
CANADA / JUDGMENT

Tang v. Cheng

2020 BCSC 1341

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 1341 Tang v. Cheng

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Tang v. Cheng,

2020 BCSC 1341

Date: 20200910

Docket: E193003

Registry: Vancouver

Between:

Bin Bin Tang

Claimant

And

Wei Cheng

Respondent

Before: Master Elwood

Reasons for Judgment

Counsel for the Claimant:

J. Kang

Counsel for the Respondent:

R.W. Evans

Place and Dates of Telephone Conference Hearing:

Vancouver, B.C.

July 10, 14 and 23, 2020

Place and Date of Judgment:

Vancouver, B.C.

September 10, 2020

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I. INTRODUCTION

- [1] The claimant applies for interim spousal support under the Family Law Act, S.B.C. 2011, c. 25 ("FLA"). She seeks retroactive and prospective support based on an imputed income for the respondent of approximately \$5 million CDN per year.
- [2] The application gives rise to a choice of law question. The respondent argues that Chinese law applies to the claim of spousal support. If Chinese law applies, the claimant is not entitled to any spousal support.
- [3] Jurisdiction is not in issue. On a previous application, Madam Justice Fleming decided that the Supreme Court of British Columbia Court will exercise jurisdiction over all of the issues in this case. The question is: which law does the court apply on an interim application for spousal support?
- [4] There are connections to both China and British Columbia. The parties were married in China. They separated in China. They were divorced by a Chinese court. They both currently live in China. On the other hand, the claimant maintained a family home in British Columbia for a number of years while their son attended a West Vancouver high school. Her claim to spousal support is based largely on sacrifices she says she made in British Columbia. The parties continue to own real estate in West Vancouver. The claimant would like to return to West Vancouver.
- [5] The FLA does not contain any choice of law rules for spousal support. No clear rule emerges from the very limited common law. The claimant argues that British Columbia law applies, either because Fleming J. decided it applies, the respondent agreed to its application, or because the law of the forum (*lex fori*) applies to spousal support.
- [6] The respondent suggests three possible choice of law rules for spousal support, each of which he argues indicates Chinese law applies: the law of the matrimonial domicile (*lex domicilii* or the law of the place the parties first resided upon marriage), the law of the last common habitual residence of the parties (often used for property claims), or the law of the jurisdiction having the closest connection to the parties and the issues.
- [7] For the reasons which follow, I have concluded that: (a) Madam Justice Fleming did not determine whether British Columbia law governs the claim of spousal support; (b) the respondent did not agree to the application of British Columbia law; (c) an appropriate choice of law rule for spousal support is based on the jurisdiction having the closest connection to the parties and the issues; and (d) the claimant has established a *prima facie* case that British Columbia law applies, which is sufficient for an interim application for spousal support.

- [8] I have also decided that interim spousal support should be based on the respondent's declared income of approximately \$620,000 CDN per year, rather than on the claimant's calculation of his imputed income. In my view, the claimant's calculation of the respondent's income is based on complex and disputed facts that will require a trial to reach a properly informed decision.

II. BACKGROUND

- [9] Bin Bin Tang and Wei Cheng were married in 1991, in Nantong, China. They had a child, each pursued successful careers and accumulated substantial wealth and property in China. Ms. Tang worked her way up to a senior position in the Communist Party of China. Mr. Cheng built a successful business focussed on real estate development. The parties incorporated a family company that provided them with salaries and benefits.
- [10] In 2007, Ms. Tang moved to Canada, in her words, "upon the insistence of [Mr. Cheng] and became a full time housewife". The parties purchased a house in West Vancouver. Ms. Tang learned English and became a Canadian citizen. She maintained the home and cared for their son. With her guidance and support, the boy achieved athletic and academic success at a West Vancouver high school.
- [11] Mr. Cheng also lived part-time in West Vancouver, while maintaining the family business and income in China. Ms. Tang assisted Mr. Cheng with the English language and life in Canada. The parties opened bank accounts and investigated business opportunities in Canada. Mr. Cheng became a permanent resident of Canada. He supported the family by depositing funds in a joint bank account and making the mortgage payments on the West Vancouver home. The parties filed Canadian tax returns.
- [12] In 2012, their son left home to attend university in New York City.
- [13] From 2012 to 2015, Ms. Tang split her time between West Vancouver, where she was supervising the construction of a new family home, and Nantong China, where Mr. Cheng was living and managing the family business. Ms. Tang's evidence is that she spent time in China at the request of Mr. Cheng to help him maintain his Canadian permanent resident status (permanent resident status can be retained outside of Canada by living with a Canadian citizen at least two thirds of the time).
- [14] Ms. Tang and Mr. Cheng separated in October 2015. Since then, they have been living in the same building complex in Nantong. Ms. Tang's evidence is that she intends to return to Canada, but she is "stranded in China" because she lacks the financial resources to live independently in Canada.

- [15] The parties have kept the house in West Vancouver. The property is registered in their names as joint tenants. It is assessed for property tax purposes at approximately \$4 million. The equity in the property is approximately \$3.2 million. Expenses related to the property have become a financial burden on Ms. Tang. Mr. Cheng has stopped depositing funds in the joint bank account to cover the expenses. He recently stopped making the mortgage payments.
- [16] Ms. Tang and Mr. Cheng were divorced by a Chinese court on December 25, 2019. The Chinese court divided the known real estate and bank accounts of the parties in China. The court awarded a majority of those assets to Ms. Tang based on its findings that Mr. Cheng had fraudulently transferred away or dissipated at least \$15.5 million in assets and committed adultery. The Chinese court did not deal with the corporations through which the parties conduct the family business. Nor did it deal with the West Vancouver property or other assets located outside of China.
- [17] Mr. Cheng appealed the judgement of the Chinese court of first instance. The appeal has not yet been heard. Under Chinese law, Mr. Cheng retains control of the assets apportioned to Ms. Tang while the appeal remains outstanding.
- [18] Ms. Tang also sued Mr. Cheng in the Chinese courts for funds she alleged he transferred to his mistress and her son. The parties settled the lawsuit for the equivalent of approximately \$800,000 CDN. Mr. Cheng must pay this settlement to Ms. Tang separate from the division of family assets after the property division portion of the Chinese divorce judgment takes effect.
- [19] Ms. Tang filed this family law case in B.C. Supreme Court on November 8, 2019. She seeks an order of spousal support and an unequal division of family property and debt under the FLA. She claims an interest in the West Vancouver property and all of Mr. Cheng's assets world-wide, except for the property dealt with in the Chinese divorce proceeding.
- [20] Mr. Cheng filed a jurisdictional response to the proceeding. He did not challenge the court's territorial jurisdiction over the issues. Instead, he pleaded that the court ought not to exercise its jurisdiction. Mr. Cheng also filed a substantive response to family claim and a counterclaim. In the counterclaim, Mr. Cheng sought spousal support and other relief under the FLA.
- [21] After Mr. Cheng filed the jurisdictional response, Ms. Tang applied for an order of the court declaring that it will exercise jurisdiction over all of the issues in the proceeding. The application was approved by a judge for hearing during the COVID-related suspension of normal court operations, based on Ms. Tang's assertion she had an urgent need for spousal support.

