IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Asselin v. Roy,*
2013 BCSC 1681

Date: 20130911
Docket: E111667
Registry: Vancouver

Between:

Marlene McMahon Asselin

Claimant

And

Robert Charles Hatheway Roy

Respondent

Before: The Honourable Mr. Justice Harvey

Reasons for Judgment

Counsel for the Claimant:	A. Thiele C. Eilers
Counsel for the Respondent:	M. Golden
Place and Date of Trial:	Vancouver, B.C. March 18-20, 22, 2013
Place and Date of Judgment:	Vancouver, B.C. September 11, 2013

Overview

[1] The focus of this matrimonial action is the division of the parties' assets. The parties never married. They commenced cohabitation in October of 1987 and separated in May 2011. They have one child of their relationship, Maria, who is 21. They began their action under the *Family Relations Act*, R.S.B.C. 1996, c 128 [*FRA*].

[2] On March 18, 2013, the *Family Law Act,* S.B.C. 2011, c. 25 [*Act*] came into force. At the commencement of the trial, the parties consented, to have their rights determined according to the provisions of the *Act* as is contemplated by s. 252.

[3] As many of the properties in issue are situated in Antigonish, Nova Scotia, the parties agreed that the court could make orders affecting the ownership of the Nova Scotia properties including orders for sale.

[4] The original pleadings asserted the claimant's entitlement to assets in the name of the respondent relying upon the doctrine of unjust enrichment. Those pleadings were never amended.

[5] The effect of the *Act*, insofar as it relates to the parties, is to modify the definition of "spouse" so as to include unmarried parties who have resided together for in excess of two years in a relationship akin to that of marriage. The *Act* removes the requirement on the claimant to demonstrate an entitlement to certain of the properties in issue premised upon trust principles.

[6] The respondent disputes the claimant's entitlement to a division of assets arguing such is precluded by a written Agreement between the parties dated December 20, 1990 (the "Agreement") which restricts the rights of each as against the property of the other.

[7] Each of the parties received inheritances during the relationship. Mr. Roy owned assets which he brought into the relationship. Depending on the enforceability of the Agreement, those factors, together with debt in the name of Mr. Roy will have to be considered.

[8] As well, there is a claim by Ms. Asselin for support for Maria who is enrolled full time in studies at Simon Fraser University.

[9] The following issues arise:

> (1) Is the Agreement binding on the parties and determinative of their property rights?
>
> (2) If the Agreement is set aside or varied, what is the family property, what are the excluded assets and what is the family debt?
>
> (3) Would the equal division of property and debt provided for under the Act be significantly unfair to either party?
>
> (4) What is the appropriate level of child support for Maria and when should it commence?

The Background

[10] The claimant is 63. She holds a PhD in language education and is currently employed as an associate professor of Language and Literacy Education at the University of British Columbia where she earns in excess of $120,000 annually. She is a member of a defined contribution pension through her employment, which she commenced in or about 1992.

[11] The respondent is 57. He has a Master's degree in Education. From approximately 1980 until May 2011, the date of separation, he was employed as a music teacher by the Vancouver School Board. He earned over $80,000 annually from that employment. He retired in May 2011 and currently receives pension benefits of $45,000 annually. Those benefits are at issue in these proceedings.

[12] The parties met at university in the summer of 1987; both were pursuing post graduate degrees. In October 1987, the parties began cohabiting in a marriage like relationship in the respondent's home located on Laurentian Avenue, Coquitlam, BC ("Laurentian").

[13] Both were married when they began cohabiting. The respondent was separated from his wife and the claimant had recently separated from her husband, Mr. Palmer, so as to begin residing with the respondent.

[14] The claimant had three children from her marriage to Mr. Palmer; Ami who was 13; Chana who was 10 and Ezra who was 9. Initially, all three of the claimant's children stayed in the care of Mr. Palmer. In the fall of 1988, the respondent's oldest child, Ami, began living with the parties at Laurentian. She resided with them for one year.

[15] When Ami returned to her father, in or about 1989, the two youngest children Chana and Ezra came to live with the parties.

[16] The respondent owned a number of assets when the claimant moved in with him, namely: equity in Laurentian; a property located at 1-76 St. Ninian, Antigonish, Nova Scotia; pensionable credits with the BC Teachers Federation; an RRSP; and some modest savings.

[17] The claimant owned nothing beyond personal effects when she moved into the Laurentian home. The respondent testified that he purchased Laurentian in 1980 for $115,000. He lived upstairs and rented the downstairs suite. He testified that the home was unencumbered at the time he began cohabiting with the claimant. No documents evidencing either the cost of the property or whether the home was encumbered were tendered. The claimant never challenged, through cross examination, the respondent's evidence as to ownership and value.

[18] The parties lived in the Laurentian home until its sale in 1991for a sale price, according to the respondent, of $175,000. Despite there being no documents offered in support of this assertion, the price wasn't challenged on cross examination.

[19] By the time of its sale, Chana and Ezra were living with the parties and Maria was 'on the way'. Their new "matrimonial" home at 313 Princeton Avenue, Port Moody, B.C. ("Princeton") was purchased solely in the name of the respondent using the sale proceeds of Laurentian as the down payment. The purchase price was

$289,000. The proceeds of Laurentian were used toward the purchase together with a mortgage for $135,000 taken solely in the name of the respondent.

[20] In 1991, the parties' daughter, Maria, was born.

[21] The claimant neither paid nor received child support after her separation from Mr. Palmer. Details of her income prior to obtaining her present employment are sketchy. She earned income from her position as a Teacher's Assistant while attending university in pursuit of her Ph. D. She also had financial assistance, from time to time, from her parents. In the main, however, the respondent was the provider in the early days. Once she obtained her PhD she began teaching at the university level. Currently, she earns in excess of $120,000 annually.

[22] Her earnings, together with gifts from her parents, were deposited into her own account and used, in the main, for the betterment of the family unit consisting, as it did from time to time, of the respondent, Maria and her two children.

[23] The claimant contributed significant amounts of both her income and gifts from her parents toward the improvement of the Princeton home. She detailed renovations and improvements to the residence which she estimated cost her in excess of $130,000. This, quite apart from contributions to the acquisition of furnishings and payments connected with the routine upkeep and maintenance of Princeton.

[24] According to the respondent, in 1998, respondent's mother died leaving him a bequest of approximately $150,000. No estate documents were tendered in evidence but, again, no serious challenge was made to this assertion during his cross examination.

[25] In addition, to his salary and violin business, the respondent invested in real estate. Throughout the 1980s and 1990s, he continued to make acquisitions of historical buildings and, in one instance, bare land. He considered Nova Scotia as a good place to make long term real estate investments.

[26] From the commencement of cohabitation, and for most of their life together, the parties maintained separate bank accounts. The respondent deposited his teacher's salary, together with any income generated from his part time business of selling violins into his personal account. From that account, he paid almost all of the operating expenses associated with Laurentian and later Princeton.

[27] From the acquisition of Princeton onward, the claimant made substantial direct contributions to their residence. She estimates her contribution, separate from expenses for day to day operational costs such as utilities, cable, and other household accounts, exceed $130,000.

[28] Save for one brief period of time, the parties didn't pool their incomes. However, after the respondent obtained employment at the university level in approximately 1992, the claimant made considerable financial contribution to the family unit; thereby lightening the load on the respondent and allowing him to devote his financial resources and his time to endeavours in Nova Scotia.

[29] The respondent questioned the costs said to have been expended by the claimant in making improvements to the home to some extent but acknowledged the work and improvements described by the claimant in her evidence were done at her expense.

[30] The parties resided together until May 2011. They separated following a criminal investigation launched against the respondent. Although charges were later dropped or stayed, he voluntarily retired from his position as a teacher as a result of the investigation. He has not worked since, other than tending to the investment properties and selling violins.

[31] Since the date of separation, the claimant has remained in occupation of Princeton. Originally Maria resided there with her but Maria has since taken up her own apartment closer to her school. Maria has just completed her third year of studies at Simon Fraser University. She receives financial assistance from the claimant in respect of her living expenses.

The 1990 Agreement

[32] According to both parties, the topic of a cohabitation agreement was raised early in the relationship. The respondent had recently separated from his wife and was, at the time he met the claimant, embroiled in family law proceedings wherein his then wife was seeking an interest in Laurentian. Their marriage was of short duration. With the assistance of his then legal counsel, Larry Nixon, he negotiated a settlement of his former wife's claims for approximately $10,000 to $15,000. The respondent testified he was unhappy about having to pay her anything in respect of an asset he owned prior to their marriage. Therefore, when he began cohabiting with the claimant, he sought an Agreement to prevent future financial obligations.

