

CANADA / JUDGMENT

Ungaro v. Velazquez

2025 BCSC 1016

COURT

Supreme Court of British Columbia

DECIDED

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2025 BCSC 1016 Ungaro v. Velazquez

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Ungaro v. Velazquez,

2025 BCSC 1016

Date: 20250604

Docket: E97480

Registry: Nanaimo

Between:

Christina Marie Ungaro

Claimant

And

Alex Urra Velazquez

Respondent

Before: The Honourable Justice S. Ramsay

Reasons for Judgment

Counsel for Claimant:

N. Nasser

Counsel for Respondent:

J. Broadhurst

Place and Date of Trial:

Nanaimo, B.C.

February 3-7, 2025

Place and Date of Judgment:

Nanaimo, B.C.

June 4, 2025

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Introduction

- [1] The most contentious issue in this family law proceeding is division of family property and debt. The claimant seeks division in accordance with a settlement agreement she says the parties reached after this proceeding was commenced. Alternatively, she seeks an unequal division of family property and debt. The respondent denies the alleged agreement and seeks equal division of family property and debt.
- [2] The parties' separation has not been amicable, particularly as it relates to finances and property division. As of the date of trial, the claimant was 54 years old and the respondent was 49 years old. They were married on June 30, 2000, and separated on September 17, 2022. They lived in Ontario for most of their marriage, before moving to British Columbia in 2021. The claimant continues to live in the family home the parties purchased when they moved to BC. The respondent returned to Ontario in 2023, where he lives in rented accommodation. The parties also own a second home in Ontario, which they purchased as an investment rental property during their marriage.
- [3] The claimant is a nurse, but health issues have prevented her from working since 2012. Her main sources of income are long term disability benefits through her employer, and CPP disability benefits. The respondent moved to Canada from Cuba after the marriage and worked at a variety of different jobs until obtaining full time employment with RBC in 2005, where he continues to work today. The claimant seeks spousal support, paid as a lump sum. The respondent says the claimant is not entitled to spousal support.
- [4] Finally, the parties do not agree on the appropriate approach to child support for their daughter, who was born in 2005 and is attending university.

Credibility

- [5] The claimant and the respondent each take issue with the credibility of the other and, to some degree, the credibility of the non-party witnesses. Assessing credibility and reliability can be difficult in a family law case where the strained nature of the parties' current relationship is apparent throughout their testimony. In my view, it is appropriate to treat the evidence of both parties with some degree of caution in this case.
- [6] In particular, I found that each of the parties at times seemed to either exaggerate or withhold details about financial matters during their testimony. I have approached all of their evidence about financial matters with caution if it is not supported by documentary evidence, particularly given that the determination and division of family property and debt is highly contentious in this case.
- [7] That said, I find the evidence of the claimant overall less reliable and credible than that of the respondent, having considered the parties' submissions on credibility and the principles discussed in *Faryna v. Chorny*, [1952] 2 D.L.R. 354 at 357, 1951 CanLII 252 (B.C.C.A.), and *Bradshaw v. Stenner*, 2010 BCSC 1398 at paras. 185-187, aff'd 2012 BCCA 296, leave to appeal to SCC ref'd, [2012] S.C.C.A. No. 392. This finding is based in part on the claimant's demeanour and her manner of responding to questions, in both direct and cross-examination. The claimant did not give her evidence in a straightforward, direct manner. I agree with the respondent's description of the claimant as exceedingly non-responsive under cross-examination. Her direct evidence was also frequently not entirely responsive to the question she had been asked.
- [8] I had the impression throughout the claimant's testimony that she was less concerned with answering questions than she was with advancing a specific narrative about her case. On one occasion, unprompted and for no obvious reason, she apologized to the Court for her behaviour the previous day. It was not obvious to me why she considered an apology to be necessary. This reinforced my view, already formed based on the claimant's testimony up to that point, that her evidence was rehearsed and focused on impression management. The striking similarity between the evidence of the claimant and her friend, Susan Connors, discussed below, is a further example of apparently rehearsed evidence.
- [9] Overall, I found that much of the claimant's evidence about the parties' relationship and past events was either implausible, internally inconsistent when subjected to scrutiny, or not supported by documentary evidence, particularly relating to their finances. On multiple occasions, the claimant refused to make reasonable concessions when faced with facts that contradicted her evidence, or she offered explanations that had no air of reality. For example, when confronted with a signed car lease agreement, the claimant refused to concede she had re-leased the vehicle in question on the date specified in the lease, and instead suggested, without foundation, that the lease agreement was wrong.

- [10] Turning to the respondent, I do not agree with the claimant's assertion that text messages between the parties often contradicted the respondent's testimony. The parties clearly used text messaging as a very informal and abbreviated mode of communication. The claimant relies on text message excerpts that are removed from the context of surrounding communications between the parties. To accept the claimant's interpretation of the messages she relies on, I would have to read meaning into the texts that is not obvious on their face. I do not consider the interpretations she proposes to be reasonable or reliable.
- [11] I also do not agree with the claimant's submission that the respondent "used every opportunity to say negative comments about the claimant" during cross-examination. Nor do I agree that the respondent was inconsistent in his ability to give detailed evidence in direct and cross-examination. I found the respondent to be generally fair and balanced in his testimony. The claimant's testimony did not have these qualities. Unlike the claimant's presentation as a witness, I found the respondent to generally be forthright and cooperative in direct and cross-examination.
- [12] The claimant also says that the respondent often resorted to over-generalizations in his evidence. I do agree that his evidence had this quality at times, although I would not characterize it as "often". To the extent the respondent's evidence was of an overly general nature, I have exercised caution in relying on the evidence.
- [13] Three non-party witnesses testified at trial. The claimant called her long-time friend Susan Conners as a witness, and the parties' former neighbour, Sean Morrison. The respondent called the claimant's sister, Robin Ungaro.
- [14] To the extent the parties suggest the evidence of Mr. Morrison and Ms. Ungaro was not credible or reliable, I do not agree. I found each of them to be unbiased, credible, and reliable in their testimony. Their evidence was relatively brief and focused on discrete issues.
- [15] Ms. Conners' testimony was also relatively brief. It included evidence about the claimant's pension, an issue of central importance at trial. Ms. Conners testified that the claimant's pension was brought up "many times" in her presence; she described three specific occasions she could recall.
- [16] The three occasions recalled by Ms. Conners were the exact same three occasions that the claimant recalled in her testimony on this topic. In cross-examination, Ms. Conners denied that her evidence was rehearsed or coordinated with that of the claimant. I cannot accept that as truthful. I do not accept it was a mere coincidence that of the "many times" Ms. Conners and the claimant say the parties all discussed the claimant's pension, they both independently and without coordination recalled the exact same three occasions.
- [17] Their evidence about these three occasions was also remarkably similar. For example, in describing one occasion, a conversation over dinner, both Ms. Conners and the claimant volunteered--without being specifically asked--that they had been for a walk before dinner,

