with another person in a marriage-like relationship for a period of at least 2 years if the application under this Act is made within one year after they ceased to live together

[Emphasis added.]

[14] The words "except under Parts 5 and 6" had the effect of excluding unmarried spouses from the provisions of Parts 5 and 6, which included provisions for the division of matrimonial property and of pension entitlements.

[15] This meant that where a common-law spouse sought a share in the other's property, they were required to bring a claim based on principles of unjust enrichment. Similarly, if unmarried spouses had signed a cohabitation agreement or a separation agreement, provisions in Part 5 of the FRA, which provided for judicial reapportionment of an agreed distribution of assets on the basis of fairness, did not apply.

[16] An exception to this approach was created in February 1998, when a new section, 120.1, was added to the FRA:

Property agreements

120.1 (1) If spouses who are not married to each other make an agreement, Parts 5 and 6 apply to

- (a) the agreement, and
- (b) if covered by the agreement,
 - (i) an annuity,
 - (ii) a pension or an interest in a pension plan,
 - (iii) a home ownership savings plan, or

(iv) property not described in subparagraphs (i) to (iii).

(2) In this section:

"agreement" means an agreement that would be

- (a) a marriage agreement for the purposes of Part 5 if the spouses were married to each other, or
- (b) a separation agreement if the spouses were married to each other or separated after marriage;

"property" means property of a spouse that would be a family asset under Part 5 if the spouses were married to each other.

(3) In applying Part 5 or 6 for the purpose of this section, a reference to "marriage" in Part 5 or 6 must be deemed to be a reference to a marriage-like relationship between the spouses who are not married to each other.

[17] Section 61(2) of the FRA defined the term "marriage agreement" for the purposes of Part 5:

- (2) A marriage agreement is an agreement entered into by a man and a woman before or during their marriage to each other to take effect on the date of their marriage or on the execution of the agreement, whichever is later, for
 - (a) management of family assets or other property during marriage, or
 - (b) ownership in, or division of, family assets or other property during marriage, or on the making of an order for dissolution of marriage, judicial separation or a declaration of nullity of marriage.

[18] The effect of s. 120.1 was to give the court the same sort of jurisdiction with respect to cohabitation and separation agreements between unmarried common-law spouses as with respect to married spouses. This included the power of the court to reapportion the agreed division of property if the court considered it to be "unfair" based on factors such as the duration of the relationship, the needs of each spouse to become or remain economically independent and self-sufficient, or "any other circumstances relating to the acquisition, preservation, maintenance, improvement or use of property or the capacity or liabilities of a spouse": FRA, s. 65(1).

[19] Section 120.1 was not in force at the time of the 1996 Agreement, but it was in force at the time of the Amending Agreement in 2004.

[20] Section 120.1 was subject to criticism. As noted in the July 2010 White Paper on Family Relations Act Reform at p. 82:

This section was intended to allow common-law spouses to opt into the Act's property division scheme by making an agreement with respect to their property. However, the way that the section has been interpreted has resulted in the Act's property division rules applying even when

common-law spouses specifically agree in their property agreement not to be bound by the Act. Section 120.1 has been roundly criticized in the Family Justice Reform Working Group's report and by family lawyers generally because it discourages common-law couples from making agreements to deal with their property or to resolve or avoid a property dispute.

- [21] The report recommended (at p. 83) that the property division scheme in the new statute apply both to married and unmarried spouses who have cohabited in a marriage-like relationship for at least two years, and proposed that s. 120.1 not be carried forward.
- [22] More generally, the report recommended (at pp. 24-25) the new statute should make it more difficult to set aside property agreements, and recognized the importance of certainty and finality on matters such as property. It suggested the new statute should provide greater clarity around when a particular provision may be set aside, increase the certainty of the law and encourage parties to use written agreements to manage their affairs.
- [23] These recommendations are reflected in the FLA, which was adopted by the legislature and given Royal Assent on November 24, 2011. The FLA provides for the making of agreements respecting property division (s. 92), but also provides that an agreement may be set aside or replaced in specified circumstances (s. 93). These provisions apply equally to married and unmarried spousal relationships.
- [24] Section 93(3) provides for an agreement to be set aside on the basis of procedural concerns, such as non-disclosure, improper advantage, or a lack of understanding regarding the nature or consequences of the agreement. If those concerns are not present, s. 93(5) provides a further power for the court to set aside an agreement. However, in order to act under s. 93(5), the court must conclude that the agreement is "significantly unfair" on consideration of:
 - a) the length of time that has passed since the agreement was made;
 - b) the intention of the spouses, in making the agreement, to achieve certainty; and
 - c) the degree to which the spouses relied on the terms of the agreement.
- [25] The use of the words "significantly unfair" is understood to mean more than a regular impact - something weighty, meaningful or compelling. By using those words, the legislature raised the bar for a finding of unfairness: *Remmem v. Remmem*, 2014 BCSC 1552 at para. 44.
- [26] Finally, s. 104(2) of the FLA provides that "[t]he rights under this Part are in addition to and not in substitution for rights under equity or any other law." In the context of a cohabitation agreement, that provision confirms that even where the FLA applies, it remains open to the parties to challenge an agreement on common law and equitable grounds such as unconscionability or duress.

[27] The bulk of the FLA came into force by regulation. The applicable regulation brought it into force on March 18, 2013. However, the FLA specifically provided that s. 120.1 was to be repealed effective as of the date of Royal Assent, which occurred on November 24, 2011. Thus, from November 24, 2011 until March 18, 2013, although the FRA generally remained in effect, s. 120.1 was no longer in force.

[28] The FLA also contained specific transition provisions for pre-existing agreements and court proceedings with respect to property division:

Definition

250. In this Part, "former Act" means the Family Relations Act, R.S.B.C. 1996, c. 128, as it read immediately before its repeal by this Act.

Transition -- proceeding respecting property division

252. (1) This section applies despite the repeal of the former Act and the enactment of Part 5 [Property Division] of this Act.

(2) Unless the spouses agree otherwise,

(a) a proceeding to enforce, set aside or replace an agreement respecting property division made before the coming into force of this section, or

(b) a proceeding respecting property division started under the former Act

must be started or continued, as applicable, under the former Act as if the former Act had not been repealed.

[29] These transition provisions are key to determining the issues on this application.

Relevant Authorities

[30] At the initial hearing of this matter, the parties drew my attention to a number of authorities. I will review some of them before turning to the two recent judgments of the Court of Appeal.