[33] The respondent initiated the topic early on and raised the matter periodically until the parties signed the Agreement in December 1990. The claimant showed no particular enthusiasm for the topic.

[34] The respondent said he was concerned that the claimant would make claims against his assets in the event their relationship broke down. From early on in the relationship, he made clear he wanted an agreement between them disentitling either of them from making a claim against the other for any relief arising from their relationship.

[35] The claimant acknowledged his concern and reassured the respondent that she had no such intention. Nonetheless, she expressed reluctance over signing an agreement. According to her testimony, the respondent persisted with the topic until she finally relented and signed the Agreement in 1990.

[36] There is mild disagreement over events leading to the execution of the Agreement. The respondent testified that he was given a copy of the proposed Agreement by Mr. Nixon in or about June 1989, so as to discuss its terms with the claimant. Thereafter, in his words, they 'argued' about the concept of a cohabitation agreement until its eventual execution by both of them in December 1990.

[37] The claimant acknowledges periodic discussions concerning an agreement. Such were always initiated by the respondent. She denies ever seeing the Agreement until the day she signed it at Mr. Nixon's office.

[38] The Agreement, once signed, remained in Mr. Nixon's office for a number of months and then was sent to the respondent. He never provided the claimant with a copy of it.

[39] He engaged Larry Nixon, his former lawyer and friend, to prepare the Agreement. There is no indication he told the claimant he'd done so prior to their arrival in his office in December 1990.

[40] Both parties agree the Agreement was signed by them in Mr. Nixon's office in December 1990. The claimant said she had never seen it before and had no forewarning that the purpose of dropping in on Mr. Nixon was to sign a cohabitation Agreement limiting the rights of both herself and the respondent in respect of property owned by the other. She, in fact, had no property at the time.

[41] By the time they met in Mr. Nixon's office, the parties were actively trying to have a child together. They had been residing together for over three years and two of the claimant's children had been living with the parties in excess of one year.

[42] Larry Nixon confirmed he prepared the Agreement at the request of the respondent but had little recollection of events leading to its signature. He testified it was his usual practice to prepare a draft agreement on the client's instructions and then provide it to the client with a view to the client providing it directly to the other spouse. He acknowledged that having done so, it would be improper to advise the other spouse on the agreement's legal import.

[43] It is conceded by the respondent that at no time prior to the execution of the Agreement did he provide a copy of the Agreement to the claimant. Instead, according their common testimony, they attended at the office of Mr. Nixon in December 1990 and met with him in respect of it.

[44] Mr. Nixon has no recollection of meeting the parties together or of witnessing, in any fashion, their execution of the Agreement. In fairness to him, he conceded to a catastrophic health incident in 2006, which left him with impaired memory and led to his withdrawal from his law practice that same year.

[45] Despite the absence of recollection as to specifics, Mr. Nixon conceded that it is his writing on the Agreement as to the date, December 20, 1990, the claimant's place of birth and spelling of the middle child's name. All alterations, I conclude, were made December 20, 1990, by Mr. Nixon. The parties signed the Agreement that day in his office as testified to by both of them. It was unwitnessed.

[46] After its execution, Mr. Nixon retained the original for a period of time, and then sent it to the respondent in July 1991.

[47] In its simplest terms, the Agreement provides that only property acquired in the joint names of the parties was to be the subject of division upon the breakdown of the relationship. It references the governing legislation in 1990, the *FRA*, and proceeded to have each party waive claims which may they might have against the other under the legislation including claims for spousal support and child support in respect of the claimant's three children.

[48] The Agreement precluded either from claiming an interest in property of the other based upon principles of trust law.

[49] The respondent says the purpose was to protect his existing assets, specifically Laurentian, 4 - 76 St. Ninian, his pension, and some small investments from any claim by the claimant for an interest therein. The 'other assets' referenced in the Agreement consisted of modest savings and a RRSP.

[50] The *quid pro quo,* he suggests, was the claimant's prospective inheritance was protected from claims by him. However, inheritances were not specifically referenced in the Agreement. Nonetheless, a reasonable reader would have concluded that all separately owned property was excluded from division whatever its origin.

[51] The claimant agreed in cross-examination that when she signed the Agreement in 1990, it was to reassure the respondent that she was not going to take from him what he accumulated prior to the parties getting together nor look to him for financial contribution to her children in the event they separated. She didn't suggest she couldn't understand its terms.

[52] The Agreement, once provided to the respondent by his counsel, was never discussed between the parties; except, according to the respondent, on one occasion, when the claimant referenced it when the parties argued about the cost of roof repairs and who was to pay for same.

[53] The Nova Scotia Properties

[54] Presently, the respondent owns five properties in Antigonish in his name alone, namely:

- 4 - 76 St. Ninian Street
- 98 St. Ninian Street
- Acreage on Highway 337
- 76 Brookland Street
- 9039 Highway 337

[55] The parties have a joint interest in 80 St. Ninian Street and 28 Bay Street.

[56] The respondent denies that the claimant has any interest in 4-76 St. Ninian or any of the remaining Nova Scotia properties based upon the Agreement signed by both in 1990. Both parties agreed that I might make orders against them dealing with the Nova Scotia properties, including orders for sale.

[57] Save for the property in joint names, the respondent says he alone has been responsible for the acquisition and preservation of the Nova Scotia real estate.

[58] The Nova Scotia properties were mainly rental units. They were overseen by a property manager living in Antigonish. He operated the properties as a proprietorship called Cornish Arms. The respondent spent many of his summers in Nova Scotia working on the properties and making improvements to them while the respondent, her children, and Maria stayed behind.

[59] 4-76 St. Ninian was purchased in 1981 for $75,000. The respondent couldn't recall the down payment but acknowledged the property was encumbered in 1987 when cohabitation began. Since its acquisition, it's been re-financed and the claimant co-signed the mortgage. The next acquisition was 98 St. Ninian St., Antigonish. He bought this in 1988 or 1989. He provided no precise details as to cost of the property or the source of the down payment. However, he acknowledged he put "a few thousand down."

[60] The next property acquired by the respondent was 76 Brookland Street, Antigonish. He paid $62,000 for it in December 1998 providing $4,000 down and the remainder by mortgage.

[61] In 1998, the respondent bought 50 acres of bare land on Highway 337 in Georgeville, Nova Scotia. He testified the source of funds was the inheritance from his mother but, once again, provided little by way of detail as to the purchase price and whether there was a mortgage on the property.

[62] The acreage is presently free and clear of any encumbrances. Its approximate value at trial was $350,000.

[63] The last property the respondent purchased in Nova Scotia, solely in his name is 337 Highway, Georgeville. This was acquired for $25,000 cash utilizing the respondent's salary and credit card proceeds cobbled together by the respondent when he learned the bank wouldn't extend credit on it.

[64] The respondent spent many summers in Nova Scotia, while the claimant and Maria remained in B.C., working on the Nova Scotia properties. On occasion, the claimant accompanied him to Nova Scotia but usually she did not.

[65] The parties jointly own two pieces of real estate, namely, 80 St. Ninian and 28 Bay Street, both in Antigonish.

[66] These jointly held properties were acquired after the claimant received a bequest of $700,000 from her late parents in or about 2006; from which, she says she contributed $154,000 to the purchase of 80 St. Ninian and $10,000 to the acquisition of Bay St. Both investments were made at the invitation of the respondent. The respondent testified he made a similar contribution to the down payment of 80 St. Ninian but failed to produce any documents evidencing the source of the funds.

[67] The respondent testified he put up similar sums for the two purchases but was vague on details as to the source of funds. No documents evidencing such a contribution were provided. 4- 76 St. Ninian was refinanced after the purchase of 80 St. Ninian so as to raise funds to complete renovations on the later. The claimant co-signed the mortgage as guarantor despite having no ownership position in that property.

[68] 80 St. Ninian was extensively upgraded and renovated after its acquisition. This required, according to the respondent, further borrowing by way of credit cards in his name. At the time of separation, he testified that he still owed over $60,000 to creditors in respect of those renovations. With the exception of records pertaining to his MBNA MasterCard, no records were provided substantiating such a claim.

[69] While none of the Nova Scotia properties have been formally appraised, the claimant obtained real estate assessments and realtor's comments so as to suggest the two jointly owned properties, 80 St. Ninian and 28 Bay Street, have little or no equity in them despite the substantial down payment made of 80 St. Ninian.

