

CANADA / JUDGMENT

Sabogal v. Sabogal

2010 BCSC 201

COURT

Supreme Court of British Columbia

DECIDED

15 February 2010

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2010 BCSC 201 Sabogal v. Sabogal IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Sabogal v. Sabogal, 2010 BCSC 201 Date: 20100215 Docket: E063858 Registry: Vancouver Between: Madalena Virginia Sabogal Plaintiff And Mario Sabogal and Nor-est Radiators Ltd. Defendants Before: The Honourable Madam Justice Hyslop Reasons for Judgment Counsel for the Plaintiff: H.D.M. Edmonds Mario Sabogal appeared on his own behalf and on behalf of Nor-est Radiators Ltd.: Place and Date of Trial: Vancouver, B.C. January 4-7 and January 14, 2010 Place and Date of Judgment: Vancouver, B.C. February 15, 2010

- [1] This is a family law proceeding. The issues are divorce, spousal support pursuant to the Divorce Act, 1985, c. 3 (2nd Supp.) and division of property pursuant to Part 5 of the Family Relations Act, R.S.B.C. 1996, c. 128 [FRA]. The granting of a divorce is not in dispute.
- [2] The plaintiff, Madalena Virginia Sabogal, and the defendant, Mario Sabogal, are husband and wife. The defendant, Nor-est Radiators Ltd., is a company incorporated under the laws of British Columbia. Its sole director and shareholder is Mario Sabogal.

BACKGROUND

Ms. Sabogal

- [3] Ms. Sabogal emigrated from Santiago, Chile to Canada in June of 1976; in particular to British Columbia. Ms. Sabogal was then 22 years old and single. Ms. Sabogal was the youngest of five children.
- [4] Her parents and one brother have both passed away. She has two sisters, both of whom reside in Venezuela, and one brother who resides in Chile. The surviving brother once resided in British Columbia, returning to Chile approximately 15 years ago.
- [5] After arriving in British Columbia from Chile, Ms. Sabogal took a six-month course to learn English. Immediately after, she went to work at a nursing home, working there until the birth of her first child.
- [6] Ms. Sabogal was born January 2, 1954; she is presently 57 years old. Ms. Sabogal is currently working as a seamstress. Mr. Sabogal

- [7] Mr. Sabogal was born August 16, 1954; he is presently 57 years old. He is a mechanic by trade and is currently operating the defendant company. He is originally from Cartago, Columbia.
- [8] Mr. Sabogal was educated and worked as a young boy in an elementary school operated by nuns and priests. He took a mechanics course by correspondence. A nun at the school told him that British Columbia needed mechanics.
- [9] Mr. Sabogal stated that he was desperate and his family was poor. His parents mortgaged their home so that he could come to Canada as a visitor. He eventually obtained his legal status in Canada. He was aged 19 when he arrived in British Columbia. He had \$25.00 in his pocket. He eventually found in work. In 1971, he took a course at B.C.I.T. in auto mechanics, auto transmissions, cooling systems, charging systems, as well as some courses for managing a business. At some point in time, and probably prior to his admission into B.C.I.T., he took English courses.
- [10] At age 26, Mr. Sabogal established Mario's Automotive Service ("Mario's Automotive"). Mr. and Ms. Sabogal
- [11] Mr. and Ms. Sabogal met each other in British Columbia. They started to live together in 1977. They were married on September 15, 1984. They separated on November 26, 2004.
- [12] It took Mr. Sabogal about two years to build up Mario's Automotive. He had no employees until recently, but had apprentices from time to time. He worked long hours. He usually worked five days a week and sometimes, when required, six days a week. Mr. Sabogal operated Mario's Automotive from the same leased premises for a period of approximately 28 years. This changed in 2004, when the lease was not renewed.
- [13] During the marriage, Ms. Sabogal performed minor services for Mario's Automotive which were to pick up parts from the wreckers or dealers, sort out papers and deliver them to the accountants. She participated in the completing of the PST and GST returns.
- [14] The separation of Mr. and Ms. Sabogal occurred when Mr. Sabogal assaulted Ms. Sabogal. As a result, the RCMP removed Mr. Sabogal from the home. A restraining order was ordered, which was lifted about three years ago. The Children
- [15] In this family law proceeding there is no claim relating to the children. However, given the length of this marriage and the issues, it is important to refer to the Sabogal children.
- [16] Ms. Sabogal obtained an ex-parte interim order from the Provincial Court of British Columbia. The court ordered that Ms. Sabogal pay Ms. Sabogal, starting January 1, 2007, the amount of \$464.00 per month. Mr. Sabogal has not paid any of the payments pursuant to this order. Ms. Sabogal has not pursued its enforcement. She stated in her evidence she did not do so because she was receiving the rents from the residences.
- [17] Three children were born to Mr. and Ms. Sabogal: Mario Jr. on February 2, 1985, Natalie, born May 30, 1988 and Bianca, born March 23, 1991.

