

CANADA / JUDGMENT

Yarmie v. Yarmie

2024 BCSC 457

COURT

Supreme Court of British Columbia

DECIDED

19 March 2024

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2024 BCSC 457 Yarmie v. Yarmie

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Yarmie v. Yarmie,

2024 BCSC 457

Date: 20240319

Docket: E142945

Registry: Victoria

Between:

Debbie Anne Yarmie

Claimant

And

Bradley Dean Yarmie

Respondent

Before: The Honourable Justice Giaschi

Reasons for Judgment

Counsel for Claimant:

M.J. McCubbin

Counsel for Respondent:

J.K. Ough

Place and Date of Hearing:

Victoria, B.C.

March 29, 30 and

October 5-6, 2023

Place and Date of Judgment:

Victoria, B.C.

March 19, 2024

Table of Contents

Introduction.. 3

Chronology of These Proceedings. 4

Facts. 4

Respondent's Retirement 10

Pension Division. 13

Circumstances of the Parties. 14

Claimant's Circumstances. 14

Respondent's Circumstances. 17

Submissions. 19

Scope of Review.. 19

Issues. 21

Analysis. 21

Should income be imputed to the Respondent?. 21

Submissions. 21

Legal Principles. 21

Income Imputation. 21

Discussion. 31

Should income be imputed to the Claimant?. 32

Disability. 33

Loss of Future Earnings. 35

LIRAs. 36

What is the support payable, if any, on the incomes of the parties?. 37

Orders. 38

Introduction

- [1] On July 8, 2016, after a trial in this matter, and in reasons indexed at 2016 BCSC 1257, Justice Johnston ordered, inter alia, that the respondent was to pay spousal support to the claimant in the amount of \$2,800 per month subject to an automatic review of the award upon the claimant settling an outstanding personal injury action. Upon the claimant settling her personal injury action, the review of spousal support occurred before Justice Gaul. By order dated September 22, 2017 (the "Gaul J. Order"), Gaul J. ordered, inter alia, that the respondent was to pay spousal support in the amount of \$1,158 per month commencing October 1, 2017. In addition, he ordered that there could be another review of spousal support upon the respondent turning 60 or upon his retirement. The respondent retired on April 14, 2021.
- [2] Both parties now apply by way of summary trial for a review of spousal support. By application dated April 19, 2021, the respondent applies for an order terminating his obligation to pay spousal support as of the date he retired and for an order cancelling any arrears. By amended notice of application filed September 8, 2022, the claimant applies to review and adjust the quantum of spousal support from September 22, 2017, although at the hearing the claimant submitted the adjustment should be from January 1, 2018.
- [3] Both parties seek to have income imputed to the other. The claimant says income should be imputed to the respondent on the basis that he voluntarily took an early retirement. The respondent says income should be imputed to the claimant on the basis that she is capable of working and to take into account the amount she received in settlement of her loss of future income claim.
- [4] For the reasons that follow, I have determined that the respondent's support obligations ceased effective April 14, 2021, the date of his retirement. The respondent's decision to retire was reasonable and no income should be imputed to him. On the other hand, income should be imputed to the claimant on the grounds that she is underemployed and to take into account her her loss of future income settlement. As a consequence of these adjustments, the claimant's income exceeds the respondent's post-retirement income and no support is payable from April 14, 2021.

Chronology of These Proceedings

- [5] On April 29, 2021, the respondent filed his application for an order that his spousal support obligation ceased as of April 14, 2021.

- [6] On May 31, 2021, the claimant filed her original application for a review of the spousal support order of Gaul J.
- [7] The applications originally came on for a hearing before Justice Power on June 4, 2021. She ordered that the applications be adjourned and re-set for a full-day hearing. She further ordered that the enforcement proceedings that had been commenced by the Family Maintenance Enforcement Program ("FMEP") against the respondent be stayed pending the full hearing of the applications.
- [8] On December 29, 2022, the claimant filed an application to set aside the order of Power J. staying the FMEP enforcement proceedings. That application was heard by Justice Jackson on February 16, 2023. Justice Jackson set aside the stay order and ordered that the respondent continue to pay the support payments ordered by Gaul J., including any retroactive amounts owing. In reasons indexed at 2023 BCSC 525, Jackson J. found that there had been a change in circumstances since the order of Power J. was made which warranted a variation of the order. In particular, she was satisfied that the respondent had failed to provide a list of documents or adequate financial disclosure. Additionally, Jackson J., citing *Sekhon v. Sekhon*, 2020 BCSC 1422 at para. 51, held that the court was without jurisdiction to stay enforcement proceedings by the FMEP.

Facts

- [9] The claimant was born on December 23, 1962. The respondent was born on April 5, 1961. At the time of the trial before Johnston J., the claimant was 53 years of age and the respondent was 55. As of the date of the hearing before me, the claimant was 60 and the respondent 62.
- [10] The parties started living together in September 1983 and were married on November 10, 1984. The parties disagreed on the date of separation with the claimant saying it was September 2012 and the respondent saying it was March 8, 2014. Justice Johnston found the parties had made an agreement under s. 92 of the Family Law Act, S.B.C. 2011, c. 25 [FLA], to treat March 8, 2014, as the separation date for purposes of division of property and debt. Accordingly, the length of the relationship was slightly in excess of 30 years.
- [11] The parties had three children during the course of their marriage who were born between the years 1992 and 1996. Child support was claimed in respect of only the youngest child, Dominic, whom Johnston J. found remained a child of the marriage until the end of 2015.
- [12] Justice Johnston described the marriage as a "traditional" marriage with the respondent as the breadwinner and the claimant looking after the household and the children. The respondent worked throughout the marriage as a third-class engineer. Initially, he worked in the pulp and paper industry. He later worked for the federal government. The claimant stopped working as a secretary for approximately 13 years while the children were young. She returned to work in 2005 as an office manager.

- [13] In 1985 the parties purchased a property at Hillview Road in Melville, British Columbia (the "Hillview property") for \$37,500. The Hillview property was the family home.
- [14] In 2007, the parties purchased a second real property which they rented out to generate income.
- [15] Until 2008, the respondent worked in the pulp and paper industry. In 2008, he obtained a new job working for the federal government in Victoria. Initially, he commuted from Melville to Victoria. In 2009, the parties moved to Victoria, which necessitated the claimant giving up her office manager job. Upon moving to Victoria, she initially worked at part-time jobs until 2011, when she secured a permanent job as a project administrator at an annual salary of \$40,000.
- [16] Notwithstanding the move to Victoria, the parties retained the Hillview property and rented a residence in Victoria.
- [17] In 2012, the claimant was injured in a car accident and had to stop working due to injuries suffered. She attempted to return to work in August 2012 but was laid off in February 2013. She then worked at a clerical job from January to March 2014. As of April 2016, the time of the trial before Johnston J., the claimant was unemployed and her personal injury action arising from the motor vehicle accident was pending.
- [18] The issues before Johnston J. included child support, spousal support, pension division and property division. Pension and property division were resolved on consent.
- [19] The respondent had contributed to two pension plans; one with the Pulp and Paper Industry Pension Plan ("PPI pension") and the other with the Federal Government Pension Plan (the "Federal pension"). These pensions were ordered, on consent, to be divided equally between the parties for the period from September 1, 1983 to March 8, 2014. As I address below, there is a dispute as to whether the Federal pension was, in fact, divided as ordered.
- [20] The family property was ordered to be divided as per the agreement between the parties. It is to be noted, however, that there was no significant property. The two real properties owned were heavily financed. The rental property was sold and generated net proceeds of sale of \$39,039, which amount was almost entirely used to pay off a joint debt. The claimant was given the right to retain the Hillview property but was required to pay an equalization payment to the respondent of \$26,182. The only chattel of any significance appears to have been a 1982 sailboat which was awarded by agreement to the respondent. This boat is currently listed for sale for \$16,000.
- [21] Concerning the incomes of the parties, Johnston J. found that the claimant's income was \$29,270 in 2012, \$17,482 in 2013, \$28,128 in 2014 and \$0 in 2015. He found the respondent's income was \$66,906 in 2012, \$82,412 in 2013, \$97,283 in 2014 and \$75,456 in 2015. Both parties' incomes included rental income, which stopped when the rental property was sold.