[70] Each of the Nova Scotia properties is encumbered by one or more mortgages. Both parties signed the mortgages on 80 St. Ninian and 28 Bay Street. The claimant also co-signed and/or guaranteed a further mortgage registered

against 76 St. Ninian, the proceeds of which were used for improvements at 80 St. Ninian.

[71] 76 St. Ninian, the property bearing the mortgage signed by each of the parties, but owned by the respondent, is similarly short of equity.

[72] The claimant worries that without a court ordered sale of all three properties to pay off the mortgages, she will be prejudiced by even a modest drop in property values. The debt will exceed the value and she will be jointly responsible for the shortfall.

Other Assets

[73] Both parties have other assets in their name alone. The respondent has financial investments totalling approximately $67,000 together with a violin collection of unknown value. He estimates their worth at $55,000, although they have not been appraised.

[74] The violin collection is in the nature of inventory for the respondent's side business of buying and selling musical instruments. Some of the stock, notably one violin said to have cost in excess of $20,000, was purchased using a credit card.

[75] The claimant has both registered and non-registered investments held at ScotiaMcLeod totalling in excess of $300,000 together with an RRSP of approximately $31,000. Both these investments arose from inheritances she received from her parents' estates.

[76] She also has accounts and RRSPs with TD Bank in excess of $31,000.

[77] Each has cars and items of personality including the contents of Princeton which remain in much the same state as they were at separation.

Inheritances

[78] Both parties testified that they received inheritances during the relationship. Neither provided documentation indicating the amount received or the date of receipt.

[79] The respondent testified he received $150,000 when his mother died in 1998**.** He testified that he used the inheritance to pay for the acreage in Nova Scotia and to pay off the balance owing on the mortgage on Princeton.

[80] Other than this testimony, nothing further was produced as to either the amount of the inheritance or the purpose to which it was put. He was not cross-examined on this topic. No documents evidencing how much of the mortgage was paid out from this inheritance. No documents were provided relating to the purchase of the Nova Scotia acreage.

[81] The claimant testified she received over $700,000 following the death of her parents in 2006. In addition to her testimony, I was referred to documents from ScotiaMcLeod evidencing a balance of $512,000 in account # 425 – 84593 as at March 2007 but no estate documents.

[82] Further, a number of withdrawals consistent with the spending pattern described by the claimant, post-inheritance, are submitted.

[83] The account number corresponds to the claimant's ScotiaMcLeod cash account. The document, found at tab 40 of Exhibit 1, also demonstrates contributions by Ms. Asselin, from the ScotiaMcLeod cash account, to her RRSP Tax Free Savings Account funds in the total amount of $25,561.80 from March 2007 to January 2011.

[84] Of the inherited funds: $154,000 was used to invest in 80 St. Ninian with the respondent; another $10,000 was put toward Bay Street. As well they were used to affect improvements on Princeton; fund travel and gifts to her children and to Maria;

and the remainder to create both registered and nonregistered accounts with ScotiaMcLeod.

[85] No documentation was produced in respect of the opening of the accounts with ScotiaMcLeod or of the estate documents evidencing the size of her bequest.

[86] The claimant wasn't cross examined on the scope of the inheritance she claims to have received or on the various purposes she stated it was put toward.

[87] The respondent argues that his mother's inheritance can be directly traced to the Nova Scotia properties. Specifically, he argues that his mother's inheritance was used to pay out the mortgage on Princeton in 1998 and, as such, a portion of Princeton is excluded to that extent. He makes the same argument in respect of the down payment, said to have come from his mother's inheritance, made on the 50 acres located on Highway 337, in Georgeville.

[88] The claimant says that both her registered and non-registered ScotiaMcLeod accounts are excluded property exempt from division under the *Act* and that her down payment to both 80 St. Ninian and Bay Street are excluded property.

Debt

[89] At separation, the respondent says, apart from debt secured by the Nova Scotia properties, he had unsecured debt, mostly in the form of credit card debt, totalling over $60,000. By trial, this had grown to over $80,000.

[90] The claimant didn't reference any debt she claims to be family debt save for those mortgages she signed on the three Nova Scotia properties; 4-76 St. Ninian, 80 St. Ninian and Bay Street.

[91] The claimant, in argument, challenges the respondent's submissions on the issue of debt, noting he had available to him approximately $60,000 of mortgage proceeds raised on the Nova Scotia properties shortly prior to the party separation.

[92] She points to his financial disclosure which can best be described as ‘scanty’ and argues that he should be disbelieved on matters relating to his debt where no underlying documentation has been produced.

[93] In response to this suggestion, the respondent says he “robbed Peter to pay Paul” as he financed the business of the apartments and the renovations to 80 St. Ninian. No documents, at least no meaningful documents, were produced in support of this contention.

Position of the Parties

[94] The claimant contests the validity of the Agreement or, if valid, argues its terms are significantly unfair and should be disregarded, in whole or in part. The respondent concedes the Agreement is unfair to the claimant as it relates to the matrimonial residence at 313 Princeton Avenue is concerned but submits it is otherwise valid and fair within the meaning of the *Act*.

[95] The claimant seeks an equal division of all of the real estate and personality, including pension entitlements. She also seeks an order that the residue of her inheritance, held in various investments and RRSPs, be excluded from a calculation of family property.

[96] The respondent suggests he retain two-thirds of the equity in Princeton. Otherwise, each party shall retain the assets in their name alone and the jointly owned property can be sold and the proceeds divided. In short, the respondent asks the court to follow the terms of the Agreement save for Princeton. Mr. Roy submits that, if the Agreement is set aside, then certain of the family property, notably Laurentian and 4- 76 St. Ninian, was owned by him prior to cohabitation and should be excluded from property division.

[97] The respondent argues the down payment for Princeton, acquired post-cohabitation but using the proceeds of Laurentian, is excluded property. He also argues that the proceeds of the inheritance he received from his mother are excluded property to the extent they can be traced to family property. The reduction

in the mortgage on Princeton in 1998 is, he claims, traceable back to the inheritance from his mother. Similarly, the down payment for the Nova Scotia acreage is traceable to the inheritance from his mother.

[98] The claimant seeks child support for Maria based upon the respondent's present income of $45,000. The claimant seeks an entitlement to a portion of the pension as family property.

Analysis

Family Law Act Election

[99] At the commencement of the trial, the parties elected to have the *Family Law Act* apply to the action. Section 252 (2) of the *Act* requires spouses to agree to have their trial under the *Act* if the proceeding began under the *FRA*.

[100] The parties also agreed that this court should assume jurisdiction over and make orders with respect to the Nova Scotia properties despite the fact the claimant initiated proceedings in Nova Scotia so as, she says, to protect her interests there.

[101] Under the *FRA*, the claimant wasn't a spouse for the purpose of property division. To prove an entitlement to any of the assets solely in the name of the respondent, the claimant would have had to prove an equitable entitlement based upon the principles of constructive or resulting trust.

[102] Under the *Act*, the parties are spouses as a result of their having resided together in a relationship akin to a marital relationship for a period in excess of two years; s. 3 (1) (b). As such, "Part V- Property Division" of the *Act* applies.

[103] The 'triggering event' is the date of separation, late May 2011. That is to say, on the separation date, the character of the assets is determined as either family property or excluded property.

[104] Future litigants referencing this decision would be well advised to avoid some of the problems encountered by the parties in this litigation by preparing a Scott

Schedule detailing the assets and liabilities of each party as of the date of separation.

[105] One of the apparent objectives of the *Act* is to create more certainty for litigants in the division of their assets. The broad judicial discretion formerly available under the *FRA* has been replaced with a more formulaic approach to both the identification and division of family property.

[106] To implement the objectives, more mathematical certainty from a clear evidentiary record is required. Where inheritances are said to come into play, estate documents should be produced. Where exclusion of property is sought, on whatever basis, documents showing the value of property as at the time cohabitation commenced and at the date of separation will be critical in the assessment which the court is to perform. Where one party suggests, as is the case here, that excluded property has changed character into another asset, documents should be provided to allow the court to trace the transaction back to the property said to be excluded.

[107] Here, because of the lateness of the parties' decision to proceed under the *Act*, this particular information has not been provided in respect of certain of the transactions; notably the tracing of equity from Laurentian into the purchase of Princeton and the pay down of the mortgage on Princeton from inherited funds.

[108] Further, Mr. Roy, until the commencement of the trial, principally argued that the Agreement precluded a detailed analysis of individual assets.

