

CANADA / JUDGMENT

R.A. v. B.A.F.

2023 BCSC 1480

COURT

Supreme Court of British Columbia

DECIDED

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2023 BCSC 1480 R.A. v. B.A.F.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R.A. v. B.A.F.,

2023 BCSC 1480

Date: 20230825

Docket: E59208

Registry: Kamloops

Between:

R.A.

Claimant

And

B.A.F.

Respondent

Before: The Honourable Mr. Justice Ball

Reasons for Judgment

Counsel for the Claimant:

R. M. Schubert

The Respondent, appearing in person:

B.A.F.

Place and Dates of Trial:

Kamloops, B.C.

January 9-12, 2023

Place and Date of Judgment:

Kamloops, B.C.

August 25, 2023

Table of Contents

Introduction. 3

Witnesses. 3

Orders by Consent. 3

Background Facts. 5

Early Years of Relationship. 5

Car Wash and Auto Lubrication Business. 7

Move to Yellowknife and Return to Kamloops. 9

Separation of the Parties. 11

Child and Spousal Support. 16

Division of Family Assets and Debts. 16

Kamloops Family Home. 16

Thunderjet Boat 17

Pension. 18

Claim for Overpaid Child Support. 18

Retroactive and Prospective Increase to Spousal Support. 20

Other Claims by the Respondent 34

Conclusion. 35

Introduction

- [1] These are reasons for judgment in a family law action for divorce and other corollary relief. As there are two young children of the marriage (the "Children") referred to in these reasons, the parties have been identified only by their initials or as claimant and respondent. Initials are used to preserve the privacy of the Children.

Witnesses

- [2] The only witnesses in this case were the parties. They agreed on most of the issues in this case as indicated in the consent orders referred to below. For instance, it was agreed that both of the parties had positive parenting skills and did good work looking after the best interests of the Children. Both parties testified that they considered the other party to be a safe and positive parent for the Children. Post-separation, the respondent stayed in her home to allow the claimant to spend time with the Children there when he did not have adequate accommodation to do so elsewhere. Also, Christmas and other important vacation days were spent in the company of the whole family, despite separation.

Orders by Consent

- [3] Following the reading of the opening of counsel for the claimant, the parties advised the Court that a number of issues were agreed, and should proceed as consent orders as follows:
- a) That, subject to the calling of necessary evidence, the parties would be divorced;
 - b) except for the division of the pensions of the parties provided in the Order made at the Judicial Case Conference on October 20, 2020, each party shall keep any assets registered solely in their respective names or in his or her possession;
 - c) each party shall be responsible for any debt registered in his or her name or otherwise owed by him or her to a third party;
 - d) the parties shall jointly share all parenting responsibilities for the Children;
 - e) the parties shall share parenting time for the Children on an equal week-on week-off basis, with the exchange of the Children taking place every Friday after school or if Friday is not a school day, then, subject to the plans and activities scheduled for the elder child, at 3:30 pm or as agreed by the parties and subject to the views and plans of the eldest child;
 - f) each party shall have the option of selecting one two-week consecutive period of parenting time with the Children once per year, with the selection of this period made no less than two months in advance in writing or by email;
 - g) With respect to Christmas holiday periods, in odd-numbered years, the claimant shall have parenting time with the Children for 24 hours ending at 7:30 pm on Christmas Eve, and the respondent shall have parenting time for 24 hours commencing at 7:30 pm on Christmas Eve, again subject to the plans and activities scheduled by the elder child, with the inverse schedule being applied in even-numbered years;
 - h) the parties also agreed that they wished a term to be added that by mutual agreement they may alter the dates scheduled to suit changes in circumstance and the view and plans of the eldest child;

- i) On an ongoing basis, and in accordance with the claimant's regular pay schedule (every two weeks), the claimant shall pay the respondent the net monthly amount owed for child support pursuant to the Federal Child Support Guidelines (the "Guidelines") and in accordance with there being shared parenting of the Children; and
 - j) the parties shall share any special or extraordinary expenses of the Children as agreed by the parties or otherwise defined by section 7 of the Guidelines in proportion to the parties' adjusted Guidelines income with payments to be made to the third party providers when reasonably possible.
- [4] The foregoing consent orders are granted based on the evidence heard. The parties are to be applauded for taking reasonable approaches which led to the consent orders aforesaid which have saved considerable court time.

Background Facts

Early Years of Relationship

- [5] The parties, R.A. and B.A.F., began living together in a marriage-like relationship on November 15, 2005 and were married on December 29, 2014, in Yellowknife, Northwest Territories.
- [6] The Children were born in 2005 and 2010, and are now 12 and 17 years old respectively.
- [7] When the parties met, both were employed at a major automobile parts dealer. The respondent was also a student at a local university in Kamloops where she was taking courses for a Bachelor Degree in Social Work.
- [8] Their first child was born prematurely by three months with a very low birth weight. This child spent the three months following his birth in hospital. The first child was in severe medical distress at birth and was transported by air, first, to Victoria General Hospital and then to Vancouver Children's Hospital by air for emergency treatment. Both parents were involved in the medical treatment and intensive care of this child. He has survived but continues to face various medical challenges, including issues with eye sight, hearing and manual dexterity.
- [9] The respondent took a year of maternity leave following the birth of the first child. Eventually, the respondent graduated from university having taken further courses to complete graduation requirements. After graduation, she obtained a position with the Ministry of Children and Family Development ("MCFD"). When necessary, after the respondent began working for MCFD, the first child was placed in day care and the parties were both involved in drop-off and pickup.
- [10] Based on the respondent's training, in September of 2008, following the respondent's academic passion for fostering children, the family began to foster children in need of support, beginning with two foster children. The home of the parties became a foster home

and she ceased to work directly for MCFD. The pay scale for the foster care depended on the number of children fostered in the home. At times, the foster work included providing respite care to allow periods of rest and rehabilitation for other foster parents. The home was considered a specialty care home due to the specialized training that the respondent had received.

- [11] As a result, the income of the respondent increased beyond the prior income earned by her working for MCFD. This activity continued for a number of years, while the claimant continued, at the same time, to work full time in the automotive parts business.
- [12] Both parties were involved in the fostering activities, with the respondent being in charge of fostering activities, in particular dealing with the parents of foster children. Fostering came to an end in August of 2013 when it was decided mutually by the parties that they collectively wished to leave the practice of fostering children.
- [13] The average monthly payment for fostering in Kamloops was \$3,500 per month. At Exhibit 3, Tab 25, from pages 29 to 51, there is a copy of a "Family Care Home Agreement" executed by the parties as the contract for fostering children in need of care. A July 25, 2008 letter provided by Children and Family Services confirmed that the parties worked, providing fostering services in their home, beginning in 2008 and continuing until 2013, with an expectation of renewal. In July 2013, the parties were fostering four children and the amount being paid for fostering, which changed regularly, averaged \$3,500 from MCFD with additional sums from Secwépemc Family Services. Payments for fostering children were received income tax free.