- [22] The application came on before Madam Justice Fleming by way of telephone conference hearing on May 25, 2020. In oral reasons for judgment pronounced the next day and published at 2020 BCSC 908, Madam Justice Fleming determined "this Court should not decline to exercise its jurisdiction over any of the claims in this family law proceeding" (para. 63).
- [23] Ms. Tang now applies for interim spousal support based on an income for Mr. Cheng which she argues is more than \$5 million per year from rental properties and investments in China. In response, Mr. Cheng argues that Chinese law governs the claim of spousal support and the application must therefore be dismissed. If British Columbia law applies, Mr. Cheng argues that interim support based on Ms. Tang's calculations is unwarranted by the evidence.
- [24] By way of reply, Ms. Tang contends that Mr. Cheng's argument Chinese law applies is not open to him to make, either because Madam Justice Fleming decided British Columbia law applies, Mr. Cheng agreed to the application of British Columbia law in his counterclaim for spousal support under the FLA or the issue is not within the jurisdiction of a master to decide.

III. ANALYSIS

A. Did Madam Justice Fleming Decide B.C. Law Applies?

- [25] In my view, Madam Justice Fleming decided exactly what her order says she decided: the Court will exercise jurisdiction over the issues in this family law case.
- [26] The choice of the substantive law to be applied to the issues is a separate question from the choice of forum: *Wong v. Wong* (1995), 8 B.C.L.R. (3d) 66, at para. 30. Madam Justice Fleming determined that British Columbia is an appropriate forum for Ms. Tang's spousal support claim; she did not decide that British Columbia law will govern that dispute.
- [27] Choice of law was not directly in issue during the application before Madam Justice Fleming. As stated, Mr. Cheng did not challenge the court's territorial jurisdiction over any aspect of the case, including spousal support. Notably, he acknowledged a real and substantial connection between British Columbia and the facts on which the proceeding is based (I will return to this point below). Rather than contest the court's jurisdiction, Mr. Cheng argued that the court should decline to exercise its jurisdiction. This position required Mr. Cheng to establish that China provided a more appropriate forum for some or all of the issues.

- [28] Choice of law may be a consideration in the court's identification of the most appropriate forum. Section 106(5)(c) of the FLA lists "the law to be applied to the issues" as one of the factors the court must consider in determining whether to decline its jurisdiction over a property claim in a family law case. Section 108 contains three choice of law rules for this purpose, which includes the concept of the proper law of the relationship defined in s. 107 of the FLA.
- [29] There are no jurisdictional provisions in the FLA for spousal support claims. Instead, the Court Jurisdiction and Proceedings Transfer Act, S.B.C. 2003, c. 28 ("CJPTA") provides guidance on jurisdictional issues. The law to be applied is one of the factors the court must consider under s. 11(2)(b) of the CJPTA in deciding whether there is a more appropriate forum in which to hear a proceeding. Unlike the FLA, the CJPTA does not contain any choice of law rules.
- [30] Madam Justice Fleming did not fully analyse the choice of law issues. This is because, first, she accepted Ms. Tang's argument that the Chinese courts do not provide a forum for dividing property located outside of China or spousal support, rendering it "unnecessary if not nonsensical" to consider whether China provides a more appropriate forum:
- [55] Based on the evidence, I accept for the purposes of this application that China cannot or does not offer an alternative forum for the division of the non-Chinese assets which are the subject of Ms. Tang's property claim and Mr. Cheng's counterclaim, or her claim for spousal support in this proceeding. I agree with Ms. Tang that the absence of an alternative forum makes it unnecessary if not nonsensical to consider the factors enumerated in s. 106(5) [of the FLA] and s. 11 [of the CJPTA], which clearly presuppose an alternative forum.
- [31] Madam Justice Fleming went on, in the event she was wrong in this conclusion - and it was necessary to determine whether China provided a more appropriate forum - to consider the factors enumerated in s. 106(5) of the FLA and s. 11 of the CJPTA. Applying those factors, Fleming J. found that China was, in any event, not a more appropriate forum (para. 59 to 62).
- [32] In doing so, Madam Justice Fleming noted that the parties had not offered any legal submissions on choice of law rules, except those contained in ss. 107 and 108 of the FLA for the property claims (para. 44 and 66). Assuming, without deciding, that ss. 107 and 108 apply to the property claims and indicate Chinese law applies to those issues, Madam Justice Fleming held that applying foreign law was not a barrier to proceeding in British Columbia (para. 62).
- [33] Madam Justice Fleming rejected Mr. Cheng's suggestion that ss. 107 and 108 of the FLA also govern the choice of law for spousal support (para. 44). She did not make any further express comment on which law might apply to the spousal support claim.
- [34] In the result, Madam Justice Fleming did not actually decide which law applies, either to the division of property or to spousal support.