Is the Agreement binding on the parties and determinative of their property rights?

[109] The *Act* recognizes the rights of parties to enter agreements to govern the division of their property upon breakup of the relationships but provides for the setting aside or variation of agreements if they are unfairly constituted or if the result is significantly unfair having regard to certain enumerated factors within s. 93 of the *Act*.

[110] Ms. Asselin argues that the Agreement was both unfairly constituted and significantly unfair to her in its substance. In the result, she says it should be set aside or varied.

[111] The relevant provisions of the *Act* are as follows:

> Agreements respecting property division
>
> 92 Despite any provision of this Part but subject to section 93 *[setting aside agreements respecting property division]*, spouses may make agreements respecting the division of property and debt, including agreements to do one or more the following:
>
> > (a) divide family property or family debt, or both, and do so equally or unequally;
> >
> > (b) include as family property or family debt items of property or debt that would not otherwise be included;
> >
> > (c) exclude as family property or family debt items of property or debt that would otherwise be included;
> >
> > (d) value family property or family debt differently than it would be valued under section 87 *[valuing family property and family debt]*.
>
> Setting aside agreements respecting property division
>
> 93 (1) This section applies if spouses have a written Agreement respecting division of property and debt, with the signature of each spouse witnessed by at least one other person.
>
> (2) For the purposes of subsection (1), the same person may witness each signature.
>
> (3) On application by a spouse, the Supreme Court may set aside or replace with an order made under this Part all or part of an Agreement described in subsection (1) only if satisfied that one or more of the following circumstances existed when the parties entered into the agreement:
>
> > (a) a spouse failed to disclose significant property or debts, or other information relevant to the negotiation of the agreement;
> >
> > (b) a spouse took improper advantage of the other spouse's vulnerability, including the other spouse's ignorance, need or distress;
> >
> > (c) a spouse did not understand the nature or consequences of the agreement;
> >
> > (d) other circumstances that would, under the common law, cause all or part of a contract to be voidable.
>
> (4) The Supreme Court may decline to act under subsection (3) if, on consideration of all of the evidence, the Supreme Court would not replace the Agreement with an order that is substantially different from the terms set out in the agreement.

> (5) Despite subsection (3), the Supreme Court may set aside or replace with an order made under this Part all or part of an Agreement if satisfied that none of the circumstances described in that subsection existed when the parties entered into the Agreement but that the Agreement is significantly unfair on consideration of the following:
>
> (a) the length of time that has passed since the Agreement was made;
>
> (b) the intention of the spouses, in making the agreement, to achieve certainty;
>
> (c) the degree to which the spouses relied on the terms of the agreement.
>
> (6) Despite subsection (1), the Supreme Court may apply this section to an unwitnessed written Agreement if the court is satisfied it would be appropriate to do so in all of the circumstances.
>
> Orders respecting property division
>
> 94 (1) The Supreme Court may make an order under this Division on application by a spouse.
>
> (2) The Supreme Court may not make an order respecting the division of property and family debt that is the subject of an Agreement described in section 93 (1) unless all or part of the Agreement is set aside under that section.

[112] The Agreement sets out:

> Each party hereto covenants and agrees that the other party hereto may, at any time in the future, acquire assets in his, or her, own name and any such assets shall belong to him, or her, solely unless otherwise agreed to in writing by the other party hereto.

[113] Princeton is not listed in the schedule B of the respondent's assets as it was not owned by the respondent at the time of the Agreement. However, Princeton remains in respondent's name alone and would therefore be excluded property under the Agreement.

[114] The respondent concedes that, given the length of time that has passed since the Agreement was made, the Agreement with regard to Princeton is significantly unfair as contemplated by s. 93 (5) (a). However, he maintains the Agreement is otherwise fair, both as to its formation and operation, insofar as the remaining assets are concerned.

[115] The claimant, he says, understood the Agreement and willingly entered into it. He denies that he took improper advantage of her vulnerability or that he failed to disclose material financial information to the claimant.

[116] As to Princeton, he suggests the claimant receive a one third interest in the property, presumably to reflect the respondent's contribution of the Laurentian sales proceeds and use of a portion of his inheritance to pay off the mortgage. Princeton has an agreed value of approximately $900,000.

[117] The claimant says that the Agreement was unfairly constituted and, as such, should be set aside in entirety or, failing that, set aside in whole or in part, based upon a finding of significant unfairness.

[118] The Agreement is signed by each of the claimant and respondent but was not witnessed. Whether Mr. Nixon was present when the parties signed the Agreement is a matter of disagreement. He was certainly there at some point so as to make the insertions and alterations admitted to be in his handwriting.

[119] It is clear that the claimant didn't received legal advice as to Agreement's impact upon her rights. Nor did she receive disclosure as to the value of the respondent's real estate or as to what, if any, liabilities he had. There was a rudimentary description of his assets in the Agreement but nothing more.

[120] Ms. Asselin had never seen the Agreement prior to being asked to sign it. I accept that she read it over in a cursory fashion, as she described, and signed it not so much because she agreed to its content but so as to assuage the respondent. I also accept that she was able to understand the terms of the Agreement and recognize that it limited her future rights.

[121] After signing the Agreement, the claimant was never provided with a copy of it. Nor, seemingly, did the parties speak of it again in any meaningful fashion. I reject the respondent's suggestion that the claimant raised it when the topic of a new roof was discussed in 2004. He testified, to the effect, that she told him the roof was his

problem as the “house is yours”. Mr. Roy suggests such was an affirmation of the intent of the Agreement. I disagree.

[122] The remark, without anything further, is a simply a statement of fact as to the legal title to Princeton as at the time the claimant said it. It may have been rhetorical. It may have been said in anger. In any event, it doesn’t conjure up an affirmation of the Agreement as the respondent suggests.

[123] Despite the Agreement, the claimant spent considerable funds on updating and renovating Princeton; a property to which she had no entitlement under the terms of the Agreement. She estimates she spent in excess of $130,000 excluding purchases for furniture, routine maintenance, utilities and pet care. The respondent takes only minor issue with the description of what the claimant funded by way of upgrades.

The Legal Test under S. 93

[124] Seemingly, the proclamation and bringing into force of the *Act* heralds a new age for property division in the province of British Columbia. The tenor of the new *Act* appears to favour a less interventionist approach than its predecessor, the *FRA*.

[125] Section 93 contemplates a two-pronged inquiry as to the enforceability of an agreement. The first inquiry is directed at the formation of the agreement; the second stage, its effect.

[126] Even if the court determines the agreement was unfairly reached, there is still discretion to decline to set aside or vary the agreement if the result would not be substantially different from that which is contained in the agreement. s. 93(4)

[127] If an agreement was fairly reached, having regard the enumerated factors in s. 93 (3), the court must go on to consider whether the agreement is significantly unfair having regard to the enumerated criteria in s. 93(5).

[128] Judicial discretion has been modified, particularly as it relates to the assessment and enforceability of agreements. Under the previous legislation, a

finding of unfairness based on one of an enumerated factors in s. 65(1) was sufficient to allow the court to, in effect, rewrite the parties' Agreement to achieve the fairness found lacking in the original version.

[129] Critics of the legislation argued the threshold for judicial intervention was low, resulting in uncertainty which, in turn, encouraged litigation.

[130] Certainty is no doubt a desirable objective and parties should be encouraged, where mutually desired, to establish regimes of property entitlement which deviate from the statutory scheme.

[131] However, certainty should not trump either procedural or operational fairness as defined in s. 93.

Findings

[132] The fact the Agreement is unwitnessed is of no consequence to its validity. Section 92 does not require that the Agreement be in writing or witnessed. Presumably, oral agreements respecting the division of property are enforceable if properly proven on the evidence. The fact the Agreement was unwitnessed doesn't preclude the court's intervention; s. 93 (6).

[133] Here, an assessment of the factors enumerated in s. 93 (3) lead to the inevitable conclusion that the Agreement signed by Ms. Asselin was procedurally unfair and should be set aside.

[134] I say that for the following reasons:

[135] Mr. Nixon testified he expected the Agreement would be provided in advance to Ms. Asselin for consultation by her with the solicitor of her own choosing. That never happened.

[136] I agree with Ms. Thiele that the respondent's financial disclosure in the Agreement was incomplete in that it failed to detail liabilities or provide values for the existing assets save for an estimate of the value of Mr. Roy's RRSP.