Car Wash and Auto Lubrication Business

- [14] In 2011, the parties entered into a contract with Mr. L, and his wife, Mrs. L., to purchase a minority shareholding in a corporation which ran a business of a car wash and auto lubrication in Kamloops (the "Business"). There was evidence that the father of the respondent provided a cheque in the amount of \$50,000 to the parties to assist in the investment in the Business, which was delivered by hand to the claimant (the "Family Investment"). Later, the parties jointly executed a Line of Credit in the amount of \$55,000 which sum was invested in the business. The claimant worked on the planning and construction of the car wash facility and left his job in 2012 to work full time in the Business. The hope was that the claimant would eventually earn a higher income, but that hope would take some time to be realized. It was never intended that the respondent would be actively employed in the business and she continued fostering children. The business was a "family asset", on all of the facts before this Court, in particular based on significant joint investments of the parties in the business. Debts created in relation to that investment are "family debts".

- [15] The business did not earn sufficient income for a start-up period and further capital was required. In order to provide further capital to the Business, Mr. L and Mrs. L., and both of the parties were required to agree to sign an agreement for a line of credit with a bank in the amount of \$55,000 that was a joint and several liability for the four of them (the "Line of Credit"). The respondent testified that she was aware that if she did not agree to and sign the line of credit, the business would be "dead in the water". Thereafter, the business did not provide expected revenue and ultimately failed. She also signed an indemnity agreement prepared by legal counsel for the parties dated December 19, 2013, when the parties were in Yellowknife to protect the parties from any claim against Mr. L., this was a term of the settlement between the parties and Mr. L.
- [16] The Business failed and some litigation followed. In 2021, the parties were separately served with legal documents in a foreclosure proceeding brought by the bank against Mr. L. and the Business. A Kamloops law firm acted on behalf of the claimant and the respondent initially; but it was not until some time later when a foreclosure action was commenced against the Business that the parties recovered sufficient monies to repay the Family Investment, which monies were repaid in full to siblings of the respondent's father, then deceased. The Line of Credit was also retired in the foreclosure proceedings, and the law firm again assisted the parties to ensure that no debts were continued to be claimed against the parties. The respondent advanced the proposition that as she had attended the law firm only to assist her husband to appreciate or understand the nature of the proceeding, she was not liable for a portion of the legal fees. The work done by the law firm was in relation to a family debt, and the result was beneficial to both parties.
- [17] The respondent agreed that she attended with the claimant at the office of the lawyer to ensure that no liability in the foreclosure proceeding was found against either of them. The respondent testified that it was for the benefit of the couple and their children to avoid liability in this proceeding. The respondent acknowledged in cross-examination that she did not know what the effect of the foreclosure proceedings might be or whether the Line of Credit would continue to affect the parties adversely. The respondent testified that she told the claimant that the lawyer was the claimant's lawyer and the claimant should be responsible for any fees, but at the same time the respondent agreed in cross-examination that the discharge of the Line of Credit was equally for the benefit of the respondent as it cleared up an apparent \$55,000 liability from her credit records. The respondent acknowledged that as a result of a term in the separation agreement (explained further below) she had responsibility for any liabilities in her own name, which included the Line of Credit, and that the release of the Line of Credit was a benefit to her.
- [18] As a result, the latter legal assistance was the subject of a bill by the law firm, which I am satisfied was a family debt, payable by the parties equally. The claimant paid the entirety of the law firm bill. He is entitled to be reimbursed for half of the law firm bill by the respondent in the amount of \$1,201.58.

Move to Yellowknife and Return to Kamloops

- [19] Shortly after the Business failed, the parties agreed that they would cease to foster children on behalf of the MCFD or others and change their location. A factor that led to this conclusion was that the parties had become involved in a high profile and newsworthy case relating to foster children. With the agreement of the respondent, the claimant applied for a number of jobs in British Columbia and eventually obtained a position with a major heavy equipment supplier in the Northwest Territories. The claimant moved to Yellowknife to assume this new position. The new employment position was attractive for the parties, because not only was the salary attractive, but the salary included full benefits and a pension, an advantage the claimant had not previously enjoyed. The respondent remained with the children in Kamloops while their home there was prepared and listed for sale. Eventually the home was sold and the respondent and the children moved to join the claimant in the north in December 2013.
- [20] The balance of student loans accrued by the time the respondent graduated was approximately \$40,000, and because of scholarship awards to the respondent, the balance was reduced to \$30,000. The student loans were repaid in full from the proceeds of the family home owned by the parties in Kamloops. Two motor vehicles were also sold ahead of the move to Yellowknife.
- [21] At the beginning of 2017, the parties were living in Yellowknife where the respondent was working as a case manager for a government agency and was earning approximately \$95,000 per annum and was, for the first time in her career, receiving a pension.
- [22] Once established in new positions in the Northwest Territories, it seemed both parties flourished with joint incomes exceeding \$200,000. This move to the north was not solely or exclusively for the benefit of the claimant, to the disadvantage of the respondent.
- [23] The respondent testified that had she remained in the Yellowknife, and not returned to British Columbia, she may have obtained a salary as high as \$120,000 per annum; assuming a certain chain of promotions. No documentary evidence of any offer of such employment or potential promotions were led in evidence. However, despite potential advancement in employment, the parties found (1) the weather in Yellowknife depressing; (2) they wished to return to Kamloops near the support of friends and family; and (3) the claimant was working where the majority of his time was spent in a bush camp disrupting family life. In March of 2017, the respondent resigned her position in Yellowknife and the parties moved back to Kamloops.
- [24] An additional factor which contributed to the concerns of the parties, if they remained in the North, was that employment opportunities were reduced for the claimant both as to availability and income in the future. Back in Kamloops, the claimant was able to apply for and obtain a manager position with his employer, which represented a reduction in pay but improvement in family life and overall lifestyle of the parties, particularly as the claimant was with his family seven days a week. The claimant actually earned \$116,000 in 2018,

approximately \$25,000 less than his income in Yellowknife.

- [25] The choice to return to Kamloops was clearly not for the immediate benefit of the claimant as his salary declined in his new working position in Kamloops. The more positive opportunity was the return of the respondent to employment with MCFD, and the prospect of obtaining a Masters degree.
- [26] The respondent received Employment Insurance compensation for a few months. Towards the end of 2017, the respondent began working in Kamloops for a government ministry and for an agency supporting adults with development disabilities. The respondent's plan was to work for at least one year in that position to become entitled to commence a program to earn a Master's degree and upon successful completion of that degree to obtain further opportunities to advance in her profession and increase her income. The respondent obtained a position working for MCFD assisting younger adults with career development.
- [27] The parties purchased another home in Kamloops.
- [28] The respondent returned to university to work on a Masters of Education Program through a scholarship program; the Master's degree was a necessary prerequisite for the respondent to be promoted above the "grid level 24" position which she had attained after her return to Kamloops. Among other things, the respondent was hoping to train students in the professional side of government.
- [29] Unfortunately, by the time of trial that degree was not completed. Four of approximately ten required courses were completed by the respondent in the Master's Program. At trial, the respondent testified that she was not successful "for various reasons", none of which were explained to the Court, with one required course in the Master's Program. This failure reduced her grade point average at university. The respondent testified that, as a result of the failed course, she would have to wait to re-apply for a new admission to the scholarship program.
- [30] The first child was assessed for disabilities after the return of the family to Kamloops but circumstances allowed a classification of this child as a "dependent with a disability", although no details of the effect of that classification were placed into evidence; an approximately \$9,000 annual credit which went to the respondent, who testified that she placed these funds into investment accounts for the benefit of the Children including a Registered Disability Savings Plan for the first child (where the government matches contributions up \$3,500 per annum on a three to one basis) and a Registered Educational Savings Account for both children.