Presented at the Initial Hearing

[31] I begin with *Wiest v. Middelkamp*, 2003 BCCA 437, which dealt with the application of s. 120.1 to a cohabitation agreement entered into prior to the enactment of that section. The parties had executed an agreement in August 1988 - several years before s. 120.1 came into effect. Justice Rowles, for the court, commented at para. 13 that:

- [131] Section 120.1 of the FRA makes it possible for those who are unmarried but who live together in a marriage-like relationship to make an agreement to which Parts 5 and 6 of the FRA will apply. Legislation that is exclusively prospective applies only to events occurring after the legislation comes into effect which in this case was 4 February 1998. The question before us is whether s. 120.1 applies retrospectively, that is, to agreements entered into by unmarried but cohabiting spouses before the section came into effect.
- [132] She noted at para. 15 the general rule that statutes are not to be construed as having retrospective operation unless such a construction is expressly, or by necessary implication, required by the language of the Act. After analysis of s. 120.1, she concluded that nothing in s. 120.1 would lead to the conclusion it was intended to have retrospective effect. Thus, it was of no application to the 1988 agreement.
- [133] A number of judgments from 2013 onward have interpreted the transitional provisions of the FLA as they apply in different contexts.
- [134] *Halliday v. Halliday*, 2015 BCCA 82, considered the transitional provisions with respect to married spouses. The parties, who had married in 1984 and separated in 2008, negotiated a separation agreement (without legal advice) which was signed in July 2009. A final order of divorce was granted in March 2011; however, no claim was made in the divorce proceeding for property division or spousal support. In January 2014, one party applied to vary the provisions of the separation agreement as to spousal support and property division.
- [135] Justice Goepel, for the court, described the transitional provisions at paras. 42-43:
- [142] The effect of s. 252(1) of the FLA is to allow parties that would otherwise have been subject to the FLA property regime at the time they filed their claim to proceed under the old FRA regime despite it having been repealed. In essence, s. 252(1) preserves the FRA regime as it concerns property division for any separation agreements that were finalized before the FRA was repealed, unless the parties elect to proceed under the FLA.
- [143] There is no evidence that the parties agreed that the dispute be governed by the FLA rather than the FRA. Accordingly, an application such as that brought by the Wife to set aside or replace a separation agreement made before the FLA came into force and dealing with property division must be resolved under the FRA.
- [136] This interpretation of the effect of s. 252 applies not only to separation agreements between married spouses but also to marriage agreements: *McHale v. McHale Estate*, 2015 BCSC 993 at para. 72.
- [137] The application of s. 252 to unmarried spouses was at issue in two 2016 judgments of the Court of Appeal.
- [138] In *Newton v. Crouch*, 2016 BCCA 115, the parties had cohabited from November 2005 to April 2012 but had never married. The claimant began proceedings in January 2013, two months prior to the FLA coming into force, seeking a declaration that the provisions in Part

5 of the FLA did not apply to the parties. On March 22, 2013 - four days after the FLA came into force - the respondent filed an amended counterclaim seeking division of family property under Part 5 of the FLA as well as spousal support. The claimant argued that the FLA should not apply, as it was not in force when the parties separated, and its application in the circumstances would be retroactive.

[39] Justice Savage, for the court, noted:

[20] Prior to the FLA property claims between unmarried partners were based on equity, trust principles and unjust enrichment. The parties acknowledge that the enactment of the FLA was intended to be remedial, correcting, inter alia, the mischief of treating common-law couples differently than married couples.

[40] He described the applicable FLA provisions at paras. 21-22:

[21] Part 1 of the FLA includes definitions of "spouse" and "former spouse". The FLA defines 'spouse' in s. 1 as "a person who is a spouse within the meaning of section 3." Section 3 provides:

- (1) A person is a spouse for the purposes of this Act if the person
 - (a) is married to another person, or
 - (b) has lived with another person in a marriage-like relationship, and
 - (i) has done so for a continuous period of at least 2 years, or
 - (ii) except in Parts 5 [Property Division] and 6 [Pension Division], has a child with the other person.
- (2) A spouse includes a former spouse.

[Emphasis in original.]

[22] Thus unmarried partners may be entitled to rely on the provisions in Part 5 of the FLA that pertain to the division of family property between spouses. Section 81 provides:

Subject to an agreement or order that provides otherwise and except as set out in this Part and Part 6 [Pension Division],

- (a) spouses are both entitled to family property and responsible for family debt, regardless of their respective use or contribution, and
- (b) on separation, each spouse has a right to an undivided half interest in all family property as a tenant in common, and is equally responsible for family debt.

[41] Justice Savage reviewed the transitional provisions in s. 252 (cited above and as considered in Halliday) as well as the provisions of s. 104 of the FLA - which provides that the rights in Part 5 are "in addition to and not in substitution for rights under equity or any law". In addition, he noted s. 8 of the Interpretation Act, R.S.B.C. 1996, c. 238, which provides that:

Every enactment must be construed as being remedial, and must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

[42] At para. 28, he drew the following conclusion:

[28] The effect of these provisions in the within proceeding appears to be as follows. The definition of "spouse" includes persons who have been in a marriage-like relationship for two years (s. 3(1)(b)(i)). Persons who were formerly in a marriage-like relationship for two years can take advantage of Part 5 of the FLA (s. 3(1)(b)(i) and s. 81), provided they do so by commencing proceedings within two years of separation (s. 198(2)(b)). In short, when a defined term is used in an operative provision of an enactment, it seems reasonable to assume that the Legislature intended that a person having the defined status on the date the enactment came into force would be entitled to the benefit of the operative provision.

[Emphasis added.]

[43] He dealt with the claimant's arguments at paras. 29-36:

[29] As I understand it, the Appellant's principle argument can be summarized as follows: (1) the Respondent was not a spouse for the purposes of property division under the FRA because she did not meet the FRA definition of spouse (she was not married); (2) she was not a spouse under the FLA because when the FLA was enacted she was no longer living in a marriage-like relationship; and therefore (3) she cannot be a "former spouse" because she was never a spouse under the FRA or FLA.

[30] Thus the Appellant asserts the Respondent is not a "former spouse" under the FLA unless the FLA spouse definition is applied to a time before the FLA's enactment. He says this type of application is prohibited because (1) there is a presumption against such a retroactive or retrospective interpretation and (2) there is a presumption against such an interference with vested rights.

[31] In my view the Appellant's argument fails for four reasons. First, interpreting the FLA reveals that the Legislature intended the FLA spouse definition to be applied to facts preceding its enactment. Second, such an interpretation is based on a party obtaining a status, applies only to the future consequences of such a status, and thus is prospective, not retroactive or retrospective. Third, if it is retrospective, then the presumption against retrospectivity is rebutted. Fourth, the FLA does not interfere with vested rights as the Appellant had no vested right to be excluded from a legislative property regime.

- [33] The difficulty with the Appellant's position, in my opinion, is that it fails to give meaning to the plain language of s. 3(1)(b)(i) of the FLA. The terms "spouse" and "former spouse" connote a status. The language of the FLA makes it clear that the status can be achieved from facts arising either in the present or in the past.
- [34] The Appellant's interpretation might be supported if the Legislature chose to define a spouse as a person who "is living with another person in a marriage-like relationship " However, it did not. Notably s. 3(1)(a) uses the present tense "is married" while s. 3(1)(b) uses the past tense "has lived". The choice of using the past tense for unmarried parties and the present tense for married spouses signals that the Legislature consciously intended for past events to be considered in s. 3(1)(b)(i).
- [35] Under the FLA, then, the term "spouse" is defined to include persons who are married or "ha[ve] lived" in a marriage-like relationship for two years. In my view, the term "former spouse" refers to a party who was married. In order to determine who is a former spouse or who has lived in a marriage-like relationship one must look to the past. The Appellant errs in asking this Court to look at the past using the definition of spouse that was repealed with the FRA rather than that of the FLA.
- [36] Upon repeal of the FRA, except as expressly provided for otherwise in the FLA, any future remedies under the FRA were lost. When the FRA was repealed, so too were the definitions contained in the FRA. Upon proclamation of the FLA the only provincial statute dealing with this subject matter is the FLA. The Legislature could not have repealed the FRA while at the same time intending to base a significant portion of the new act on whether a party met a repealed definition.
- [44] To similar effect is his statement at para. 68 that:
- [68] What confers the contested rights under the FLA in this case is the attainment of a status, that of being or having been in a marriage-like relationship for a period of two years. That is the effect of s. 3(1)(b)(i) of the FLA that defines a spouse to include a person who has lived in a marriage-like relationship for two years, when read in conjunction with s. 81 of the FLA. Subject to the limitation period, it does not matter when that status was achieved.
- [Emphasis added.]
- [45] Justice Savage described the legislative intent underlying the transitional provisions of the FLA at paras. 38-43:
- [38] Prior to the FLA, married persons could claim for property division under the FRA, but unmarried partners had to rely on the equitable doctrines of unjust enrichment and constructive trust to deal with property division. Such proceedings could be time consuming, complex, and lacking an appropriate documentary record.