- [18] Upon the birth of Mario Jr., Ms. Sabogal left the workforce at Mr. Sabogal's request. There is no evidence before me that Ms. Sabogal disagreed, so I assume this was the arrangement that she and her husband made. Ms. Sabogal did not return to the workforce until 2007. During the years that she was out of the workforce she stayed home and cared for the children. She drove the children to school, lessons, participated in car pools involving other children and drove the children to their activities. She was responsible for cleaning, laundry, making all meals, attended the children's events such as "Meet the Teacher" and events that she and the children were involved. Ms. Sabogal took a position in the uniform shop at the children's school which resulted in free tuition for the children. Ms. Sabogal's evidence was that Mr. Sabogal was not very involved with the children.
- [19] Mr. Sabogal did some of the shopping, which was acknowledged by Ms. Sabogal. Mr. Sabogal remembers attending to some of the children's needs and recalls happy times playing with the children, helping to decorate the house for birthday parties and renting movies for the children. Family vacations occurred during the summer months, which Mr. Sabogal took great pride in describing. He acknowledges that he worked long hours at his business.
- [20] Mario Jr. is a civilian who teaches flying for the air force in Manitoba. Prior to his employment, he completed a four-year course in Abbotsford. His parents purchased a condominium for him to reside while attending school. Ms. Sabogal estimates that after separation she spent as much as \$60,000.00 on Mario Jr.'s flying. In addition, Ms. Sabogal paid Mario Jr.'s condominium expenses and provided food for him. Mr. Sabogal also contributed to Mario Jr.'s flying after separation. Mario Jr. paid his tuition fees from student loans.
- [21] Natalie has completed a three-year science degree. She just completed one upgrading course. Her long-term goal is to attend the University of British Columbia and enrol in engineering. However, her plans are to tour Europe, leaving in March of 2010. She is presently working in a coffee shop and living with Ms. Sabogal.
- [22] Bianca graduated from high school in June of 2009. She works eight to ten hours per week at a restaurant and she resides with Ms. Sabogal. She is registered to take two courses at Capilano College starting January of 2010. It is unlikely that she will be employed while attending school. RESIDENTIAL PROPERTIES
- [23] In 1983, and prior to their marriage, Mr. and Ms. Sabogal purchased their first home: 1712 Ross Road, in North Vancouver ("Ross Road"). Ross Road was purchased with a down payment of approximately \$25,000.00, and borrowed money secured by a mortgage. A further \$25,000.00 was paid sometime after the purchase of Ross Road. Of that amount, \$7,000.00 was borrowed from an acquaintance of Mr. Sabogal.
- [24] After purchasing Ross Road, Mr. and Ms. Sabogal built a suite in the downstairs of the house where the Sabogal family resided. They rented the upstairs of Ross Road.
- [25] While living at Ross Road, their two older children were born.

- [26] In 1989, Mr. and Ms. Sabogal purchased 2893 Wembley Place, in North Vancouver ("Wembley Place") in which the family resided.
- [27] Wembley Place was purchased for \$235,500.00 and financed by two mortgages, one for \$100,000.00 registered against Ross Road and \$130,000.00 mortgage registered against Wembley Place. After the purchase of Wembley Place, Mr. Sabogal built a suite in the basement for rental purposes. He eventually added an addition to Wembley Place which housed a sewing room and an area for a washer and dryer.
- [28] Mr. and Ms. Sabogal kept Ross Road renting it out as two separate rental units.
- [29] In 1993, Mr. and Ms. Sabogal purchased for \$272,500.00, 1151 Arborlynn Drive ("Arborlynn Drive") which contained two rental units. It was financed by borrowing \$299,000.00 secured by a mortgage on Ross Road and Arborlynn Drive. They continued to rent those units.
- [30] After the purchase of Arborlynn Drive, Mr. and Ms. Sabogal continued to reside in the upstairs of Wembley Place and had five rental units; two on Ross Road, one in Wembley Place and two in Arborlynn Drive.
- [31] Ms. Sabogal looked after placing tenants in the rental units, collecting rents and depositing them in the bank. Ms. Sabogal looked after paying the bills related to the rental units. She cleaned up the units and readied them for new tenants. Mr. Sabogal did repairs, and those he could not do, Ms. Sabogal arranged for them to be done. In his evidence, Mr. Sabogal gave many examples of work he did on the residences that he and Ms. Sabogal own. As an example, he replaced the roof on two of the residences. He did a renovation along with a paid carpenter on another residence. This is not an exhaustive list of the work he did on the houses. After separation, Mr. Sabogal assisted in the clean-up of Ross Road when the downstairs unit flooded in January of 2009. Ms. Sabogal paid for the out-of-pocket expenses.
- [32] By 1999, Mr. and Ms. Sabogal owned Ross Road, Wembley Place and Arborlynn Drive free and clear of any financial encumbrances. In 1999, Mr. and Ms. Sabogal borrowed \$60,000.00 which was secured by a mortgage on Wembley Place. Mr. Sabogal said that he needed an expense to write-off. The funds, that is the \$60,000.00, were used to buy a van for Ms. Sabogal, and to take the family on a holiday across Canada. The van, a Honda Odyssey, has depreciated starting in 1999 as against Mr. Sabogal's income from Mario's Automotive. NOR-EST RADIATORS LTD. AND MARIO'S AUTOMOTIVE SERVICE
- [33] When Mario's Automotive lease ended, Mr. Sabogal brought his business home to Wembley Place and operated Mario's Automotive from the home for a period of about six months. Wembley Place is located in a residential neighbourhood. The neighbours were upset with this event, and eventually the District of North Vancouver became involved, prohibiting Mr. Sabogal from continuing his business from his home.

- [34] Mr. Sabogal looked at places for lease, taking Ms. Sabogal with him from time to time. Mr. Sabogal concluded he would spend more on rent than if he were to buy his own place in which to operate his business. He had, for some time, wanted to buy something. Mr. Sabogal found such a place which had an existing business. The property is owned by the defendant, Nor-est Radiators Ltd. ("Nor-est").
- [35] Mr. Sabogal purchased the shares in Nor-est. In order to do so, he decided to mortgage Ross Road, Wembley Place and Arborlynn Drive rather than mortgage the real property of Nor-est, as residential interest rates were less. Ms. Sabogal was reluctant to mortgage the homes. Ms. Sabogal stated that Mr. Sabogal pressured her into signing the mortgage so that the Nor-est property could be purchased. Mr. Sabogal would follow Ms. Sabogal around talking about it, and spoke to friends hoping that they would bring pressure on her to mortgage the properties. On one occasion, he was waiting outside Save-On-Foods wanting to talk about the mortgage. When she refused, Mr. Sabogal slammed his car door and left. Finally, Ms. Sabogal relented and she and Mr. Sabogal signed a mortgage for \$870,000.00 in favour of the North Shore Credit Union over Ross Road, Wembley Place and Arborlynn Drive. The mortgage was signed August 3, 2004 and registered toward the end of October of 2004. Mr. Sabogal took over the business of Nor-est in November of 2004, the same month the Sabogals separated.
- [36] No documents were provided at this trial for the purchase of the shares of Nor-est, nor any explanation given why shares were purchased in Nor-est as against purchasing the real property from the existing company.
- [37] Besides the money secured by the mortgage for the purchase of Nor-est shares, Mr. Sabogal paid an additional \$120,000.00 for the purchase of the shares. \$20,000.00 was raised from lines of credits, charge cards, and a small amount of money he had in a personal account. Nor-est gave back to the former owner of the Nor-est shares a \$100,000.00 mortgage secured against the Nor-est real property. The \$100,000.00 was interest free and required payments of \$5,000.00 per month. The first payment was paid on November 29, 2004, and the last payment was paid on June 29, 2006; a period of 20 months. The mortgage is paid in full.
- [38] The mortgage in favour of the North Shore Credit Union is presently the subject of a second foreclosure proceeding. The first foreclosure was resolved when Mr. Sabogal paid money to take it out of foreclosure.
- [39] The present foreclosure action was started in October of 2009, and on December 7, 2009, the court granted an order nisi with a redemption period of six months, and made a finding that \$791,799.85 was owed to the North Shore Credit Union with a per diem rate of interest of \$48.33. Judgment in that amount was ordered against Mr. and Ms. Sabogal as well as costs.
- ABBOTSFORD CONDOMINIUM
- [40] When Mr. and Ms. Sabogal's son, Mario Jr., started college in Abbotsford in 2003, they purchased, in their names, a condominium located in Abbotsford, in which Mario Jr. could reside during his college years. The purchase price of the condominium was \$50,000.00. The