Separation of the Parties

- [31] On October 18, 2018, the parties separated, and there has been no reconciliation.

[32] At the date of separation, the family was resident in the family home in Kamloops. On that date, the claimant moved out of the family home. The respondent and the Children remained living in the family home. The claimant continued paying expenses of the family home including mortgage, utilities, and property taxes.

[33] As the claimant was living in rented accommodation, smaller than the family home, the Children only spent parenting time with him on Friday and Saturday nights; returning the Children to the respondent on Sunday. The claimant planned to live in a shared parenting time regime but not until he had found more suitable and larger accommodation for the Children.

[34] After some period of mediation and with the assistance of legal counsel, on May 28, 2019, the parties entered into a separation agreement (the "Separation Agreement") which was prepared by the respondent and dealt with the division of family property on a final basis and the determination of parenting arrangements as well as the payment of child and spousal support on an interim basis.

[35] The Separation Agreement provided, in part, as follows:

Para. 3: The parties agree that joint legal guardianship is in the best interests of the children. The parties agree that both parents are fit and proper persons to have joint responsibility for the care of the dependent children.

Para. 4: The parties agree that the children will primarily with [the respondent].

Para. 6: [The claimant] will pay child support in the amount of \$1,739.00 (or the amount payable pursuant to the Federal Child Support Guidelines of Canada) monthly to [the respondent]. Child support payments will commence on March 8, 2019 and will be paid semi-monthly.

Para. 11: [The claimant] will pay spousal support in the amount of \$273.00 monthly to [the respondent] until such time as [the respondent] remarries or cohabits with another person in a common-law relationship or dies, which will come first. Spousal support payments will commence on March 8, 2019 and will be paid semi-monthly.

Para. 23: The parties agree to divide their marital assets as set out in this agreement (a) [the respondent] will assume the following debts and will not hold [the claimant] responsible to pay any portion of them now or in the future: (1) 2015 Dodge Caravan (with a value of \$25,000.) and (2) 50% joint Boat loan for the Thunderjet (with a value of \$35,000.)

Para. 25: The jointly owned Thunderjet boat has been put up for sale. The payments for the boat loan will be split equally by both parties until the sale of the boat. Proceeds from the sale of the boat used to pay the balance of the boat loan. Any remaining debt not covered by the sale of the boat will be split equally between both parties.

Para. 26: Except as otherwise expressly provided for in this agreement, each party shall be solely responsible for the debts in his or her name respectively and shall save harmless the other with respect to any liability resulting therefrom.

Para. 29: The parties will work together towards joint parenting time with the children.

Para. 30: Those terms in this Agreement which deal with parenting arrangements and the payment of child and spousal support shall be reviewed by the parties six months after completion of this agreement and prior to either party seeking an order for divorce.

Para. 31: The parties agree that the continuance of spousal support payments will be reviewed annually.

[36] Neither party has made a claim that the Separation Agreement is invalid or should be set aside, but both agree that changes may result from the reviews contemplated in paragraphs 30 and 31 of the Separation Agreement.

[37] The evidence at trial was consistent with the proposition that spousal and child support payments made by the claimant to the respondent pursuant to the Separation Agreement were based on the children residing primarily with the respondent. Those payments were reviewable six months after the completion of the Separation Agreement or annually thereafter or upon the granting of an order for divorce.

[38] The income of the claimant in various categories is set out in the table below:

Total Income from line 150

Employment income

RRSP income

Rental income

2017

140,249.89

123,676

16,470

2018

131,967.24

119,952

9,121

2,894

2019

134,121

121,896

10,340

1,884

2020

124,286.85

115,877

8,350

2021

134,816.35

124,561

10,255.35

2022

130,429.32

[39] During the years of the COVID-19 pandemic, the employer of the claimant imposed an across-the-board reduction of income for all employees because of a reduction in business income. In 2021, his previous income level was restored.

[40] This table contains the income at line 150 of the respondent's income tax returns as well as child and spousal support payments received by the respondent from the claimant:

Year

Line 150 (15000)

Child Support payments received

Spousal Support payments received

Rental Income

2017

\$43,840 (actual income in Yukon was \$95,000)

2018

\$64,645

Family and household expenses paid by the claimant from Oct. 18 - Dec. 31

Family and household expenses paid by the claimant from Oct. 18 - Dec. 31

\$2,894.39

2019

\$68,870

Jan. 1 to March 7 family expenses paid by the claimant: March 8 to Dec. 31 approx. 10 months at \$1,739 or \$17,390.

Jan. 1 to March 7 family expenses paid by the claimant: March 8 to Dec. 31 approx. 10 months at \$273 or \$2,730.

\$1,884

2020

\$72,530

Jan. 1 to Sept 30, \$1,739 per month or 9 month total of \$15,651 and Oct. 1 to Dec. 31 @ \$893 per month or 3 month total of \$= annual total of \$18,334

Jan. 1 to Sept 30, \$273 per month or 9 month total of \$2,457 and Oct.1 to Dec 31 @ \$696 per month or 3 month total of \$2,088 = annual total of \$4,545

2021

\$72,601.32

12 months @ \$893 = \$10,716

12 months @ \$696 = \$8,523

2022

\$72,716

12 months @ \$893 = \$10,716

12 months @ \$696 = \$8,523

[41] In the year 2023, the respondent's employment was categorized as an "Administrative Officer - R24-" which the respondent testified was at the top of the pay grid in her employment section. The respondent testified that, while she was unsure of the exact increase in income that had been awarded to government employees following recent salary negotiations, it was her "best guess" that the increase for the year 2023 was between 3% and 4%.

[42] Following separation, the respondent had purchased a town house in Kamloops where she lived with the Children. In December of 2022, the respondent formed a new relationship with L.B., the father of a single child. The custody of that child is shared with its mother through a parenting schedule. L.B. does have some parenting time with his son.

- [43] The respondent and L.B. determined that the town house was too small for the family, so they have jointly purchased a home in Kamloops. The respondent contributed the bulk of the proceeds of sale of the town house to purchase the new home in May of 2022 for approximately \$800,000, subject to a mortgage of approximately \$600,000. The respondent described the new home as a "fixer-upper". The funds used to renovate the fixer-upper were obtained from L.B.'s share of the sale of a home he shared with a former girlfriend. L.B. also contributed skill, and labour to the renovation of the home being renovated. The renovations have cost over the \$100,000 budget estimate.
- [44] Among general improvements to the fixer-upper was the creation of additional new bedrooms for a total of six bedrooms, including a bedroom occupied by the mother of the respondent. The mother has agreed to pay approximately one-third of the shared utilities and other household expenses.