[137] Procedural fairness in family related matters is paramount. Different considerations apply in the negotiations of contracts between spouses, on the one hand, and commercial transactions, on the other. As was said in *Rick v. Brandsema,* 2009 SCC 10 at para. 46:

> [46] This contractual autonomy, however, depends on the integrity of the bargaining process. Decisions about what constitutes an acceptable bargain can only authoritatively be made if both parties come to the negotiating table with the information needed to consider what concessions to accept or offer. Informational asymmetry compromises a spouse's ability to do so.

[138] The Agreement reads "prior to executing this agreement, each party hereto will have had the opportunity to receive independent legal advice." No such opportunity was afforded Ms. Asselin.

[139] Ms. Asselin, in my view, hadn't the necessary information to fully consider her position in entering into the Agreement. By the date the Agreement was signed, she had been residing with Mr. Roy for a period in excess of two years and, as such, had at least the potential for a spousal support claim under existing legislation.

[140] Similarly, two of Ms. Asselin's children and been residing with her and Mr. Roy for a period in excess of one year. She was without income and inferentially, her two children were being supported by Mr. Roy thus entitling her to a potential claim for child support for Mr. Roy in the event of separation.

[141] Each of these 'rights' was waived under the Agreement without her situation having been explained to her by someone safeguarding her interests. While Ms. Asselin may have understood generally that she was giving up rights in making this Agreement, absent Independent Legal Advice, she likely would not be able to substantially understand the specific import of the Agreement.

[142] As to the submission that Ms. Asselin, by virtue of her education, understood the nature and consequences of the Agreement, I refer to the following passage in *Gurney v. Gurney,* 2000 BCSC 6, where Pitfield, J. stated:

> [29] In the family law context, providing independent legal advice must mean more than being satisfied that a party understands the nature and contents of

> the Agreement and consents to its terms. The solicitor should make inquiries of the party so as to be fully apprised of the circumstances surrounding the agreement. The party should be advised of his or her legal rights and obligations in relation to the subject matter of the Agreement and advised of the consequences associated with a refusal to sign. The solicitor should offer his or her opinion on the question of whether it is appropriate for the party to sign the Agreement in all the circumstances. It is only with that kind of advice that the party can make an informed decision about the advisability of entering into the Agreement as opposed to pursuing some other course.

[143] Nothing in the language in s. 93 (3) (c) ameliorates that statement of law.

[144] Here none of the safeguards referenced by Mr. Justice Pittsfield were provided to the claimant. It was not for want of care on the part of Ms. Asselin but rather by virtue of the manner in which the Agreement was put before her that the safeguards were not provided.

[145] The circumstances surrounding the execution of the Agreement were initiated by the respondent. He arranged the meeting with Mr. Nixon in circumstances telling Ms. Asselin she ‘was to sign something’. The respondent was in possession of the Agreement for months prior to its execution and chose not to provide it to the claimant but rather ‘spring it upon her’ at what she perceived to be a social gathering that Mr. Nixon’s office.

[146] Neither Ms. Asselin nor anyone on her behalf played any role in the drafting of the Agreement’s terms. They were drafted by Mr. Nixon and heavily weighted in Mr. Roy’s favour. Ms. Asselin had no opportunity to offer up contrary proposals or have them incorporated into the Agreement.

[147] Finally, I note that the parties were, at the time the Agreement was executed, actively attempting to conceive a child together. In my view, such further exacerbates this Asselin’s ‘vulnerability’, as the word is used in s. 93 (3)(b).

[148] In the result, I conclude that the Agreement should be set aside on procedural grounds. I must now consider on all the evidence if the Court would replace the Agreement with a substantially different order than those terms set out in the Agreement.

[149] The distribution of assets under the Agreement is significantly at odds with the result which would accrue under the *Act*. If the Agreement remained in place, the claimant would be denied an interest in the home to which she has made significant financial contributions.

[150] She would be liable on the mortgage on 4-76 St. Ninian without any offsetting entitlement to the equity, if any, in the property.

[151] Having found the Agreement procedurally unfair and, in the result, setting it aside, I need not consider s. 93 (5) provisions to set aside the Agreement because it is otherwise significantly unfair.

[152] However, if I am wrong in my assessment that the Agreement is procedurally unfair, I would also set it aside for being substantively unfair. The *Act* requires the court to consider the length of time that has passed since the agreement, the intention of the spouses and the degree to which the spouses relied on the agreement; s. 93(5).

[153] As stated above, the respondent concedes that the length of time since the Agreement was made will affect the applicability of the Agreement with respect to Princeton. However, the other two factors are also at play.

[154] The circumstances leading to the execution of the Agreement cannot be said to have been as a result of the joint intentions of the parties to preserve their separate assets as against future claims by the other of them. In making the Agreement, there was no joint intention of the parties to achieve certainty. Insofar as the respondent intended to achieve some degree of certainty in his financial affairs, that intention was not shared with the claimant.

[155] Only the respondent sought an Agreement protecting his financial position. While I agree that the effect of the Agreement was to safeguard property subsequently acquired by Ms. Asselin, I do not conclude such was on Mr. Roy’s mind when the Agreement was drafted. No mention was made in the Agreement of

prospective inheritances. Nor does there appear to be a discussion between the parties about inheritances expected by either.

[156] In terms of reliance on the Agreement, it is not open to Mr. Roy to say he relied upon the Agreement while, at the same time, allowing, if not actively encouraging, the claimant to make sizeable cash infusions from her separate property, her inheritance, towards the betterment of Princeton. Allowing the mixing of funds between the parties and shared finances, even to a limited degree, is a clear indication that as time passed, the initial framework for property division in the Agreement, no longer reflected the intentions of the parties.

[157] On this basis, I would also set aside the Agreement as being significantly unfair.

If the Agreement is set aside or varied, what is the family property, what are the excluded assets and what is the family debt?

Family Property

[158] Section 81 of the *Act* mandates an equal sharing of the family property and equal responsibility of family debt unless same would result in 'significant unfairness'; s. 95.

[159] Section 84 of the *Act* provides as follows:

> 84 (1) Subject to section 85 [excluded property], family property is all real property and personal property as follows:
>
> (a) on the date the spouses separate, property
>
> (i) that is owned by at least one spouse, or
>
> (ii) in which at least one spouse has a beneficial interest;
>
> (b) after separation, property
>
> (i) acquired by at least one spouse, or
>
> (ii) in which at least one spouse acquires a beneficial interest,
>
> that is derived from the property referred to in paragraph (a) or from the disposition of that property.
>
> (2) Without limiting subsection (1), family property includes the following:
>
> (a) a share or an interest in a corporation;

> (b) an interest in a partnership, an association, an organization, a business or a venture;
>
> (c) property owing to a spouse
>
> (i) as a refund, including an income tax refund, or
>
> (ii) in return for the provision of a good or service;
>
> (d) money of a spouse in an account with a financial institution;
>
> (e) a spouse's entitlement under an annuity, a pension, a retirement savings plan or an income plan;
>
> (f) property, other than property to which subsection (3) applies, that a spouse disposes of after the relationship between the spouses began, but over which the spouse retains authority, to be exercised alone or with another person, to require its return or to direct its use or further disposition in any way;
>
> (g) the amount by which the value of excluded property has increased since the later of the date
>
> (i) the relationship between the spouses began, or
>
> (ii) the excluded property was acquired.

[160] The property at issue before me is principally real estate, both in B.C. and Nova Scotia, financial assets in the name of each party and chattels. For the purposes of this litigation, there has been no post-separation change in the character of any assets.

Unlike the former legislation governing property division, there is no requirement under the *Act* to establish entitlement to an asset before its characterization as 'family property'. There is no requirement of ordinary usage or contribution to the asset; rather the court merely has to determine that such property existed on the date of separation and at least one spouse owned it or had a beneficial interest in it.

[161] Section 84(1) (g) provides that family property includes "the amount by which the value of excluded property has increased since the later of the date the relationship between the spouses began, or the excluded property was acquired."

[162] The excluded property, here, is the net value of Mr. Roy's interest in Laurentian as at the date of cohabitation. Laurentian was sold in 1991 for $175,000. I have no evidence as to the equity in 1987 when the parties began cohabiting.

[163] Similarly, the net equity in 76 St. Ninian as at October 1987, if identifiable, would be excluded property but any accretion in value thereafter is family property subject to division between the parties.

[164] The Georgeville acreage on Highway 337 is also said to have its origins in money received by the respondent from his mother's estate. No details were provided by Mr. Roy as to the amount of the down payment.