and that the claimant had made macaroni and cheese for dinner. I do not agree with the respondent's submission that this is necessarily an odd thing to remember 12 years later. I accept that the specifics of a particular meal can be memorable, as Ms. Conners testified in redirect that it was on this occasion. What is unusual is that both Ms. Conners and the claimant each volunteered these very specific details in their testimony, when they were not obviously relevant to the topic at hand. It is implausible that they would each independently remember these details and think to include them, unprompted, in their testimony, without some advance discussion of their evidence.

- [18] To the extent that Ms. Conners and the claimant each testified about the same events, the above circumstances make it impossible for me to have any confidence in the credibility and reliability of their evidence and I give it no weight.

Income determination

Rental income

- [19] While the parties have earned rental income in the past from their property in Ontario, I find that because of the marriage breakdown and division of property, neither party will be in the financial position to earn income from an investment rental property going forward.

Respondent's income

- [20] The respondent's total income has increased annually over the past six years. He says that an average of his last three years of income should be used for the purpose of income determination.
- [21] The respondent's current annual base salary is \$54,350. His total annual salary exceeds this figure because he also receives discretionary, performance-based bonuses and overtime pay. He testified that the amount of overtime available to him in 2024 was higher than usual due to RBC acquiring HSBC Canada that year. His evidence is that he will not continue working the same amount of overtime in the future. The respondent says that in these circumstances, a reasonable expectation for his income going forward is \$65,000 annually. This is just under the average of his income for the last three years.
- [22] The claimant says that the respondent's 2024 income should be used for assessing his likely future income, observing that the respondent's income has increased annually since 2019.
- [23] I accept the respondent's evidence that he had an unusually high amount of overtime in 2024. However, I find it improbable that his salary increase in 2024 is fully attributable to extra overtime in that year. The respondent's total 2024 salary increase is comparable to his salary increase in 2023 and is quite a bit less than the increase in 2022. There is no evidence that the respondent also had unusually high overtime in those years.

[24] I find that the respondent's 2024 income best reflects his income going forward, even if his overtime in future years is not as high as in 2024. This is consistent with the existing pattern of annual salary increases demonstrated in the evidence.

[25] For these reasons, I find the respondent's income is \$70,410.

Claimant's income

[26] The claimant's annual income consists of \$40,385 in LTD benefits and \$15,362 in CPP disability payments, for a combined total annual income of \$55,747. The claimant's employer also continues to contribute to her pension, in the amount of \$11,190 per year. The respondent says that this amount should be included in the claimant's income.

[27] I observe that the respondent's employer also makes an annual contribution to his pension. He does not appear to have made an upward adjustment to his income to reflect this contribution.

[28] The respondent did not provide me with any authority to support that employer contributions to pension accounts can and should be characterized as income for present purposes. There is no expert evidence as to whether (and, if so, how) employer pension contributions are treated as employment income for tax purposes. In the absence of any such authority and evidence, the respondent has not established that the pension contribution should be included in the claimant's income.

[29] For these reasons, I find that the claimant's income is \$55,747.

Alleged settlement agreement

[30] The claimant alleges the parties reached an enforceable agreement to settle the division of family property and debt. The respondent denies there is any enforceable settlement agreement.

Preliminary issue - pleadings

[31] In closing submissions, the claimant sought leave to amend her claim to plead reliance on the alleged agreement. The respondent objects, on the ground that it would not be just and convenient to allow the amendment: *Han v. Dorje*, 2021 BCSC 939 at para 33.

[32] I do not accept the respondent's assertion that he had no notice of the claimant's reliance on the alleged agreement. The claimant brought a pre-trial application for production of the document that recorded the alleged terms, since it was in the respondent's possession. If the respondent did not already have notice of the claimant's position by that point, that application should have alerted him to her intention to rely on the agreement. More significantly, determination of whether the parties reached an agreement settling property division is listed as an issue in dispute in the claimant's trial brief. The respondent must have understood from this that enforcement of the alleged settlement agreement was going

to be an issue at trial--indeed, his trial brief includes his position in response to that issue, denying the agreement.

- [33] Applying the principles set out in *Macdonald v. Macdonald*, 21 B.C.L.R. (3d) 379, 1996 CanLII 1360 (B.C.S.C.), and summarized in *Lam v. Chiu*, 2012 BCSC 677 at para. 10, I permit the claimant's proposed amendment. It is not inconsistent with the pleadings already filed by the claimant, or with the evidence tendered by her and her witnesses at trial and on discovery. If the amendment had been sought earlier, it would not have changed the course of the trial--to the contrary, the trial proceeded as though this was in fact a pleaded issue. The amendment is not unfair to the respondent. At all material times, he knew that the claimant's position was that they had reached a settlement agreement. Finally, the amendment is necessary for determining the central issue between the parties--division of property.