- [22] In relation to spousal support, Johnston J. held that the claimant was entitled to spousal support "primarily on a compensatory basis" but also on a "secondary needs basis". He reasoned that she had been injured during the marriage and her injuries were then impairing her ability to become self-sufficient. He noted that the relationship was 30 years in length and further observed that such lengthy relationships gave rise to a presumptive claim to equal standards of living upon dissolution.
- [23] Justice Johnston ordered that the respondent pay the claimant prospective spousal support, at the high end of the Spousal Support Advisory Guidelines [SSAG] range, of \$2,800 per month. This was based on the respondent having an annual income of \$75,000 and the claimant having no income. Justice Johnston further determined that the length of the relationship and the claimant's age did not warrant an end date to the support.
- [24] An issue before Johnston J. in relation to spousal support was whether an income of \$40,000 should be imputed to the claimant. He declined to impute such an income because it ignored her accident-related disability and because it was uncertain how much she would recover in her personal injury action. He did, however, agree that there should be a right to review the spousal support once the outcome of the personal injury action was known. He accordingly made the following order:
14. The parties will have an automatic review of spousal support immediately upon the Claimant settling her claims for damages, or, if those claims go to trial immediately upon judgment being handed down. The review will be deferred in the event of an appeal of any award in Ms. Yarmie's favour until the appeal is either compromised by settlement or decided.
- [25] In March 2017, the claimant settled her personal injury action, triggering the automatic review ordered by Johnston J. The review hearing was held on August 22 and September 19, 2017. On September 22, 2017, Gaul J. gave oral reasons for judgment.
- [26] Justice Gaul found that the claimant settled her action for \$535,085.50, which comprised: special damages of \$30,000; past income loss of \$140,000; future income loss of \$178,000; general damages of \$100,000; costs of future care of \$35,000; and costs of \$52,085.50.
- [27] Justice Gaul held that \$53,908 of the amount received for past income loss was family property to be divided between the parties. He ordered that the claimant was to pay one-half of this amount, or \$26,454, to the respondent. It is common ground that this amount has never been paid and a judgment in this amount is registered against the Hillview property.
- [28] Justice Gaul then addressed the incomes of the parties. He found the respondent's income was \$80,705 in 2014, \$59,703 in 2015, and \$68,842 in 2016. Concerning the claimant's income, Gaul J. found the claimant had earned \$32,000 in 2012, the year of the motor vehicle accident, and that she likely would have earned \$40,000 that year if the accident had not occurred. He further found that she earned no income in 2015 or 2016 and not much in 2017. However, he rejected the claimant's submission that she was unable to earn income from

employment. At para. 27 he wrote:

- [27] Ms. Yarmie says she is unable to return to an active workforce on account of her age as well as her accident-related disabilities. She acknowledges that she does work on a volunteer basis a few days a week, but she claims that that is for her own personal good including her mental health. I am not convinced that Ms. Yarmie is functionally unable to earn some form of employment income. Nor am I persuaded that she is functionally disabled or prohibited from working. The fact that she has not sought any sort of disability pension suggests she continues to believe or at least harbours a hope that she has the capacity to return to some form of gainful employment.
- [29] Justice Gaul imputed an income to the claimant in the amount of \$40,000 per year.
- [30] Justice Gaul applied the guideline incomes to determine retroactive and prospective support. Justice Gaul held that the respondent had overpaid spousal support in the years 2014 to 2016 and was entitled to a spousal support credit of \$47,647 (para. 7 of the Gaul J. Order). Justice Gaul further ordered that prospective monthly support was to be paid by the respondent to the claimant in the amount of \$1,158 per month commencing October 1, 2017 and continuing until further order of the court. This amount was at the high end of the SSAG range and based on incomes of \$68,842 for the respondent and \$40,000 for the claimant.
- [31] Justice Gaul additionally ordered that there be a review of spousal support "upon the respondent turning 60, or upon the respondent's retirement, whichever occurs first".
- [32] Justice Gaul briefly explained his reasons for ordering the review:
- [35] On the evidence before me, Mr. Yarmie is presently able to claim his pension from his previous employment with a lumber mill in the north island. He will soon will able to claim his other pension with the federal government. Naturally Ms. Yarmie will be entitled to her proportionate share of those pensions. In my view it would be appropriate that the parties have leave to have another review of spousal support upon Mr. Yarmie turning 60 or upon his retirement, whichever occurs first, and I so order.
- [33] A portion of the transcript of the hearing before Gaul J. is before me. The transcript reveals there was some discussion at the hearing about the respondent retiring at age 60. Justice Gaul was advised that the respondent was eligible to retire at age 60 or before and the respondent requested that any order include a term for a review of spousal support upon the respondent's retirement. The claimant, who was self-represented, advised Gaul J. that it would be prejudicial to her if the respondent retired at age 60. She initially requested that an income be imputed to the respondent if he retired but later requested that there be a review of support if he retired.
- [34] An appeal of the September 22, 2017 order of Gaul J. was filed by the claimant but was abandoned. The claimant also brought an application before Gaul J. to re-open the hearing. In reasons rendered on September 4, 2018, Gaul J. refused to reopen the hearing. In the course of those reasons, he noted, at paras. 59 and 63, that his original decision "would have

been marginally different" in the claimant's favour, if she had presented the new evidence at the original hearing. However, at para. 65, he reiterated that even with the new evidence he remained satisfied the claimant had a residual capacity to work.

- [65] Having heard the submissions of counsel and having seen the evidence Ms. Yarmie seeks to present, I remain satisfied that she has a residual capacity to work and that, in the circumstances, she has either chosen to be unemployed or underemployed. Either way, in my view her residual capacity to work, even if it is a modest one, when factored into the amount she accepted in recognition of her loss of future income, continues to equate to a Guideline income of approximately \$40,000

Respondent's Retirement

- [35] The respondent became eligible to retire from his employment as a Maintenance Craftsman at the Pacific Forestry Centre with Natural Resources Canada (the "Forestry Centre") when he turned 57 in September 2017.
- [36] On January 20, 2021, the respondent submitted a notice of retirement from his position. His retirement was effective on April 14, 2021. The date of his retirement was nine days after his 60th birthday. The retirement date also roughly coincided with the exhaustion of the spousal support credit of \$47,647 ordered by Gaul J.
- [37] The reasons and bona fides of the respondent's decision to retire are disputed.
- [38] In his affidavit made April 13, 2021, the respondent deposed that he had long-standing health problems and it was always presumed he would retire at 60. His exact words are as follows:
27. I have some health problems which have diminished my capacity to continuing working. These problems have been long known to both myself and Claimant and it was always presumed I would retire at the age of 60.
- [39] The respondent's claim to having health problems was disputed by the claimant as was the statement that it was always presumed he would retire at 60. In her affidavit made May 28, 2021, she deposes that she is unaware of him having any health problems and that she "understands" he continues to do mechanical work and landscaping and to sail and water ski. She also observes that, at the hearing before Gaul J. in September 2017, the respondent's counsel remarked that he was healthy. Concerning the presumption that the respondent would retire at the age of 60, she deposes that was never a part of their plan. She says their collective plan was for the respondent to continue to work at the Forestry Centre "until the time was right to leave" and that he would then pursue contract work with SNC Lavalin in Victoria.

