

CANADA / JUDGMENT

Sea v. He

2024 BCCA 161

COURT

British Columbia Court of Appeal

DECIDED

29 April 2024

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2024 BCCA 161 Sea v. He

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Sea v. He,

2024 BCCA 161

Date: 20240429

Docket: CA48818

Between:

David Tai-Jiun Sea

Appellant

Respondent on Cross Appeal

(Claimant)

And

Ronghui He also known as Rong Hui He, Rong-Hui He and/or Randy He

Respondent

Appellant on Cross Appeal

(Respondent)

Before:

The Honourable Chief Justice Marchand

The Honourable Justice Griffin

The Honourable Mr. Justice Voith

On appeal from: An order of the Supreme Court of British Columbia,

dated December 13, 2022 (Sea v. He, 2022 BCSC 2169,

New Westminster Docket E058805).

Counsel for the Appellant:

A.S.K. Wormeli

L.X. Zhao

Counsel for the Respondent:

C. Ke

Place and Date of Hearing:

Vancouver, British Columbia

January 15, 2024

Place and Date of Judgment:

Vancouver, British Columbia

April 29, 2024

Written Reasons by:

The Honourable Chief Justice Marchand

Concurred in by:

The Honourable Justice Griffin

The Honourable Mr. Justice Voith

Summary:

The parties married in 2006 and separated in 2019. They have one child together. The trial judge made many orders. On appeal, the appellant raises issues relating to the division of property, and child and spousal support. He also brings an application to adduce fresh evidence to support aspects of his appeal. On cross-appeal, the respondent raises issues relating to child and spousal support.

Held: Application to adduce fresh evidence dismissed. Appeal allowed in part. Cross-appeal dismissed.

The judge did not err in making challenged factual findings, valuing family property and determining the parties' incomes. Further, she provided sufficient reasons explaining why she did not reapportion the respondent's stock trading accounts back to the date of trial, why she determined that a "mid-range" spousal support award was appropriate and how she determined the appellant's income.

However, the judge erred in principle by failing to set her mind to the question of how much it would cost the appellant to make the Compensation Payment she ordered him to make. As a result, she did not achieve the equality and fairness the legislation and authorities demand. The question of whether there should be an adjustment to account for costs that will likely be incurred by Mr. Sea in order to make the Compensation Payment, whether due to costs of borrowing, taxes arising on sale of an asset, or otherwise, is remitted to the trial court.

Further, there is no question that the appellant's RRSP will eventually be distributed and deferred taxes paid. In the maze of assets to be divided, it appears the judge overlooked the tax implications of dividing the appellant's RRSP at face value. The judge erred in principle by failing to set her mind to the issue. The appellant is ordered to transfer half the value of his RRSP at the date of trial to the respondent by way of spousal RRSP rollover and the appellant's Compensation Payment is reduced accordingly.

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Reasons for Judgment of the Honourable Chief Justice Marchand:

Introduction

[1] The appellant, David Sea, and the respondent, Randy He, are both originally from China. They met in British Columbia in 2004. They began co-habiting in March 2005, married in May 2006 and separated in June 2019. Both have children from previous marriages. Ms. He has two sons and Mr. Sea has two daughters. Their first and only child, DSJ, is now 18 years old.

- [2] Mr. Sea is 73 years old and is a co-owner of Diversified Products of Canada Ltd. ("Diversified"). Mr. Sea and his ex-wife, Christina Chao, each own 50% of Diversified's shares. Mr. Sea was in business with Diversified for many years before the parties' relationship began. Mr. Sea was semi-retired when he met Ms. He, but was the primary income earner in the relationship. His income was principally derived from Diversified.
- [3] Ms. He is 50 years old. She has a degree in Chinese Literature from Shenzhen University. Prior to the parties' separation, Ms. He was DSJ's primary parent, and spent much of her time organizing and attending DSJ's many activities. Prior to trial, she had never worked in Canada.
- [4] When the parties separated, they owned a number of assets, including: real property, vehicles, business assets, bank accounts, investments and personal property.
- [5] In reasons indexed as 2022 BCSC 2169 [RFJ] the trial judge made many orders, including orders: granting the parties a divorce; recognizing both parties as guardians of DSJ; allocating parenting time and parental responsibilities; dividing family property; requiring Ms. He to pay child support of \$503 per month to Mr. Sea; requiring Mr. Sea to pay spousal support of \$6,600 per month to Ms. He; requiring Ms. He to pay retroactive child support of \$10,000 to Mr. Sea; and requiring Mr. Sea to pay retroactive spousal support of \$50,000 to Ms. He.
- [6] Mr. Sea appeals certain orders made by the judge in relation to division of property and spousal support. In particular, he submits the judge erred:
1. in law or in mixed fact and law by "not accounting for tax consequences arising upon disposal of both Diversified and [his] RRSP";
 2. in fact by finding that \$190,000 in a specific bank account "did not stem from a shareholder's loan from Diversified";
 3. in fact or in mixed fact and law by not providing him with credit for his "post-separation contributions to his RRSP in the amount of \$100,000";
 4. in mixed fact and law or by providing insufficient reasons "for not reapportioning [Ms. He's] stock trading accounts back to the date of trial";
 5. in mixed fact and law by finding that his income was \$454,560; and
 6. in mixed fact and law or by providing insufficient reasons for determining that a "mid-range" spousal support award was appropriate.

Mr. Sea seeks to adduce fresh evidence to support aspects of his appeal.

[7] Ms. He maintains that Mr. Sea's fresh evidence application and appeal should be dismissed. She maintains that Mr. Sea's fresh evidence application fails the test set out in *Palmer v. The Queen*, [1980] 1 S.C.R. 759, 1979 CanLII 8. She also maintains that Mr. Sea's appeal fails, largely on the basis of standard of review arguments. Further, Ms. He cross-appeals certain orders made in relation to child and spousal support. In particular, she submits the judge erred:

1. in fact by finding that Mr. Sea's income was \$454,560;
2. in law by not providing any explanation for her "computation" of Mr. Sea's income;
3. in law by matching Mr. Sea's annual calendar year income to Diversified's corporate year income despite finding that a three-year average approach to determining Mr. Sea's annual income was appropriate in the circumstances; and
4. in fact by finding that she is likely to earn investment income of \$21,000 per year.

[8] Mr. Sea maintains that the judge did not err as alleged by Ms. He.

II. The Judge's Reasons for Judgment

[9] The trial judge gave lengthy and comprehensive reasons for judgment. I will summarize them only to the extent necessary to address the issues raised in the appeal and cross-appeal.

A. Credibility and Reliability

[10] The trial judge had significant issues with the credibility and reliability of both parties. She took a cautious approach to their evidence. She accepted it when it was consistent with "reliable documentary evidence, agreed facts or other reliable evidence, where either [party] made statements against interest, and where [the parties] agree[d]": RFJ at para. 81 (emphasis in original). Otherwise, she placed weight on "evidence that [was] more in harmony with the preponderance of probabilities that a practical and informed person would readily recognize as reasonable in the circumstances": RFJ at para. 81.

B. Property Division

Legal Principles

[11] The judge began her analysis of property division issues by setting out the legal framework for property division under the Family Law Act, S.B.C. 2011, c. 25 [FLA]. The parties take no issue with her statement of the legal principles and neither do I. For convenience, I set out the judge's concise summary below:

[82] On separation, each spouse is presumptively entitled to an undivided half interest in all family property as a tenant in common, regardless of their respective use or contribution, and equally responsible for family debt: see the Family Law Act, S.B.C. 2011, c. 25 (the "FLA"), s. 81.

[84] Property is categorized as either "family property" or "excluded property." All real or personal property owned by either spouse at the date of separation is broadly defined as family property (FLA s. 84(1)).

[85] "Excluded property" is described in FLA s. 85(1), which provides in relevant part:

85 (1) The following is excluded from family property:

(a) property acquired by a spouse before the relationship between the spouses began;

...

(b.1) gifts to a spouse from a third party;

...

(g) property derived from property or the disposition of property referred to in any of paragraphs (a) to (f).

[86] A spouse claiming that property is excluded property is responsible for demonstrating that the property is excluded property: FLA s. 85(2).

[87] The test for establishing a claim for excluded property is proof on a balance of probabilities by the party asserting an excluded property interest. Precision or mathematical certainty is not required, but to discharge the burden, the party seeking to prove property is excluded property must do so with clear and cogent evidence. See *Shih v. Shih*, 2017 BCCA 37, at paras. 40-44.

[88] "Family debt" is defined under FLA s. 86 as follows:

Family debt includes all financial obligations incurred by a spouse

(a) during the period beginning when the relationship between the spouses begins and ending when the spouses separate, and

(b) after the date of separation, if incurred for the purpose of maintaining family property.

Thus, any debt acquired during the relationship, regardless of whether it was for a family purpose, is a family debt.

[89] Section 87 of the FLA requires that the value of family property and debt is the fair market value as of the date of the hearing respecting the division of property or debt, unless an agreement or order provides otherwise. A departure from the presumptive date for valuation of family property is effectively a reapportionment or unequal division of the family property, which can only be done under s. 95 of the FLA: see *Kumagai v. Campbell Estate*, 2018 BCCA 24, at para. 76.

