

CANADA / JUDGMENT

Porter v. Porter

2023 BCSC 2062

COURT

Supreme Court of British Columbia

DECIDED

23 November 2023

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2023 BCSC 2062 Porter v. Porter

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Porter v. Porter,

2023 BCSC 2062

Date: 20231123

Docket: E231475

Registry: Vancouver

Between:

Herbert Henery Porter

Claimant

And

Kathleen Joanne Marie Porter also known as

Kathleen Joanne Marie Reimer also known as Kathleen Joanne Porter, Herbert Ross Porter,
Patricia Katherine Mabe also known as Trish Mabe,

Porter Holdings Ltd., Reflection Development Ltd., and 1356893 BC Ltd.

Respondents

Corrected Judgment: The text of the judgment was corrected to refer to the parties by their names rather than by initials on December 20, 2023.

Before: Master Robertson

Reasons for Judgment

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Kathleen Joanne Marie Reimer also known as Kathleen Joanne Porter: and Porter Holdings Ltd.

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Counsel for the Respondents, Herbert Ross Porter, Patricia Katherine Mabe also known as Trish Mabe, Reflection Development Ltd., and 1356893 BC Ltd.

F. Lamer

Place and Date of Hearing:

Vancouver, B.C.

August 18 and 24, 2023

Place and Date of Judgment:

Vancouver, B.C.

November 23, 2023

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- [1] The claimant brings this application for an order pursuant to s. 89 of the Family Law Act, S.B.C. 2011, c. 25 (the "FLA") that the Respondent, Kathleen Joeanne Marie Porter, also known as Kathleen Joeanne Marie Reimer, also known as Kathleen Joanne Porter (referred to as "Ms. Porter"), make an interim distribution in the amount of \$455,000, within 30 days of this order.

Background

- [2] The claimant is 88 years old, and Ms. Porter is 81. They were married on February 15, 1964, and had two children together, one of whom is the respondent Herbert Ross Porter ("Mr. HR Porter") Both children are independent adults, in their 40's and 50's.
- [3] In the 1980's the parties moved to Chilliwack and purchased, among other properties, a home in Chilliwack that became their family residence (the "Former Family Residence") an agricultural piece of land which was over 15 acres in size, close to the Chilliwack Airport (the "Airport Road Property"), which was owned by their family company, another named respondent, Porter Holdings Ltd.
- [4] The parties separated in April 2012 when the claimant left the Former Family Residence without any notice, and without providing any information to his family as to his whereabouts, leaving only a hand-written note as follows:

Kathleen

You have been a good wife. Its been me all along causing trouble. Maybe now that I have left (this 1 p.m. Sunday 8, 2012) I won't be able to annoy anyone anymore.

I am very sorry for all the times I got angry. Looking back over all the years I have been the cause of all your heartache. Maybe now that I'll be out of your life, things should be a lot [sic] pleasant for you.

I tried to leave the house as clean as possible. I cleaned the room & washroom downstairs to make it look like it did months ago.

The tools are yours to sell. Maybe an ad in the paper or craigslist will get some action. Herbert would give you an idea as to the worth or whatever of them. I don't want any of them or money from them.

I put caseron on most of the yard.

The old pool table is now laying in the trailer.

The trailer is not licensed.

I got you a hanging basket at little mountain. The lady said the baskets with geraniums won't be ready for 2 weeks.

All the best Kathleen and have many pleasant years.

[the Claimant]

PS

I took my wordy sign down on the Airport Road Property anticipating the realty people were going to erect one. I would appreciate if you could find a real estate firm that would do this.

Thanks,

I also painted the area where the eating counter is. Hope you like the electronic covers & the way they are arranged. I also bought 2 door stops and installed them. They look a little stronger than the one that broke. I left the battery charger for the camera batteries. The sheet in the bedroom downstairs is washed. I put the umbrella and 4 chairs out on the deck.

Garbage is read for this Tuesday AM.

That is all I can think of.