condominium was purchased with cash. Ms. Sabogal's evidence is, and is not disputed by Mr. Sabogal, that Mr. Sabogal brought home a paper bag filled with cash. That was the money used to purchase the Abbotsford condominium. The dispute is as to the amount. Ms. Sabogal said the bag contained \$45,000.00 cash; Mr. Sabogal said it was \$37,000.00 cash. In any event, the money came from Mario's Automotive. It is unreported income. Mr. Sabogal's evidence was that sometimes when he received some cash, he would throw it into a tool box over the years. The condominium was sold in 2007 and the proceeds were divided equally between Mr. and Ms. Sabogal, with Mr. Sabogal declaring the capital gains on his tax return for the year 2007. THE VALUE OF ROSS ROAD, WEMBLEY PLACE AND ARBORLYNN DRIVE

- [41] Ms. Sabogal introduced the only evidence of value of Ross Road, Wembley Place and Arborlynn Drive. It is as follows: Property: Appraisal dated January 29, 2008: 2010 B.C. Assessment (as of July 31, 2009): The 2009 B.C. property assessment reflects the market value of the properties to July 1, 2007 or July 1, 2008, whichever is lower Ross Road: \$750,000.00 \$680,800.00 \$719,000.00 Wembley Place: \$810,000.00 \$762,900.00 \$806,000.00 Arborlynn Drive: \$640,000.00 \$579,700.00 \$588,700.00 TOTAL: \$2,200,000.00 \$2,023,400.00 \$2,113,700.00
- [42] There are no current appraisals of these residences. As a result, I have averaged the 2008 appraisal, the 2009 and 2010 B.C. assessments, and have come to the following value for each property. Ross Road: \$716,600.00 Wembley Place: \$792,966.00 Arborlynn Drive: \$602,800.00 VALUE OF SHARES OF NOR-EST'S REAL PROPERTY AND NOR-EST SHARES
- [43] Ms. Sabogal, through her counsel, retained Mr. David Jones of the appraisal firm Campbell and Pound, to appraise the real property owned by Nor-est located at 1171 and 1175 West 14th, North Vancouver, British Columbia. Mr. Jones provided a written appraisal dated October 8, 2009. Mr. Jones is a qualified commercial appraiser. Mr. Jones attended court and gave evidence.
- [44] Mr. Jones, in his evidence, stated that by January of 2009, the market for both commercial and residential real property had bottomed out and was as low as it got. By the fall of 2009, a miraculous recovery started, first by the residential market, and followed by the commercial market.
- [45] On October 1, 2009, the court granted an order permitting an appraiser, appointed by Ms. Sabogal, to have Nor-est's real property appraised. Mr. Jones attended the premises. Mr. Sabogal refused to permit Mr. Jones access to the premises. As a result, Mr. Jones had to calculate the square footage of the premises by using other means, such as pacing out the size of the building, and relying on aerial photographs and other documents in the possession of the District of North Vancouver. His calculation as to the size of the premises was 5400 square feet. He concluded in his written appraisal dated October 8, 2009, that the real property owned by Nor-est on October 8, 2009 was valued at \$1,045,000.00.

- [46] In fact, the building is 5966 square feet. Based on the premises being 5966 square feet, Mr. Jones' opinion was that the additional market value of the property is between \$75,000.00 and \$100,000.00. This makes the Nor-est real property worth between \$1,120,000.00 and \$1,145,000.00.
- [47] In anticipation of Mr. Sabogal presenting evidence to the court that the Nor-est building required approximately \$200,000.00 in repairs, Mr. Jones, in a written report dated January 4, 2010, adjusted the value downwards of the building by \$145,000.00. This would make the value of the real property owned by Nor-est, after taking into consideration the additional square footage, between \$975,000.00 and \$1,000,000.00. Mr. Jones made it clear that there had been no verification of the repair cost. In fact, Mr. Sabogal called no witnesses to confirm the cost of the repairs.
- [48] Mr. Sabogal attempted to introduce pictures of parts of the building which he claims need repair. I refused the introduction of these pictures as evidence as they had not been disclosed and, further, it was Mr. Sabogal who refused entrance to Mr. Jones to the building despite the court order. This would be unfair to Ms. Sabogal as Mr. Jones had no opportunity to view those parts of the building that Mr. Sabogal alleged needed repair.
- [49] Had Mr. Sabogal permitted Mr. Jones entry into the Nor-est building, he would have discovered two residential suites in the building.
- [50] I conclude that the Nor-est's real property's value is \$1,132,500.00. This figure takes into consideration the additional square feet and is an average of \$1,120,000.00 and \$1,145,000.00.
- [51] Mr. Sabogal attempted to introduce a report from a real estate salesperson, Donna Pinkowski. This report was not sent to Ms. Sabogal's counsel in accordance with Rule 40A of the Rules of Court. Counsel for Ms. Sabogal objected to the report going in as evidence, and rightly so. Ms. Sabogal was agreeable that the report be accepted for the sole purpose of Ms. Pinkowski's statement that she would list the property for sale at between \$700,000.00 to \$750,000.00, which does not include the business component or equipment.
- [52] In anticipation of the purchase of the Nor-est shares, Mr. Sabogal stated that he had an environmental study done at a cost of \$14,000.00. He further stated that he installed a new furnace in the premises of the Nor-est real property.
- [53] Counsel for Ms. Sabogal, in submissions, attempted to value Nor-est using the balance sheet and inserting the value Mr. Jones put on the property and any other assets of the company, in particular equipment, at book value. Goodwill was ignored. Mr. Sabogal's evidence was that the equipment is old, obsolete and some does not even operate. The B.C. assessment valued Nor-est's real property in 2008 at \$913,000.00.
- [54] I am not prepared to accept the analysis done by Ms. Sabogal's counsel in valuing the company. I will treat the Nor-est shares' value as that of the land. Ms. Sabogal's Income