- [35] That she did not decide which law applies to the issues appears to be confirmed by the following exchange between Madam Justice Fleming and counsel for Mr. Cheng concerning the form of the order:
- [70] MR. EVANS: Yes. Just so I understand it, it's a declaration that the court is not declining to exercise its jurisdiction, but there is no findings with respect to the law that applies or any further terms that need to be added?
- [71] THE COURT: No. That is right. I am not making a declaration that we have jurisdiction, because that is not in dispute.
- [36] Ms. Tang disagrees with this analysis. She argues that the underpinning of Madam Justice Fleming's decision was a finding that Chinese law does not provide spousal support and does not to apply so as to bar an interim application for spousal support.
- [37] Ms. Tang places particular reliance on a statement by Madam Justice Fleming at paragraph 57: "I see no barrier to an interim application proceeding."
- [38] I agree with Ms. Tang that Madam Justice Fleming found Chinese law does not provide spousal support for a person in Ms. Tang's circumstances. At paragraph 57 of her reasons, Madam Justice Fleming accepted the affidavit opinion evidence of Yukang Lai, a Chinese lawyer, that Ms. Tang cannot apply for spousal support at this stage. Mr. Lai's evidence, as summarized by Fleming J. at paragraph 36(4), is that Ms. Tang is not entitled to apply for spousal support under Chinese law.
- [39] However, I do not agree that it necessarily follows the court is bound to apply British Columbia law. There is no automatic entitlement to interim spousal support under the FLA; a claimant must still establish a *prima facie* case that the FLA applies: *Ovchinnikova v. Stevens*, 2018 BCSC 951.
- [40] The choice of law question in these proceedings is a threshold issue going to Ms. Tang's entitlement to spousal support under the FLA. As with other circumstances involving threshold issues, interim spousal support should only be ordered if it is established that Ms. Tang has made out a *prima facie* case for her entitlement: *L.G.B. v. M.A.C.M.*, 2005 BCSC 1786, at para. 14 - 16; *Robles v. Kuhn*, 2009 BCSC 1163, at para. 12(7).
- [41] Madam Justice Fleming did not decide the threshold issue of entitlement under the FLA. The court's statement at paragraph 57, "I see no barrier to an interim application proceeding", must be considered in context. Mr. Cheng had argued it was premature for the B.C. Supreme Court to exercise its jurisdiction until the appellate division of the Chinese court renders its decision. He argued that the appeal decision in China will have a bearing on any property division or final spousal support awarded by the British Columbia courts. It was in this context that Madam Justice Fleming said she saw no barrier to an interim application proceeding:

- [57] There is nothing inconsistent in deciding this Court should not decline to exercise its jurisdiction and also recognizing that a trial or final resolution of the parties' claims should await the outcome of the appeal in China.
- [58] The urgency of this application is driven by Ms. Tang's assertion she has an urgent need for spousal support. Accepting Mr. Lai's evidence that the outstanding appeal prevents the trial judgment from coming into effect, and bearing in mind the legal principles that govern interim applications for spousal support, I see no barrier to an interim application proceeding.
- [42] In other words, Madam Justice Fleming found that the outstanding appeal in China is not a barrier to an interim application for spousal support in British Columbia. She did not say British Columbia law will apply on the interim application.
- [43] Choice of law is a complicated and disputed issue in this case. The telephone conference hearing before Madam Justice Fleming proceeded on an urgent basis with a limited record and limited assistance from counsel on choice of law rules. Madam Justice Fleming acted on Ms. Tang's plea of urgency and rendered a timely decision. She expressly did not bind the judge (or master) hearing the application for interim spousal support to agree the application is urgent (para. 83). Even assuming Madam Justice Fleming anticipated British Columbia law would apply, I do not think Her Ladyship intended to bind the judge (or master) hearing the application on that question either.
- [44] In short, Madam Justice Fleming determined that Ms. Tang is entitled to apply to this Court for interim spousal support, but not whether British Columbia law governs the application. Before the court will order Mr. Cheng to pay interim spousal support, Ms. Tang must establish a *prima facie* case that British Columbia law applies to the claim of spousal support.

B. Is Choice of Law Within the Jurisdiction of a Master?

- [45] Ms. Tang argues that choice of law is not within the jurisdiction of a master. In my view, this argument is without merit.
- [46] It is well known that masters do not have jurisdiction to make final orders where there is a dispute on the facts or the law: Practice Direction PD-50, at para. 8; *Pye v. Pye*, 2006 BCSC 505.
- [47] This is not an application for a final order. The only application before me is Ms. Tang's application for interim spousal support.
- [48] In determining whether Ms. Tang has made out a *prima facie* case that British Columbia law applies to the claim of spousal support, I will not be making a final determination on which law applies. A trial judge may reach a different conclusion on a better developed body of evidence. He or she will not be bound by my decision on this application.

C. Did the Respondent Consent to British Columbia Law?

- [49] Ms. Tang argues that Mr. Cheng agreed to the application of British Columbia law to the issues in this case. In my view, this argument is also without merit.
- [50] Litigants may agree on a choice of law. Their agreement may be inferred from conduct. However, in this case, there is no evidence of an agreement, express or implied. Instead, Ms. Tang relies on Mr. Cheng's counterclaim in which he sought relief under the FLA, including spousal support.
- [51] A person who invokes the jurisdiction of the court as a plaintiff (or a counter-claimant) may be found to have consented to the jurisdiction of the court over related claims, a concept known as attornment: Castel & Walker, Canadian Conflict of Laws, 6th ed. at para. 11.2.
- [52] Attornment is a separate question from choice of law. Attornment relates to jurisdiction and choice of forum. Jurisdiction is no longer in issue in this case. Mr. Cheng acknowledged the court's territorial jurisdiction and Madam Justice Fleming refused to decline that jurisdiction.
- [53] Mr. Cheng's counterclaim seeking relief under the FLA is a pleading in the alternative. Mr. Cheng's primary position is that Chinese law governs the issues. His position in that regard has been clear from the outset.
- [54] Family law court forms are intended to simplify the pleadings in a family law case. Inferring an agreement by Mr. Cheng on a disputed issue in this case would be inconsistent with that objective.

D. What is the Choice of Law Rule for Spousal Support?

- [55] In my view, an appropriate choice of law rule for the purposes of this application is that spousal support is governed by the law of the jurisdiction having the closest connection to the parties and the issues.
- [56] Neither the FLA nor the CJPTA provides choice of law rules for spousal support. Ms. Tang's claim to spousal support is therefore subject to common law choice of law rules. There is no decision of any Canadian court of which I am aware that establishes a choice of law rule for spousal support.
- [57] Ms. Tang proposes a rule based on the following statement in Castel, at para. 19.3:

Where the application is for spousal support, the court first applies its own law but if there is no entitlement under that law, the court applies the law of the jurisdiction in which the parties maintained a common habitual residence. In determining the amount of support, the court applies its own law.

[58] I cannot adopt the *lex fori* rule stated in *Castel*. The only authority cited in support of this rule is *Fastlicht v. Carmichael*, 2018 BCSC 37. With respect to the learned authors, *Fastlicht* does not say the court first applies its own law (I will return to *Fastlicht* below.)

[59] *Halsbury's Laws of Canada - Conflict of Laws* (2016 Reissue) at HCF-210 states the same rule as *Castel*. *Halsbury's* footnotes four cases, none of which support the above-quoted rule as a generally applicable choice of law rule for spousal support.

[60] The source of the rule in *Castel* and *Halsbury's* appears to be s. 12(3) of the *Interjurisdictional Support Order Act*, S.B.C. 2002, c. 29 ("ISOA") and similar legislation across Canada. Section 12(3) of the ISOA provides that:

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(3) In determining the entitlement to and amount of support for a claimant, the British Columbia court must,

(a) subject to paragraph (b), apply the law of British Columbia, and

(b) if the claimant is not entitled to support under the law of British Columbia, apply the law of the jurisdiction in which the claimant and the respondent last maintained a common habitual residence.