Bye Kathleen

The Loser

- [5] At the time that he left, the claimant was a US Citizen, having attained such citizenship during the parties' relationship. The evidence is that, due to restrictions regarding ownership of non-US assets, after attaining US citizenship, sometime in 2010 the claimant transferred his interest in the Former Family Residence to Ms. Porter.
- [6] In addition to the Former Family Residence, at the time of separation the parties each held 53 shares in Porter Holdings Ltd., the owner of the Airport Road Property which, at that time, had a restrictive covenant registered against title, the effect of which was to impede any sale or redevelopment. The assessed value of the Airport Road Property at the time of the separation was \$73,422, with Porter Holdings Ltd. having debt of approximately \$48,000.
- [7] Following separation, and while the location of the claimant remained unknown with him making no overtures to contact either Ms. Porter or his adult children, Ms. Porter and Mr. HR Porter, who himself was involved in land development, sought to deal with the Airport Road Property. The restrictive covenant remained an impediment such that they determined that the property would have to be rezoned for development and removed from the agricultural land reserve to realize any appreciable value through a sale.
- [8] Accordingly, in 2018 Ms. Porter and Mr. HR Porter decided to locate the claimant and seek to have him transfer his shares in Porter Holdings Ltd. to Ms. Porter.

- [9] Ms. Porter deposes that, at that time, they believed that the claimant had "abandoned" his interests in Canada, such that not only did he abandon the marriage and his family, but also any interest he had in the Former Family Residence or Porter Holdings Ltd., and through the shares therein, in the Airport Road Property.
- [10] MR. Mr. HR Porter retained a private investigator who found the claimant living in Roswell, New Mexico. In September 2018 MR. Mr. HR Porter and his wife, the respondent Patricia Katherine Mabe, aka Trish Mabe ("Ms. Mabe") travelled to Roswell, attending unannounced at the claimant's house and meeting with him. Mr. HR Porter tape recorded the meeting. The transcript of that meeting was introduced into evidence. At the meeting, in summary:
- a) After being greeted at the door, Mr. HR Porter and Ms. Mabe were invited into the claimant's house. Upon entering, Mr. HR Porter advised the claimant that he was sick and had cancer, which was part of the reason why he came to see him, saying that he got cancer because of "stress".
 - b) Mr. HR Porter advised the claimant that "mom's doing OK", but that "nobody's talking to anybody", and provided an update as to family matters, after which he explained why he had come. Specifically, he said:

a lot of stuff has changed, so the family's changed. It changed the second you left. The very second. So I'm not here to discuss that too much. It is what it is . The business part of it, I don't know if you have any intention of coming back to Canada or not"
 - c) The claimant responded to that statement with: "not at this time I don't, right now anyway".
 - d) Mr. HR Porter then noted that he was making "full disclosure", and then advised "there's interest in the property in [indiscernible] for at least the 5 acres that's zoned AP1" and that they wanted to sell it. The claimant stated "you do whatever you want with it". Mr. HR Porter then advised that he had to "sign it away", with the claimant saying "I will, I will". Ms. Mabe then stated "thank you for doing that. That's the right thing for the family ". Mr. HR Porter then asked if the claimant had a notary, and advised the claimant to get the documents signed before a notary "tomorrow".
 - e) Mr. HR Porter then commented to the claimant that after the claimant left the family, everything fell on him, that the "stress fell" on him, and that the claimant's leaving affected him a lot, and then again referenced his cancer diagnosis and impact of stress on his health, commenting that the claimant would likely outlive him. Mr. HR Porter state that he had come to terms with his own mortality, and then changed the topic back to the property issues, saying "we're not going to deal with this now because they are going to be closed, but essentially what I'm asking you -- I'm not telling you, -- I'm asking you, to make our lives at least a little bit easier and let us have it".
 - f) The claimant responded: "I don't need it".

[11] On September 6, 2018, the claimant attended before a notary and executed a three separate share transfers representing the 53 total shares in Porter Holdings Ltd., and a gift letter to Ms. Porter which includes the following statements:

This letter will evidence my intention at this time to gift to you 53 Common Shares with a par value of \$1.00 each in the capital of the Company .

I am gifting these shares to you I felt it inappropriate to enter into any kind of share transfer agreement and trust that this documentation will be sufficient for your purposes.

