COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Small v. Small,*
2023 BCCA 349

Date: 20230908
Docket: CA47388

Between:

Oxana Small aka Oxana Kirsanova

Appellant
(Claimant)

And

Trevor Scott Small aka Trevor Small

Respondent
(Respondent)

Before: The Honourable Mr. Justice Groberman
The Honourable Mr. Justice Grauer
The Honourable Mr. Justice Marchand

On appeal from: An order of the Supreme Court of British Columbia, dated August 26, 2020 (*Small v. Small*, 2020 BCSC 1253, Vancouver Docket E180585).

Counsel for the Appellant: R. Fleming
A. Mackenzie

The Respondent, appearing in person: T. Small

Place and Date of Hearing: Vancouver, British Columbia
April 5-6, 2023

Place and Date of Judgment: Vancouver, British Columbia
September 8, 2023

Written Reasons by:
The Honourable Mr. Justice Grauer

Concurred in by:
The Honourable Mr. Justice Groberman
The Honourable Mr. Justice Marchand

Summary:

This is an appeal of certain orders following the breakdown of a relationship that spanned more than twelve years. The appellant raises a number of issues not raised at trial. She contends that the trial judge erred in: (1) the division of liabilities of the parties to the respondent's incorporated company, in which the claimant was a shareholder; (2) calculating the net value of a vehicle the appellant purchased from the company; (3) imputing too little income to the respondent; and (4) making a

time-limited spousal support order. Held: Appeal allowed in part. Several orders are set aside and new orders substituted. In the circumstances of the case the parties put before her, the judge did not err by failing to value the company as a family asset, but did err in law by failing to distinguish between "family debt" incurred to maintain family property and debt incurred to cover family expenses, which resulted in the appellant's over-contribution to the shareholder debt to the company. The judge made a palpable and overriding error in calculating the net value of the vehicle. The imputation of income to the respondent attracts a highly deferential standard of review, and the judge did not err in her approach. The fresh evidence of the respondent's post-trial income is properly considered either by means of a review or on the basis of a material change in circumstances, but not before this Court. Finally, though the appellant did not raise the issue at trial, the judge erred in law by failing to consider the making of an initial indefinite order of spousal support in line with the Spousal Support Advisory Guidelines, subject to a later review. The parties are directed to bear their own costs as the established errors could largely have been avoided had the appellant appropriately prosecuted her case below.

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Reasons for Judgment of the Honourable Mr. Justice Grauer:

1. INTRODUCTION AND ISSUES

[1] As the trial judge noted in her reasons for judgment following trial, "this case is one of high conflict between the parties" (*Small v Small*, 2020 BCSC 707, pronounced May 7, 2020, at para 97 ["*Small #1*"]). In *Small #1*, the judge began her analysis by addressing concerns she had with the credibility of both parties in the evidence they gave at trial:

> [101] The ongoing hostility between the parties spilled over into their testimony in the courtroom. It was apparent that the evidence of both parties was heavily coloured by their entrenched views of the inequities of the situation. This rendered both of them incapable of viewing events in a measured or objective way.
> …
> [104] I do not find that either the claimant or the respondent was deliberately dishonest in giving their evidence. I do conclude that the evidence of both parties is so heavily coloured by their own subjective perspectives on the fairness of the situation that I must approach their testimony with caution when it is not supported by the documentary record.

[2] There were many issues before the judge, and, after her trial judgment, the parties returned before her twice with post-trial applications. These yielded two further judgments: "*Small #2*", August 26, 2020, indexed at 2020 BCSC 1253; and "*Small #3"*, November 25, 2020, indexed at 2020 BCSC 2062. In *Small #3*, by which time the judge was *functus officio*, she noted that the appellant,

Ms. Kirsanova (complainant below), was attempting to re-open the trial judgment and the judgment in *Small #2*, raising arguments and seeking relief never presented or sought at trial. We are faced with a similar problem.

[3] In this Court, Ms. Kirsanova submits that the judge erred in her treatment of Glocal Brand Solutions Ltd ("GBS"), the business through which the respondent, Mr. Small, earned his income. She also says that the judge erred in calculating the net value of a motor vehicle she bought from GBS, in imputing income to Mr. Small in the amount of only $100,000, and in putting a time limit of six years after trial on her award of spousal support. Other aspects of the judgment below, relating to division of real estate assets, RRSPs and child support are not directly in issue. Among these other assets was the matrimonial home, a house the parties constructed on Magdalen Crescent. They moved into it in 2009.

[4] With respect to GBS, the issue raised by the parties at trial was how what they described as 'the company's debt' should be divided (at para 115(b)). In fact, it was the parties' debt in the form of loans advanced to them by GBS.

[5] Ms. Kirsanova had become a shareholder in GBS, and this permitted income from the company to be split between them (Mr. Small was the principal income-earner). After their separation, GBS became the vehicle through which the parties' post-separation expenses were paid, including expenses relating to the maintenance of the Magdalen Crescent property. These expenses were paid by means of the advances from GBS to the parties. This left each of them, as the two shareholders, owing substantial amounts to GBS by the time they separated their financial affairs. The parties and the judge repeatedly described these advances as "shareholder loans", and I will do the same. I wish to be clear, however, that they were loans made by GBS to its shareholders and not the other way around. They were recorded on the company's balance sheet as "Due from Corporate Shareholder(s) – Current Amounts".

[6] Ms. Kirsanova raises the following issues in her appeal:

1) Her primary complaint is that the judge erred in her approach to the GBS shareholder loans by failing to grapple properly with the legal status of GBS. Was GBS a separate legal entity to be valued as family property, an alter ego of Mr. Small, or a third-party creditor? Ms. Kirsanova maintains that this failure in analysis led the judge into an error of principle: she failed to treat GBS as a family asset to be valued and divided. It also led her, Ms. Kirsanova asserts, into an error of law, improperly treating the shareholder loans as family debt to be divided equally.

2) Ms. Kirsanova says further that the judge made an arithmetic error in calculating the net value of a BMW X3 she purchased from GBS and used exclusively since separation.

3) With respect to support, Ms. Kirsanova takes the position that the judge erred in principle in failing properly to apply the *Federal Child Support Guidelines*, SOR/97-175 [*FCSG*] in imputing income to Mr. Small, leading her to impute an income that was too low. Ms. Kirsanova seeks an order admitting fresh evidence concerning Mr. Small's income found in materials submitted by Mr. Small in his post-trial application covered in *Small #2*.

4) Ms. Kirsanova then says that the judge misapplied the *Spousal Support Advisory Guidelines* [SSAG] in imposing a time-limited spousal support order.

[7] Ms. Kirsanova's appeal, particularly in relation to the GBS shareholder loans, is problematic in three ways.

[8] First, neither party took the position at trial that Ms. Kirsanova now takes—that the judge ought to have valued GBS as family property for the purpose of dividing that value between the parties. Neither party asked the judge to do so, neither party took the position that GBS had any value, and neither party adduced expert evidence that would have allowed the judge to assess such a proposition. That question was simply not put before the judge.

[9] Second, the matter of how to deal with the debt owed to GBS in the form of shareholder loans was not litigated in isolation at trial, and cannot be approached in isolation here. As the judge observed at para 138: "The issue of how to divide the GBS debt is intertwined with [Mr. Small's] claim for reimbursement of post-separation contributions to the Magdalene Crescent property and to [Ms. Kirsanova's] rent". The judge found it also intertwined with other issues including other property debt (the BMW X3), Mr. Small's claim for reimbursement of Ms. Kirsanova's proper share of their two sons' special and extraordinary expenses, and the question of whether he intended to transfer his excluded property to Ms. Kirsanova at the time of their purchase of the Magdalen Crescent property. When it comes to the division of property, however, Ms. Kirsanova's appeal encompasses only the question of GBS and the shareholder loans.

[10] Third, at trial, Mr. Small's position that the GBS shareholder loan debt was family debt that should be equally divided was, as the judge described it, "transparently advanced"; yet Ms. Kirsanova made no submissions other than to agree that she was responsible for a portion of it (*Small #3* at para 17). It was not until *Small #3*, by which time the judge was *functus*, that Ms. Kirsanova sought to raise the sort of arguments she now relies on. Consequently, once again, the positions she now takes were not ones the judge had the opportunity to consider.

[11] An appeal is, of course, not intended to be a re-trial. Ms. Kirsanova has already had two kicks at the trial can. As I approach the issues she raises, I bear this in mind together with the standard of review.