- [55] Since separation, Ms. Sabogal has been receiving all the rents generated from Ross Road, Wembley Place and Arborlynn Drive. However, in 2006, Mr. Sabogal started to receive the rents from the basement suite at Arborlynn Drive. Ms. Sabogal paid all expenses relating to Ross Road, Wembley Place and Arborlynn Drive. Until January of 2009, Ross Road rentals were from two units. A flood occurred which put an end to renting out the basement suite at Ross Road. It is now used by the upstairs tenant of Ross Road. At the time of trial, Ms. Sabogal's rental income is as follows: Ross Road: \$1,423.00 Arborlynn Drive (upstairs): \$1,300.00 Wembley Place (downstairs suite): \$1,400.00 Total Gross Income: \$4,123.00
- [56] Up until 2007, neither Ms. Sabogal nor Mr. Sabogal declared the rental income from Wembley Place. Starting in 2008, Ms. Sabogal declared rental income from Wembley Place. In 2008, Ms. Sabogal's expenses for Ross Road and Arborlynn Drive totalled \$24,118.66. In 2007, the expenses for Ross Road and Arborlynn Drive were \$24,432.35. In 2008, the expenses for Wembley Place's suite were \$3,273.59. Due to the flood, the gross rent on Ross Road for 2009 will decrease by approximately \$7,500.00 per year. Barring any vacancies and unforeseen expenses, Ms. Sabogal's income from the present rental units is likely to be approximately \$49,400.00 gross per year for 2009, less expenses of approximately \$27,300.00; net rental income approximately \$22,100.00 for the year 2009. The rental income, together with her employment income, will give Ms. Sabogal an income of approximately \$45,000.00 per year. This does not take into consideration the sale or transfer of any units as a result of the competing claims for the division of property between Mr. and Ms. Sabogal.
- [57] Ms. Sabogal's income for the following years is: Year: Rental Income: Employment Income: Interest Income: Total: 2005: \$13,113.32 \$13,113.32 2006: \$14,200.00 \$14,200.00 2007: \$15,251.65 \$10,905.75 \$610.25 \$26,767.65 2008: \$24,291.77 \$18,170.73 \$774.18 \$43,236.68 2009: \$22,100.00 \$21,116.15 (Estimated) \$43,216.15 (Estimated)
- [58] Ms. Sabogal's rental income reduces with the sale or transfer of any of the residences. She does not anticipate her employment income will increase.
- [59] In March 2007, Ms. Sabogal returned to the workforce selling uniforms at \$11.00 per hour. In September 2007, she left that position due to a misunderstanding and an angry argument with her boss. She then obtained a job with Associated Fire and Safety as a seamstress starting at an hourly rate of \$12.00 per hour. At the time of trial, Ms. Sabogal's hourly rate of pay was \$13.00. She works 40 hours per week. However, there are times that she will be off work a day or two when there is no work. The business that she works for has three people employed, which includes the owner, Ms. Sabogal and one other person. The owner is 72 years of age and has had a heart attack. Ms. Sabogal has no reason to believe that her position will not continue.
- [60] Ms. Sabogal, at age two, contracted poliomyelitis which left one of her legs shorter than the other. This required her to have hip surgery in 1991. She cannot walk for long periods and cannot climb stairs. This disability does not affect her job as she performs her job in a seated position. Mr. Sabogal's Income

- [61] Mr. Sabogal's income for the following years is as follows: Year: Rental Income: Self-Employment Income: Total: 1993: \$594.50 \$6,538.71 \$7,133.21 1994: \$3,047.37 \$8,929.61 \$11,976.98 1995: \$11,779.72 \$1,752.48 \$13,532.20 1996: \$9,986.00 \$2,764.00 \$12,750.00 1997: \$11,662.00 \$2,396.00 \$14,058.00 1998: \$24,023.00 \$5,806.00 \$29,829.00 1999: \$7,833.00 \$14,005.00 \$21,838.00 2000: \$28,547.00 <\$1,883.00> \$26,664.00 2001: No tax return available. 2002: \$12,593.07 \$13,784.27 \$26,377.34 2003: \$9,306.31 \$4,218.52 \$13,524.83 2004: \$15,626.00 \$1,338.00 \$16,964.00 2005: \$13,113.32 \$0 \$13,113.32 2006: \$0 \$0 \$0 2007: \$12,443.00 (capital gains) \$0 \$12,443.00 2008: \$0 \$3,500.00 (T4 from Nor-est) \$3,500.00
- [62] After separation and up to and including 2006, Ms. Sabogal declared half the rental income and expenses. Ms. Sabogal, after separation, received all of the rents. According to Ms. Sabogal's income tax return, commencing in 2007, Ms. Sabogal declared all of the rent and rent expenses.
- [63] Nor-est's premise has two suites in it: one is occupied and rented by a former employee of Nor-est for which he pays directly to Mr. Sabogal \$450.00 per month; the other suite is occupied by Mr. Sabogal. It is difficult to determine what Mr. Sabogal's income has been since purchasing the shares of Nor-est. Mr. Sabogal has received no T4s or dividends from Nor-est other than in 2008 he was T4'd for \$3,500.00. He acknowledges that he takes cash from Nor-est. He claims he does not know how much.
- [64] Attached to Mr. Sabogal's financial statements (Form 89) were Nor-est's financial statements ending October 31, for the years 2006, 2007 and 2008. No financial statements were disclosed at this trial for the year ending October 31, 2005, which was the first year of Nor-est's operation with Mr. Sabogal as the owner. Nor were there any financial statements disclosed for Nor-est for the year ending October 31, 2009. Between 2006 and 2007, Nor-est's debt due to shareholders was increased by approximately \$15,000.00. The only person that could have increased this was the sole shareholder, Mr. Sabogal. Between October 31, 2007 and October 31, 2008, the shareholder's loan was decreased by about \$5,500.00.
- [65] Mr. Sabogal has diabetes (not insulin dependent), and has some heart problems for which he has recently been treated in hospital.
- [66] The financial statements show that the mortgage due to the North Shore Credit Union was paid by Nor-est as Nor-est deducted the interest expense in its financial statements for the years 2006, 2007 and 2008.
- [67] Mr. Sabogal states that when he first bought Nor-est the business was going well. When he bought the business it came with three employees. One employee quit shortly after the purchase of the business and one employee was laid-off one year ago. Besides Mr. Sabogal there is one other employee.
- [68] Nor-est's employee, Mr. Patterson, was T4'd in 2008 for \$55,928.63. The former employee, who was laid-off a year ago, lives in one of the suites in the Nor-est real property and was T4'd in 2008 for \$36,873.40, in 2007 \$39,017.05, in 2006 \$34,739.35 and in 2005 \$36,193.26.