- [40] The respondent filed another affidavit made November 25, 2022, in which he further deposes to having health issues and, for the first time, deposes to having to provide care and assistance to his ailing parents. He stops short, however, from deposing that his health issues and the need to care for his parents were reasons for retiring.
- [41] The respondent filed yet another affidavit made on March 21, 2023. In that affidavit, he deposes:
- a) The claimant was always aware he was going to retire at age 60;
 - b) During the 2016 trial and the 2017 review hearing, the court was told that he was going to retire at age 60; and
 - c) He did not retire to avoid paying spousal support.
- [42] At para. 38 of his March 21, 2023 affidavit, the respondent deposes that he did not retire due to medical reasons:
38. I did not retire due to medical reasons nor have I ever stated that I did. I retired when I turned 60 as I always intended to do and as the Court was told in 2016, and Ms. Yarmie has always known.
- [43] Notwithstanding this assertion, the respondent nevertheless deposes to his medical issues (including, shortness of breath, high blood pressure, pre-diabetes and long-term shoulder and back issues) and to his ongoing need to care for his aging parents.
- [44] In addition to the affidavits of the parties, the respondent has formally admitted that he is capable of working and earning income on both a part-time basis and "on a substantially full-time basis".
- [45] In view of the admissions of the respondent and considering all of the affidavit evidence of the parties, I make the following findings of fact:
- a) The respondent was eligible to retire on a full pension in September 2017;
 - b) The respondent in fact retired in April 2021, upon turning 60;
 - c) The sole reason for the respondent's retirement was that he had turned 60;
 - d) At the time of his retirement the respondent was, and he remains, capable of working on a substantially full-time basis;
 - e) Although the respondent has minor health issues, these do not prevent him from working on a substantially full-time basis; and
 - f) Although the respondent provides care and assistance to his aging parents, this was not a reason for his retirement and did not prevent him from working.

- [46] I do not accept that the parties had a specific joint plan during the marriage that the respondent would retire at age 60. The respondent's evidence falls short of establishing such a specific plan. However, I also do not accept any implication in the claimant's evidence that the respondent would continue working indefinitely or until at least the age of 65. The claimant's evidence was overly vague as to when the respondent would retire. She deposed only that the respondent would retire when the time was right. I find that the parties did contemplate that the respondent would retire at an age earlier than 65.
- [47] Further, I do not accept that the respondent retired to avoid having to make support payments. There is no evidence of this other than bald assertions by the claimant and the coincidence of the respondent turning 60 at approximately the same time as the expiry of the spousal support credit. Significantly, if the respondent's motivation in retiring had been to defeat his support obligations, he could have retired when he first became eligible for retirement in 2017. The fact that he did not do so suggests his intent was not to avoid his support obligations.

Pension Division

- [48] As indicated, Johnston J. ordered, on consent, that the respondent's pensions be divided equally between the parties for the period from September 1, 1983 to March 8, 2014. This occurred with the respondent's PPI pension. The claimant's share of the PPI pension was 43.86% or \$158,930, which amount was paid to her on June 1, 2018, and deposited into a LIRA account.
- [49] Whether the division of the respondent's Federal pension occurred as ordered is a matter of dispute. In a letter dated March 3, 2021, Public Works Canada acknowledged receipt of an application to divide this pension with a division period of September 1, 1983 to March 8, 2014. In that letter, Public Works Canada advised that the claimant's share would be 50% or approximately \$59,229.86. However, in a subsequent letter dated July 7, 2021, Public Works Canada advised that the pension had been divided with a formal division date of June 23, 2021, and that the sum of \$78,338.09 had been paid to the claimant.
- [50] The claimant acknowledges receiving approximately \$79,000 from Public Works Canada and depositing this sum into a LIRA account.
- [51] The respondent submits that his Federal pension was divided as of June 23, 2021 and that the claimant has been overpaid by approximately \$19,000. His submissions are based on the different amounts and different division dates in the two letters from Public Works Canada. The claimant submits that there has been no overpayment.
- [52] I agree with the claimant that, notwithstanding the reference in the July 7 letter to a division date of June 23, 2021, and the different amounts in the two letters, the pension has been properly divided. First, the amount of \$59,229.86 in the March 3, 2021, letter was merely an estimate and the fact the actual amount was more does not mean there was an overpayment. Public Works Canada specifically advised that "this estimate may differ

significantly from the actual payment amount". Second, the "Statement of Deduction" that accompanied the March 3, 2021 letter disclosed that, with the division pension, the monthly payments would decrease from \$1,570.43 to \$1,231.10, a reduction of \$339.33 per month. In the July 7, 2021, letter Public Works Canada advised that the actual reduction in the respondent's monthly pension payment was \$339.57, an amount almost identical to what was estimated in the "Statement of Deduction". If there had been an overpayment of approximately \$19,000, the actual reduction would have been greater.

- [53] Accordingly, I conclude that the reference in the July 7, 2021, letter from Public Works Canada to a formal division date of June 23, 2021 is an error. I find that the respondent's Federal pension has, in fact, been divided with a division date of March 8, 2014, as ordered by Johnston J.

Circumstances of the Parties

Claimant's Circumstances

- [54] The claimant deposes to being in dire financial circumstances and facing bankruptcy. She says that she has been unable to earn any income from employment since her motor vehicle accident. She deposes that she has been forced to borrow from family and friends and through lines of credit. She deposes that she cannot afford medical care or even to eat.
- [55] Before reviewing the claimant's actual circumstances, I wish to record that her affidavits are replete with embellishment, exaggeration and argument. I find that she grossly exaggerates the severity of her financial circumstances.
- [56] The most recent F8 financial statement sworn by the claimant was sworn on March 20, 2023. It discloses that her income in 2021 and 2022 was \$16,893 and \$16,984, respectively. Her income is comprised of CPP and PWD disability benefits.
- [57] It was in the latter part of 2018, that the claimant applied for CPP and PWD disability benefits. Both applications were supported by reports from her physician. Her application for CPP disability benefits was approved on December 22, 2018 with an effective date of May 2017 and a monthly benefit of \$830.93. On January 9, 2019, her application for PWD benefits was approved with an effective date of February 1, 2019. The letter approving her application did not stipulate the amount of the benefit but was accompanied with an information sheet that advised her, among other things, that she had a yearly annual earnings exemption of \$12,000. I note that as of January 1, 2024 the amount is now \$16,200.
- [58] The claimant's expenses, as disclosed in her most recent F8 financial statement, are \$3,585 per month or \$43,022 per year. Given her income, her expenses appear to exceed her income by \$27,000. However, I do not accept that the claimant's expenses are as set out in her most recent F8 financial statement. In particular, she deposes that her housing expenses are \$1,115.77 per month, which represents one-half of the mortgage, property tax, property insurance and utilities on the Hillview property. The other half she deposes is paid by her

daughter who is a joint owner and who lives half-time at the property. [I address this in more detail below.] I accept that the daughter pays half of these expenses, however, the parties' adult son, Dominic, also resides at the Hillview property. The claimant deposes that he pays interest on her debts, often buys groceries and contributes to utilities. These contributions by Dominic, who otherwise does not pay rent for the privilege of living in the claimant's home, have not been taken into account in her financial statement and the claimant does not specify in her affidavits exactly how often or how much Dominic contributes to her various expenses.