Alleged agreement

- [34] The claimant says the evidence establishes that the settlement agreement meets all requirements of an enforceable contract, as summarized in *Oswald v. Start Up SRL*, 2021 BCCA 352 at para. 34.
- [35] The claimant's evidence is that the parties sat down one day and came to an agreement about how to divide property and debt. The claimant says she wrote down their agreement in a document titled "settlement", with the respondent contributing verbally. Neither party signed the document. The claimant says she gave the document to the respondent, so that he could send it to his lawyer to prepare a formal agreement for the parties to sign.
- [36] The claimant's evidence is that on the day the parties had this discussion, she called Ms. Conners, in the presence of the respondent, and told Ms. Conners that the parties had agreed to a settlement. Ms. Conners also described this call in her evidence. As with her evidence about the dinner discussed above, her evidence was remarkably similar to that of the claimant.
- [37] The respondent has no memory of any such call. He agrees that the parties met to discuss settlement, and that the claimant wrote out a division of assets and debt, but he denies that they reached an agreement. Rather, he says he told the claimant that he would consult with his lawyer about the proposed terms, and that he then sent the document to his lawyer for that purpose. He says that after meeting with his lawyer, he decided not to agree to the proposed division reflected in the document, because it was not equal and did not make sense to him. His evidence is that he decided not to agree to any settlement before receiving the claimant's financial disclosure.
- [38] I accept the respondent's evidence and prefer it to that of the claimant and Ms. Conners, for the reasons discussed above regarding their credibility. I also consider his explanation for why he did not agree to the settlement during his meeting with the claimant--because he wished to consult with his lawyer--to be most consistent with the probabilities affecting the

case, and specifically, the fact that the parties were engaged in active, ongoing litigation and represented by legal counsel. If the document prepared by the claimant reflected an agreement, I do not accept that she would have left it to the respondent and his counsel to finalize things. That is not consistent with the claimant having taken the lead in preparing the document or with the parties' general practice of the claimant taking the lead in financial matters. The evidence does not establish, on a balance of probabilities, that the respondent intended to contract and agreed to the essential terms of the contract such that the parties had reached an enforceable agreement.

- [39] Further, I do not agree with the claimant's submission that the respondent's conduct before and after the settlement meeting is consistent with the parties having reached an enforceable agreement. I give little weight to text messages where the respondent used the word "agreement", for the reasons discussed above regarding text messages in this case. I have already found Ms. Conner's evidence is not credible or reliable; even if it were, I do not consider her testimony that the claimant told her about the agreement over the phone in the presence of the respondent to be evidence that the respondent conducted himself as though the parties had reached an agreement.
- [40] For these reasons, I find that the evidence does not establish, on a balance of probabilities, that a settlement agreement was reached between the parties as to property and debt division.

Family property and family debt

- [41] I preface my discussion of the parties' family property and debt with a general comment about the state of the evidence. The parties agreed to admit into evidence a significant volume of financial records but referred to only a handful of pages in their evidence and submissions. To the extent a witness gave evidence about a specific excerpt from those records or directed me to specific content during their submissions, or where information is obvious on the face of the documents, I have considered it in making my findings. However, I have not undertaken a comprehensive review or analysis of the financial records as a whole. Absent some assistance from the parties in the form of identifying what specific information they consider relevant to the issues for determination, the Court cannot reasonably be expected to sift through hundreds of pages of financial records and itself identify what content might be relevant, and for what purpose a party might wish to rely on it.

Family property

Real property

- [42] The parties jointly own two homes: the family home in BC, and a rental property in Ontario. The claimant alleges that the respondent also has a half-interest in a home in Cuba that constitutes family property.

- [43] The value of family property must be based on its fair market value as of the date of trial: Family Law Act, S.B.C. 2011, c. 25 [FLA], s. 87. The claimant says the BC home is valued at \$1,399,000, which I understand is based on the anticipated listing price for the home. The respondent says the value is \$1,335,000, based on an appraisal dated February 29, 2024.
- [44] I do not consider the listing price for the BC home to be a reliable indicator of its fair market value. There is no expert evidence before me about the correlation between the listing and sale price of residential property, nor is there evidence that would allow me to assess the likelihood of the home actually selling for the listing price. In the circumstances, I consider the February 29, 2024, appraisal to be the best evidence of the BC home's fair market value at the time of trial. I therefore find the BC home has a value of \$1,335,000. For clarity, this valuation is for the purpose of assessing the parties' respective financial positions under my division of family property and family debt analysis. Given that the house is for sale, the parties should use the actual net sale proceeds when dividing family property and family debt as ordered below.
- [45] The Ontario rental property has an appraised value of \$655,000. In the absence of any other more recent evidence as to the fair market value of the property, I find the Ontario home has a value of \$655,000. Again, this valuation is for the purpose of assessing the parties' respective financial positions under my division of family property and family debt analysis. I will further address valuation in the context of division of family property and family debt below.
- [46] The claimant says the respondent is a beneficial half-owner of his parents' home in Cuba, which is therefore family property. The respondent agrees the Cuba property is his family's home but denies that he has any ownership interest in it. The documentary evidence shows that the respondent's mother is the legal owner of the Cuba property. However, the claimant says I should draw an adverse inference against the respondent on this issue, for failing to obtain a historical land title search of the Cuba property. While not clearly articulated in argument before me, I assume the claimant's theory is that the historical search would reveal that the respondent was at one point an owner and has transferred the property to his mother. I find the evidence does not support this theory.
- [47] First, I find no basis for an adverse inference against the respondent. The respondent's mother authorized claimant's counsel to obtain a historical title search. Apparently, Cuban authorities would not accept the authorization and required that the respondent's mother attend in person at the Consulate of Cuba in the United Kingdom, where she currently is, to carry out the document request procedure herself. This did not happen. The respondent's mother is not a party to this proceeding. It cannot be said that, as a witness, she was in the exclusive control of the respondent. There is no evidence that the claimant tried but was unable to subpoena her as a witness. There is no evidence that the respondent himself has any ability to obtain the historical search. It is not a document in his control. This is not a case of non-disclosure on the part of the respondent.

- [48] The claimant relies on a text message from the respondent to Mr. Morrison, in which the respondent states: "I'm trying to sell my house in Cuba". Without more, this does not establish, on a balance of probabilities, that the respondent owns the Cuba property. I accept the respondent's evidence that he used the word "my" in the sense of it being his family's home, not to mean that he owned it. His evidence comparing word choice in the text message to saying "my apartment" to refer to his rental apartment was persuasive.
- [49] The claimant's evidence is that the respondent, his sister, and their parents discussed ownership of the Cuba home over the years. She says his parents said the house belonged to the respondent and his sister, and that one day it would belong to their children. Even if I were to accept this evidence as credible, it would not prove that the respondent owns the house. I consider a more likely interpretation of the statements attributed to the respondent's parents to be that they intended for the respondent and his sister to inherit the Cuba property in the future, and for their children to then inherit it from them.
- [50] I find that the claimant has not established, on a balance of probabilities, that the respondent has any interest in the Cuba home that would qualify as family property. I add that even if the claimant had been able to prove that the Cuba home is family property, there is no evidence that would allow me to make any findings as to its value.

