CANADA / JUDGMENT

Siroski v. Ross

2025 BCSC 1893

COURT
Supreme Court of British Columbia

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2025 BCSC 1893 Siroski v. Ross

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Siroski v. Ross,

2025 BCSC 1893

Date: 20250929

Docket: E180962

Registry: Victoria

Between:

Shaleen Melissa Siroski

Claimant

And

John Paul Emile Ross

Respondent

Before: The Honourable Mr. Justice Veenstra

Reasons for Judgment

Counsel for the Claimant:

V. Hemminger

Counsel for the Respondent:

S.N. Wall

Counsel appearing as Amicus Curiae:

P.J. Reimer

Place and Dates of Hearing:

Victoria, B.C.

January 23-24, 2025

Written Submissions of the Claimant Received:

February 11 and

August 20, 2025

Written Submissions of the Respondent Received:

February 20 and

August 11, 2025

Place and Date of Judgment:

Victoria, B.C.

September 29, 2025

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Introduction

[1] The respondent, Mr. Ross, applies pursuant to Rule 11-2 of the Supreme Court Family Rules [SCFR] by way of two virtually identical notices of application, filed December 10 and 18, 2024, respectively, to strike out certain paragraphs of the claimant's nearly identical notices of application filed on June 27 and December 3, 2024. Mr. Ross also seeks special costs.

[2] Mr. Ross alleges that:

a) The filing of a second notice of application on December 3, 2024, nearly identical to the first one, rather than an amended notice of application, is an abuse of process, and the December 3, 2024 notice of application should be struck out;

b) The positions that the claimant, Ms. Siroski, seeks to advance are barred by res judicata (either issue estoppel or cause of action estoppel), or alternatively are an attempt to relitigate issues and thereby an abuse of process;

c) Alternatively, Ms. Siroski made an election at a hearing before Mr. Justice Johnston in November 2020 to affirm the Variation Agreement, and any pleading seeking to set it aside is an "inconsistent pleading" and an abuse of process for that reason;

d) Ms. Siroski's claim to set aside an agreement made in October 2018 (the "Variation Agreement") to vary the parties' separation agreement was improperly brought by way of the Notice of Family Claim filed in this matter in September 2020;

e) Ms. Siroski's two 2024 notices of application purporting to seek orders setting aside the Variation Agreement were brought out of time and are barred by the applicable limitation period;

f) Ms. Siroski's claims in her recent notices of application for fines, penalties and damages as a result of breaches of the parties' separation agreement are not matters raised in the Notice of Family Claim and cannot now be advanced because they would be out of time; and

g) In any event, Ms. Siroski's two notices of application do not provide a sufficient legal basis for the relief sought with respect to the claim for fines, in that they reference s. 213 but not s. 230 of the Family Law Act, S.B.C. 2011, c. 25 [FLA], and in any event s. 230 does not provide for fines in respect of failures to make support payments.

Background Facts

Events Leading Up to the Separation Agreement

[3] The parties began living together in July 1996 and were married in Saskatchewan in July 2006. They have three children:

a) A daughter, G.R., born in March 2006 and now 19 years old;

b) A son, J.-P.R., born in July 2007 and now 18 years old; and

c) Another son, H.R., born in March 2009 and now 16 years old.

[4] The parties separated in February 2013. Despite Mr. Ross earning a substantial income as a construction superintendent, the parties were in financial difficulty at the time of separation. Ms. Siroski said that is because they had "overbuilt" a house, which house was lost to foreclosure following their separation. Ms. Siroski made an assignment in bankruptcy in 2013 and was discharged in 2015. Mr. Ross made an assignment in bankruptcy in either 2016 or 2018 (the record is inconsistent on that point) and was discharged several years later after conditions were met.

[5] Mr. Ross has lived since separation in Manitoba. He re-partnered soon after the parties' separation. He and his now-wife, Brooke Ross, entered into a Spousal Agreement in March 2015 stating that Mr. Ross had no interest in the property in which they lived.

[6] Ms. Siroski moved with the parties' children to Victoria. There is some suggestion in the materials that she also embarked on a new relationship, although I was not referred to the particulars of that and it is not relevant to the present application.

[7] Leading up to 2017, Mr. Ross worked as a construction superintendent on a project in China.

[8] The parties signed a Separation Agreement in 2017. Its recitals confirmed that:

John is self-employed as a contractor in the oil and gas industry and earns approximately $300,000.00 per year; and Shaleen is employed part-time as a receptionist at Twist Hair Salon in Victoria, British Columbia and earns approximately $12,000.00 per year;

[9] The Separation Agreement provided that Mr. Ross would pay the following:

a) $5,500 per month in child support, which was deemed to include a contribution of $779.00 per month in respect of special and extraordinary expenses; and

b) $1,500 per month in spousal support until December 31, 2025.

[10] The parties agreed that until at least June 30, 2021, there would be no variation of the quantum of child support unless:

(a) The children or any of them cease to reside with Shaleen on a primary basis;

(b) John suffers job loss or a change in employment and/or income related to circumstances outside of his control including but not limited to health problems and other such conditions and circumstances that adversely impact upon his ability to work overseas, the termination of his contract by his current employer and factors impacting upon the oil and gas industry including natural disasters, work stoppages, lack of work or other industry-related disruption.

[11] Similarly, the parties agreed that there would be no variation in the quantum of spousal support, except if Shaleen was to cohabit in a common-law relationship for three years or more, or:

John is entitled to apply for a variation or termination of spousal support, in the event that John suffers job loss or a change in employment and/or income related to circumstances outside of his control including but not limited to health problems and other such conditions and circumstances that adversely impact upon his ability to work overseas, the termination of his contract by his current employer and factors impacting upon the oil and gas industry including natural disasters, work stoppages, lack of work or other industry-related disruption.

[12] The parties agreed that Mr. Ross would apply for a divorce in the Court of Queen's Bench (Family Division) in Brandon, Manitoba. However, the parties also agreed that Ms. Siroski was domiciled and resident in British Columbia, and the agreement stated that it would be governed and construed according to the laws of British Columbia.

[13] Attached to the Separation Agreement were certificates of independent legal advice signed to confirm that each party had legal advice with respect to the Separation Agreement - Mr. Ross in Manitoba and Ms. Siroski in British Columbia. The agreement was signed by Ms. Siroski on January 20, 2017, and by Mr. Ross on April 12, 2017.

Events Leading to the Variation Agreement

[14] A few months later, Mr. Ross's employment status changed. The circumstances of that change are a matter of contention between the parties. Mr. Ross says that his contract was not renewed in August 2017, although the evidence is vague or inconsistent as to whether that was at his instance or his employer's. Ms. Siroski says that Mr. Ross told her that his new partner gave him an ultimatum that he could no longer work overseas, and that as a result he left his job.

[15] In August 2017, four months after signing the Separation Agreement, Mr. Ross stopped paying support. Ms. Siroski says that this left her in a state of financial desperation.

[16] On February 16, 2018, Ms. Siroski filed the Separation Agreement in the Supreme Court of British Columbia. That filing initiated the present proceeding (No. E180962, Victoria Registry). Ms. Siroski subsequently enrolled with the BC Family Maintenance Agency (the "BCFMA", then known as the Family Maintenance Enforcement Program).

[17] On October 8, 2018, the parties entered into an agreement to vary the Separation Agreement (the "Variation Agreement"), which was signed by Ms. Siroski on September 26, 2018, and by Mr. Ross on October 8, 2018. The recitals of the Variation Agreement include the following:

John has disclosed to Shaleen that his overseas contract was not renewed on or about August 2017 and he is now currently self-employed and working as a construction supervisor on a contract basis, with Tundra Oil and Gas Partnership in Virden, Manitoba and his new income is $110,000 per year after operating expenses.

[18] The Variation Agreement provided that child support would be reduced to the following:

a) commencing September 1, 2017, monthly payments of $2,000; and

b) commencing September 15, 2018, a further $250 per month in respect of special expenses, plus reasonable expenses for hockey equipment, to be purchased second-hand wherever possible.

[19] The Variation Agreement also provided that spousal support would be reduced to $550.00 per month effective as of September 1, 2017.

[20] Finally, the Variation Agreement provided that there would be a one-time lump-sum adjustment of unpaid support amounts, with the sum of $25,000.00 to be paid by December 31, 2020, in full satisfaction of any arrears owing at the time of the Variation Agreement.

[21] Attached to the Variation Agreement are certificates of independent legal advice in respect of each party. With respect to Ms. Siroski, the certificate was completed by the same lawyer who provided independent legal advice in respect of the Separation Agreement and who had filed the Separation Agreement in the Supreme Court of British Columbia. That same lawyer filed the Variation Agreement in this proceeding on October 31, 2018.

[22] Once the Variation Agreement was signed, Mr. Ross began paying support based on the new monthly amounts for a period of time. He did not, however, pay the $25,000 lump sum.

[23] In May 2019, the parties were divorced by an order of the Manitoba Court of Queen's Bench.

[24] In June 2020, Ms. Siroski signed an option agreement to purchase a townhouse by way of a rent-to-own program. Ultimately, she was unable to complete this purchase on her own - she says that her financing was ultimately not approved because she could not show a stable stream of support payments. She was only able to continue with the townhouse purchase by bringing in a friend. She blames Mr. Ross for the loss of a $12,000 initial deposit and for the fact that she now rents the unit from her friend rather than owning it.

British Columbia Litigation (Action No. E180962)

[25] On September 1, 2020, Ms. Siroski filed a Notice of Family Claim (the "2020 NOFC") in this proceeding. The 2020 NOFC notes in s. 3 that there were written agreements between the parties dated April 12, 2017, and October 8, 2018. In s. 4 of the 2020 NOFC, it is noted that Ms. Siroski was seeking an order respecting children, an order for spousal support, "another order" and an order for costs.

[26] The notice of family claim form, in s. 4, instructs the party completing the form to "complete and attach" Schedule 2, if seeking an order respecting children, Schedule 3 if seeking an order for spousal support, and Schedule 5 if seeking "another order".

[27] Schedule 2 of the 2020 NOFC states that Ms. Siroski was seeking a review of parenting including the preparation of a s. 211 report, expressing concern that:

the Children were subjected to unreasonable pressure by the Respondent to relocate immediately to his residence without returning from summer vacation.

[28] In Schedule 2, Ms. Siroski also sought child support pursuant to the Federal Child Support Guidelines, SOR/97-175, based on the respondent's income, which was said to be unknown. In s. 5 of Schedule 2, which is intended to set out "[c]urrent child support arrangements", the following is recorded:

Set out in the Separation and Variation Agreement but are not being followed and the Respondent has also pledged the Claimant's credit and cause debt to the Claimant. Arrears are accruing and no payments are being made. However, the Claimant was never provided with the Respondent's sworn financial disclosure and was pressured to accept what was offered.

[29] Finally, I note that Schedule 2 says that orders are sought pursuant to both the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.), and the FLA.

[30] Unfortunately, the version of the 2020 NOFC in the record does not include a Schedule 3, which should have been attached in order to particularize the claim for spousal support, and would have specified whether the claim was advanced under the Divorce Act, the FLA, or both.

[31] In Schedule 5, in the section for "orders under the Family Law Act", the following are included:

2. full financial disclosure such that an accurate income can be determined from separation as is required for support purposes retroactively and prospectively.

3. That the Separation Agreement and the Variation Agreement, or certain parts of those agreements be revoked and set aside pursuant to s. 214.

[32] Another part of Schedule 5 includes provision for "other orders". In that part, the following are listed:

1. An order for compensation to the Claimant for losses occurred due to the Respondent pledging credit in her name.

2. Orders as set out above but under the Divorce Act (Canada) should there be limitation as to the applicability of the provisions in this matter under the Family Law Act.

3. Costs.

[33] On September 28, 2020, Mr. Ross filed a Response to Family Claim, disagreeing with all of the relief sought, and asserting that:

The Claimant was not pressured into the Separation or Variation Agreement and had independent advice from counsel. At the time of both the Separation Agreement and Variation Agreement, Counsel for the Claimant signed a Certificate of Independent Legal Advice acknowledging that she was signing the Separation Agreement "without any compulsion, fear, threat or influence" from the Respondent. At the time of both the Separation Agreement and Variation Agreement, the Claimant signed a Certificate of Acknowledgement stating that she was executing the agreements "voluntarily and without compulsion." The parties also acknowledged the sufficiency of financial disclosure in the Separation Agreement.

The Hearing Before Mr. Justice Johnston

[34] On October 14, 2020, Mr. Ross filed a notice of application in this proceeding seeking two orders:

a) that the Separation Agreement be varied such that the two eldest children relocate to live with Mr. Ross in Manitoba, and

b) that the amounts of child and spousal support be reduced.

[35] On November 3, 2020, Ms. Siroski filed an application response asserting that Mr. Ross had pressured the children to stay in Manitoba. It argued that the children had an established life in Victoria with many friends, having been at the same school since kindergarten. She also expressed concern that, although Mr. Ross had said that he was not working at the time, he would need to find employment, and that would inevitably take him away from his family residence such that his new wife would become the children's primary parent.

[36] Also on November 3, 2020, Ms. Siroski filed a notice of application. In Part 1, which sets out the orders sought, it states:

1. That the children of the family (the "Children") will remain in the primary care of the Claimant and reside with the Claimant, Shaleen Melissa Siroski and shall have specified parenting time with the Respondent as follows:

a. One month each summer and for one week on each of the winter and spring break vacations.

b. All other time as agreed between the parties in advance and in writing.

2. That the Respondent be ordered to provide full financial disclosure pursuant to the Federal Child Support Guidelines within 14 days and that the disclosure shall include but not be limited to the following:

a. The last three years of 7317884 MB Ltd;

b. The sworn financial disclosure of Brooke Ross.

3. That support as agreed and set out in the Variation Agreement, dated October 8, 2018 be enforced.

4. That, alternatively, the Respondent's income be imputed to no less than set out in the Variation Agreement, dated October 8, 2018.

5. Special Costs or costs.

[37] Nothing in the notice of application reconciles the request to enforce the support provisions of the Variation Agreement with the request in the 2020 NOFC to set aside the Variation Agreement. As I read Part 2 (Factual Basis) of the notice of application, it is entirely focused on the questions of the children's residence and parenting time, and does not address support at all.

[38] Part 3 (Legal Basis) of the notice of application provides no further clarification. It simply states the following:

22. The Family Law Act, S.B.C. 2011, c. 25;

23. The Divorce Act R.S.C. 1985;

24. The Federal Child Support Guidelines, in particular s. 18 as it relates to determining all income that is available for a payor and as it required to consider the net pre-tax corporate income available.

25. Other legal basis as may be permitted by this Honourable Court.

[39] Mr. Ross filed an Application Response on November 12, 2020, consenting to some limited disclosure, but otherwise opposing the orders sought. In Part 4 (Factual Basis), it is noted that:

8. The Respondent still works as a consultant and construction supervisor in the oil and gas industry for pipelines and plants. He is an employee of 7317884 Manitoba Ltd (the "Numbered Company") which is wholly owned by his wife, Brooke Ross ("Mrs. Ross").

[40] The Factual Basis goes on to assert that Mr. Ross's income had decreased significantly in 2020 due to an economic downturn in the oil and gas industry and the compounding effects of COVID-19, but that he was continuing to actively seek work in the oil and gas industry.

[41] In the Legal Basis, Mr. Ross asserted that Ms. Siroski had failed to obtain leave to have her application heard prior to a Judicial Case Conference, or alternatively that she had given insufficient notice. It went on to assert that Mr. Ross's income had decreased in 2020, and that there was no basis to impute income.

[42] The two applications were set down for hearing before Mr. Justice Johnston on November 19-20, 2020. By the time of the hearing, the relocation application related only to the eldest child.

[43] On December 24, 2020, Mr. Justice Johnston gave reasons for judgment, which are indexed at 2020 BCSC 2063. He described the applications before him:

[1] These are cross-applications: Mr. Ross seeks an order permitting his oldest child, [G.R.], born March 10, 2006, to relocate to live with him in Virden, Manitoba, commencing December 28, 2020, and a further order varying child and spousal support currently governed by an agreement.

[2] Ms. Siroski opposes Mr. Ross's applications, and seeks her own orders confirming the parenting terms provided in their separation agreement. As well, Ms. Siroski seeks full financial disclosure from Mr. Ross, including three years information on a numbered Manitoba corporation, as well as a sworn financial statement from Mrs. Ross. Additionally, Ms. Siroski seeks enforcement of support provisions of an agreement varying a separation agreement, and in the alternative that income be imputed to Mr. Ross at no less than the income of $110,000 per year reflected in the variation agreement.

[44] Mr. Justice Johnston described the Separation Agreement and Variation Agreement at paras. 4-13, then reviewed the facts underlying the relocation application at paras. 14-24. At paras. 25-38, he reviewed the applicable law governing the relocation application, then provided his analysis of the relocation issue at paras. 39-46, concluding at para. 46 that the relocation application should be dismissed.

[45] At para. 47, Mr. Justice Johnston turned to Mr. Ross's application for a reduction in support payments, noting that:

[47] Mr. Ross seeks prospective and retroactive variation of child and spousal support to January 1, 2020, to reflect true incomes of himself and Ms. Siroski. Ms. Siroski resists on the basis that Mr. Ross's current income is not readily apparent, as he has not fully disclosed his financial circumstances.

[46] After referencing provisions of the Separation Agreement governing support, Mr. Justice Johnston commented that:

[51] When the original Separation Agreement was signed, Mr. Ross earned $300,000 a year working in China on a month on/month off rotation. His contract ended, and he began working in Canada for $110,000 per year. That led to the Variation Agreement.

[47] After reviewing Mr. Ross's more recent affidavit as to his economic circumstances in 2020, Mr. Justice Johnston commented:

[56] Counsel have invited me to consider 884 Manitoba as Mr. Ross's company, and its net income as his income, but if I do, counsel says I must also consider corporate liabilities. That is difficult with a company that has no financial statements.

[62] Ms. Siroski complains that Mrs. Ross's numbered company has not provided its financial statements, to which Mr. Ross has replied that the company has none. Instead, the company has provided its corporate tax returns referred to earlier and its general ledger. The latter is not particularly helpful.