[61] Section 12(3) of the ISOA is part of a procedure that allows a claimant in a reciprocating jurisdiction to obtain a support order against a spouse in British Columbia. Section 12(3) of the ISOA has no application in this case because China is not a reciprocating jurisdiction and Mr. Cheng is not in British Columbia. Moreover, Ms. Tang has not invoked the procedure under the ISOA. She applies under the FLA. In my view, the court cannot simply transport a rule from the ISOA to the FLA. The ISOA is based on model uniform legislation which has no application here.

[62] Turning to the common law, the first step in the choice of law analysis is to characterize the claim. In *Tezcan v. Tezcan* (1992), 62 BCLR (2d) 344 (C.A.), the Court of Appeal held that claims to movable property are governed by *lex domicilii* (law of the matrimonial domicile or the place the parties first resided upon marriage), and claims to immovable property are governed by *lex situs* (law of the place where the property is located). Further, in *Christopher v. Zimmerman*, 2000 BCCA 532, the Court of Appeal held that claims in equity based on constructive trust are governed by the law of the place where the enrichment occurred.

[63] Spousal support does not fit easily within any of these existing categories. Spousal support is not a property claim; nor is it a claim in equity based on unjust enrichment. Spousal support is a creation of statute. The objectives of spousal support under the FLA are set out in s. 161:

161 In determining entitlement to spousal support, the parties to an agreement or the court must consider the following objectives:

- (a) to recognize any economic advantages or disadvantages to the spouses arising from the relationship between the spouses or the breakdown of that relationship;
 - (b) to apportion between the spouses any financial consequences arising from the care of their child, beyond the duty to provide support for the child;
 - (c) to relieve any economic hardship of the spouses arising from the breakdown of the relationship between the spouses;
 - (d) as far as practicable, to promote the economic self-sufficiency of each spouse within a reasonable period of time.
- [64] In my view, spousal support is best characterized as a legislated redistribution of the economic advantages and disadvantages of a qualifying relationship and its breakdown.
- [65] The common law concept of domicile as a choice of law rule does not fully reflect this characterization of spousal support. A couple may begin or end their relationship in a jurisdiction with limited connections to the economic advantages or disadvantages of their union. A more flexible approach is required to accomplish the legislative objectives of spousal support under the FLA.
- [66] In *Kendregan v. Kendregan*, 2009 BCSC 23, Mr. Justice Myers held that there must be a real and substantial connection with British Columbia before the court will apply the FLA to a non-resident spouse (para. 60). Although *Kendregan* is a jurisdiction case, its logic also applies to a choice to apply British Columbia legislation such as the FLA. A real and substantial connection is a minimum requirement before the court will apply the FLA. Beyond this basic requirement, however, the existing case law demonstrates significant flexibility.
- [67] In *Parker v. Mitchell*, 2016 BCSC 723, the parties agreed that, if the court took jurisdiction over the spousal support claim, British Columbia law would apply based on the claimant's residence at the time the proceeding was commenced (para. 40).
- [68] The parties, an unmarried couple, lived in California, but regularly spent their summers in British Columbia. The respondent owned real estate in British Columbia, including the summer home and a number of rental properties. Following their separation, the claimant moved to the summer home in British Columbia.
- [69] The claimant commenced a family law case under the FLA seeking spousal support and an interest in the respondent's property. California law did not provide analogous rights. In California, a person in the position of the claimant was limited to a claim based on implied contract or equitable principles.

- [70] The respondent applied for an order staying the action in British Columbia because the court either lacked jurisdiction or ought to decline its jurisdiction. Mr. Justice Nathan Smith dismissed the application. In the course of his reasons, Smith J. found that California law applied to the claimant's property claim, and British Columbia law applied to her claim of spousal support.
- [71] Mr. Justice Smith based the choice of law for the property claim on s. 107(a) of the FLA and the parties' "most recent common habitual residence", which was California (the couple separated in California and did not live together in British Columbia following their separation).
- [72] Parker does not contain any analysis of the choice of law for spousal support. However, the decision is instructive for how Mr. Justice Smith approached the question of jurisdiction over the claim of spousal support. While jurisdiction and choice of law are separate issues, both depend in large degree, in my view, on the connecting factors between the parties, the issues and the fora in question.
- [73] As stated, the FLA does not contain any jurisdictional provisions for spousal support. Accordingly, the CJPTA governed the court's exercise of jurisdiction in Parker. Section s. 3(d) of the CJPTA allows the court to take jurisdiction when a respondent is "ordinarily resident" in British Columbia at the time the proceeding is commenced. In Parker, Mr. Justice Smith found that the respondent was "ordinarily resident" in British Columbia because, although he lived in California, "the settled routine of the respondent's life include[d] regular and normal periods of residence in British Columbia" (para. 24).
- [74] Section 3(e) of the CJPTA also allows the court to take jurisdiction when there is a "real and substantial connection" between British Columbia and the facts on which the proceeding against a respondent is based. In Parker, Mr. Justice Smith found a real and substantial connection because:
- [26] a claim for spousal support is being advanced by a claimant now resident in British Columbia and part of the income from which the respondent would pay support is derived from property in British Columbia."
- [75] Parker illustrates a number of points relevant to the current application. First, spousal support is not governed by the law of the matrimonial domicile. British Columbia was neither the domicile of the parties when they began the relationship, nor was it their most recent common habitual residence. Second, the residence of the claimant is an important factor in the choice of law (although standing alone, the claimant's residence would not be enough to apply the FLA to a non-resident spouse: Kendregan). Third, ownership of a part-time residence in British Columbia may be a factor in the choice of law analysis (although there must be a connection between the real estate and the claim of spousal support, as there was in Parker; property ownership alone is not enough: Ovchinnikova).