2. STANDARD OF REVIEW

[12] As both this Court and the Supreme Court of Canada have repeatedly made clear, the scope of appellate review in family law cases is narrow, and the standard of review is highly deferential; see, for instance, *Barendregt v Grebliunas*, 2022 SCC 22 at paras 100–104, and *Jean Louis v. Jean Louis*, 2020 BCCA 220 at para 24. Courts of Appeal should be reluctant to interfere with the judge's exercise of discretion, including in such matters as the division of assets and support orders (*Hickey v Hickey*, [1999] 2 SCR 518 at paras 10, 12; *He v Guo*, 2022 BCCA 355 at para 15). The reason for this, in relation to support orders, was explained in *Hickey*:

> [12] There are strong reasons for the significant deference that must be given to trial judges in relation to support orders. This standard of appellate review recognizes that the discretion involved in making a support order is best exercised by the judge who has heard the parties directly. It avoids giving parties an incentive to appeal judgments and incur added expenses in the hope that the appeal court will have a different appreciation of the relevant factors and evidence. This approach promotes finality in family law litigation and recognizes the importance of the appreciation of the facts by the trial judge. Though an appeal court must intervene when there is a material error, a serious misapprehension of the evidence, or an error in law, it is not entitled to overturn a support order simply because it would have made a different decision or balanced the factors differently.
>
> [Emphasis added.]

[13] In *Van de Perre v Edwards*, 2001 SCC 60 at paras 11–12, the Court confirmed that these principles of appellate review are equally applicable to other aspects of family law. To succeed, then, an appellant must establish a material error, a serious misapprehension of the evidence, or an error of law: *Barendregt* at para 103; *Hickey* at para 12; *Jean Louis* at para 24; *He* at para 15.

[14] In general terms, an appellate court must review a trial judge's reasons generously and as a whole, bearing in mind the presumption that trial judges know the law: *Barendregt* at para 104, citing *R v GF*, 2021 SCC 20 at para 79: "Where ambiguities in the trial judge's reasons are open to multiple interpretations, those that are consistent with the presumption of correct application must be preferred over those that suggest error [citation omitted]".

3. BACKGROUND FACTS

[15] The facts are set out in detail in *Small #1*. I summarize below those directly relevant to this appeal. Paragraph references are to *Small #1* unless otherwise noted.

[16] Ms. Kirsanova was born in Russia, while Mr. Small was born in Canada. They married on February 28, 2003, in Japan, where Mr. Small was operating English-language schools. They moved to Canada in July 2003.

[17] The judge described Mr. Small's relevant employment history as follows:

> [43] The respondent incorporated [Glocal] Brand Solutions Ltd. ("GBS"), a management consulting company, in August 2009. The claimant became a shareholder of GBS in 2014. Starting in 2010, the respondent took on employment, with a series of companies through

GBS, with his focus being on sales and product distribution.

[44] Between 2012 and 2018, the respondent, through GBS, worked for three companies specializing in the marine energy sector: Corvus Energy ("Corvus"), Plan B Energy Storage ("Plan B"), and Xalt Energy ("Xalt"). GBS was paid $120,000 to $140,000 per year by Corvus and Plan B. The respondent says that both of these companies eventually went bankrupt. The respondent's contract with Xalt lasted only six months, from November 2017 to April 2018. He was paid approximately $12,000 to $13,000 per month. The contract was terminated when Xalt was bought by a German company.

[45] The respondent says that he was paid by GBS primarily through shareholder loans, and occasionally through dividends and a salary cheque. He and the claimant engaged in income splitting. The respondent says the parties did not receive money when dividends were paid, but rather the dividends were used to reduce the amount of the parties' shareholder loans. GBS is currently not operating. The shareholder loans outweigh the retained earnings, and there is not enough retained earnings to dividend out the balance owing. GBS has not earned an income since April 30, 2018.

[46] The respondent did not work at all between April 30, 2018 and November 2019. The respondent says that there are a variety of factors that conspired to prevent him from working in this period: the demands of the litigation, which included high conflict parenting issues; the work required to complete the sale of the Magdalen Crescent Property; and a fire at his rental home on July 28, 2018 that destroyed or damaged his and the children's personal belongings. On November 18, 2018, the respondent's vehicle was T-boned at an intersection by a car that ran a red light. The respondent says the injuries he suffered in the accident delayed his attempts to find employment.

[47] In November 2019, the respondent accepted an offer of employment with Acuva Technologies ("Acuva") as Director of Sales and Business Development, North America. The respondent's annual salary is $80,000 with the potential for an annual bonus based on revenues generated. He works full-time from Monday to Friday. The respondent continues to work on business opportunities outside of his employment with Acuva. He is presently engaged in a project involving the potential marketing of a rare Indonesian nut in Canada.

[Emphasis added.]

[18] The judge went on to describe Ms. Kirsanova's employment history in this way:

[48] The claimant received a law degree in Russia. At the time she married the respondent, she was working as a lawyer in Russia. The claimant quit her job to travel to Japan to marry the respondent.

[49] The claimant worked for the respondent's company Kawami Inc. between 2007 and 2009. This was the first time that she earned income in Canada. The parties split income from Kawami. The claimant says the income she received did not necessary reflect the work she did for Kawami. Although the claimant did not work for Holy Soles, the parties continued to engage in income splitting so that some of the respondent's income from that company was reported on the claimant's income tax returns.

[50] Between 2010 and April of 2017, the claimant worked for GBS. The parties do not agree on the proper characterization of the claimant's duties. The claimant says she assisted the GBS bookkeeper in managing revenue, while the respondent says she worked a few hours a month organizing receipts and writing cheques. In 2015, the claimant briefly worked for Plan B, a company that had a contract with GBS, where she earned $27 per hour.

[51] From November 2013 to the present, the claimant has taught Bikram yoga and Pilates at various studios in the Lower Mainland. As of the time of trial, her teaching averaged six classes per week. Since October 2019, she has also worked part-time for Skip

the Dishes and cleaning houses. In 2018, the claimant reported a gross business income of $39,000 from teaching yoga and Pilates, and a net business income of $16,120.

[52] The claimant says she has considered alternative career options since arriving in Canada, including the possibility of going to law school to qualify to practice in this country. She says such options are not realistic due to the prohibitive cost. The claimant says she is presently unable to work more hours as she needs to focus on repairing her relationship with her children, which has become hostile.

[19] The judge then addressed the parties' separation and their subsequent dealings with both the Magdalen Crescent property and GBS. She discussed how their financial affairs remained intertwined for a period after separation, during which the family's post-separation expenses were paid mainly through income they received from GBS in the way of shareholder loans:

[53] The parties separated on October 11, 2015. The claimant moved out of the Magdalen Crescent Property on December 1, 2015.

[54] Following their separation, the parties alternated residing at the Magdalen Crescent Property with the children. The respondent resided at the home from December 1, 2015 to August 31, 2016, and the claimant from September 1, 2016 to April 30, 2017. The respondent lived at the Magdalen Crescent Property again from May 1, 2017 until July 31, 2018, when the property was sold.

[55] The parties both rented properties during the periods of time that they resided away from the Magdalen Crescent Property. From May 1, 2017 to the present, the claimant has resided at a rented townhouse in Surrey, British Columbia. From August 1, 2018 to May 15, 2019, the respondent resided at a rented home in White Rock. In May 2019, the respondent moved to Surrey, where he currently resides.

[56] The parties' financial affairs continued to be intertwined after separation. The mortgage for the Magdalen Crescent Property was paid out of the parties' joint account at RBC, which was funded from their joint CIBC account. Other family expenses, including child care expenses, property tax, and insurance, and each party's rent when they were living away from the Magdalen Crescent Property, were also paid out of the joint CIBC account.

[57] For the reasons explained in greater detail later in this judgment, it is clear that post-separation family expenses were financed primarily through income that the parties received from GBS by way of shareholder's loans. Although the claimant deposited her income from yoga and Pilates teaching in the CIBC joint account until April 2017, that income was not significant.

[58] Until April 2017, the claimant had signing authority on GBS cheques, including cheques to herself, to the respondent and to third parties. In cross-examination, the claimant agreed that she would decide in the moment, based on advice from the GBS bookkeeper, whether to make a cheque out to herself or the respondent and in what amount. The allocation of shareholder's loans to each party was, in turn, driven at least in part by whether a cheque was made out to the claimant or to the respondent. The claimant testified that it was up to the bookkeeper to decide how GBS income would be split.

[59] In April 2017, the respondent removed the claimant's signing authority and effectively terminated her position at GBS. The claimant ceased to have any active role in the company. She opened bank accounts in her own name in April 2017, and thereafter deposited her employment income into her personal accounts.