- [59] The claimant deposes that the parties' daughter, Olivia, loaned her \$30,000 so she could buy out the respondent's interest in the Hillview property and that Olivia was added to the title to the Hillview property as to an undivided 1/100 interest. She further deposes that she considers Olivia to be a 50% owner of the property because she contributes to the maintenance of the property and to the mortgage, property taxes, insurance and utilities.
- [60] I accept that Olivia loaned the claimant \$30,000 and that she contributed to the property expenses. I do not accept that Olivia has a 50% interest in the Hillview property. The claimant has provided no documentation indicating Olivia has a 50% interest. The fact that Olivia contributes to the expenses of the property does not mean she has a 50% interest. The claimant acknowledges that Olivia lives at the Hillview property part-time. In fact, she deposes that "in the aggregate" Olivia lives with her half the time. In these circumstances, Olivia's contributions are more consistent with a form of rent than capital contributions. I accept only that Olivia has a 1/100 undivided interest in the Hillview property, as reflected in the title. It follows that the claimant has a 99/100 interest in the property.
- [61] The claimant's F8 financial statement made March 20, 2023 sets out the value of the Hillview property as \$1,021,000, being the 2023 BC Assessment valuation. The same financial statement discloses that the mortgage on the property, as of December 1, 2022, was \$347,369. Accordingly, I find as a fact that the equity in the property is at least \$673,000 and the claimant's interest in that equity is approximately \$667,000.
- [62] As indicated, in September 2018, the claimant received \$158,930 from the respondent's PPI pension and in May 2021, she received \$78,200 from the respondent's Federal pension. Both amounts were deposited by the claimant into LIRA accounts. Accordingly, her share of the respondent's two pensions totalled approximately \$237,000. However, her most recent financial statement dated March 20, 2023, indicates that, as of December 1, 2022, the total amount in the two LIRA accounts was only \$196,777. This discrepancy has not been explained by the claimant.
- [63] In addition to the mortgage on Hillview property, the claimant's financial statement made March 20, 2023 discloses unsecured debts totalling in excess of \$140,000. These debts include credit card debts of approximately \$40,000 and an amount of \$5,600 owing to a law firm. The vast majority of the debt, \$94,600 is said to be personal loans owed to family and friends.

- [64] In her affidavit made April 29, 2022, the claimant deposes to having borrowed from family members and friends. She provides as an example of such borrowing a promissory note dated January 10, 2017 in the amount of \$40,000 bearing an interest rate of 10%. However, she provides no other documentary evidence of loans from family members and friends. Given the absence of evidence corroborating debts to family members and friends, I find that, at most, the debts owed to family and friends is \$40,000.
- [65] Accordingly, the claimant's total unsecured debts, are approximately \$85,000. Additionally, she owes the respondent \$26,454, being his share of her past loss of income settlement.

Respondent's Circumstances

- [66] At some point in time, the respondent re-partnered. The respondent has admitted that he is in a common law relationship with Monica Fritz and that during the course of their marriage-like relationship Ms. Fritz acquired an interest in multiple real properties through inheritance. In his affidavit made March 21, 2023, the respondent deposes that Ms. Fritz is his partner and that she inherited real properties from her father when he passed away on August 31, 2021. He deposes, however, that the properties are excluded properties and he will not benefit from them. He further deposes that he and Ms. Fritz maintain entirely separate finances with no joint accounts or investments.
- [67] I accept that the respondent has no financial or proprietary interest in any of the properties owned by his new partner. There is no evidence to the contrary. However, he does have a potential claim in the future to a portion of those assets under the FLA or the Wills, Estates and Succession Act, S.B.C. 2009, c. 13.
- [68] The respondent's income since his retirement is comprised solely of his pension income. In 2022, the income from his two pensions totalled \$34,205. The PPI pension income was \$18,200 and the Federal pension income was approximately \$16,000. There is no evidence that he has other sources of income.
- [69] The respondent's most recent F8 financial statement indicates that his average expenses are \$5,100 per month or \$61,000 annually. His expenses include \$1,158 per month in support payments to the claimant, \$500 per month for housing, and \$930 per month for servicing his line of credit and credit cards. I do not accept that the respondent pays \$500 per month for housing as he lives with his new partner. Additionally, I note if the monthly housing expenses and support payments are ignored, his expenses are approximately \$3,400 per month or \$41,000 per year, an amount that exceeds his income by approximately \$6,000.
- [70] The most recent F8 financial statement sworn by the respondent on March 21, 2023 discloses he has total assets, excluding his pensions, of approximately \$26,000. His assets comprise:
- a) Several old vehicles having a combined value of approximately \$6,500;

- b) The 1982 Catalina sailboat valued at \$16,000, which I have previously mentioned has been listed for sale; and
 - c) A 1969 Gibson Les Paul guitar valued at \$4,000.
- [71] The respondent owns no real property and has no financial investments, other than his pensions. He also has minimal balances in his bank accounts.
- [72] The respondent's total debts are \$41,273 and are comprised of a \$26,000 line of credit, a loan from Scotiabank of \$11,000 and a credit card debt of \$3,400.

Submissions

- [73] In summary, the claimant submits that the support payments ordered to be paid by the respondent should be adjusted retroactively from January 1, 2018. In the alternative, she submits that support should be recalculated from the date of the respondent's retirement. She submits that the spousal support should be based on the respondent's actual income until his retirement and on an imputed annual income of between \$80,000 and \$120,000 from the date of his retirement. She says his decision to retire was not reasonable and he is intentionally unemployed. In respect of her income to be used in the spousal support calculations, she submits that her income should be the actual amounts she receives in disability benefits. She ultimately submits that the respondent should be required to pay ongoing support at the high end of the SSAG range, which amount would be \$4,379 per month with an imputed annual income of \$120,000, or \$2,102 per month with an imputed annual income of \$80,000.
- [74] In summary, the respondent submits that spousal should be terminated because his decision to retire was reasonable, his pension income has been divided with the claimant and the standards of living of the parties are roughly equivalent. In the alternative, he submits that spousal support should be reduced. He says the claimant is capable of working and an income should be imputed to her on the grounds of intentional unemployment, on the basis that she has capital assets which she ought to be using to generate an income and to take into account the amount she received for her loss of future income settlement. He additionally submits that the claimant's application for retroactive support from January 1, 2018, is an impermissible attempt to re-argue matters determined by Gaul J.

Scope of Review

- [75] Before setting out the issues some comments are in order concerning the scope of this review. The claimant made extensive submissions in relation to whether the scope of the review was confined to the quantum of support or whether entitlement to support was also subject to review. In making these submissions, the claimant presumed that the respondent would argue that both entitlement and quantum were subject to review. However, in the course of submissions, the respondent admitted that the claimant's entitlement to support was not in issue. Accordingly, there is agreement between the parties that the review is

limited to quantum.

[76] There is also a concession from the claimant that, if the review is limited to quantum only, the claimant is not entitled to a retroactive adjustment of support from January 1, 2018. This concession is at para. 121 of her written submissions, as follows:

121. However, if the review is restricted to quantum only, then it would logically follow that the court can only consider ongoing support because the only issue to be reviewed is quantum based on the change arising from the event contemplated by the review order.

[77] I am in agreement with the parties that the review is limited to quantum.

[78] It is trite that a review hearing is different from a variation hearing in that the party seeking a review need not prove a material change in circumstances and the review is a hearing de novo: *Morck v. Morck*, 2013 BCCA 186 at paras. 16-17. However, a hearing de novo does not mean that all aspects of the original support order are to be revisited. To the contrary, the ambit of the review is determined by the order granting a right of review: *Leskun v. Leskun*, 2006 SCC 25 at paras. 36 and 39.

[79] The Gaul J. Order provided:

11. Each party has leave to have another review of spousal support upon the Respondent turning 60, or upon the Respondent's retirement, whichever occurs first.

[80] Although Gaul J. did not expressly state that the review was limited quantum or limited to the post-retirement period, such limitations are, in my view, implicit in the order he did make.

[81] Accordingly, I proceed on the basis that it is only the quantum of support that is being reviewed and that any adjustments are to be effective as of the respondent's date of retirement.

Issues

[82] The main issues to be decided are:

- a) Should income be imputed to the respondent and, if so, how much?
- b) Should income be imputed to the claimant and, if so, how much?
- c) What is the support payable, if any, on the incomes of the parties?

Analysis

Should income be imputed to the Respondent?

Submissions

- [83] The claimant submits that a payor spouse is not entitled to retire and have their support payments decreased merely because they qualify for a pension. She submits that retirement before 65 constitutes early retirement and that an income will always be imputed when the payor is able to work and earn income. The claimant therefore says an income should be imputed to the respondent commensurate with what he would have earned had he not retired. She says this amount is between \$80,000 and \$120,000.
- [84] The respondent submits that a payor spouse who qualifies for a full pension is entitled to retire and to an adjustment in, or termination of, support, regardless of their age and regardless of whether they are able to continue working. He therefore submits that no income should be imputed to him.