[63] Whether Mr. Ross is currently underemployed must be considered. That COVID-19 has disrupted the economy is sufficiently notorious that I can take judicial notice of that fact, and I do. Whether there is a downturn in the oil and gas industry beyond the impact of COVID-19 is not so notorious. The only evidence of general downturn comes from Mr. Ross. Similarly, Mr. Ross has sworn that COVID-19 has restricted his ability to travel to Saskatchewan, thus further reducing his opportunities for work. I would need more and better evidence of such restrictions before inferring that COVID-19 has reduced Mr. Ross's job opportunities in Saskatchewan or Alberta.

[64] Mr. Ross's evidence on this suffers from its generality; there is no real evidence of a reasonable search for employment on his part.

[65] Mr. Ross has not satisfied me that his current financial circumstances are outside his control, and his application to vary child and spousal support is dismissed.

[66] Although there is no separate application with respect to the $25,000 lump sum payable by December 31, 2020, I disagree with Mr. Ross's characterization of this amount as something other than a lump sum settlement of Ms. Siroski's claim for arrears to the date of the variation agreement. In my view, the wording of clause 7, "she acknowledges that the sum of $25,000 is wholly sufficient to adjust for any arrears of support which may have accumulated" makes clear that this payment is a settlement of arrears.

[48] The final three paragraphs of Mr. Justice Johnston's decision deal with cost-related questions:

[67] Finally, the parties shall each pay half of the cost of Dr. Elterman's interview and report.

[68] As to costs, this matter was reasonably brought in response to [G.R.'s] expressed desire to try living with Mr. and Mrs. Ross. The mobility question was decided at least in part, and a large part, on the tentative nature of [G.R.'s] wish to move.

[69] My view, which is open to submissions, is that the parties should each bear their own costs of these applications. If either party wishes to argue otherwise, they should set the matter down for further submissions, oral or written, before January 15, 2021.

[49] Nothing in Mr. Justice Johnston's reasons for judgment specifically addressed Ms. Siroski's notice of application (other than the description of the application at para. 2).

[50] No formal order was taken out in respect of this judgment.

[51] In January 2021, Mr. Ross's lawyer filed a Notice of Intention to Withdraw, and nothing further happened in the litigation for over a year.

Events after the Judgment of Johnston J.

[52] At some point, Mr. Ross again ceased paying support. In March 2021, Ms. Siroski re-enrolled with the BCFMA.

[53] In early 2022, Mr. Ross began preparing paperwork to seek a further variation of his support obligations by means of the Interjurisdictional Support Orders Act, S.B.C. 2002, c. 29 [ISO Act].

[54] The ISO Act provides a mechanism for a party from one jurisdiction (including another province) to make application to change an existing support order without having to go to the place where the support order was made - with the procedural steps necessary to advance the application being handled by the "designated authority". The designated authority for British Columbia is a group within the Ministry of the Attorney General. A lawyer from that Ministry, Mr. Reimer, appeared at the present application in order to provide information on the ISO Act process, but did not make submissions on the substantive issues raised.

[55] Mr. Ross prepared an affidavit in February 2022, which ultimately led to the filing of a "Support Variation Application" in the Supreme Court of British Columbia on September 16, 2022. In this application, Mr. Ross sought to have the total amount of his monthly support payments reduced from $2,800 to $1,000, to have his obligation to pay spousal support terminated as of January 1, 2021, and to reduce the arrears to $15,000.

[56] The application was served on Ms. Siroski on November 29, 2022, with the hearing scheduled for January 19, 2023. Ms. Siroski filed a response on December 22, 2022, opposing the application.

[57] As all of this was going on, the parties' second child (J.-P.R.) began living with Mr. Ross in Manitoba in early October 2022, and remained there for about 16 months (until early February 2024).

[58] On January 19, 2023, the application came on for hearing before Justice Saunders, who ordered that Mr. Ross's application be adjourned generally and granted an order that the designated authority contact Mr. Ross "and request that he provide to this Court" the information and documents set out in a lengthy list, including documents relating to the Manitoba numbered company.

[59] On July 17, 2023, Mr. Ross made a further affidavit addressing some of the documents and information referenced in the order of Justice Saunders. The adequacy of the additional information provided, and whether it complies with Justice Saunders' order, is a matter of controversy between the parties (although not specifically in issue before me).

[60] Mr. Ross's application was initially rescheduled for the fall of 2023, then rescheduled again for December 2023. However, the lawyer who had represented Ms. Siroski since 2017 was in the process of leaving the practice of family law, and the application was adjourned again so that Ms. Siroski could retain new counsel.

[61] Ultimately, the application was scheduled for the week of August 5, 2024.

The Siroski Applications

[62] On June 27, 2024, Ms. Siroski filed the first of the two notices of application that are in issue on the present application, seeking among other things that the Variation Agreement be set aside, that income of $300,000 be imputed to Mr. Ross, and that Mr. Ross be fined for his failures to pay child support and spousal support.

[63] Mr. Ross, who had not been represented by counsel in this proceeding since January 2021, decided that he should retain counsel. The hearing that had been scheduled for August 5, 2024, did not proceed. Instead, counsel scheduled a Case Planning Conference to discuss scheduling of the various pending applications.

[64] An initial Case Planning Conference took place on November 19, 2024. The time reserved for the conference was insufficient, and the parties were directed to schedule a further Case Planning Conference, with the court file in which the ISO Act documents had been filed to be made available at that time.

[65] On December 3, 2024, Mr. Ross filed his materials in response to the Notice of Application filed on June 27, 2024. That same day, Ms. Siroski filed a further Notice of Application (the "Second 2024 NOA"). The Second 2024 NOA was mostly identical to the June 27, 2024 Notice of Application, but added the following under Part 1 (Orders Sought):

22. That the Respondent John Ross and/or Brooke Ross be required to pay damages to the Claimant for losses caused as a result of John Ross breaching the terms of the Original Separation Agreement and Variation Agreement.

[66] Mr. Ross's counsel wrote on December 5, 2024, asserting that:

a) Ms. Siroski should have filed an amended notice of application, rather than a separate document,

b) having two nearly identical notices of application was an abuse of process, and demanding that the second one be withdrawn; and

c) in any event, any claim for damages was subject to a two-year limitation period, and the limitation period had long since expired.

[67] Ms. Siroski's counsel responded asserting that:

There is no opportunity to file an amended Notice of Application. The Registry will not accept it which is why I am asking that the one just served replace the one served in June.

The Present Application

[68] On December 10, 2024, counsel for Mr. Ross filed the first of his two notices of application seeking to strike out most of the relief sought in the claimant's two outstanding notices of application. A second notice of application in almost identical terms was filed on December 18, 2024.

[69] A further Case Planning Conference was held on December 17, 2024. Justice Wolfe ordered that Mr. Ross's application to strike out portions of Ms. Siroski's notices of application be heard on two days in January 2025, prior to the hearing of the other outstanding applications.

[70] The specific paragraphs from the Second 2024 NOA that Mr. Ross seeks to strike out are the following:

4. Pursuant to the [FLA] the [Variation Agreement] is set aside in its entirety.

5. That the [Separation Agreement] replace the Variation Agreement.

8. That child support and spousal support owed by the Respondent to the Claimant is hereby calculated retroactively to the date of separation and is deemed payable by the Respondent immediately to the Claimant and in accordance with the [Separation Agreement].

13. The Respondent be fined the sum of $5,000.00 for each breach he has made of the [Separation Agreement] and the Variation Agreement. Such breached include the following:

a. The Respondent breached the [Separation Agreement] as follows:

i. when he voluntarily ceased employment overseas and unilaterally withheld child support, paying his proportionate share of special expenses for the Children, and spousal support payments;

ii. when he applied to amend the [Separation Agreement] in contravention of sections 10, 11, 12 of the [Separation Agreement]

iii. When he withheld child support and spousal support payments as required in the [Separation Agreement] and, in doing som forced the application to accept a reduced amount of child and spousal support on both a retroactive and prospective basis.

iv. When refusing to extend medical and dental benefits to the Children of the marriage in contravention of paragraph 25 of the [Separation Agreement].

b. The Respondent breached the Variation Agreement as follows:

i. When he unilaterally withheld child support, paying his proportionate share of special expenses for the Children, and spousal support payments, thus causing the Applicant significant and irrevocable financial loss.

ii. When he unilaterally failed to pay a lump sum of arrears of $25,000 as agreed upon in the Variation Agreement on or before December 31, 2020, thus causing the Applicant significant and irrevocable financial loss.

15. The Respondent reimburses the Claimant for the total cost of the photocopying of binders for the court as ordered by Justice Saunders on January 19, 2023.

22. That the Respondent John Ross and/or Brooke Ross be required to pay damages to the Claimant for losses caused as a result of John Ross breaching the terms of the [Separation Agreement] and Variation Agreement.

[71] The application was heard on January 23-24, 2025. It became apparent during the hearing that some of the legal objections that Mr. Ross was raising were not specifically identified in the notices of application. The parties indicated a preference to deal with all of Mr. Ross's objections together, so I granted leave for the parties to file written submissions in February 2025 with respect to those new issues.

[72] Having reviewed the materials, and having identified a number of authorities not referenced in the parties' materials, I issued a memorandum on June 23, 2025, inviting further submissions from the parties with respect to those authorities. Those submissions were received in August 2025.

Issues

[73] The issues raised on the present application can be summarized as follows:

a) Whether the filing of a second notice of application on December 3, 2024, nearly identical to the first one, rather than an amended notice of application, is an abuse of process, and the Second 2024 NOA should be struck out;

b) Whether Ms. Siroski's claim to set aside the Variation Agreement is barred by res judicata (either issue estoppel or cause of action estoppel), or alternatively is an attempt to relitigate an issue and thereby an abuse of process;

c) Alternatively, whether Ms. Siroski should be taken to have made an election at the hearing before Mr. Justice Johnston in November 2020 to affirm the Variation Agreement, such that any pleading seeking to set it aside is an "inconsistent pleading" and an abuse of process;

d) Whether Ms. Siroski's claim to set aside the Variation Agreement was improperly brought by way of the 2020 NOFC;

e) Whether the claim in the June 2024 notice of application seeking to set aside the Variation Agreement was brought out of time and is barred by the applicable limitation period;

f) Whether the other claims in Ms. Siroski's 2024 notices of application - seeking fines, penalties and damages arising from breaches of the parties' Separation Agreement:

i. Are sufficiently supported by the legal and factual basis in the notice of application;

ii. Raise issues not raised in the 2020 NOFC and thus are beyond the scope of pleaded relief;

iii. In any event, cannot now be advanced because they would be out of time; and

g) Finally, whether the claim in para. 15 of the notice of application (with respect to photocopying of binders) states a proper claim.

The Rule 11-2 Standard

[74] Mr. Ross's application to strike the above-noted paragraphs from Ms. Siroski's notices of application is brought pursuant to SCFR Rule 11-2. Rule 11-2(1) provides that:

Scandalous, frivolous or vexatious matters

(1) At any stage of a family law case, the court may order to be struck out or amended the whole or any part of a pleading, petition or other document on the ground that

(a) it discloses no reasonable claim or defence, as the case may be,

(b) it is unnecessary, scandalous, frivolous or vexatious,

(c) it may prejudice, embarrass or delay the fair trial or hearing of the family law case, or

(d) it is otherwise an abuse of the process of the court,

and the court may pronounce judgment or order the family law case to be stayed or dismissed and may order the costs of the application to be paid as special costs.

[75] The application was argued largely on the basis of Rule 11-2(1)(d). In order to succeed, Mr. Ross must establish that it is "plain and obvious" that the fault identified (res judicata, abuse of process, limitation, etc.) is established: World Wide Treasure Adventures Inc. v. Trivia Games Inc. (1996), 17 B.C.L.R. (3d) 187, 1996 CanLII 1428 at para. 37 (C.A.); Chapman v. Canada (Minister of Indian and Northern Affairs), 2003 BCCA 665 at paras. 12-13; Jensen v. Ross, 2014 BCCA 173 at paras. 38-46.

New versus Amended Notice of Application

Positions of the Parties

[76] The positions of the parties are set out in the correspondence they exchanged in December 2024, which I have quoted above. Mr. Ross asserts that having two documents in place advancing the same relief is an abuse of process, and that Ms. Siroski should instead have filed an amended notice of application. Ms. Siroski, on the other hand, says that technically there is no such thing as an amended notice of application and the proper approach where

additional relief is to be added to a notice of application is to file a new notice of application, adding that relief, and advise the other party of your intention to proceed on the basis of the revised document.

Legal Context

[77] Rule 8-1 provides a process to amend "a pleading filed by the party". It sets out when an amendment to a pleading may be made, how the amendment is to be marked, provides for it to be filed in the court registry, and sets out what an opposing party is entitled to do by way of response.

[78] Rule 8-1 uses the defined term "pleading". The definition of that term in Rule 1-1 is:

"pleading" means a notice of family claim, a response to family claim, a counterclaim and a response to counterclaim;

[79] Rule 17-1(19) provides that the process in Rule 8-1 also applies to the amendment of a petition or petition response.

[80] However, nothing in Rules 10-5 or 10-6, which deal with contested applications, or elsewhere in the SCFR, sets out a process for amending a notice of application or makes Rule 8-1 applicable to a notice of application.

[81] In Ramcoff Productions Management Ltd. v. Lesmur Enterprises Ltd., 2000 BCSC 1940, dealing with similar provisions in the previous Rules of Court, Justice Macaulay noted that:

[3] Mr. Quinlan, appearing as agent for counsel for the plaintiff, advanced a preliminary objection that the Rules of Court do not permit a party to amend a notice of motion. Accordingly, he contended that the court can only address the second order sought as the original Notice of Motion did not seek any orders additional to it.

[4] Assuming that he might not succeed on that technical objection, Mr. Quinlan also sought an adjournment of the application to set the plaintiff's praecipe aside so that that application could be heard at the same time as the defendant's application to dismiss the proceedings for want of prosecution under Rule 2(7).

[5] While the Supreme Court Rules do not expressly permit the amendment of a notice of motion, the Rules do not prohibit it either. The purpose of a notice of motion is to inform parties of record, whose interests may be affected, of:

1. the timing of the application;
2. the specifics of the order sought;
3. the rule or enactment relied on; and
4. the materials in support.

Under the Rules, more than one order may be sought in a single notice of motion.

[6] I see no reason why a party should be prevented from amending a notice of motion, provided the amended motion is served in compliance with the Rules. In this case, the plaintiff did not raise any issue respecting lack of notice or other prejudice. To require the defendant to file a new notice of motion would add unnecessarily to the cost of litigation and delay matters further. The object of the Rules is to secure the just, speedy and inexpensive determination of every proceeding on its merits. The Rules are the servant of the court, not the master. I refuse to strike out the amended Notice of Motion.

[82] In Yi Teng Investment Inc. v. Keltic (Brighouse) Development Ltd., 2019 BCSC 2197, there was a month-long hiatus in a pleadings application involving competing applications to strike and to amend the notice of civil claim in a real estate dispute. During that hiatus, the plaintiff filed an amended notice of application revising its proposed pleading to no longer assert an in rem claim to land.

[83] At paras. 90-92, Justice P. Walker noted that:

[90] Since there is no specific provision in the Rules for a party to amend a notice of application, leave must be sought in the absence of consent by the opposing party. Leave is predicated on the exercise of the Court's inherent jurisdiction: Lama Lo Holdings Ltd. v. Gurnisch Development Corp., 5908 Holdings Ltd. and Ralph Schwartzman, 2013 BCSC 2224 at para. 35; Bank of Montreal v. Basant Motors Ltd., 2019 BCSC 748 at paras. 5-7.

[91] The usual course when an applicant realizes that an application is ill conceived is for the application to be dismissed with leave to bring a fresh application: Can. Deposit Ins. Corp. v. Columbia Trust Co., 1987 CanLII 2762 at paras. 23-24 (B.C.S.C.).

[92] I do not wish my decision to be taken to condone the practice of filing an amended notice of application without leave or consent of the opposing party. However, in the present circumstances, I am prepared to grant leave because I see no point in requiring Yi Teng to file a new notice of application in light of its submission that it would simply replicate its existing Amended Rule 6-1(1) Application. Keltic is aware of the proposed amendments and the evidence Yi Teng relies upon. Keltic will have full opportunity to respond with further response materials. There is no prejudice to Keltic that cannot be remedied in costs if I am persuaded that it is entitled to them. Accordingly, I am not prepared to grant Keltic's New Rule 9-5 Application to strike the Amended Rule 6-1(1) Application.

[84] I note that both the Lama Lo and Basant Motors cases involved applications in which the applicants sought to change their positions during the hearing of the applications. None of them referred to Ramcoff Productions.

[85] My understanding of the practice of the Supreme Court registry is that the registry does not recognize an amended notice of application as a distinct form of document. A filing fee is charged as if the document was a fresh notice of application - unlike an amended pleading, for which no new fee is generally charged. At the same time, registry staff do not reject notices of application that have the word "amended" on them. In the absence of other

concerns (such as time to hearing), and upon payment of the fee, a document titled "amended notice of application" will generally be accepted for filing, leaving it to the parties and the court to determine the significance of that wording.

Analysis

[86] In my view, I do not need to resolve any differences between Ramcoff Productions and Yi Teng. I would note that, in my experience, I see documents marked as "amended notice of application" from time to time. It seems to me that in many circumstances, the use of an amended notice of application may be proportionate and advance the proceeding in a manner that advances the objects of the rules (i.e., a just, speedy and inexpensive determination).

[87] When filing an "amended notice of application" without leave, counsel and parties should realize that the document is not, technically speaking, an amended version of the document originally filed. It is clear from Yi Teng and the judgments it cites that the court has inherent jurisdiction to grant leave to amend a notice of application. There may be cases where it is appropriate to take the additional steps required to obtain such leave.

[88] As noted by Justice Macaulay in Ramcoff Productions, a key consideration will always be the adequacy of notice to the other parties. It may well be that practices should differ where the nature of an application changes mid-hearing. But that is not something I need to decide.

[89] I accept that it may be an abuse of process for a party to pursue much the same relief through multiple different means. This most typically arises where a party commences multiple different actions seeking the same relief.

[90] In my view, this is not such a case. Ms. Siroski sought to add an item of relief to her notice of application. In light of the court registry's advice that there is no such thing as an amended notice of application, she filed a second nearly identical notice of application, but immediately advised opposing counsel that the second document was intended to function as an amended notice of application.