[60] Although the claimant's active involvement with GBS ended in April 2017, she continued to have use and possession of a vehicle owned by GBS. GBS covered the insurance costs. Between May 2017 and April 2018, the respondent paid $2,200 per month

> towards her rent of $2,800. During the same period, the respondent also covered the Magdalen Crescent Property mortgage payments, property tax, and insurance, as well as such child care expenses as the children's private school tuition.
>
> [61] The respondent says that between October 11, 2015 and July 30, 2018, he spent in excess of $250,000 to cover expenses related to the Magdalen Crescent Property, including mortgage payments, property taxes, and home insurance, and also to cover the claimant's living expenses including rent. The respondent seeks reimbursement for these expenses before the proceeds from the sale of the Magdalen Crescent Property are otherwise distributed. He also seeks reimbursement of s. 7 expenses he covered for the children in the same period.
>
> [62] The parties agree that as of April 30, 2018, their financial entanglement came to an end. As of that date, the respondent stopped paying the claimant's rent, the parties fully separated their bank accounts, and GBS stopped earning any income.
>
> [Emphasis added.]

[20] By April 30, 2018, when the parties' "financial entanglement" came to an end, the total outstanding amount of their shareholder loans was $272,140.74. The company also had tax liabilities to CRA approaching $70,000, and credit card debt of $8,312.16. It had cash of $5,863.10. In these circumstances, it is not surprising that the issue raised by the parties was how to divide GBS's debt between them. Again, it is noteworthy that neither of them asked for the company to be valued as a family asset or led evidence from which such a valuation could be determined.

4. FIRST ISSUE: THE GBS LIABILITIES

4.1 The judgments below

4.1.2 Small #1

[21] As noted, one of the issues before the judge in *Small #1* was how the proceeds from the sale of the Magdalen Crescent property should be divided. Mr. Small took the position that it would be significantly unfair to divide those proceeds equally, in large part on the basis of his disproportionate contribution to expenses associated with maintaining the property post-separation. In the alternative, he argued that "if he does not otherwise receive credit for his contributions in the post-separation period, then the GBS debt existing as of April 2018 should be subject to equal division in recognition of the fact that the debt was incurred for family purposes" (at para 127).

[22] The judge accepted Mr. Small's evidence about his disproportionate contribution, and about the GBS shareholder loans. As she intended to divide the debt represented by those loans equally, she concluded that it would not be significantly unfair to divide the Magdalen Crescent proceeds equally as well:

> [131] I accept the respondent's submission that he has borne a disproportionate financial burden in the post-separation period in effectively financing two family homes. This is particularly apparent after April 2017 when he began covering the claimant's housing costs and the Magdalen Crescent Property housing expenses while at the same time that the claimant stopped depositing her employment income into the parties' joint account.

> [132] However, in light of my conclusion (set out below at paras. 144-51) that the GBS debt existing as of April 2018 is family debt which is subject to equal division, the respondent's post-separation contributions are accounted for in the property and debt division. The respondent's evidence, which I have accepted, is that the parties' expenses after separation were largely financed by way of shareholder loans from GBS. As I have ordered the equal division of those loans, there is no significant unfairness in the equal division of the proceeds of sale of the Magdalen Crescent Property as a result of the respondent's post-separation contributions.
>
> [Emphasis added.]

[23] In the result, the judge ordered equal division of the net proceeds of the sale of the Magdalen Crescent property, which totalled over $1.6 million, noting that they would "jointly share in the family debt that went to maintaining the property" (at para. 137). In all the circumstances, the judge concluded that equal division did not result in significant unfairness to Mr. Small.

[24] On the question of family debt, the judge observed (at para 109) that, in accordance with section 86(b) of the *Family Law Act,* SBC 2011, c 25 [*FLA*], family debt includes financial obligations incurred by a spouse after the date of separation "if incurred for the purpose of maintaining family property". As we shall see, the appellant contends, in my view correctly, that the judge erred in law in applying this provision, because not all of the post-separation debt of GBS was incurred for the purpose of maintaining "family property".

[25] Turning to the GBS debt, the judge noted that the issue of how to divide it was intertwined with Mr. Small's claims arising out of his post-separation contributions to the Magdalen Crescent property and to his payment of Ms. Kirsanova's rent. The judge considered first the shareholder loans advanced from the separation until April 30, 2017, when Ms. Kirsanova's position with GBS was terminated and her active involvement in the company ceased. The judge found that family expenses in this post-separation period were financed primarily by the shareholder loans from GBS, and that the recorded allocation of shareholder debt as between Ms. Kirsanova and Mr. Small, was a bookkeeping matter that did not appear to bear any relationship to the parties' personal patterns of consumption:

> [144] The evidence before me establishes, and I find, that family expenses in the post-separation period were financed primarily by shareholder loans from GBS. While the claimant stresses that her own employment income was also pooled into the parties' joint CIBC account, at least until the end of April 2017, her income was relatively modest by comparison. Indeed, the claimant appears to agree with that characterization. In resisting the imputation of income to her that is sought by the respondent, the claimant emphasizes that her earnings over time have been insignificant once amounts allocated to her through income splitting are removed.
>
> [145] Furthermore, the allocation of shareholder debt as between the claimant and the respondent, at least until the end of April 2017, does not appear to bear any relationship to the parties' personal patterns of consumption. As I have already noted, the claimant had signing authority on GBS cheques until April 2017. Whether a particular cheque was made out to the respondent or the claimant was a decision the claimant made in consultation with

> the GBS bookkeeper. The claimant agrees the loans from GBS were covering family expenses. It is illogical in such circumstances to speak of "her debt" and "his debt". It was family debt, incurred through a family business that both parties had active involvement in up until April 30, 2017.
>
> [146] In my view, even if the claimant was only responsible for GBS liabilities existing as of May 1, 2017, those liabilities should be subject to equal division. The value of the total shareholder loans to the parties as of that date was $214,243.66, of which the claimant's equal share would be $107,121.83.
>
> [Emphasis added.]

[26] The judge then looked at the additional $57,897 in shareholder loans advanced to Mr. Small by GBS between May 1, 2017 and April 30, 2018, finding that this liability, too, should be equally divided along with the additional tax liability that existed as of that date:

> [148] The claimant argues that the respondent has not demonstrated that he incurred further liability to GBS in this period directly as a result of servicing family expenses. I do not agree. In my view, the inescapable inference arising from the evidence is that the additional shareholder loans to the respondent from GBS between May 1, 2017 and April 30, 2018, were incurred for the purpose of maintaining family property. During this period of time, the property tax, insurance, and mortgage payments on the Magdalen Crescent Property alone totalled over $52,000. In the same period, the respondent paid $11,100 towards the claimant's rent, and over $25,000 towards tuition, hockey fees, and dental expenses for the children.
>
> [149] The claimant does not point to any source of funds, other than GBS, that could conceivably have covered these expenses. By May 1, 2017, even the claimant's limited income derived from teaching yoga and Pilates was being deposited into her personal account, while the parties' joint accounts continued to fund the family expenses. The claimant did not argue that the respondent has failed to make full financial disclosure. She also did not point to anything in the parties' extensive financial disclosure to suggest that the respondent had engaged in excessive personal consumption over the relevant time, or that he had some alternate source of income or savings. The reality is that the parties' resources were stretched by the demands of servicing two households on limited resources.
>
> [150] Accordingly, I find that the shareholder loans advanced by GBS to the respondent between May 1, 2017 and April 30, 2018 constitutes debt that was incurred by the respondent to maintain family property and thus is family debt within the meaning of s. 86 of the *FLA*. The claimant is therefore responsible for half of the shareholder loan debt of $272,140.74 that existed as of April 30, 2018, which is $136,070.37.
>
> [151] For the same reason, I conclude that the tax liability owed by GBS as of April 30, 2018 should be divided equally between the claimant and the respondent as a family debt. The respondent says, and the claimant does not dispute, that the debts to the CRA and HST paid out in January 2020 had accrued by April 30, 2018. I accept the respondent's position that he was unable to reduce the tax liability earlier due the financial burdens created by the parties' post-separation expenses. The tax liability of $69,117.97 should therefore be equally divided.

[27] The result was an order that the parties "shall be equally responsible for the [GBS] shareholder loan debt existing as of April 30, 2018 of $272,140.74, such that each party owes $136,070.37".

4.1.3 Small #2

[28] In *Small #1*, the judge gave leave to the parties to return, if necessary, in two circumstances: first, in the event there were issues arising from *Small #1* that required clarification; and second, in the event that either party sought a redetermination of income based on COVID-19 related impacts of more than a temporary nature (see *Small #2* at para 3; the matter of COVID-19 related impacts is discussed further below).