- [69] Mr. Sabogal was T4'd only \$3,500.00 in 2008. According to him he earns no income.
- [70] Mr. Sabogal claims that the Nor-est business has declined caused by everything from electric cars to body shops providing services he used to provide. He also claims it takes him much longer to do a job than it used to. Despite his claim that business was not doing well, he has failed to provide any financial statements for the first year in which he operated Nor-est or the year 2009. By doing so, a comparison could be made.
- [71] There is no evidence as to what happened to Mario's Automotive. Both Mario's Automotive and Nor-est are advertised separately in two telephone directories for the years 2009/2010. The unanswered questions is: was the business of Mario's Automotive rolled into Nor-est, or does it remain a separate proprietorship continuing in business from the Nor-est real property?
- [72] Since April of 2006, Mr. Sabogal received the rent from the downstairs suite from Arborlynn Drive. At that time, the rent was \$1,250.00 per month. It changed from that amount to \$1,100.00 per month in June of 2007. The tenants left in November of 2009, leaving the place in chaos and owing rent. Mr. Sabogal made the repairs to the suite and it remains empty. He complains that the suite in which he resides in the Nor-est real property is cold and difficult for him to live in, but he has never explained why he did not move into the suite in Arborlynn Drive. He now claims that he and his disabled brother will be moving into the suite.
- [73] In contradiction to this, he stated that he would move in with his former employee in the suite he is occupying and lease out the suite that he is presently living in the Nor-est real property.
- [74] Mr. Sabogal gave evidence of the history of the purchase of Ross Road, Wembley Place and Arborlynn Drive residences.
- [75] Ross Road was purchased prior to the marriage of Mr. and Ms. Sabogal with the result that Ms. Sabogal's maiden name initially appeared on the title of the property which was changed almost nine years after their marriage from her maiden name to her married name and from tenants-in-common to joint tenants.
- [76] Upon Ross Road's mortgage being paid, Mr. and Ms. Sabogal purchased Wembley Place, just around the corner from Ross Road. Wembley Place then became the residence of the Sabogal family. As stated earlier, two mortgages were secured on Wembley Place and Ross Road to purchase Wembley Place. Mr. Sabogal made the decision to accelerate and increase the monthly payments so that the mortgage would be paid earlier than anticipated. The amount that was paid was \$5,800.00 per month. Of this amount, \$1,700.00 per month came from Mario's Automotive and the balance from the then rental units. In June of 1993, Mr. and Ms. Sabogal purchased Arborlynn Drive. Once again, Mr. Sabogal made the decision to accelerate the monthly payments to \$5,800.00 per month so that the mortgage would be paid earlier than anticipated.

- [77] In these proceedings, the evidence of personal income for Mr. Sabogal dates back to 1993. To pay out \$1,700.00 from Mario's Automotive on the mortgage would require a net income of \$20,400.00 per year. The most income Mr. Sabogal ever earned from Mario's Automotive, starting in 1993, was in 1999 which was \$14,005.00.
- [78] In order to make these \$5,800.00 payments, Mr. Sabogal must have a net income of at least \$69,600.00 per year. He stated that the source of his income was from rental properties and Mario's Automotive. This does not take into consideration that Mr. Sabogal was supporting a family of five people. It would not be unreasonable to assume that Mr. Sabogal's imputed income, taking into consideration income taxes not paid and support for his family, Mr. Sabogal's gross income could be as high as \$75,000.00 to \$100,000.00 per year.
- [79] In 1999, Mr. and Ms. Sabogal took out a loan for \$60,000.00 secured by a mortgage. The payments were \$5,167.95 per month. The loan was paid within a year. In order to make the payments on this loan, Mr. Sabogal's net income would have to be \$62,000.00 per year.
- [80] While giving evidence, Mr. Sabogal pulled a \$10.00 bill from his pocket and stated that he took this from Nor-est. This was intended to minimize the cash he takes from Nor-est. Mr. Sabogal declares no income from Nor-est other than the year 2008. Mr. Sabogal gave a charitable donation of \$1,000.00 in 2007, \$4,000.00 in 2009 and volunteered that he had given more than that to the mission in Columbia where he had been educated. I find it ironic that Nor-est could pay almost \$93,000.00 to employees in 2008, yet pay Mr. Sabogal nothing other than the \$3,500.00.
- [81] Between November of 2004 and July of 2006, Nor-est and/or Mr. Sabogal were able to maintain monthly payments on two mortgages: one mortgage to the former owner of Nor-est of \$5,000.00 per month; the other mortgage to the North Shore Credit Union, payments are unknown. However, Nor-est, in its financial statements for the year ending October 31, 2006, paid mortgage interest in the amount of \$46,773.00, the year ending 2007 paid \$47,871.00 and mortgage interest year ending October 31, 2008, \$25,245.00. For the period November 2004 to July 2006, Mr. Sabogal or Nor-est was able to pay at a minimum between \$8,000.00 and \$9,000.00 per month to meet the mortgage obligations to Mr. Lockwood (former shareholder of Nor-est) and the North Shore Credit Union. After the payment of the mortgage to the former owner of Nor-est, Mr. Sabogal's payment for interest only was approximately \$3,900.00 to \$4,000.00 per month. The capital amount of the mortgage due to the North Shore Credit Union has been reduced. In 2006, Nor-est had a modest loss. In subsequent years, 2007 and 2008, small profits were made. I can only conclude that Mr. Sabogal permitted the mortgage to the North Shore Credit Union to go into default to put pressure on Ms. Sabogal and to cause her distress. Ms. Sabogal gave evidence that this has caused her anxiety and distress. POSITIONS