[12] The claimant has deposed that he has no specific memory of signing these documents and that he was overwhelmed with seeing his son for the first time in many years. He signed documents that he believed were to assist with the sale of the Airport Road Property generally. At his discovery, the claimant acknowledged that he knew there were legal consequences attached to the transfer documents, and that he understood that he was transferring his interests, albeit saying that he thought it was only in respect of 5 acres, and that he believed it would also be for the benefit of his daughter, not primarily Mr. HR Porter.

[13] Thereafter, Porter Holdings Ltd., with Mr. HR Porter doing the majority of the work after being substituted as sole director for Porter Holdings Ltd. in place of the claimant, sought to undertake the rezoning efforts. Ms. Mabe was added by Mr. HR. Porter as a signatory to Porter Holdings Ltd. for banking purposes. Porter Holdings Ltd. secured a mortgage with Prospera Credit Union for \$7.5 million which was advanced to the respondent Reflection Development Ltd. (a company owned by Mr. HR Porter) to carry out the rezoning processes.

[14] Rezoning was ultimately successful, the effect of which was to increase the value of the Airport Road Property substantially.

[15] On July 19, 2021 Porter Holdings Ltd., sold the Airport Road Property for over \$28 million.

[16] After payment of the \$7.5 million mortgage with Prospera Credit Union, which was used to pay Reflection Development Ltd. for its services, the net proceeds of sale were \$19,759,000. From those amounts:

- a) on August 24, 2021, Mr. HR Porter caused Porter Holdings Ltd. to loan \$4.4 million to Reflection Development Ltd. at a stated interest rate of 5% per annum, as reflected in a promissory note. That promissory note, however, was later amended to provide for an interest rate of 0.05%, in place of the 5% rate previously indicated.
- b) On August 24, 2021, Porter Holdings Ltd. distributed \$1 million to Ms. Porter.
- c) On August 31, 2021, Ms. Porter executed a "deed of gift" by which she was to transfer by gift \$12.5 million, with \$5 million being distributed on September 9, 2021, and \$7.5 million being used to set off the Prospera Credit Union debt to Reflection Development Ltd.

- d) Ms. Porter and Mr. HR Porter then declared a capital divided of \$13,475,000 for tax purposes in respect of the transaction in (b) and (c) above, with Porter Holdings Ltd. keeping as retained earnings approximately \$6.8 million, with those funds being used for (a) above with the remainder being placed in an investment account which had a balance of just under \$1.4 million as of September 19, 2022.
- [17] Porter Holdings Ltd. has subsequently secured a mortgage with Prospera Credit Union for \$7.5 million, the funding proceeds of which were used to grant a loan to the respondent, Reflection Development Ltd. and/or #13 Co. Ltd., companies owned by Mr. HR Porter and his wife, Ms. Mabe, which are the owners of four parcels of real property and/or development lands.
- [18] The Claimant subsequently learned of the \$28 million sale of the whole of the Airport Road Property, and that the majority of net realizations were either gifted or loaned back to Mr. HR Porter or companies in which he and his wife hold the sole interests.
- [19] On May 20, 2022, this notice of family claim was filed, with the claimant asserting that he continued to hold an interest in Porter Holdings Ltd. and that any share transfer was done under duress or as a result of fraudulent misrepresentations made by Mr. HR Porter and Ms. Mabe either on their own or as agent for Ms. Porter, and seeking, as a general summary only, a division of family assets and a declaration that any transfers, dividends or loans to the respondents Mr. HR Porter, Reflection Development Ltd. and #13 Co. Ltd. are void and/or impressed with a trust.
- [20] Examinations for discovery were held between July 21 to 28, 2023.
- [21] Trial is set for 3 weeks commencing April 22, 2024.
- [22] The claimant has sold his property in the US, using the proceeds of approximately \$147,000 to pay legal costs which have either been paid, or remain outstanding in an amount which exceeds \$147,000. The claimant has now moved back to the lower mainland and lives with his daughter. His financial statements show that his expenses, excluding legal fees, amount to about \$13,000 per year, based on his daughter allowing him to live with her, but with another \$15,6000 expected to be spent each year on rent if he is to move out as is his stated intention. His income is \$33,000 per year, derived solely from pension income. He has no or nominal available funds to advance this litigation.
- [23] Ms. Mabe's assets include the shares in Porter Holdings Ltd., which continues to hold retained earnings, as well as a home she purchased with the net proceeds of the Former Family Residence worth approximately \$583,000, and non-registered accounts with just over \$1 million which are mainly comprised of funds drawn as dividends from Porter Holdings Ltd.
- [24] Ms. Mabe's income is largely from CPP and OAS benefits of approximately \$21,000. She deposes that she has a shortfall in income and expenses of some \$112,000, notably after payment of \$75,000 that she makes each year in charitable donations. She is suffering from