[29] Mr. Small applied for a redetermination of income based on COVID-19 impacts, and for a variety of other unrelated orders that the judge considered amounted to an application to re-open the trial (the trial order had not yet been entered). Of relevance to the GBS shareholder debt, Mr. Small sought an order requiring Ms. Kirsanova to reimburse GBS for her share in the amount of $106,070.37 by August 30, 2020. The amount was what Mr. Small said Ms. Kirsanova owed, taking into account dividends issued after April 30, 2018, that reduced the outstanding loans (*Small #2* at para 17).

[30] Ms. Kirsanova opposed. She did not dispute the quantification of the debt, but wished for additional time to consider the calculations. Her primary position was that it would be unfair to require her to repay the debt as it would benefit Mr. Small personally. She contended that the judge should instead order that her portion of the shareholder loan debt be reduced by requiring GBS to declare dividends retroactively during the years in which the loans were incurred (*Small #*2 at para 18).

[31] The judge declined to have anything to do with this:

> [20] In my view, it is not the role of the Court to direct the method by which GBS may recover the debt owed by the claimant. It is not even clear to me what jurisdiction I have to order GBS to declare dividends within the context of this proceeding. The Trial Judgment provides that the claimant is responsible for half of the parties' shareholder loan debt to GBS of April 30, 2018. It is up to GBS to determine the method by which it will collect on the debt. Further, I do not agree that there is anything unfair in requiring the claimant to repay to GBS her share of the significant post-separation expenses that were incurred for family purposes.
>
> [21] For these reasons, I decline to issue any order or direction that would excuse the claimant from directly repaying the shareholder loan debt to GBS. However, I am not prepared to issue a deadline for repayment at this time, as the respondent has requested. To date, the claimant has resisted repaying her share of the shareholder loans because she believed she was entitled to insist on an alternative repayment method. With that controversy resolved, I assume the parties will act promptly to seek agreement on a repayment amount and a deadline for repayment.
>
> [22] In the circumstances, I consider it appropriate to simply adjourn the relief sought by the respondent in term 2 of the notice of application. The respondent can re-apply for that relief in the event that the parties are unable to reach agreement.

4.1.4 Small #3

[32] Having failed to reach agreement on the repayment of Ms. Kirsanova's share of the shareholder loans, the parties returned before the judge—this time on application by Ms. Kirsanova. The judge considered this application to go well beyond the question she had left open, being the exact quantification of the GBS debt, observing:

> [12] The claimant's material is not directly responsive to the one issue that was left unresolved after the Post-Trial Judgment. Instead the claimant has filed a new notice of application, without leave of the court, seeking a range of expansive remedies in relation to the GBS shareholder loans, including remedies that are directly contrary to my Post-Trial Judgment and remedies that have never before been sought including at trial.
>
> [13] The claimant's application can best be described as an application to reopen the Trial Judgment, which is now the subject of an entered order, combined with an application to reopen the Post-Trial Judgment, which itself sought a reopening of the Trial Judgment. The claimant requests that I order the respondent to declare dividends as a means of reducing her shareholder loan debt, which is a form of relief that was not sought at trial and which I have already refused to grant in the Post-Trial Judgment.
>
> [14] The claimant says that reopening of the Post-Trial Judgment is warranted as a result of new information provided by the respondent in his reopening application filed July 29, 2020. This information is clearly not new but was, rather, in the claimant's possession at the time the original post-trial applications were argued.
>
> [15] The claimant has attempted to overcome this hurdle by filing, on November 5, 2020, an amended application response to the respondent's July 29, 2020 notice of application. The application response is not so much amended as completely revised, raising new substantive arguments that were never advanced at the hearing of the respondent's application on August 12 and 14, 2020. Further, the amended application response was filed after judgment had already been issued on the respondent's application.
>
> [16] The claimant approaches the present hearing as if it was open to her to raise any new argument she chooses to in relation to the GBS shareholder loan debt without regard to the fact that the trial process is complete, save for the single narrow issue of the respondent's proposed quantification of the repayment amount.
>
> [17] I note that the respondent's position that GBS shareholder loan debt should be equally divided as of April 30, 2018, was transparently advanced in his written argument at trial and the loans were quantified in his Scott Schedule. Yet the claimant made no submissions on the GBS shareholder loan debt at trial, save to agree that she was responsible for her portion of the shareholder loans that existed as of May 1, 2017.
>
> [18] Any opposition the claimant had to the relief sought by the respondent ought to have been raised at trial. The claimant has in any event had a further opportunity to revisit the issue of the GBS shareholder loans through the Post-Trial Judgment, including the opportunity to put in new evidence on the issue.
>
> [19] If the claimant was unhappy with the Trial Judgment or Post-Trial Judgment, she also had the opportunity to seek the remedy of appellate review. She does not, however, have a remedy available to her in the form of repetitive attempts to re-litigate issues in the trial court after the trial has concluded.
>
> [20] For these reasons, as I advised the parties at the outset of this hearing, I am not prepared to entertain the claimant's application to reopen the reopening application at this stage and in these circumstances. Indeed, the claimant's litigation conduct is, in my view, approaching the stage where it may properly be viewed as an abuse of court process.

[33] The judge then dealt with the one issue that she considered was properly before her, accepting Mr. Small's evidence, and rejecting Ms. Kirsanova's arguments:

> [21] I will now turn to address the only issue that is properly before me at this time, which is the quantification of the shareholder loans that the claimant must repay. In the Trial Judgment I equally divided the shareholder loans as of April 30, 2018, so that each party was responsible for $136,070.37. The respondent accepts that this amount should be reduced by $30,000 to reflect dividends issued to the claimant by GBS on July 31, 2018. This leaves a net amount owing of $106,070.37.
>
> [22] The amount of shareholder loan debt is confirmed in a letter provided by Dianne Mee, the GBS accountant. The source documents, the shareholder account records, are also in evidence and were in evidence at trial. They support the respondent's calculations.
>
> [23] The claimant raised two issues in opposition to the respondent's proposed quantification. First, she says that the respondent has not produced records to confirm that the claimant was not issued dividends after July 31, 2018. I do not consider this to be a legitimate objection. As respondent's counsel points out, if dividends had issued to the claimant, then a T5 would also have been issued to her and she would have been required to report the dividends on her tax return. There is no evidence that further dividends have issued to her.
>
> [24] Second, the claimant says that I ought not to rely on Ms. Mee's evidence or the underlying source documents because the claimant has suspicions that there are inaccuracies in the shareholder account records. The claimant did not raise such suspicions at trial, and there is no evidence before me to substantiate them in any event.
>
> [25] I am satisfied based on the evidence that the respondent's calculation is correct. I therefore order that the claimant forthwith reimburse GBS the sum of $106,070.37.
>
> [Emphasis added.]

4.2 On appeal

4.2.1 The appellant's position

[34] Ms. Kirsanova raises a number of overlapping sub-issues that, she says, flow from the judge's failure to grapple with the legal status of GBS—in particular, her failure to appreciate that it was a family asset and should be valued as such. Instead, Ms. Kirsanova says, the judge treated GBS as though it were a third-party creditor.

[35] One of the sub-issues relates to spousal support. She points out that although the parties separated in October 2015, their financial affairs continued to be intertwined. It was not until April 30, 2017 that Ms. Kirsanova ceased to have any active involvement with GBS, and April 30, 2018, when their financial entanglement came to an end. In the meantime, as we have seen, Mr. Small continued to support the family via shareholder loans from GBS. In these circumstances, it was not until August 2018 that Ms. Kirsanova applied for interim spousal and child support. That application was resolved by a consent order pronounced November 27, 2018 by which the parties agreed, without prejudice, that Mr. Small would pay spousal and child support monthly based on imputed incomes of $30,000 to Ms. Kirsanova, and $155,412 to Mr. Small. Ms. Kirsanova contends that

before this order, she acted on the basis that support was provided through the shareholder loans.

[36] This leads directly to the second sub-issue, concerning the extent to which the shareholder loans were found to be "family debt" used to maintain family property post-separation as required by section 86(b) of the *FLA*. According to Ms. Kirsanova, there were two relevant periods: (1) from separation to April 30, 2017, during which the shareholder loans came to $214,243.66 (the "first period"; hereafter rounded to $214,000), and (2) from April 30, 2017, to April 30, 2018, during which the shareholder loans totalled $57,897 (the "second period", hereafter rounded to $58,000). Ms. Kirsanova submits that it was only the shareholder loans in the latter period that the judge found were incurred to maintain family property. By finding that Ms. Kirsanova was also responsible for half of the $214,000 in shareholder loans incurred in the first period, Ms. Kirsanova says that the judge erred in law, obliging her to repay half of the support she was entitled to receive in that first period.