[91] In my view, there is no abuse of process in the circumstances and the Second 2024 NOA should not be struck out.

[92] I would add one final note. In most cases, time limitations are satisfied through the filing of an originating pleading or a petition. There are a limited number of situations in which a time limitation is satisfied through the filing of a notice of application. As discussed below, that may well apply to a claim governed by s. 198(3) of the FLA. If a notice of application cannot be amended, and a party determines that it is necessary to change the manner in which an application is pleaded, then there may well be very good reason to leave the original notice of application outstanding, or alternatively to make a separate application for formal leave to amend the notice of application. That is not an issue in this particular case, as there is no allegation that a time limitation expired between June 27 and December 3,

2024. But it may be a factor in other cases.

Res Judicata and Abuse of Process

Positions of the Parties

[93] Mr. Ross says that, having sought at the hearing before Mr. Justice Johnston in the fall of 2020 to enforce the support provisions of the Variation Agreement, Ms. Siroski cannot now seek to have the Variation Agreement set aside in its entirety.

[94] Mr. Ross says that such a claim would be res judicata, barred by either or both of issue estoppel and cause of action estoppel, and also that it would be an abuse of process to allow her to now take such a fundamentally different position and effectively seek to relitigate the issue. [Mr. Ross's somewhat related arguments based on election and inconsistent pleadings will be dealt with in the next part of this judgment.]

[95] Mr. Ross argues that, although Mr. Justice Johnston's decision may not on its face deal with the Variation Agreement, his Reasons for Judgment should be read as in effect affirming it. Mr. Ross specifically relies on the comment of Mr. Justice Johnston that:

[51] When the original Separation Agreement was signed, Mr. Ross earned $300,000 a year working in China on a month on/month off rotation. His contract ended, and he began working in Canada for $110,000 per year. That led to the Variation Agreement.

Mr. Ross says that this is a final and determinative conclusion as to how Mr. Ross's former job ended, and gives rise to an issue estoppel as to "how his job ended".

[96] Mr. Ross says further that, apart from what is express in the judgment, given that Mr. Ross was seeking to reduce child support, Mr. Justice Johnston was required by s. 148 of the FLA to consider "whether he would make a different order" upon consideration of matters set out in s. 150 (e.g. whether there were reasonable arrangements for the support of the child, the amounts required under the Federal Child Support Guidelines, and other provisions made for the benefit of the child).

[97] Mr. Ross further argues that the doctrine of functus officio applies to bar reconsideration of Mr. Justice Johnston's decision.

[98] Ms. Siroski says that the application she made was not an application for a final order. She notes that nothing in Justice Johnston's judgment suggests that any of the applications before him were final in nature. None of the application materials reference Rule 10-11. Ms. Siroski submits that her application at the time should be considered as interlocutory, and as a result, res judicata has no application.

[99] Ms. Siroski says that nothing in Mr. Justice Johnston's judgment reflects a consideration of whether the Variation Agreement operates fairly or is impacted by unconscionability. She submits that on a clear reading of Mr. Justice Johnston's decision, he did not give any consideration to those issues.

[100] Ms. Siroski further argues, relying on the Murray decision at para. 72 (discussed below), that even if there had been an application to enforce a specific provision of an agreement, that is different in nature from judicial consideration of the validity of an agreement.

[101] Ms. Siroski says that the present application is not an attempt to relitigate any issue that Mr. Justice Johnston determined. Alternatively, she notes cases (including K.G. v. British Columbia (Children and Family Development), 2021 BCSC 773 at para. 50) commenting that res judicata is generally applied less stringently in the family context, as well as cases noting that even where the requirements of res judicata are met, the court has a discretion to refuse to apply the principle where it would cause unfairness or work an injustice: see cases summarized at J.K. v. L.R., 2019 ONCJ 868 at para. 109.

[102] Ms. Siroski says that the doctrine of functus officio has no application in the circumstances, given that Mr. Justice Johnston made no determination as to the validity of the Variation Agreement, and his order was never entered.

Legal Context

[103] In Cliffs Over Maple Bay (Re), 2011 BCCA 180, Justice Newbury discussed the policy objectives underlying the doctrine of res judicata at paras. 25-26, referencing at para. 25 the following comments from Spencer Bower and Turner, The Doctrine of Res Judicata (4th ed., 2009):

Two policies support the doctrine of res judicata estoppel: the interest of the community in the termination of disputes and the finality and conclusiveness of judicial decisions; and the interest of an individual in being protected from repeated suits and prosecutions for the same cause. Maugham L.C. said:

The doctrine of estoppel is one founded on considerations of justice and good sense. If an issue has been distinctly raised and decided in an action, in which the parties are represented, it is unjust and unreasonable to permit the same issue to be litigated afresh between the same parties or persons claiming under them.

[104] However, Justice Newbury cautioned that:

[26] Appellate courts in Canada have emphasized that the importance of finality and the principle that a party should not be 'twice vexed' (bis vixari) for the same cause, must be balanced against the other "fundamental principle" that courts are reluctant to deprive litigants of the right to have their cases decided on the merits

[105] A concise summary of the principles governing res judicata, drawn from Cliffs Over Maple Bay, is found in Erschbamer v. Wallster, 2013 BCCA 76:

[12] The doctrine has two aspects, issue estoppel and cause of action estoppel. In brief terms, issue estoppel prevents a litigant from raising an issue that has already been decided in a previous proceeding. Cause of action estoppel prevents a litigant from pursuing a matter that was or should have been the subject of a previous proceeding. If the technical requirements of issue estoppel or cause of action estoppel are not met, it may be possible to invoke the doctrine of abuse of process to prevent relitigation of matters.

[13] In Cliffs Over Maple Bay, Madam Justice Newbury set out the requirements of issue estoppel at para. 31 :

(1) that the same question has been decided;

(2) that the judicial decision which is said to create the estoppel was final; and,

(3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised, or their privies....

In the present case, it is not asserted that the issues the defendant wishes to raise as defences were questions decided in the first proceeding. Accordingly, it is not necessary to give further consideration to issue estoppel.

[14] With respect to cause of action estoppel, Newbury J.A. quoted, at para. 13, from the seminal case of Henderson v. Henderson (1843), 3 Hare 100, 67 E.R. 313 at 319 (Ch.):

In trying this question, I believe I state the rule of the Court correctly when I say that, where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.

She noted, at para. 14, that this language has been somewhat narrowed by the decision in Hoque v. Montreal Trust Co. of Canada, 1997 NSCA 153, 162 N.S.R. (2d) 321, where Mr. Justice Cromwell stated that the doctrine should apply to "issues which the parties had the opportunity to raise and, in all the circumstances, should have raised" (para. 37).

[15] Madam Justice Newbury set out the requirements of cause of action estoppel at para. 28 :

1. There must be a final decision of a court of competent jurisdiction in the prior action [the requirement of "finality"];
2. The parties to the subsequent litigation must have been parties to or in privy with the parties to the prior action [the requirement of "mutuality"];
3. The cause of action in the prior action must not be separate and distinct; and
4. The basis of the cause of action and the subsequent action was argued or could have been argued in the prior action if the parties had exercised reasonable diligence.

[106] These principles were applied in the family law context in Murray v. Harrison, 2023 BCSC 2014. In that case, the claimant had obtained a judgment on a summary trial application heard in December 2021 that included an order for payment of a balancing payment of $31,767 in accordance with para. 57 of the parties' separation agreement. Some five months later, the respondent filed a notice of application seeking an order that the separation agreement be set aside or replaced and the earlier judgment be "changed, suspended or terminated".

[107] Justice Hardwick summarized the applicable legal principles:

[48] According to the doctrine of res judicata, where the matter in dispute has already been adjudicated upon by a competent court, it cannot be litigated again. The principle of res judicata generally applies not only to points upon which the court was actually required to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of the litigation and which the parties, exercising reasonable diligence, might have brought forward at the time.

[49] In Meszaros v. Hendry, Swinton, McKenzie Insurance Services, 2014 BCSC 2087, Justice Macintosh explained that the "concept underlying res judicata is that a court has already visited the matter and decided it, and should not be asked to do so again" (at para. 8). Said earlier at paragraph 5 of Meszaros, Macintosh J. explained:

[5] Res judicata means that something has already been decided. It contemplates that a question was adjudicated upon: see for example Bryan A. Garner, ed., Black's Law Dictionary, 8th ed. (St. Paul: Thomson, 2004) at 1336-1337. Where res judicata is found, a party is normally prevented from raising the matter again. To raise it again would be unfair to the other party who already litigated it successfully. To raise it again would also further consume court time and run the risk of there being two verdicts inconsistent with one another.

[50] The doctrine of res judicata implies a judicial act, rather than an administrative act (Schlenker at para. 29) and is invoked by the judicial act of pronouncing an order, including an order by consent (Schlenker at para. 32). A separation agreement has not been given judicial consideration by virtue of simply being filed in accordance with the Rules.

[51] The party asserting that a matter is res judicata has the burden of proving it (see Meszaros at para. 12).

[62] In the more recent case of Danyluk v. Ainsworth Technologies Inc., 2001 SCC 44, the Supreme Court of Canada directly revisited the above noted statements from Angle and explained at para. 24:

[24] . . . In other words, as discussed below, the estoppel extends to the material facts and the conclusions of law or of mixed fact and law ("the questions") that were necessarily (even if not explicitly) determined in the earlier proceedings.

[108] Justice Hardwick concluded that res judicata had not been established, commenting that:

[69] The December 17, 2021 Application thus did not engage this Court in a determination of whether the Separation Agreement, in its entirety, was 'binding' or 'valid'. As described above, this line of judicial inquiry was simply not engaged in by Justice Brongers because it was not before the court.

[70] Rather, the December 17, 2021 Application was to vary the Separation Agreement in regard to parenting and child support, and to enforce a very specific paragraph in respect of payment of a liquidated sum which was described as a compensation payment for specified property.

[71] The fact that the Separation Agreement was relied upon to grant the order for divorce in the January 4, 2022 Final Order is also, in my view, a red herring. The court must, in accordance with s. 11(2) of the Divorce Act, be satisfied that reasonable arrangements are in place for the "children of the marriage". That assessment must be made on the basis of the evidence before the court at the time of the application for divorce. The court cannot possibly foresee what might occur in the future and it would be a dangerous precedent, I find, to conclude that simply relying upon a Separation Agreement for the purposes of granting a divorce by necessity renders any claim as to the fairness of that Separation Agreement res judicata. This would also, in my view, be inconsistent with the time limits established by s. 198 of the FLA.

[72] The claimant further, in my view confuses the enforcement of a specific provision of the Separation Agreement, effectively by consent, with a judicial consideration of the "validity" of the Separation Agreement.

[109] While both parties relied upon the statements of principle in Murray, Mr. Ross sought to distinguish the result, noting that the party who sought to enforce a part of the agreement only applied with respect to one specific paragraph, and that in any event, it was the other party who later sought to set the agreement inside.

[110] Where the strict requirements of res judicata are not met, the doctrine of abuse of process may apply. As noted in McCann v. Barens, 2023 BCSC 2000:

[39] Aside from the categories of res judicata, the doctrine of abuse of process allows the court to prevent its process from being used in a way that would bring the administration of justice into disrepute: Toronto (City) v. C.U.P.E., Local 79, 2003 SCC 63 at paras. 35 and 37 [Toronto (City)], citing R. v. Scott, [1990] 3 S.C.R. 979 at 1007, 1990 CanLII 27 and Canam Enterprises Inc. v. Coles, 2000 CanLII 8514 at para. 55, 51 O.R. (3d) 481 (C.A.), Goudge J.A. dissenting, rev'd 2002 SCC 63 (aff'g dissent of Goudge J.A.) [Canam]. This doctrine is not constrained in the same way as issue estoppel. It has been applied where an action is an attempt to relitigate a claim that has already been determined: Toronto (City) at para. 37, citing Canam at paras. 55-56.

[111] The scope of the doctrine of abuse of process by relitigation was discussed in the Toronto (City) case:

[37] In the context that interests us here, the doctrine of abuse of process engages "the inherent power of the court to prevent the misuse of its procedure, in a way that would . . . bring the administration of justice into disrepute" (Canam Enterprises Inc. v. Coles (2000), 51 O.R. (3d) 481 (C.A.), at para. 55, per Goudge J.A., dissenting (approved [2002] 3 S.C.R. 307, 2002 SCC 63)). Goudge J.A. expanded on that concept in the following terms at paras. 55-56:

The doctrine of abuse of process engages the inherent power of the court to prevent the misuse of its procedure, in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute. It is a flexible doctrine unencumbered by the specific requirements of concepts such as issue estoppel. See House of Spring Gardens Ltd. v. Waite, [1990] 3 W.L.R. 347 at p. 358, [1990] 2 All E.R. 990 (C.A.).

One circumstance in which abuse of process has been applied is where the litigation before the court is found to be in essence an attempt to relitigate a claim which the court has already determined. [Emphasis added.]

As Goudge J.A.'s comments indicate, Canadian courts have applied the doctrine of abuse of process to preclude relitigation in circumstances where the strict requirements of issue estoppel (typically the privity/mutuality requirements) are not met, but where allowing the litigation to proceed would nonetheless violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice. (See, for example, Franco v. White (2001), 53 O.R. (3d) 391 (C.A.); Bomac Construction Ltd. v. Stevenson, [1986] 5 W.W.R. 21 (Sask. C.A.); and Bjarnarson v. Government of Manitoba (1987), 38 D.L.R. (4th) 32 (Man. Q.B.), aff'd (1987), 21 C.P.C. (2d) 302 (Man. C.A.).) This has resulted in some criticism, on the ground that the doctrine of abuse of process by relitigation is in effect non-mutual issue estoppel by another name without the important qualifications recognized by the American courts as part and parcel of the general doctrine of non-mutual issue estoppel (Watson, supra, at pp. 624-25).

[112] Finally, with respect to the doctrine of functus officio, I was referred to a recent summary of the governing principles in Esteghamat-Ardakani v. Taherkhani, 2023 BCCA 290:

[81] The doctrine of functus officio is founded on the notion that once a court has performed its function, it has exhausted its authority. Narrow in scope, it is one of several legal principles designed to promote finality and achieve stability of judgments for purposes of appeal. Under the functus doctrine, as a general rule, once a judge has decided a matter and the judgment has been entered, they have discharged their office and have no ability to return to and correct the decision. Rather, subject to limited exceptions, the function of correcting judgments is reserved to the appellate court: Canadian Broadcasting Corp. v. Manitoba, 2021 SCC 33 at paras. 32-35; Tsaoussis (Litigation Guardian of) v. Baetz (1998), 41 O.R. (3d) 257 (C.A.) at 264; Truong v. Tran, 2012 BCCA 492 at para. 35.

[82] Despite the general rule, judges have jurisdiction to correct or alter an entered judgment where there is a statutory basis for doing so. For example, in family law proceedings judges have jurisdiction to alter orders for support. Other exceptions apply where amendment is necessary to correct an error in expressing the manifest intention of the court, or where the matter has not been heard on its merits: Canadian Broadcasting Corp. at para. 33.

[113] The Court continued by quoting at para. 83 from the Canadian Broadcasting Corp. case, including paras. 34-35 which state:

[34] This rule serves goals of finality and, by stabilizing judgments subject to review, of an orderly appellate procedure (Chandler, at p. 861; H.(E.), at p. 214). As Doherty J.A. wrote in Tsaoussis (Litigation Guardian of) v. Baetz (1998), 41 O.R. (3d) 257 (C.A.), for the parties to litigation, finality meets both an economic and psychological need as well as serving as a practical necessity for the system of justice as a whole (pp. 264-65). More specifically, if lower courts could continuously reconsider their own decisions, litigants would be denied a reliable basis from which to launch an appeal to a higher court (Doucet-Boudreau, at para. 79; see also Ayangma v. French School Board, 2011 PECA, 3, 306 Nfld. & P.E.I.R. 103, at paras. 11-12). The appeal record would be written on "shifting sand", ultimately inhibiting effective review (Wong, at p. 548).

[35] That said, functus officio is only one of several legal principles designed to promote the goal of finality. Indeed, given it is inherently tied to the entering of the formal judgment and its exceptions are relatively restrictive, this Court has described the doctrine of functus officio as narrow in scope (Reekie, at pp. 222-23; see also Wong, at pp. 555-56). So, while it is an important norm recognized in our jurisprudence to serve this necessary purpose, no one rule has a monopoly on finality.

[114] Functus officio was also raised in the Murray case. Justice Hardwick determined that it was not applicable, even though the prior order of Justice Brongers was a final order, made following a summary trial, and entered with the court registry. She concluded that:

[83] it is clear from a review of the Brongers' Reasons for Judgment and the resulting January 4, 2022 Final Order that it was not in issue before the Justice Brongers at the summary trial on December 17, 2021 whether the Separation Agreement, or any portion thereof, should be set aside under s. 93 of the FLA or on any common law basis.

[84] Further, the submission that the enforcement of a single term of a separation agreement filed with the Court pursuant to the Rules could render any further s. 93 application to set aside the agreement functus officio gives rise, in my view, to public policy concerns.

Analysis

[115] In this case, a determination of what actually occurred before Mr. Justice Johnston is challenging. Neither of the counsel who appeared before me were involved in this case at the time - both assumed their current roles several years later. The notices of application and application responses from 2020 are not clear as to the legal bases upon which the various applications were advanced, and that is particularly so with respect to the application to "enforce" the Variation Agreement. No transcript was obtained of the hearing before Mr. Justice Johnston, so it is not clear exactly how the request to enforce the Variation Agreement was explained to the court, nor is it known whether anything said at the hearing would shed light on whether the court would be addressing Ms. Siroski's application in its judgment. Although the reasons for judgment note (at para. 2) the application brought by Ms. Siroski, nothing in the analysis or conclusions specifically addresses that application. With no formal order having ever been taken out, it is not possible to look to that document for any insight it might have provided.

[116] I note that it is not uncommon, particularly in family matters where multiple discrete applications are set down at once, for the court to prioritize and determine the most urgent matters and leave the others for future determination. While that is a possible explanation for the lack of any apparent decision with respect to the matters raised in Ms. Siroski's notice of application, I cannot ascertain from the reasons for judgment whether that is in fact the case.