[165] Princeton was acquired after the date the spouses began to cohabit and, as such, is family property. The claimant's interest in it, however, is subject to a determination of (1) the portion of the down payment from the Laurentian sale proceeds which is excluded property and (2) the extent to which the equity in Princeton was enhanced by the use of the respondent's inheritance from his mother.

[166] Otherwise, all of the real estate in Nova Scotia is family property subject, of course, to the encumbrances upon them.

[167] In addition, although not much by way of evidence was directed towards other than the real estate, ScotiaMcLeod accounts and debt, the parties' vehicles at separation, the contents of Princeton, Mr. Roy's violin collection, the financial accounts in the name of each of them as at separation are all family property under the definition contained in s. 84(1) of the *Act*.

[168] Each of the parties has pensions through their employment. Neither has provided valuations of their pensions. In Mr. Roy's case, a portion of his pension is excluded property.

[169] Unfortunately, as noted earlier, neither party prepared a Scott Schedule evidencing the assets or debt in existence as at the triggering event, May 24, 2011 and, where appropriate, their value on that date.

[170] In the result, absent evidence at trial as to the identity and valuation of assets as at the date in question, I have relied upon the parties' Form 8 financial disclosure statements in ascertaining the identity of various accounts not discussed in the

evidence. If amongst them are accounts which did not exist as at May 24, 2011, then such should be deleted from the following list of family assets.

[171] As to the value of the assets, those assets which are family property consisting of accounts and financial institutions subject day to day use, such as checking accounts, the valuation should be taken as at the date of separation.

[172] For those accounts representing long-term investments, specifically the RRSPs of each party found to be family property; those are to be divided in specie at the time of division unless it can be shown contributions were made post-separation. In such case, the amount of such contribution should be subtracted from the divisible portion of the asset.

[173] The divisible assets, subject to what I say about excluded property, are as follows:

- the Princeton residence
- 28 Bay Street, Antigonish, Nova Scotia
- 80 St. Ninian Street, Antigonish, Nova Scotia
- 4-76 St. Ninian Street, Antigonish Nova Scotia
- 98 St. Ninian Street Antigonish Nova Scotia
- 76 Brookland Street, Antigonish Nova Scotia
- 337 Highway, Georgeville, Antigonish Nova Scotia
- 9039 Highway 337, Georgeville, Antigonish Nova Scotia
- 1996 Toyota four Runner
- TD Canada trust account #907-028-6967
- TD Canada trust account #93137110524
- TD Canada trust RRSP #90708016681 – 16
- TD Canada trust RRSP GIC #90708016681

- TD Canada trust RRSP #90708903890 – 05
- TD Canada trust RRSP #93248038606 – 06
- the claimant's UBC pension
- 1994 Ford Crown Victoria
- 1991 Mercedes 560
- Canada savings bonds in the name of the respondent (2900)
- CIBC account#776-5835
- RBC account #509-0568
- G & F Financial Account # 51673203
- RBC mutual fund RRSP (respondent)
- Canacord RRSP (respondent)
- Violin collection
- contents of 313 Princeton, Port Moody
- that portion of the respondent's pension acquired after October 1987.

[174] Save where discussed later on in these reasons, the totality of the above assets are family property subject to equal division.

The Parties' Pensions

[175] Each of the parties has a pension plan earned through their employment. Mr. Roy commenced receiving benefits shortly following separation. That portion of his pension acquired by him prior to the commencement of cohabitation is not family property and is excluded from division by Part 6 of the *Act*.

[176] The remainder, the portion acquired by him from 1987 until May 2011, is family property subject to division unless such would be significantly unfair.

[177] The whole of Ms. Asselin's pension acquired up to the triggering an event is family property subject only to the same considerations for an unequal division as described in s. 95 (1).

[178] Ms. Asselin seeks to have the matter of pension division deferred until the parties can obtain valuations of their respective pensions and determine methodology for division which might involve the buyout by Mr. Roy of Ms. Asselin's interest in his pension.

[179] Mr. Roy has argued that the Agreement precludes division of either's pension entitlement. As stated above, I have set aside the Agreement. That does not, in my view, preclude me from an unequal division of the pensions were same warranted upon consideration of s. 95 (1).

[180] Section 95(1) reads:

> Unequal division by order
>
> 95 (1) The Supreme Court may order an unequal division of family property or family debt, or both, if it would be significantly unfair to
>
> (b) divide benefits as required under Part 6 *[Pension Division]*.

[181] On the facts before me, I am unable to determine whether the pension division called for under Part 6 is 'significantly unfair' to the parties without knowing the underlying values of both the 'included portion' and 'excluded portion' of Mr. Roy's pension and the whole of Ms. Asselin's pension together with information as to when the respondent can begin to enjoy an actual financial benefit from her pension.

[182] The respondent elected an option for payment providing for only a five year guarantee. There are no survivor's benefits. Such may or may not impact the manner in which the division of the respondent's pension occurs. Further information is required.

[183] In addition, neither party addressed the issue of whether s. 95 (2) allows the court to re-consider the parties' written Agreement (or any other agreement) respecting the division the parties' pensions.

[184] The court has to consider whether an equal division of the family property portions of each party's pension would be significantly unfair. Here, the respondent is presently reliant on the pension for his support. He is being asked to pay child support based upon this income yet the claimant seeks an entitlement to it. These particular circumstances will need to be considered in dividing the pension between the parties. Further, I have no evidence as to when the claimant's pension becomes payable or the extent tot to which his entitlement to the claimant's pension will replace the income which will be immediately lost to Mr. Roy in the event his pension is divided in the fashion directed by the legislation.

[185] Finally, as to the pensions, the claimant suggests that the respondent be required to buyout the claimant's interest in his pension by using cash received from other assets. Before that can be considered, values will have to be demonstrated.

[186] Accordingly, I direct the parties obtain the necessary information to value and structure of their pensions in the fashion I have described and re-attend to make submissions on the issue of pension division keeping in mind matters I have pointed out in these reasons.

If, after exchanging such information, the parties are able to agree on the pension division, then no further application is necessary. Otherwise, the parties are at liberty to set this matter down before be for a determination of the issue of 'significant unfairness', as it relates to their pensions.

Excluded Property

[187] Each of the parties argues some of their property is "excluded property".

[188] The respondent argues that a portion of the Laurentian sale proceeds, the inheritance proceeds received from his mother used to acquire the Nova Scotia

acreage and pay off the Princeton mortgage are excluded from division pursuant to section 85.

[189] Further, he argues that a portion of 4-76 St. Ninian is excluded property and only the growth in equity from October 1987 on is family property under the *Act.*

[190] Ms. Asselin argues that the registered and non-registered accounts at ScotiaMcLeod are excluded property.

[191] As to the remaining 'competing' claims for exclusion, the claimant suggests a 'broad brush' approach. She says the equity in Princeton should be divided equally. Such, she says, will recognize the use of the Laurentian proceeds towards the acquisition of Princeton and the use by her of inherited funds toward the acquisition of 80 St. Ninian and Bay Street and free the court from considerations of math. She says that she and Mr. Roy should retain all of their own various investments in RRSPs.

[192] These suggestions on property division are not consistent with the approach mandated by the *Act*; rather, the proposed division harkens back to the broad discretion given trial judges under the *FRA.*

[193] With respect, I don't agree the claimant's approach fosters the certainty that s. 85 seeks to achieve. Section 85 reads as follows:

> Excluded property
>
> 85 (1) The following is excluded from family property:
>
> (a) property acquired by a spouse before the relationship between the spouses began;
>
> (b) gifts or inheritances to a spouse;
>
> (c) a settlement or an award of damages to a spouse as compensation for injury or loss, unless the settlement or award represents compensation for
>
> (i) loss to both spouses, or
>
> (ii) lost income of a spouse;
>
> (d) money paid or payable under an insurance policy, other than a policy respecting property, except any portion that represents compensation for

> (i) loss to both spouses, or
>
> (ii) lost income of a spouse;
>
> (e) property referred to in any of paragraphs (a) to (d) that is held in trust for the benefit of a spouse;
>
> (f) property held in a discretionary trust
>
> (i) to which the spouse did not contribute,
>
> (ii) of which the spouse is a beneficiary, and
>
> (iii) that is settled by a person other than the spouse;
>
> (g) property derived from property or the disposition of property referred to in any of paragraphs (a) to (f).
>
> (2) A spouse claiming that property is excluded property is responsible for demonstrating that the property is excluded property.

[194] Here, the relevant sections are (a) property acquired by a spouse before the relationship between the spouses began; (b) gifts or inheritances to a spouse; and (g) property derived from aforementioned property or the disposition of that property.