[90] Section 95(1) of the FLA allows the court to order an unequal division of family property or family debt, but only if it would be significantly unfair to equally divide such property or debt. Section 95(2) enumerates factors the court may consider in weighing whether an unequal division should be ordered. These factors include:

- the terms of any agreement between the spouses (s. 95(2)(b));
- a spouse's contribution to the career or career potential of the other spouse (s. 95(2)(c));
- whether family debt was incurred in the normal course of the relationship between the spouses (s. 95(2)(d));
- whether a spouse, after the date of separation, caused a significant decrease or increase in the value of family property or family debt beyond market trends (s. 95(2)(f));
- the fact that a spouse, other than a spouse acting in good faith, either (i) substantially reduced the value of family property, or (ii) disposed of, transferred or converted property that is or would have been family property, or exchanged property that is or would have been family property into another form, causing the other spouse's interest in the property or family property to be defeated or adversely affected (s. 95(2)(g));
- a tax liability that may be incurred by a spouse as a result of a transfer or sale of property or as a result of an order (s. 95(2)(h));
- any other factor (other than the consideration referred to in subsection (3)) that may lead to significant unfairness (s. 95(2)(i)).

Excluded Property Claims

[12] The parties agreed that Mr. Sea's shares in Diversified and a summer cottage he owned on Vancouver Island (the "Summer Cottage") were excluded property: RFJ at paras. 96-97. Only the increase in the value of these assets from the date the parties began co-habiting in March 2005 to the date of trial was family property. The parties agreed that the increase in value of the Summer Cottage was \$408,000: RFJ at para. 97. I will address the judge's valuation of Mr. Sea's interest in Diversified below.

- [13] The judge rejected Mr. Sea's evidence that he purchased a property referred to by the judge and the parties as "Mainland" with funds he had acquired before his relationship with Ms. He began. As a result, the entire Mainland property was family property subject to division: RFJ at paras. 104-109.

Diversified

- [14] Both parties adduced expert opinion evidence regarding the increase in value of Mr. Sea's shares in Diversified between March 2005 and the date of trial. Ron Tidball gave expert evidence for Mr. Sea and Donald Burnham for Ms. He. Mr. Tidball prepared a main report dated November 11, 2021, an updated report dated August 13, 2022 and a report dated August 23, 2022 commenting on Mr. Burnham's report. Mr. Burnham prepared a single report dated August 9, 2022: RFJ at paras. 118-120.
- [15] The expert valuations of Diversified as of March 2005 were within \$500 of each other. The judge accepted Mr. Tidball's slightly lower valuation of \$851,000: RFJ at para. 123. For reasons that are not at issue on appeal, the judge preferred Mr. Burnham's \$2,454,500 estimate of the value of Diversified at the date of trial. Subject to a consideration of tax issues, she therefore found the value of Mr. Sea's shares in Diversified available for division to be \$1,603,500 (\$2,454,500 minus \$851,000): RFJ at para. 147.
- [16] Mr. Sea raised two tax issues. First, he argued that provision should be made for taxes he would incur on taking money out of Diversified, so-called "distributive" taxes: RFJ at para. 148. Second, he argued that provision should be made for a contingent tax liability related to payments made by Diversified to related entities E&H Consultants Ltd. ("E&H") and J Spa Studio Corp. ("J Spa"): RFJ at para. 159.
- [17] The judge began her analysis of the distributive tax issue by referencing excerpts from the expert reports. At para. 149, the judge referenced the following passage from Mr. Tidball's first report:

Distributive personal income taxes at a high marginal rate of up to approximately 38% would arise on removal of cash or other assets from [Diversified] by the individual shareholders. There is varying case law regarding the applicability of distributive income taxes for purposes of matrimonial asset division.

- [18] On the other hand, at para. 150, she referenced the following passage from Mr. Burnham's report:

Provision should be made for tax liabilities if the notional purchaser were to contemplate the substantive distribution of [Diversified's] assets or the wind-up of the Company soon after the Valuation Date. Neither of these actions was contemplated in this valuation as a most likely course of action for an arm's length purchaser of the shares on a notional basis.

- [19] The judge considered it significant that neither expert made any deduction for distributive tax liabilities in their valuations. Further, she noted there was no evidence that Mr. Sea intended to liquidate Diversified or that he would need to do so in order to satisfy a property division order: RFJ at para. 151.
- [20] Relying on *Maguire v. Maguire*, 2016 BCCA 431 at paras. 38-39, the judge held:
- [155] There is no absolute rule concerning whether tax consequences should or should not be taken into account in the division of family assets. Corporate and distributive taxes can and should be taken into account in the division of property in appropriate cases. Where there is evidence that a division of family assets will attract tax consequences, an allowance should be made for tax. Where it is not clear when or in what amount taxes will be exigible, an allowance may not be made.
- [21] She then recited the following summary of the principles applicable to distributive taxes set out by Justice Savage (as he then was) in *McKenzie v. McKenzie*, 2015 BCSC 241 at para. 8:
- (1) where there is sufficient evidence to satisfy the Court of tax consequences or other costs inherent in a compensation order the Court should take these into account in setting the compensation amount;
 - (2) the onus is on the payor to provide the trial judge with the necessary evidence of the tax consequences arising from the division of assets or other consequences of having to acquire the funds to pay the payee;
 - (3) there is no absolute rule as to how the compensation order might be calculated, depending, as it does, on the type of assets to divided, timing, the parties involved and other orders in the action;
 - (4) the matter should be considered as of the date of trial, not as of the date the matter comes back before the court; and
 - (5) the overriding principle is fairness.
- [22] The judge ultimately concluded that "the tax implications and tax consequences respecting Diversified are, at best, speculative": RFJ at para. 157. She found there was no evidence Mr. Sea intended to sell Diversified nor that he would need to do so in order to make a compensation payment to Ms. He. She inferred Mr. Sea intended "for Diversified to continue as a going concern", which distinguished this case from *Sanai v. Mahmoud*, 2017 BCCA 155 where the companies at issue were holding companies and provision was made for distributive taxes: RFJ at para. 157. Accordingly, the trial judge did not make a deduction for distributive taxes from the value of Diversified available for division: RFJ at para. 158.
- [23] Turning to contingent tax liabilities, Mr. Tidball, who acknowledged he is not a tax expert, reported in his first report that:

[I]n our opinion, a potential purchaser should not acquire the shares of [Diversified] considering the significant risks related to a CRA audit and the contingent income tax liability related to possible personal expenses and the payments to E & H and J Spa . . .

In our opinion, the net assets and goodwill, if any, of the business of [Diversified] would be sold, and not the shares of [Diversified].

[24] Mr. Tidball gave the opinion that Diversified's tax liability "could approach or exceed" \$1 million in relation to payments made by Diversified to E&H and J Spa: RFJ at para. 161. However, the judge did not discount the value of Mr. Sea's interest in Diversified to account for that contingent liability for three reasons: (1) a purchaser could avoid the contingent tax liability by purchasing Diversified's assets rather than its shares; (2) there was no expert evidence regarding "what an appropriate discount in value should be"; and (3) the contingent tax liability would only arise if Diversified were audited by the CRA but it was "highly speculative" and "pure conjecture" that would ever occur: RFJ at paras. 161-165.

Real Property

[25] The judge noted that various pieces of real property owned jointly by the parties or Mr. Sea were family property subject to division, namely Mainland, the increase in value of the Summer Cottage and properties the judge and parties referred to as "3601", "3602" and "Seymour". The value of these properties was not in issue: RFJ at para. 166.

[26] The judge also noted that Ms. He received net proceeds of \$205,395 from the sale of a property referred to by the judge and the parties as "University High". The judge held that the net proceeds were also family property "because, as a result of the sale, Ms. He essentially received an advance payment": RFJ at para. 167.

Bank and Financial Institution Accounts

[27] The judge identified a number of bank and financial institution accounts as family property subject to division. Of relevance to the appeal, the judge had to determine: (1) whether the amounts in the accounts ought to be valued as of the date of separation rather than trial; (2) the value of Ms. He's two stock trading accounts; and (3) whether Mr. Sea's deposit of \$190,000 into an RBC account held by his daughter Ginnie Sea for DSJ was family property.

[28] Regarding the first issue, the judge rejected Mr. Sea's argument that the amounts in the parties' bank and financial institution accounts should be valued as of the date of the separation. She held:

[169] [A]s I noted above, a departure from the presumptive date for valuation of family property is effectively a reapportionment of the family property, which can only be done under s. 95 of the FLA. [Mr. Sea] provided no convincing argument to depart from the trial date as the date for valuation.

- [29] Regarding the second issue, the judge noted that Ms. He had two active stock trading accounts identified as "HSBC 2G2E" and "HSBC 2G2F". Account 2G2E was a Canadian dollar margin account and 2G2F was a US dollar margin account. The judge determined that Ms. He borrowed money for transactions in the 2G2F account and that the amount in her Canadian dollar account (2G2E) always had to be more than the negative balance in her US dollar account (2G2F): RFJ at paras. 174-175.
- [30] The trial judge noted that the account balances in the 2G2E and 2G2F accounts went from \$387,114 CDN and (\$296,311 US) respectively on January 31, 2022 to \$183,595 CDN and (\$139,986 US) respectively on June 30, 2022 without satisfactory explanation. She determined that both Mr. Sea and Ms. He had used the money available to them as they saw fit since their separation: RFJ at paras. 172, 177-178.
- [31] The judge accepted that the amounts in the two HSBC stock trading accounts shown in Ms. He's F8 financial statement were accurate as of trial: RFJ at para. 179.
- [32] Regarding the third issue, the parties agreed that the RBC Dominion account in Ginnie Sea's name was opened in March 2022, and that Mr. Sea deposited \$190,000 to the account for the benefit of DSJ. An account statement described Mr. Sea's deposit as a "transfer of funds from RBC": RFJ at para. 181. The judge noted that Mr. Sea provided no further explanation as to the actual source of the funds: RFJ at para. 181.
- [33] According to Mr. Sea, he obtained the \$190,000 through a \$200,000 shareholder loan from Diversified. However, an employee of Diversified who supported its accounting, bookkeeping and records could not recall a shareholder loan in this amount, and Mr. Sea did not call his daughter to testify about the account. In these circumstances, the judge did not accept Mr. Sea's testimony regarding the shareholder loan. Instead, she found that Mr. Sea was the source of the \$190,000 deposit, it was not "equivalent to money being held in trust for DSJ", and it "should be treated as family property, subject to division": RFJ at paras. 182-185.