- [39] For example, to recover under unjust enrichment, a plaintiff had to establish (1) an enrichment of the defendant by the plaintiff, (2) a corresponding deprivation of the plaintiff, and (3) the absence of a juristic reason for the enrichment. The juristic reason analysis required the court to consider established categories of juristic reason and, in their absence, the reasonable expectations of the parties and public policy considerations: *Kerr v. Baranow*, 2011 SCC 10.
- [40] In my opinion, the Legislature's treatment of these pre-FLA actions reveals its intention as to how the FLA operates based on past events.
- [41] Section 252(2) expressly provides that, absent agreement, a proceeding in respect of property division that was commenced under the FRA must be continued under the FRA "as if the former Act had not been repealed". Section 252(2) applies only to married spouses as proceedings in connection with property division could not be "commenced under the former Act" by unmarried persons: *Bressette v. Henderson*, 2013 BCSC 1661 at para. 122. Accordingly married persons who were engaged in FRA proceedings were to continue to be governed by the FRA unless they opted into the FLA by consent.
- [42] Conversely, unmarried parties who had commenced a property action in equity before the FLA was enacted are not required to continue the action in equity. Section 104(2) of the FLA states that the FLA property rights are "in addition to and not in substitution for rights under equity or any other law." Thus, it is open to a person to pursue a claim under the FLA in addition to their other equitable or legal rights.
- [43] When the Legislature addressed the question of pre-FLA actions, pre-FLA actions commenced by married parties and pre-FLA actions commenced by unmarried parties, it chose only to restrict married parties already in proceedings under the FRA from the FLA, absent an agreement otherwise. The Legislature could have provided for a transitional provision that embraced common-law relationships in a similar manner, thus expressly delaying the benefit of the remedial provisions to unmarried persons. It chose not to do so. I am not convinced this was an oversight. It is more likely, in my view, that the two situations were treated differently to fulfill the remedial aspect of the FLA (for unmarried partners).
- [Emphasis added.]
- [46] *Matteucci v. Greenberg*, 2016 BCCA 116, was released the same day as *Newton* and was also written by Savage J.A. It also involved parties who had lived together (from August 2006 to July 2012) but never married. Mr. Matteucci had commenced proceedings in September 2012. In October 2013 - after the FLA had come into force - Ms. Greenberg filed a counterclaim seeking (among other things) a division of family property under the FLA. The key issue was whether Ms. Greenberg was entitled to advance claims under the FLA.
- [47] The legislative intent of the transitional provisions were discussed at paras. 42-49:

- [42] The parties acknowledge that the enactment of the FLA was intended to be remedial, correcting, inter alia, the mischief of treating common-law couples differently than married couples. The FRA was repealed upon proclamation. The FLA followed upon a "white paper" the "White Paper on Family Relations Act Reform: Proposals for a New Family Law Act" published in July 2010 which identified the mischief I have mentioned. There were some 15 months between the time the FLA received Royal Assent and the time the Act came into force by B.C. Reg. 131/2012. The Regulation was approved and ordered on June 18, 2012 and provided that the FLA would be brought into force on March 18, 2013. It could not be said that these changes to the legal regime were not clearly at play well before the legislation came into force.
- [43] Notwithstanding that remedial aspect, Mr. Matteucci argues that in *Wiest v. Middelkamp*, 2003 BCCA 437, this Court "refused to apply legislation extending rights to unmarried couples retroactively because a clear expression of legislative intent to make the impugned provisions retroactive was not present in the statute". With respect, in my view the issue in *Wiest* turned on very different statutory provisions.
- [44] What was at issue in *Wiest* was whether s. 120.1 of the FRA operated retrospectively as well as prospectively so as to apply to agreements made by common-law and same sex couples prior to its enactment. The Court analyzed the provision contextually, and concluded that it was not intended to apply retrospectively.
- [45] The ability to "make" an agreement subject to the legislative provisions was conferred by the new legislation and therefore did not apply to agreements made before the legislation was in force. In my view, unlike s. 120.1 in *Weist*, the FLA does purport to place unmarried and married couples in the same position in these respects.
- [46] As I see it here, the FLA defining provisions are attaching new consequences for the future, as of the date of passage of the statutory provision, with respect to a state of affairs that existed in the past. Thus a spouse or former spouse has status to bring an application under the FLA provided the express limitation periods are met. Moreover, as the enactment of the FLA repealed the FRA, a contrary interpretation would have created an unexplained lacuna. Unmarried spouses who separated prior to March 18, 2012 could not avail themselves of the FLA while those who separated after March 18, 2012 could. In my view there is nothing in this remedial legislation that evinces such an intention.
- [47] There are other indications these statutory provisions were intended to apply in these circumstances. For example, where the drafters of the legislation sought to exclude application of an expansive definition, they were express in so doing, such as in s. 3(1)(b)(ii). This provision limits the expanded definition of "spouse" based on parentage to parts of the FLA other than the parts on Property Division and Pension Division.
- [48] The transitional provisions are also indicative of legislative intent. Section 252 requires proceedings respecting property division started under the FRA to be continued under the FRA as if it was not repealed. Notably, the legislature chose not to provide that property

division proceedings that could have been started under the FRA were to continue under the FRA, or to provide that spousal support claims started under the FRA continue under the FRA. If the legislature intended the FRA, with its various shortcomings, to apply to spousal support claims, or property claims that were not already started under the FRA, it would have explicitly said so.

- [49] Of course s. 252 cannot apply to unmarried persons formerly in marriage-like relationships as those persons have no statutory property entitlements under the FRA. Instead, unmarried persons formerly in marriage-like relationships can only rely on the statutory property division regime in the FLA.

[Emphasis added.]

- [48] Both Newton and Matteucci dealt with unmarried couples who had not entered into either cohabitation agreements or separation agreements. While their analysis is clearly significant, neither case directly decides the question of what law governs unmarried couples who had signed such agreements.

- [49] Harris v. Duin, 2018 BCSC 1144, involved parties who began to live together in July 2004 and signed a cohabitation agreement in September 2005. They separated in August 2010. The claimant commenced proceedings in February 2017 claiming division of property under the FLA. The respondent applied to dismiss the claims on two grounds: first, that the FLA had no application, and second, that the claim was barred by the limitation period in s. 198 of the FLA.

- [50] Justice Jenkins made reference to Halliday, including the paragraphs quoted above, then commented:

- [30] Section 252(1) of the FLA is not confusing. Unless the spouses agree otherwise, a proceeding to enforce, set aside or replace an agreement respecting property division made before March 18, 2013 (or a proceeding respecting property division that started under the FRA before the FLA came into force) must continue under the FRA. This property division claim must be resolved under the provisions of the FRA as there was no mutual consent to resolve the claims under the FLA.