Child and Spousal Support

- [45] From the separation date of October 18, 2018 until March 7, 2019, the claimant paid expenses to maintain the family home. During that period, the respondent did not seek payments of either spousal or child support. Beginning on March 8, 2019, and continuing to September 30, 2020, the claimant paid the respondent each month the sum of \$1,739 in child support and \$273 in spousal support for a total of \$2,012 per month or \$24,144 annually.
- [46] Based on the change in circumstance to shared parenting, from October 1, 2020 until the trial date, the claimant paid \$1589 per month for 2020 for child and spousal support to the respondent. The claimant asserted that of this sum \$893 was child support and \$696 was spousal support, totalling \$19,068 per annum.
- [47] The claimant is entitled, as a retirement savings plan, to purchase a certain number of shares in the capital stock of his employer, three shares each pay period with one further share contributed by the employer. At Tab 11 of Ex. 3, is a document from Sun Life which shows the history of the claimant's participation in employee share purchase plan or RRSP. The claimant participated in this plan for approximately ten years. Twice each year, spring and fall, the claimant would sell the shares purchased in the open market. The RRSP income was included in the line 150 income set out previously.

Division of Family Assets and Debts

- [48] I have dealt with the family debt arising from the Business and related litigation earlier in this judgment.

Kamloops Family Home

- [49] The original Kamloops family home was sold in 2019 and the proceeds of sale were divided equally by the parties. Rental income, when received prior to the sale of the family home, was divided equally by the parties. No change to this distribution was sought by either party.

Thunderjet Boat

- [50] The Thunderjet boat owned by the parties was, at the time of separation, represented by an indebtedness of \$69,940.87. The Separation Agreement at para. 23, provided that each of the parties agreed to accept 50% of the joint boat loan agreement in the amount of \$35,000. The respondent testified that she was not aware of the amount of the debt associated with Thunderjet boat. Given that the respondent drafted the Separation Agreement, her evidence cannot be considered accurate. The boat was, in accordance with the Separation Agreement, sold for approximately \$51,614.03 leaving a balance of \$18,326.48 due to the bank.
- [51] The claimant paid that sum to the creditor bank in its entirety by bank draft dated July 4, 2019. Apart from retiring the indebtedness to the creditor bank, this payment stopped interest running on the indebtedness, a benefit to the respondent. The claimant continues to advance a claim for half of the balance of the payment on the indebtedness aforesaid. At trial, the respondent, after some argument, did not dispute her obligation to pay this debt in the amount.
- [52] The respondent agreed in evidence that, in the Separation Agreement, she agreed to share in the debt created by the purchase of the Thunderjet boat and the debt that remained after the sale of the boat was to be divided equally by the parties. She had signed all documents relating to the sale to the new purchaser and knew the sale price of the boat to the new purchaser and that there remained a balance owing on the loan in the amount of \$18,326.84. The respondent agreed that she had been asked to pay one-half of that amount to the claimant, but stated it was not convenient for her to pay the claimant \$9,163.42. The respondent agreed in her testimony that she was at the time of trial in a position to pay that debt to the claimant, and there was no reason that she should not pay the \$9,163.42 to the claimant. There will be judgment for the claimant against the defendant for that sum.

Pension

- [53] At a judicial case conference held before Master Keim on October 20, 2020, on a final basis, agreed by consent:
- (a) that the claimant's employment pension, with a major industrial equipment company, and, be divided equally pursuant to relevant legislation and Part six of the Family Law Act, with the date of entitlement being from November 15, 2005, to October 18, 2018; and
 - (b) that the respondent's employment pension, with a territorial government in Canada, be divided equally pursuant to the relevant legislation and Part six of the Family Law Act, with the date of entitlement being from November 15, 2005 to October 18, 2018.
- [54] While this consent order has continuing effect, the parties advised that the division of these pensions equally between the parties had not been fully achieved at the date of trial, but intend to complete this division.

Claim for Overpaid Child Support

- [55] The claimant has advanced a claim against the respondent on the basis that he has overpaid support since September 1, 2020, relying on *Contino v. Leonelli-Contino*, 2005 SCC 63. This submission is based on the change of circumstance which took place on September 1, 2020, when the parents left a primary parenting regime and began a shared parenting regime in relation to the Children. The respondent agreed that the claimant had overpaid child support since the change in parenting time. The Court in *Contino* is clear that the change from a primary parenting regime to a shared parenting regime is a change of circumstance that would require an adjustment of the amount paid by the payor parent. In this case the respondent did not make any payment to the claimant.
- [56] The respondent submitted in oral argument that she agreed with counsel for the claimant that the claimant had overpaid child support for some period of time. No details were provided of what the respondent said that overpayment involved.
- [57] The respondent also submitted that when the claimant altered payment of child and spousal support on the occurrence of the change in circumstance to shared parenting, because that change was not effected by court order; the court should now embark upon a review of the circumstances, as they relate to spousal support, which gave rise to the Settlement Agreement on May 28, 2019. This request for review was not presented in any pleading nor in the trial brief of the respondent.
- [58] It is clear, in the case at bar, that the change of circumstance from one parent being with the children for the majority of the time to shared parenting is a material change in circumstance which would require a change in child support payable.
- [59] The calculation of child support in a shared parenting situation is determined by calculating each party's obligation to pay child support based on their individual Guidelines income, then set off one against the other.

Table of Support Paid Since September 1, 2020

- [60] The table above shows that for the period from September 1, 2020 up to December 31, 2022, the claimant paid \$25,850 for child support and that over the same time frame based on the claimant's Guidelines income, the claimant was only obliged to pay \$20,600 leaving a sum of \$5,250, which sum is an overpayment. The respondent paid nothing to the claimant for child support over the same period. The respondent ought to have paid child support to the claimant, or accounted for child support during the period of shared parenting.

Retroactive and Prospective Increase to Spousal Support

- [61] The respondent has made a claim for 13 years of spousal support; support requested to be paid by the claimant at a higher level than provided in the Separation Agreement. The claim for thirteen years of spousal support was first formally claimed in the notice of family claim. The respondent in a counterclaim sought spousal support increases from the "low" range in the Separation Agreement as follows:
- (a) Spousal support in the mid to high range to be paid semi-monthly until May 31, 2032, for a 13 year total from May 2019.
 - (b) Back [or retroactive] spousal support to be paid in the amount of \$827.00 (the difference between \$273.00 and \$1100.00) to be paid for the period from May 2019 until September 30, 2020 for a total amount of \$14,059.00.
 - (c) Back [or retroactive] spousal support to be paid in the amount of \$375.00 (the difference between \$725.00 and \$1100.00) to be paid for the period from October 1, 2020 until the date of this order.
- [62] The respondent also submitted that spousal and child support were inextricably linked together by the Separation Agreement and amounted to a fixed monthly payment, of approximately \$2,000, regardless of allocation between spousal or child support. When circumstances changed to shared parenting, for example, with a commensurate reduction in child support payable by the claimant, the respondent was entitled to an increase in spousal support. This submission is not reflected in the language of the Separation Agreement and is inconsistent with the provisions of the Guidelines which are based solely on the Guidelines incomes of the parties and changing familial circumstances. This submission of the respondent for thirteen years of entitlement to spousal support on a prospective basis has not been made out.
- [63] Section 15.2 of the Divorce Act, R.S.C. 1985, c. 3, governs spousal support orders.
- [64] This Court does not have jurisdiction to vary a separation agreement under the Divorce Act. However, it does have jurisdiction to make an order for support that is inconsistent with a previous agreement. This is because the Court is not bound by an agreement between the parties when it exercises a statutory power to award support under s. 15 of the Divorce Act: *A.D.J. v. F.J.*, 2022 BCSC 600 at para. 201.
- [65] To be entitled to spousal support, a person must have been a "spouse" under the Divorce Act. A "spouse" is defined as including a "former spouse", but the definition is far less descriptive than the Family Law Act, S.B.C. 2011, c. 35, definition, which includes a person who has had a child with the other person.
- [66] The length of the relationship of the parties includes time spent in a marriage-like relationship prior to marriage: see *Hill v. Kelly*, 2023 BCSC 630 at para. 7 and *Smith v. Smith*, 2023 BCSC 991 at para. 2.