- [82] Ms. Sabogal's position is the family assets should be reapportioned in favour of her by an additional 5% to 10%, or 55% to 60% of the value of the family assets, less the debt owing to the North Shore Credit Union. She bases this argument on s. 65(e) of the FRA, her need to become and remain economically independent and self-sufficient.
- [83] Ms. Sabogal seeks \$35,000.00 in lump sum support. Counsel for Ms. Sabogal stated that this would permit her to return to school and take a one-year course. Of this amount, \$10,000.00 would be for tuition and school fees and the balance, \$25,000.00, to replace one-year's income while she is attending school.
- [84] Ms. Sabogal proposed that she receive Wembley Place and Arborlynn Drive, and that she take \$114,650.00 of the debt. She proposes that Mr. Sabogal receive Ross Road, the Nor-est shares and take over \$685,350.00 of the debt.
- [85] Mr. Sabogal argues that the shares of Nor-est are not family assets and argues that Ms. Sabogal wanted nothing to do with Nor-est, and he had been only operating Nor-est less than one month prior to their separation.
- [86] Mr. Sabogal argues that he was responsible for the down payment on Ross Road when it was first purchased. Based on these facts, Mr. Sabogal argues the family assets should be reapportioned in his favour.
- [87] Mr. Sabogal's pleadings seek judicial reapportionment of the family assets in his favour on the grounds that he has contributed an unequal share of the acquisition, preservation and maintenance of these assets, and in the alternative, an equal division of the assets found to be family assets.
- [88] In Mr. Sabogal's pleadings he claims that some of the family assets have been conveyed away or dissipated by Ms. Sabogal.
- [89] Mr. Sabogal argues that Mr. Jones' appraisal is worthless and the value of the Nor-est property is \$730,000.00. He argued it should be put on the market and sold. He also argued that he would keep the property so as to become a landlord.
- [90] Mr. Sabogal argues that his wife is self-sufficient and able to support herself. He says she has a job and is very skilful. He claims that Ms. Sabogal was in the accounting business in Chile. He also argues that she could work with the elderly. He further argues that Ms. Sabogal should have her children (daughters) pay rent or she could take in students to supplement her income.

ANALYSIS

- [91] There is no dispute that Ross Road, Wembley Place and Arborlynn Drive are anything other than family assets pursuant to s. 58 of the FRA. All three residences were used for a family purpose. Both Ross Road and Wembley Place were used as the family home. All three residences provided income to Mr. and Ms. Sabogal. Ross Road and Wembley Place were

mortgaged to provide funds to purchase Arborlynn Drive. All three properties, including Ross Road, are owned by Mr. and Ms. Sabogal as joint tenants. Ms. Sabogal looked after the rental residences. Mr. Sabogal provided work renovating and repairing the rental residences. Given the length of the marriage and the length of the relationship, the original \$25,000.00 down payment, provided by Mr. Sabogal, is not sufficient to reapportion Ross Road in favour of Mr. Sabogal.

- [92] In *Murchie v. Murchie*, [1984] B.C.J. No. 1582, the court concluded that an equal division of family assets was fair despite the fact that the husband brought in substantial assets to the marriage that lasted 12 years.
- [93] Mr. Sabogal argues that the shares of Nor-est are not a family asset and should not to be considered in the division of family assets.
- [94] Section 59 of the FRA reads: Excluded business assets 59 (1) If property is owned by one spouse to the exclusion of the other and is used primarily for business purposes and if the spouse who does not own the property made no direct or indirect contribution to the acquisition of the property by the other spouse or to the operation of the business, the property is not a family asset.
- (2) In section 58 (3) (e) or subsection (1) of this section, an indirect contribution includes savings through effective management of household or child rearing responsibilities by the spouse who holds no interest in the property.
- [95] The residential units; that is, Ross Road, Wembley Place and Arborlynn Drive were put up as security for a loan so that Mr. Sabogal could borrow money to purchase the shares in Nor-est.
- [96] A similar situation occurred in *Campbell v. Campbell*, [1990] B.C.J. No. 1267 (B.C.C.A.), when a mortgage, guaranteed by the wife, was secured against a home inherited by the husband and secured against the family home. The proceeds were used to invest in four mutual funds. Three of the mutual funds were registered in the name of the husband and the other in the name of the husband and wife. The trial judge found the home and two of the mutual funds not to be family assets; the other two mutual funds were found to be family assets. Mrs. Campbell appealed.
- [97] Mr. Justice Legg concluded for the court that: By assisting in this investment plan she shared with the respondent the risk that the plan might not succeed. But if it did succeed, she was entitled to a share of the success. In my opinion, the Boyles Road property, when it was charged with the mortgage guaranteed by the appellant, for the purposes of providing capital to invest in the shares of mutual funds was used as a family asset or was part of a joint venture to which the appellant contributed. In my view, the trial judge erred in holding that the Boyles Road property was not a family asset in the particular circumstances of this case. I would accede to appellant's counsel's argument that the appellant is entitled to a half interest in this property. It is my further opinion that the trial judge erred in segregating the

mutual funds purchased in October from the funds purchased in September, and holding that the funds purchased in October were not family assets. The reasons given by the judge for taking this approach show that she considered that the mutual funds purchased in September, consisting of \$25,000 in the Industrial American Fund and \$50,000 in the Templeton Gr. Fund came from the proceeds of the mortgage of \$73,000 charged against the family home. Because the appellant held a joint interest in the family home, the judge reasoned that the appellant had an acknowledged beneficial interest which she put at risk. The judge distinguished the charge against the family home from the charge against the Boyles Road property. But that approach did not take into account the evidence that the raising of the monies to invest in the mutual funds purchased in September and purchased in October, were raised by mortgages granted on the family residence and the Boyles Road residence at the same time as part of a single plan or joint venture to invest in the four mutual funds.