Bank accounts

- [51] The respondent has a TFSA account with RBC. For trial purposes, he agrees it can be treated as family property and accepts that its current value as of trial should be used: \$2,037.14.
- [52] The respondent says it is appropriate to depart from the presumptive date of valuation being the date of trial for the parties' remaining personal bank accounts. He proposes the date of separation as the date of valuation, based on the separate spending of the parties between separation and trial, relying on *Kooner v. Sangha*, 2015 BCSC 1113 at para 186. I agree that approach is appropriate in this case, but only for those accounts that have been actively used by the parties for their own personal banking post-separation and not for accounts that have been used for expenses related to the BC and Ontario properties.
- [53] I find the evidence establishes that the following accounts have been used by the parties for personal banking post-separation, and should therefore be valued as of the date of separation as follows (negative amounts are indicated by parentheses):
- a) RBC account 5804 (respondent): \$396.24;
 - b) RBC account 2935 (respondent): \$6.75; and
 - c) RBC account 6015 (claimant): (\$25.72).
- [54] I find the evidence establishes that the following accounts were used for family purposes post-separation, and should therefore be valued as of the date of trial as follows (negative amounts are indicated by parentheses):

- a) RBC account 6312 (claimant): (\$91.38); and
 - b) RBC account 1595 (joint): \$0 (as of Oct 6, 2022, which is the most recent value available in the evidence).
- [55] I am unable to make any findings as to the use of a Scotiabank account--it is not apparent on the face of the account statements and is not established by the parties' testimony. I therefore use the presumptive date of valuation under the FLA and find that Scotiabank account 4983 (claimant) has the following value as of the date of trial: \$7.53.
- [56] The respondent says the RESP account 4336 is not family property, but provides no explanation of that position. The claimant made no submission as to the treatment of this account. RESPs are generally treated as family property: *Freitas v. Freitas*, 2025 BCSC 254 at para. 13. I find this account is family property, with a value as of the trial date of \$6,346.42.
- [57] The following accounts are included in the Scott Schedule provided by the parties, but were opened post-separation for personal use. I find they are not family property: RBC account 7406 (respondent), and Scotiabank account 5777 (claimant).

Pensions and RRSPs

- [58] The respondent holds two Sunlife RESSOP plans: a deferred profit sharing plan, and a retirement savings plan. The respondent says post-separation contributions should be excluded from the value of these plans: *Pidwerbeski v. Garcia*, 2020 BCSC 2022 at para. 84. I find the plans should be valued as of the date of trial (\$23,153.84 and \$32,616.55), but excluding the post-separation contributions made by the respondent and his employer (\$3,272.77 and \$1,636.25, respectively), for a total valuation of \$50,861.31.
- [59] It is unclear on the evidence whether the respondent also has an employee pension through RBC. This is included as a line item in the parties' Scott Schedule but without any value assigned to it. I accept that if there is a separate employee pension, it would be family property, but I am unable to make any findings in that regard, including as to value, given the state of the evidence.
- [60] I understand the parties accept the value of the claimant's HOOPP pension is \$378,452.76. The claimant also has an RDSP and an RRSP with RBC. I find the evidence establishes that the claimant made post-separation contributions of \$225 to the RDSP and \$720 to the RRSP, which should be excluded from the date of trial value of those plans. I therefore find the value of the RDSP is \$15,697.63 and the value of the RRSP is \$11,793.20.
- [61] Finally, the parties list CPPs on the Scott Schedule, but there is no evidence as to their value, nor is there a value assigned to the plans in the Scott Schedule. These are family property, but I am unable to make any findings as to their value given the state of the evidence.

Other family property

- [62] The Scott Schedule includes the respondent's 2022 tax refund of \$7,745.63 as a line item. The claimant says this is family property; the respondent's position is that it is not. The parties did not make any submissions in support of their respective positions.
- [63] Section 84(2)(c)(i) of the FLA provides that family property includes an income tax refund owing to a spouse. To the extent the respondent's income tax refund arises from income tax remitted before the date of separation, the refund is family property even if it was received after the date of separation: *Byrne v. Byrne*, 2015 BCSC 318 at paras. 50-55. There is no accounting or opinion evidence on the amount of income tax remitted by the respondent as of the separation date. In the circumstances, on the basis that the parties separated just short of three quarters into the 2022 calendar year, I find that three quarters of the refund is family property; that calculation is \$5,809.22.
- [64] The 2014 Subaru Legacy currently in the respondent's possession is family property. The respondent says its value is \$5,000. The only evidence regarding its value is a printout from the Autotrader.ca website, giving a value range of \$3,269 to \$7,269 for a vehicle of the same year and model. I do not consider that to be reliable evidence for the purpose of determining the vehicle's value. I find that this vehicle is family property, but given the state of the evidence, I am unable to make any finding as to its value.
- [65] The respondent says the value of the Subaru should simply be set off against the claimant's vehicle. I do not accept that approach as appropriate, since the evidence shows the claimant leased her vehicle in March 2024, after the date of separation. It is not family property.
- [66] Similarly, while I accept that the parties' household goods and furnishings are family property, the state of the evidence does not allow me to make any findings regarding the nature or value of that family property.
- [67] The Scott Schedule includes RBC life insurance as a line item, but all fields are blank. The parties did not make any submissions on this, and did not identify for me any evidence about this asset or its value. In the circumstances, I am unable to consider or make any findings regarding whether there is an RBC life insurance that is family property, and, if so, its value.
- [68] The claimant gave some evidence about a watch she received from her father, which she believes is now in the respondent's possession. The state of the evidence does not allow me to make any findings as to who has possession of the watch, whether it is family property, or its value. I therefore make no orders regarding the watch.
- [69] The respondent says that Cuban paintings received from his parents during the marriage are excluded property, but provides no evidence to support this other than asserting that the artwork was given to him by his parents. To the extent the respondent suggests that his parents gave the artwork to him only, and not to the parties jointly, I consider it improbable that the respondent's parents made this distinction at the time, either expressly or impliedly.