[37] A third sub-issue arises out of the order requiring only Ms. Kirsanova to repay her shareholder loan to GBS, instead of requiring Mr. Small to do so too. In the result, Ms. Kirsanova asserts, the judge failed to effect an equal division of the debt.

[38] A fourth sub-issue concerns GBS's liability to the CRA. Ms. Kirsanova contends that it was an error in law to find that this liability constituted family debt under the *FLA* and was thereby subject to equal division.

[39] As I remarked above, while Ms. Kirsanova contested her liability to reimburse the GBS shareholder loan debt to the extent sought by Mr. Small, it does not appear that she raised these arguments at trial. This has at least some consequences. As I explain below, I consider it now too late to complain about the judge's alleged failure to value GBS as a family asset given the manner in which Ms. Kirsanova pursued her case at trial. I reiterate that, as the judge observed in *Small #3* at para 17, Ms. Kirsanova made no submissions on the claim for an even division of the shareholder loans other than to agree that she was responsible for her proper portion that existed as of May 1, 2017. Judges can only deal with what the parties put in front of them.

[40] Similarly, the third sub-issue is one not raised by Ms. Kirsanova at trial. I am not prepared to consider it. In any event, how Mr. Small should repay his portion of the shareholder loans to GBS was a matter between GBS and him as GBS's by-then sole shareholder. Nor does this violate the principle that family debt should be assessed at the time of trial. As far as GBS was concerned, the debt to be assessed at the time of trial was that outstanding as of April 30, 2018.

[41] I accept, however, that Ms. Kirsanova can properly raise the first, second and fourth sub-issues, which focus on errors of law, and concern the question of in what portion of the shareholder loans she should properly share. This was a question she did contest at trial, even if she did so on the basis of an approach different from that taken before us.

4.2.2 The respondent's position

[42] Mr. Small contends that the judge did not err in relation to the status of GBS. She expressly found it to be a family business. She did not value it as a family asset because neither party asked her to, and there was no evidence that would have enabled her to do so. On the evidence before her, all that GBS had was debt, which the judge properly divided as family debt.

[43] In Mr. Small's submission, the judge's treatment of the GBS shareholder loans must be viewed holistically. Their equal division as family debt was balanced by the judge's decision to order an equal division of the family asset of the Magdalene Crescent property, notwithstanding Mr. Small's position that equal division would be substantially unfair to him.

[44] Mr. Small maintains that the judge's findings of which Ms. Kirsanova complains were findings of mixed law and fact, and accordingly are owed deference. He submits that the appellant's reading of section 86 of the *FLA* does not accord with the authorities, and the judge's conclusion that the shareholder loans constituted family debt was properly supported in law by her findings.

4.3 Discussion

4.3.1 The status of GBS and "family debt"

4.3.1.1 Overview

[45] As already noted, the judge observed that "[t]he issue of how to divide the GBS debt is intertwined with [Mr. Small's] claim for reimbursement of post-separation contributions to the Magdalene Crescent property and to [Ms. Kirsanova's] rent" (at para 138).

[46] Mr. Small's position at trial really came down to this: in the period after their physical separation, he covered the family expenses, including the maintenance of the Magdalene Crescent property and, after it was sold, Ms. Kirsanova's rent. He covered those expenses through his income, which was paid out through GBS as shareholder loans. He argued accordingly that he should be reimbursed for a fair share of that money either through an unequal division in his favour of the proceeds from the sale of Magdalene Crescent, or through repayment of a portion of the shareholder loans. As quoted above, the judge put it this way:

> [131] I accept the respondent's submission that he has borne a disproportionate financial burden in the post-separation period in effectively financing two family homes. This is particularly apparent after April 2017 when he began covering the claimant's housing costs and the Magdalen Crescent Property housing expenses while at the same time that the claimant stopped depositing her employment income into the parties' joint account.
>
> [132] However, in light of my conclusion (set out below at paras. 144-51) that the GBS debt existing as of April 2018 is family debt which is subject to equal division, the respondent's post-separation contributions are accounted for in the property and debt division. The respondent's evidence, which I have accepted, is that the parties' expenses after separation were largely financed by way of shareholder loans from GBS. As I have ordered the equal

> division of those loans, there is no significant unfairness in the equal division of the proceeds of sale of the Magdalen Crescent Property as a result of the respondent's post-separation contributions.

[47] Moreover, the nature of GBS as a family business was one of the factors the judge considered in determining whether Mr. Small intended to transfer his excluded property to Ms. Kirsanova at the time of the purchase of the Magdalene Crescent property. In listing the evidence upon which she relied in drawing the inference that he did intend to transfer his excluded property, the judge noted at para 123(c):

> GBS was a family business. As of 2014, the claimant and respondent were equal shareholders. The claimant worked with the respondent in the company until April 2017, and they shared income from GBS.

[48] When it comes to the division of property, however, only the question of GBS and the shareholder loans is raised before us.

[49] With this context in mind, I will turn first to the question of the status of GBS.

4.3.1.2 Status

[50] By the time of trial, GBS was no longer a family business. Mr. Small was the sole operator, director and employee of a company that carried a large receivable due in the form of loans it had advanced to its two shareholders. Properly speaking, these were not liabilities of GBS, but rather liabilities of one or both of its two shareholders. These loans, on the evidence, were nearly all the value that the company had. In this situation, and given the positions the parties took before her, I see no error in the judge's "failure" to assess the value of GBS as a family asset for the purpose of dividing that value between the parties. She was not asked to do so, and the necessary evidence was not put before her. The parties must live with the choices they made.

[51] The problem the parties put before the judge, and with which she dealt, was a different one: what to do about the monies each party owed to GBS once their financial affairs had become disentangled and GBS had resumed its status as Mr. Small's operating company. One of the positions taken by Ms. Kirsanova at trial is that she should be responsible for repaying only those shareholder loans recorded as having been advanced to her on the company's books. The judge rejected this, noting at para 145 that the allocation of shareholder debt as between the parties did not appear to bear any relationship to their personal patterns of consumption.

[52] Given the particular circumstances of this case, I consider that even though the business had been a family one, it was analytically appropriate to treat the debt like one owed to a third-party creditor, borrowed in the name of both parties and used for the benefit of the family. There was little else the judge could do in the circumstances. As things stood, the total debt owed to GBS by its shareholders was a burden borne solely by Mr. Small. The real question was how much of that

burden should be shared by Ms. Kirsanova, to be considered in the context of how their other properties were to be divided.

[53] In my view, how the judge resolved this question, balancing the intertwined factors before her, is entitled to deference—unless, as Ms. Kirsanova argues, the judge's analysis was wrong in law in treating the $214,000 in loans advanced in the first period as family debt. I turn to consider that question.

4.3.1.3 Family debt to 2017 (the first period)

[54] Recall that in Ms. Kirsanova's submission, the judge did not make a finding that the loans totalling $214,000 advanced in the first period were used to pay "family debt". Ms. Kirsanova concedes that the judge specifically found that the additional $58,000 in shareholder loans incurred in the second period were incurred for the purpose of maintaining family property (at para 148)—although she disputes the accuracy of this finding.

[55] By section 84(1) of the *FLA*, "family property" is all real property and personal property owned by at least one spouse on the date the spouses separate. By section 84(2)(a), family property includes a share or an interest in a corporation. Here, it is clear that GBS was family property when the spouses separated. They continued to operate it as a family business after separation until April 30, 2017. During that time, they each incurred debt through the monies advanced by GBS to cover family expenses.

[56] By section 86 of the *FLA*, what is included in family debt differs according to whether it was incurred before or after separation:

> 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.

[57] As noted, Ms. Kirsanova contends that since the judge made no finding here that the first period shareholder loans were "incurred for the purpose of maintaining family property", then those loans do not qualify as "family debt". Instead, she maintains that the judge conflated "family debt" with "family expenses". This resulted, she says, in her having to fund her own notional spousal and child support during that period because the shareholder loans from separation to April 30, 2017, financed what she lived on as well as the maintenance of property.

[58] The first question is whether this fairly describes the judge's approach. It is clear that the judge understood the law and the operation of section 86 of the *FLA*. She set it out at para 109 of her reasons. It is also true that she seems on several occasions to have used the phrase "family

expenses" as if it comprised "family debt" in the sense of monies paid to maintain family property. Did she do so in a manner that went beyond what could properly be considered "family debt"? I ask this in the context of what the Supreme Court of Canada said in *GF* (at para. 79): "Where ambiguities in a trial judge's reasons are open to multiple interpretations, those that are consistent with the presumption of correct application must be preferred over those that suggest error…".