- [67] Section 15.2 also sets out the objectives for spousal support under the Divorce Act, which are:
- (6) An order made under subsection (1) or an interim order under subsection (2) that provides for the support of a spouse should
 - (a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;
 - (b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;
 - (c) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and
 - (d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time
- [68] The case of *Miglin v. Miglin*, 2003 SCC 24, provides the correct test to apply when a party seeks spousal support in circumstances where the parties have a pre-existing separation agreement purporting to be final. In the case at bar, the Separation Agreement states "This Agreement will be binding upon and will ensure (sic) to the benefit of the parties, their respective heirs, executors, administrators, and assigns". The Separation Agreement by that language is a final order.
- [69] Further, the respondent repeatedly submitted that the Separation Agreement was the first agreement which was "interim" or "interim only for the provisions which were beneficial" to the claimant in nature or it was a "sweetheart deal" with "floating numbers" for support. The respondent then repeatedly referred to there being a "floating amount" for the spousal support amounting to approximately \$2,000.00 per month. "Floating number" is not a term used in the Separation Agreement and no question was put to the claimant about this phrase during cross-examination. The Separation Agreement does provide for reviews of support payments in paras. 8, 30, and 31. Unfortunately it appears the respondent confused legal concepts including provisions for future reviews of support amounts as a license for retroactive reviews of the amounts contained in the Separation Agreement. The phrases quoted above, do not appear in the language of the Separation Agreement, an agreement prepared by the respondent. As noted above, the respondent, in the filed counterclaim, requests an order that spousal support be adjusted upward from the date of the Separation Agreement.
- [70] The claim by the respondent for 13 years of increased spousal support is unreasonable as the delay in giving notice of that claim prevented the claimant from preparing financially to respond: *G.M.W. v. D.P.W.*, 2014 BCCA 282 at para. 45.

[71] In *Nicholl v. Nicholl*, 2020 BCCA 173, the Court of Appeal undertook a comprehensive analysis of *Miglin* in the context of the party's challenge to the spousal support provisions in a separation agreement and provided the following summary of the test:

[40] In summary, a court undertaking a *Miglin* analysis should:

Stage One

1. Inspect the circumstances at the time the agreement was entered into to determine if there is evidence of "oppression, pressure, or other vulnerabilities". If such negative circumstances existed, the "agreement will merit little weight".
2. If there are no such negative circumstances, determine whether the agreement considered the Divorce Act factors and complied with its objectives. If the agreement does not comply with those objectives, the intervention of a court is only warranted where the agreement operates in a way that reflects a "significant departure from the general objectives" of the Divorce Act.

Stage Two

If the court has not intervened at stage one, the court must still analyze the agreement at the time of the application for spousal support to consider whether it represents the parties' original intentions and whether it continues to comply with the Divorce Act. The claimant needs to demonstrate that new circumstances, not reasonably anticipated at the time of the agreement, warrant the court's intervention. The change in circumstances needs to be significant but need not be "radically unforeseen". However, the focus is not on whether a change occurred, but whether the agreement continues to represent the parties' intentions and continues to be in substantial compliance with the objectives.

[72] In *Nicholl* at para. 30, the Court held that, in both stages of the *Miglin* test, it was necessary for the Court to examine the factors outlined in the Divorce Act, and consider whether the separation agreement operates in a way that reflects substantial compliance with the objectives of the statute.

[73] In both *Miglin* and *Nicholl*, the Court recognized the tension between the objectives of the Divorce Act, as set out in the above sections, and the policy goal of encouraging spouses to negotiate a settlement agreement allowing them the autonomy and freedom to structure their post-divorce lives in a manner that reflects their own objectives and concerns: *Nicholl* at para 35.

[74] The Court is not entitled to ignore or overlook pre-existing agreements for spousal support. Spousal support agreements that are validly made are entitled to deference: *Zimmerman v. Shannon*, 2006 BCCA 499 at paras. 58-61.

- [75] Turning to the first step in stage one of the Miglin analysis, in the case at bar, no actions of the claimant were noted to result in the respondent agreeing, against her wishes, to execute the Separation Agreement which included specific provisions as to the quantum of spousal support or its duration. Both parties were, in the best interests of the Children, trying to arrange their financial affairs to provide adequate housing for the Children. In those circumstances, it is significant that the respondent actually drafted the Separation Agreement, and prior to the execution of the Separation Agreement, did receive independent legal advice. There was no evidence of oppression, pressure or use of other vulnerabilities which would lead this Court to find any of the negative circumstances invoked by the Court in Miglin apply in this case.
- [76] The respondent claimed initially, in final submissions, that the Separation Agreement was signed by her under coercion by the claimant. Upon noting that the respondent was the person who drafted the Separation Agreement, and that she signed the Separation Agreement of her own free will, the respondent abandoned the suggestion that coercion was involved at all.
- [77] The respondent expressed a view that because she did not seek legal advice prior to preparing and signing the Separation Agreement, she somehow did not appreciate the legal effect of the Separation Agreement as a document which was a final agreement between the parties. This view was not consistent with her other evidence that legal advice was obtained by her prior to the preparation of the Settlement Agreement. That said, the respondent has made no attempt to set aside or otherwise vacate the Separation Agreement.
- [78] Both parties expressed principled reasons to agree to the terms of the Separation Agreement, terms which allowed each of them to settle debts, as an example, to create more positive financial statements which invited opportunities for access to borrowed capital to be used to purchase new homes for the benefit of the Children.
- [79] As I have found that there are no negative circumstances arising from the marriage, I turn to the second step of stage one of the Miglin analysis. Based on the facts of this case, the combination of child support and spousal support paid by the claimant to the respondent provides an equitable sharing by the couple of the economic consequences of the marriage and its breakdown. Shortly put, the Separation Agreement provided the couple with a roughly equal standard of living, taking into account, their past and ongoing incomes, returns from investment and obligations under the Separation Agreement.
- [80] The respondent submitted in a year by year analysis that she should have received more by way of spousal support than that stated in the Separation Agreement. After approximately one year involved in looking after her eldest child, immediately after birth who was in serious medical distress, she claimed the next five years spent providing foster parenting services and respite services for other parents as a disadvantage caused by the marriage. With respect, the respondent testified that she had followed her passion for work as a foster parent and had engaged her husband to support this activity, notwithstanding he was

already working in a full-time position in the automobile parts business. The choice of a career as a foster parent was a choice freely made by the respondent. There is no proof of a disadvantage caused by a marriage when one partner makes more money than the other in their chosen occupation. One might consider that the involvement of both partners in a marriage, in a joint activity such as fostering children, could properly be considered an advantage.