The respondent has not met the burden of proving the paintings were a gift to him alone and are therefore excluded property. However, the claimant has not proven that the artwork has any value beyond sentimental. I therefore find that the Cuban artwork is family property but has no monetary value.

Family debt

[70] The family debt in this case consists of mortgages against the BC and Ontario residences, several lines of credit, and credit card debt.

Mortgages

[71] There appears to be no dispute as to the mortgage debt. It consists of three separate mortgages over the two properties, as follows:

- a) RBC mortgage account ending 189-001: \$160,904.16
- b) RBC mortgage account ending 213-001: \$375,454.21
- c) RBC mortgage account ending 482-001: \$314,854.91

[72] Accordingly, I find that the total family debt pertaining to the mortgages is: \$851,213.28.

Lines of credit

[73] The parties have three joint lines of credit ("LOC"s), two with RBC and one with Scotiabank. I find the evidence demonstrates the following amounts were owing under the LOCs as of the date of separation and the date of trial, rounded to the nearest dollar:

Account

Separation

Trial

Total Increase

RBC LOC ending 155-001

\$46,680

\$92,471

\$45,791

RBC LOC ending 458-001

\$0

\$10,000

\$10,000

Scotiabank LOC

\$29,861

\$42,800

\$12,939

TOTAL

\$76,541

\$145,271

\$68,730

- [74] As I understand it, the parties agree the amount owing under the LOCs at the date of separation is family debt. They disagree about the treatment of the post-separation increase. Assessing the extent to which this increase is family debt is made difficult by both parties' failure to engage in the analysis required under s. 86(b) of the FLA in their submissions on this issue.
- [75] Post-separation financial obligations incurred by a spouse will only be family debt to the extent they were incurred for the purpose of maintaining family property: FLA s. 86(b). This requires proving that (1) a party incurred financial obligations, and (2) the financial obligations were used for the purpose of maintaining family property.
- [76] In this case, the respondent takes issue with various withdrawals from the LOCs made by the claimant post-separation, which total \$68,785 and are itemized in a table included in his submissions. I note that one of the withdrawals included in the respondent's total pre-dates the parties' separation (\$2,064 from the Scotiabank LOC on September 1, 2022). Excluding that withdrawal, the total is \$66,721. The respondent says these withdrawals are not family debt.
- [77] The claimant does not dispute she made withdrawals, but says the funds were used to maintain family property and therefore qualify as family debt.
- [78] A difficulty with the respondent's submissions on this issue is that he appears to assume, without engaging in any analysis, that the total amount of the claimant's LOC withdrawals is a "financial obligation incurred by a spouse" that should be taken into consideration in assessing whether the current LOC debt is family debt under s. 86. I accept that a withdrawal from a LOC by one party will often result in a financial obligation incurred by that party. However, in my view, that analysis requires consideration of whether and to what extent withdrawn amounts were repaid.
- [79] In addition to withdrawals, the account statements show that the claimant occasionally transferred money into two of the LOC accounts. Neither party provided me with a detailed analysis of the LOC transactions. There is no expert evidence to assist with understanding

the extent to which the financial obligation incurred by the claimant's withdrawals has since been repaid, or whether there are other accounting considerations, such as the impact of interest accrued between the time of withdrawal and repayment, that might be relevant to the analysis. All of this makes it impossible to determine with precision the extent to which the claimant's withdrawals created a financial obligation.

- [80] In these circumstances, I consider the best way to determine the total incurred financial obligation for the purpose of s. 86(b) is to deduct deposits made by the claimant from the total amount of post-separation withdrawals that the respondent says were made by the claimant and are not family debt. There is no evidence that the respondent made payments toward the LOCs. Therefore, I have assumed that where an amount is showing as a "payment" on each LOC monthly statement that is in evidence, it was made by the claimant.
- [81] I have not included interest payments for the purpose of the analysis, even though the evidence shows the claimant made those payments. This is because those payments correspond to interest accrued on the LOC and therefore, in my view, should not be treated as repayment of amounts withdrawn by the claimant. For RBC LOC account 155-001, the interest payments are obvious on the face of the records, as they appear in a separate column. For the Scotiabank LOC, I infer that where a payment is in the exact amount or very close to the exact amount of an interest charge, the payment was made for the purpose of paying interest.
- [82] Using the approach described above and based on the records in evidence, I find the claimant made the following payments:

Account

Date

Payment

RBC 155-001

Sept 26, 2022

\$120

Oct 7, 2022

\$120

Jan 17, 2023

\$60

Jan 26, 2023

\$60

Feb 9, 2023

\$60

Feb 27, 2023

\$60

Mar 23, 2023

\$60

Sept 13, 2023

\$1,500

Nov 6, 2023

\$3,000

RBC 458-001

\$0

Scotiabank

Oct 4, 2022

\$300

Oct 31, 2022

\$300

Nov 29, 2022

\$300

Jan 3, 2023

\$580

TOTAL

\$6,520

[83] I have not accounted for \$5,000 that the claimant testified she repaid after withdrawing that amount to pay her legal fees. She said she could not remember when she repaid the money. I was not provided with any reference to documentary evidence of the repayment. None of the above payments is for \$5,000. This is an example of why I have concluded the claimant's evidence is not credible or reliable when it comes to the parties' finances. I find the evidence does not establish that the claimant repaid the \$5,000 that she withdrew for personal use.