RRSP

- [34] Only Mr. Sea had an RRSP. The judge accepted it had a stated value of \$256,400.86 as of the date of trial and found it was family property subject to division: RFJ at paras. 195-196. In her division of family property, the judge did not take account of the tax-deferred status of the funds within Mr. Sea's RRSP and did not consider dividing it by way of a spousal rollover.

Final Division of Family Property

- [35] In determining whether an equal division of family property would be significantly unfair, the judge first identified the property to be divided and then notionally divided it equally. As part of this exercise, the judge made the following comments regarding the property at issue:

[223] Based on [a particular] allocation, and to equalize the division, Mr. Sea would make a compensation payment to Ms. He of \$2,074,424.50 (\$5,972,367.00 minus \$3,897,942.50 (i.e., 50% of the net family property)), which I will round to \$2,074,400.00. Each party keeps bank and financial accounts that are in that person's name. All of the real property is clear title, and based on the fair market values, Mr. Sea can borrow against the equity in the properties being allocated to him to make the compensation payment. Mr. Sea will not need to liquidate his interest in Diversified. Ms. He receives fewer cash assets than Mr. Sea. However, she received the cash advance of \$150,000 and the net proceeds from the sale of University High, and she will receive very substantial cash through the compensation payment. In addition, she will receive income-producing properties in Mainland [number] and Seymour (assuming she wishes to continue to rent both or one of them).

[Emphasis added.]

[36] For reasons that are largely not at issue on appeal, the judge rejected Ms. He's argument that an equal division of family property would be significantly unfair to her: RFJ at paras. 224-242. Of some note, however, the judge addressed Ms. He's concerns about the tax consequences associated with her being allocated income-producing properties (namely Mainland and Seymour) rather than a principal residence. In particular, the judge noted there was no suggestion Ms. He had any immediate plans to sell either of these properties if allocated to her. In her view, "the more likely scenario [was] that [Ms. He] will retain them as income-producing rental properties for at least the foreseeable future": RFJ at para. 223. As a consequence, the judge concluded that the timing, amount and tax consequences of any future sale "are all purely speculative": RFJ at paras. 236-237.

[37] The judge then ordered (at para. 243) the following allocation of family property (with all amounts in \$CDN):

Item

To Mr. Sea

To Ms. He

Advance to Ms. He

\$0.00

\$150,000.00

3601

\$1,300,000.00

\$0.00

3602

\$1,700,000.00

\$0.00

Seymour

\$0.00

\$675,000.00

Mainland [number]

\$0.00

\$765,000.00

Summer Cottage

\$408,000.00

\$0.00

University High

\$0.00

\$205,395.00

Maserati

\$20,000.00

\$0.00

Cadillac

\$10,000.00

\$0.00

Buick

\$0.00

\$27,000.00

Sea RRSP

\$256,400.00

\$0.00

Debt owed to Mr. Sea by third party

\$280,000.00

\$0.00

Diversified

\$1,603,500.00

\$0.00

CIBC [number]

\$12,080.00

\$0.00

CIBC USD [number]

\$4,770.00

\$0.00

CIBC GIC [number]

\$70,683.00

\$0.00

TD [number]

\$7,600.00

\$0.00

RBC [number]

\$14,240.00

\$0.00

Fidelity TFSA

\$46,024.00

\$0.00

Manulife TFSA

\$49,070.00

\$0.00

RBC Dominion [number]

\$190,000.00

\$0.00

HSBC [number]

\$0.00

\$423.00

HSBC 2G2E

\$0.00

\$183,186.00

HSBC 2G2F

\$0.00

(\$182,486.00)

Totals:

\$5,972,367.00

\$1,823,518.00

[38] As contemplated at para. 223 of the RFJ, to equalize the division, the judge ordered Mr. Sea to make a compensation payment of \$2,074,400.00 (the "Compensation Payment") to Ms. He, on certain terms, with payment in full due no later than 180 days after the date of her reasons for judgment: RFJ at para. 244.

C. Child and Spousal Support

[39] To their credit, the parties agreed they should both be guardians of DSJ and DSJ's primary residence would remain, as it had been for some time, with Mr. Sea: RFJ at para. 247. There was also not much debate about the history of the parties' relationship. As a result, the primary issues relating to child and spousal support at trial concerned the quantification of the parties' incomes for purposes of the Federal Child Support Guidelines, SOR/97-175 [Guidelines].

[40] After setting out ss. 16-19 of the Guidelines, the judge turned to her determination of the parties' incomes.

Ms. He's Income

[41] Regarding Ms. He, the main issue was whether and how much income should be imputed to her under s. 19 of the Guidelines. Citing a number of leading authorities, the judge stated that the test for imputing income to an unemployed or under-employed parent is "one of reasonableness, having regard to a parent's capacity to earn income in light of the parent's age, education, health, work history and work availability": RFJ at para. 285.

- [42] The judge rejected Ms. He's submission that she be imputed an annual income of \$15,000 in the first year following judgment and \$30,000 in subsequent years. The judge found there was no reliable evidence Ms. He's age, education, health and work history would present barriers to her earning "at least" minimum wage. The judge was not persuaded there was a good reason for Ms. He not to improve her employability and find work once DSJ was of school age. The judge found that, despite Ms. He's intelligence, she had not made reasonable efforts to find paid work, even at minimum wage. The judge also noted that Ms. He had to expect to contribute to both her own monthly expenses of approximately \$6,000, as well as provide child support for DSJ: RFJ at paras. 288-292.
- [43] The judge ultimately imputed employment income of \$32,500 and total annual income of \$53,500 to Ms. He: RFJ at para. 293. It is evident from these numbers and the record that the judge accepted Mr. Sea's submission that Ms. He be imputed annual interest and other investment income of \$21,000: RFJ at paras. 286, 293.

Mr. Sea's Income

- [44] Regarding Mr. Sea, the main issue was how to quantify his pattern of income as a shareholder of Diversified in accordance with ss. 17 and 18 of the Guidelines. The judge was assisted in this task by "Guidelines income reports" prepared by Mr. Burnham and Mr. Tidball. The judge recognized these reports were not technically expert reports but rather served as arguments summarizing evidence and information: RFJ at paras. 294-299.
- [45] In closing submissions, the parties agreed that, under s. 17(1) of the Guidelines, Mr. Sea's income should be determined based on his pattern of income over a three-year period. They also agreed that, under s. 18(1)(a) of the Guidelines, Diversified's pre-tax income (adjusted to add back the payments to E&H and J Spa) should be included in Mr. Sea's income: RFJ at para. 300.
- [46] Mr. Burnham estimated Mr. Sea's annual income to be \$535,840 based on the period of 2019-2021. In contrast, Mr. Tidball estimated Mr. Sea's annual income over the same period to be \$454,560. The difference arose in part because Mr. Burnham estimated Mr. Sea's annual income based on calendar years (ending December 31) while Mr. Tidball estimated Mr. Sea's annual income based on corporate year ends (ending March 31): RFJ at paras. 304-305.
- [47] Despite the income reports, Ms. He asserted that Mr. Sea's annual income should be determined to be \$612,566. Ms. He noted that Diversified's revenue went up but profit went down between the years ending March 31, 2020 and 2021. Ms. He urged the judge to conclude Mr. Sea was funnelling corporate money "to another - unidentified - non-arm's length entity that he controls": RFJ at para. 306. The judge dismissed the argument on the basis it was built on speculation and had not been put to Mr. Sea in cross-examination: RFJ at paras. 306-307.

[48] The judge found the calculation that best reflected Mr. Sea's income was Mr. Tidball's critique of Mr. Burnham's reports. In doing so, she accepted the matching of personal income and the following year's corporately available income was reasonable in the circumstances. The judge concluded Mr. Sea's Guidelines income for 2022 was \$454,560: RFJ at paras. 309-310.

Child Support

[49] Based on Ms. He's imputed income of \$53,500, the trial judge ordered her to pay Mr. Sea child support of \$503 per month, commencing on January 15, 2023: RFJ at para. 311.

Spousal Support

[50] The judge began her analysis of spousal support issues by setting out a number of uncontroversial principles. Again, neither the parties nor I take any issue with the judge's statement of these principles so I set them out in full:

[319] The objectives of a spousal support order are set out in the Divorce Act s. 15.2(6), which provides that:

An order . . . 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.

[320] No single objective set out in s. 15.2(6) is paramount, and all must be considered by the court: see *Moge v. Moge*, [1992] S.C.R. 813, at pp. 850-853. The first two objectives relate to compensatory support, and the last two objectives relate to non-compensatory support. Compensatory entitlement will arise where, as a result of the parties' roles during the marriage, one spouse has suffered economic disadvantage or has conferred economic advantages on the other. Most often, such entitlement will arise where one spouse has sacrificed career opportunities in order to take on more of the family's household or child-rearing responsibilities. Upon the dissolution of the marriage, the spouse who has given up opportunities may be entitled to spousal support, either to compensate for diminished earning capacity, or to share in the augmented earning capacity of the other spouse. See *Zacharias v. Zacharias*, 2015 BCCA 376, at para. 26. Non-compensatory support entitlement focuses on the needs of the spouses and on their respective means. It is based on the idea

that spouses, by virtue of marriage, have some ongoing responsibility to care for one another. The degree to which non-compensatory principles will apply will depend on a close examination of not only the means and needs of the spouses, but also of the nature of the marital relationship and its duration: Zacharias, at para. 27.