Legal Principles

Income Imputation

- [85] Imputation of income is addressed in s. 19(1) of the Federal Child Support Guidelines, SOR/97-175 [Guidelines], which sets out a non-exhaustive list of circumstances where a court may impute income. The relevant section is 19(1)(a) which provides:

19 (1) The court may impute such amount of income to a spouse as it considers appropriate in the circumstances, which circumstances include the following:

- (a) the spouse is intentionally under-employed or unemployed, other than where the under-employment or unemployment is required by the needs of a child of the marriage or any child under the age of majority or by the reasonable educational or health needs of the spouse;
- [86] The general test for imputing income on the grounds of unemployment or underemployment is one of reasonableness, as set out in *Marquez v. Zapiola*, 2013 BCCA 433 at paras. 36-38 [Marquez]:
- [36] For the purposes of both child and spousal support, there is a broad judicial discretion to impute income to either or both spouses. However, the party seeking to have income imputed to the other spouse has the burden of establishing an evidentiary basis for such a finding.
- [37] The test for imputing income for intentional under-employment or unemployment is one of reasonableness, having regard to the parties' capacity to earn income in light of their age, education, health, work history and work availability. A spouse's capacity to earn income will include that person's ability to work or to be trained to work. See *Van Gool v. Van Gool* (1998), 1998 CanLII 5650 (BC CA), 113 B.C.A.C. 200, 44 R.F.L. (4th) 314 at paras. 28-31, *Barker v. Barker*, 2005 BCCA 177, 45 B.C.L.R. (4th) 43 at para. 19, and *McCaffrey v. Paleolog*, 2011 BCCA 378, 24 B.C.L.R. (5th) 62 at para. 46.

- [38] Although the legal foundation for awarding spousal support is different from that of child support (see *Kerr v. Baranow*, 2011 SCC 10, [2011] 1 S.C.R. 269 at para. 208), the test for imputing income for the purpose of fixing the quantum of support is similar. Again, the test is one of reasonableness, having regard to the same factors to be considered in imputing income for child support.
- [Emphasis added.]
- [87] In *Windle v. Windle*, 2010 BCSC 18, Justice MacKenzie wrote, relying on previous authority, that "bad faith" was not an element of the test.
- [86] Under s. 19(1)(a) of the Guidelines, the court will consider not only the amount of income a spouse actually earns, but also the amount of income a spouse could earn if working to capacity. A payor spouse is expected to take reasonable steps to obtain employment commensurate with factors such as age, health, education, skills, and work history. There is no requirement of bad faith: *V. (J.A.) v. V. (M.C.)* (1998), 1998 CanLII 5650 (BC CA), 59 B.C.L.R. (3d) 395 at para. 31 (C.A.); *Hanson v. Hanson*, 1999 CanLII 6307 (BC SC), [1999] B.C.J. No. 2532 at paras. 10-13 (S.C.). The parent required to pay is intentionally under-employed if that parent chooses to earn less than he or she is capable of earning. [Emphasis added.]
- [88] In *R.T.C. v. N.M.C.*, 2021 BCSC 2273 [R.T.C.], Justice Majawa similarly stated that an improper motive was not a part of the test.
- [134] The party seeking to have income imputed to their former spouse bears the onus of showing, on a balance of probabilities, that their former spouse is intentionally under-employed: *Windle v. Windle*, 2010 BCSC 18 at para. 88. A spouse is intentionally under-employed when they choose to earn less than what they are capable of earning: *Barker v. Barker*, 2005 BCCA 177 at paras.18-19. Section 19(1)(a) does not apply where, through no fault or act of their own, the spouse is terminated from their employment or given reduced hours: *Drygala* at para. 28. In British Columbia it is not necessary for a party alleging under-employment to show that their former spouse is under-employed with the intent of avoiding support obligations: *Barker* at paras.18-19. [Emphasis added.]
- [89] It is important to note that *Marquez*, *Windle* and *R.T.C.*, all address the general test for imputation of income. They did not specifically concern the retirement of a payor spouse, an issue to which I now turn.
- [90] As I have indicated, the parties make dramatically different submissions concerning the applicable legal principles when a payor spouse retires. The respondent submits that no income should be imputed to a payor spouse who qualifies for a full pension, regardless of their age or their capability to continue working. In contrast, the claimant submits that a payor spouse is not entitled to retire and have their support payments decreased merely because they qualify for a pension. She submits an income can and should be imputed if the retiring spouse is capable of earning employment income.

[91] The SSAG briefly addresses retirement and support. Section 7.5.2 of the SSAG addresses the meaning of indefinite support noting that indefinite support does not mean permanent support and further noting that indefinite support will often mean support is significantly modified or comes to an end on retirement.

In practice, however, most orders for indefinite support after long marriages will be significantly modified, if not eliminated, after the retirement of the payor and the receipt of pension income by the payor and the recipient. "Indefinite" often means "until the payor reaches 65".

[92] Similarly, s. 7.5.3 of the SSAG provides:

In reality, given the ages of the parties in the cases covered by the rule of 65, there will likely be significant changes in the amount of support ordered upon the retirement of one or both of the spouses.

[93] It is to be noted that, although s. 7.5.2 of the SSAG states the end date of indefinite support will "often" be when the payor reaches the age of 65, s. 7.5.3 does not qualify the word retirement with a requirement that the payor have reached the age of 65.

[94] The Spousal Support Advisory Guidelines: The Revised User's Guide notes, at p. 101, that the courts are not always clear on what constitutes "early retirement" but nevertheless states that retirement before 65 is early retirement, in the absence of health issues or other circumstances.

When the payor retires "early" and seeks a reduction in spousal support, there will be close scrutiny of the decision to retire. When will a retirement be described as "early"? The courts are not always clear. For our purposes, an "early" retirement is either a retirement on a reduced pension or a retirement on a full or unreduced pension before 65 years of age, in the absence of health issues or other special circumstances. If the court sees the early retirement as "voluntary" and not necessary or reasonable, then it is likely that spousal support will not be changed

[95] The respondent refers me to and relies heavily upon *Ross v. Ross* (1994), 94 B.C.L.R. (2d) 206, 1994 CanLII 1322 (BCCA). This case concerned a traditional marriage of 47 years. Upon the divorce of the parties, the husband's pensions were divided equally and the husband was ordered to pay \$800 per month in maintenance. Several years later, the husband retired at age 70. Both parties sought a variation of the maintenance award. At paras. 15-16, Lambert J.A. wrote:

15 The fundamental question in this case is whether the fact that Mr. Ross is still capable of working at age 71 is a circumstance that should cause this Court to order that he pay maintenance to Mrs. Ross in a situation where if he does not work their incomes from pensions are equal and she has significantly more in capital assets than he does. As a part of that question and one of its aspects there is a concern about whether the answer to the question is affected by the fact that Mrs. Ross has bought a condominium to provide a secure and comfortable home and needs funds to meet her mortgage commitments.

16 In my opinion, the law does not require Mr. Ross to continue to work after age 71 in order to permit Mrs. Ross to retain her condominium. Mr. Ross may well have a continuing capacity to work at age 71 but neither sub-section 61(2) nor 62(1) of the Family Relations Act requires this Court to make an order that would compel him to work by requiring him to pay maintenance to the point that he could not survive on his income without working.

[96] Although Ross was decided under the Family Relations Act and did not consider the SSAG, it apparently remains good law. In *Powell v. Levesque*, 2014 BCCA 33 [Powell], Justice D. Smith writing for the Court of Appeal, cited Ross with approval and further held that the retirement of the payor spouse was a material change in circumstances.