- [84] Applying the analysis and findings described above, for the purpose of s. 86(b), I find that the claimant incurred financial obligations in the amount of \$60,201 after the date of separation (total post-separation disputed withdrawals of \$66,721, minus total deposits of \$6,520). I acknowledge that this analysis does not account for the impact of interest, including that a portion of the total increased LOC debt will be interest that relates to the claimant's withdrawals. However, without expert evidence, it is impossible to determine what that number might be, and I am therefore unable to account for it in my calculations.
- [85] The next step of the analysis is determining whether those financial obligations constitute family debt. The question I must answer is whether the financial obligations were "incurred for the purpose of maintaining family property", per s. 86(b). The claimant says they were; the respondent says the claimant has not met the burden of proof in that regard.
- [86] The claimant gave some evidence about her use of the LOC funds, but did not provide a detailed accounting in that regard. She argues that she has been responsible for paying for expenses related to the family's properties and debts since separation, which she says have exceeded the total amount withdrawn from the LOCs. She says the respondent should have paid half those expenses, but only contributed about \$5,000. In the circumstances, she says there is no need to account dollar for dollar for the amounts withdrawn from the LOCs, because they are effectively offset by all the payments she has made.
- [87] I accept that it may be possible to conduct an analysis of family debt under s. 86(b) in a way that does not require an itemized accounting of every expense. A detailed line by line analysis will likely not be proportionate in many cases. However, even if the analysis is performed in a global or general way, it must still be grounded in the evidence and the language of s. 86(b). The claimant's analysis is not, because it simply sets off expenses against incurred financial obligations without any consideration of (a) the purpose of the expenses, and (b) whether the evidence proves that financial obligations were incurred for those expenses.
- [88] The claimant's analysis includes interest payments on the LOCs and joint credit card debt as expenses to be set off against the LOC withdrawals. She did not provide any authority for the proposition that making interest payments of this nature can be characterized as being for the purpose of "maintaining family property". In my view, such payments do not constitute family debt, and are more appropriately considered in the application of s. 95 of the FLA.
- [89] I am satisfied that the evidence establishes the claimant has had primary responsibility for maintaining family property since the separation, with some limited financial contribution from the respondent. However, I find the evidence does not establish, on a balance of probabilities, that the claimant's LOC withdrawals were made for that purpose. The claimant herself acknowledges that she used funds withdrawn from the LOC for personal use on at least one occasion--the \$5,000 that she used to pay legal fees. The claimant's evidence that withdrawing funds for personal use was limited to this one instance is not credible or reliable, for the reasons explained in my discussion of her credibility. While I accept that the

degree of detail required of a s. 86(b) analysis can range from detailed to general depending on the circumstances, given my concerns with the claimant's credibility, I consider this case to require analysis at the more detailed end of the spectrum.

- [90] The evidence as to the nature, extent, and timing of the claimant's expenditures for the purpose of maintaining family property is lacking in many respects. There is some evidence from the claimant about amounts she says she has paid since separation to maintain family property, but it is relatively general. She testified that she paid \$74,000 toward mortgages. She says she paid for property taxes, car insurance, the car lease for her vehicle until it was returned, and utilities. She described various repairs to the family home that she says she paid for.
- [91] In support of these assertions, the claimant provided the court with a document described as an "accounting of expenses paid by the claimant since separation" that purports to summarize the payments she has made, which she said she prepared with the help of a friend. However, it is not clear to me the extent to which the documentary evidence might support this summary document, and the claimant's testimony and submissions are of little to no assistance in that regard. Even if I might be able to make my own inferences from the records that are in evidence, those records do not cover all relevant time periods. All of this means that I place little weight on the "accounting of expenses" document.
- [92] I accept that there is documentary evidence establishing some of the costs incurred by the claimant in maintaining family property. However, in those instances there is no credible and reliable evidence to establish that the claimant used funds withdrawn from the LOCs to pay those costs.
- [93] For these reasons, I find that the financial obligations incurred by the claimant under the LOCs after the date of separation are not family debt within the meaning of s. 86(b). The claimant alone is responsible for repayment of the \$60,201 debt that I find she incurred under the LOCs. Subtracting that amount from the total LOC debt at the time of trial (\$68,730), I find that the total post-separation family debt under the LOCs is \$8,529. This results in total LOC family debt of \$85,070 (total of \$76,541 LOC debt at time of separation plus \$8,529 post-separation family debt).

Credit card debt

- [94] As set out in the Scott Schedule, the parties have the following credit cards:
- a) Scotiabank Visa (joint);
 - b) RBC Visa (respondent);
 - c) Home Depot credit card (claimant);
 - d) Triangle Mastercard (claimant); and
 - e) PC Mastercard (claimant).

[95] I understand the parties agree that the joint Scotiabank Visa debt is family debt and should be valued as of the date of trial. I find this is family debt in the amount of \$3,133.46.

[96] The respondent says the parties' personal credit cards should be valued as of the date of separation. In the absence of reliable evidence that these credit cards were used for the purpose of maintaining family property after separation, I cannot determine that the post-separation debt is family debt under s. 86(b). I therefore agree that the date of separation should be used for valuation purposes. I find the family debt, valued at the date of separation, in respect of the parties' personal credit cards, is:

- a) RBC Visa (respondent): \$2,411.11;
- b) Home Depot credit card (claimant): \$877.95;
- c) Triangle Mastercard (claimant): \$1,142.94; and
- d) PC Mastercard (claimant): \$1,729.71.

[97] Based on these findings, the total family debt associated with credit cards is \$9,295.17.

Excluded property

Claimant's settlement funds

[98] The claimant was involved in a car accident around the time of the parties' marriage. She received a settlement of \$8,866, which she used toward the down payment on the parties' first home.

[99] The claimant says the settlement funds are excluded property and relies on s. 85(1)(c) and s. 85(3) of the FLA. Section 85(1)(c) excludes a personal injury settlement from family property unless the settlement represents compensation for lost income of a spouse (s.85(1)(c)(ii)).

[100] There is very little evidence about the settlement. The claimant testified that the settlement funds were intended to be used for future medical expenses, but there is no documentation or other evidence to support this assertion. In cross-examination, the claimant was not sure whether the settlement included compensation for pain and suffering.

[101] Given my findings regarding the claimant's credibility, I do not consider her testimony to be a reliable basis for reaching conclusions about the nature of the settlement funds. On the evidence, there is no way to determine the extent to which the settlement represents compensation for lost income. The claimant has the burden of establishing that settlement funds are excluded property: s. 85(2). I find that she has not met that burden.

Division of family property and family debt

[102] Having found there is no agreement between the parties as to division of family property and debt, these issues must be determined under the FLA. The starting point for the analysis is equal division between the parties, per s. 81.