[117] Mr. Ross alleges that, by filing the November 2020 notice of application, Ms. Siroski completely reversed her position with respect to the Variation Agreement from what was advanced in the 2020 NOFC only two months earlier. Nothing in the application materials provides any support for that allegation, or any explanation of why Ms. Siroski might have done so.

[118] This is of particular concern in light of an obvious alternative explanation. It is not unusual in cases where former spouses cannot agree on the proper amount of support for an interim order to be obtained for some amount that can be ascertained from the parties' recent past history. In the circumstances extant at the time the notice of application was filed, Mr. Ross was paying Ms. Siroski nothing and she was in a position of desperation. It would not be unusual for a party coming to court on an interim basis to seek an order for

payment of the amount most recently agreed to - such a position might well be looked on favourably by a court seeking a rough-and-ready interim solution. In my view, in the absence of any other evidence on which to determine what positions were actually advanced before Mr. Justice Johnston, this is a more likely explanation for what Ms. Siroski sought in her notice of application than the explanation advanced by Mr. Ross - that Ms. Siroski completely reversed her position from a pleading filed just two months earlier without any apparent rational reason to do so.

[119] As noted above, Mr. Ross bears the onus on the Rule 11-2 application to establish that it is "plain and obvious" that Ms. Siroski's claims are barred by res judicata or abuse of process. With respect to res judicata, that would include establishing that Mr. Justice Johnston decided the validity of the Variation Agreement and that his decision on that point was a final decision. In my view, neither of these points have been established.

[120] Mr. Ross also asserts that the comments of Mr. Justice Johnston at para. 51 reflect a decision as to how Mr. Ross's former job ended. In my view, those comments reflect a synthesis of Mr. Ross's evidence that is set out without reflecting a decision on any contested facts. The key part of para. 51 - the words "his contract ended" - is expressed in a neutral manner that does not include any analysis of whether the ending of the contract was initiated by Mr. Ross or whether the ending of the contract was related to "circumstances outside of his control".

[121] Mr. Ross alleges that Mr. Justice Johnston must have considered all factors related to the reasonableness of the support order in the course of making a decision as to Mr. Ross's application to reduce his support obligations. I do not read the judgment that way. In my view, Mr. Justice Johnston concluded that the evidentiary record was not sufficient for him to make a decision. Mr. Justice Johnston's decision was simply to leave the existing regime in place for the time being.

[122] I turn briefly to the allegation of abuse of process by relitigation. As noted in the Toronto (City) case, a claim may be found to be an abuse of process where it is "in essence an attempt to relitigate a claim the court has already determined". It can apply even when the strict requirements of res judicata are not met. It is most often applied where the privity/ mutuality requirements are not met, but the expressions of principle in Toronto (City) make clear that the doctrine is not limited to such circumstances.

[123] In this case, it has not been established that Mr. Justice Johnston determined the validity of the Variation Agreement. As a result, there is no basis on which to find that there has been an abuse of process by relitigation.

[124] I turn finally to functus officio. This doctrine is, as noted in Esteghamat-Ardakani, narrow in scope. It is dependent upon the order having been entered. However, no order has been entered in respect of Mr. Justice Johnston's decision.

[125] In my view, Mr. Ross has not established that Ms. Siroski's claim to set aside the Variation Agreement is barred by res judicata or abuse of process through relitigation, nor has he established that the court is functus officio with respect to that claim.

Election and Inconsistent Pleading

[126] Mr. Ross alternatively argues that Ms. Siroski should be taken to have made an election to affirm the Variation Agreement when she filed her notice of application in November 2020, and that she knowingly chose at that time to abandon her claim to set aside the Variation Agreement.

[127] Mr. Ross further argues that the claim to have the Variation Agreement set aside is inconsistent with the position advanced at the hearing before Mr. Justice Johnston, seeking to enforce the support provisions of the Variation Agreement, and that this violates Rule 4-6 which prohibits inconsistent allegations.

[128] These positions are closely related to the arguments about res judicata and abuse of process, and Ms. Siroski opposed them on generally the same grounds.

[129] As explained in First Majestic Silver Corp. v. Davila Santos, 2012 BCCA 5 at paras. 23-26:

[23] The concept of abuse of process is used in a variety of contexts. For example, in Toronto (City) v. C.U.P.E., Local 79, it was used to prevent an attempt to relitigate an issue which had already been adjudicated upon in circumstances where the requirements of the doctrine of issue estoppel had not been met. In the present case, the defendants say the doctrine of abuse of process should be used to prevent the plaintiffs from bringing a subsequent action based upon allegations that are inconsistent with allegations made in support of a previous action (being the plan approval proceeding).

[24] The defendants submit the chambers judge erred in focusing on the concept of an election between inconsistent rights rather than on the type of mischief prevented in the case of Vanmills Establishment v. Coles (1992), 8 C.P.C. (3d) 178 (B.C.S.C. Chambers). In that case, a former shareholder of a bankrupt company had sued the trustee in bankruptcy, alleging that his negligence and wrongdoing had caused loss to the former shareholder when he sold his legal and beneficial interest in his shares to Mr. Coles. The former shareholder then sued Mr. Coles alleging that he held the beneficial interest in the shares in trust for the former shareholder. In dismissing the second action, Mr. Justice Cohen said the following:

[10] This is not a matter of a litigant pursuing inconsistent remedies, where no election is necessary until judgment. There can be no doubt that in the instant action Crux is attempting to pursue inconsistent rights. Crux elected in his action against Sigurdson to claim that he had disposed of his legal and beneficial interest in the C.I.S. shares to Coles. Having elected to sue Sigurdson on that basis, I find that Crux cannot now sue Coles in the instant action on the basis that he retained a beneficial interest in the C.I.S. shares. In my opinion, his election in his action against Sigurdson is binding upon him. The principle that,

in the case of inconsistent rights, a plaintiff's irrevocable and unequivocal election is deemed to be made by the commencement of an initial action is established in Scarf v. Jardine (1882), 7 App. Cas. 345, 30 W.R. 893 (H.L.) and Ashmore v. Bank of British North America (1913), 4 W.W.R. 1014, 18 B.C.R. 257, 13 D.L.R. 73 (C.A.).

[25] In Vanmills Establishment, Cohen J. made reference to an election having been made, and there is jurisprudence that supports the notion that the doctrine of election governs this type of situation: see, for example, Commonwealth Investors Syndicate Ltd. v. Laxton (1992), 15 B.C.A.C. 282, 68 B.C.L.R. (2d) 145, and Allnorth Consultants Limited v. Tercon Construction Ltd., 2010 BCCA 570, 79 B.L.R. (4th) 238, leave to appeal to S.C.C. refused, [2011] S.C.C.A. No. 78. However, there is support for the defendants' position that this type of defence falls under the rubric of abuse of process. In Mystar Holdings Ltd. v. 247037 Alberta Ltd., 2009 ABQB 480, 10 Alta. L.R. (5th) 260, Mr. Justice Brooker considered the existence of inconsistent allegations within the context of the court's inherent jurisdiction to prevent abuses of the court's process. He expressed the principle in the following terms:

[49] In general, I am persuaded that a party is not free to deliberately argue diametrically inconsistent facts in various actions, thus knowingly advancing irreconcilable positions which are not articulated as alternative claims.

[26] The flaw in the defendants' position is that there were no statements made in the plan approval proceeding that are inconsistent with the allegations in this action. There was simply no mention in the plan approval proceeding of the Bolaños property or a possible claim against the defendants. Silence does not equate to a representation or an allegation that First Silver did not have any interest in the Bolaños property or that First Silver did not have a cause of action against the defendants. None of the allegations made in this action is inconsistent with any statement in the materials filed in the plan approval proceeding.

[130] The applicable principles were considered more recently in Este v. Esteghamat-Ardakani, 2018 BCCA 290:

[92] Donna submits the trial judge erred in applying the law on inconsistent pleadings "to automatically equate inconsistent pleadings with abuse of process, without consideration of the context and circumstances of the case." She says, correctly, that not every instance of inconsistent pleadings will amount to an abuse of process: Pan Afric Holdings at para. 37.

[93] Cases concerning inconsistent pleadings fall along a spectrum. At one end are cases in which the courts find that, properly interpreted, no inconsistency exists: Stewart v. Clark, 2013 BCCA 359 at para. 48, 49 B.C.L.R. (5th) 1; First Majestic Silver Corp. v. Davila Santos, 2012 BCCA 5 at para. 26, 29 B.C.L.R. (5th) 211. In the middle are cases in which an inconsistency is found, but the court declines to characterize it as an abuse of process because it was not advanced "deliberately or with full knowledge of the facts": Walsh v. Mobil Oil Canada, 2013 ABCA 238 at para. 94, 364 D.L.R. (4th) 508. At the other end are cases in which a party knowingly took inconsistent positions: Pepper's Produce Ltd. v. Medallion Realty Ltd., 2012 BCCA 247 at para. 28, 34 B.C.L.R. (5th) 226. Of note is that in both First

> Majestic and Pepper's Produce, the following passage from Mystar Holdings Ltd. v. 247037 Ltd., 2009 ABQB 480 at para. 49, 10 Alta. L.R. (5th) 260, is quoted with approval:

In general, I am persuaded that a party is not free to deliberately argue diametrically inconsistent facts in various actions, thus knowingly advancing irreconcilable positions which are not articulated as alternative claims.

[Emphasis in original.]

[131] Mr. Ross also relies upon Rule 4-6(1), which provides:

(1) A party must not, in a pleading, make an allegation of fact or raise a new ground or claim inconsistent with the party's previous pleading.

[132] I have discussed above the meaning of the defined term "pleading". It would not include a notice of application.

[133] In my view, Mr. Ross's claim on this ground fails for many of the same reasons as for his claims of res judicata and abuse of process by relitigation. I do not read the November 2020 Notice of Application as necessarily reflecting an abandonment of the claim to set aside the Variation Agreement, as opposed to seeking interim relief in light of Mr. Ross's ceasing to pay any support whatsoever. In the absence of actual evidence of the position taken by Ms. Siroski at the hearing before Mr. Justice Johnston, I do not conclude that it is plain and obvious that there has been an election made or that Ms. Siroski has knowingly advanced irreconcilable positions.

Proper Form for Application to Set Aside Agreement / Applicable Limitation Period

Legal Context

Material Family Law Act Provisions

[134] The FLA provides a statement of general principle at s. 199:

199 (1) A court must ensure that a proceeding under this Act is conducted

(a) with as little delay and formality as possible, and

(b) in a manner that strives to

(i) minimize conflict between, and if appropriate, promote cooperation by, the parties

[135] One of the means by which the goal of promoting cooperation is accomplished is found in s. 4(b) of the FLA, which encourages parties to a family law dispute to resolve their differences through agreement. With respect to such agreements, s. 6 provides that:

Agreements respecting family law disputes generally

6 (1) Subject to this Act, 2 or more persons may make an agreement

(a) to resolve a family law dispute, or

(b) respecting

(i) a matter that may be the subject of a family law dispute in the future,

(ii) the means of resolving a family law dispute or a matter that may be the subject of a family law dispute in the future, including the type of family dispute resolution to be used, or

(iii) the implementation of an agreement or order.

(2) A single agreement may be made respecting one or more matters.

(3) Subject to this Act, an agreement respecting a family law dispute is binding on the parties.

(4) Subsection (3) applies whether or not

(a) there is consideration,

(b) the agreement has been made with the involvement of a family dispute resolution professional, or

(c) the agreement is filed with a court.

[136] Agreements may cover a wide variety of issues, including property division and support. Various provisions of the FLA govern disputes with respect to agreements, depending on what is covered by the agreement - for example, s. 44(4) deals with requests to set aside agreements with respect to parenting arrangements; s. 58(4) deals with requests to set aside agreements with respect to contact with a child; and s. 93(3) deals with requests to set aside agreements respecting property division.

[137] In this case, the matters at issue involve child and spousal support. With respect to child support, s. 148 provides that:

Agreements respecting child support

148 (1) An agreement respecting child support is binding only if the agreement is made

(a) after separation, or

(b) when the parties are about to separate, for the purpose of being effective on separation.

(2) A written agreement respecting child support that is filed in the court is enforceable under this Act and the Family Maintenance Enforcement Act as if it were an order of the court.

(3) On application by a party, the court may set aside or replace with an order made under this Division all or part of an agreement respecting child support if the court would make a different order on consideration of the matters set out in section 150 [determining child support].

[Emphasis added.]

[138] With respect to spousal support, ss. 163 and 164 provide:

Agreements respecting spousal support

163 (1) An agreement respecting spousal support may provide for the circumstances under which spousal support will change or end, including if a spouse lives with another person or enters a relationship with another spouse, but a condition of spousal support that the spouse abstain from sexual relations after separation is not binding.

(2) Despite section 160 [duty to provide support for entitled spouse], in making an agreement respecting spousal support, a spouse may agree to release the other spouse from liability for spousal support.

(3) A written agreement respecting spousal support that is filed in the court is enforceable under this Act and the Family Maintenance Enforcement Act as if it were an order of the court.

Setting aside agreements respecting spousal support

164 (1) This section applies if spouses have a written agreement respecting spousal support, with the signature of each spouse witnessed by at least one person.

(2) For the purposes of subsection (1), the same person may witness each signature.

(3) On application by a spouse, the court may set aside or replace with an order made under this Division all or part of an agreement described in subsection (1) only if satisfied that one or more of the following circumstances existed when the parties entered into the agreement:

(a) a spouse failed to disclose income, significant property or debts, or other information relevant to the negotiation of the agreement;

(b) a spouse took improper advantage of the other spouse's vulnerability, including the other party's ignorance, need or distress;

(c) a spouse did not understand the nature or consequences of the agreement;

(d) other circumstances that would under the common law cause all or part of a contract to be voidable.

(4) The court may decline to act under subsection (3) if, on consideration of all of the evidence, the court would not replace the agreement with an order that is substantially different from that set out in the agreement.

(5) Despite subsection (3), the court may set aside or replace with an order made under this Division all or part of an agreement if satisfied that none of the circumstances described in that subsection existed when the parties entered into the agreement but that the agreement is significantly unfair on consideration of the following:

(a) the length of time that has passed since the agreement was made;

(b) any changes, since the agreement was made, in the condition, means, needs or other circumstances of a spouse;

(c) the intention of the spouses, in making the agreement, to achieve certainty;

(d) the degree to which the spouses relied on the terms of the agreement;

(e) the degree to which the agreement meets the objectives set out in section 161 [objectives of spousal support].

(6) Despite subsection (1), the court may apply this section to an unwitnessed written agreement if the court is satisfied it would be appropriate to do so in all of the circumstances.

[Emphasis added.]

[139] Finally, in Part 10 of the FLA, the following provision deals with time limits:

Time limits

198 (1) Subject to this Act, a proceeding under this Act may be started at any time.

(2) A spouse may start a proceeding for an order under Part 5 [Property Division] to divide property or family debt, Part 6 [Pension Division] to divide a pension, or Part 7 [Child and Spousal Support] for spousal support, no later than 2 years after,

(a) in the case of spouses who were married, the date

(i) a judgment granting a divorce of the spouses is made, or

(ii) an order is made declaring the marriage of the spouses to be a nullity, or

(b) in the case of spouses who were living in a marriage-like relationship, the date the spouses separated.

(3) Despite subsection (2), a spouse may make an application for an order to set aside or replace with an order made under Part 5, 6 or 7, as applicable, all or part of an agreement respecting property or spousal support no later than 2 years after the spouse first discovered, or reasonably ought to have discovered, the grounds for making the application.

(4) The time limits set out in subsection (2) do not apply to a review under section 168 [review of spousal support] or 169 [review of spousal support if pension benefits].

(5) The running of the time limits set out in subsection (2) is suspended during any period in which persons are engaged in

(a) family dispute resolution with a family dispute resolution professional, or

(b) a prescribed process.

[Emphasis added.]

[140] The provisions of the Divorce Act relating to agreements are much less extensive. Section 7.3 (added in 2019) encourages parties to a proceeding, to the extent that it is appropriate to do so, to resolve the matters that may be the subject of an order under the Divorce Act through a family dispute resolution process. Sections 15.1(5) (dealing with initial applications for child support orders) and 17(6.2) (dealing with applications to vary a child support order) permit a court to take into account a written agreement respecting the financial obligations of parents. Otherwise, the Divorce Act says little about separation agreements.

[141] I turn now to the relevant provisions of the SCFR. Sections 148(2) and 163(3) of the FLA are both referenced in SCFR Rule 2-1 - Agreements:

Written agreements

(1) A copy of a written agreement referred to in section 15, 44 (3), 58 (3), 148 (2) or 163 (3) of the Family Law Act may be filed.

Filing agreements under the Family Law Act

(2) To file an agreement under subrule (1), a copy of the agreement must be attached to a requisition in Form F17.1 and the requisition must be filed.

Enforcing agreements

(3) Without limiting any other power the court may have to enforce an agreement filed under this rule, the court may make an order for that purpose on an application and, for that purpose, Part 10 of these Supreme Court Family Rules applies.

[Emphasis added.]

[142] Rule 3-1, subrules (4.1) and (4.2) provide that:

Filing agreements under the Family Law Act

(4.1) If a person files under Rule 2-1 (2) a requisition to which an agreement is attached and there is no existing family law case within which it is appropriate to file the requisition, the filing of the requisition under that rule starts a family law case.

Style of proceedings if filing of agreement starts family law case

(4.2) If the filing of a requisition starts a family law case under subrule (4.1) of this rule, the style of proceeding in the family law case must name the person filing the requisition as "Claimant" and the other parties to the agreement as "Respondents".

[143] These may be contrasted with the general rule, set out in Rule 3-1(1):

Commencing family law cases by notice of family claim

(1) Except for those special situations referred to in subrules (2.1) to (2.4), (4.1), (4.4) and (4.5) of this rule, every family law case must be started by filing a notice of family claim under Rule 4-1.

[144] I infer from the underlined words in Rule 3-1(4.1) that if, at the time an agreement is to be filed pursuant to Rule 2-1, there is an existing family law case, then the requisition is properly filed in that existing family law case, using the existing style of cause and proceeding number. If not, then the requisition commences a new family law case.

[145] Finally, I note that the phrase "family law case" is defined in Rule 1-1:

"family law case" means a proceeding in which one or more of the following orders is sought:

(a) an order under the Divorce Act;

(b) an order under the Family Law Act;

and includes

(f) a proceeding that, under Rule 3-1 (4.1), was started by the filing of a requisition and agreement under Rule 2-1 (1),

[146] It is important to keep in mind that the SCFR provisions apply to claims raised under both the Divorce Act and the FLA, while the FLA provisions I have cited apply only to claims under the FLA.