[321] A court is not required to decide one basis of support to the exclusion of the others, and the doctrine of equitable sharing is the overarching principle to be focussed on by the court: see Chutter v. Chutter, 2008 BCCA 507, at para. 49.

[322] Moreover, under the Divorce Act s. 15.2(4), courts must:

... take into consideration the condition, means, needs and other circumstances of each spouse, including

- (a) the length of time the spouses cohabited;
- (b) the functions performed by each spouse during cohabitation; and
- (c) any order, agreement or arrangement relating to support of either spouse.

[Bold emphasis omitted.]

[51] The parties provided DivorceMate calculations under the Spousal Support Advisory Guidelines (Canada, Department of Justice, Spousal Support Advisory Guidelines, (Guide) by Carol Rogerson & Rollie Thompson (Ottawa: DOJ, 2008)) [SSAG] to the judge. However, she was unable to rely on them because they were based on assumptions of Guidelines incomes she did not accept. Instead, based on her income findings, the judge used DivorceMate to generate the following monthly spousal support amounts and durations: \$5,676 at the low end, \$6,622 at the mid-range and \$7,568 at the high end of the SSAG range, for a duration of 7.25 to 14.5 years from the date of separation: RFJ at paras. 328-330.

[52] The judge next set out the parties' positions on spousal support. Ms. He advanced four reasons why the quantum should be at the high end of the range and last indefinitely. Conversely, Mr. Sea advanced seven reasons why the quantum should be at the low end of the range and terminate in August 2028: RFJ at paras. 323-324, 331-334.

[53] The judge then turned to the factors enumerated under s. 9 of the SSAG for guidance in determining the appropriate quantum and duration of spousal support. She also acknowledged that, under s. 11 of the SSAG, the formulas do not automatically apply above gross payor incomes of \$350,000. She noted that \$350,000 is not a "cap". She then cited Hathaway v. Hathaway, 2014 BCCA 310 at para. 48, for the propositions that above the \$350,000 "ceiling": (1) the SSAG formulas may still provide an appropriate method of determining spousal support; and (2) an individualized, fact-specific analysis is required: RFJ at paras. 336-337.

[54] In her individualized analysis, the judge came to a number of fact-specific conclusions (RFJ at paras. 339-342):

1. Ms. He did not sacrifice a lucrative career by moving from China to Canada with Mr. Sea;
 2. Ms. He made choices about how she wished to spend her time once DSJ returned to school;
 3. DSJ's activities were funded by an account that was paid by Mr. Sea;
 4. Ms. He received the majority of the net proceeds from the sale of Central;
 5. Ordering spousal support at the high end of the SSAG range would not encourage Ms. He to become economically self-sufficient;
 6. Ms. He had experienced economic hardship since the relationship began to break down and lacked the means to support a lifestyle that approached the marital standard of living;
 7. Ms. He would benefit from the division of property and the Compensation Payment; and
 8. Despite being of retirement age, Mr. Sea "has had the luxury of being able to enjoy a very substantial income, without the burden of full-time work": RFJ at para. 342.
- [55] The judge considered these factors alongside the objectives of a spousal support order and concluded that spousal support in the mid-range of the SSAG for a period of 10 years from the date of separation was appropriate: RFJ at para. 343. More specifically, she ordered:
- [344] [U]ntil further court order or agreement of the parties, and subject to review:
- (a) Mr. Sea pay spousal support to Ms. He in the sum of \$6,600 per month, beginning on January 15, 2023 and on the 15th day of every month thereafter;
 - (b) either party may apply for a review of spousal support any time after one year from the date of this judgment, the focus of the review to be on Ms. He's employment qualifications and status and the extent to which she continues to be in need of spousal support; and
 - (c) Mr. Sea's obligation to pay spousal support to Ms. He will terminate with the payment due and payable on June 15, 2029.
- [56] Finally, the judge noted that "either party can apply for a variation in spousal support if there is a material change which justifies a variation": RFJ at para. 345.

Retroactive Child Support

- [57] Since the parties' separation, no child support had been paid by either parent. After considering the leading authority of *D.B.S. v. S.R.G.*, 2006 SCC 37, the judge saw no justification for ordering Mr. Sea to pay retroactive child support to Ms. He for the three months in 2019 when the parties shared parenting of DSJ. Although Mr. Sea had experienced no hardship due to the absence of child support from Ms. He, the judge found this did not excuse Ms. He's blameworthy conduct in failing to take any steps to put herself in a position to provide child support: RFJ at paras. 352, 352-355.

[58] The judge found that \$10,000 in retroactive child support was appropriate "to reinforce for Ms. He that she has obligations to provide financial support to DSJ": RFJ at para. 356.

Retroactive Spousal Support

[59] By order made September 1, 2020, Mr. Sea was required to pay interim spousal support of \$4,000 per month to Ms. He. In determining whether to award retroactive spousal support to Ms. He, the judge considered a number of factors, including: (1) Ms. He needed spousal support above the interim amount; (2) Ms. He had not made genuine efforts to find paid work or to improve her employability; and (3) Mr. Sea had been financially supporting Ms. He and DSJ, and would experience some hardship if there were a significant award of retroactive spousal support. Taking a holistic view of these factors and others, the judge ordered Mr. Sea to pay \$50,000 in retroactive spousal support to Ms. He: RFJ at paras. 358, 369-374.

III. Standard of Review

[60] The standard of review applicable to this appeal is set out at length in *Housen v. Nikolaisen*, 2002 SCC 33. Issues of pure fact only merit appellate interference where the judge committed a palpable and overriding error: *Housen* at para. 10. Inferences of fact are also to be reviewed on the standard of palpable and overriding error: see *Housen* at paras. 21-25; *H.L. v. Canada (Attorney General)*, 2005 SCC 25 at paras. 72, 74-75. Questions of law are reviewed on a standard of correctness: *Housen* at para. 8.

[61] Insufficient reasons may amount to an error of law. The critical question is whether "the trial judge's reasons, considered in the context of the evidentiary record, the live issues as they emerged at trial and the submissions of counsel, deprive the appellant of the right to meaningful appellate review?" An appellate court is entitled to conclude that deficient reasons constitute an error of law only when it cannot discern the foundation of the judge's ruling from the record as a whole: *R. v. R.E.M.*, 2008 SCC 51 at para. 57.

IV. On Appeal

A. Division of Property Issues

[62] The parties accept the judge's decision to equally divide family property and take no issue with what she found to be family property. Only Mr. Sea challenges certain aspects of the judge's property division rulings. The main issues relate to the judge's treatment of distributive taxes. I will tackle those issues before turning to Mr. Sea's challenge of a specific factual finding and his argument regarding the sufficiency of the judge's reasons for not reapportioning Ms. He's investment trading accounts to the date of separation.

Did the judge err by not accounting for distributive taxes in her valuation of Diversified?

Position of the Parties

- [63] Mr. Sea accepts the accuracy of the judge's statement of the law that "[t]here is no absolute rule concerning whether tax consequences should or should not be taken into account in the division of family assets": RFJ at para. 155. However, he maintains it is an incomplete statement and asserts the judge fell into error by failing to account for distributive taxes that were "inherent" in Diversified.
- [64] Mr. Sea relies principally on *Sanai v. Mahmoud*, 2017 BCCA 155. In that case, the trial judge ordered an equal division of family assets under the Family Relations Act, R.S.B.C. 1996, c. 128 [FRA]. To effect the division, he allocated the family home to the respondent and shares in three corporations to the appellant. To equalize the division, he ordered the appellant to make a compensation payment to the respondent: *Sanai* at para. 6.
- [65] *Sanai* was an appeal of trial judgments indexed as *M.S. v. M.M.*, 2015 BCSC 1599 and 2016 BCSC 470 [*M.S.* and *M.S. No. 2* respectively]. In addressing the issue of distributive taxes associated with the companies, the trial judge in *M.S.* stated his understanding of the law as follows:
- [163] In determining the amount of the compensation order, disposition costs, including tax consequences, must be taken into account if an asset must be sold in order for the non-owning spouse to realize his or her interest in the asset. They need not be taken into account "when it is not known when, if ever, the asset would be sold", or where those costs are "hypothetical and speculative": *Ouellette v. Ouellette*, 2012 BCCA 145 at paras. 29, 31, 32.
- [66] The trial judge then found the appellant would likely be able to satisfy a compensation order with his post-tax assets and made no allowance for a reduction in the value of the companies: *M.S.* at paras. 150, 163; *Sanai* at paras. 29, 31.
- [67] On appeal, this Court held the trial judge erred in principle by failing to account for the distributive tax burden the appellant would face on the ordered division: *Sanai* at para. 35. More specifically, the Court held that the trial judge's statement of the law was correct but incomplete. The trial judge's statement did not give effect to the premise that "to the extent the circumstances of the asset permits, and provided there is evidence on which to do so, the parties are entitled to equality of treatment": *Sanai* at para. 32, citing *Stein v. Stein*, 2008 SCC 35 at para. 9.
- [68] To ensure "equality of treatment" and put divided assets "on the same footing", this Court held that "the law, correctly understood, does not limit the requirement of an allowance for distributive taxes to cases in which the asset must be sold to allow the non-owning spouse to realize his or her interest in the asset": *Sanai* at paras. 29, 32-33.
- [69] This Court in *Sanai* distinguished its earlier decision in *Ouellette v. Ouellette*, 2012 BCCA 145, which I will discuss further below, on three bases: (1) certain tax consequences "appear[ed] to have been speculative and unsupported by evidence"; (2) "Mr. Ouellette did not intend to sell his interest in the business "; and (3) the companies at issue were two

holding companies and a personal services corporation, "none of them requiring the continuity essential to an on-going concern as was the case in Ouellette": Sanai at para. 34; Ouellette at para. 27.