- [76] In *Fastlicht*, supra, Madam Justice Maisonville found that British Columbia law applied to the issues in a case involving connections to both Ontario and British Columbia and real estate in both jurisdictions.
- [77] The parties in *Fastlicht* began their relationship in Toronto and ended it in Vancouver. They purchased a condominium in Toronto and leased an apartment in Vancouver. For most of the relationship, they lived in Toronto; but the last place they were together as a couple was in Vancouver.
- [78] The claimant commenced a family law case in British Columbia seeking property division and spousal support under the FLA. The respondent argued that Ontario law ought to be applied to the spousal support claim. Based on the length of their relationship, the claimant was not entitled to spousal support under Ontario law.
- [79] Madam Justice Maisonville found territorial jurisdiction for the claim of spousal support based s. 3(e) of the CJPTA and an arguable case of a real and substantial connection between the facts and British Columbia (para. 92).
- [80] Madam Justice Maisonville went on to conclude that "the law of BC applies to the issues in the proceeding" (para. 117; emphasis added), which I take to include spousal support. Unfortunately, Her Ladyship did not conduct a choice of law analysis for the spousal support claim.
- [81] In my view, British Columbia law applied to the spousal support claim in *Fastlicht* because of the connections between the parties, the issues and British Columbia. The claimant's career was in Vancouver. The respondent assumed a debt of the claimant to the University of British Columbia. The parties leased an apartment and lived together during regular periods of time in British Columbia. Their relationship ended shortly after the respondent presented the claimant with a draft separation agreement that would have been performed in British Columbia. These facts, in addition to the claimant's residence, established connections on which to apply British Columbia law.
- [82] In *D.L. v. M.Y.*, 2019 BCSC 881, a case in which the parties lived in both China and Vancouver, Madam Justice Sharma found that Chinese law applied to the property claims, and British Columbia law applied to the spousal support claims. *D.L.* has some similarities to the present case.
- [83] The claimant met the respondent on a trip to China. The parties married and entered into a marriage agreement in China. During the marriage, they visited with one another and had two children together; however, neither party fully relocated to either location. The respondent's parents purchased a house for the claimant and the children in Vancouver; but the respondent wanted the family to live in China. The parties separated in China. The respondent remained in China.

- [84] Madam Justice Sharma granted a stay of proceedings with respect to the property division and spousal support claims. Applying the choice of law rules for the property claims in s. 107 of the FLA, Sharma J. found that China was the "most recent common habitual residence of the couple" and also the jurisdiction "most closely associated with the relationship between the spouses" (para. 77-78).
- [85] Having found that Chinese law applied to the property issues, Madam Justice Sharma considered the remaining factors in s. 106 of the FLA and concluded that China was a more appropriate forum for those aspects of the case (para. 79-80).
- [86] Turning to the spousal support claim, Madam Justice Sharma found that China was again the more appropriate forum, reaching this conclusion under s. 11 of the CJPTA for many of the same reasons she raised with respect to property division under s. 106 of the FLA. However, Her Ladyship noted, "unlike property division, with respect to spousal support, there does not appear to be any issue of applying foreign law" (para. 89).
- [87] As I understand the underlined passage, Madam Justice Sharma was saying that British Columbia law would have applied to spousal support had the court not declined its jurisdiction. The basis for this conclusion is unclear without knowing the positions of the parties in D.L. However, the facts suggest a number of connecting factors between British Columbia, the parties and the issues. The claimant lived in Vancouver. She raised the children primarily in Vancouver. The family home was in Vancouver.
- [88] I draw the following conclusions from these authorities:
- a) Spousal support is not governed by the law of the matrimonial domicile.
 - b) Spousal support is not necessarily governed by the law of the parties' most recent common habitual residence, but that place may be a factor in the choice of law analysis.
 - c) The residence of the claimant at the time the proceeding was commenced is an important factor, but standing alone does not justify the application of British Columbia law to a non-resident spouse.
 - d) The presence of real property in British Columbia with a connection to the spousal support claim is an important factor in the choice of law analysis.
 - e) Other factors include the location where the spouses contributed to their economic union or raised their children.

E. Which Law Applies to Spousal Support in this Case?

- [89] In my view, Ms. Tang has presented a *prima facie* case that British Columbia law applies to her claim of spousal support.
- [90] A number of factors establish a connection between the spousal support claim and British Columbia. Ms. Tang's claim is based largely on evidence she gave up a successful career to move to British Columbia and devote most of her time to the care and education of the

parties' son in British Columbia. Her claim is also based on evidence she maintained a family home in British Columbia from 2007 to 2012, helped build the parties' current home in West Vancouver and maintained that property to the present day. Many of her most pressing financial needs arising out of the breakdown of the marriage are related to the West Vancouver home. It is likely the West Vancouver home will play a central role in any resolution of Ms. Tang's claims under the FLA, including spousal support.

- [91] Mr. Cheng acknowledges a real and substantial connection with British Columbia based on the West Vancouver home, the mortgage on that property and the parties' bank accounts in this jurisdiction.
- [92] On the other hand, there is no evidence the parties lived together in British Columbia after 2012. The last place they lived together as a married couple was an apartment in Nantong, China. When the parties separated, Ms. Tang moved to a separate apartment in the same building complex. There is no evidence Mr. Cheng has lived in British Columbia for any period of time after 2012.
- [93] The evidence of Ms. Tang's recent residence is ambiguous. In her first affidavit, Ms. Tang deposed that she "had been living" at the family home in West Vancouver since around March 2014. In a subsequent affidavit, she deposed that she was "regularly residing" in Vancouver since 2012, but she was currently "stranded in China." In her most recent affidavit, Ms. Tang acknowledged that from 2012 to 2015, she lived two thirds of the year with Mr. Cheng in China, but did not clarify her residence after 2015. It is clear that Ms. Tang currently lives in China, although she deposes that she intends to return to West Vancouver.
- [94] A person can be ordinarily resident in more than one jurisdiction: Parker, at para. 19, citing *Blazek v. Blazek*, 2009 BCSC 1693, at para. 33. A person is ordinarily resident where "in the settled routine of his life he regularly, normally or customarily lives": Parker, at para. 18, citing *Thompson v. Minister of National Revenue*, [1946] S.C.R. 209 at 231. The legal concept of residence also incorporates consideration of where a person intends to live: Parker, at para. 34, citing Dicey and Morris, *The Conflict of Laws*, 10th ed., vol. 1 at 144-5.
- [95] Recognizing the interim nature of this application, I find that Ms. Tang is resident in British Columbia as well as China. Ms. Tang spent regular and normal periods of residence in British Columbia from 2007 to at least 2015. There is some evidence, albeit ambiguous, that she continued to spend regular periods of time in British Columbia after 2015. She took great pains following the parties' separation to pay the expenses and maintain the house in West Vancouver. She intends to return to British Columbia as soon as she is able to do so.
- [96] The evidence of Ms. Tang's dual residence in combination with the connecting factors between the issues and British Columbia is sufficient to establish a *prima facie* case British Columbia law applies to the claim of spousal support.