- [81] The quantum and duration of support under the Separation Agreement is consistent with the Guidelines and the Spousal Support Advisory Guidelines (the "SSAG"). In para. 11 of the Separation Agreement, the claimant agreed to pay spousal support in the amount of \$273 monthly to the respondent until such time as the respondent remarries or cohabits with another person in a common-law relationship or dies, whichever ever will come first. Spousal support commenced on March 8, 2019, and has been paid semi-monthly. Child and spousal support was agreed by the claimant in the Separation Agreement to be the sum of \$1,739 of child support and \$273 for spousal support calculated on the "with the child support" formula in the Guidelines. These payments were calculated at a time when the respondent was the primary care provider for the children who spent only weekends in the care of the claimant. Later, when shared parenting was established on November 28, 2019, both child and spousal support was adjusted to reflect shared parenting, again based on the Guidelines.
- [82] The usual amount to be paid in a shared parenting situation is determined by calculating each party's entitlement to child support based on his or her Guidelines income and then subtracting the smaller support amount from the larger support amount creating an "offset" which is the amount of child support payable. Taking into account, the incomes of the parties for the year ending December 2022 and applying adjustments, discussed in the submissions of the parties, the guideline income of the claimant is \$130,429 for which the claimant would have responsibility to pay \$1,914. per month to the respondent in child support. The respondent would have a guideline income of \$74,247 and would have responsibility to pay \$1,152 per month for child support to the claimant. Offsetting these amounts results in an obligation for the claimant to pay \$762 a month in child support, in the circumstance of shared parenting.
- [83] Further, in so far as practicable, the terms of the Separation Agreement promote the economic self-sufficiency of each party. As noted above, during the period that the parties were engaged in fostering children, this was an activity which was described as a "passion" of the respondent. The parties worked together in fostering children in need of appropriate care; there was a fulfilment of the respondent's working goals. The claimant continued with his work in heavy equipment trade and also assisted in the fostering activities. There was no evidence that the respondent had sacrificed opportunity for further education or other employment opportunities. Her passion was to foster children and that was what the activity in which the parties were engaged.

- [84] The decision to return to Kamloops was again a mutual decision of the parties who wished to return near to their long-time friends and family members in the Kamloops area. In Kamloops, the respondent obtained work in the social work field and it was her intention to obtain a Masters degree. Her efforts in this regard were interrupted when she failed to complete a course in the Masters program. She told the Court the reason for that failure was not something she wished to discuss in the court, but whatever the reason, in the circumstances of the separation and re-partnering of the parties, there has been no suggestion that any adverse circumstance could be attributed to the actions of the claimant. Whatever steps the respondent intended to take to advance her career by building her academic record and credentials, has been slowed by conduct attributable only to the respondent, which is not supported by evidence that the failure was attributable to the marriage nor a consequence thereof. Both of the parties have re-partnered and begun to move on with their lives while sharing parenting of the Children.
- [85] At each stage of the marriage, the parties' economic decisions were made jointly and not for the advantage of one party or the other; this is entirely consistent with the intention of the parties and in substantial compliance with the Divorce Act provisions.
- [86] Additionally, the duration of support is consistent with the SSAG. A feature of the Separation Agreement, as noted above, is that spousal support shall end if the respondent lives in a common-law relationship. A common-law relationship is one that endures for two or more years of living together in a marriage-like relationship.
- [87] In the second stage of the Miglin test, the Court must analyse the agreement at the time of the application for spousal support to consider whether it represents the original intentions of the parties and whether the agreement continues to comply with the Divorce Act. The party seeking to be awarded spousal support above the terms of the contract needs to demonstrate that new circumstances, not reasonably anticipated by the parties at the time of the agreement, would merit the Court's intervention. Current circumstances must "represent a significant departure from the range of reasonable outcomes anticipated by the parties, in a manner that puts them at odds with the objectives of the Act" before the Court will intervene: Miglin at para. 91.
- [88] In Reid v. Reid, 2017 BCCA 73, the Court of Appeal stated the following with respect to the second stage of the Miglin analysis:
- [58] The second stage of the Miglin inquiry is concerned with events that occur after the agreement is entered into. Even if the agreement was entirely proper at its inception, unforeseen circumstances may lead a court to award spousal support notwithstanding a separation agreement that purported to finally determine the issue:
- [87] Where negotiation of the agreement is not impugned on the basis set out above and the agreement was in substantial compliance with the general objectives of the Act at its time of creation, the court should defer to the wishes of the parties and afford the agreement great weight. Nevertheless, the vicissitudes of life mean that, in some circumstances, parties may

find themselves down the road of their post-divorce life in circumstances not contemplated. Accordingly, on the bringing of an application under s. 15.2, the court should assess the extent to which enforcement of the agreement still reflects the original intention of the parties and the extent to which it is still in substantial compliance with the objectives of the Act.

[Emphasis added.]

- [89] As noted above, the first child born to the parties had very serious medical challenges to overcome from the start of his life, but apart from the fact that both parents were involved in the intense care of the child, there was no economic advantage or disadvantage caused by the claimant or the respondent. The career of the claimant continued but not entirely in the same business and not with unbridled success as the Business ended in failure. The parties agreed to move to the Northwest Territories for a number of factors, not specifically related to the career of either of them. The sale of the Kamloops house at the time of that move to the north provided an opportunity for cash to become available and repay the student loans exclusively tied to the Social Work degree earned by the respondent, and therefore to her benefit.
- [90] The evidence before this Court was that the parties attempted to create economic fairness when they prepared and signed the Separation Agreement. There is now no basis to set aside that Agreement.
- [91] The Separation Agreement provided for regular reviews of support paid by the claimant, however, no such reviews have taken place due to circumstances beyond the control of the parties including meeting restrictions imposed during the Covid-19 lockdown, also the respondent suffered very painful symptoms from a back disc injury from February to March 2019. The cause of this injury was not described and any sequelae went unmentioned in the evidence. Based on the evidence, I am unable to assign any responsibility or consequence to either party for a failure to conduct these reviews.
- [92] The Separation Agreement continues to represent the parties' intentions and continues to be in substantial compliance with the objectives of the Divorce Act.
- [93] With respect to entitlement to an adjustment in spousal support, the respondent cited *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420 and *Chutter v. Chutter*, 2008 BCCA 507. In *Bracklow*, the marriage followed four years of living together, when the parties shared household expenses equally but the wife encountered a series of serious health problems which prevented her from working and she was admitted to hospital with psychiatric problems. She had not worked since and was unlikely to work again. The respondent had remarried and his new wife was employed. Appellant had previously obtained spousal support which was increased and also received disability benefits. The trial judge determined that no economic hardship befell the appellant as a result of the marriage or its breakdown and the appellant was not entitled to support.