- [98] In *Detta v. Detta*, [2001] B.C.J. No. 2081, Mr. Justice Melnick referred to *Campbell* at para. 39: Although not involving a business asset, the case of *Campbell v. Campbell* (1991), 26 R.F.L. (3d) 354 (B.C.C.A.) is of interest. In that case, the husband inherited a house from his mother. This house was not a family residence. He subsequently mortgaged the house. The wife signed the mortgage as guarantor. The trial judge found that the house belonged to the husband alone, and was not a family asset because it was inherited. The Court of Appeal overturned this decision, saying that because the wife had guaranteed the loan, she had contributed to the asset by taking a risk, and that therefore the house was a family asset. Although this case does not involve business assets, it does indicate the court's attitude regarding direct contribution to assets.
- [99] In *Detta*, the plaintiff wife signed a promissory note which proceeds were used in the purchase of a business in which the defendant husband had an interest with another investor. In the *Detta* marriage, the parties continued to live together only for several months after the money was borrowed. Mr. Justice Melnick found the shares of the business to be a family asset. He concluded:
- [40] I have no doubt whatever that both Ms. Belcher's direct contribution in signing or guaranteeing the loan to the Royal Bank of Canada and putting up, as security, substantial family assets and, to a lesser extent, her intercession with her father on behalf of Mr. *Detta*, were substantial and meaningful contributions to his being able to acquire the shares of *Caliper*. No less meaningful were her indirect contributions in being, effectively, his partner in life and helping enable him to achieve a position where he was not only able to afford to make the investment in *Caliper*, but to obtain the training and find the position of employment that eventually placed him in the position of being an appropriate person to become Mr. *Hambalek's* co-owner in the investment. It is true that the parties separated within months of the purchase of the shares in *Caliper*. To that extent, much of which has transpired, both positively and negatively, for the company since that time has not been due to any efforts of Ms. Belcher (although presumably her name is still on the loan with the

bank). That, however, does not make Mr. Detta's shares in Caliper any less a family asset.

- [100] The shares of Nor-est are owned solely by Mr. Sabogal. In order to purchase Nor-est shares, Mr. Sabogal needed the support of the residential properties due to their substantial value, and the fact they were owned free and clear. Basically, the Nor-est shares were purchased with borrowed money. Further, Nor-est was saving on the interest rate.
- [101] The Sabogals were married almost 20 years to date of separation. They lived together for 27 years to the date of separation.
- [102] The burden of proving that Nor-est shares are a business asset lies with Mr. Sabogal. Mr. Sabogal has not met that burden. I find that Nor-est shares are family assets.
- [103] Mr. and Ms. Sabogal are each seeking reapportionment of the family assets.
- [104] Mr. Justice Melnick reviewed the factors of s. 68 of the FRA and stated:
- [44] On reviewing the factors in s. 65 of the Family Relations Act, it is clear that the lengthy duration of this marriage militates in favour of equality of ownership of the Caliper shares. On the other hand, the duration of the period during which the parties have lived separate and apart in relation to the total amount of time Mr. Detta has owned those shares (all but three months) would suggest the opposite. The same point is relevant to the date when the shares were acquired. The property was not acquired by Mr. Detta either through inheritance or gift and so s. 65(1)(d) is not applicable. Mr. Justice Melnick reapportioned the shares in favour of Mr. Detta to 65%.
- [105] The purchase of the Nor-est shares occurred in the same month of the separation of Mr. and Ms. Sabogal. After the purchase of the Nor-est shares, it was Mr. Sabogal who operated the business of Nor-est. Ms. Sabogal was not involved with any of the day-to-day operations of the business.
- [106] Mr. Sabogal has received income and the benefits from Nor-est, though not declared.
- [107] Ms. Sabogal has maintained and operated the rental units in Ross Road, Wembley Place and Arborlynn Drive. She has received all the income and paid all the expenses, except one rental unit in Arborlynn Drive to which I have already referred.
- [108] Both Mr. and Ms. Sabogal, since their separation, have maintained the family assets which is a benefit to the other.
- [109] There is no factor pursuant to s. 65 of the FRA that would persuade me to reapportion the Nor-est shares in favour of Mr. Sabogal.

- [110] Mr. Sabogal's pleadings seek reapportionment on the basis that Ms. Sabogal has conveyed away family assets or dissipated them. There has been no proof that Ms. Sabogal has dissipated the family assets. Mr. Sabogal stated that the residences are not being looked after, for which he gave no details or particulars. The only family asset that Ms. Sabogal has sold was a tent trailer which had been used by the family. She sold it for \$1,900.00. I am prepared to order that Ms. Sabogal pay Mr. Sabogal the sum of \$950.00.
- [111] Ms. Sabogal seeks reapportionment of the family assets based on s. 65(1)(e) of the FRA: Judicial reapportionment on basis of fairness 65 (1) If the provisions for division of property between spouses under section 56, Part 6 or their marriage agreement, as the case may be, would be unfair having regard to ...
- (e) the needs of each spouse to become or remain economically independent and self sufficient,
- [112] She seeks reapportionment in her favour by 5% to 10% of the net value of the family assets.
- [113] Ms. Sabogal did not enter the work force until 2007. She will not be self-sufficient as a result of her earnings from her employment. She has demonstrated in her most recent financial statement sworn December 16, 2009, that she is able to look after herself based on her earnings and the rental income that she has been receiving.
- [114] Ms. Sabogal's share in the family assets and her stream of income has been and continues to be jeopardized by Mr. Sabogal and Nor-est failing to pay the mortgage owing to the North Shore Credit Union. Ms. Sabogal's assets will be at risk until the North Shore Credit Union is paid.
- [115] Ms. Sabogal's proposal for the division of the family assets is that she would receive Wembley Place and Arborlynn Drive. Mr. Sabogal would receive Ross Road and the Nor-est shares. Ms. Sabogal will take on \$114,650.00 of the debt and Mr. Sabogal will take on \$685,350.00 of the debt. I cannot order that Mr. and Ms. Sabogal borrow money. All I am able to order is that which is directed pursuant to s. 61(1) and (2) of the FRA.
- [116] Ms. Sabogal gave evidence that she has been approved for a mortgage of \$400,000.00. Mr. Sabogal, in his submissions, not in evidence, said he had applied for a mortgage of \$350,000.00.
- [117] The family assets and their values are as follows: Nor-est: \$1,132,500.00 Ross Road: \$716,600.00 Wembley Place: \$792,966.00 Arborlynn Drive: \$602,800.00 Total: \$3,244,866.00 Less an estimated amount due to the North Shore Credit Union: <\$810,000.00> Total value of family assets: \$2,434,866.00
- [118] An equal share of the family assets is \$1,217,433.00. I am prepared to reapportion the family assets giving Ms. Sabogal 55% of the family assets and Mr. Sabogal 45% of the family assets. I have done so to assist Ms. Sabogal in her need to become or remain economically independent and self-sufficient (s. 65(1)(e) of the FRA). Five per cent of the family assets would give Ms. Sabogal an additional \$121,743.00. Ms. Sabogal will have the following