Setting Aside or Varying an Agreement

[147] In Halliday v. Halliday, 2015 BCCA 82, the Court of Appeal made clear the proper procedure for an application to set aside a separation agreement. At paras. 1-2, Justice Goepel observed that:

[1] Family law cases contain many traps for the unwary. The Supreme Court Family Rules (the "Family Rules") and the different legislative regimes are complex. Litigants must select with care the appropriate procedures under Family Rules. They must be mindful in seeking relief of the distinctions within and differences between federal and provincial legislation. While the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.), the Family Law Act, S.B.C. 2011, c. 25 (the "FLA"), and the Family Relations Act, R.S.B.C. 1996, c. 128 (the "FRA"), to the extent that it still applies, contain many similar provisions, they are not identical.

[2] Particular care must be taken with regard to the procedures and time limits to bring proceedings to set aside provisions of a separation agreement. The fact that many family law litigants are unrepresented compounds the problem. The fine distinctions in procedure and in the legislation are often understandingly lost to the legally untrained and, I might add, to those that are legally trained. Recognizing the distinctions can be the difference between success and failure. This proceeding, to date, is a cautionary tale as to what can go wrong.

[148] At paras. 35-36, Justice Goepel commented on some of the differences between the FLA and the Divorce Act with respect to limitation periods:

[35] The Divorce Act definition of "spouse" includes a former spouse for the purposes of child and spousal support by way of s. 15. There are no express limitations in the Divorce Act concerning the time pursuant to which a party may bring an application for spousal support. The existence of an agreement between the parties governing spousal support is not a bar to an application for support. If the parties do have a separation agreement, then the agreement can, by way of s. 15.2(4)(c), be taken into account by the court; the court will have to determine whether spousal support should, regardless of the terms of the agreement, be ordered. This requires the court to engage in the analysis set out in cases such as Miglin v. Miglin, 2003 SCC 24, Hartshorne v. Hartshorne, 2004 SCC 22, and Rick v. Brandsema, 2009 SCC 10.

[36] The FLA has taken a somewhat different approach with regard to limitation periods. The FLA, like the Divorce Act, defines "spouse" as including a former spouse. Unlike the FRA, it does not rely on the definition of spouse to import a limitation period. Instead, it has express limitation provisions.

[149] Having quoted ss. 198(2) and (3), Justice Goepel went on to note that:

[37] Section 198(2) of the FLA requires, in the case of spouses who have been married, that a spouse who seeks an order to divide property or family debt, a pension, or for spousal support bring the claim within two years of the parties' divorce.

[38] Section 198(3) concerns applications where the parties have entered into an agreement respecting property or spousal support. In those situations, if a party seeks to set aside the agreement or replace the agreement with an order under Part 5, 6 or 7 of the FLA, the application must be brought within 2 years after the spouse first discovered, or reasonably ought to have discovered, the grounds for making the application.

[39] While "grounds" is not defined in s. 198 of the FLA, s. 164 of the FLA sets out a myriad of factors that must be considered when a spouse seeks to set aside or replace a spousal support agreement. The factors are similar to those set out in Miglin.

[Emphasis in original.]

[150] Having quoted s. 164, Justice Goepel commented:

[40] Section 164(3) says that the court may only set aside or replace with an order all or part of an agreement when satisfied that one or more of the circumstances set out in that subsection existed. That provision is then contradicted by ss. 164(5) which indicates the circumstances set out in ss. 164(3) need not exist if the agreement is significantly unfair on consideration of a completely different set of circumstances. Given the language of s. 164 determining when a party first discovered, or reasonably ought to have discovered, the grounds for making the application is, I suggest, a matter of some complexity.

[151] Beginning at para. 48, Justice Goepel dealt with the various applicable procedural provisions:

[48] Procedures in family law cases are governed by the [SCFR]. By definition, a family law case includes proceedings in which court orders are sought under the Divorce Act or the FLA. The object of the [SCFR] is to help parties resolve legal issues in a family law case fairly and in way that will secure the just, speedy and inexpensive determination of every family law case on its merits.

[152] Having quoted Rules 2-1, 3-1 and 4-1, Justice Goepel turned to Rule 10 and explained that:

[53] Rule 10 concerns how to choose the appropriate procedure when seeking an order other than at trial. The rule concerning applications is particularly important. Rule 10-5 sets out how applications are to be brought:

How applications are to be brought

(1) To apply for an order referred to in subrule (2), a party must do the following, and to apply for an order to enforce an agreement filed under Rule 2-1 (2), to enforce an order, to enforce compliance with a determination of a parenting coordinator filed under Rule 2-1.1 (1) or to enforce an arbitration award filed under Rule 2-1.2 (1), a party may do the following:

(a) in the case of an application not referred to in paragraph (b), (c), (d) or (e) of this subrule, apply in accordance with Rule 10-6;

Applications brought under this Part

(2) Subrule (1) applies to applications for the following orders:

(c) to set aside or replace the whole or any part of an agreement filed under Rule 2-1;

[153] Justice Goepel then described what he saw as procedural errors that had been made in the case before him:

[58] This proceeding has regrettably been marred by a series of procedural errors and missteps. The proceeding was commenced when the Wife filed by requisition the parties' Separation Agreement. Pursuant to R. 3-1(4.1), the filing of the requisition commenced the family law case.

[59] A party seeking an order to set aside or vary a separation agreement must do so by way of application: see Rules 10-5(1) and 10-5(2). Accordingly, the Wife was correct to bring an application to set aside the whole or part of the Separation Agreement.

[60] The original application was brought before Madam Justice Dorgan. Unfortunately, the relevant Family Rules do not appear to have been brought to her attention. She erred when she advised the Wife that she could not obtain the relief she sought unless she issued a notice of family claim seeking spousal support. I note that the Husband's counsel did not suggest otherwise.

[61] Madam Justice Dorgan was correct in noting that on the material before her it would be impossible to find the facts necessary to determine if the Separation Agreement should be set aside. Given the numerous factual issues that will almost always be in play on such applications, it is most difficult to envision many circumstances in which a contested application to set aside or replace an agreement filed under R. 2-1 could be determined by way of a summary application.

[62] As a result of the comments of Madam Justice Dorgan, a notice of family claim was subsequently issued. The subsequent proceedings up to and including the hearing before Mr. Justice Mackenzie all followed. A Notice of Family Claim is an originating document. As this litigation had already been commenced by the filing of the Separation Agreement there was no authority in the [SCFR] for issuing the Notice of Family Claim, which initiated a parallel action concerning the same subject matter.

[63] Whether the Notice of Family Claim and subsequent steps are nullities or mere irregularities, I need not decide. They clearly did not comply with the [SCFR] and should be set aside: R. 21-5(1)(c). The matter never should have come before Justice MacKenzie in the form that it did. I note that none of the aforementioned procedural deficiencies were brought to his attention. In the circumstances, the order that he made cannot stand and must be set aside.

[154] With respect to how to proceed moving forward, Justice Goepel said:

[64] In the result the parties are back in the position they were on March 5, 2014 when Madam Justice Dorgan adjourned the Wife's application generally. The Wife is at liberty to bring on for hearing an application to set aside the Separation Agreement. She would be well advised to amend that application to include a claim for spousal support under the Divorce Act. The Husband, in turn, should consider amending his response so that the property portion of the application is determined under the appropriate legislation. Assuming the Wife does amend to seek spousal support under the Divorce Act, the Husband may wish to consider whether he wishes to continue to raise a limitation defence to the claim for spousal support given that such a defence does not arise when spousal support is sought under the Divorce Act.

[65] The object of the Family Rules is to secure the just, speedy and inexpensive determination of every family law case on its merits. To assist that mandate, I would direct that before any further hearing is held that the parties attend at a JCC. At the JCC the parties can discuss and hopefully determine which issues continue to require judicial resolution and the procedures that should be put in place to most efficiently resolve those issues.

[155] Halliday was applied by Justice Mayer (as he then was) in Kler v. Kang, 2018 BCSC 1136. In that case, the parties made a separation agreement in August 2016, which was filed in the court registry by way of requisition by one party. The other party then filed a notice of family claim, commencing a new family law case, that included not only a claim for divorce but also a claim to vary the separation agreement.

[156] Justice Mayer concluded that:

[9] By filing a notice of family claim (E180416) rather than seeking relief under the existing action (E162516), Mr. Kler breached the Rules. In addition, Rule 10-5(1)(a) requires that a party applying for an order referred to in subrule (2), which includes, pursuant to subrule (2)(c), orders to set aside or replace the whole or any part of a settlement agreement, must (emphasis on must) make an application in accordance with Rule 10-6. The procedure set out in Rule 10-5 is mandatory: Halliday, at para. 59.

[10] Mr. Kler contends that this case is distinguishable from Halliday. I respectfully disagree. The reasons of Justice Goepel are clear and binding on this court. In addition, Mr. Kler relies upon the decision of Justice Humphries of this court in Carreiro v. Carreiro, 2015 BCSC 1901, for the proposition that the Rules favour allowing his action to proceed. Although Justice Humphries exercised her discretion pursuant to Rule 1-3 to allow a claim to dismiss a settlement agreement to continue, she specifically stated in her reasons that she was not ruling on the question of whether the claim should have been brought as an application pursuant to Rule 10-5(1) and (2).

[11] Mr. Kler points to Rule 1-3, which provides that the object of the Rules is to, amongst other things, help the parties secure a just, speedy and inexpensive determination of every case on its merits. He contends that Rule 1-3 supports his contention that the notice of family claim should be allowed to continue as, given the complexity of the dispute with respect to the legitimacy of the settlement agreement, that a trial would be a most effective way to resolve it. In addition, he seeks other relief, including a divorce. I note that Ms. Kang does not object to the divorce proceeding itself. In my view, the requirement under Rule 10-5 that a challenge to a settlement agreement is to be brought by way of application reflects the objects set out in Rule 1-3; that is, to require disputes with respect to a filed settlement agreement to be resolved summarily by application rather than by trial.

[12] Given that the filing of the notice of family claim by Mr. Kler was done in breach of the Rules, it is within the court's power pursuant to Rule 21-5(1)(a)(i) to strike out the notice of family claim filed by Mr. Kler under action number E180416 or to set aside any steps taken in the proceeding pursuant to Rule 21-5(1)(c). In the circumstances and pursuant to Rule

21-5(e), which provides the court with the ability to make any orders that it considers will further the object of the Rules, I consider it appropriate to strike the portions of Mr. Kler's claim which are set out in family claim action number E180416 except the claim for divorce, which may proceed under that action number.

[13] Mr. Kler is, of course, at liberty to bring an application to vary or asset aside the settlement agreement and for the other relief sought in the proceedings commenced by Ms. Kang under action number E162516. He is also, of course, at liberty, and the decision is his to do to, so seek to apply for an order that this application be referred to the trial list or for any other procedural steps, including examinations for discovery which he considers may be beneficial.

[157] In A.D.J. v. F.J., 2022 BCSC 600, the parties had entered into minutes of settlement dated June 30, 2011. The document contemplated that it would be incorporated into a more complete separation agreement, but that never happened. It appears to have been common ground that it was binding nonetheless. At trial, the mother argued that the minutes of settlement contemplated a review of child and spousal support. Justice Francis disagreed, but concluded that the intention was that the terms agreed to could be:

[198] revisited in accordance with the provisions of the governing legislation. The Divorce Act provides for circumstances in which support under an agreement can be revisited by the Court. I have considered the Mother's claim for spousal support in accordance with the authorities interpreting the relevant sections of the Divorce Act.

[158] At paras. 199-201, Justice Francis noted:

[199] The Father relies on the decision of the BC Court of Appeal in Halliday v. Halliday, 2015 BCCA 82. In Halliday, the Court of Appeal held that, because a party seeking an order to set aside or vary a separation agreement filed under R. 2-1 of the Supreme Court Family Rules, B.C. Reg. 169/2009 [Family Rules] must do so by way of application, a notice of family claim seeking a variation of support should be set aside under R. 21-5(1)(c): paras. 60 and 63.

[200] Halliday has no application in this case. This proceeding was not initiated by the filing of a separation agreement. It was initiated by notice of family claim. There is no procedural impediment to the Court considering the Mother's entitlement to spousal support under the Divorce Act in the context of this proceeding.

[201] This Court does not have jurisdiction to vary a separation agreement under the Divorce Act. However, it does have jurisdiction to make an order for support that is inconsistent with a previous agreement. This is because the Court is not bound by an agreement between the parties when it exercises a statutory power to award support under s. 15 of the Divorce Act: Howardson v. Howardson, 2020 BCSC 1842.

[159] In L.H. v. V.Z.H., 2023 BCSC 835, the claimant sought to amend the notice of family claim to include a claim to set aside the parties' separation agreement with respect to property division. Associate Judge Nielson concluded that:

[19] The settlement can be varied or set aside pursuant to s. 93(3) within the time prescribed by s. 198 of the FLA. However, the proper process is pursuant to SCFR 10-5 on an "application". It is not open for the claimant to simply continue with the prior family law proceeding as amended. The legislature has determined the process to set aside an agreement pursuant to s. 193 and 198 and it is to be pursuant to an "application", and that legislative choice of process must be respected. Finally, the A.D.J. case is distinguishable in my view as the application in A.D.J. was pursuant to the Divorce Act. It was not an application to set aside an agreement pursuant to s. 93 of the FLA.

[20] As noted by the court in Kler, supra, during the application process the court or the claimant could apply to have the matter referred to the trial list, or apply for any other procedural steps within the application contemplated by SCFR 10-5, including an examination for discovery. However, that is another application for another day if necessary.

[21] Pleadings are a roadmap to how the parties intend to advance their positions within a proceeding. Within an application to set aside a settlement agreement, the notice of application and the response serve the same purpose. In my view, the claimant is free to bring her application to set aside the settlement agreement stating the orders sought together with her legal basis for doing so, together with a summary of the facts relied upon and accompanying affidavits in support. The response serves the same purpose to a different end.

[160] In S.S. v. M.O., 2025 BCSC 795, the parties separated in 2017 and signed a separation agreement a month after separation. The initial court filing was a notice of family claim in January 2018 that sought only a claim of divorce. An uncontested divorce order was granted by consent in 2018. Four years later, M.O. filed a notice of intention to proceed and a counterclaim. M.O. filed an amended counterclaim in October 2023, seeking to set aside the separation agreement provisions with respect to property division. Then, in August 2024, M.O. filed a notice of application seeking the same relief.

[161] At paras. 142-145, Justice E. Sigurdson noted that:

[142] I do not read the FLA as providing that a pleading announcing that a separation agreement is in issue satisfies the need to bring an application under s. 93(3), which is the proper procedure and what is contemplated in s. 198(3). Neither party provided support for this construction. This interpretation of ss. 93(3) and 198(3) would in my view be inconsistent with the spirit of the legislation, which aims to provide some certainty to the parties, and to protect properly negotiated separation agreements, on which parties are relying, from undue or untimely challenges and multiple proceedings.

[143] Accordingly, I find that the question before me is: was the application, filed on August 16, 2024, brought within two years of when M.O. knew or ought to have known the grounds for the application?

[144] I do not perceive any prejudice to the parties to my proceeding on this analysis, given that the arguments on the relevant bases for suspension of time would have been the same whether the time limit was for the pleading to be made or the application to be brought.

[145] I would in any event come to the same conclusion whether the correct measure was the date of the prescribed s. 93(3) Separation Agreement Application or the date of the Amended Counterclaim, as I conclude that the elements of the Amended Counterclaim seeking to challenge the Separation Agreement were also brought out of time.

[162] Specifically, Justice Sigurdson concluded that, on the facts before her:

[147] In order to satisfy s. 198(3), the Separation Agreement Application made under s. 93(3)[1] would have to have been brought by May 15, 2019, unless the time limit in that provision were extended. In my view, M.O would have to demonstrate the running of time was suspended until August 16, 2022, being two years prior to the filing of the Separation Agreement Application.

[163] Footnote [1] states:

[1] Or if I am wrong, the Amended Counterclaim, with the running of time extended to October 23, 2021.

[164] Because both the Amended Counterclaim and the Separation Agreement Application were both filed well beyond the applicable limit, there was no basis for any party to raise questions of whether any of the documents might be considered an irregularity.

Cases equating application and notice of family claim

[165] I note that the use of the word "application" in the FLA is considered in a series of cases dealing with applications in respect of parenting arrangements where a child is residing out of the province. Those applications are governed by Division 7 of Part 4 of the FLA, including s. 74(2) which provides that:

(2) Despite any other provision of this Part, a court may make an order under this Part respecting guardianship, parenting arrangements or contact with a child only if one of the following conditions is met:

(a) the child is habitually resident in British Columbia when the application is filed;

(b) the child is not habitually resident in British Columbia when the application is filed, but the court is satisfied

[Emphasis added.]

[166] In Gill v. Delbeck, 2019 BCSC 1660, Justice Fleming (as she then was) commented that:

[8] The parties dispute the meaning of the phrase "when the application is filed" in s. 74(2)(a) and (b). Mr. Delbeck takes the position it ought to be interpreted as the current application filed June 13, 2019, when the Children were not physically present or habitually resident in B.C., as provided for in s. 72(2). In contrast, the Gills argue the phrase refers to when this proceeding began. The FLA does not define application.

[9] In support of his position, Mr. Delbeck relies upon the definition of application set out in Rule 1-1 of the Supreme Court Family Rules: "'application' means an application before trial to obtain an order or an application, whenever made, to change a final order".

[10] I have not been referred to any case that has considered this question. For a number of reasons, however, it is clear to me that "when the application is filed", is properly interpreted as meaning when the document that commences the claim for guardianship, parenting arrangement or contact is filed; in this case, the notice of family claim. At that time the Children were both habitually resident and physically present in B.C.

[11] Unlike the Rules, the FLA contemplates all the orders it provides for being granted on application. At the same time the legislation distinguishes interim orders from other orders. Section 216 of the FLA, empowers the court to grant an interim order if an application for an order is made in accordance with any requirements or conditions of the FLA that would apply, if the order was not an interim order.

[167] In Gill, the children had been habitually resident in British Columbia when the notice of family claim was filed, and thus the court had jurisdiction to decide a contact application.