- [31] Under FRA the claimant is not and was not a "spouse" when she commenced this proceeding in 2017. To be a spouse under the FRA parties must either be married, or live together in a common-law like relationship. In the latter situation, once the parties split, they cease to be "spouses" if they do not bring a claim under the FRA within a year. Even if the claimant was a "spouse" under the FRA, she would not have been so for the purposes of Part 5--the Part dealing with the division of matrimonial property. As the Court of Appeal said in para. 47 quoted above, any claim to set aside the property portions of the Agreement would likely be "doomed to fail if it proceeds under the FRA".

- [32] If I am wrong and the FLA could apply to the circumstances of these parties, s. 198(2) would be a likely impediment to a claim for property division. It would be incumbent on her to show that any action was started less than two years "after the spouse first discovered, or reasonably ought to have discovered, the grounds for making the application".
- [51] His conclusion is stated at para. 43:
- [43] Ms. Harris was not a spouse for the purposes of property division under the FRA. If the FLA applies, then she did not bring her claim within two years of when she ought to have known she had a claim. As such, her claims cannot succeed and I dismiss the claims in her notice of family claim.
- [52] There is no reference in the judgment in Duin to either Newton or Matteucci.
- [53] Two judgments of this court, released less than three months apart in the spring of 2019, provided detailed analysis of the transitional provisions as they apply to unmarried couples who had entered into separation agreements prior to the FLA coming into force, but after s. 120.1 had been repealed. The two decisions come to different conclusions. It is clear that Justice Norell, who wrote the second of the two, was not aware of the first decision.
- [54] *Blunt v. Lee*, 2019 BCSC 351, dealt with an unmarried couple who had separated in March 2011, agreed to terms in December 2012, and executed a formal separation agreement on January 9, 2013. In December 2017, Mr. Blunt applied pursuant to the FLA to set aside parts of the separation agreement, including those dealing with property division. Ms. Lee applied for summary dismissal of the application, arguing the FRA applied and that any application under that statute was out of time.
- [55] Justice Young's detailed analysis of the transitional provisions of the FLA and of the law governing the dispute before her is set out at paras. 18-35. She distinguished *Matteucci* because the parties in that case did not have an agreement, and thus it did not resolve the question of whether s. 252(2)(a) of the FLA applies where there is an agreement. She read s. 252(2)(a) as applying to any agreement made before the FLA came into force, regardless of whether the parties could have brought proceedings in respect of it under the FRA. As a result, she concluded that an application to set aside the agreement cannot be brought under the FLA. With respect to the reference in s. 252 to the "former Act", she commented that the FRA had been repealed "in two stages": on November 24, 2011, when a handful of provisions including s. 120.1 were repealed, and on March 18, 2013, when "the majority of the FRA was repealed". She concluded the references in s. 252(2)(a) to proceedings continuing under the former Act did not include s. 120.1. She thus concluded that the parties had no recourse under the FRA, but that:
- [35] When statutory provisions do not apply, couples who were in marriage-like relationships may rely on the equitable principles of unconscionability and unjust enrichment to challenge the validity of family law agreements

- [56] The second of the two cases decided in the spring of 2019 was *B.L.S. v. D.J.S.*, 2019 BCSC 846. The parties in *B.L.S.* had lived together in a marriage-like relationship from July 1991 to April 2011, and had entered into a separation agreement in August 2012 - after the repeal of s. 120.1 of the FRA. Thus, the legal context is virtually identical to that in *Blunt*. Justice Norell's judgment at 2019 BCSC 846 is a ruling on a point of law. The action thereafter proceeded to a lengthy trial, which was decided in 2021.
- [57] Although Norell J. was unaware of the judgment in *Blunt*, she was referred to *Duin*. The respondent before her argued that *Duin* established that where common-law spouses had entered into a written cohabitation agreement, s. 252 of the FLA did apply and property division could not be litigated pursuant to the FLA: *B.L.S.* at paras. 29-32. She concluded that *Duin* was decided on the basis of the limitation period issue, that the comments about s. 252 were obiter, and in any event, she was bound by *Newton* and *Matteucci* which she saw as compelling a different conclusion: *B.L.S.* at paras. 33-35.
- [58] After the 2021 trial in *B.L.S.*, there were appeals and cross-appeals which were heard together and dismissed in *Sperring*.
- [59] At the time this matter was originally argued, the claimant relied heavily on the judgment of Norell J. in *B.L.S.* in support of her position that the FLA governed this proceeding. In *Sperring*, the Court of Appeal concluded that the analysis of Norell J. in *B.L.S.* was correct and was to be preferred over what was said in *Blunt*. I will discuss later in this judgment what was said by the Court of Appeal in *Sperring*.
- [60] The final judgment drawn to my attention by the parties at the initial hearing is *C.S. v. C.B.*, 2020 BCSC 1020. It involved parties who began to reside together in 2005, entered into a cohabitation agreement in 2006, then married in 2007. They separated in 2018. At trial, the claimant wife sought to have the distribution of property varied pursuant to s. 65 of the FRA. The respondent husband argued that, as a matter of statutory interpretation, the FRA was not applicable. He sought to rely on the excluded property provisions of the FLA.
- [61] Justice Funt concluded at paras. 108-110 that s. 252 was applicable in the case before him, and that "[a]ccordingly, the Court will apply the property division provisions of the FRA 'as if' the FRA had not been repealed": *C.S.* at para. 109.
- [62] Because the parties were married, the facts are significantly different from the present case. However, the fact that the cohabitation agreement was made in advance of, and without reference to, the parties' marriage was found to bring s. 120.1 into consideration. Justice Funt explained that:

- [165] Although the parties were subsequently married, the Cohabitation Agreement is not a marriage agreement (nor a separation agreement). For the purposes of property division, s. 61 of the FRA defines a "marriage agreement" as an agreement respecting property entered into "by two people before or during their marriage to take effect on the later of the date of the marriage or the execution of the agreement" for, among other matters, property division.
- [166] Under s. 120.1 of the FRA, a cohabitation agreement is treated as a "marriage agreement" for the purposes of Part 5 of the FRA properly division provisions provided that the formal requirements of a marriage agreement as set forth in s. 61(3) of the FRA are met: *Wiest v. Middelkamp*, 2003 BCCA 437, paras. 26-27; *Waters v. Conrod*, 2007 BCCA 230, paras. 10-12, 16. In the case at bar, the formal requirements are met.
- [167] Section 120.1(3) provides that in applying Part 5 for the purpose of s. 120.1, a reference to "marriage" in Part 5 "must be deemed to be a reference to a marriage-like relationship between the spouses who are not married to each other". Section 1 of the FRA defines "spouse", in part, as a person who lived with another person in a marriage-like relationship for a period of at least two years if the application under the FRA is made within one year after they ceased to live together.
- [63] Justice Funt went on to consider the application of s. 252 to agreements made before the repeal of s. 120.1:
- [170] Section 120.1 was in effect when the parties executed the Cohabitation Agreement. Section 120.1 was repealed on the Royal Assent of the FLA on November 24, 2011: FLA, ss. 258 and 482.
- [171] Section 120.1's repeal was not stated to be retroactive. As noted, s. 252(2)(a) is a transitional provision that allows a proceeding to be brought to enforce, set aside, or replace an agreement respecting property division made before the coming into force of s. 252.
- [172] Section 252 came into force on March 18, 2013: B.C. Reg. 131/2012.
- [173] The fact that s. 120.1 of the FRA was repealed before s. 252 came into force does not affect s. 252's transitional application to agreements made before the repeal of s. 120.1.
- [174] In writing for the majority, Justice Dickson (as he then was) in *Gustavson Drilling (1964) Ltd. v. Canada (Minister of National Revenue)*, [1977] 1 S.C.R. 271 stated at 279:
- The general rule is that statutes are not to be construed as having retrospective operation unless such a construction is expressly or by necessary implication required by the language of the Act.
- [175] The repeal of s. 120.1 of FRA also "does not reach into the past and declare that the law or the rights of parties of an earlier date shall be taken to be something other than they were as of that earlier date. ": *Gustavson*, Dickson J., at 279.
- [176] Section 35(1)(b) of the Interpretation Act, R.S.B.C. 1996, c. 238 reads:

35 (1) If all or part of an enactment is repealed, the repeal does not

- (b) affect the previous operation of the enactment so repealed or anything done or suffered under it,

[177] Returning to s. 252(2)(a) of the FLA, the Cohabitation Agreement is an agreement respecting property division before the coming into force of s. 252. The Cohabitation Agreement was made before the repeal of s. 120.1 of the FRA.

[178] If the Cohabitation Agreement had been made after the repeal of s. 120.1 of the FRA and before the coming into force of s. 252 of the FLA, *Blunt v. Lee*, 2019 BCSC 351 would apply. The Cohabitation Agreement would still be a valid agreement but s. 65 of the FRA (including on "as if" basis) could not have application. The claimant would need to rely on the equitable principles of unconscionability and unjust enrichment.

[179] Here, the Cohabitation Agreement is treated as a "marriage agreement" for the purposes of Part 5 of the FRA property division provisions before their repeal as part of the March 18, 2013 repeal of the FRA: FLA, ss. 259 and 482, B.C. Reg. 131/2012.

[180] Under the "previous operation" of s. 120.1, Part 5 of the FRA was applied to s. 120.1 cohabitation agreements.

[181] The language of s. 252 of the FLA "as if the former Act had not been repealed" enables s. 65 of the FRA to apply "as if" it had not been repealed rather than leaving the parties to such s. 120.1 agreements to rely on the equitable principles of unconscionability and unjust enrichment -- a possibly expensive and difficult legal voyage.

[182] The result has sensible harmony. In the case at bar, the legal framework is the same as that of a couple that entered into a "marriage agreement" in, say, June 2006, and then separated in, say, March 2018. In each case, s. 65 of the FRA applies "as if" it were still in force.

[64] Justice Funt made no reference to the judgment in *B.L.S.* and proceeded on the basis that *Blunt* correctly stated the law. However, it is clear from para. 178 that he considered *Blunt* to apply only to agreements entered into after the repeal of s. 120.1.

[65] An appeal from the judgment in *C.S.* was outstanding at the time the present application was first argued. The appeal was dismissed in *Bingham*. The reasoning of the Court of Appeal will be discussed below.

The February 2023 Court of Appeal Judgments

[66] The judgment of the Court of Appeal in *Sperring* was released on February 3, 2023. As noted above, the court dismissed all appeals and cross-appeals from the judgments of Norell J. in *B.L.S.* Justice Willcock, for a unanimous court on this point (there was a dissent limited to spousal support issues), dealt with the 2019 ruling of Norell J. on the transitional provision of the FLA beginning at paras. 47-48:

- [47] The appellant contends it was an error to consider the respondent to be a "spouse" for the purpose of s. 198(3) of the Family Law Act, the provision that enabled her to apply to set aside the separation agreement and seek orders for division of property under Part 5 and spousal support under Part 7 of the Act. He says, further, the judge erred in determining that s. 252(2)(a) of the Family Law Act applies to common law spouses. He argues that when the separation agreement was set aside, the proceeding with respect to property division should have been continued under the Family Relations Act as if it had not been repealed, pursuant to the transitional provision. For that reason, the appellant says the judge erred in dividing property pursuant to the Family Law Act as opposed to the common law, which was the only recourse available to non-married couples for property claims when the Family Relations Act was in force.
- [48] The trial judge dealt with these arguments by referring to the judgments of this Court in *Newton v. Crouch*, 2016 BCCA 115 and *Matteucci v. Greenberg*, 2016 BCCA 116.
- [67] Justice Willcock then reviewed the judgments in *Newton* and *Matteucci*. After quoting from paras. 33-36 and 68 of *Newton*, he noted at para. 51 that "in light of *Newton*, it is clear that the respondent in this appeal is a 'spouse' entitled to seek whatever relief is available to spouses under the Family Law Act". He then quoted from paras. 41-43 of *Newton*, emphasizing the comments of Savage J.A. that "[s]ection 252(2) applies only to married spouses".
- [68] With respect to *Matteucci*, Willcock J.A. referenced paras. 45-46, in which Savage J.A. distinguished *Wiest*, and paras. 48-50 in which Savage J.A. addressed the transitional provisions. He then turned to the manner in which Norell J. had dealt with the appellant's arguments seeking to distinguish *Newton* and *Matteucci*, noting at paras. 55-57:
- [55] The appellant in the case at bar sought to distinguish this case from *Newton* and *Matteucci*. His argument was summarized and dealt with by the trial judge, in the First Reasons, as follows:
- [25] [The appellant] argues that neither *Newton* nor *Matteucci* concern unmarried partners who had entered into a separation agreement. The Court was addressing situations under s. 252(2)(b), and not s. 252(2)(a) which is the situation in this case. [The appellant] argues that the Court's comments should be limited to the former situation. He argues by its plain wording, s. 252(2)(a) mandates that a separation agreement as to property division, made prior the FLA coming into force, must be reviewed under the FRA.
- [26] I do not read anything in *Newton* or *Matteucci* as supporting the distinction urged by [the appellant] The Court of Appeal has stated that s. 252 does not apply to unmarried spouses because proceedings in connection with property could not be commenced by unmarried spouses. In this case, s.120.1 was repealed at the time of the separation agreement, and neither party had any right to apply to set aside the agreement under the FRA. Interpreting s. 252(2)(a) to apply to unmarried spouses who have a separation agreement, and requiring them to apply under the FRA would be meaningless when they have no right under the FRA

to set aside a separation agreement concerning property. Such an interpretation would be contrary to the remedial intention of the FLA with respect to unmarried spouses.

[Emphasis added.]