[33] In *Ross v. Ross* (1994), 1994 CanLII 1322 (BC CA), 7 R.F.L. (4th) 146 (B.C.C.A.), this Court held (at para. 15) that the law does not require payor spouses to maintain spousal support at a level that forces them to continue to work after becoming eligible for full retirement benefits. The appellant in this case, although only 44 years of age at the time of her retirement, could not be compelled to remain at that employment after she had completed her 25 years of service in order to maintain her spousal support obligation under the Consent Order. Moreover, the appellant's increasing physical limitations arising from her knee condition, which the judge acknowledged "no doubt made some aspects of her military employment quite uncomfortable" (para. 28), clearly influenced her decision to retire despite her attempt to continue with her military employment for an additional year after she had completed her obligatory service.

[34] The evidence did not support the judge's finding that the appellant took early retirement. Nor was there any evidence that the appellant chose to retire in order to avoid her support obligation or any of her other financial commitments under the Consent Order, all of which she had met. In my view, her retirement was a material change in circumstances as the primary source of her income changed from employment to pension and her level of income decreased significantly thereafter.

[Emphasis added.]

[97] At para. 37 of Powell, Smith J.A. further held that the decision to retire was reasonable.

[37] In summary, the appellant's decision to retire after 26 years, having completed 25 years of service in the CAF, and in the face of increasing health issues, was not in my view unreasonable. This resulted in a decrease in her level of employment income of \$43,000 and in her total income (after her pension benefit had been divided with the respondent) of \$14,000. There was no evidence to support a finding that she had a greater earning capacity than what she was able to earn at Tim Hortons. In my view, the appellant met the threshold test of a material change in circumstances for variation of the spousal support provisions of the Consent Order.

- [98] Powell is also noteworthy in that the payor spouse was 44 years of age and entitled to full retirement benefits. The fact that the payor retired before 65 was not of significance. However, a distinguishing feature of Powell is that the payor spouse also had medical issues which contributed to the decision to retire.
- [99] In *Rochon v. Rochon*, 2018 BCSC 1899, at para. 94, Justice DeWitt-Van Oosten, as she then was, also cited Ross with approval, although the context involved the reasonableness of a decision to sell an asset.
- [294] Although not precisely within the same context, I consider the principle adopted in *Ross v. Ross*, 1994 CanLII 1322 (BC CA), 94 B.C.L.R. (2d) 206 (C.A.), as affirmed in *Powell v. Levesque*, 2014 BCCA 33, to be apposite. A person who has made a reasonable decision to retire, due to health reasons or otherwise, should not be forced to pursue work and/or a continued business endeavour for the sole purpose of ensuring that his or her spouse is financially supported. [Emphasis added.]
- [100] In *McCallum v. McCallum*, 2015 BCSC 837, Justice G.P. Weatherill relied on Ross for the proposition that there is no law dictating when a spouse may retire. He further held it is only when the spouse is acting in bad faith that the court should look behind the decision to retire.
- [41] There is no law dictating when a payor spouse may retire. In *Ross v. Ross* (1994), 1994 CanLII 1322 (BC CA), 94 B.C.L.R. (2d) 206 (C.A.), the issue was whether a 71-year-old who was capable of continuing to work should be required to keep working or should he be allowed to retire, forcing his wife to sell her condominium. The court held that the legislation did not "require" the court to make an order compelling him to work or require a support order effectively compelling him to work.
- [42] Generally speaking, it is only when a spouse is acting in bad faith in order to frustrate the right of a former spouse to support that the Court should look behind the decision to retire (*Lemoine v. Lemoine* (1997), 1997 CanLII 9522 (NB CA), 185 N.B.R. (2d) 173 (C.A.); *Vennels v. Vennels* (1993), 1993 CanLII 446 (BC SC), 45 R.F.L. (3d) 165 (B.C.S.C.)). [Emphasis added.]
- [101] In contrast to Ross and the decisions that rely on it, the claimant refers me to a series of cases and authorities that she submits stand for the proposition that an income will almost always be imputed to a payor spouse who retires before age 65 without good reason, regardless of whether the decision to retire was reasonable. The cases and authorities relied on by the claimant are: *Szczerbaniwicz v. Szczerbaniwicz*, 2010 BCSC 421; *Ashton v. Ashton*, 2015 BCSC 790; *Hague v. Hague*, 2021 BCSC 771; *Harper v. Harper*, 2021 BCSC 758; and an article by Prof. Rolley Thompson.
- [102] In *Szczerbaniwicz*, Justice Punnett was called upon to decide whether an income should be imputed to the defendant who retired at the age of 51. He summarized the applicable law as follows:

[26] Therefore, if the court finds that a party's retirement was motivated by the desire to avoid a maintenance obligation, it will most likely impute income. Even if the party's motivation was not to avoid maintenance, the court will likely impute income so long as the party has the ability to earn an income.

[27] If the retirement is not voluntary because of economic circumstances, medical reasons, or an employer's actions and the payor is unable to work, the court will tend to reduce the maintenance payable; otherwise, if the payor is still capable of earning an income, his application to terminate or vary spousal support will likely fail: *Bentley v. Bentley*, 2009 CanLII 3779 (Ont. S.C.J.); *Bullock v. Bullock*, 2007 BCSC 318, 36 R.F.L. (6th) 150 at para. 7.

[Emphasis added.]

[103] At para. 30, Punnett J. ultimately concluded as follows:

[30] I have no hesitation in finding that the defendant's reasons for taking early retirement do not relieve him of his obligation to pay spousal maintenance. His decision to retire was purely personal. It is of note that he retired shortly after he ceased paying spousal support and the plaintiff's counsel initiated an application to have his pay garnished. Given his history of failing to meet his maintenance obligation, the supposed reasons for his early retirement and the timing of his retirement, I infer that, in part, his motivation was to avoid his court-ordered (and I note consented to) obligation to his wife.

[Emphasis added.]

[104] In *Ashton*, Justice Jenkins imputed an income to a payor spouse who retired at age 55. The claimant submits the circumstances in *Ashton* closely parallel the circumstances before me. I do not agree. In my view, *Ashton* is more consistent with the proposition proposed by the respondent. This is apparent from para. 52, where Jenkins J. expressly referred to *Ross*, and from para. 54, where Jenkins J. found the payor spouse was acting in bad faith.

[52] Counsel referred me to a decision of my brother judge Punnett in *Szczerbaniwicz v. Szczerbaniwicz*, 2010 BCSC 421, as authority for the position that if a party's retirement is motivated by a desire to avoid support obligations and the party still has an ability to earn income, the court will carefully consider the individual circumstances of the case and may impute income to the payor spouse. Though the FLA does not require the court to make an order that would compel a party to work to pay maintenance (*Ross v. Ross* (1994), 1994 CanLII 1322 (BC CA), 94 B.C.L.R. (2d) 206), it is only when a spouse is acting in bad faith in order to frustrate the right of a former spouse to support that the Court should look behind the decision to retire (*Vennels v. Vennels* (1993), 1993 CanLII 446 (BC SC), 45 R.F.L. (3d) 165 (B.C.S.C.)). [Emphasis added.]

[54] Mr. Ashton's retirement was without notice to the respondent and also occurred shortly after he received the respondent's notice of application, at a time when he knew his ability to rely on para. 11.6(d) of the Agreement could be in jeopardy. I infer from this and the above evidence that Mr. Ashton's decision to retire was most likely not motivated by his allegations of injuries and disability but more likely a desire on his part to avoid the continued payment of spousal support.

[Emphasis added.]

[105] The claimant relies on Hague as establishing that retirement before 65 is early retirement. In Hague, Justice Baird endorsed the statement from the SSAG that an early retirement is one that occurs before the age of 65 but, his endorsement was obiter dicta as the payor spouse was over 65 when he retired. Justice Baird held he was entitled to retire after working for 45 years and qualifying for a full pension even though he was not ill or disabled.