F. What is the Respondent's Income for Interim Spousal Support Purposes?

i. Mr. Cheng's Declared Income

- [97] Mr. Cheng describes the family business as an assortment of hotels and investments in various industries. He estimates the current value of the family property to be approximately \$40 to 48 million CDN. Mr. Cheng deposes that he and Ms. Tang each receive monthly payments of 10,000 RMB from the family company. These payments provide the parties with annual incomes of 120,000 RMB (approximately \$23,000 CDN based on current exchange rates).
- [98] According to Mr. Cheng, the determination of any additional income is a complex issue which is currently before the Chinese courts.
- [99] Nonetheless, in a form F8 financial statement in these proceedings, Mr. Cheng declared annual rental income of \$751,322 CDN in additional to his corporate salary.
- [100] In a second financial statement, Mr. Cheng declared rental income of \$596,403 CDN. He explained that the rent declared in his first statement did not account for deductions for strata fees, property management and maintenance fees.
- [101] Mr. Cheng's total declared income is therefore approximately \$620,000 CDN (\$596,403 + \$23,000).
- [102] According to Mr. Cheng, this estimate of his income does not reflect the judgment of the Chinese court of first instance in the divorce proceedings. He says there will be a significant reduction in his income if the appeal is dismissed and the assets apportioned to Ms. Tang are transferred to her.

ii. Imputed Income

- [103] Ms. Tang argues that Mr. Cheng's annual income for support purposes is at least \$5 million CDN. In my view, interim spousal support should be based on the income Mr. Cheng declared in his financial statements, rather than on Ms. Tang's estimate of his total income.
- [104] Ms. Tang has amassed a substantial amount of evidence in support of her estimate, including disclosure in the Chinese divorce proceedings, findings of the Chinese court and her own investigations.
- [105] In addition to 50% of the shares of the family company, Mr. Cheng owns various holding companies either directly or through trusts with his parents. A number of these companies are disclosed in Mr. Cheng's financial statements. According to Ms. Tang, these and other, undisclosed companies are the primary engines of Mr. Cheng's substantial wealth.
- [106] For the purposes of this application, Ms. Tang focuses on rental income from four specific properties and profits realized by Mr. Cheng from three specific investments.

- [107] Before turning to the evidence, it bears emphasizing that this is an application for interim support pending a final determination to take place at a trial which has not yet been set. The parties have not attended a judicial case conference. They have not exchanged lists of documents. There have been no examinations for discovery. Although the parties have been engaged in litigation in China for several years, there has been no clear judicial determination of their incomes, at least not as far as I was made aware on this application.
- [108] As a general rule, income should not be imputed to a spouse on an interim application unless the evidence is properly developed or there are exceptional circumstances: *I.F. v. R.J.R.*, 2015 BCSC 793, at para. 13 and 130.
- [109] An interim application is not intended to involve an extensive exercise of fact finding based on volumes of documentation and complex calculations. As Madam Justice Fitzpatrick said in *Davathasan v. Devathasan*, 2017 BCSC 1010:
- [90] The interim nature of the application indicates that the general purpose of interim spousal and child support is to stabilize matters before the trial. In addition, the intention is not to put the parties to great expense in producing all relevant evidence towards seeking (or opposing) such relief, which adds to the already heavy financial burden of these types of proceedings. Where issues, such as appropriate income levels, are hotly contested and raise valid issues, it will often be the case that such matters are best left to a more fulsome exploration of the evidence, such as at trial.
- [110] In *Devathasan*, Madam Justice Fitzpatrick imputed income to a payor spouse of \$2.7 million per year. The evidence on the interim application in that case was sufficient to find that this level of income was available to the respondent from a lucrative medical practice in Singapore and rental properties in Toronto and Florida. Notably, Madam Justice Fitzpatrick declined to go further and impute income of over \$4 million per year based on the claimant's argument the respondent's declared income sources were but one aspect of his true income:
- [96] I am simply unable to adequately assess these allegations and counter arguments on this application, given the limits that must apply here. In my view, it would be inappropriate to embark upon an assessment of such evidence, which requires an extensive consideration of all evidence (and likely more than is before me) including the viva voce testimony of the parties and perhaps others. Further, I am not in a position to resolve issues of credibility relating to this issue at this type of hearing: *Plese v. Herjavec*, 2015 ONSC 7572 at para. 52.
- [111] In *Long v. Sun*, 2019 BCSC 2129, Mr. Justice Affleck declined to impute income on an interim application based on estimates and calculations provided by the claimant, finding that the evidence offered was "at best conjecture or speculation" (para. 40).

[112] I would not go as far as to say Ms. Tang's calculations are at best conjecture or speculation. But the caution against imputing substantial income before the evidence is fully developed and tested is apposite. Many of Ms. Tang's calculations are based on untested assumptions, opinion and disputed facts.

iii. Evidence of Rental Income

[113] Ms. Tang relies on evidence of three commercial rental properties: the Youth Building, the Hanoxi Building and the Shanghai Duplex.

[114] The Youth Building is a six-story office building in Nantong, China. Ms. Tang says the building was purchased using family funds. Mr. Cheng says he purchased the building with a personal loan, and Ms. Tang signed a notarized "Statement Giving Up Property Rights". The Youth Building is rented to a bank. The rent, according to statements collected by Ms. Tang, is approximately \$3.68 million RMB or \$736,000 CDN per year.

[115] The Hanoxi Building is a five-story commercial building in Nantong. It was purchased using family funds and it is managed as part of the family business. The property is registered in the joint names on Mr. Cheng and Ms. Tang. Much of the building is rented to a hotel called Hotel 66. A lease agreement with Hotel 66 specifies rent totalling approximately \$1.2 million RMB or \$240,000 CDN per year.

[116] There are four or five other tenants of the Hanoxi Building. Two units on the first floor are rented to a restaurant. An expired lease indicates that the restaurant paid rent in the equivalent of approximately \$232.69 CDN per square foot. Ms. Tang estimates the rent on the remaining units using the rent paid by the restaurant per square foot. She estimates that the total rent generated by the Hanoxi Building is approximately \$377,029 CDN per year.

[117] Mr. Cheng says the total rent is under review by the Chinese courts. Further, he deposes that the hotel and restaurants are not currently operating due to the COVID-19 pandemic.

[118] The Shanghai Duplex is made up of two units, A5 and A6, located in Nantong. Ms. Tang says the units were purchased using family funds. Mr. Cheng says they were purchased with a combination of family company money and personal loans.

[119] A lease on unit A5 requires rent in the amount of the equivalent of approximately \$115,200 CDN per year. Assuming unit A6 is leased for the same amount, Ms. Tang estimates that the total rent on the Shanghai Duplex is the equivalent of approximately \$230,000 per year.

[120] Mr. Cheng says neither unit has a long-term lease. Further, he says, the rent is under review by the Chinese courts.