- [56] The trial judge addressed the appellant's contention that the authorities favoured the application of s. 252 to common law spouses who had entered into agreements, specifically the trial court's decisions in *J.C. v. A.W.*, 2016 BCSC 1012, and *Harris v. Duin*, 2018 BCSC 1144.
- [57] She considered the judgment in *J.C.* to be consistent with *Newton* and *Matteucci*. The consideration of the transitional provision in *Duin* was obiter because the claimant's action under the Family Law Act was statute barred by a limitation. In the result, she concluded:
- [35] I am bound to follow *Newton* and *Matteucci*. With respect to property division, the decisions in *Newton* and *Matteucci* state that s. 252 does not apply to unmarried spouses because they did not have any statutory property entitlements under the FRA. This is consistent with the remedial nature of the FLA, which is to generally grant unmarried spouses the same rights as married spouses. I find the FLA applies to [the respondent's] claim to set aside the separation agreement concerning property division subject to any limitation defence under s. 198 of the FLA.
- [36] With respect to spousal support, there is no transitional provision such as s. 252. A party wishing to apply to set aside a separation agreement concerning spousal support finalized prior to the FLA coming into force must proceed under the FLA: *Halliday* at para. 44. *Matteucci* holds that there is no vested right to a limitation period under the FRA, and a spouse is entitled to advance such a claim under the FLA so long as that claim is not barred by the limitation period in that Act. I find that [the respondent] is entitled to advance a claim for spousal support under the FLA subject to any limitation defence under s. 198 of the FLA.
- [69] Justice Willcock then reviewed at paras. 58-59 comments of *Riley J.* in a subsequent judgment:
- [58] The argument advanced by the appellant, that s. 252 clearly applies in cases where a common law spouse seeks to set aside a separation agreement entered into before coming into force of the Family Law Act and that the Family Relations Act is the governing law in such cases, was accepted in *Blunt v. Lee*, 2019 BCSC 351. The apparent conflict between the trial judge's decision in this case and the judgment in *Blunt v. Lee* is helpfully canvassed by Justice *Riley* in *Sotham v. Got*, 2020 BCSC 625. He wrote:
- [31] Ms. Got relies principally on *Blunt v. Lee*, 2019 BCSC 351, in which *Young J.* distinguished *Newton* and *Matteucci* and went on to hold that s. 252(2)(a) is not limited to spouses who were or had been married. *Young J.* found it significant that s. 252(2)(a) does not refer to "the former Act", and instead refers to agreements "made before the coming into force of this section". On this basis, *Young J.* concluded at para. 21 that "[i]f the Legislature wished to exclude agreements between common law spouses from the application of s 252(2)(a), it would have done so explicitly".

- [32] Ms. Got also relies on *Harris v. Duin*, 2018 BCSC 1144 [Harris], which similarly applied s. 252(2)(a) to an agreement between unmarried partners. In *Harris* the Court did not consider the argument made in the case at bar, that is, that s. 252(2)(a) does not apply to unmarried partners because they had no statutory entitlement to property division under the FRA regime. Thus, the court in *Harris* did not consider the Court of Appeal's comments in *Newton and Matteucci* to the effect that s. 252(2) does not apply to unmarried partners. Moreover, this aspect of *Harris* can fairly be considered obiter, because the presiding judge went on to find that even if the claimant had the ability to pursue a claim under the FLA, it was barred by the statutory limitation period in s. 198(2).
- [33] Mr. Sotham relies on *B.L.S.*, in which Norell J. applied the reasoning in *Newton and Matteucci* to hold that s. 252(2)(a) did not apply to an agreement between unmarried partners. The crux of the analysis in *B.L.S.* is the passage at para. 35 of the reasons
- [34] Unfortunately, it appears that the *Blunt* decision was not brought to the attention of the court in *B.L.S.*
- [59] While Riley J. found it unnecessary in *Sotham* to resolve the controversy, he observed:
- [35] I have some sympathy for Norell J.'s view in *B.L.S.* that the underlying principle in *Newton and Matteucci* is not limited to s. 252(2)(b). The gist of the Court of Appeal's reasoning in *Newton and Matteucci* is that s. 252(2) was never intended to apply to unmarried partners since they had no statutory entitlement to property division in the era of the FRA. This reasoning would appear to apply to proceedings to enforce, set aside or replace agreements concerning property division as contemplated in s. 252(2)(a). Although common law partners could make agreements, those agreements would almost invariably be focused on equitable claims in the event of breakdown of the relationship, rather than property division claims as contemplated under the FRA. I also agree with Norell J.'s comment at para. 35 of *B.L.S.* that interpreting s. 252(2)(a) to apply only to married spouses would be "consistent with the remedial nature of the FLA" in regards to unmarried partners.
- [70] The conclusion of Willcock J.A. with respect to the applicable law is set out at paras. 60-63:
- [60] In my opinion Riley J. and Norell J. have it right. A proceeding to enforce, set aside or replace an agreement respecting property division made by common law partners before the coming into force of the Family Law Act could not "be started or continued, as applicable, under the former Act as if the former Act had not been repealed". The former Act made no provision for the setting aside of such agreements, and the respondent could not have started a proceeding nor continued one "under the former Act".
- [61] In my view, the plain effect of the transitional provision was that parties with a remedy under the former Act should have their claims addressed under that Act. Those without such a remedy could look to the Family Law Act for relief.

[62] Further, in my view, the trial judge's reading of s. 252 is more consistent with the remedial intent and purpose of the Family Law Act than that proposed by the appellant.

[63] The trial judge did not err in concluding that when a separation agreement between common law spouses is set aside, the court should then turn to Parts 5 and 7 of the Family Law Act to fashion a remedy, if appropriate.

[Emphasis added.]

[71] The judgment in Bingham was released exactly one week after the judgment in Sperring. Justice Groberman summarized the key argument made on appeal and the conclusion he drew at paras. 3 and 7:

[3] The relief claimed in this action includes setting aside or replacing the Cohabitation Agreement. The judge found s. 252 applicable and divided the couple's property under the provisions of the FRA. Mr. Bingham says the judge erred in doing so. He contends that s. 252 applies only to agreements made at a time when spouses are either preparing to separate or are already separated. I will refer to such agreements as "separation agreements". He says s. 252 does not apply to other family law agreements. Accordingly, he says that property division should have been effected under the substantive provisions of the FLA, not those of the FRA.

[7] For reasons that follow, it is my view that the judge was correct in his interpretation of s. 252. The section applies to the Cohabitation Agreement and, when that agreement was set aside, the couple's property was properly divided under the provisions of the FRA. It is therefore unnecessary to consider whether Mr. Bingham's actions during the marriage served to remove the property in question from the "excluded property" regime of the FLA, and I will refrain from discussing that issue.

[72] Beginning at para. 23, Groberman J.A. dealt with the appellant's argument that the word "agreement" in s. 252 was intended to be limited to separation agreements. One of the submissions made was based on the comments of Savage J.A. in *Newton and Matteucci*. At paras. 49-53, he commented:

[49] Mr. Bingham also contends that interpreting s. 252 according to its plain meaning leads to absurdities. He says the section should be interpreted in a manner that conforms with the intent of the FLA, which is to reform family law. He cites *Newton v. Crouch*, 2016 BCCA 115 and *Matteucci v. Greenberg*, 2016 BCCA 116. In his factum, he characterizes those cases as follows:

In both *Newton and Matteucci*, a literal interpretation of s. 252 is augmented by the Court in favor of an interpretation that follows the remedial purpose of the FLA. Section 252(2)(b), strictly interpreted, affords only FRA rights, and thus no property rights, to unmarried couples who started proceedings before the coming into effect of the FLA. In looking at both situations, this Court invoked s. 8 of the Interpretation Act, R.S.B.C. 1996, c. 238, which states that "Every enactment must be construed as being remedial, and must be given such fair, large and liberal

construction and interpretation as best ensures the attainment of its objects" (Matteucci, para 18; Newton, para 27). Newton and Matteucci confirm that "large and liberal construction" requires the use of the FLA in spite of a literal interpretation of s. 252(2)(b).