- [70] In the result, based on a report prepared by Mr. Tidball, the Court "[brought] parity to the division of family assets" by making a 27% allowance for distributive personal income taxes on the companies that had been allocated to the appellant: Sanai at para. 38.
- [71] Here, Mr. Sea says it is understandable he did not lead evidence he would have to sell assets to satisfy a compensation order when he did not know what compensation order would be made. More to the point, he says "it is unclear how he could be expected to pay nearly \$2.1 million without [incurring] any tax, even if the amounts are not precisely known." Relying on the statement at para. 32 of Sanai, he further says "[t]here is nothing in the 'circumstances of the asset' which does not permit a deduction for tax, there is evidence from Mr. Tidball on which to do so, and the parties are entitled to equality of treatment."
- [72] For her part, Ms. He submits the judge did not err in her findings of fact, her statement of the law or her application of the law to the facts she found. In Ms. He's view, the judge was correct to find Mr. Sea and Ms. Chao would continue to own Diversified, there was no plan to sell or wind-up Diversified, and Mr. Sea had "abundant assets" independent of Diversified from which to make the Compensation Payment.
- [73] Ms. He relies on authorities such as Ouellette and P.T. v. K.T. and others, 2017 BCSC 1158 [P.T. No. 3] to argue the judge had a principled basis for the decision she made in the particular circumstances of this case. She says Mr. Sea has failed to demonstrate any basis for appellate intervention.
- [74] In Ouellette, the trial judge divided the parties' family assets, including the husband's business interests, under the FRA. The judge declined to deduct disposition costs from the accepted gross value of the husband's business interests on the basis Mr. Ouellette did not intend to sell his interest in the business to satisfy the judgment. Rather, he was going to use the proceeds from the sale of the family home to do so: Ouellette at paras. 15, 27.
- [75] On appeal, Mr. Ouellette argued it was unfair he was required to use his tax-free asset (the family home) to make the compensation payment and be burdened with all of the tax consequences associated with the sale of his business interests: Ouellette at para. 30. This Court dismissed his appeal on the basis "the trial judge did not err in declining to take the hypothetical and speculative disposition costs into account": Ouellette at para. 32.
- [76] In P.T., the trial judge gave three sets of reasons related to the division of family property. In his original set of reasons (P.T. v. K.T. and others, 2016 BCSC 2367), he awarded P.T. a \$1,019,250 monetary award representing a 25% interest in a stratified four-plex: P.T. No. 3 at para. 1.

- [77] Soon after, a corporate respondent, Kryos Holdings Ltd. ("Kryos"), applied to re-open the trial before judgment was entered, asking the judge to revisit the monetary award to consider "potential latent capital gains taxes" on the property at issue: P.T. No. 3 at para. 2. In his second set of reasons (P.T. v. K.T. and others, 2017 BCSC 520 [P.T. No. 2]), the judge declined to deduct 25% of the capital gains that would be payable if the entire four-plex were sold. Instead, he ordered that a deduction of approximately \$53,000 be made from the initial monetary award. That money represented 25% of the capital gains payable if one of the units in the four-plex were sold. The money was to be held in an interest-bearing account for a certain period of time, and would be payable to Kryos only "if and when" a unit within the four-plex were sold and capital gains taxes incurred on that sale: P.T. No. 3 at paras. 2, 10-11.
- [78] In P.T. No. 2, the judge's "if and when" order was intended to address issues of risk and fairness associated with future contingent tax liabilities. He explained:
- [22] Accounting for a speculative future contingent tax liability in property division runs the risk that the division of assets will be unfair to one party if that tax liability never materializes or only does so in the distant future. Failing to account for a potential or speculative future contingent tax liability runs the same risk of unfairness but for the other party.
- [79] Following P.T. No. 2, Kryos sought to clarify the judge's second set of reasons and bring Sanai, which had just been decided, to his attention: P.T. No. 3 at paras. 3, 6. At the clarification hearing, Kryos argued that P.T. should be liable to pay 100% of the capital gains tax arising from the sale of one of the four-plex units on the theory that none of those taxes would have been payable absent the monetary award: P.T. No. 3 at para. 36. The judge declined to make the adjustment for a variety of reasons, including because it would have the effect of requiring P.T. to prepay his share of the capital gains tax that would be payable if the entire four-plex had been sold, when the judge had made a factual finding that K.T. and the other respondents intended to hold the property for the long term. Any sale of the other units was speculative: P.T. No. 3 at paras. 37-39.
- [80] If Ms. He's primary position is dismissed, she submits in the alternative any deduction for distributive taxes should be discounted to account for factors such as: (1) the availability to Mr. Sea of a non-taxable capital dividend on a sale; (2) the uncertainty of the timing and mode of sale of Diversified; and (3) the fact she was also awarded taxable assets in the division of family property.

Analysis

- [81] Mr. Sea takes issue with how the judge gave effect to her decision to divide family property equally. Leaving aside the RRSP issue for the moment, he essentially argues he will end up with an asset, Diversified, that is burdened by latent taxes while Ms. He will end up with cash that is free and clear of any such burden. He says such an outcome is neither fair nor in accordance with the law.

- [82] The judge was in a difficult position. The parties had a wide variety of valuable assets that first had to be valued and then divided equally. Many of their assets had potential latent tax issues. The judge was alive to these issues. She clearly understood that latent taxes would affect the value to the parties of Diversified and various pieces of real property if they were sold. On the evidence, she concluded they would not be sold and so did not account for latent taxes in her valuation and division of family property.
- [83] Although the judge's handling of latent taxes was "equal" in the sense that she took the same approach to assets she allocated to both parties, it was arguably "unequal" in the sense that Mr. Sea was allocated assets, principally Diversified, with latent tax issues of potentially substantially greater magnitude than those allocated to Ms. He. Did she err in doing so?
- [84] As pointed out by the trial judge in P.T. No. 3, contingent tax liabilities are challenging to address. If they are deducted from the value of an asset but do not materialize for a very long time or at all, the party holding the asset with the contingent tax liability will be advantaged to the detriment of the other party. On the other hand, if they are not deducted from the value of an asset but do materialize in the near to medium term, the tables turn and the party holding the asset with the contingent tax liability will be disadvantaged to the benefit of the other party. In the search for equality and fairness, much will turn on the judge's view of what the future holds.
- [85] Where potential latent tax issues are in play, a variety of outcomes is possible. In *Sanai*, this Court made a deduction for latent taxes where the evidence supported that outcome: at paras. 6, 38. In *Ouellette*, this Court did not interfere with the judge's decision not to deduct "hypothetical and speculative disposition costs": at para. 32. In P.T. No. 2, the trial judge made an order to ensure latent tax issues would be accounted for "if and when" they arose: at paras. 22, 29. In *Cochrane v. Cochrane*, 2013 BCSC 2114, the impact of potential latent taxes was discounted because there was a strong likelihood that only a portion of the value to be distributed would be taken immediately with the balance taken at some later indeterminate time: at para. 40. In *D.Z. v. M.Z.*, 2022 BCSC 706, the trial judge held, correctly in my view, that "[t]he proper amount [of distributive taxes] is not a precise accounting nor an exact science" and "[t]he court can pick a percentage it thinks reflects distributive taxes": at para. 163.
- [86] Here, I do not agree with Mr. Sea that the judge had an incomplete understanding of the law. She was referred to a number of leading authorities, including *Sanai*, and stated the key principles succinctly, clearly and correctly. More specifically, as noted above, she held:
- [155] There is no absolute rule concerning whether tax consequences should or should not be taken into account in the division of family assets. Corporate and distributive taxes can and should be taken into account in the division of property in appropriate cases. Where there is evidence that a division of family assets will attract tax consequences, an allowance should be made for tax. Where it is not clear when or in what amount taxes will be exigible, an allowance may not be made. See *Maguire v. Maguire*, 2016 BCCA 431, at paras. 38-39.

[156] The principles that apply to distributive taxes were summarized by Savage J. (as he then was) in *McKenzie v. McKenzie*, 2015 BCSC 241, at para. 8:

- (1) where there is sufficient evidence to satisfy the Court of tax consequences or other costs inherent in a compensation order the Court should take these into account in setting the compensation amount;
- (2) the onus is on the payor to provide the trial judge with the necessary evidence of the tax consequences arising from the division of assets or other consequences of having to acquire the funds to pay the payee;
- (3) there is no absolute rule as to how the compensation order might be calculated, depending, as it does, on the type of assets to divided, timing, the parties involved and other orders in the action;
- (4) the matter should be considered as of the date of trial, not as of the date the matter comes back before the court; and
- (5) the overriding principle is fairness.

[87] The judge did not, as Mr. Sea points out, refer to the specific passage in *Sanai* that held "to the extent the circumstances of the asset permits, and provided there is evidence on which to do so, the parties are entitled to equality of treatment": *Sanai* at para. 32. But, more importantly, she set her mind to whether *Sanai* required her to discount the value of *Diversified* to account for distributive taxes in the circumstances before her. Her conclusion that it did not was, in my view, open to her.