- [94] The Supreme Court of Canada noted that during marriage spouses owe one another a mutual duty of support but when a marriage breaks down, however, the presumption of mutual support no longer applies. The Divorce Act allows for three bases for spousal support which are compensatory, non-compensatory and contractual.
- [95] In the case at bar, there was never a circumstance of need created by ill-health or other dire circumstance, except for the ill-health of the first child prior to the marriage. Throughout the marriage the respondent had been employed except for short mutually-agreed unemployment between her fostering career, work in Yellowknife and return to Kamloops with the beginning of a Masters program.
- [96] While instructive, the circumstances which give rise to the decision in Bracklow are completely distinguishable from the case at bar. Bracklow is based on the significant deterioration of the appellant during a six year relationship, because when the Bracklows separated, "Mrs. Bracklow was ill and with no means of support." While, the respondent earned less than the claimant in the case at bar, she had chosen her own career path during the marriage, unrelated to and not reliant upon the employment of the claimant. In the case at bar, entitlement of the respondent arises only from the Settlement Agreement and there is no basis for compensatory support based on an economic disadvantage due to the breakdown of the marriage nor needs based non-compensatory support. The latter would be based on such factors as an exclusive stay at home care for children, focusing on career goals to allow for primary care of children, and acceptance of a lower standard of living by the respondent to allow the other spouse to succeed; which were not present in any of the respondent's employment situations.
- [97] The leading case on spousal support of *D.B.S. v. S.R.G.*, 2006 SCC 37, is actually a collection of four appeals heard at the time. Two of these cases involve claims for retroactive awards where no support payments had ever been paid by the other parent, the other two appeals involved request for additional funds to be added to original awards. At para. 4 the Court stated:

At the same time, however, the similarities between the four appeals are unmistakable. Each case involves a recipient parent who failed to apply to a court for an increase in child support payments in a timely manner. Most unfortunate, each case involves children who lived prolonged periods without the support they were due. Whatever the outcome of these individual cases, the ultimate goal must be to ensure that children benefit from the support they are owed at the time when they are owed it. Any incentives for the payor parents to be deficient in meeting their obligation should be eliminated.

[98] At para. 5, the Court stated:

Against this backdrop, it becomes clear that retroactive awards cannot simply be regarded as exceptional orders to be made in exceptional circumstances. A modern approach compels consideration of all relevant factors in order to determine whether a retroactive award is appropriate in the circumstances. Thus, while the propriety of a retroactive award should not be

presumed, it will not only be found in rare cases either. Unreasonable delay by the recipient parent in seeking an increase in support will militate against a retroactive award, while blameworthy conduct by the payor parent will have the opposite effect. Where ordered, an award should generally be retroactive to the date when the recipient parent gave the payor parent effective notice of his/her intention to seek an increase in support payments; this date represents a fair balance between certainty and flexibility.

[99] In the case at bar, the respondent has acknowledged that the claimant has overpaid child support, while at the same time the respondent is seeking an increase in spousal support for a period of 13 years from 2019 to 2032. This would appear to be an order inconsistent with the provisions of the Separation Agreement.

[100] In *D.B.S. v. S.R.G.*, 2005 ABCA 2, the appellate level decision dealing with three of the four cases under appeal, Paperny J.A., speaking for a unanimous Court, observed that parents have a mutual obligation to support their children, and this obligation translates into the legal basis for child support. Justice Paperny, at paras. 13-20, also noted that child support is the right of the child, that courts are always free to intervene to determine the proper level of support and that incidental benefits to the custodial parent cannot come diminish the quantum of child support due.

[101] With respect to spousal support, the parties dispute the appropriate range for spousal support. The appropriate basis for entitlement to spousal support is contractual as there the Separation Agreement is the foundation of support. Initially, the Separation Agreement, provided a figure in the "low" range, the range agreed to by the respondent as her need at that time was "low". It is highly positive that the respondent has continued working for pay with the exception of the first year after the birth of a child when the medical needs of the child were profound. Upon return of the respondent following maternity leave, she took up fostering children and an increase in salary from her previous job with a government ministry. She continued working after they moved to Yellowknife; there with a much improved salary. The move to Yellowknife was a deliberate end to the fostering career. In Yellowknife, both parties enjoyed higher salaries, and future increases in salary seemed assured, but the parties jointly determined to return to Kamloops, with knowledge that salaries would be at the lower level.

[102] There was no demonstrated loss nor detriment proven by the respondent prior to or post-separation, it being noted that once the parties began shared parenting, the claimant made a substantial upward monthly payment of spousal support from \$273 per month to \$696 per month effective October 1, 2020.

The case of *Boekhoff v. Boekhoff*, 2016 BCCA 33, involved a husband who had in 1997 when divorced, been ordered to pay his wife, the appellant, spousal support of \$800 per month. The parties had been married for 20 years. During the course of the marriage, the appellant primarily remained at home to care for the two children of the marriage. In the fall of 2000 or 2001, the parties met to discuss continuation of spousal support. Although there was some controversy

about the persons who attended that meeting, the parties did agree the claimant would only pay \$200 per month for spousal support. Spousal support payments continued for the following ten years without the appellant taking issue with the spousal support being paid in the amount of \$200 per month.

- [103] The appellant instructed her lawyer as of September 8, 2010, to demand reinstatement of payment of \$800 per month and arrears of spousal support over ten years in the amount of \$70,000 inclusive of interest. The respondent responded that he relied upon the agreement to reduce spousal support to \$200 per month. In 2014, the appellant commenced an application for payment of arrears, then in the amount of \$99,000 and reinstatement of increased monthly support payments.
- [104] The trial judge found, as a fact, that the appellant agreed the reduction to \$200 in late 2000 or early 2001, and the appellant was thereby disentitled from claiming the full amount; citing the public policy against "hoarding". The Court also found that ordering payment of the arrears would work hardship on the respondent. The trial court ordered that the arrears were rescinded from January 1, 2001, to September 1, 2014 (the trial date). On a prospective basis, the trial judge also reinstated the spousal support in the amount of \$800 per month on an indefinite basis.
- [105] The Court of Appeal found that the appellant was estopped from asserting entitlement to arrears resulting from the reduced payments agreed by the parties. The Court of Appeal then considered the separate question of whether the arrears had been appropriately cancelled under the authority of the Divorce Act, in particular, s. 17(7)(a) - (d) thereof.
- [106] The case of *Cawker v. Cawker* (1995), 18 R.F.L.(4th) 268, 1995 CanLII 1627 (B.C. C.A.), highlights both the significance of an agreement to reduce support with the recipient's delay in seeking enforcement of the original order. In *Cawker* at para. 25, the Court found it was very significant that the wife, despite having many opportunities to seek to raise spousal support amounts had not done so for over nine years. Despite the fact the trial judge failed to consider s. 17(7) of the Divorce Act, the Court of Appeal found the wife had waived entitlement to arrears of spousal support payments. The Court in *Boekhoff* concluded at para. 63 this was an appropriate case for arrears to be cancelled pursuant to ss.17(4.1) and 17(7) of the Divorce Act.
- [107] In *Boekhoff*, the Court went on to consider entitlement of the wife to ongoing spousal support, but that was in a marriage much longer, over 20 years, than the case before this Court (13 years). In this case, a marriage-like relationship commenced in 2005 and an actual marriage lasted four years (2014 to 2018), no court order has been made. Following separation, there was a period of primary parenting and then a material change in circumstance occurred when the parties moved into a shared parenting regime. At that point both parties had an obligation to pay child support, or at least payment of an offset amount by the party with the highest income. The claimant made spousal and child support payments in this case.