[121] The Ramada Building is a hotel located very close to the Youth Building. Mr. Cheng owns rooms on the first and fourth floors of the Ramada Building. There is no evidence of what rent Mr. Cheng receives for these rooms.

[122] Using the rent per square foot from the Youth Building, Ms. Tang estimates that Mr. Cheng receives the equivalent of approximately \$294,555 CDN per year from the rooms he owns in the Ramada Building.

[123] Mr. Cheng deposes in general terms that the properties relied on by Ms. Tang are not fully rented.

iv. Evidence of Investment Income

[124] Ms. Tang relies on three large investments from which she says Mr. Cheng realized substantial profit in recent years.

[125] In 2015, Mr. Cheng sold a subsidiary of a family owned company at a profit. The transaction gave rise to a dispute with another investor. The dispute ended up in court and Mr. Cheng was ordered to repay some of the profit. Based on court documents and hearsay evidence, Ms. Tang calculates that Mr. Cheng's proper share of the profit was the equivalent of approximately \$854,000 CDN.

[126] Ms. Tang proposes that this profit be spread over six years to reflect additional income to Mr. Cheng of approximately \$142,333 CDN per year.

[127] Mr. Cheng acknowledges receiving approximately \$680,000 CDN from the sale of the company, but he says the funds were used to repay loans used to acquire family property.

[128] In 2015, the family company sold a subsidiary to the Chinese government. The company realized a capital gain on this one transaction in the amount of the equivalent of \$11.6 million CDN. Ms. Tang proposes that this gain also be spread over six years to reflect additional income to Mr. Cheng of approximately \$1,930,000 CDN per year.

[129] Finally, Ms. Tang argues that cash flow from a real estate company under Mr. Cheng's control should be imputed to him as income. According to the company's financial statements, net cash flow in 2019 was the equivalent of approximately \$1,170,803 CDN. A three year average of its cash flow would be the equivalent of approximately \$284,373 CDN per year.

v. Conclusion on Imputed Income

[130] There are a number of reasons why I should not impute income to Mr. Cheng based on the calculations proposed by Ms. Tang.

[131] First, it is not possible within the limits of an interim application to properly analyse the income on the properties identified by Ms. Tang. Nor would I expect Mr. Cheng to respond fully on the timeframe of this application.

- [132] Ms. Tang's calculations incorporate a number of assumptions, some of which are denied by Mr. Cheng. Ms. Tang submits that her assumptions are "conservative". This may be accurate; but interim spousal support should not be based on disputed and untested assumptions.
- [133] Ms. Tang's calculations also appear to be based on gross rent without accounting for expenses and property taxes. Further evidence and analysis is required before the rents can be equated to income.
- [134] Second, Ms. Tang's calculations ignore any distinction between Mr. Cheng and the various companies through which he carries on business. It is not at all clear how Mr. Cheng receives income from the companies. It is not at all clear how the companies account for loans to Mr. Cheng. These issues also require further evidence and analysis before it can be found that the corporate profits are income in Mr. Cheng's hands.
- [135] Third, many of the issues raised by Ms. Tang appear to part of the divorce proceedings in China. Those proceedings are only partially described in the materials before me. It is important that this Court not make findings at odds with the conclusions of the Chinese court. Conversely, it is also important that this Court not simply adopt findings from a proceeding under a different legal system. More information about the Chinese proceedings, possibly including further expert evidence, is required before the financial issues can be properly analysed.
- [136] Fourth, Mr. Cheng's declared income already includes an estimate of net rental income derived from the family business. It may be that Mr. Cheng understates this income. However, at present, his admitted income is sufficient to achieve the "rough justice" required on an interim application.
- [137] In summary, Ms. Tang seeks to impute substantial income to Mr. Cheng while the Chinese judgement remains under appeal and prior to any examinations for discovery or meaningful analysis of the complex corporate issues in this proceeding. I am not persuaded I ought to make an order imputing additional income to Mr. Cheng at this time.

vi. Tax Gross Up

- [138] Ms. Tang argues that Mr. Cheng's income should be grossed up for support purposes. She relies on *Devathasan*, where at para. 109, Madam Justice Fitzpatrick grossed up pre-tax corporate rental income because the respondent received this income tax-free in Singapore.
- [139] I decline to gross up Mr. Cheng's declared income. There was no evidence provided to me with respect to the appropriate method for grossing up this income. In my view, it would be more appropriate to have any tax gross up dealt with at a trial when the sources of Mr. Chen's income are better understood and the question of whether and how it is taxed can be fully considered by the trial judge: *Devathasan*, at para. 110.

G. What is an Appropriate Amount of Interim Spousal Support?

i. General Considerations

[140] The general considerations to be considered on an interim application for spousal support are summarized in *Robles v. Kuhn*, 2009 BCSC 1163:

1. On applications for interim support the applicant's needs and the respondent's ability to pay assume greater significance: *Gibb v. Gibb*, [2005] B.C.J. No. 2730 (S.C.);
2. An interim support order should be sufficient to allow the applicant to continue living at the same standard of living enjoyed prior to separation if the payor's ability to pay warrants it: *Grossi v. Grossi*, [1993] B.C.J. No. 878 (S.C.);
3. On interim support applications the court does not embark on an in-depth analysis of the parties' circumstances which is better left to trial. The court achieves rough justice at best: *Randhawa v. Randhawa*, [1999] B.C.J. No. 3299; *Newson v. Newson*, 1998 CanLII 6440 (BC CA), [1998] B.C.J. No. 2906, 65 B.C.L.R. (3d) 22 (C.A.);
4. The courts should not unduly emphasise any one of the statutory considerations above others;
5. On interim applications the need to achieve economic self-sufficiency is often of less significance;
6. Interim support should be ordered within the range suggested by the Spousal Support Advisory Guidelines unless exceptional circumstances indicate otherwise: *Ladd v. Ladd*, [2006] B.C.J. No. 1930, 2006 BCSC 1280 (S.C.);
7. Interim support should only be ordered where it can be said a prima facie case for entitlement has been made out: *L.G.B. v. M.A.C.M.*, [2005] B.C.J. No. 2966, 2005 BCSC 1786 (S.C.);
8. Where there is a need to resolve contested issues of fact, especially those connected with a threshold issue, such as entitlement, it becomes less advisable to order interim support: *L.G.B.*

[141] There is no serious argument about Ms. Tang's prima facie entitlement to spousal support under British Columbia law. Her claim is based on a lengthy marriage in which she gave up a successful career and focussed on raising a child and assisting her husband with a family business.

[142] Ms. Tang deposes that she is now in poor health, with no income of her own, significant debt, including debt related to the family home in West Vancouver, and limited career prospects.