- [50] With respect, counsel has misinterpreted the reasons of the Court in those two cases. Both cases involved former common law spouses who separated in 2012. Litigation arising out of the breakdown of their relationships was commenced prior to the coming into force of the FLA. After the coming into force of the FLA, however, pleadings were filed that sought property division under the FLA.
- [51] The FRA did not provide for division of property between common law partners on the breakdown of their relationship. While common law partners could, in some circumstances, make claims to property based on the doctrine of unjust enrichment, such claims were equitable in nature and not based in statute.
- [52] The question for this Court in Newton and Matteucci was whether a common law partner could acquire a right to property division under the FLA in a case where the common law relationship ended before the coming into force of that statute.
- [53] In both cases, the party claiming property division under the FLA came within the definition of "spouse" under that statute, and their claims for property division were brought within two years of the date of separation, so were not barred by the limitation period set out in s. 198 of the FLA. The Court was called upon to decide whether, notwithstanding that the claimants could bring themselves within the terms of the FLA and appeared to be entitled to property division under that statute, their claims were barred because they would not have been entitled to property division under the FRA on the date of separation.
- [73] After reviewing both Newton and Matteucci, Groberman J.A. concluded at para. 59 that:
- [59] Both cases, then, were based on the plain meaning of s. 252. Section 252(2)(b) has no application to common law partners, because they had no ability to make claims "respecting property division under the [FRA]". Neither Newton nor Matteucci was, as Mr. Bingham would have it, decided "in spite of a literal interpretation of s. 252(2)(b)".
- [74] In Part E (Jurisprudence) of his judgment, beginning at para. 76, Groberman J.A. referenced a number of cases dealing with the applicability of s. 252(2)(b) in the context of married parties, including Halliday. At the end of that section he commented:
- [92] Before leaving the subject of the jurisprudence interpreting s. 252 of the FLA, I should mention that the parties have cited cases that deal with the question of how the transitional provisions affect actions by unmarried partners to set aside pre-FLA agreements: Harris v. Duin, 2018 BCSC 1144; Blunt v. Lee, 2019 BCSC 351; B.L.S. v. D.J.S., 2019 BCSC 846; and Sotham v. Got, 2020 BCSC 625. The issue has very recently been resolved by this Court in Sperring v. Shutlak, 2023 BCCA 54. The question addressed by those cases is quite different from the one before the Court on this appeal, and the cited cases do not provide useful guidance on the issue before us.

[75] He concluded at para. 93 that, in the judgment under appeal, Funt J. "made no error in his interpretation of s. 252 of the FLA and was correct in applying the substantive provisions of the FRA to this proceeding".

Positions of the Parties

The Respondent

[76] The respondent brought this application asserting that:

- a) the claimant has no standing to seek remedies under Part 5 of the FLA and is precluded from seeking relief under the FLA;
- b) the claimant has no standing to seek remedies under Part 5 of the FRA and is precluded from seeking relief under the FRA;
- c) the cohabitation agreement, as amended, must be enforced unless the claimant is able to set it aside on traditional equitable grounds such as unconscionability or duress; and
- d) in the event the cohabitation agreement is set aside, the claimant's entitlement to claim against any of the respondent's assets will be determined by the law of unjust enrichment.

[77] The respondent argued that the claimant seeks in this proceeding "to enforce, set aside or replace an agreement respecting property division", and as such s. 252(2)(a) of the FLA requires that those claims be determined "under the former Act", which is the FRA as it read immediately before its repeal in March 2013. The respondent asserted that, because the FRA at that time provided no statutory relief for an unmarried spouse, the claimant is limited to her remedies at common law and in equity. With respect to those remedies, the respondent says that because of the cohabitation agreement, which provides a "juridical reason" for the contractual division of assets, the claimant will have no viable claim in unjust enrichment unless she is first able to set aside the cohabitation agreement.

[78] At the time this application was initially argued, the respondent relied on the judgment in Blunt. However, in Sperring, the Court of Appeal decided that the approach of Norell J. at the trial level in Sperring was to be preferred over that taken in Blunt. The respondent acknowledges that this court should be guided principally by Sperring in determining whether the parties' pre-FLA cohabitation agreement deprives the claimant of standing to seek remedies under Part 5 of the FLA.

[79] However, the respondent argues that what is decided in Sperring is limited to separation agreements made after the repeal of s. 120.1 of the FRA. The respondent says the key factor underlying the decision in Sperring is that it was not open to the spouses in that case to start a proceeding to set aside the separation agreement under the FRA because, with s. 120.1 having been repealed, the FRA provided no avenue for proceedings with respect to a cohabitation agreement.

[80] The respondent says the present case is different. Since the cohabitation agreement in this case was "amended and affirmed" in 2004, it was open to the claimant from that time until the repeal of s. 120.1 to start a proceeding under the FRA to set aside the cohabitation agreement. Thus, the respondent argues:

Applying the principle of decision in Sperring - that the application of s. 252 depends on whether a proceeding for the relief could have been started under the FRA - to these facts compels the conclusion that the Claimant has no standing to attack the Cohabitation Agreement under the FLA. Incidentally, this result is consonant with the view of the trial judge in Bingham, which was reproduced without criticism in the Court of Appeal's reasons, that the purpose of s. 252(2)(a) was to ensure that property division conformed with the expectations of parties who entered into agreements under the FRA.

[81] With reference to Duin, the respondent argues that the case:

held that the FRA applied in an action to enforce a cohabitation agreement between unmarried in 2005, when section 120.1 of the FRA was in effect. Like the parties in this case, the couple in Harris v. Duin separated after the coming into force of the FLA. However, the rationale for the result in Harris v. Duin - a plain reading of s. 252(b) - does not reflect the principle of decision in Sperring.

[82] The respondent maintains his position that the claimant's only remedy for setting aside the cohabitation agreement is through common law and equitable doctrines.

The Claimant

[83] The claimant asserts that on its proper interpretation, the transitional provision in s. 252(2) of the FLA does not apply to unmarried spouses. The claimant says this position is confirmed by Sperring. Thus, where an unmarried spouse applies to set aside a cohabitation agreement, the application will proceed under the FLA. The claimant argues it would be contrary to the remedial intent of the FLA to interpret s. 252 in the manner advanced by the respondent, and that it would be meaningless to require an unmarried spouse to claim under the FRA with respect to property division when the FRA provides no rights to such a person.

[84] At the initial hearing, the claimant argued in the alternative that if s. 252(2) requires the claim to be determined under the FRA, then the court should apply s. 120.1 notwithstanding its repeal. The claimant asserts that the Amending Agreement reaffirmed and varied the 1996 Agreement at a time when s. 120.1 was in effect, and thus after that time, the parties' arrangement was subject to s. 120.1. As a result, the claimant asserts that to the extent the FRA is applicable she is entitled to rely on Part 5 of the FRA.

[85] In her recent submissions made with respect to Sperring and Bingham, the claimant says Sperring makes it absolutely clear that this case is governed by the FLA. The claimant says that under Sperring, recourse to the FLA is not limited to those unmarried spouses who

could never at any point have relied on pre-FLA legislation. The fact that the claimant could have sought an order under the FRA prior to the repeal of s. 120.1 on November 24, 2011 has no present bearing. Section 120.1 was repealed over a year before the FLA came into effect. Section 252 of the FLA references the version of the FRA that was in effect immediately prior to the coming into force of the FLA on March 18, 2013. That clearly did not include s. 120.1.

[86] The claimant argues that the relevant question is whether the parties to this proceeding could have commenced proceedings to enforce, set aside or replace their agreement under the FRA as it existed immediately prior to March 18, 2013. The answer, the claimant submits, is clearly no.