health ailments, including a chronic heart condition which required a pacemaker to be implanted. She had intended to purchase a life interest at a community facility known as Elim Village by selling her current home; however has been prevented from doing so as a result of the claimant's certificate of pending litigation being registered against her home.

- [25] The claimant estimates that Ms. Mabe has access to \$7.2 million in assets, that being the home equity, her personal investment portfolio, and her interest in Porter Holdings Ltd. As Ms. Mabe notes, however, the ability to deal with many of those assets comes with tax consequences.

Legal Basis

- [26] The court's jurisdiction to order an interim distribution is found at s. 89 of the FLA, which provides as follows:

89 If satisfied that it would not be harmful to the interests of a spouse and is necessary for a purpose listed below, the Supreme Court may make an order for an interim distribution of family property that is at issue under this Part to provide money to fund

- (a) family dispute resolution,
- (b) all or part of a proceeding under this Act, or
- (c) the obtaining of information or evidence in support of family dispute resolution or an application to a court.

- [27] The purpose of s. 89 was described as follows in *I.F. v. R.J.R.*, 2015 BCSC 793 ("I.F."), at para 192:

- [192] The blunt purpose of s. 89 is to assist economically disadvantaged spouses to access justice in matrimonial disputes; it is meant to help level the litigation playing field that is so often skewed when one spouse controls all or the majority of the wealth and assets. Application of s. 89 calls for a purposive interpretation, where the need of the applicant spouse to receive an interim distribution and the potential entailing harm to the other spouse are evaluated contextually with an eye on the larger objectives endorsed by the FLA.

- [28] In *Bartch v. Bartch*, 2018 BCCA 271 ("Bartch"), the court noted the need for a cautious approach:

- [192] The blunt purpose of s. 89 is to assist economically disadvantaged spouses to access justice in matrimonial disputes; it is meant to help level the litigation playing field that is so often skewed when one spouse controls all or the majority of the wealth and assets. Application of s. 89 calls for a purposive interpretation, where the need of the applicant spouse to receive an interim distribution and the potential entailing harm to the other spouse are evaluated contextually with an eye on the larger objectives endorsed by the FLA.

- [29] By their very nature, s. 89 applications are brought and, if successful, distributions are made well before there is a determination on the merits as to either parties' entitlement to the property in issue. Thus, the court decides whether a distribution is to be made despite not being in a position to fully weigh the evidence, something which is to be done at trial.
- [30] The Court of Appeal in *Etemadi v. Maali*, 2021 BCCA 298, at paras. 50 to 53 established the questions a court ought to ask in consideration such an application as follows:
- a) Is the applicant economically disadvantaged in relation to the prosecution of the litigation or otherwise in pursuit of dispute resolution?
 - b) If so, is it appropriate to make an order that "levels the playing field" or provides for "balanced participation" in dispute resolution?
 - c) Based on a preliminary assessment of the circumstances, is the *prima facie* case of "sufficient merit to warrant pursuit"?
 - d) In considering the above, has the applicant established the s. 89 requirements, namely both that it would not be harmful to distribute property and that it is necessary for a purpose listed in s. 89, as a court should not order a distribution in an amount greater than what is required?
- [31] A presider must always exercise their discretion by deciding whether, in the particular circumstances of the case, it is in the interests of justice to grant the order sought (at para. 53).
- [32] In this case, there is no disagreement as to the economic inequality of the parties, or that the claimant is economically disadvantaged relative to the respondent. Rather, the primary issues in dispute in this matter are:
- a) whether there is a *prima facie* case of sufficient merit to warrant pursuit; and
 - b) whether or not a distribution would be harmful to the respondent given:
 - i. the property in issue is not liquid. There would have to be a distribution of some sort from the company, whether that be income, or a dividend of some sort, which may have significant tax consequences; and
 - ii. the risk of a complete inability to recover any amounts from the claimant if he is unsuccessful at the end of the day, given that he is largely impecunious.
- [33] As to the concern that in making such an order on an interim basis the court is predetermining a threshold issue that is in dispute, in *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71 the Supreme Court of Canada did not find that to be a bar, albeit not in a family law context, provided the court exercises its discretion with an appropriate level of caution:

37 Although a litigant who requests interim costs must establish a case that is strong enough to get over the preliminary threshold of being worthy of pursuit, the order will not be refused merely because key issues remain live and contested between the parties. If the court does decide to award interim costs in such circumstances, it will in a sense be predetermining triable issues, since it will have to decide that one side will receive its costs before it is known who will win on the merits (and since the winner is usually entitled to costs). As a result, concerns may arise about fettering the discretion of the trial judge who will eventually be called upon to adjudicate the merits of the case. This in itself should not, however, preclude the granting of interim costs if the relevant criteria are met. As Macdonald J. noted in *Organ*, supra, the court's discretion must be exercised with particular caution where it is being asked to predetermine an issue in this sense, but it does not follow that the court would be going beyond the limits of its discretion if it were to grant the order.

[34] At para. 191 of I.F. the court noted that the fact that there was a marriage agreement, the enforceability of which was at issue, was not a bar to an order being made. The court noted as follows:

[194] In cases where the applicant may be precluded from entitlement to the family property based on a pre-existing agreement, the notion of being harmful to the other spouse's interests could also take the form of the court permitting a distribution so as to enable the funding of an unmeritorious claim. A reasonable way to attenuate that manifestation of harm is to require the applicant to show there is a reasonable prospect of success of impeaching the subject agreement. The claimant in the case at hand has satisfied that hurdle.

[35] In *Etemadi*, the allegation that 50% of the property in issue was not family property, did not prevent an order from being made.

[36] Similarly, the fact that there is an alleged transfer of an asset being claimed to be a family asset, the validity of which is in dispute, should not be bar to a distribution order, provided that the applicant can establish there is some merit.

[37] In satisfying the court as to the merits, in I.F. the court framed the question as whether or not the issue was "worthy of pursuit" and whether there was a "reasonable prospect of success". Other cases, whether it be in a s. 89 context, or a security for costs application which has some similar considerations, the issue has also been framed as whether the claim is "bound to fail", whether there is a "triable claim" or whether there is a claim "worthy of investigation".

[38] Finally, In I.F., at para. 15 the court observed that while the court is to take a cautionary approach on every interim application, as the court in *Bartch* encourages specifically on applications such as this, it ought to also strive to ensure that it is not so overly cautious as to be timid. That applies to an application under s. 89, provided it is in the interests of justice to make the order, and the risk of harm can be attenuated as much as possible.

Analysis

Is the Claimant Economically Disadvantaged?

- [39] The claimant argues that he fits squarely into the purpose of s. 89, given his economic disadvantage, noting that even if the \$12.5 million gift to Mr. HR Porter is taken into account, the respondent's financial means still exceeds the claimant's by a magnitude of 50:1, namely his \$33,000 yearly income versus the \$7.2 million in assets, even before pension income, that Mr. HR Porter can look to. The economic differences between the parties is even more stark if the \$12.5 million gift to Mr. HR Porter is taken into account.
- [40] The respondents did not seriously dispute that the claimant is at an economic disadvantage.
- [41] I find that the claimant is economically disadvantaged in relation to the prosecution of the litigation and in pursuit of dispute resolution.

Would an Order "Level the Playing Field" or Provide for "Balanced Participation" in Dispute Resolution?

- [42] The claimant has no financial ability to fund any aspect of this litigation, or any dispute resolution process.
- [43] Based upon the financial circumstances of the parties, I find that an order would level the playing field to enable the parties to achieve a resolution on the merits, or to allow each to participate in a balanced dispute resolution process.
- [44] In this respect, it is "necessary" for the purposes set out in s. 89.