[8] There is no denying that the respondent's decision to retire was voluntary. He could have kept working. He was not ill or disabled. He was not dismissed or laid off. But it was not an early retirement, a question addressed in Spousal Support Advisory Guidelines: The Revised User's Guide (Canada, Department of Justice: April 2016) at p. 101 as follows:

When will a retirement be described as "early"? The courts are not always clear. For our purposes, an "early" retirement is either a retirement on a reduced pension or a retirement on a full or unreduced pension before 65 years of age, in the absence of health issues or other special circumstances. If the court sees the early retirement as "voluntary" and not necessary or reasonable, then it is likely that spousal support will not be changed.

[9] I endorse these remarks. The present respondent was over 65 when he retired. He had worked for 45 years. His pension was fully vested and payable. Many people retire at this stage of life. The claimant herself seems to have permanently left the workforce. In my view it was reasonable for the respondent to do the same thing. There is no evidence that his decision was motivated by a desire to stop paying support to the claimant. I have no reason to think that he will return to work if I grant the order.

[106] In Harper, Justice Baker held that a payor spouse who retired on a full pension at age 55 had not taken early retirement but she nevertheless imputed an income to him because he was healthy and able to work. At para. 15, she wrote:

[15] In the case before me, Mr. Harper has retired as permitted under his employment, and will receive his full unreduced pension. Consistent with the law as set out in Powell, I am satisfied that Mr. Harper has not taken early retirement and his decision to retire was reasonable. However, unlike the payor in Powell, Mr. Harper is in good health and has not indicated that he intends to continue working in some other capacity. As found by the court in McPherson v. McPherson, 2019 BCSC 933, "[e]ntitlement to a full pension is but one factor to consider in evaluating the overall reasonableness of an individual's decision to retire from

the workforce. It is not determinative on its own."

[107] The claimant finally relies on Prof. Rollie Thompson's article *Slackers, Shirkers, and Career-Changers: Imputing Income for Under/Unemployment*, where the learned Professor writes, at p.11:

In line with the change of employment cases, a surprisingly strict approach emerges from these [retirement] cases: even if a payor's early retirement is reasonable, the payor has a duty to take full-time (or maybe substantial part-time) employment after retirement, subject to any ongoing health problems.

[108] As is apparent from the foregoing review of the authorities, there is some uncertainty as to the legal principles to be applied when a payor spouse who is capable of earning income retires on a full pension before reaching the age of 65. Ross and Powell suggest that no income should be imputed to the payor spouse in these circumstances, especially where there has been a division of the pension. Similarly, McCallum and Ashton suggest no income can be imputed unless the decision to retire was motivated by bad faith or merely to avoid paying support. Hague also supports this proposition, albeit in respect of a retirement after age 65. In contrast, Szczerbaniwicz and Harper suggest an income can and should be imputed even where the decision to retire before age 65 is otherwise reasonable. (Although, given the retirement of the payor spouse in Szczerbaniwicz was motivated in part by bad faith, it arguably does not stand for this proposition.)

[109] I am required by the doctrine of stare decisis to follow decisions made by the Court of Appeal. Ross and Powell are decisions of the Court of Appeal. I have not been referred to any other appellate authorities that expressly or impliedly overrule them. Accordingly, I consider that I am bound by Ross and Powell not by Szczerbaniwicz or Harper, which did not even refer to Ross and are inconsistent with McCallum and Ashton.

[110] Therefore, in my view, the principles to be applied are:

- a) The test for imputing income for intentional unemployment or underemployment is one of reasonableness;
- b) Retirement before the age of 65 is not necessarily "early retirement" (Powell);
- c) Additional income should not be imputed to a spouse who retires prior to the age of 65 where the decision to retire is reasonable (Powell);
- d) A decision to retire upon being eligible for a full pension can be considered reasonable (Ross and Powell). This is especially so where the payor's pension has been divided with the payee spouse, the parties' incomes from pensions are equal and the payee spouse has more assets than the payor spouse (Ross);
- e) A decision to retire motivated by bad faith or to avoid paying support is not reasonable (McCallum, Szczerbaniwicz, and Ashton); and

- f) Where a payor spouse has made a reasonable decision to retire, they should not be forced to continue to work solely to support the payee spouse (Rochon). In particular, contrary to what is set out in Harper, and to a lesser extent Szczerbaniwicz, it is not open to me to impute an income where the decision to retire is reasonable, regardless of whether the retired payor spouse is capable of earning additional income.

Discussion

- [111] I have set out above my findings of fact in relation to the respondent's retirement. I have found that the sole reason for the respondent's retirement was because he turned 60 and that he did not retire to avoid making support payments. It follows from these findings that the respondent's decision to retire was not motivated by bad faith.
- [112] Further, in my view, the respondent's decision to retire was reasonable and no additional income should be imputed to him. The factors that lead me to this conclusion are:
- a) The parties contemplated that the respondent would retire before the age of 65;
 - b) The respondent has worked full-time for over 40 years and accumulated two pensions during that period;
 - c) The respondent's pensions have been shared with the claimant. She received a total of \$237,000 from his pensions which she has deposited into LIRA accounts. Those accounts apparently now contain only approximately \$197,000, a discrepancy which has not been explained by the claimant; and
 - d) The claimant is in a better financial position than the respondent. In addition to her two LIRA accounts, she has equity in the Hillview property of approximately \$667,000. In contrast, the respondent has assets worth approximately \$26,000. The debt positions of the parties are not dramatically different. The claimant has unsecured debts of approximately \$85,000 and the respondent has unsecured debts of approximately \$46,000. Overall, but disregarding the parties' pensions and LIRAs, the claimant is in a significantly better position than the respondent. She has unencumbered assets of approximately \$580,000, whereas the respondent's debts exceed his assets.
- [113] I have not neglected the fact that the respondent has re-partnered and probably enjoys a standard of living that exceeds the standard of living enjoyed by the claimant. However, that is due to the financial circumstances of his new partner. Importantly, the claimant appears to have the same standard of living that she enjoyed during the relationship. Although she deposes to living in abject poverty, I have not accepted her evidence of this. She lives in the same house as she did during the relationship and her expenses are subsidized by her two children who live with her.

[114] Overall, the circumstances before me are not dissimilar from those before the Court of Appeal in Ross. The respondent's pension has been divided with the claimant, the claimant has more assets than the respondent and, as will be seen, their post-retirement incomes are, at the least, comparable when an account is taken of the claimant's loss of future income settlement.

[115] Accordingly, I find that the respondent's decision to retire was reasonable and additional income should not be imputed to him.

Should income be imputed to the Claimant?

[116] The respondent submits that an income should be imputed to the claimant on various grounds, namely: that she has some residual capacity to earn employment income; that she received an amount for future loss of income that must be imputed; and that she has two LIRAs upon which she can draw. The respondent stops short of specifying a particular amount that should be imputed to the claimant but says it is at least roughly equivalent to his pension income.

[117] The claimant submits that no income should be imputed to her. She denies she has any ability to work. She says that the award she received on account of future loss of income ought not to be considered and, in any event, has been spent. She further submits that her LIRAs should not be used to impute income to her on the grounds that drawing down the LIRAs would jeopardize her long-term financial stability and because the respondent has failed to lead the necessary evidence to determine what income could be imputed from the LIRAs.

Disability

[118] The evidence before me establishes that the claimant was 60 years of age as of the last date of the hearing before me. She is now 61. Her age has not been and is not alleged to be an impediment to her working.

[119] The claimant has a history of working and employment skills. She was gainfully employed up to the date of her accident and was employed after the accident from August 2012 to February 2013 and from January to March 2014.

[120] There is nothing in the evidence suggesting that there is a lack of available work for the claimant.

[121] The only reason given for the claimant not working is her alleged disability due to the injuries suffered in the 2012 motor vehicle accident.