[87] The claimant thus argues:

To interpret Sperring as holding otherwise would be inconsistent with the remedial intent of the FLA, which the courts in Sperring and those cases on which it relies have so clearly espoused. Sperring makes clear that the court will not tolerate an interpretation of the legislation that effectively leaves unmarried spouses without recourse. This is reflected by the Court of Appeals' remarks in Bingham [para. 92] that Sperring resolved the question of how the transitional provisions affect actions by unmarried partners to set aside pre-FLA agreements. That is, Sperring applies in respect of all such actions, not only those wherein the unmarried spouses entered into agreements following the repeal of s. 120.1 of the FRA.

Analysis

[88] The cases reviewed above are helpful, but it is important to keep in mind that most of them have important factual differences from the present situation. Halliday and Bingham involved married parties. In both Newton and Matteucci, the unmarried spouses had neither a cohabitation agreement nor a separation agreement. Sperring and Blunt involved agreements made after the repeal of s. 120.1. While Duin involved a cohabitation agreement made while s. 120.1 was in force, subsequent judgments suggest that the comments made on the transition provisions were obiter. Justice Norell found it inconsistent with Newton and Matteucci, and one could read the judgment in Sperring as confirming her view.

[89] In the present case, the original 1996 Agreement predates the coming into force of s. 120.1, but the Amending Agreement of 2004 was made after s. 120.1 was in effect. For purposes of analysis, I will assume that s. 120.1, prior to its repeal, would have applied to the parties' cohabitation agreement as amended, although, as noted below, I don't think that makes a difference to the result.

[90] It is my view that the claimant is correct in her position that the result in Sperring applies to a cohabitation agreement or separation agreement between unmarried spouses, regardless of whether that agreement was entered into before or after the repeal of s. 120.1.

- [91] The decision of the legislature to repeal s. 120.1 immediately upon Royal Assent, over a year before the FRA as a whole was to be repealed, and to adopt a transitional provision that expressly references the FRA "as it read immediately before its repeal", reflects clear legislative intent. When the FLA came into effect on March 18, 2013 - which is the date at which s. 252 came into effect - there was no proceeding available "under the former Act" in respect of agreements between unmarried spouses.
- [92] The judgments in Newton, Matteucci and Sperring consistently reflect an understanding of the policy intent of the FLA as it applies to unmarried spouses.
- [93] In both Newton and Matteucci, Savage J.A. identified one of the goals of the FLA as being to correct the mischief of treating common-law couples differently than married couples: Newton at para. 20; Matteucci at para. 42.
- [94] In Newton, Savage J.A. concluded that s. 252(2) applies only to married spouses, because proceedings in connection with property division could not be commenced under the "former Act" (as that term is defined in s. 250) by unmarried spouses: Newton at para. 41. While it was open to the legislature to provide that property division proceedings that could have been started under an earlier version of the FRA were to be brought under the FRA, it chose not to do so: Newton at para. 43; Matteucci at para. 48. Thus, unmarried persons formerly in marriage-like relationships can only rely on the statutory property division regime in the FLA: Matteucci at para. 49.
- [95] It follows that the legislative intent is that the provisions of the FLA dealing with property division would apply to common-law partners. Part 5 of the FLA provides statutory remedies and consequences that attach to the defined status of a spouse: Newton at para. 28. The legislature intended the FLA definition of spouse to be applied to facts preceding its enactment, and the future consequences of that status apply to persons who fell within the definition before the FLA came into force: Newton at paras. 29 and 68; Matteucci at para. 46.
- [96] Sperring confirms that this legislative intent is not limited to cases not involving a cohabitation or separation agreement. At para. 51, Willcock J.A. concluded based on his review of Newton that Ms. Shutiak was "a 'spouse' entitled to seek whatever relief is available to spouses" under the FLA.
- [97] In Sperring, Willcock J.A. concluded (at para. 60) that Riley J. in Sotham, and Norell J. in B.L.S., "have it right". This was after quoting, at para. 55, the comments of Norell J.A. at para. 26 of her judgment, and providing emphasis with respect to her comments that an interpretation that required parties to apply under the FRA when s. 120.1 had been repealed "would be contrary to the remedial intention of the FLA with respect to unmarried spouses".
- [98] Immediately prior to his statement at para. 60 that Riley J. had it right, Willcock J.A. had quoted the following sentence from Riley J.:

I also agree with Norell J.'s comment at para. 35 of B.L.S. that interpreting s. 252(2)(a) to apply only to married spouses would be "consistent with the remedial nature of the FLA" in regards to unmarried partners.

[99] I return to the Bingham case which, it must be remembered, dealt with an action involving married parties. In the trial judgment, Funt J. had commented that in his view the validity of the parties' cohabitation agreement depended on s. 120.1 of the FRA because although they eventually married, the agreement did not expressly state that it was in contemplation of marriage. However, s. 120.1 is not referenced in the Court of Appeal judgment. While Groberman J.A. considered Newton and Matteucci in some depth, it was in the context of their discussion of the remedial intent of the legislation.

[100] As noted above, Groberman J.A. commented at para. 92 that "the question of how the transitional provisions affect actions by unmarried partners to set aside pre-FLA agreements" was "resolved by this Court" in Sperring. He described the question addressed by Sperring, Duin, Blunt, B.L.S. and Sotham as being "quite different from the one before the Court on this appeal". It is noteworthy that this paragraph came at the conclusion of a lengthy discussion of judgments dealing with actions by married spouses.

[101] In my view, Groberman J.A. was clearly distinguishing what was decided in Sperring (where the FLA applied) from what was before the court in Bingham (where the FRA applied) on the basis of whether the parties were married or unmarried. Having reviewed what is said in both cases, it is clear that Groberman J.A. considered Sperring to have resolved the applicable law for cases involving unmarried spouses, while Bingham dealt with the application of s. 252 in cases involving married spouses. Although Groberman J.A. later commented that Funt J. "made no error in his interpretation of s. 252", I see that as confirming the manner in which Funt J. dealt with the application of that provision to cases involving married spouses. It was not intended to adopt the indirect implications of comments made by Funt J. with respect to s. 120.1 that could arguably impact on cases dealing with unmarried spouses.

[102] This distinction makes sense in light of the legislative intent as outlined in the various Court of Appeal judgments set out above. Married spouses who signed agreements prior to the FLA coming into force have access to the statutory regime under the "former Act", while unmarried spouses do not.

[103] I note that, based on this analysis, it matters not whether the parties' cohabitation agreement was subject to s. 120.1. Even if, on a proper interpretation, the 2004 Amending Agreement did not have the effect of bringing the parties' arrangement within the scope of s. 120.1, on the basis of Sperring, it is clear the FLA would apply.

[104] The respondent advances an interpretation of the FLA that would result in all unmarried spouses having full recourse to Part 5 of the FLA, with the exception of those who signed either cohabitation or separation agreements between February 1998 and November 2011. This latter group would be bound by their agreements unless able to set them aside based

on common law and equitable principles. That interpretation is contrary to the legislative intent and to the reasoning in Newton, Matteucci and Sperring. On a proper interpretation, I conclude that Part 5 of the FLA is open to persons who were unmarried spouses prior to the repeal of s. 120.1, regardless of whether they had signed a cohabitation or separation agreement.

Conclusion

[105] I conclude that it is open to the claimant to bring her claim in this matter on the basis of the FLA.

[106] The respondent seeks a declaration to the opposite effect. The application is dismissed.

"Veenstra J."

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