[195] Section 85(2) casts the onus of proof upon the spouse seeking to exclude property.

[196] The equity in Laurentian as at October 1987, is excluded property pursuant to s. 85(1)(a). Not surprisingly, in my view, owing to the lateness of this matter proceeding under the *Act*, there is no evidence as to the value of Laurentian as at the date the parties began cohabiting. Had the matter been commenced under the *Act*, I would have expected production of historical appraisal of Laurentian so as to properly assess the respondent's submission.

[197] What I know is it sold for $175,000 in 1991. I accept as fact that substantially the whole of the net sale proceeds were applied to the acquisition of Princeton. I do so based on a purchase price of $289,000 together with closing costs including property purchase tax and legal fees.

[198] This invokes s. 85(1)(g), causing whatever portion of the $175,000 which 'existed 'as at October 1987 to remain for the benefit of Mr. Roy in these proceedings as property excluded from division under Part V of the *Act.*

[199] I accept Mr. Roy's evidence that Laurentian was purchased for $115,000 and unencumbered at the time of its sale. It increased in value by $60,000 from the date of purchase to the date of sale. Doing the best I can, in the absence of an appraisal, I determine that $35,000 of that increase in value occurred by October 1987 and the remainder thereafter. Mr. Roy was never cross-examined as to this amount and this was the only evidence before me on this subject.

[200] As such, the excluded portion of Princeton based on the tracing of the excluded portion of Laurentian into the acquisition of Princeton is $150,000. That sum, together with what follows, is excluded from the division of the Princeton property in favor of Mr. Roy.

[201] In respect of the inheritance from his mother, Mr. Roy again failed to produce any documents which would indicate, with precision the value of the inheritance and the purpose to which it was applied. I know from the documents before me that $135,000 mortgage was taken out on Princeton in 1991. There is no dispute but that the mortgage was discharged by funds provided by Mr. Roy without contribution from Ms. Asselin.

[202] Monthly payments between 1991 and 1998 would have, no doubt, reduced the principal outstanding as at the time the inheritance was received by the respondent. Again, doing the best I can only limited evidence before me; I estimate the principal amount of the mortgage, at the time of payout, to be $115,000. This sum is excluded from the division of the Princeton proceeds and payable, in the first instance, to Mr. Roy.

[203] In the result, I'm satisfied that from the otherwise equal division of Princeton, Mr. Roy should receive, firstly, the sum of $265,000 which, in my view, fairly represents a combination of the equity in Laurentian as at October 1987 ($150,000) together with the amount outstanding on the mortgage on Princeton as at the date of receipt by him of the inheritance from his mother ($115,000).

[204] I also know from documents produced, that the acreage located at 9039 Highway 337, Georgeville, Nova Scotia was acquired in or around the fall of 1998. Other than Mr. Roy's bare assertion, I've no evidence that any of the down payment came from funds inherited by him from his mother. He never mentioned an amount. Given the history of acquisitions in Nova Scotia; mostly with small down payments, it is unlikely the amount was significant given the mortgage was for $35,250.

[205] I accept that Mr. Roy had equity in 76 St. Ninian as at October 1987, but have no basis on which to assess the amount. Since its acquisition, the property has been re-financed to provide funds for the renovation of 80 St. Ninian; one of the jointly owned Nova Scotia properties.

[206] Both parties agree there is little, if any equity, in 4-76 St. Ninian. The assessed value is $233,100; a realtor has opined the value may be as high as $258, 520. The mortgage and line of credit which encumbers this property has an outstanding balance of $250,523.

[207] If sold, there will likely be nothing left to distribute, leaving both parties liable for any shortfall.

[208] In the result, I conclude there is nothing left of the 'excluded portion' of the property to maintain for the benefit of the respondent. More likely, there will be a shortfall between the selling price and the amount required to discharge the encumbrances leaving each party with the liability in respect of 76 St. Ninian.

[209] In respect of the acreage on Highway 337, acquired according to the respondent with partial proceeds from the inheritance from his mother, no documents have been provided which allow me to determine the extent of the respondent's down payment and positively identify the source of those funds as coming from the inheritance he received from his mother in 1998.

[210] While sympathetic to the respondent's plight, the absence of any evidence as to the amount of the down payment or any basis upon which to make an informed estimate of the amount precludes any finding that any portion of the Highway 337

acreage is excluded property. The *Act* makes clear that it is the respondent who bears the onus of proof to demonstrate that property ought to be excluded.

[211] Here, he's failed to do so. I cannot specify, on the balance of probabilities, either the amount paid for the down payment in respect of the Highway 337 acreage or the source of funds.

[212] In the result, I decline to find any portion of the Highway 337 acreage is excluded property.

[213] Schedule A to the parties' Agreement makes reference to an RRSP in the respondent's name of "approximately $20,000", "savings of approximately $10,000" and "effects and musical instruments having an approximate value of $20,000." No evidence was led confirming the accuracy of the statement or, more importantly, what became of the assets.

[214] Again, noting the onus on the respondent to prove what property is excluded under the *Act,* I'm unable to find any of the property referenced in Schedule A either still exists or is traceable into other property presently owned by the respondent.

[215] Ms. Asselin's evidence on the matter of inheritance, coupled with documentary evidence surrounding the approximate sum of $512,000 on deposit at ScotiaMcLeod, persuades me of the fact she received an inheritance in the approximate amount of $700,000 in or around 2006.

[216] I further conclude that the original funds were used by Ms. Asselin to: provide gifts to Ms. Asselin's children, including Maria; make improvements to Princeton; and to make investments in both 80 St. Ninian and Bay Street.

[217] Based upon the documentary evidence coupled with Miss Asselin's testimony, I conclude that her ScotiaMcLeod accounts 485-38537, 425-84593 and 699-51012 are excluded property within the meaning of the *Act.*

[218] As to the $10,000 investment in Bay Street, I am satisfied that the sum originated from the claimant's inheritance and, as such, is excluded property and

should be returned to the claimant in advance of the distribution of the remaining equity in Bay Street.

[219] 80 St. Ninian presents a different problem. I have no doubt that $154,000 was advanced by the claimant towards the purchase of 80 St. Ninian. This $154,000 was from her inheritance. The respondent has not demonstrated a similar contribution and, even assuming he had, it would have come from property I have determined is family property.

[220] Owing to extensive renovations done to 80 St. Ninian, a further mortgage was taken on 76 St. Ninian thus diminishing the equity on that property.

[221] Presently, it appears there is very little or no equity in 80 St. Ninian. What equity there is, at least to the extent of $154,000, is excluded property by virtue of s. 85 (1) (g). However, if nothing remains of 80 St. Ninian by virtue of market forces, then, in my view there is nothing left to exclude.

[222] In my view, s. 85 doesn't provide for a tracing of otherwise excluded funds beyond the asset which was acquired through the disposition of her inheritance. Just as the claimant is entitled to no consideration for monies expended by her from the inheritance on matters such as travel or other disposables, if there is no equity or insufficient equity in 80 St. Ninian to repay her original investment, she cannot look to other family property to make up the difference.

[223] The claimant testified that she spent over $120,000 of her inheritance on improvements to the Princeton home. Were those improvements demonstrated to have enhanced the value of the property, the enhanced value would be excluded property.

[224] No such assertion has been made by the claimant; nor was any evidence adduced indicating that the improvements resulted in an identifiable appreciation to the value of the residence. Nor have I been asked to infer that such is the case.

[225] Ultimately, the question of whether the claimant is 'compensated' for the loss of this investment is a matter of fairness. I will address that issue later in these reasons.

[226] In the result, I find the following to be excluded property exempt from division:

- The first $265,000 of equity in Princeton
- The three ScotiaMcLeod accounts in the name of the claimant; the RRSP, TFSA, and Cash Account;
- The first $154,000 of equity in 80 St. Ninian;
- The first $10,000 of equity in Bay Street.

[227] That portion of the respondent's pension acquired by him prior to October 1987 is more properly dealt with under Part 6 of the *Act* which prescribes the manner of pension division for the pre and post-cohabitation portions of pension entitlement.

Family Debt

[228] Family debt was a concept unknown under the *FRA* except insofar as it could be considered where unfairness resulted in the division of assets.

[229] The *Act* specifically deals with debt in section 86 which reads as follows:

> Family debt
>
> 86 Family debt includes all financial obligations incurred by a spouse
>
> (a) during the period beginning when the relationship between the spouses begins and ending when the spouses separate, and
>
> (b) after the date of separation, if incurred for the purpose of maintaining family property

[230] Other than the mortgages registered against the two Ninian properties and Bay Street, the claimant doesn't seek to take into account any debt in her name alone which arose during the period of cohabitation.