Would an Order be Harmful?

- [45] In addition to the necessity requirement, an order can only be made under s. 89 if the court is satisfied that it would "not be harmful to the interests of a spouse". Here, Ms. Porter argues it will be harmful to her to make a distribution given that there is little likelihood of recovery should the claimant be wholly unsuccessful, given the claimant's admitted impecuniosity.
- [46] In addition, Ms. Porter argues, there is harm given that she has arranged her financial affairs, including the significant amounts received by her after the Airport Road Property was sold, such that there will be financial consequences to her, such as tax implications, if funds are taken out of her registered investments or drawn from the Porter Holdings Ltd. through a dividend.
- [47] The claimant notes that Ms. Porter, and Mr. HR Porter, were content to cause Porter Holdings Ltd. to obtain a significant loan, secured by a mortgage, in order to lend money to the companies owned by Mr. HR Porter and Ms. Mabe. The claimant argues that the same could be done here. In addition, one can assume that there are other ways to draw funds that, with tax advice, may not have similar consequences, for example repayment of shareholder loans. There was insufficient information before the court to make a definitive finding that there was no practical way to access the significant proceeds from the sale of

the Airport Road Property.

- [48] In addition, regard must be had to the circularity of the harm concept in s. 89.
- [49] In order for a court to be satisfied that there is no risk of harm, the economically disadvantaged party would have to have access to sufficient assets to cover the full amount of the distribution if they are unsuccessful. If that is the case, they may be hard pressed to establish that the order is necessary in order for them to proceed to dispute resolution or to prosecute all or part of the proceedings. It would be the rare case where there are no assets logistically realizable by the applicant, but are sufficient that they could still be looked to for judgment recovery.
- [50] As such, there is generally a risk of financial harm whenever an interim distribution is made. Considering the cautionary approach to be employed, but one that is not so overly cautious so as to be timid, as stated in I.F., and the overall intent of s. 89, I do not read s. 89 as requiring that the court be satisfied that there is no risk of harm at all, as that would render the section meaningless.
- [51] Ultimately, as noted in Bartch at para. 63 it must ultimately be in the interests of justice to grant the order sought:
- [56] Section 89 establishes two conditions that must be met by an applicant seeking an interim distribution. The first is that the distribution will not be harmful to the distributing party. The second is that the applicant needs money to fund the family law proceedings or pursue the resolution of the family dispute. Even where those conditions are met, the issuance of an interim distribution remains a discretionary exercise, as s. 89 provides that the court "may" make such an order. Consequently, in exercising his or her discretion under s. 89, a judge must consider whether, in the particular circumstances of the case, it would be in the interests of justice to grant the order sought.
- [52] In determining if it is in the interests of justice to make an order where the applicant is impecunious, as is the case here, there must be merit to the claim. The court should not be so overly cautious so as to stifle a party's ability to pursue what is otherwise a meritorious claim, because of a potential of financial harm. To do so would unduly prejudice the economically disadvantaged spouse, and potentially give a windfall to the advantaged one.
- [53] However, where there is likely no prospect of recovery if the applicant is not successful, the merits must take on a greater focus. The greater the merits, the less likely there is to be financial harm.
- [54] In this respect, I am satisfied that where the applicant is impecunious such that any recovery is improbably, the court must be satisfied that there is a reasonable prospect of success on their claim. While this may create a higher hurdle than the "bound to fail" test, this higher hurdle is necessary in order for the court to resolve the issue as to harm in favour of the applicant.