assets: Asset: Value: Wembley Place: \$792,966.00 Arborlynn Drive: \$602,800.00 Total: \$1,395,766.00

- [119] The additional 5% of the family assets is \$121,743.00 or 55% of the net family assets is \$1,339,176.00. In order to satisfy Ms. Sabogal's share of the family assets, reapportionment at 55% Mr. Sabogal will transfer to Ms. Sabogal his interest in Wembley Place and Arborlynn Drive, which total \$1,395,766.00. Reapportionment at 55% of the net family assets is \$1,339,176.00; a difference of \$56,590.00. SPOUSAL SUPPORT
- [120] In submissions, Ms. Sabogal sought \$35,000.00 so that she could go back to school. There was no evidence that Ms. Sabogal intended on going back to school. I am prepared to award a lump sum of spousal support for Ms. Sabogal of \$65,000.00. I have done so because there is little hope of Ms. Sabogal ever receiving maintenance from Mr. Sabogal, who takes the position that he has no income. He has for years under-reported his income by substantial amounts. I have every reason to believe that he will continue to do so. An order for periodic support in favour of Ms. Sabogal is likely to be ignored by Mr. Sabogal, as he ignored his obligation to pay the North Shore Credit Union, and permit Mr. Jones to inspect the Nor-est real property despite a court order.
- [121] Ms. Sabogal's lump sum spousal support and her reapportioned interest in the family assets are satisfied by Mr. Sabogal transferring his interest in Wembley Place and Arborlynn Drive, together with the payment to Ms. Sabogal of \$8,410.00.
- [122] Mr. Sabogal's share of the family assets are the Nor-est shares and Ross Road. However, Mr. Sabogal will have to raise a sufficient amount of money to have the North Shore Credit Union mortgage discharged. I have estimated this amount at approximately \$810,000.00 (inclusive of daily interest and costs). If he does not do so within 45 days of the date of these reasons, I order that Ross Road be sold immediately with Ms. Sabogal to have sole conduct of its sale. She may list Ross Road and may pay to any real estate agent or firm that arranges a sale of Ross Road, a commission of not more than 7% of the first \$100,000.00 and 2 ½% of the balance above \$100,000.00, to be paid from the proceeds of the gross selling price. Ms. Sabogal will advise Mr. Sabogal of all offers that she receives. If Ms. Sabogal receives an offer that she is prepared to accept and Mr. Sabogal is not prepared to accept, the matter can come before the court for resolving that dispute and any other dispute regarding the sale Ross Road.
- [123] The net sale proceeds of Ross Road, after the payment of real estate commission, the usual vendor/purchaser adjustments and any legal fees or disbursements relating to its sale, will be paid towards the satisfaction of the amount owing to the North Shore Credit Union. The balance of the mortgage owing to the North Shore Credit Union shall immediately be paid by Mr. Sabogal and/or Nor-est. If Mr. Sabogal or Nor-est does not immediately pay the amount owing to the North Shore Credit Union, Ms. Sabogal may satisfy and pay the amount owing to the North Shore Credit Union. She will have judgment against Mr. Sabogal and Nor-est jointly and severally for the amount that she paid to the North Shore Credit

Union to satisfy the mortgage. TAXES

[124] The tax consequences of the transfer of Wembley Place and Arborlynn Drive to Ms. Sabogal and the transfer of Ross Rod to Mr. Sabogal were not addressed by either Ms. Sabogal or Mr. Sabogal.

[125] In transferring these properties it is my hope that the tax, and in particular, the capital gains, will be postponed, and that Mr. Sabogal and Ms. Sabogal will each take on the other's tax consequence for the transfer for each of these properties. That may not occur if Ross Road is sold pursuant to this order. Either Ms. Sabogal or Mr. Sabogal may appear before me to resolve any of the tax matters that arise from this order. DIVORCE

[126] Subject to s. 12 of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp), Mr. and Ms. Sabogal who were married at Vancouver, British Columbia, on September 15, 1984, are divorced, which divorce will take effect on the 31st day from the date of these reasons. COSTS

[127] Ms. Sabogal has been substantially successful and I award her costs assessed at Scale B. SUMMARY

1. A divorce is granted;
2. Mr. Sabogal will transfer to Ms. Sabogal his interest in Wembley Place and Arborlynn Drive in satisfaction of Ms. Sabogal's claims for division of assets pursuant to Part 5 of the FRA and lump sum maintenance pursuant to the Divorce Act, plus \$8,410.00;
3. Ross Road and the shares of Nor-est are the sole property of Mr. Sabogal;
4. Ms. Sabogal will transfer to Mr. Sabogal Ross Road, so long as Mr. Sabogal pays and satisfies the amount due and owing to the North Shore Credit Union;
5. In the event Mr. Sabogal does not satisfy the amount due to the North Shore Credit Union, then Ms. Sabogal may sell Ross Road and pay the net sale proceeds to the North Shore Credit Union and satisfy the balance owing to the North Shore Credit Union for which she will have judgment against Mr. Sabogal and Nor-est jointly and severally; and
6. Costs to Ms. Sabogal at Scale B. "H.C. Hyslop J." HYSLOP J.

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