- [122] The claimant deposes to being unable to work because of injuries to her neck and spine, chronic pain, breathing difficulties, migraines and episodic numbness. She supports her alleged inability to work with a functional capacity evaluation report and a vocational assessment report that were prepared in 2016 for her personal injury action and with a report and a letter from her doctor, Rachel McKenzie, dated July 17, 2018 and February 24, 2022, respectively.
- [123] I do not consider that either the functional capacity evaluation or the vocational assessment are deserving of much weight, given that they were prepared in 2016, seven years ago. In any event, they are somewhat contradictory. The functional capacity expert opined that the claimant was competitively unemployable whereas the vocational assessment expert opined that she was marginally employable in clerical work on a part-time basis.
- [124] The report of Dr. McKenzie dated July 17, 2018, is a Service Canada Medical Report form that is handwritten. The diagnosis is "cervical spine - spinal stenosis". It is noted that the claimant has "slowed gait", pain in the neck and arms and reduced range of movement in the neck. The prognosis of the main medical condition is "will progress".
- [125] I consider Dr. McKenzie's July 17, 2018, report to be of little relevance. It was prepared five years ago and provides minimal information. Additionally, the prognosis then was that the claimant "will progress". In other words, it does not establish a current total disability.
- [126] The letter from Dr. McKenzie dated February 24, 2022, is more recent. It provides:
- Debbie is my patient and she has a history of chronic pain which I am continuing to treat her for and which I consider to be permanent that combined with her physical limitations continue to prevent her from being able to work.
- [127] The only other corroborating evidence relating to the claimant's inability to work is the fact that she has not worked since the accident, except for short periods, and she is in receipt of disability benefits.
- [128] In my view, the various reports and letters relied on by the claimant do not establish that she is currently disabled and completely unable to work. With the exception of Dr. McKenzie's letter dated February 24, 2022, the reports are dated and, in any event do not collectively establish a complete inability to work. As indicated, the vocational assessment report suggested she was marginally employable on a part-time basis and Dr. McKenzie's report dated July 17, 2018 suggested she would improve. The only reasonably current evidence is Dr. McKenzie's letter dated February 24, 2022. Strictly speaking, this letter is expert opinion evidence and not admissible given its noncompliance with the Rules. Putting aside the inadmissibility of the letter, it is a bald statement of opinion unsupported by any facts.

- [129] On the basis of the evidence that has been proffered, I am not satisfied that the claimant is completely disabled from working. I find that she has some capacity to work, at least on a part-time basis. It follows that an income should be imputed to the claimant.
- [130] Concerning the amount of income to be imputed, in my view the amount to impute to address the claimant's income earning ability is \$11,000 per year. This represents one-third of what she would earn if she was employed at a minimum-wage job.

Loss of Future Earnings

- [131] There is no doubt that the portion of the settlement funds received by the claimant in respect of her motor vehicle accidents was in respect of loss of future earnings and must be imputed to her. The claimant has accepted as much in her written reply submissions. Where the parties disagree is on the amount that should be imputed. The respondent says it should be \$10,000 per year whereas the claimant says it should be \$5,600 per year. Neither amount is correct. The respondent's calculation mistakenly used the past loss of income award and the claimant's calculation applied the wrong period.
- [132] The amount settled upon for loss of future earnings was \$178,000. This amount was calculated based on the claimant's anticipated earnings up to age 65. Although the claimant says the award covered 15 years, this is not correct. The award for loss of future earnings covered the period from the date of the settlement (2017) to the date the claimant would turn 65 (December 23, 2027). This is 10 years, not 15. Accordingly, the amount settled upon, ignoring discounting, was \$17,800 per year.
- [133] The claimant submits that only 50% of the settlement should be imputed because she, in fact, received only 50%. She says that the balance was used to pay legal fees, applicable taxes, disbursements, and interest. Although I do not necessarily agree with the claimant's submission, I proceed on the basis that \$9,000 per year should be imputed to the claimant. However, this amount must be grossed up as it was not taxed. The gross-up amount, using a tax rate of 20%, would be \$11,000.

LIRAs

- [134] It is undisputed that the claimant has two LIRA accounts into which her shares of the respondent's pensions were deposited. As I have indicated, the amount deposited was \$237,000 but the accounts now contain only approximately \$197,000, for reasons not explained.
- [135] Although the claimant has deposed the funds in the LIRA accounts are locked in and cannot be withdrawn until she turns 65, in submissions the only reasons given for not imputing an income to her in respect of these LIRA accounts is that withdrawals would jeopardize her long-term financial stability and that the amount to be imputed has not been proven.

[136] In Harper at para 42, Baker J. addressed a similar issue and held that income could be imputed. She wrote:

[42] In the case before me, the facts are more stark than in Boston. Both parties have in their own names the identical pensions that each of them contributed to during the marriage. I am satisfied that the income available to Ms. Farrington from the two municipal pensions must be taken into account in determining Ms. Farrington's guideline income. She is not required to take the income from those pensions now, if she prefers to allow them to build until she reaches age 60. However, the income she is entitled to receive now will be imputed as income for the purposes of determining her guideline income.

[Emphasis added.]

[137] The claimant, in her submissions, implicitly acknowledges that she can withdraw funds from her LIRA accounts. She is in the same position as Ms. Farrington in Harper. She may elect to keep all of the funds in the LIRAs but income can be imputed to her for the amounts she is entitled to withdraw. Regrettably, I do not have the evidence before me to determine what that amount is. However, as I address immediately below, it is not necessary to determine the amount as the claimant's income for support purposes exceeds the respondent's even without including an imputed income from the LIRA accounts.

What is the support payable, if any, on the incomes of the parties?

[138] The quantum of any support payable is dependent on the incomes of the parties, including any imputed income.

[139] The claimant's income as reported on her tax returns was approximately \$17,000 in each of 2021 and 2022 and was comprised of CPP and PWD disability benefits. When the amounts of imputed income are added to this, her income for support purposes is at least \$39,000 (17,000 [actual income] + 11,000 [part-time work] + 11,000 [future loss of income award]). The amount would be larger if more than one-half of her loss of future earnings settlement is used in the calculation.

[140] Given my conclusion that no income is to be imputed to the respondent, his income for support purposes is to be calculated solely on the basis of his pension income, which is approximately \$34,200 (\$18,200 of which is PPI pension income and \$16,000 of which is Federal pension income). However, because his pensions have already been divided with the claimant, this amount must be reduced to prevent double dipping: *Boston v. Boston*, 2001 SCC 43 at para. 64. The amount of the reduction is significant. The PPI pension was divided roughly 44% to the claimant and 56% to the respondent meaning, only 6% of that pension was not divided. Accordingly, to prevent double dipping, only approximately \$1,100 of the respondent's PPI pension income can be used as income for support. Ignoring any double dipping in respect of the Federal pension income, this means the respondent's income for support is only approximately \$17,100. (\$16,000 + \$1,100).

- [141] It is absolutely clear that the claimant's income for support purposes exceeds the respondent's income for support purposes. Her income, including imputed income, is at least \$39,000 whereas the respondent's income, ignoring any double dipping, is less than \$34,000. Even if the income imputed to the claimant is completely ignored, her actual income of \$17,000 is more than the respondent's income, when account is taken of the pension division and double dipping.
- [142] Given the claimant's income exceeds the respondent's income for support, no support is payable by the respondent to the claimant as of April 2021, the date of his retirement.

Orders

- [143] Accordingly, the obligation of the respondent to pay spousal support to the claimant pursuant to the order of Gaul J. dated September 22, 2017, ceased as of April 14, 2021.
- [144] To the extent that the respondent has made support payments to the claimant subsequent to April 14, 2021, those amounts shall be repaid to the respondent by the claimant.
- [145] Any arrears of spousal support accumulated after April 14, 2021 are cancelled.
- [146] The parties have leave to appear before me to address costs, if necessary.

"Giaschi J."

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/24/04/2024BCSC0457.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/yarmie-v-yarmie-2024>

Prepared on 26 October 2026 · Esheria