- [55] In addition, the court may make orders that seek to minimize the risk of harm.
- [56] In *D.P.R.M. v. V.L.N.*, 2017 BCSC 1790, the court concluded as follows:
- [12] I have decided that the best approach to the matter will be to keep costs to a minimum and to make a s. 89 order that, while fit for the intended purpose of permitting the claimant to make her case, will be modest enough that the claimant will be able to pay it back over a reasonable period of time if she is unsuccessful. Madam Justice Ballance talked about this in *I.F. v. R.J.R.* The thing about an interim distribution of property is that if, ultimately, it is determined that the claimant had no entitlement to a share of the property, she will be obliged to make the respondent whole. In a case such as the present one, furthermore, in which allegations of collusion and fraud are being made, it seems inevitable that one party or the other may be faced with a very significant bill of costs.
- [13] Assessing the matter carefully, therefore, and keeping squarely in mind the balance that s. 89 of the FLA requires me to strike, namely, that the claimant should have access to justice without harming the interests of the respondent, I will make what I consider to be a reasonable and proportionate interim distribution order, along with directions for the speedy, inexpensive and simple resolution of the main issue here which, succinctly stated, is whether at this stage the claimant is a "spouse" entitled to seek support and property orders under the FLA.
- [57] In other words, the court has the discretion to tailor orders so as to strike the appropriate balance. While the claimant seeks a one-time lump sum order to cover their costs to trial, or close to trial, making such an order may not appropriately balance the risk of harm.
- [58] I asked counsel if they could take me to any authority under s. 89 to provide for a staggered distribution, noting that this case may be one that can be resolved through mediation, or, perhaps a summary resolution on the threshold issues, although expressing no opinion myself as to the suitability of either, such that it may not be necessary to make the full distribution as sought at this time, taking into account that it would put both of the parties to considerable cost to bring sequential applications for further distributions if I were to limit the distribution at this time.
- [59] If there are resolution measures that could be taken, a staggered distribution could address some of the risks, including the logistical ones, such as the tax consequences, that were raised with respect to liquidating the funds for distribution. Neither party was aware of any authority directly on point in that regard. Both seemed to agree, without committing to it, that mediation may be one option to resolve these matters.
- [60] Section 89 provides that a court may make an order to fund "all or part" of a proceeding, or, separately, family dispute resolution processes. As such, I am satisfied that the court does have discretion to make a staggered order, if a s. 89 order is appropriate, in order to attenuate the risk to the funding party, and to avoid the need for multiple applications.

Conclusion

- [61] In applications such as this the court must weigh the relative merits of the claim such that it can balance the risk that, if not successful, the funding party will not recover what it paid out, meaning that they may well fund the litigation against themselves, against the risk that a claim that has sufficient merit that it is worthy of pursuit, but will otherwise be stifled due to the applicant's economic disadvantage and impecuniosity. If the claim has a reasonable prospect of success, there is not likely to be any harm in making the order sought.
- [62] While the respondents have all put forward arguments as to substantial and robust defences which may well carry the day, I find that the claimant has met the hurdle to establish a reasonable prospect of success.
- [63] Specifically, and while in no way making any determination one way or the other on the merits, there is a possible interpretation of the letter left by the claimant that may not equate to an abandonment of all property interests. Similarly, the claimant's explanation as to the emotional impact of having Mr. HR Porter and Ms. Mabe arrive without notice, and the conversation that ensued and ultimately led to the transfer which the claimant says was obtained under duress, at this early stage, is one that if accepted, is a reasonable one.
- [64] As such, it would not be in the interests of justice to allow the claim to be stifled solely because of the claimant's impecuniosity.
- [65] In this respect, the claimant has established the necessity requirement in s. 89. Given the merits, there is no harm. In addition, I am satisfied that any financial risk can be alleviated with a staggered distribution, with the first tranche being sufficient to pay past accounts and fund mediation, the second to cover pre-trial costs, and the third to cover trial costs.

Summary of Orders Made

- [66] Ms. Porter shall pay to the claimant an interim distribution as follows:
- a) \$225,000 within 30 days of the date of this order;
 - b) A further \$100,000 by March 1, 2024; and
 - c) A further \$110,000 by April 15, 2024.
- [67] As requested by the parties, para. 2 and 3 of the notice of application filed June 7, 2023 are adjourned generally.
- [68] As to costs, the parties did not have an opportunity to make submissions. If the parties wish to make written submissions they may do so in writing with the claimant making his submissions within 14 days of these reasons, and the respondents seven days thereafter. Otherwise, if the parties are in agreement they may enter the order with a term that costs will be in the cause.

"Master Robertson"

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CASE PAGE <https://chat.esheria.ai/case-law/canada/porter-v-porter-2023>

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