- [103] The claimant's position is that equal division of family property and debt would be significantly unfair, per s. 95(1). She says many of the factors enumerated in s. 95(2) support an unequal division of family property in her favour.

Section 95(1)--unequal division

- [104] The respondent says that the long duration of the parties' relationship (22 years) weighs strongly against unequal division of family property, relying on s. 95(2)(a). He says that after a 22-year marriage, into which neither party brought assets and in which both parties contributed in their own right throughout, unequal division would be "manifestly unfair" to the respondent.
- [105] While I acknowledge the respondent's concern, the question I must answer under s. 95(1) is whether equal division would be significantly unfair. To determine if it would be significantly unfair to divide family property equally, I must notionally divide family property in accordance with the FLA and then determine whether equal division is significantly unfair: *Remmem v. Remmem*, 2014 BCSC 1552 at para. 47.
- [106] The total of the family property that I have been able to value in this case is \$2,461,291. The total value of family debt in this case is \$945,578. An equal division of the value of family property minus the value of family debt (\$1,515,713) results in each party effectively receiving \$757,856.50 (\$1,515,713 divided by 2). (I acknowledge that this analysis includes the parties' pensions, which are divided under Part 6 of the FLA. However, I have not been provided with evidence or submissions to suggest that the result of Part 6 division would be anything other than equal.) I must determine whether this result is significantly unfair, as argued by the claimant.
- [107] The claimant puts great weight on s. 95(2)(b), which provides that the court may consider the terms of any agreement between the parties. The claimant says that throughout their marriage, the parties orally agreed that they would exclude their pensions from any property division if their marriage ended. She says the respondent provided this assurance to her on many occasions. I note that the evidence on this issue does not align with the claimant's submission that there was a mutual agreement to exclude pensions. At best, the evidence is that the respondent assured the claimant that he would not pursue her pension. There is no evidence that the claimant gave similar assurances to the respondent regarding his pension.
- [108] In any event, the respondent denies that the parties had any agreement about pensions during their marriage. The only evidence that the respondent provided the alleged assurances is the testimony of the claimant and Ms. Connors. As already stated, their evidence is not credible, and I do not accept it. The claimant has not met the burden of proving an oral agreement regarding pension division and it is therefore not a relevant consideration for the purpose of my s. 95(1) analysis.

- [109] The claimant emphasises the relative age of parties--the respondent is five years younger than the claimant, which means he has more remaining years to earn income--and that she is in a vulnerable position because of her disability. Unlike the respondent, the claimant says it will be impossible for her to earn more income and rebuild her pension if it is divided with the respondent. Relative age and vulnerability are not enumerated factors under s. 95(2). However, I accept that they can be considered under s. 95(2)(i) (other factors that may lead to significant unfairness).
- [110] The claimant has generous disability benefits through her previous employment as a nurse, which will provide her with a reasonable income until she is required to start collecting pension income at age 60. At that point, she will be wholly reliant on her pension income, with no ability to supplement it with other income sources given her disability. Division of the claimant's pension will no doubt mean that her available future pension income is much lower than she expected. While this will be offset to some degree by her share of the respondent's pension, the claimant is far more disadvantaged by an equal division than the respondent, given the parties' respective circumstances and the difference in value of their respective pensions.
- [111] The claimant also submits that her efforts have allowed the respondent to advance in his employment, which is a consideration under s. 95(2)(c). I accept that the claimant contributed to the respondent's career, helping him to improve his English and integrate to life in Canada when he arrived from Cuba. She helped the respondent find jobs and build his resume. However, I must also consider the respondent's contribution to the claimant's career. He has provided both financial and non-financial support to the claimant throughout their marriage, including in support of her career before she became disabled from working. I therefore conclude that this is a neutral factor in the analysis.
- [112] Section 95(2)(f) allows me to consider whether a party has caused a significant decrease or increase in the value of family property or family debt. The claimant's increase to the LOC debt is not a relevant consideration here, as I have already determined that most of that increase is not family debt.
- [113] I find that the evidence establishes that the claimant has increased the value of family property and decreased the value of family debt since separation, to a degree that is significant. I am able to reach this conclusion despite issues with some missing financial documentation and the claimant's credibility issues, based on the uncontroverted evidence that since separation, the claimant has borne most of the financial burden of maintaining and making mortgage payments on the family home (the rental income on the investment property covered the expenses associated with that property) and making interest payments on the parties' debts. There is sufficient evidence for me to infer that the time and money the claimant has invested in maintenance of the family home has increased its value, or at the very least prevented a significant decrease in value. The interest payments on the parties' debts resulted in the family debt being significantly lower at the date of trial than it might otherwise be.

- [114] I find that all of this has significantly benefited the parties' joint financial position, with relatively little financial contribution from the respondent. This was not only a significant financial burden for the claimant, but also a significant mental burden for her to bear on her own.
- [115] As stated, the respondent emphasizes the parties' relatively long marriage. While this is a factor that, on its own, weighs in favour of equal division, in my view the totality of the circumstances discussed above supports a finding that an equal division of family property and debt would be significantly unfair to the claimant. To equally divide family property and debt in these circumstances will penalize the claimant and give rise to unfairness that is compelling, meaningful, and extensive or important enough to merit attention: *Jaszczevska v. Kostanski*, 2016 BCCA 286 at para. 41.
- [116] I reach this conclusion having also considered the respondent's claim for occupational rent, which in my view should not succeed and does not offset the significant unfairness of equal division of property. I acknowledge that after leaving the family home, the respondent says he has paid rent totalling \$33,000. However, I decline to exercise my discretion to make an allowance for occupational rent in this case, in light of what I consider to be relevant considerations as follows: the respondent did not pay spousal support or child support after separation; the parties' daughter continued to reside in the family home with and was supported by the claimant until she left for university; the evidence does not establish financial difficulty experienced by the respondent by being deprived of equity in the home; and there is no evidence that postponing sale of the family home to the time of trial caused any decrease in the selling value of the home.
- [117] The difficulty is determining an unequal division that will address this significant unfairness. The claimant proposes a 65/35 reapportionment in her favour. While she does not specifically address this in her submissions, I assume she means a reapportionment of the net value of family property after accounting for family debt. Even if that was not the claimant's intention, I consider that to be the best approach.
- [118] I do not consider a 65/35 reapportionment to be appropriate in this case. As stated above, the net value of family property is \$1,515,713. Using that as a starting point, the claimant's proposal would have the respondent effectively receiving \$530,500 and the claimant receiving \$985,213--a difference of \$454,713. An order that would have the claimant receive almost twice what the respondent receives goes far beyond what is necessary to remedy the significant unfairness arising out of the factors discussed above.
- [119] In my view, the appropriate unequal division of family property to address the significant unfairness of equal division is a 55/45 division in favour of the claimant. Using \$1,515,713 as a starting point, this results in the claimant notionally receiving \$833,642 to the respondent's \$682,071--a difference of \$151,571. I find that this is a reapportionment that addresses the significant unfairness that would result from an equal division of family property and debt.