[59] As I read the judge's reasons, and I say this with respect, it seems to me that the judge did fail to consider the distinction between monies advanced through shareholder loans from GBS to cover property maintenance, and monies advanced to cover family expenses other than the maintenance of property. This distinction does not appear to have been raised by Ms. Kirsanova at trial. It should have been. It is an important one given the scheme of the *FLA*. Debt incurred by a spouse before separation is, *per se*, family debt. But after separation, debt incurred by a spouse can only be considered family debt if it is used to maintain family property: see, for instance, *Maguire v Maguire*, 2016 BCCA 431 at para 32.

[60] Mr. Small relies on this Court's decision in *Bryan v Chapman*, 2011 BCCA 278, to support the proposition that a post-separation debt may be a family debt even if not incurred to maintain family property, so long as there is a discernible nexus between it and "some family purpose or benefit" (at para 43). That argument, however, is not sustainable. *Bryan* was decided under the *Family Relations Act*, RSBC 1996, c 128 [*FRA*], before the *FLA* came into force. The *FRA* did not have a provision equivalent to section 86 of the *FLA* (as this Court observed in *Maguire* at para 24). The current *FLA* scheme ensures, among other things, that a spouse in the position of Ms. Kirsanova is not obliged to underwrite support to which she is otherwise entitled post-separation, or subsidize the post-separation living expenses of the spouse in the position of Mr. Small.

[61] My conclusion that the judge did indeed conflate "family expenses" with "family debt" is based on the manner in which the judge approached these loans. As previously noted, the judge observed at para 138 that the issue of how to divide the GPS data is "intertwined with [Mr. Small's] claim for reimbursement of post-separation contributions to the Magdalene Crescent property and to the claimant's rent" (emphasis added). Rent, of course, is a living expense, not a property-maintenance expense. At para 57, the judge observed that "post-separation family expenses were financed primarily through income that the parties received from GBS by way of shareholder's loans", noting that the claimant's income during this period was "not significant". On the evidence, it would appear that the reference to "family expenses" means exactly what it says: Ms. Kirsanova used the monies to pay for a variety of things, including school expenses, groceries, gas, utilities, and "all kinds of expenses"—as well as property expenses. This is further confirmed by the judge's approach to Mr. Small's claim for reimbursement of special and extraordinary expenses incurred up to April 30, 2018, such expenses indeed being "family expenses", but not "family debt":

> [257] Second, up until April 30, 2018, the parties' finances remained intermingled. Family

> expenses continued to be paid primarily out of the parties' joint CIBC account, which was largely funded by the GBS shareholder's loans. I have already determined that the GBS shareholder's loans should be equally divided as family debt as of April 30, 2018. The respondent would be doubly compensated if the claimant was additionally required to reimburse him for a portion of family expenses incurred up to April 30, 2018.
>
> [Emphasis added.]

[62] It follows that Ms. Kirsanova's concession recorded by the judge at para 145, that the shareholder loans in this first period covered family expenses, did not resolve the question of whether they constituted family debt.

[63] As quoted above from paras 131–132 of her reasons for judgment, the judge clearly was concerned about balancing the division of the proceeds from the sale of the Magdalene Crescent property with the advances from GBS by which Mr. Small was "effectively financing two family homes". Then at para 137, the judge explained her conclusion that equal division of the proceeds of the sale of the Magdalen Crescent property would not be significantly unfair, indicating that "for the reasons set out below they will jointly share in the family debt that went to maintaining the property". What she ordered, however, went beyond that. By dividing the responsibility for the shareholder loans over the first period equally, the judge effectively obliged Ms. Kirsanova to share also in debt incurred to cover living expenses for her and their children post-separation, normally the subject of support orders, as well as living expenses incurred by Mr. Small. That is an error of law.

[64] How to correct it? The question is whether it becomes necessary to remit the entire question of property division to the trial court given the importance of the overall context of the division of property and the balancing that the judge strove to achieve. It seems evident that it is neither reasonable nor practical for this Court now to review years of expenditures in order to determine a precise breakdown, all without the benefit of expert assistance and an appropriate record. Nevertheless, in a high conflict case such as this, litigated across many years at considerable expense, re-trial is a result to be avoided if fairness can be achieved otherwise. In my view, it can. It can be achieved by respecting the judge's concern to divide the costs related to the maintenance of property, particularly the Magdalene Crescent property, while ensuring that Ms. Kirsanova is not obliged to subsidize Mr. Small's expenses and the support to which she was entitled. The fairest way to accomplish this, in my opinion, is to deduct from the total shareholder loan debt to April 30, 2017, of $214,243.66 an amount that takes into account Mr. Small's living expenses and his share of special and extraordinary expenses, together with the support Ms. Kirsanova would have been entitled to receive had she sought it in place of relying on the shareholder loan advances to cover her expenses.

[65] As we have seen, Mr. Small agreed in November 2018 to pay child support of $1,739 monthly, and spousal support of $1,264, together with 75% of special and extraordinary expenses for the children. This was based on an imputed income of $155,412, in line with GBS's pre-tax income in

2017. GBS's pre-tax income (and hence Mr. Small's) was considerably lower in the preceding years. As the judge noted (at para 219), the net income reported on GBS's unaudited financial statements from 2015 to 2018 was as follows:

2015: $86,682
2016: $116,006
2017: $155,412
2018: $153,880

[66] In *Small #1*, the judge ordered Mr. Small to pay child support of $962/month, plus 67% of the extraordinary expenses. This was based on imputed incomes of $100,000 to Mr. Small and $35,000 to Ms. Kirsanova. The judge also awarded spousal support in the amount of $850/month.

[67] Working within these parameters, I would estimate that the notional child and spousal support Ms. Kirsanova could expect to have received in the period from October 11, 2015, to April 30 2017, would be in the range of $35,000. Mr. Small's share of the extraordinary expenses covered by the shareholder loans in that period would come to approximately $46,000.

[68] Taking this into account, together with living expenses over the years in question, the Magdalene Crescent property mortgage, tax and insurance costs and the BMW X3 costs, I conclude that a fair assessment of the amount of the shareholder loans that should properly be considered family debt would reduce the total of $214,243.66 to $120,000, a reduction of over $94,000.

4.3.1.4 Family debt 2017–2018 (the second period)

[69] As I observed above, the judge specifically found that the shareholder loan debt of $57,897 incurred during this second period was incurred "for the purpose of maintaining family property" (at paras 148 and 150). The question therefore becomes whether that finding was one of palpable and overriding error. I am not satisfied that it was. While it is true that the judge discussed not only the payments relating to the Magdalene Crescent property (which would constitute family debt), but also money spent to cover Ms. Kirsanova's rent and special expenses for the children (which would not constitute family debt), the amount the judge found had been spent on Magdalene Crescent ("over $52,000") is sufficient in the circumstances to support her conclusion. This is particularly so when one considers, holistically, that this must be balanced with the denial of Mr. Small's claim for reimbursement of Ms. Kirsanova's share of the extraordinary expenses in this second period.

4.3.1.5 GBS's tax debts

[70] The judge took the same approach to the tax debt, finding that it was a debt incurred by Mr. Small to maintain family property. In doing so, she accepted Mr. Small's evidence that while these debts were paid in January 2020, they had accrued by April 30, 2018 (at para 151). The judge

concluded that, accordingly, it should be equally divided.

[71] The judge found that GBS's tax liability was as follows:

> [143] The GBS tax liability to the Canada Revenue Agency (CRA) as of July 31, 2017 was $37,992.43, and the HST debt was $6,158.75. As of July 31, 2018, GBS owed $58,688.91 to the CRA and $7,100.60 to HST. As I have noted, a total of $69,117.97 was paid out of the Trust Funds on January 23, 2020 to satisfy all tax liability as of that date ($60,719.76 to the CRA and $8,398.21 to HST).

[72] Although Ms. Kirsanova's active participation in GBS ceased as of April 30, 2017, she remained an equal shareholder through April 30, 2018, benefiting from both loans to the shareholders and dividends. It follows, in my view, that the judge did not err in treating the tax liabilities up to April 30, 2018 as a family debt. That liability was necessarily incurred to maintain GBS, a family property. As I understand it, the tax debt has already been paid out of trust funds, with each party contributing equally. I would not disturb that.

4.3.2 Conclusion

For the reasons just stated, I conclude that the judge did not err in failing to value GBS as a family asset for the purpose of dividing that value between the parties. She did the best she could with the case the parties presented, and undertook an appropriate analysis in the circumstances. In my respectful view, however, the judge erred in law in her approach to the division of the GBS "shareholder loan" debt incurred in the period to April 30, 2017. She did so by failing to distinguish between debt incurred to maintain family property and debt incurred to cover family expenses other than property maintenance, thereby requiring Ms. Kirsanova to contribute too great an amount to the debt owed to GBS by way of shareholder loans.