[88] *Sanai* and other leading authorities demand that judges undertake a case- and fact-specific inquiry into, among other things, the likelihood that the value of assets subject to division will be reduced by latent tax consequences or other costs as a consequence of the division. While *Sanai* makes clear that reductions for distributive taxes or other costs are not limited to cases where the asset in issue "must be sold to allow the non-owning spouse to realize [their] interest in the asset" (at para. 33), *Ouellette* makes equally clear that the intention of the owning spouse is not therefore irrelevant: *Sanai* at paras. 33-34; *Ouellette* at paras. 27, 32.

[89] The judge undertook the required analysis. Borrowing from the language of *Sanai*, she was not satisfied "there [was] evidence on which to" account for distributive taxes in her valuation of *Diversified*: *Sanai* at para. 32. In particular, she identified several key factors that made this case similar to *Ouellette* and distinguishable from *Sanai*: (1) she recognized "the value in *Diversified* comes from its income-earning power" not a liquidation of its assets; (2) there was no evidence Mr. Sea would be required or intended to sell *Diversified*; and (3) she inferred Mr. Sea intended for *Diversified* to continue as a going concern: RFJ at para. 157; see *Sanai* at para. 34. All of these factors supported her conclusion that distributive taxes were too speculative to justify any discount in the value of *Diversified*.

- [90] My finding that the judge was justified in refusing to account for distributive taxes in her valuation of Diversified is, however, not the end of the story. As Mr. Sea says, the Compensation Payment "would have to come from somewhere", and there may have been costs associated with making that payment, whether costs associated with borrowing funds, or costs associated with sale of an asset other than Diversified (commissions or taxes). For example, even without liquidating Diversified, if Mr. Sea sold 3601 (his principal residence), he might incur a significant real estate commission. If Mr. Sea sold the Summer Cottage or 3602, he might incur capital gains taxes. And, if Mr. Sea had to borrow against his real property holdings, he would incur borrowing costs.
- [91] The judge was aware the Compensation Payment "would have to come from somewhere" and identified (at para. 223) one means for Mr. Sea to make the payment, namely borrowing against the equity in his various properties. But, the judge then did not set her mind to the question of how much it would cost Mr. Sea to make the Compensation Payment in that, or any other, fashion. In my respectful view, she erred in principle by failing to do so. Given that the judge concluded that equal division was appropriate and the goal of the Compensation Payment was to equalize the parties' share of family property, she ought to have considered whether the means of making the Compensation Payment would upset that equalization goal.
- [92] In retrospect, it is difficult to fault the judge because Mr. Sea failed to adduce evidence of the costs associated with making the equalization payment he was seeking or alternatively with respect to the equalization payment Ms. He was seeking. On the other hand, it can be difficult for a party dealing with a complex bundle of assets to predict the outcome of trial, as there can be any number of alternative ways of dividing assets. In my view, rather than proceed straight to appeal, it would have been preferable for Mr. Sea to have followed the course taken in P.T., and asked the judge to re-open the trial to address the costs associated with making the Compensation Payment ordered by her. However, Mr. Sea did not take these steps. Given the lack of clear precedent on the appropriate procedure, I am of the view his failure to seek to re-open the trial ought not to be an impediment to relief on this appeal.
- [93] In my view, at this stage of the proceeding, the only option available to achieve the equality and fairness the legislation and authorities demand is to return the matter to the trial court to address.
- [94] I would therefore allow this aspect of Mr. Sea's appeal. I would remit to the trial court for determination the question of whether there should be an adjustment to account for costs that will likely be incurred by Mr. Sea in order to make the Compensation Payment, whether due to costs of borrowing, taxes arising on sale of an asset, or otherwise. Ms. He is free, of course, to challenge Mr. Sea's position as to the costs he will incur in order to make the Compensation Payment. Finally, I would add that nothing in these reasons should be taken as restricting the trial court from making an "if and when" order or discounting the predicted costs associated with Mr. Sea making his equalization payment to account for various contingencies. It will be up to the trial court to determine if, and by how much, the

Compensation Payment ought to be adjusted to take account of likely costs associated with the making of that payment so as to best approximate the goal of equalization.

Did the judge err in her division of Mr. Sea's RRSP?

- [95] Mr. Sea alleges the judge erred by dividing Mr. Sea's RRSP without accounting for the inherent tax liability associated with it. "In the alternative", he submits the judge should have at least subtracted his \$100,000 in post-separation contributions from the value of his RRSP, leaving a balance of \$156,400.86 available for division.
- [96] Ms. He, wisely, did not strongly oppose Mr. Sea's primary ground of appeal regarding the division of his RRSP.
- [97] Mr. Sea held investments in his RRSP on a tax-deferred basis. There is no question his RRSP, like the RRSPs of every other person in Canada who has one, will eventually be distributed and the deferred taxes paid. In the maze of assets to be divided, it appears the judge overlooked the tax implications of dividing Mr. Sea's RRSP at face value. In my view, it was an error in principle for the judge not to set her mind to the issue.
- [98] Fortunately, there is an easy solution to correct the judge's oversight. Spousal rollovers are the almost universally employed vehicle used to divide RRSPs on a tax-neutral basis following a separation. They permit one spouse to transfer amounts within their RRSP to an RRSP held by the other spouse. The transferring spouse does not pay tax on making the transfer and the receiving spouse does not pay tax on receiving the transfer. Both pay taxes only when they make withdrawals from their RRSP, as required by the Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.).
- [99] To achieve the equal division of family assets ordered by the judge, I would allow this aspect of Mr. Sea's appeal and order that he transfer \$128,200 (half of \$256,400) from his RRSP to an RRSP held by Ms. He by way of spousal rollover within 30 days of the release of this judgment.
- [100] I am not entirely clear why Mr. Sea has framed his argument regarding his post-separation contributions to his RRSP as an "alternative" argument. Having allowed the appeal on Mr. Sea's primary argument, I would normally see no need to address his "alternative" argument. However, in the event I have misunderstood Mr. Sea's intention, I will deal with it briefly.
- [101] Mr. Sea's argument that the judge erred by not reducing his RRSP to account for his post-separation contributions fails for two reasons. Simply put, Mr. Sea has not: (1) pointed to anything in the record to support the conclusion that his post-separation contributions to his RRSP were not family property or derived from family property; or (2) identified any reviewable error in the judge's decision to divide his RRSP equally as of the usual date, namely the trial date.

Did the judge err by finding that \$190,000 in one of Mr. Sea's bank accounts did not stem from a shareholder's loan from Diversified?

[102] The judge found that \$190,000 in the account held by Ginnie Sea for the benefit of DSJ came from Mr. Sea and was family property subject to equal division: RFJ at para. 185. In doing so, the judge rejected Mr. Sea's evidence regarding the source of the \$190,000. Mr. Sea submits the judge erred in fact by finding the \$190,000 he transferred from a particular account to his daughter did not stem from a shareholder's loan from Diversified. He seeks to adduce fresh evidence to establish that \$200,000 was deposited into that account just before \$190,000 was transferred to his daughter and that the \$200,000 came from Diversified by way of a shareholder's loan.

[103] I would dismiss Mr. Sea's fresh evidence application because the proposed fresh evidence does not meet the Palmer test. The four criteria set out in Palmer were recently affirmed and clarified in the family law context by the Supreme Court of Canada in *Barendregt v. Grebliunas*, 2022 SCC 22:

[29] Whether in criminal or non-criminal matters courts have typically applied the four criteria set out by this Court in Palmer when parties seek to adduce evidence on appeal:

- (i) the evidence could not, by the exercise of due diligence, have been obtained for the trial (provided that this general principle will not be applied as strictly in a criminal case as in civil cases);
- (ii) the evidence is relevant in that it bears upon a decisive or potentially decisive issue;
- (iii) the evidence is credible in the sense that it is reasonably capable of belief; and
- (iv) the evidence is such that, if believed, it could have affected the result at trial.

[104] First, the proposed fresh evidence was available and could have been adduced at trial. It therefore fails the "due diligence" criterion.

[105] Second, the proposed fresh evidence is not relevant. Whether or not the money came from a shareholder's loan does not change the conclusion that the funds are family property. I will discuss this further in the context of the fourth criterion.

[106] Third, the proposed fresh evidence is not credible. It is comprised principally of an unaudited financial statement of a company, Diversified, controlled by Mr. Sea. Mr. Sea was found not to be credible by the judge (RFJ at para. 74) and, as noted by his own expert, has a history of using Diversified to engage in questionable financial practices. Further, the evidence is at odds with the judge's interpretation of the testimony given by Diversified's accounting employee, the very person now swearing the truth of the proposed fresh evidence. Finally, the evidence has not been tested by way of cross-examination.

[107] Fourth, I am not convinced the proposed fresh evidence, if believed, could reasonably be expected to have affected the result of the trial. The alleged shareholder loan was not apparent to or taken into account by the parties' experts in their valuations of Diversified. If the alleged loan had been excluded as a family asset in the hands of Mr. Sea, it presumably would have been an asset and increased the value of Diversified, part of the value of which was family property. One way or the other, the \$190,000 would have been subject to division.

[108] The judge made a factual finding regarding the source of the \$190,000. Mr. Sea has failed to demonstrate any error, never mind a palpable and overriding one, in the judge's determination. I would dismiss this ground of appeal.

Did the judge err by providing insufficient reasons for not reapportioning Ms. He's stock trading accounts back to the date of separation?

[109] At trial, Mr. Sea argued the parties' bank and financial institution accounts should be divided as of the date the parties separated rather than the trial date. He submitted the balance in one of Ms. He's stock trading accounts dropped without explanation from \$563,000 at separation in June 2019 to \$183,186 just before trial in June 2022. On appeal, he submits the judge failed to adequately explain why she declined to reapportion Ms. He's stock trading accounts back to the date of separation to account for the significant decrease in the value of family property caused by Ms. He.