[168] This approach was affirmed in B.C. v. D.E., 2023 BCCA 251, where Justice Abrioux concluded:

[80] I am not aware of any authorities apart from Gill that have specifically considered the substantive issue in question. I would conclude that Justice Fleming was correct in her analysis in that case. Because the NOFC here commenced claims related to parenting arrangements, its filing date is the relevant time for establishing physical presence under s. 74(2)(b)(i) and habitual residence under s. 74(2)(a) of the FLA. Since the child in this case was physically present in British Columbia when the NOFC was filed on January 13, 2022, the judge, in my view, in light of his conclusion regarding his s. 74(2)(a) analysis, ought then to have considered the applicability of s. 74(2)(b). In fairness to the judge, however, B.C. did not present an alternative argument to him based on s. 74(2)(b) of the FLA.

Irregularity versus Nullity

[169] In Halliday at para.63, Justice Goepel concluded that he did not need to decide whether the steps Ms. Halliday had taken were "nullities or mere irregularities". He emphasized at para. 64 that there was nothing preventing Ms. Halliday from continuing with the notice of application she had filed earlier, possibly amended to include a claim under the Divorce Act, in accordance with the procedure he had identified. That will not always be the case.

[170] Rule 21-5 provides that:

If party does not comply with the rules

(1) If a party does not comply with these Supreme Court Family Rules, the court may do one or more of the following:

(a) if the party who has not complied is a claimant or a respondent who has brought a counterclaim,

(i) strike out the notice of family claim, counterclaim or petition, and

(ii) grant judgment dismissing the claims made in the notice of family claim, counterclaim or petition;

(b) if the party who has not complied is a respondent or a respondent to counterclaim, strike out the response to family claim, response to counterclaim or response to petition;

(c) set aside a step taken;

(d) make an order for costs against the party;

(e) make any other order it considers will further the object of these Supreme Court Family Rules.

Non-compliance with rules

(2) Unless the court otherwise orders, a failure to comply with these Supreme Court Family Rules must be treated as an irregularity and does not nullify

(a) a family law case,

(b) a step taken in the family law case, or

(c) any document or order made in the family law case.

[171] In Carreiro v. Carreiro, 2015 BCSC 714, the action had been commenced in 1998, after an initial separation following which the parties had reconciled. The parties separated for a final time in 2001, and signed a separation agreement in March 2002. In 2004, the claimant filed a summary trial application (under what was then Rule 18A) in the 1998 action seeking to have the 2002 separation agreement declared null and void. After examinations for discovery in 2005, no steps were taken for several years. A trial was scheduled for June 2014,

and in January 2014, the claimant obtained leave to amend the pleadings to apply to set aside the separation agreement and revisit the issues of property division and support. The judge who granted leave to amend said that the respondent's concerns as to limitations could be dealt with at trial.

[172] Justice Humphries was the trial judge. With respect to limitation issues, she commented:

[124] In this case, the issue of Ms. Carreiro's dissatisfaction with the separation agreement was clearly before the court from the filing of the Rule 18A application. It was spelled out in the affidavit in support of the Rule 18A application filed on September 24, 2004, in which Ms. Carreiro raised the different values of the properties.

[125] While it would have been neater to have amended the Statement of Claim in 2004 or even filed another one, rather than tacking new things on to the 1998 action through the Rule 18A application, the respondent could have been under no misapprehension that all these issues now had to be dealt with. In fact, for the next year, proceedings moved forward on that basis. The respondent participated in the process after the Rule 18A application was filed, attending two JCCs, the discovery, sending a Notice to Admit and a List of Documents, and paid child support. He did not raise a limitations defence until very recently.

[127] Considering the factors to be taken into account in the exercise of discretion to allow amendments, I conclude there was no unfairness in granting the amendments initially, and the limitations defence advanced by the respondent under the Limitation Act should not succeed.

[128] I note the comments of the Court of Appeal in a recent decision, Halliday v. Halliday 2015 BCCA 82, in which they conclude at para. 59, after close scrutiny of the Family Rules:

A party seeking an order to set aside or vary a separation agreement must do so by way of application: see Rules 10-5(1) and 10-5(2).

[129] The court noted, earlier in the judgment, the complexity of the legislative regime, and how easily things can go wrong. In that case, they decided to send the entire matter back to begin again.

[130] I recognize that the present proceeding is fraught with problems, and I sent a memorandum to counsel asking them if they wished to address this aspect of Halliday specifically in order to avoid the potential for such a result should this case be appealed. Both parties repeated their previous submissions regarding the 1998 Writ and the effect of the Rule 18A proceeding, and each alleged that Halliday assisted their respective positions.

[131] Rule 21-5(2) of the Family Rules allows the court to treat a failure to comply with the Rules as an irregularity, not a nullity, and while the Court of Appeal refused to give the parties in Halliday the benefit of this saving provision (apparently because the limitation argument respecting property had not been considered under the right statute), I will do so here to the extent that it is necessary to comply with a large and liberal interpretation of Rule 1-3(1)(b):

The object of these Supreme Court Family Rules is to

(a) help parties resolve the legal issues in a family law case fairly and in a way that will

(b) secure the just, speedy and inexpensive determination of every family law case on its merits.

[132] In other words, I will not dismiss the claim to set aside the separation agreement because it has been brought as part of a Notice of Civil Claim instead of by way of application, if indeed it should have been (which I do not decide). As long as Mr. Carreiro can make his limitation arguments under the proper sections, he is not prejudiced by the form in which the issue is raised.

[173] In Chan-Henry v. Liu, 2018 BCSC 2140, the parties made a separation agreement in February 2011, and a notice of joint family claim (seeking only a divorce) was filed later that year, commencing action No. E113516. The parties were divorced in February 2014, with the divorce order stating that all corollary relief was dismissed as abandoned (although as noted by Justice Kent, the pleadings at that time did not seek any corollary relief). Disputes arose, and Mr. Chan-Henry filed an amended notice of family claim in action No. E113516 seeking various corollary relief. In June 2015, there was a consent final order dealing with various matters of corollary relief. A second action (No. E152799) was commenced by notice of family claim in October 2015, in which the pleadings as ultimately amended sought among other things to vary the property division effected by the 2011 separation agreement.

[174] An application to strike pleadings was brought mid-trial. Justice Kent dismissed the application, stating:

[32] By way of a mid-trial application filed July 3, 2018, Ms. Liu applies for an order striking out or setting aside all pleadings filed in E113516 subsequent to the final order for divorce issued February 17, 2014, as well as an order setting aside the Consent Final Order issued June 19, 2015. She argues:

- the Supreme Court Family Rules do not permit the filing of an Amended Notice of Family Claim following a final order dismissing all corollary relief as abandoned--the pleading filed by Mr. Chan-Henry is therefore a nullity which should be struck out along with all subsequent steps followed in response; and

- hence, "the matter of E113516" should never have come before the court in June 2015 in the form that it did--the Consent Final Order resulted from various procedural errors and "compromises made as a result of a looming trial scheduled on an erroneously filed" pleading and should thus be set aside.

[33] In reply, Mr. Chan-Henry says:

- it would be an absurd result if the last four years of litigation were undone on the basis paragraph 2 of the divorce order or because he should have filed an application instead of an amended claim--sending the parties back to square one at this stage would be a "colossal waste of both the parties' and judicial resources";
- neither party raised any concerns before the Consent Final Order regarding the procedural legitimacy of the litigation in which both parties filed pleadings, brought applications, produced documents, undertook discovery, and ultimately agreed to settle the litigation by way a consent order;
- in any event, while Ms. Liu invokes Rule 21-5(1) and Halliday v. Halliday, 2015 BCCA 82, in support of her application to strike, subrule 21(5)(2) requires the court to treat procedural non-compliance "as an irregularity and [one which] does not nullify ... (b) a step taken in [a] family law case or (c) ... any order made in the family law case".

Analysis

[34] I agree with all the points raised by Mr. Chan-Henry.

[35] The object of the Supreme Court Family Rules is to secure the just, speedy and inexpensive determination of a family law case on its merits in a practical manner and one proportionate to the interests at stake. To that end, form must not prevail over substance and particularly so where the result, as here, would be to nullify litigation conducted over many years in accordance with procedures to which the parties and the court have acquiesced.

[36] I am not prepared to declare all these matters a nullity just so the same issues can be litigated afresh. Rule 21(5)(1) is not mandatory but only confers a discretion on the court to impose remedies having regard to the object of the Rules as a whole. To that end, it will only be in truly exceptional cases where non-compliance with the rule will result in a nullification of proceedings or court orders and not simply a non-fatal irregularity.

[37] Ms. Liu's application to strike out or set aside on procedural grounds all pleadings and proceedings taken in E113516 following the final divorce order dated February 17, 2014, including the Consent Final Order dated June 19, 2015, is dismissed.

[175] In Pearce v. Napier, 2023 BCSC 1295, Mr. Napier applied to strike Ms. Pearce's notice of appeal from an arbitration award on the basis that the appellant commenced the appeal using the wrong form (Form F80 rather than Form F79). Ms. Pearce, on the other hand:

[32] submits that nothing would have changed with the filing of the appeal under the correct form and this non-compliance must be treated as an irregularity and does not nullify the appeal. She relies on Rule 21-5 SCFR

[176] Justice Girn's conclusion is found at paras. 33-36:

[33] Rule 21-5(2) effectively allows the Court to treat a failure to comply with the Rules as an irregularity, not a nullity.

[34] The appellant relies on Hayes Forest Services Ltd. v. Krawczyk, 2005 BCCA 17, where the Court considered whether the filing of documents for the commencement of a civil appeal rather than a criminal appeal rendered the appeal from a conviction for criminal contempt a nullity. Low J.A. concluded that the filing of a "wrong piece of a paper" in the correct court does not invalidate the appeal, it was merely irregular and could be cured:

[12] I think the conclusion that proceedings are a nullity should be reached sparingly. In the present case, the appellant had a genuine intention to appeal and she appealed to the right court within the time limited for appeals which is the same for both criminal and civil appeals. The document by which the appellant initiated her appeal was not the correct document but in all other respects she properly commenced her appeal, including timely service upon the Crown. In my opinion, it is more correct to say that the error made by the appellant was at the low end of the continuum and does not remove the foundation or the authority for the appeal so as to render the notice of appeal a nullity. I conclude that the concept of nullity is more applicable to court documents such as a writ or notice of appeal issued or filed in the wrong court. An example would be the bringing of an appeal from a conviction in Provincial Court of a summary offence directly to this court instead of to the Supreme Court of British Columbia as required by law. In that situation, this court would be without jurisdiction and the notice of appeal would be a nullity.

[13] I prefer to think of the use of the wrong notice of appeal form in the circumstances of this case as an irregularity that can be cured. The error that occurred was merely a matter of form, not a matter of substance. It does not go to the court's jurisdiction. A declaration that the notice of appeal is a nullity is, for me, too rigid an application of the procedural rules. It would be what Dickson J. (as he then was) described as the "punctilio of an earlier age" in a slightly different context in R. v. Sault Ste. Marie (City), 1978 CanLII 11 (SCC), [1978] 2 S.C.R. 1299 at p. 1307.

[35] In the case at bar, I find the filing of the appeal in the wrong form is indeed an irregularity and does not invalidate the appeal.

[36] While the irregularity could be cured with granting the appellant leave to file the notice of appeal in the correct form, in my view, it is not required given that Justice Caldwell has already provided directions for the conduct of the appeal. That is what would have occurred if the appellant had filed the appeal using the correct form. As well, the parties have complied with Justice Caldwell's directions and materials have been filed and exchanged. It is simply not necessary at this stage of the proceedings.

[177] Rule 21-5(2) is virtually identical to Rule 22-7(1) of the Supreme Court Civil Rules [SCCR], and SCFR Rule 21-5(1) is very similar to SCCR Rule 22-7(2). However, SCFR Rule 21-5 does not have a provision directly comparable to SCCR Rule 22-7(3), which states:

(3) The court must not wholly set aside a proceeding on the ground that the proceeding was required to be started by an originating pleading other than the one employed.

[178] SCCR Rule 22-7 was considered in The Redeemed Christian Church of God v. New Westminster (City), 2022 BCCA 224, in which the applicant had brought various claims for Charter remedies by way of a petition rather than a notice of civil claim. Justice Voith noted at paras. 74-77 that:

[74] The effect of R. 22-7(3) is clear: It confirms that a proceeding is not to be "wholly set aside" on the basis that it was incorrectly commenced using a form of pleading other than the one required. However, a trial or motions judge has significant discretion on how best to rectify such a situation.

[75] In Gittings v. Caneco Audio-Publishers Inc. (1988), 26 B.C.L.R. (2d) 349, 1988 CanLII 2832 (C.A.), the plaintiff had commenced an action for damages for breach of fiduciary duty and negligent misrepresentation, as well as a claim for compensation under s. 224 of the Company Act, R.S.B.C. 1979, c. 59. The defendants applied to have the statement of claim struck out, in part on the basis that it should have been brought by way of petition. Several paragraphs of the statement of claim were struck out, as was the s. 224 claim. The appeal from that order was allowed in part on the basis that the judge failed to apply R. 2(3) of the previous Rules, which is equivalent to the present R. 22-7(3). What is important, for present purposes, is that the court recognized that, although the claim should have been brought by petition, nevertheless, "it would not be a practical possibility to deal with the complex issues which appear to be raised here without essentially converting the proceeding into an action": at 352. Rather than have the plaintiffs file a petition, which would then be converted into an action, the court struck the plaintiff's statement of claim, which was defective for other reasons, but granted the plaintiff leave to file a new statement of claim. See also: Leung v. 568263 BC Ltd., 2000 BCSC 577 which is to similar effect.

[76] In 0927745 B.C. Ltd. v. Charlie's Chocolate Factory Ltd., 2014 BCSC 610, Justice Myers addressed a proceeding that had been commenced by way of petition and which should have proceeded by notice of civil claim. He fashioned a practical solution and said:

[13] Rule 22-7 deals with the effect of non-compliance with the Rules. Rule 22-7(3) provides that a proceeding is not to be set aside if it was commenced by a pleading other than the mandated one. Accordingly, I order that this petition be converted to an action. To save the parties costs, I also order that the petition stand as a notice of civil claim and that the response to the petition stand as a response to the civil claim.

[77] In Transpacific Tours Ltd. (c.o.b. CP Air Holidays) v. Canada (Director of Investigation and Research) (1985), 68 B.C.L.R. 32, 1985 CanLII 107 (S.C.), which dealt with a Charter claim, the judge concluded that the proceeding had been incorrectly commenced as a petition. However, neither of the parties objected to the proceeding having been commenced by petition instead of by writ of summons. Therefore, the court exercised its discretion "to permit continuance of the proceedings in their present form": at 38.

[179] Although SCFR Rule 21-5 does not have a provision directly comparable to SCCR Rule 22-7(3), it is my view that for the reasons discussed by Justice Humphries in Carreiro at para. 131, and in light of:

a) the use of the word "must" in Rule 21-5(2);

b) the object of the SCFR as set out in Rule 1-3; and

c) the mandate reflected in s. 199 of the FLA to minimize delay and formality;

it will be rare that the court in a family law case will wholly set aside a proceeding due to the use of an incorrect form of originating proceeding.

Positions of the Parties

[180] I will identify below the parties' initial submissions (at the hearing in January 2025 and in the initial written submissions of February 2025) and the revised submissions that each party made based on the authorities identified in my memorandum (which I discuss have discussed above under the heading "Legal Context").

Mr. Ross

[181] Mr. Ross's initial submission with respect to this issue was made up of two legally distinct but practically related arguments.

[182] First, Mr. Ross submitted that the FLA requires that a request to set aside a separation agreement be brought by way of notice of application and not by a notice of family claim. Mr. Ross says that 2020 NOFC did not comply with the FLA and was incapable of initiating a claim to set aside the Separation Agreement.

[183] Second, Mr. Ross submitted that the FLA requires that the notice of application to set aside the Variation Agreement must have been filed no later than two years after discovery of the grounds for the application. Mr. Ross says that:

a) The filing of the 2020 NOFC does not meet the two-year requirement because it is in the wrong form;

b) That said, the filing of the 2020 NOFC provides incontrovertible evidence that by September 2020, Ms. Siroski had "discovered" the grounds for an application to set aside the Variation Agreement; and

c) The Notice of Application filed in June 2024 was well out of time, and Ms. Siroski's claim to set aside the Variation Agreement is thus statute-barred.

[184] Mr. Ross says that s. 198 of the FLA makes a clear and deliberate distinction between a "proceeding" (the term used in ss. 198(1) and (2)) and an application (the term used in s. 198(3)). The legislature used a different term for s. 198(3), and thereby evinced an intention to apply a specific procedure and a specific, strict limitation period, for applications to set aside agreements. Mr. Ross says that this reflects a presumption of finality in legal agreements. He says that allowing Ms. Siroski's application to proceed at this time would undermine the clear legislative intent.

[185] Mr. Ross says that he is prejudiced by Ms. Siroski's delay in filing a notice of application (as opposed to the 2020 NOFC) because he has relied on the validity of the Variation Agreement in structuring his financial and personal affairs.

[186] Having considered the authorities that I identified, Mr. Ross in August 2025 made several further submissions.

[187] Mr. Ross says in general that a notice of family claim is distinct from a notice of application, and does not require a detailed summary of the factual and legal bases for the relief sought. He says that it was not until he received the first 2024 notice of application that he had proper notice of the alleged basis for setting aside the Variation Agreement.

[188] Mr. Ross submits that the 2020 NOFC was filed only two weeks prior to the two-year anniversary of the Variation Agreement, and that it does not outline detailed grounds as to the basis on which Ms. Siroski wants to set aside the Variation Agreement, or exactly what provisions she takes issue with. He submits that it does not serve the function that would have been served by a proper notice of application.

[189] Mr. Ross argues as well that what was said in the 2020 NOFC was vague and confusing. He notes that what was sought in Part 5 was that "the Separation Agreement and the Variation Agreement, or certain parts of those agreements be revoked and set aside pursuant to s. 214", but s. 214 simply provides that "[i]f an order is made to set aside part of an agreement, the part is deemed to be severed from the remainder of the agreement." Mr. Ross says that the pleading in 2020 did not constitute a "roadmap" of Ms. Siroski's claims.