[120] For these reasons, to address the significant unfairness arising out of equal division of family property, pursuant to s. 95(1), I order that the parties shall divide family property and family debt in a manner that achieves a 55/45 reapportionment of the net value of family property minus family debt in favour of the claimant. Subject to the specific orders set out below, I leave it to the parties to decide how they wish to achieve this reapportionment.

Specific orders

[121] The respondent requests 15 days from the date of judgment to elect to purchase the claimant's interest in the Ontario home. I do not understand the claimant to take a position on this proposed order. I therefore order that the respondent advise the claimant whether he wishes to elect to purchase her interest within 15 days of the date of this judgment.

[122] While there is an appraisal of the Ontario home, it is now somewhat dated. If the respondent opts to purchase the claimant's interest, the purchase must be at a mutually agreeable price. If the parties cannot agree on a purchase price, the property shall be sold. The parties must use either the agreed-upon sale price or the actual net sale proceeds, whichever is applicable, for the purpose of achieving the reapportionment ordered above.

[123] The respondent has enumerated specific items from the family home that he wishes to receive, which he says is a fair (which I take to mean equal) division of household contents. As stated above, I cannot make any findings regarding the nature or value of household goods. I am therefore unable to determine what might constitute an appropriate division. In the circumstances, I leave it to the parties to agree on how to divide these items. If the parties cannot agree, items falling under this category of family property must be sold and the parties shall divide the sale proceeds in accordance with the apportionment ordered above.

[124] I make a similar order in respect of the Subaru vehicle, given I cannot make any finding as to its value. I leave it to the parties to agree on the value of the vehicle and how to account for it in their division of family property. If the parties cannot agree, the car must be sold, and the parties shall divide the sale proceeds in accordance with the apportionment ordered above.

[125] I have found the Cuban artwork is family property but has no value beyond sentimental. If the parties cannot agree on how to divide the art, then they are to alternate taking turns selecting individual paintings. The respondent shall have the first selection, because the paintings were gifts to the family from his parents.

[126] The claimant says the respondent has their family photos, and she wishes to receive an electronic copy. While this request seems reasonable, there is no evidence before me about the status of the photos. If the respondent has any digital family photos, he must provide an electronic copy of them to the claimant.

Spousal support

- [127] The claimant seeks spousal support. While her claim is pleaded under both the FLA and the Divorce Act, R.S.C. 1985, c. 3 [DA], the parties each made their arguments under the DA.
- [128] Pursuant to s. 15.2(6) of the DA, an order for spousal support should:
- recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;
 - apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;
 - relieve any economic hardship of the spouses arising from the breakdown of the marriage; and
 - in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.
- [129] Of these objectives, the first two relate to compensatory support, and the last two relate to non-compensatory support. The claimant seeks spousal support on both a compensatory and non-compensatory basis.
- [130] In determining spousal support, s. 15.2(4) of the DA requires that I consider the condition, means, needs, and other circumstances of each spouse, including the length of time the spouses cohabited and the functions performed by each spouse during cohabitation.
- [131] I am not satisfied that claimant has demonstrated an entitlement to compensatory support in this case. I find that both parties contributed equally to the household throughout their marriage, through paid and unpaid work at different times; the claimant's submissions in that regard emphasize her contributions and ignore those of the respondent. There are no financial consequences related to care of their daughter that need to be addressed through an award for spousal support.
- [132] Turning to non-compensatory support, as is often the case, the parties have each been economically disadvantaged by the breakdown of their marriage. This is inevitable with the move from one joint to two separate family households. But for my order for unequal division of family property and family debt, the claimant would suffer a somewhat greater degree of economic hardship than the respondent, given the parties' respective ages and earning potential, and the claimant's health status. However, I find that after the unequal division I have ordered, the claimant's economic hardship is equivalent to that of the respondent. In the circumstances, I decline to award support on a non-compensatory basis.

Child support

- [133] The parties' daughter is over the age of majority, pursuing post-secondary education, and not residing with either party. The claimant's position is that the daughter's educational expenses, minus contribution of their daughter either through RESP or otherwise, should be apportioned between the parties based on their income level.
- [134] The respondent says he should continue paying \$400 monthly to their daughter directly, to be reviewed when more information is available about her future housing and educational plans.
- [135] In the circumstances, I prefer the claimant's approach as best reflecting child support principles. I order that the parties shall share their daughter's post-secondary expenses proportionate to their income.
- [136] The claimant also seeks contribution from the respondent toward the cost of their daughter's attendance at an educational program in France in 2023. The claimant paid the program cost of \$7,430. The respondent did not support the decision to send their daughter to this program. I find that this was a post-secondary education expense within the meaning of s. 7(1)(e) of the Federal Child Support Guidelines, and order that the respondent reimburse the claimant his proportionate share calculated based on the parties' respective incomes.

Divorce

- [137] I am satisfied that there is no possibility of reconciliation and that the other pre-requisites to granting a divorce are met. I therefore order that the claimant and the respondent are divorced, the divorce to take effect on the 31st day after the date of this order.

Costs

- [138] As success was shared, the parties shall bear their own costs.
- [139] I am seized of any applications in this matter for one year from the date of these reasons. After the expiry of one year, the parties may request to appear before me, but I will no longer be seized.

"Ramsay J."

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