[110] In her analysis, the judge correctly noted that, absent an agreement or order otherwise, s. 87 of the FLA requires the value of family property and debt to be determined as of the date of the hearing respecting the division of property or debt. She then cited *Kumagai v. Campbell Estate*, 2018 BCCA 24, at para. 76 for the proposition that a departure from the presumptive date for valuation of family property is effectively a reapportionment or unequal division of the family property, which can only be done under s. 95 of the FLA: RFJ at para. 89. Section 95 of the FLA permits an unequal division of family property or family debt only if it would be significantly unfair to divide the family property or family debt equally.

[111] The judge declined to divide any of the parties' bank and financial institution accounts at the date of separation because Mr. Sea "provided no convincing argument to depart from the trial date as the date for valuation": RFJ at para. 169. I take the same view on appeal.

[112] Mr. Sea has not identified any evidence that was before the judge to establish that the balance in Ms. He's Canadian dollar stock trading account HSBC 2G2E was \$583,000 at the date of separation. Fortunately, the balance does not appear to be controversial as Ms. He has helpfully provided responsive fresh evidence on appeal showing the balance in HSBC 2G2E to have been approximately \$568,000 CDN in December 2019. This evidence also establishes the balance in Ms. He's US dollar stock trading account HSBC 2G2F to have been approximately (\$560,000 CDN) at the same time.

- [113] The evidence before and accepted by the trial judge established Ms. He had a balance of \$387,114 CDN in 2G2E and of (\$296,331 US) in 2G2F in January 2022, and \$183,595 CDN in 2G2E and (\$139,986 US) in 2G2F just before trial in June 2022: RFJ at para. 177. In the absence of a satisfactory explanation from Ms. He regarding what happened in these accounts, the judge inferred Ms. He used the money in the accounts "as she saw fit": RFJ at paras. 177-178.
- [114] For my part, I fail to see how any of this evidence or these findings support Mr. Sea's argument regarding the date of valuing Ms. He's investment accounts. The flaw in Mr. Sea's argument is that he looks only at the positive balance in Ms. He's 2G2E account while completely ignoring the offsetting negative balance in Ms. He's 2G2F account. It is the difference between these two accounts that matters and that difference was divided equally by the judge. Whether measured in 2019 or at the date of trial, Ms. He's net investment holdings were negligible.
- [115] As noted, the judge gave very brief reasons for dismissing Mr. Sea's application to reapportion Ms. He's stock trading accounts back to the date of separation: RFJ at para. 178. On the record, in my view, the outcome was obvious and the judge said all that was required.
- [116] I would not accede to this ground of appeal.

B. Support Issues

- [117] The judge's income findings were at the heart of her spousal and child support orders. They are also at the heart of the appeal and cross-appeal of those orders. I will deal with the parties' arguments regarding the judge's income findings before turning to the sufficiency of her reasons for making a mid-range award.
- Did the judge err in finding that Mr. Sea's annual income was \$454,560?
- [118] Mr. Sea says the judge erred by failing to address his argument that his annual income should have been reduced by \$30,000 to account for "bonuses" he provides to employees of Diversified out of his personal income. In her cross-appeal, Ms. He says the judge erred by matching Mr. Sea's income to Diversified's income while also using an averaging approach. In my view, neither party has identified a reviewable error.
- [119] It is true that the judge did not address whether to reduce Mr. Sea's income to account for the \$30,000 he testified to providing to employees of Diversified out of his personal income. The most obvious reason is that Mr. Sea did not ask her to do so: see RFJ at paras. 301-302. In any event, I know of no reason why the judge would classify voluntary payments made to the employees of Diversified out of Mr. Sea's personal income as a deductible business expense rather than what they were: gifts.
- [120] I would not accede to this ground of appeal.

[121] In her cross-appeal, Ms. He takes issue with the judge's decision to base her finding of Mr. Sea's annual income, in part, on a three-year average of Diversified's pre-tax income to its March 31 corporate year-end rather than of his personal income to December 31. She relies on *Gagnon v. Petke*, 2008 BCSC 610, where the payor had provided the trial judge with various ways of determining his income. One of those ways involved allocating his company's corporate income (for corporate years ending May 31) to calendar years to "match" his other sources of income: *Gagnon* at para. 52. In the circumstances, the judge held it was not necessary to "match" his personal year end with his company's year end because she was using a three-year average to calculate his income: *Gagnon* at para. 134.

[122] The judge's task in this case was to determine Mr. Sea's annual income in accordance with ss. 16 to 20 of the Guidelines: Guidelines, s. 15. Ordinarily, a spouse's annual income is their "Total income" for tax purposes, adjusted in accordance with a Schedule to the Guidelines: Guidelines, s. 16. Here, however, given Mr. Sea's fluctuating income, the parties agreed the judge ought to determine his income in accordance with s. 17(1) of the Guidelines. That subsection of the Guidelines provides:

17(1) If the court is of the opinion that the determination of a spouse's annual income under section 16 would not be the fairest determination of that income, the court may have regard to the spouse's income over the last three years and determine an amount that is fair and reasonable in light of any pattern of income, fluctuation in income or receipt of a non-recurring amount during those years.

[Emphasis added.]

[123] As can be seen, s. 17 does not dictate a particular way of determining a fair income. Rather, when "the court is of the opinion that a determination of a spouse's income under s. 16 would not be the fairest determination of that income", the court has the discretion to employ a method that will be: *Harras v. Lhotka*, 2016 BCCA 246 at para. 24, citing *Ewing v. Ewing*, 2009 ABCA 227 at paras. 37-38.

[124] Here, the judge had to arrive at a "fair and reasonable" determination of Mr. Sea's income. She was not bound to take a mechanical or rigid approach. She was engaged in a fact- and context-specific exercise of judgment and discretion.

[125] To assist the judge with this task, the parties provided her with Guidelines income reports prepared by their experts. As noted above, these were arguments, not expert reports. In any event, both experts relied on Mr. Sea's reported income in the preceding three years, 2019 to 2021 and, as contemplated by s. 18 of the Guidelines, Diversified's pre-tax income.

[126] Mr. Burnham, for Ms. He, made various adjustments to Mr. Sea's reported annual income, including an adjustment to account for Mr. Sea's share of undistributed pre-tax income in Diversified to its corporate year ending on March 31, 2021. Mr. Tidball, for Mr. Sea, took a slightly different approach and included Diversified's most recent financial results to its corporate year ending on March 31, 2022. Mr. Tidball's reliance on Diversified's most recent

results was consequential because Diversified's earnings dropped significantly from 2021 to 2022.

[127] The judge was well aware of the differences between the approaches of the parties' experts. She expressly concluded Mr. Tidball had taken a "reasonable approach" while Mr. Burnham had not. She therefore accepted Mr. Tidball's estimate of Mr. Sea's annual income: RFJ at paras. 306-310.

[128] Ms. He's cross-appeal rests on Gagnon but her reliance on that case is misplaced. Gagnon represents no more than a fact-specific application of accepted legal principles. It did not create a rule of law that a judge may not rely on a payor's company's financial results when determining the payor's income through an averaging of the payor's previous three years of income. Notably, both experts in this case incorporated Diversified's year-end results into their estimates of Mr. Sea's income, just in slightly different ways and to slightly different end points.

[129] Ms. He has not identified any reviewable error in the trial judge's approach to or determination of Mr. Sea's Guidelines income. The judge's determination is entitled to deference.

[130] I would not accede to this ground of cross-appeal.

Did the judge err in law by not providing any explanation for her "computation" of Mr. Sea's income?

[131] Ms. He submits the trial judge erred in law by failing to provide any explanation for why she preferred Mr. Tidball's estimate of Mr. Sea's income over Mr. Burnham's. She says the judge found that Mr. Burnham's figures of Mr. Sea's income were the most supported by the evidence but then did not explain where he went wrong.

[132] Trial reasons are important. In the civil context, they justify and explain the result, tell the losing party why they lost, provide for informed consideration of the grounds of appeal, and satisfy the public that justice has been done: *Ecobase Enterprises Inc. v. Mass Enterprise Inc.*, 2017 BCCA 29 at para. 7, citing *K.L.K. v. E.J.G.K.*, 2011 BCCA 276 at para. 25; *F.H. v. McDougall*, 2008 SCC 53.

[133] As set out above, insufficient reasons amount to an error of law only when an appellate court cannot discern the foundation of the judge's ruling from the record as a whole: *R. v. R.E.M.*, 2008 SCC 51 at para. 57.

[134] Here, the parties advanced detailed submissions regarding Mr. Sea's income, including Guidelines income reports prepared by their experts. Ultimately, the judge adopted the approach taken in a report prepared by Mr. Tidball: RFJ at para. 309. As noted, that report was based, in part, on Diversified's financial results to March 31, 2022 whereas Mr. Burnham's report relied, in part, on Diversified's financial results to March 31, 2021. Mr. Tidball's report identified this was "significant because the income of the company was

declining".

[135] Respectfully, it is not difficult to discern the foundation of the judge's decision and where she thought Mr. Burnham "went wrong". In her view, it was reasonable and appropriate to base her determination of Mr. Sea's income on the most current data available. She rejected Mr. Burnham's report because he did not do so. That conclusion was clearly open to her.

[136] I would not accede to this ground of cross-appeal.

Did the judge err in finding that Ms. He would earn \$21,000 per year in investment income?

[137] Ms. He submits the judge made a palpable and overriding error in imputing investment income to her of \$21,000 per year. She says: (1) there was no evidence she would utilize both properties allocated to her as rental properties; (2) it is reasonable to infer she would be living in one of the units; and (3) the evidence shows that rental income from the properties would be far less than \$21,000.