[190] Mr. Ross submits that it was not open to him to raise a limitation defence to Ms. Siroski's claim to set aside the Variation Agreement until after he received her application in June 2024, as "there was no limitation issue prior to that application".

[191] Mr. Ross submits that Rule 1-3 of the SCFR is not a license to disregard clear statutory limitation periods. He submits that:

a) Parties are entitled to rely on the finality of agreements and the certainty of legislated time limits;

b) Allowing a stale claim to be advanced undermines fairness by reviving long-settled disputes;

c) Rewarding lengthy delays "encourages tactical inaction", which is contrary to the intent of the rules; and

d) Litigating stale claims increases costs and complexity.

[192] Mr. Ross says that L.H. v. V.Z.H. addresses questions of procedure in a context in which there were no limitation consequences. He submits that it does not stand for the proposition that a limitation can be satisfied by a pleading.

[193] Mr. Ross says that the conclusions of Justice Fleming in Gill, and the subsequent cases that affirmed and applied those conclusions, should be confined to the jurisdictional context. Mr. Ross submits that it is important when determining jurisdiction to do so based on the substance of the relief sought, rather than the procedural form by which the matter was initiated. He says that those considerations are less significant in claims to set aside or vary separation agreements. Mr. Ross says that nothing in Gill or B.C. v. D.E. says that there should be a uniform interpretation of the word "application" throughout the FLA. Rather, its meaning depends on the statutory context and purpose of the provision in which it appears.

[194] Mr. Ross says that this is evident from s. 198, in which the word "proceeding" is used to indicate multiple procedural vehicles while "application" is used where a specific, narrow, technical interpretation is intended.

[195] With respect to Rule 21-5(2), Mr. Ross argues that Ms. Siroski's failure in this case is substantive and not procedural. He submits that allowing Ms. Siroski to rely on the notice provided by the 2020 NOFC would, in effect, allow her to defeat a substantive statutory limitation period.

[196] Mr. Ross says that Carreiro is distinguishable because, in that case:

a) The notice of family claim contained detailed allegations of duress, coercion and lack of meaningful negotiation;

b) The claimant filed a summary trial application within the limitation period, outlining her legal and evidentiary basis for the claim;

c) There had also been examinations for discovery in a timely manner; and

d) The parties' substantive rights were governed by the Family Relations Act, which had a materially different scheme for property division.

[197] Mr. Ross says that the Family Relations Act also contained a statutory provision (s. 68(3)) allowing the court to extend a limitation period "if circumstances warrant", which Mr. Ross says is different from s. 198 of the FLA.

[198] Mr. Ross says that in Carreiro, Madam Justice Humphries allowed the amendment precisely because the respondent had long known that the agreement was in issue and because the claim had been actively pursued.

[199] With respect to the other cases applying Rule 21-5(2), Mr. Ross says that:

a) Chan-Henry did not involve a limitation period issue, and is thus distinguishable; and

b) Unlike Pearce, this is not simply a case of "filing the wrong piece of paper", but rather a case of filing a bare pleading as opposed to a 16-page notice of application with thousands of pages of supporting evidence (which is what Ms. Siroski filed in June 2024).

Ms. Siroski

[200] Ms. Siroski says that the interpretation of s. 198(3) advanced by Mr. Ross prefers form over function. She argues that the interpretations advanced by Mr. Ross are contrary to the goal of ensuring that the issues in dispute between former spouses are dealt with on their merits.

[201] Ms. Siroski's initial submission was that in the case of an agreement that deals with spousal support, both s. 198(2) and s. 198(3) apply. She says that the introductory words of s. 198(3) - "despite subsection (2)" - indicate that subsection (3) was intended to add a less restrictive limitation when it comes to parties applying to set aside an agreement. It is thus the later of the two limitation periods that governs, and at the very least, a party has two years from the date of divorce to make a claim for spousal support under the FLA. The 2020 NOFC was filed within that time.

[202] Ms. Siroski also argued that s. 198(3) is intended to be permissive rather than mandatory - that is, that a party may but is not required to initiate a claim to set aside an agreement by notice of application rather than by a notice of family claim. She says that this is the clear intent to be taken from the use of the word "may" in s. 198(3). She notes as well that the form of notice of family claim requires the parties to plead the existence or non-existence of an agreement, and says that if a party was barred from using a notice of family claim if an agreement is in place, there would be no need for such a statement in the pleading.

[203] In her August 2025 submissions, Ms. Siroski accepted that in light of Halliday, the 2020 NOFC represents a procedural irregularity in respect of the claimant's claim to set aside the Variation Agreement. She accepted that that claim ought initially to have been brought by notice of application pursuant to Rule 10-5. She submits that this is a procedural irregularity that has been corrected by the filing of her notices of application in 2024. She notes that this proceeding has been in progress for nearly five years, and that it was only in 2025 that the respondent raised a limitations defence based on procedural irregularities.

She submits that the respondent has, in effect, acquiesced in the claimant's claims being determined on their merits.

[204] The claimant notes that limitation periods did not appear to be in issue in Halliday, Kler or L.H. v. V.Z.H., while in A.D.J. v. F.J., the claimant was able to proceed with her claim pursuant to the Divorce Act through the mechanism of a notice of family claim in any event. Ms. Siroski further notes that in S.S. v. M.O., the claim was barred by limitations whether one calculated time based on filing of the notice of family claim or the notice of application.

[205] Ms. Siroski says that Mr. Ross has, since the fall of 2020, been aware of the claim she intends to advance, and that while there may have been formal irregularities with her approach, there has been no substantive irregularity or prejudice. Ms. Siroski submits that Carreiro is apposite to the issues in this proceeding, in that like Mr. Carreiro, Mr. Ross was under no misapprehension from 2020 onward as to issues with respect to the Variation Agreement having to be dealt with.

[206] Ms. Siroski submits that a proper application of Rule 21-5 in light of Rule 1-3, and giving due consideration to s. 199 of the FLA, would be to conclude that any procedural irregularities do not nullify her claims and are not a basis upon which to strike her claims or to find that they are barred by a limitation period - something she would have been required to provide had she filed a notice of application.

Analysis

[207] As acknowledged by Ms. Siroski in her August 2025 submission, it is clear from Halliday and the cases that follow it that from a procedural standpoint, a claim to set aside a separation agreement is properly advanced by a notice of application. The notice of application should be filed in the proceeding in which the separation agreement is in issue. If the parties already have a family law case under way in this court, then as I read the provisions of Rule 3-1, the notice of application should be brought within the existing family law case. If there is no existing family law case, then a new family law case should be initiated by filing the separation agreement as an attachment to a requisition. Once a family law case has been commenced by requisition, then Halliday seems to suggest that it is improper or at least unnecessary to seek relief in respect of the enforcement, variation or setting aside of the separation agreement in a notice of family claim.

[208] This is certainly the case where a claim to set aside a separation agreement is made under the FLA. While in a general sense, the intent of the SCFR is to have similar procedures for similar claims whether brought under the FLA or the Divorce Act, as noted in Halliday at para. 35, the jurisprudential basis for an order departing from a separation agreement is different under the Divorce Act. I repeat from the excerpt quoted above from Halliday at para. 35:

The existence of an agreement between the parties governing spousal support is not a bar to an application for support. If the parties do have a separation agreement, then the agreement can, by way of s. 15.2(4)(c), be taken into account by the court; the court will have to determine whether spousal support should, regardless of the terms of the agreement, be ordered. This requires the court to engage in the analysis set out in cases such as Miglin v. Miglin, 2003 SCC 24, Hartshorne v. Hartshorne, 2004 SCC 22, and Rick v. Brandsema, 2009 SCC 10.

[209] If a party seeks an order for spousal support under the Divorce Act, in which the existence of a prior agreement is merely a factor to be taken into account, then it is not clear that the matter governed by Rule 10-5(2)(c) - which provides that Rule 10-6 is to govern an application "to set aside or replace the whole or any part of an agreement". A.D.J. v. F.J. indicates that, at the very least, it is not inappropriate to plead a claim under the Divorce Act in a notice of family claim. Whether such a claim can be brought by notice of application as well is a question not squarely raised in the application before me. I note that in the present case, while the 2020 NOFC pleads both the FLA and the Divorce Act, the notices of application that Mr. Ross seeks to strike out reference only the FLA in respect of that relief. I will not comment further on this question, other than to note that it would be unfortunate if a claim that is often brought in the alternative would be governed by substantially different procedures in respect of each statute. I note as well that, in Halliday, Justice Goepel suggested that the proper course of action was for Ms. Halliday "to amend that application to include a claim for spousal support under the Divorce Act".

[210] At para. 62 of Halliday, Justice Goepel concluded that where a family law case is initially commenced by filing an agreement attached to a requisition, it is improper to subsequently file a notice of family claim in that same proceeding. That is not to say that a person who wishes to set relief in respect of a family law agreement may also want to seek additional relief. I infer from Justice Goepel's comments in Halliday that the proper course in those circumstances would be to commence a separate family law case, bearing a different action number, setting out any portions of the relief the party seeks that are not inherently part of the enforcement, variation or setting aside of the family law agreement.

[211] This may inevitably lead to an application to have the two proceedings heard together, but the rules as interpreted in Halliday lead to that result.

[212] The somewhat incongruous result of this is that, where multiple matters are in issue right from the start, a family law case is properly commenced by notice of family claim. When questions of enforcement, variation or setting aside of the agreement arise, it appears to be appropriate for those claims to be reflected in pleadings that comply with the rules governing a notice of family claim. In that case, a party seeking to have the agreement issues dealt with separately might be faced with questions about the appropriateness of severance. Where the initial issue relates only to enforcement, variation or setting aside of a family law agreement, then the proceeding is commenced by requisition and no pleading may be filed in respect thereof. Rather, any relief a party may seek in respect of the agreement will be particularized only in a notice of application. And if other issues

subsequently arise, a new family law case must be started and the parties' various disputes are only tried together if the court so orders.

[213] In Kler at para. 11, Justice Mayer commented that the requirement that a challenge to a separation agreement be brought by notice of application reflects a desire that "disputes with respect to a filed settlement agreement be resolved summarily by application rather than by trial". At the same time, as noted by Justice Goepel in Halliday at para. 61, "it is most difficult to envision many circumstances in which a contested application to set aside or replace an agreement filed under R. 2-1 could be determined by way of a summary application".

[214] That said, although they relate to petitions under the SCCR, the comments of Justice Griffin in Cepuran v. Carlton, 2022 BCCA 76 at para. 160 are (with adaptations) applicable to a complex notice of application in a family law case:

[160] To summarize, I am of the view that a judge hearing a petition proceeding that raises triable issues is not required to refer the matter to trial. The judge has discretion to do so or to use hybrid procedures within the petition proceeding itself to assist in determining the issues, pursuant to R. 16-1(18) and R. 22-1(4). For example, the judge may decide that some limited discovery of documents or cross-examination on affidavits will provide an opportunity to investigate or challenge the triable issue sufficiently to allow it to be fairly determined by the court within the petition proceeding, without the need to convert the proceeding to an action and refer it to trial.

[215] As to the application of this approach in family matters, see K.A.B. v. P.D.M., 2023 BCSC 1156 at para. 66.

[216] I turn to consider the approach taken in Gill, approved in B.C. v. D.E. - that is, that as a matter of statutory interpretation the court can consider the pleading initiating the claim as being "when the application is filed". It is interesting to note that Halliday, Kler and L.H. were decided not on the interpretation of the word application in s. 193 of the FLA, but rather on the basis of Rules 10-5 and 10-6. It is only S.S. v. M.O. at para. 142 that expresses a view contrary to that in Gill and B.C. v. D.E., and it does not appear that either of those cases were cited to Justice Sigurdson.

[217] That said, I see the approach in Gill as reflective of the desirability of prioritizing effectively determining cases on their merits and avoiding "formality" (per s. 199(1)) by focusing on the actual knowledge of the other party that a claim is being brought.

[218] I turn then to the question of whether the Court can and should treat the advancement of Ms. Siroski's claim pursuant to s. 164 of the FLA by way of a notice of family claim as an irregularity rather than a nullity, and if so, how the irregularity should be remedied.

[219] In my view, Ms. Siroski's dissatisfaction with the Variation Agreement was clearly before the court from the filing of the 2020 NOFC in September 2020. The fundamental cause of the issue being faced by the Court on this application is the use of the incorrect form by Ms.

Siroski in September 2020 to bring forward her claims in respect of the Variation Agreement. To use the language of Justice Low in Hayes Forest Service (as quoted in Pearce), Ms. Siroski had a genuine intention to challenge the Variation Agreement and she filed a document in the right court within the time limited for a challenge pursuant to s. 164 of the FLA which stated that she was challenging the Variation Agreement pursuant to the FLA. The document that Ms. Siroski used was not the correct form, but it clearly placed in issue the question of whether the Variation Agreement should be set aside.

[220] In my view, SCFR Rule 21-5(2) is clearly brought into play in the circumstances. It is the SCFR that mandates the form of document that is to be used. And it is the failure to use the correct form that is at the foundation of Mr. Ross's position. SCFR Rule 21-5(2) requires the court to treat procedural non-compliance as an irregularity unless there is good reason to order otherwise.

[221] Contemplating that, Mr. Ross has advanced a claim that he has been prejudiced by the circumstances. He claims that, since the signing of the Variation Agreement, he has "ordered his affairs" on the basis that the agreement is in place. No specifics are given with respect to this relatively general assertion.

[222] In my view, it is clear that Mr. Ross knew from September 2020 onward that Ms. Siroski was challenging the provisions of the Variation Agreement with respect to spousal support. In fact, there is nothing that would suggest that either he or his counsel realized that it was arguable that Ms. Siroski had used the wrong form to initiate this claim until just before the hearing in January 2025. As I noted above, this issue was not raised in Mr. Ross's notice of application to strike out the claim.

[223] I have quoted above what Mr. Ross said in his response to family claim (filed on September 8, 2020) about the claim to set aside the Variation Agreement. In my view, it is clear from what he said there that Mr. Ross understood exactly the nature of the issue that was being raised.

[224] I conclude that the advancing of Ms. Siroski's claim to set aside the Variation Agreement pursuant to s. 164 of the FLA by way of a notice of family claim is an irregularity and not a nullity.

[225] I must then determine the most appropriate means to address this irregularity. Having considered the remedies granted in the cases I have reviewed above, it would seem to me that the irregularity would be best corrected by having Ms. Siroski file a notice of application setting out her claim to set aside the Variation Agreement. However, Ms. Siroski has already done so.

[226] In my view, I am in much the same position now as was Justice Girn in Pearce. It is simply not necessary at this stage of the proceeding to require further steps to correct this irregularity. The proceedings should simply continue in their present form.

Claims for Fines and Penalties

Positions of the Parties

[227] With respect to Ms. Siroski's request in para. 13 of her Second 2024 NOA that fines be imposed, Mr. Ross submits that the Second 2024 NOA does not provide a legal basis for such fines. He says that the only FLA provision referenced in the Second 2024 NOA that deals with fines is s. 213, which deals with fines for non-compliance with document production obligations.

[228] Mr. Ross notes that Ms. Siroski might have pointed to s. 230(2) for such jurisdiction, but argues that s. 230 is not applicable where a spouse has filed a written agreement respecting child or spousal support and registered with the BCFMA, because both s. 148(2) (in respect of child support) and s. 163(3) (in respect of spousal support) of the FLA provide that the agreement is:

enforceable under this Act and the [FMEA] as if it were an order of the court.

[229] Mr. Ross says that both s. 148(2) and s. 163(3) explicitly contemplate the enforcement of support agreements. He says that given these provisions, it cannot be said that "no other provision of this Act applies for the purposes of enforcing an order made under this Act", which is a precondition mandated by s. 230(1) for the availability of fines pursuant to s. 230(2). He says that, to the extent this limits the use of s. 230 in respect of agreements as to support, it reflects the fact that such agreements have not in most cases been given judicial consideration. He says that the provision should be read as if to say that agreements are enforceable either through the BCFMA "and/or by an order of the court".

[230] In any event, Mr. Ross argues that the conduct said to ground the request for fines and penalties occurred more than two years in the past, and as a result, the claims are barred by the Limitation Act, S.B.C. 2012, c. 13. Mr. Ross notes that, although claims for support arrears are excepted from the two-year limitation by s. 3(1)(l), as are fines and penalties under the Offence Act, R.S.B.C. 1996, c. 338 (s. 3(1)(m)) or the Securities Act, R.S.B.C. 1996, c. 418 (s. 3(1)(o)), there is no exception given for fines and penalties under the FLA.

[231] Mr. Ross acknowledges that s. 198(1) of the FLA provides that, except as otherwise provided in the FLA:

a proceeding under this Act may be started at any time.

However, Mr. Ross says that this provision must be read subject to these provisions of the Limitation Act - otherwise s. 3(1)(l) would be moot. Mr. Ross notes that the Limitation Act was passed a year after the FLA, and thus should be interpreted on the basis that FLA claims not falling within s. 3(1)(l) are governed by the Limitation Act.

[232] Counsel for Mr. Ross acknowledged that she was unaware of any case law with respect to this interpretation.

[233] Ms. Siroski says that a claim for fines and penalties is governed by s. 198(1) of the FLA, and may be brought at any time. She submits that fines and penalties under the FLA are intended to give the court broad tools to manage the tendency of family litigation to involve heightened levels of conduct, and that this conduct may well occur years after litigation has been commenced.

[234] Ms. Siroski says that the FLA often distinguishes between making an order and enforcing an order. Thus, s. 212 deals with the authority to make a disclosure order, while s. 213 deals with the kinds of penalties the court can impose for failure to comply with a disclosure order.

[235] Ms. Siroski says that ss. 148(2) and 163(3) of the FLA deal with the status of agreements, and provide that once filed they are "enforceable under this Act and the Family Maintenance Enforcement Act as if an order of the court". These provisions establish or make explicit the status of a filed agreement, and give it in many respects the same status as a court order.

[236] Ms. Siroski says that giving an agreement this status is very different from the provision of a remedy where there has been a breach. She notes that s. 230 is headed "Enforcing orders generally". She references A.J.F. v. N.L.S., 2020 BCSC 26, where Justice Skolrood (as he then was), in considering both s. 228 ("Enforcing orders respecting conduct") and s. 230, commented that:

[84] In addressing s. 228, a court must also be mindful of the purposes of conduct orders as stated in s. 222 of the FLA: C.A.L. at para. 43. Section 230 is linked to s. 228 in this case because its application is only triggered if no other provision of the FLA applies: s. 230(1); I.J.G.P.G. v. K.M., 2018 BCSC 2468 at para. 20; Partridge v. Partridge, 2018 BCSC 1687 at para. 79.