- [108] Based on the reasoning in Boekhoff, the claim for arrears of child and spousal support set out in Ex. 1 and 2, schedules prepared by the Family Maintenance Enforcement Program and any interest or penalties claimed thereon is hereby cancelled entirely in this case, pursuant to ss. 17(4.1) and 17(7) of the Divorce Act.
- [109] As noted in the Boekhoff at para. 71, the issue before the Court is not simple the equality of incomes, but rather the Court should consider if the parties were enjoying a standard of living comparable to the standard of living enjoyed by the parties during the marriage or marriage-like relationship. In this case, both parties have re-partnered, are living in what by all accounts are large family homes, which include rooms for the children near their respective schools, where all four parents are working in their chosen employment. There was no evidence of any inadequate or substandard living conditions. The living conditions of the parties otherwise, based on the evidence, seem comparable.

Other Claims by the Respondent

- [110] At the opening of the trial, it was anticipated that a claim would be made by the respondent against the claimant with respect to the Family Investment. The advance of \$50,000.00 was invested in the Business then operated by the parties. The respondent agreed that the claimant had re-paid the advance in full, and no claim was advanced in this proceeding. No order will be made in relation to this matter.
- [111] The expenses listed by the respondent at page 14 of the Financial Statement of the respondent were at best an estimate by the respondent of the expenses for one of the Children because that child had unfortunately broken his leg in an accident, thereby reducing his skiing and hockey activities and related expenses for the period of his recuperation. The other child is entitled to grants for individuals with physical impairments which reduce expenses. That said the respondent was not able to provide actual costs from memory while testifying. It is clear that the parties are required to make contributions for s. 7 expenses, which are agreed, in proportion to their income.
- [112] During the course of the trial, the parties also agreed that commencing on June 1, 2023, and in each year following so long as either of the children is a "child of the marriage" as defined in the Divorce Act, s. 2(1) and or spousal support is payable, the parties shall exchange a complete copy of their income tax return for the prior year with all attachments and any notice or assessment or reassessment received in the prior year.
- [113] Submissions were also made alleging delay by the claimant in bringing this family file before the court. Counsel for the claimant provided valid reasons for the delay in this action was filed including the closing of courts during the COVID-19 pandemic, the illness of counsel and the lack of court time available. These explanations are accepted as reasonable and were not challenged. It should also be noted that there are two parties in litigation so that either party may bring a matter to the attention of the court without delay, in chambers, a trial management conference or a settlement conference if they are

dissatisfied with progress or lack of progress of the other party. That did not occur in the case at bar.

- [114] The respondent repeatedly submitted that the failure to impose a remedy for the alleged delay by the plaintiff and its consequences would create a precedent for other litigants to do the same. Given that access to most family files by others is restricted by regulation, and only reported cases are accessible, this submission lacks an evidentiary or practical foundation.

Conclusion

[115] The respondent shall pay to the claimant:

- a. the sum of \$9,163.42 representing one-half of the family debt related to the Thunder Jet boat.
- b. the sum of \$1,201.58 presenting one half of the family debt related to legal fees for release of the Line of Credit.
- c. the sum of \$24,315.00 related to the overpayment of child and spousal support by the claimant to the respondent and underpayment by the respondent for the period from September 1, 2020 up to the date of trial.
- d. With respect to spousal support, there will be an order that pursuant to the provisions of para. 23 of the Separation Agreement that there be a hearing before the Registrar of this Court to determine the status of the relationship of the respondent and L.B. and for a report by the Registrar to this Court with respect to the status of that relationship in relation to "common law" relationships. The Registrar shall have the authority to hold a pre-hearing conference or conferences for the purpose of obtaining necessary documents from the parties and other information prior to the hearing aforesaid.
- e. The hearing before the Registrar aforesaid shall be scheduled by either of the parties to be conducted within 60 days of January 1, 2024, or so soon thereafter as a hearing date is available before the Registrar, convenient to counsel. This Court shall remain seized of the issue of whether the respondent and L.B. have been living together for a period sufficient to find there is a common-law relationship between them and if there is any ongoing entitlement of the respondent to spousal support pursuant to the Separation Agreement.
- f. The consent orders contained in para. 3(a) through (j) above are granted.
- g. Each party shall remain a guardian of the Children. In sharing all parental responsibilities of the Children, the parties will exercise those responsibilities as follows:
- i. Each guardian will have the obligation to advise the other guardian of any matters of a significant nature regarding the Children;

- ii. Each guardian will have the obligation to discuss with the other guardian any significant decisions that have to be made concerning the Children, including significant decisions about the health (excluding emergency decisions), education, religious instruction and general welfare;
 - iii. In the event that the guardians cannot reach agreement on a significant decision, despite their best efforts to do so, each guardian shall have the right to apply for directions from the Court; and
 - iv. Each guardian will have the right to obtain information concerning the Children directly from third parties, including but not limited to teachers, counsellors, medical professionals, and third party caregivers.
- h. the parties shall be permitted to communicate with one another regarding all matters respecting the Children by the use of email.
 - i. The claimant shall pay to the respondent the sum of \$762 per month, and in accordance with his biweekly pay schedule, for the support of the Children commencing on January 1, 2023 and continuing each and every month thereafter, for as long as the Children are eligible for support under the Divorce Act (Canada) or until further agreement of the parties or court orders, with these payments representing the net monthly amount owed for child support pursuant to the Federal Child Support Guidelines and in accordance with there being shared parenting of the Children.
 - j. There will be an order, commencing in 2023, and within 30 days of this order, and by July 1 of each and every year thereafter for so long as child support is payable, the parties shall provide each other with complete Income Tax returns with all attachments, and forth with thereafter adjust the amount of child support to be paid based on any changes in the incomes of the parties and in accordance with the Federal Child Support Guidelines.
 - k. Notwithstanding there being an annual review of child support, each party shall be at liberty to apply to the court for a variation in the obligation of the either party to pay child support and/or there being spousal support payable based on a material change in circumstances.
 - l. With respect to the declaration for the amount of spousal support paid by the claimant to the respondent for the period from October 1, 2020 to August 31, 2023 (the approximate date hereof) or 35 months at \$696.00 per month, it is declared that the amount of spousal support paid by the claimant to the respondent was \$24,360.00.
 - m. The parties did not have a particular opportunity to make submissions on the payment of costs. Normally, the successful party is entitled to costs and in this case the claimant has been substantially successful. If the parties are unable to agree on the payment of costs, they may set down a hearing for one hour before this Court within three months of the release of these Reasons.

"Ball J."

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