[138] At para. 293 of her reasons for judgment, the judge imputed employment and total income to Ms. He of \$32,500 and \$53,500, respectively. By difference, she must be taken to have imputed \$21,000 of some other type of income to Ms. He. The judge did not specifically characterize or set out the basis for her imputation of this "other" income. It is evident from the record, however, that she accepted Mr. Sea's submission this was a reasonable amount based on Ms. He's own report of earning "interest and investment income" of \$21,058.59 in her 2021 income tax return.

[139] Respectfully, this ground of Ms. He's cross-appeal suffers from two fatal flaws. First, she assumes the judge based her imputation of income on expected rental income from Mainland and Seymour when the record shows it was based on her own report of "interest and other investment income" in her 2021 income tax return. Second, on the basis of the judge's orders, Ms. He will receive an equalization payment well in excess of one million dollars. Once in hand, should she choose to invest it prudently, Ms. He can be expected to earn income from it. The judge's assessment of likely future additional income of \$21,000 was conservative, whether it be rental income or investment returns or a combination of the two.

[140] I would not accede to this ground of cross-appeal.

Did the judge err by providing insufficient reasons for determining that a "mid-range" spousal support award was appropriate?

[141] Mr. Sea submits the judge erred by providing insufficient reasons for determining a mid-range spousal support award was appropriate. He relies on various excerpts from the Revised User's Guide to the SSAG (Canada, Department of Justice, Spousal Support Advisory Guidelines: The Revised User's Guide, (guide) by Carol Rogerson & Rollie Thompson (Ottawa: DOJ, 2016)) ["Revised User's Guide"] related to the handling of payor incomes over \$350,000. He says there was no real discussion as to why, in this case, the judge considered it

appropriate to make a mid-range award. He is critical of the judge for failing to distinguish "all the other cases" he cited dealing with similar circumstances and for not engaging with the leading case of *Chutter v. Chutter*, 2008 BCCA 507.

[142] I disagree with Mr. Sea on every level.

[143] Mr. Sea cites the following excerpt from s. 11 of the Revised User's Guide on awarding spousal support where the payor's income exceeds \$350,000, which is described as a "cap" but not a "ceiling":

There are some clear principles enunciated in the case law, even if the actual outcomes are discretionary and sometimes conflicting. In *J.E.H. v. P.L.H.*, 2014 BCCA 310, leave to appeal to SCC refused [2014] S.C.C.A. No. 412, there is a careful review of the law for cases above the ceiling, where some of these principles are stated.

- The formulas for amount are no longer presumptive once the payor's income exceeds the "ceiling".
- The ceiling is not an absolute or hard "cap", as spousal support can and usually does increase for payor incomes above \$350,000.
- The formulas are not to be applied automatically above the ceiling, although the formulas may provide an appropriate method of determining spousal support in an individual case, depending on the facts.
- Above the ceiling, spousal support cases require an individualized, fact-specific analysis. It is not an error, however, to fix an amount in the SSAG range, as was done in *J.E.H. v. P.L.H.*, above. Evidence and argument are required.
- Where the payor's income is not too far above the ceiling, the formula ranges will often be used to determine the amount of spousal support, with outcomes falling in the low-to-mid range for amount. How far is "not too far above" is still not clear. Somewhere between \$500,000 and \$700,000, it seems.
- Once the payor's income is "far" above the ceiling, then the amount of support ordered will usually be below the low end of the SSAG range, but SSAG ranges are still calculated and sometimes the outcome will fall within the SSAG range.
- For incomes not too far above \$350,000, courts frequently order an amount at the low end of the SSAG range for amount (payor's income noted for each): *Ponkin v. Werden*, 2015 ONSC 7466 (\$498,828, then \$406,507); *Stober v. Stober*, 2015 BCSC 743 (\$600,000); *Piche v. Chiu*, 2015 BCSC 335 (\$465,000); *Droit de la famille - 151740*, 2015 QCCS 3284 (\$375,000); *Cork v. Cork*, 2014 ONSC 2488 (\$562,000, final); *C.E.A. v. B.E.A.*, 2014 BCSC 1500 (\$592,122); *Dymon v. Bains*, 2013 ONSC 915 (\$550,000); *D.L.D. v. R.C.C.*, 2013 BCSC 590 (\$652,000); *Perry v. Fujimoto*, 2011 ONSC 3334 (\$353,000); *Trombetta v. Trombetta*, 2011 ONSC 394 (\$660,000); and *Teja v. Dhanda*, 2007 BCSC 1247, appeal partly allowed on other issues, 2009 BCCA 198 (\$425,000).

[Bold emphasis in original; underline emphasis added.]

[144] There is no question that the SSAG and Revised User's Guide provide helpful guidance to trial judges in their assessments of spousal support: *Parton v. Parton*, 2018 BCCA 273 at para. 46, citing *Chutter* at para. 100.

[145] There is also no question that the SSAG and the Revised User's Guide are not binding and do not determine the outcome in any particular case: *Parton* at para. 46; *Chutter* at para. 100. The excerpt of the Revised User's Guide reproduced above recognizes, as did the trial judge, that an individualized and fact-specific analysis is required: RFJ at para. 338; see also *Parton* at paras. 43-46.

[146] As the reproduced excerpt notes, there are many examples where courts order spousal support at the low end of the SSAG range where the payor's income is above \$350,000. But, the excerpt also recognizes that awards typically fall in the "low-to-mid range" where the payor's income is "not too far above" \$350,000. By "not too far above", the authors of the Revised User's Guide have in mind payor incomes of less than somewhere between \$500,000 and \$700,000.

[147] Here, the judge's mid-range award of spousal support is consistent with the excerpt from the Revised User's Guide cited by Mr. Sea: "mid range" is within the "low-to-mid range" and Mr. Sea's annual income was "not too far above" \$350,000. Furthermore, while the judge did not distinguish "all the other cases" cited by the parties, she was not required to do so. Rather, she was required to explain why she made the award, which she did.

[148] As noted above, the judge began her analysis of spousal support by setting out a number of uncontroversial propositions. She noted the objectives of a spousal support order and recognized her obligation to also consider the "condition, means, needs and other circumstances of each spouse" under ss. 15.2(6) and 15.2(4), respectively, of the Divorce Act, R.S.C. 1985, c.3 (2nd Supp.): RFJ at paras. 319-322.

[149] After citing the seven reasons advanced by Mr. Sea for a spousal support award at the low end and the four reasons advanced by Ms. He for an award at the high end of the range, the judge identified why she settled on a mid-range award: RFJ at paras. 331, 333, 339-343. In particular, the judge reasoned:

· Ms. He did not sacrifice a lucrative career or career prospects in China to marry Mr. Sea. Further, she made the personal choice, absent the constraints of financial obligation, to be absent from the workforce to raise DSJ once he started school. She therefore did not have a strong compensatory claim: RFJ at para. 339.

· An award at the high end of the range would provide little encouragement to Ms. He to pursue economic self-sufficiency: RFJ at para. 340.

- Ms. He had "experienced economic hardship as a consequence of the breakdown of the parties' marriage" and "lack[ed] the means to support herself at a level approaching the marital standard of living." She, therefore had, "a reasonably strong non-compensatory claim": RFJ at para. 341.
- Her property award and compensation payment would offset her "reasonably strong non-compensatory claim" to some degree: RFJ at para. 341.
- While Mr. Sea's age was a consideration, he had "the luxury of being able to enjoy a very substantial income" and would not have to work full-time to pay spousal support: RFJ at para. 342.

[150] In terms of the objectives of spousal support, the absence of a strong compensatory claim and the need to provide an incentive to Ms. He to support herself pulled in one direction towards a spousal support award lower in the range. On the other hand, Ms. He's reasonably strong non-compensatory claim pulled in the opposite direction towards a spousal support award higher in the range.

[151] In terms of the "condition, means, needs and other circumstances of each spouse", the key factors again pulled in opposite directions. The fact that Ms. He would receive valuable property and a substantial equalization payment favoured an award of spousal support lower in the range. But, Mr. Sea had even more substantial means. He owned valuable excluded property, was awarded half of the family property and was in a position to continue to earn a very good income with minimal effort, all of which favoured an award of spousal support higher in the range.

[152] Mr. Sea disagrees with the way the judge balanced the key factors and is disappointed with the judge's decision to make a mid-range spousal support award. But, respectfully, he has not identified a reviewable error. While the judge's reasons were not to Mr. Sea's liking, they were sufficient in the sense that they explained why she made her decision and have not deprived him of the right to meaningful appellate review.

[153] I would not accede to this ground of appeal.

V. Conclusion and Disposition

[154] For all of these reasons, I would dismiss Mr. Sea's application to adduce fresh evidence and allow his appeal in part. Specifically, I would:

1. set aside the judge's order allocating Mr. Sea's RRSP holdings of \$256,400 to him;
2. reduce the compensation payment to be made by Mr. Sea to Ms. He by \$128,200;
3. order that Mr. Sea transfer \$128,200 from his RRSP to an RRSP held by Ms. He by way of spousal rollover within 30 days of the release of this judgment;

4. remit to the trial court for determination the question of whether there should be an adjustment to account for costs that will likely be incurred by Mr. Sea in order to make the Compensation Payment, whether due to costs of borrowing, taxes arising on sale of an asset, or otherwise;
5. dismiss all of Mr. Sea's other grounds of appeal; and
6. dismiss all of Ms. He's grounds of cross-appeal.

"The Honourable Chief Justice Marchand"

I AGREE:

"The Honourable Justice Griffin"

I AGREE:

"The Honourable Mr. Justice Voith"

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