[73] In *Small #3*, the judge ordered Ms. Kirsanova to pay to GBS $106,070.37 on account of her share of the shareholder loans, calculated as follows:

a) total remaining shareholder debt to GBS to be divided of April 30, 2018, of $272,140.74;

b) Ms. Kirsanova's one half share: $136,070.37

c) less dividend paid to Ms. Kirsanova to reduce her shareholder loan: $30,000

d) balance: $106,070.37

[74] For the reasons explained above, I would re-assess that amount in this way:

a) total remaining shareholder debt to GBS to be divided as of April 30, 2018: $177,897;

b) Ms. Kirsanova's one half share: $88,948.50

c) less dividend of $30,000

d) balance: $58,948.50

[75] It follows that Ms. Kirsanova, having paid the $106,000 ordered in *Small #3*, is entitled to be repaid $47,051.50.

5. THE SECOND ISSUE: DIVIDING THE VALUE OF THE BMW X3

5.1 The judgments below

5.1.1 Small #1

[76] GBS initially purchased this vehicle the day before the parties separated in October 2015 for $59,524.14, borrowing $30,241.78 to do so. Ms. Kirsanova had exclusive use of it after separation, and bought it from GBS in 2019 for a without-prejudice price of $38,000. At that time, GBS paid off the amount still owing on the loan ($4,714). Ms. Kirsanova later obtained a valuation from a BMW dealer indicating an estimated market value of $28,584. Mr. Small was prepared to accept that the value should be set at $38,000, as opposed to $59,524.14, but pointed to all of the debt incurred by GBS in servicing the BMW purchase.

[77] The judge declined to take into account GBS's financing and insurance costs, other than the final loan payment, because, "[a]mong other considerations, I have already determined that the GBS debt existing as of April 30, 2018 is subject to equal division" (at para 184). She accepted that Ms. Kirsanova's appraisal was the only evidence of the car's fair market value, but considered that there should be a further adjustment for the final loan payment of $4,714.

[78] In the result, the judge ordered Mr. Small to pay Ms. Kirsanova $2,351 as an adjustment. She arrived at this figure by subtracting the fair market value of $28,584 from the without prejudice price paid of $38,000, dividing that in two ($4,708), and subtracting half the value of the outstanding loan GBS paid at the time Ms. Kirsanova bought the car ($2,357).

[79] Ms. Kirsanova says that this calculation was palpably wrong and failed to effect an equal division of the vehicle's net value. In her submission, the net value was $23,870, calculated by deducting the loan amount GBS paid of $4,714 from the fair market value of $28,584. Each party's 50% share therefore comes to $11,935. But as Ms. Kirsanova paid $38,000 to GBS, she asserts, Mr. Small should have been directed to pay her $26,065 in compensation, being the value of her 50% share less what she in fact paid.

5.1.2 Small #2

[80] On this first post-trial application, Mr. Small asked the judge to re-open the trial for the purpose of re-determining the value of the BMW X3. He submitted that the judge should have assessed the value at $38,000, being what Ms. Kirsanova actually paid on a without prejudice basis

when she bought the vehicle from GBS. He relied on an exchange of communication between the parties including advice from a car dealer. Mr. Small also sought reimbursement of $1,900 towards provincial sales tax, although he adduced no evidence about this. The judge turned Mr. Small down:

> [26] I am not prepared to exercise my discretion to re-open the trial to re-determine the value of the BMW X3. The respondent does not say that evidence was misconstrued or an argument overlooked. He simply seeks to persuade me to re-hear the arguments, re-weigh the evidence, and reach a different conclusion on the valuation of the vehicle. On the payment of PST, the respondent cannot even point to evidence to re-weigh.
>
> [27] I conclude that no miscarriage of justice would occur if the trial is not re-opened to address the merits of the respondent's arguments. Accordingly, I dismiss the respondent's application to re-open the trial to re-determine the value of the BMW X3.

5.2 Discussion

[81] I set out the facts and Ms. Kirsanova's argument on this issue above at paras 77–80. Recall that Ms. Kirsanova purchased the vehicle from GBS for $38,000, without prejudice to her right to take a different position about its value at trial. Indeed, she did take a different position at trial, contending that the fair market value of the vehicle was $28,584, based on an appraisal she obtained. The judge accepted that appraisal as representing the fair market value, and resisted Mr. Small's later attempt in *Small #2* to persuade her differently.

[82] The question was what adjustments should be made to effect an equal division of the value of the vehicle. As noted above, the judge concluded that Ms. Kirsanova should receive $2,351 as an adjustment to the purchase price. She did this by taking one half of the difference between the $38,000 Ms. Kirsanova paid and the fair market value ($38,000 - $28,584 = $9,416 ÷2 = $4,708). She then subtracted $2,357, being one half of the value of the last loan payment made by GBS, which GBS paid at the time that the vehicle was transferred.

[83] I agree with Ms. Kirsanova that, given the parameters she employed, the judge made an error in her calculation. In the circumstances, that error must be taken to be palpable and overriding. I disagree, however, with Ms. Kirsanova's alternative calculation, which would require Mr. Small to compensate her in the amount of $26,065 (see para 80 above).

[84] As I see it, the error the judge made was in dividing the excess value paid by Ms. Kirsanova. The vehicle was found to have a fair market value of $28,584, but Ms. Kirsanova paid $38,000. She therefore paid $9,416 too much and was entitled to a return of all of that, rather than being credited for only half her overpayment.

[85] In my view, the proper approach begins by crediting each party with half the fair market value of the vehicle ($14,292). That is the base amount that GBS was entitled to receive, but as it also paid all of the final loan payment, it was entitled to a further $2,357, being half of what it paid. On an equal division based on the facts found by the judge, then, GBS ought to have received $16,649

from Ms. Kirsanova. But in fact it received $38,000. In these circumstances, Ms. Kirsanova is entitled to an adjustment of $21,351 ($38,000 - $16,649). The same result is achieved by deducting the amount of the loan attributable to Ms. Kirsanova ($2,357) from her half-share of the market value ($14,292), yielding $11,935, and then adding back her overpayment in the amount of $9,416.

[86] I have not forgotten that the GBS debt that the judge declined to consider would include debt incurred during the first period of the shareholder loans. That would have been family debt, and I kept it in mind in adjusting the family debt portion of the shareholder loans for the first period with a view to preserving this aspect of the balancing act.

5.3 Conclusion

[87] In these circumstances, I would set aside the judge's order that Mr. Small reimburse Ms. Kirsanova $2,351 for the purchase of the BMW X3, and substitute an order that Mr. Small reimburse Ms. Kirsanova $21,351.

6. THE THIRD ISSUE: IMPUTING INCOME TO MR. SMALL

6.1 The judgments below

6.1.1 Small #1

[88] The trial completed in January, 2020, before the COVID-19 pandemic greatly restricted business operations in British Columbia. The judge's reasons were released on May 7, 2020, by which time the restrictions had been imposed and remained in place. Noting that these events did not form part of the trial record, the judge proceeded to determine each party's income as of the time of trial, while also giving leave to either party to apply to have their income re-determined based on post-trial events. Mr. Small sought to do so in *Small #2*, relying in part on the evidence that Ms. Kirsanova seeks now to have admitted in this Court as fresh evidence.

[89] At trial, Ms. Kirsanova sought to impute income of $155,000 to Mr. Small for the period from November 2018 to trial (based upon his pre-trial without prejudice agreement for the purpose of interim support), and $163,000 ongoing. Mr. Small maintained that the income he was earning at the time of trial from Acuva ($80,000 plus potential bonuses as noted above) was reasonable and the result of his *bona fide* efforts to find employment in accordance with his skills, experience and capacity. He argued that for the period from November 2018 through November 2019, due to the impact of the termination of his contract with Xalt, his involvement in preparing the Magdalene Crescent property for sale, and injuries he suffered in a motor vehicle accident, the court should impute income of only $40,000 to him for support purposes.

[90] The judge began by setting out the legal framework:

> [191] Section 16 of the *Federal Child Support Guidelines*, SOR/97-175 [*Guidelines*],

establishes the general rule that a spouse's income for support purposes is determined "using the sources of income set out under the heading "Total income" in the T1 General form issued by the Canada Revenue Agency and is adjusted in accordance with Schedule III". Section 17(1) of the *Guidelines* provides that if the court is of the opinion that the determination of a spouse's annual income under s. 16 would not be the fairest determination of income, the court may have regard to the spouse's income over the last three years and may determine an amount that is fair and reasonable in light of any pattern of income or fluctuation in income.