[85] The measures set out in ss. 228 and 230 should be resorted to when, and only to the extent, necessary and appropriate to enforce and secure compliance with orders made under the FLA: Kanta v. Kanta, 2017 BCSC 2321 at para. 19; Kanta v. Kanta, 2017 BCSC 1428 at para. 72. Orders under ss. 228 and 230 may be necessary to impart on one or both parties that they are bound by the FLA and must comply with court orders: B.G.M.S. v. J.E.B., 2018 BCSC 1628 at para. 177.

[86] Although compliance with the FLA and related court orders is critical, the FLA mandates a more holistic approach to resolving family disputes that minimizes delay, formality and conflict between the parties: s. 199(1). The remedies available under ss. 228 and 230 empower the court to provide progressively more serious responses as a particular case may dictate. More importantly, a court's objective should be to fashion a remedy that ensures compliance while addressing the specific situation before the court: J.R.B. v. J.H.F., 2015 BCPC 70 at para. 26.

[237] Ms. Siroski submits that the language in s. 230 is intended to direct parties to more specific enforcement provisions - like ss. 213, 221 and 228 - where they are applicable. She submits that the clear legislative intent is that s. 230 is to apply where none of the FLA's other enforcement provisions apply. She submits that the fact that an order or agreement for support can be registered with the BCFMA does not fetter the various means provided by the FLA for court to enforce orders, including s. 230.

Legal Context

Need to Plead Claims for Fines

[238] I was not referred to any authority dealing specifically with whether a claim for a fine under the FLA must be specifically set out in a formal pleading such as a notice of family claim or counterclaim.

[239] There are authorities that deal in a more general sense with the requirements of family law pleadings. In Bhatti v. Grewal, 2025 BCCA 138, Justice Grauer referred with approval to the discussion of Justice Burnyeat in Henry v. Tigrado, 2012 BCSC 461. In Henry, in the course of denying an application to strike out a counterclaim for failure to plead material facts, Justice Burnyeat commented that:

[2] Rule 21-1 of the Family Rules provides:

(1) The forms in Appendix A must be used if applicable, with variations as the circumstances of the family law case require, and each of those forms must be completed by including the information required by that form in accordance with any instructions included on the form.

[Emphasis added.]

[3] Rule 4.1(1) provides that, to commence a family law claim, a person must file a notice of family claim in Form F3. Form F3 requires the claimant to set out the orders sought as well as facts about the parties, about the spousal relationship history, and about prior court proceedings and agreements. Schedule 1 to Form F3 requires a claimant to set out personal information, the grounds for the claim for divorce, confirmation that there is no possibility of reconciliation, proof of marriage and details regarding children. In Form F3, the Respondent is advised that a response to the family law case must be filed in Form F4 and that any counterclaim must be filed in Form F5.

[8] Schedule 5 to Form F5 deals with "other orders" and, while Schedule 5 requires a respondent to set out any facts upon which an order for a change of name is based, Schedule 5 does require the facts to support orders under the Family Relations Act or "other orders" to be set out. In dealing with "other orders", Schedule 5 only requires the counterclaim to "set out terms of other proposed orders and the authority under which those orders are sought".

[Emphasis in original.]

[240] Justice Burnyeat concluded:

[17] I conclude that nothing in Form F5 or in the Family Rules places a requirement on a respondent in his or her counterclaim to provide the material facts giving rise to the orders sought in the counterclaim. It appears that there is not even a requirement that the cause of action which would justify the orders sought must be set out. These are obvious deficiencies. The question which arises is whether compliance with the instructions in a mandatory form provides a defence to an application pursuant to Rule 11-2(1) of the Family Rules.

[18] The Family Rules are new. For the first time, the Family Rules are separate from the Civil Rules. Section 8 of the Interpretation Act, R.S.B.C. 1996, c. 238, states that every enactment must be construed as being remedial and must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

[19] It could hardly be consistent with a remedial construing of the Family Rules if orders that are set out according to the instructions in the relevant form could nevertheless be struck on the grounds that they do not provide essential information. Rule 21-1 of the Family Rules mandates the use of the Forms as well as compliance with the instructions set out in the Forms. I cannot conclude that Form F5 can be interpreted to include either an express or an implied requirement for a respondent in a counterclaim to state the material facts upon which the causes of action in the counterclaim are based when all that is required is to set out the orders sought. The Respondent has completed the form required. I can find no Legislative intent that the material facts to support a cause of action or the cause of action itself must be included when a counterclaim is provided by a respondent. It would have been easy for the Legislature to add the type of provisions dealing with counterclaims which are in the Civil Rules, the types of requirements which are set out in dealing with a family law claim, the response to a family law claim, or the various schedules to the various Forms provided by the Family Rules other than Form F5. The Legislature did not do that.

[241] In Bhatti, the initial notice of family claim, filed by Mr. Grewal, claimed only a divorce. Ms. Bhatti counterclaimed seeking orders for spousal support and for property division. She claimed that two houses in Surrey, for which Mr. Grewal's parents and sister were on title, were family property, and named them as respondents by counterclaim. They applied to strike out the claims pursuant to Rule 11-2(1)(a), on the basis that no material facts were pleaded. The chambers judge had initially directed Ms. Bhatti to amend to plead the material facts supporting her claim, but then later struck out the amended claim for failure to state sufficient material facts.

[242] Justice Grauer noted at para. 23 that, in deciding whether pleadings disclose a cause of action, the judge should read them generously, with a view to accommodating inadequacies in form attributable to deficient drafting. He noted at para. 25 that:

[25] The amended pleading could certainly have been clearer. While it sets out causes of action and some material facts, it is incomplete in setting out the material facts and insufficiently connects the facts to the causes of action. The judge was right to conclude at the first

hearing that the document should be amended (or particulars provided). But the fact remains that, as observed by both Justices Burnyeat and Crossin, the pleading (both original and as amended) was nevertheless compliant with the SCFR. No lack of compliance arose until the second hearing--and that was in relation to the first order, not the SCFR.

Availability of s. 230 Fines Where Registered with the BCFMA

[243] Division 6 of Part 10 of the FLA is titled "Enforcement Generally". Among the provisions is s. 230:

Enforcing orders generally

230 (1) Subject to section 188 [enforcing orders respecting protection], an order under this section may be made only if no other provision of this Act applies for the purposes of enforcing an order made under this Act.

(2) For the purposes of enforcing an order made under this Act, the court on application by a party may make an order to do one or more of the following:

(a) require a party to give security in any form the court directs;

(b) require a party to pay

(i) the other party for all or part of the expenses reasonably and necessarily incurred as a result of the party's actions, including fees and expenses related to family dispute resolution,

(ii) an amount not exceeding $5 000 to or for the benefit of the other party, or a spouse or child whose interests were affected by the party's actions, or

(iii) a fine not exceeding $5 000.

[244] Other orders in Part 10 that provide for enforcement, and in most cases include authority to order a fine, including:

a) s. 213 - "Enforcing orders respecting disclosure";

b) s. 221 - "Misuse of court process";

c) s. 228 - "Enforcing orders respecting conduct".

Limitations and Claims for Fines

[245] As noted above, s. 198(1) of the FLA provides that:

(1) Subject to this Act, a proceeding under this Act may be started at any time.

[246] Mr. Ross's submissions rely in part on provisions of the Limitation Act. In the Limitation Act, the term "claim" is defined in s. 1:

"claim" means a claim to remedy an injury, loss or damage that occurred as a result of an act or omission;

[247] Certain claims are exempted from the Limitation Act by s. 3:

3 (1) This Act does not apply to the following:

(l) a claim for arrears of child support or spousal support payable under

(i) a judgment, or

(ii) an agreement filed with the court under section 148 (2) or 163 (3) of the Family Law Act;

(m) fines or penalties under the Offence Act;

(o) fines or penalties under the Securities Act or a claim for an amount payable pursuant to an order made under section 155.1 (b), 157 (1) (b), 161 (1) (g) or 164.09 of that Act.

(2) This Act does not apply to a claim or court proceeding for which a limitation period has been established under another enactment, except to the extent provided for in the other enactment.

[248] Where a claim is not exempted from the Limitation Act, the basic limitation period is provided by s. 6:

6. (1) Subject to this Act, a court proceeding in respect of a claim must not be commenced more than 2 years after the day on which the claim is discovered.

Analysis

[249] I begin by noting that the provisions of the FLA granting the court's jurisdiction to order fines -ss. 213, 221, 228 and 230 - are all part of Part 10 - Court Processes. They generally relate to matters such as disclosure (s. 213), misuse of court processes (s. 221) and the conduct of parties (s. 228). Most of these are matters that arise after a proceeding is commenced. The specific limits of s. 213 were considered in Sperring v. Shutiak, 2023 BCCA 54 at paras. 135-137. Nothing that is express in s. 230 inherently limits its application to conduct within an ongoing litigation - the only requirement is that it be used for "the purposes of enforcing an order made under this Act".

[250] Where a proceeding has been commenced by notice of family claim, a party almost never amends their pleading to add the seeking of fines to the various summaries of relief sought. Rather, the notice of family claim primarily focuses on the substantive relief sought. Fines are simply one aspect of the court process.

[251] An interesting question arises whether there are circumstances in which a particular type of fine being sought could be considered substantive relief that should be specifically pleaded (presumably in Schedule 5 of a notice of family claim). That all assumes that a claim is being pursued by way of a notice of family claim.

[252] In my discussion of the previous issue, I reviewed in some detail the proper practice to be followed when a party seeks to enforce, vary or set aside a separation agreement. I concluded that the proper approach where there is no existing proceeding is to file the agreement under cover of a requisition and then make an application with respect thereto. I noted Justice Goepel's conclusion in Halliday that it is not proper, where a proceeding has been commenced by requisition, to thereafter file a notice of family claim to particularize the specific relief that is sought with respect to the separation agreement.

[253] In my view, it is implicit in this that any relief that is necessarily collateral to enforcement, variation or setting aside of a separation agreement is properly brought under the umbrella of the requisition. As emphasized in the excerpt from A.J.F. v. N.L.S. quoted above, the purpose of a fine under s. 230 is to secure compliance with orders (or an agreement if it has the status of an order). As a remedy whose purpose is to secure compliance, it is necessarily collateral to enforcement of the order (or agreement). If a party is not entitled to file a notice of family claim in respect of the main relief (i.e. remedies necessary to enforce an agreement), then I do not see how that party can be restricted in the relief it seeks as a result of a failure to plead it in a notice of family claim.

[254] Thus, it is my view that the fines that Ms. Siroski seeks do not need to be reflected in a notice of family claim.

[255] That said, I agree that there is an issue with the particularization of the grounds for the fines that are being sought in Part 3 of the existing notices of application. It became clear during the hearing that the authority relied on for the fines was s. 230, and that the failure to specifically reference that section was inadvertent. I would grant Ms. Siroski leave to amend the notice of application to correct that error.

[256] I turn to the submission that a fine pursuant to s. 230 is not available because the section states that an agreement, once filed, is "enforceable under this Act and the Family Maintenance Enforcement Act as if an order of the court".

[257] I agree with Ms. Siroski that this provision deals with the status of the agreement. It does not provide an actual remedy. Rather, it makes clear that a party having filed a separation agreement then has access to the full range of remedies available in respect of a court order, including those available under the FLA as well as the ability to register with the BCFMA.

[258] In my view, the language used in s. 230(1) - restricting the ordering of fines under s. 230(2) - is mainly aimed at distinguishing s. 230 from other provisions that provide for similar relief, including fines. Its primary goal is to ensure that there is no doubling up of fines and penalties.

[259] I turn finally to the question of limitation periods. In my view, s. 198(1) of the FLA is clear that other than as provided in the FLA, "a proceeding under this Act may be started at any time". I acknowledge Mr. Ross's submission that, if that is the case, then there seems to be

little purpose to s. 3(1)(l) of the Limitation Act and it making clear that the statute does not apply to claims for arrears of child support of spousal support. However, it is my view that a provision like this cannot through implicit operation negate the specific language of s. 198(1).

[260] I note as well that s. 3(2) of the Limitation Act also makes clear that the Limitation Act does not apply where another enactment deals with limitations.

[261] In any event, to the extent that a claim for a fine is advanced in order to secure compliance with an agreement with respect to the payment of child or spousal support, then s. 3(1)(l) would exempt it from any limitation in any event.

Claim for Damages

Positions of the Parties

[262] With respect to para. 22 of the Second 2024 NOA, by which Ms. Siroski advances a claim for damages, Mr. Ross argues that:

a) There is no claim for damages in the 2020 NOFC, and thus no pleading putting forth a claim for damages that could be the subject of a summary trial application;

b) Ms. Siroski has made no application to amend the 2020 NOFC; and

c) In any event, a new claim based on breach of contract would be time-barred with respect to conduct more than two years in the past - yet it appears that the conduct allegedly giving rise to damages was more than two years in the past.

[263] Mr. Ross says that a claim for damages would be governed by the two-year limitation period found in s. 6 of the Limitation Act. Mr. Ross says that the exemption found in s. 3(1)(l) of the Limitation Act applies only to claims for "arrears of child support or spousal support", and not to claims for damages flowing from a failure to make support payments in a timely manner.

[264] In addition, Mr. Ross says that there is nothing in either Part 2 (Factual Basis) or Part 3 (Legal Basis) of the Second 2024 NOA supporting the claim for damages.

[265] Ms. Siroski says that the availability of a claim for damages for breach of a separation agreement has been confirmed by various courts, and that this includes a failure to make spousal support payments: Owen v. Owen, 2011 BCSC 1284 at paras. 14-17.

[266] Ms. Siroski says that her claim for damages is not barred by the Limitation Act. She says that the claim arises from obligations as to child and spousal support, and thus the exemption at s. 3(1)(l) of the Limitation Act is applicable. She also relies on s. 198(1) of the FLA which provides that claims under the FLA are not subject to limitations. She says further that a breach of contract that involves a failure to perform an obligation scheduled to be performed periodically gives rise to a claim from the date of each individual breach.

[267] Ms. Siroski says that the 2020 NOFC she filed indicates she is making claims for child and spousal support, and that she is not barred from seeking damages as one form of relief. Alternatively, if this Court determines otherwise, she seeks leave to amend the 2020 NOFC.

Analysis

[268] I will not repeat the various comments I have made above regarding the nature of pleadings in a family law case, and the extent to which claims that are aimed at securing compliance with an agreement filed with the court should or should not be pleaded.

[269] It is my view that a claim for damages - even one arising from a failure to comply with a separation agreement - is not incidental to enforcement of that agreement. As such, it is a claim that should be pleaded before attempts are made to seek judgment on the claim.

[270] The process for amending pleadings to add a claim is set out in Rule 8-1. There are numerous authorities dealing with the addition of a claim, including in circumstances where one party says that a limitation has expired. None of those authorities were argued before me.

[271] I do note that the 2020 NOFC did include a claim for compensation - however, that was in respect of alleged pledging of credit. As I understand it, the claim for damages that Ms. Siroski now seeks to advance relates primarily to Mr. Ross's post-2020 stopping of the payment of support and its consequential impact on her ability to purchase the townhouse in which she resides.

[272] It is my view that Ms. Siroski - should she wish to advance a claim for damages - should bring an application to amend the 2020 NOFC to plead such a claim. The court hearing that application can determine whether the amendment should be permitted.

[273] Given the lack of a supporting pleading reflecting a claim for damages, it is my view that para. 22 of Part 1 of Ms. Siroski's December 3, 2024, Notice of Application should be struck. If her application to amend the 2020 NOFC is successful, then that claim can be readvanced - either by amending the notice of application or by filing a separate notice of application.

Photocopying Claim

[274] With respect to para. 15 of the Second 2024 NOA, which seeks reimbursement of photocopying charges to prepare binders for court, and references the order of Justice Saunders, Mr. Ross says that there are no specific provisions in Justice Saunders' order dealing with photocopying charges. The order simply directs that:

pursuant to s. 30(2) of the Interjurisdictional Support Orders Act, that the designated authority of the Province of British Columbia contact the Applicant and request that he provide to this Court the following information and documents

[275] Given that the claim relates to the photocopying of materials for submission to the court (presumably in an application record), it is in my view properly advanced as part of a claim for costs. Costs are already sought in para. 21 of Ms. Siroski's notice of application.

[276] It is unusual to particularize a claim for court costs. Costs are normally a matter dealt with after an application has been decided on its merits, and are most often assessed by the registrar, with no need for particularization until such time as the matter goes before the registrar.

[277] It is my view that para. 15 is thus an unnecessary averment and should be struck pursuant to Rule 11-2(1)(b).

Costs

[278] Both parties advanced claims for special costs. I am not satisfied that either party has engaged in reprehensible conduct. The application raised a number of complex and technical issues which have taken some time to work through.

[279] Ms. Siroski has been successful on the major issues that were raised on this application. That said, it is clear that many of the issues that have taken time on this application arise from technical breaches on Ms. Siroski's behalf of some of the Supreme Court Family Rules. Mr. Ross's success has been on matters that are significantly less consequential.

[280] In my view, the appropriate result in all the circumstances would be for each party to bear their own costs of this application.

Conclusion

[281] The application to strike out numerous paragraphs of Ms. Siroski's two notices of application is dismissed, with the exception of paras. 13, 15 and 22. For the reasons set out above, para. 15 would be properly part of a claim for costs if Ms. Siroski is ultimately successful in respect of the application brought by Mr. Ross.

[282] With respect to the claim in para. 13, Ms. Siroski is granted leave to amend the Second 2024 NOA to particularize the legal basis for the fines sought, including reference to s. 230.

[283] With respect to the claim in para. 22, should Ms. Siroski wish to advance that claim, she should make application to amend the 2020 NOFC to plead a claim for damages. Given the issues identified above with respect to the claim, Ms. Siroski should seek leave of the court and should not rely on Rule 8-1(1)(a). That is the appropriate time at which to decide the limitation and other issues that Mr. Ross seeks to raise.

[284] The parties are to bear their own costs of this application.

"Veenstra J."

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