[143] According to Mr. Cheng, Ms. Tang continues to receive a monthly salary of 10,000 RMB from the family company, as well as health care coverage and use of a company car.

- [144] Ms. Tang refuses to accept the company salary. Her reason for refusing the payments is opaque. I would impute the company salary to Ms. Tang. However, \$23,000 CDN per year is far below the standard of living Ms. Tang enjoyed during the marriage. Her expenses easily outstrip this very modest income.
- [145] Ms. Tang's income will increase, and Mr. Cheng's income will decrease, if and when the order of the Chinese court of first instance is implemented and various rental properties are transferred from one spouse to the other. In the meantime, however, Mr. Cheng maintains control of all the real estate in his name and continues to enjoy the full income declared in his financial statements.

ii. Guideline Support

- [146] Mr. Cheng's declared income exceeds the "ceiling" of \$350,000, for determining interim spousal support set out in the Spousal Support Advisory Guidelines ("SSAG"). As Madam Fitzpatrick noted in *Devathanan*, interim support on income over \$350,000 is highly discretionary. The SSAG formulas are not to be automatically applied. What is required is to apply an individualized, fact-specific analysis (para. 140-141).
- [147] Mr. Cheng argues that the court should not attempt to address the full objectives of spousal support on this application because full spousal support would be, in the words of his counsel, "triple compensation": Ms. Tang has been awarded a majority of the couple's assets in China, and she will receive a significant settlement in the civil proceedings.
- [148] Ms. Tang responds that the outcome of the divorce proceedings is not as lopsided as it might appear. In particular, the Chinese court did not divide the family owned companies. As Ms. Tang describes it, the trial decision divided the parties' Chinese real estate holdings and bank accounts, but not the companies. As well, she argues, the court in China could not deal with the assets Mr. Cheng concealed or transferred away. Accordingly, she submits, the property the Chinese court awarded her represents only part of the parties' family property.
- [149] There is considerable uncertainty regarding the parties' financial positions over the medium to long term. On an interim basis, however, Ms. Tang has shown a current need for spousal support and a current ability by Mr. Cheng to pay support based on the full amount recommended by the SSAG.
- [150] If, after a trial, the amount of interim support is found to be too low or too high, or no support at all is awarded (if Chinese law applies), there are sufficient assets, including real estate in British Columbia, with which to readjust the parties' final positions.
- [151] Accordingly, I will order Mr. Cheng to pay interim spousal support using the mid range recommended by the SSAG based on his declared annual income of \$620,000. Using the DivorceMate calculation provided by Mr. Cheng's counsel, this income yields interim spousal support of \$21,678 per month.

[152] The outcome of the Chinese appeal proceedings may have a bearing on the interim spousal support payable to Ms. Tang. Accordingly, I will direct the parties to review the interim support order in the event the Chinese appeal court renders its decision before the trial in these proceedings.

iii. Retroactive Support

[153] Ms. Tang claims retroactive support commencing January 1, 2020. Ms. Tang says she has gone into debt as a result of Mr. Cheng's conduct following the separation.

[154] The circumstances in which retroactive support may be awarded were described by the Supreme Court of Canada in *D.B.S. v. S.R.G.*, 2006 SCC 37. The Court directed a broad and holistic approach based on four factors, summarized at para. 133, none of which are determinative on their own:

- a) Is there a reasonable excuse for why support was not sought earlier?
- b) Was there any blameworthy conduct on the part of the payor parent?
- c) Is a retroactive award appropriate in light of the child's past and present circumstances?
- d) Will a retroactive award cause hardship to the payor parent or to his or her other children?

[155] Although *D.B.S.* concerned child support, the same principles apply to spousal support: *Devathanan*, at para. 147.

[156] At paras. 120-125 of *D.B.S.*, the Court held that the commencement date for an award of retroactive support should not be restricted to the date an application to a court or formal notice is given. Rather, one must look to the date of effective notice (para. 121).

[157] In this case, there is no evidence that Ms. Tang gave any notice of an intention to seek spousal support under British Columbia law before she served the notice of family claim on Mr. Cheng by way of substitutional service by e-mail on December 19, 2019.

[158] After he received the notice of family claim, Mr. Cheng raised a legitimate jurisdictional objection against spousal support under British Columbia law. Madam Justice Fleming dismissed the jurisdictional objection on May 26, 2020. During the hearing of the jurisdictional issue, Mr. Cheng was put on notice that Ms. Tang would apply for interim spousal support no later than July 15, 2020. Ms. Tang filed the notice of application on July 3, 2020.

[159] In my view, spousal support should commence June 1, 2020, following the decision by Madam Justice Fleming. Prior to that decision, there was a live issue as to whether this Court would exercise jurisdiction. While Mr. Cheng continued to argue that Chinese law applies and Ms. Tang is not entitled to spousal support, the nature of his objection was qualitatively different once Madam Justice Fleming decided this Court would exercise its jurisdiction. The issue became whether Ms. Tang had a *prima facie* entitlement to spousal support under the FLA. Mr. Cheng had knowledge of the facts on which Ms. Tang asserted

her entitlement. It is appropriate that Mr. Cheng be required to pay retroactive support from June 1, 2020.

- [160] Any additional retroactive support should await a trial at which time the trial judge can consider Ms. Tang's allegations of blameworthy conduct by Mr. Cheng on a better developed body of evidence.

H. Document Application

- [161] Ms. Tang applies for an order requiring Mr. Cheng to produce a broad range of documents from January 2013 to present. Very little time was spent at the hearing on the document application. In my view, the scope of document production should be discussed at a JCC before Ms. Tang brings such an application. In the meantime, of course, both parties have obligations under the Rules to deliver an initial list of documents and then exchange requests for additional documents if they believe the initial lists are incomplete.

IV. CONCLUSION

- [162] Ms. Tang has established a prima facie case that British Columbia law applies to spousal support in this case. A prima facie case is sufficient for an interim order of spousal support under the FLA.
- [163] Mr. Cheng's income for the purposes of interim spousal support is \$620,000.
- [164] Mr. Cheng shall pay to Ms. Tang interim spousal support in the sum of \$21,678 per month, forthwith for September 2020 and continuing on the 1st day of each month thereafter until agreement of the parties or further order of the court.
- [165] Mr. Cheng shall pay to Ms. Tang retroactive interim spousal support for June, July and August, 2020.
- [166] The parties shall review the interim support order in the event the Chinese appeal court renders its decision before a trial in these proceedings. If the parties cannot agree on interim support following the Chinese appeal decision, either party may apply for a variation of this order.
- [167] The balance of the relief sought in the notice of application is adjourned.
- [168] Costs of this application will be in the cause.

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