[231] The respondent says he owes in excess of $81,000 as at the date of swearing his Form 8 financial statement in February 2013. He says the debts have

arisen as a result of construction expenses. He presents no evidence in support of that contention except his oral evidence. He testified that the bookkeeper demanded receipts of them so as to keep proper records for Cornish Arms. He testified that the "paper trail needs to be kept clear." Despite this, nothing was produced.

[232] He testified that part of that indebtedness is $43,000 owing to MBNA MasterCard. He says other amounts are owing to capital one MasterCard, the TD line of credit, Amex, and RBC Visa.

[233] The only documents produced by the respondent in support of his stated debt were MBNA statements spanning February 2011 to January 2012.

[234] His May 3, 2011 statement indicates a payment of $57,000 was made to reduce the balance to a credit balance of $393.01. The $57,000, it would seem, was derived from mortgage proceeds received from a mortgage taken on one of the Nova Scotia properties.

[235] Mr. Roy testified that the use of credit cards to fund renovations to 80 St. Ninian was a stop-gap measure as the parties attempted to raise financing for the runaway expenses associated with the project.

[236] As at the date closest to the triggering event, the MBNA account evidences no indebtedness.

[237] By January 2012, the outstanding balance had grown to $7,656. Minimal payments were being made monthly. A year later the outstanding balance has grown to $43,000.

[238] By way of explanation, the respondent testified he would "borrow from Peter to pay Paul" using seven or eight credit cards to juggle payments on the construction and renovations occurring at 80 St. Ninian.

[239] Nothing was produced by the respondent in respect of the other credit facilities.

[240] The rigors of proving that debt was incurred in furtherance of a family purpose have been ameliorated under the *Act*. However, there remains an obligation to establish debt has been incurred since separation by something more than oral testimony, or the swearing of a Form 8 financial document almost 2 years following the triggering event.

[241] Hence, the *Act* requires cogent documentary evidence to perform what, in part, is simple arithmetic. Here, with the exception of the MBNA accounts, which evidence no debt owed by the respondent at the triggering event, there has been none.

[242] Requests were made by the claimant to have documents produced. They were not. The respondent says documents relating to the Cornish Arms were left in the former matrimonial home. The claimant denies this. No application was brought by the respondent for their production nor did he take steps to acquire, from third parties, financial documents which would support his assertions regarding the financing of the Nova Scotia properties.

[243] What is clear from the respondent's testimony is that receipts were required by the bookkeeper for Cornish Arms in respect of all of the renovation costs and payments on account of the Nova Scotia real estate.

[244] Only the respondent had the wherewithal to produce those together with statements of account in respect of the various credit cards on which he says balances are owed.

[245] One of the expenses, $22,000 for a violin bought on eBay was said to of been paid by a credit card or through PayPal. It would have been a simple matter for the respondent to order one receipt from his bank for a payment of that magnitude. He didn't do so.

[246] While no doubt cumbersome, the bookkeeper for Cornish Arms could have been called to substantiate the respondent's claims of "robbing Peter to pay Paul."

No doubt, credit card information would have been provided to the bookkeeper so as to keep proper track of expenses connected to the real estate.

[247] Absent proof of debt existing at the time of separation coupled with proof, in the broad sense of the word, as to how debt was incurred (so as to assess whether it would be significantly unfair to divide such debt equally), the respondent is responsible for whatever debt he now has in his name alone.

[248] The parties are jointly responsible for mortgages and or lines of credit encumbering 4-76 St. Ninian, 80 St. Ninian and 28 Bay Street.

Would the equal division of property and debt provided for under the Act be significantly unfair to either party?

[249] The division of family property is to be equal unless the court finds that it would be "significantly unfair" to do so in view of the enumerated criteria:

> 95 (1) The Supreme Court may order an unequal division of family property or family debt, or both, if it would be significantly unfair to
>
> (a) equally divide family property or family debt, or both, or
>
> (b) divide benefits as required under Part 6 *[Pension Division]*.
>
> (2) For the purposes of subsection (1), the Supreme Court may consider one or more of the following:
>
> (a) the duration of the relationship between the spouses;
>
> (b) the terms of any Agreement between the spouses, other than an Agreement described in section 93 (1) *[setting aside agreements respecting property division]*;
>
> (c) a spouse's contribution to the career or career potential of the other spouse;
>
> (d) whether family debt was incurred in the normal course of the relationship between the spouses;
>
> (e) if the amount of family debt exceeds the value of family property, the ability of each spouse to pay a share of the family debt;
>
> (f) whether a spouse, after the date of separation, caused a significant decrease or increase in the value of family property or family debt beyond market trends;
>
> (g) the fact that a spouse, other than a spouse acting in good faith,
>
> (i) substantially reduced the value of family property, or

> (ii) disposed of, transferred or converted property that is or would have been family property, or exchanged property that is or would have been family property into another form, causing the other spouse's interest in the property or family property to be defeated or adversely affected;
>
> (h) a tax liability that may be incurred by a spouse as a result of a transfer or sale of property or as a result of an order;
>
> (i) any other factor, other than the consideration referred to in subsection (3), that may lead to significant unfairness.
>
> (3) The Supreme Court may consider also the extent to which the financial means and earning capacity of a spouse have been affected by the responsibilities and other circumstances of the relationship between the spouses if, on making a determination respecting spousal support, the objectives of spousal support under section 161 *[objectives of spousal support]* have not been met.

[250] As noted, I have deferred matters relating to the parties' pensions for further submissions both as to the manner of division, as per the request of the claimant, and as to the matter of whether s. 95 (1)(b) has application to the facts of this case.

[251] Otherwise, I conclude that an equal division of the family property as earlier found would not be "significantly unfair" to either party.

[252] In concluding this, I refer to the remarks of Justice Stewart who, in *Jacobellis v. Ohio,* (1964) 378 U.S. 184 *,* famously stated:

> I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description ["hard-core pornography"]; and perhaps I could never succeed in intelligibly doing so. But **I know it when I see it**, and the motion picture involved in this case is not that.
>
> [Emphasis added]

[253] I, too, will leave to others to formulate an intelligible definition of "significantly unfair" as that term is defined in section 95 and elsewhere in the *Act*.

[254] However, "I know it when I see it" and this, save for my possible reservations concerning pension division, this is not "it".

[255] The parties' relationship was a long one. The division of property provided for under the *Act* will leave each party in a position of economic well-being

and self-sufficiency. The respondent, to some extent, is the author of his own misfortune in terms of his current employment situation. There is nothing in his circumstances which would lead me to believe his current situation is of long-term duration. His past accomplishments, coupled with his educational background, will no doubt leading to profitable employment in the near future.

[256] In the result, I order an equal division of the property I have determined to be family property save for the parties' pension entitlement which is the subject of further inquiry.

[257] The benefit of these reasons in hand, the parties have 90 days in which to discuss and hopefully resolve the manner in which their respective interest in the family property is to be realized. In the event they are unable to do so there will be liberty to apply before me at a mutually convenient time.

What is the appropriate level of child support for Maria and when should it commence?

[258] I accept that, for the purposes of the Child Support Guidelines, the respondent's income is presently $45,169. For the purposes of this calculation, I do not accept his self-employment business losses or the rental losses described by him in his Form 8. Insufficient details were provided for me to rely on the assertions set out there.

[259] Maria is enrolled in SFU and currently living on her own. I accept that the claimant provides financial assistance. She does so directly to Maria.

[260] On the basis of submissions of counsel it appears Princeton will be sold and the claimant will be downsizing to smaller accommodation. There is no evidence on which I can conclude that Maria will be returning to live with the claimant during the course of her studies.

[261] Nor is it apparent to me from the evidence as to Maria's separate means from employment.

[262] In the circumstances, I order that the respondent pay the sum of $300 per month, consistent with the order of Madam Justice Loo made at the judicial case conference, directly to Maria until she's no longer a child of the marriage as defined by the *Act* or as agreed to between the parties.

[263] Given the claimant's exclusive occupation of the former matrimonial home coupled with the fact it has been mortgage free during the period of occupation, I decline to make an order for support payable retroactively prior to the pronouncement of Madam Justice Loo's order.

Costs

[264] The parties are at liberty to address the matter of costs at the same time as they make submissions on the issue of pension division and, possibly the manner in which each party will realize their interest in the family property.

"Harvey J."