[192] Section 19(1) of the *Guidelines* sets out a non-exhaustive list of circumstances in which the court may impute income. These factors include:

(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; …

[193] Imputing income for intentional unemployment or under-employment does not require a finding of bad faith on the part of the spouse in respect of whom the imputation is sought; it only requires a finding that he or she is not earning to capacity: *M.C.V. v. F.V.*, 2018 BCSC 96 at para. 153.

[194] The imputation of income should not be the product of speculation or guess-work; the court must find that the parent is realistically capable of earning the income that is sought to be imputed and whether he or she has taken reasonable steps to obtain employment commensurate with factors such as age, health, education, skill and work history: *Bourque v. Gerlach*, 2006 BCCA 157 at para. 63; *Marquez v. Zapiola*, 2013 BCCA 433 at para 37 [*Marquez*]; *Shen v. Tong*, 2013 BCCA 519 at paras. 81-82.

[195] Although the legal foundation for awarding spousal support is different from that of child support, the test for imputing income for the purpose of fixing the quantum of support is similar. The test is one of reasonableness, having regard to the same factors to be considered in imputing income for child support: *Marquez* at para. 38.

[Emphasis added.]

[91] Ms. Kirsanova submits that the judge erred in law by having regard to Mr. Small's income over some 15 years instead of the three years permitted by section 17(1) of the *FCSG*. The judge's analysis proceeded as follows:

[212] I will first address the respondent's argument that his actual employment income with Acuva should be used as a basis for determining his income for the purpose of prospective support and that income should not be imputed.

[213] The determination of the respondent's income is complicated in this case by an inconsistent pattern of earnings over time. The respondent has not followed a standard employment path of either working in one field or for one employer. From 2003 until the time he took on employment with Acuva, the respondent was an entrepreneur who pursued a variety of diverse business opportunities.

[214] Between 2003 and 2006, the respondent did not work in Canada at all but rather received $7,000 to $8,000 per month from his English school business in Japan. This amounted to an annual income of $84,000-$96,000.

[215] Between 2006 and 2008, the respondent worked for Holey Soles Canada, and then Holey Soles Japan after settling his lawsuit. At the same time, the respondent started up Kawami.

[216] Because the parties engaged in income splitting, through Kawami and then GBS, the respondent's historical Line 150 income between 2006 and 2011 is not reflective of his actual earnings. It is not apparent to me how one might derive an accurate assessment of the respondent's earnings in this period of time, and neither party suggested a method to me.

[217] The respondent's highest income years were from 2012 to 2018 when he had successive contracts, through GBS, to provide management services to three marine energy companies: Corvus, Plan B, and Xalt. The respondent made his initial contact with Corvus through a hockey coaching connection. The subsequent contracts with Plan B and Xalt flowed from contacts the respondent had developed at Corvus.

[218] GBS was paid $120,000 to $240,000 per year by Corvus and Plan B. The respondent says he believes he was paid above market value for his services. GBS's contract with Xalt ran for approximately six months, from November 2017 to April 2018. The respondent recalls that GBS was paid approximately $12,000 to $13,000 per month by Xalt. He says the contract ended when Xalt was bought by a German company.

[219] The net income reported on GBS's unaudited financial statements from 2015 to 2018 is as follows:

2015 - $86,682

2016 - $116,006

2017 - $155,412

2018 - $153,880

[220] The claimant argues that the respondent's earnings, through GBS, were on an "upward trajectory". This is the basis upon which she argues for an imputed income of $163,000; that is, the 2018 net earnings, plus $10,000.

[221] The respondent says he did make efforts to replace the Xalt contract, but that there were no other opportunities available in the marine energy sector. He has provided evidence of his attempts to secure alternative employment after April 2018. …

[92] The judge then made the following findings:

[223] I conclude that the evidence does not support the claimant's position that an income of $163,000 should be imputed to the respondent. I agree with the respondent that GBS's earnings over the 2015-2018 period were unusually high and not indicative of an earnings trend. In this period, the respondent, through GBS, managed to secure a series of lucrative, short-term contracts in a specialized field. The claimant has not provided evidence that equally lucrative opportunities were available to the respondent after the contract with Xalt ended.

[224] At the same time, I am not persuaded that the respondent's current annual income of $80,000 fairly reflects his reasonable earning capacity. While the respondent's earnings history is not linear, he has generally been successful in pursuing diverse business opportunities. He successfully ran an English school business in Japan, an import clothing company, and a management consulting business. While it is not easy to precisely estimate the respondent's earnings over time, it does not appear that he has earned less than $100,000 annually between 2003 and 2018 and in some years he has earned significantly more. The respondent has the potential to earn an income above $80,000 with Acuva depending on the revenue he generates. He continues to explore other business opportunities outside Acuva.

[225] In my view, $100,000 is a fair and reasonable estimate of the respondent's annual income for support purposes as of the date of trial, and I impute income to him in this amount.

[93] Having found that $100,000 was a reasonable estimate of Mr. Small's income for support purposes as of the date of trial, the judge went on to conclude that it was appropriate to impute the same amount for the period from November 2018 to trial. She accepted that he was entitled to resile from the "stop-gap" without-prejudice amount of $155,000 he agreed to for the purposes of interim support without showing a material change in circumstances, but she rejected his contention that he was capable of earning only $40,000 during this time:

> [230] The question as it relates to the pre-trial period is whether the respondent made adequate efforts to secure alternative, commensurate employment after the termination of the Xalt contract in April 2018.
>
> [231] I have already reviewed the evidence of the respondent's employment search after April 2018. While I accept that the respondent did make some effort to secure employment, the evidentiary record does not indicate that he acted with diligence in pursuing either employment or business opportunities. Viewing the evidence in the most favourable light possible, the documentary record suggests that the respondent applied for about 65 jobs over a 19-month period, which is three to four applications per month. The respondent testified that he had some job interviews during this time, but did not provide details.
>
> [232] Further, I do not accept that someone with the respondent's level of education, business skills, and employment history was only capable of earning an income of $40,000 during this time. Indeed, the respondent himself appears to acknowledge that an imputed income of $40,000 would constitute under-employment. He attributes his failure to work more in this period to the stress of the litigation, the need to prepare the Magdalen Crescent Property for closing, and the fire at his rental property. The respondent cites the injuries he suffered in the November 18, 2018 motor vehicle accident as a factor that limited his ability to work.
>
> …
>
> [235] On the basis of the limited medical evidence adduced at this trial, and in the absence of any expert evidence, I cannot conclude that the respondent's accident-related injuries had any significant impact on his ability to work in the pre-trial period. I also do not accept that the other stressors in the respondent's life at the time, including the ongoing stress of the litigation, provide a legitimate excuse for his unemployment or under-employment.
>
> [236] Accordingly, and for the reasons already stated, I find it reasonable to impute an income to the respondent of $100,000 for the purpose of determining his support obligations as of November 2018. In my view, the respondent had the capacity to earn such an income as of that date.

6.1.2 Small #2

[94] In *Small #2*, the judge considered Mr. Small's application to have his income re-determined for spousal and child support purposes based on COVID-19 impacts. In doing so, she reviewed both his evidence at trial and his affidavit evidence in support of this application:

> [36] ... At trial, the claimant sought to impute an annual income of $163,000, to the respondent. This was based on the income the respondent had received in the years 2012-2018 through a series of lucrative contracts he secured, through GBS, in the marine energy sector.
>
> [37] The respondent testified at trial over the period January 6 to 8, 2020. His evidence was that in the fall of 2019, he accepted a full-time job with Acuva Technologies ("Acuva") at an annual salary of $80,000, with bonus potential. He testified he had been unsuccessful in

finding a higher paying job. In his written closing submissions, dated January 24, 2020, the respondent argued that it was “absolute lunacy” to suggest that an income of $163,000 should be imputed to him (para. 189). He said that his income at Acuva should be taken at “face-value” as “the best salary he is currently able to negotiate” (para. 190).

[38] In support of his application for a re-determination of income, the respondent provided evidence by way of two affidavits. These affidavits disclose the following information:

- In December 2019 and January 2020, the respondent was in discussions with a company by the name of Foreship about a potential job opportunity in the marine energy field.
- In January 2020, Foreship offered GBS a contract to consult in the area of sustainable technology for a fee of $10,500 US per month, minus travel expenses to Seattle. (This is approximately $166,000 CDN per year.)
- The respondent’s employment, through GBS, with Foreship was conditional on his obtaining a US work visa. The respondent was granted a work visa on January 15, 2020, which was his fourth attempt at securing a visa.
- The respondent resigned his employment with Acuva in mid-January in anticipation of starting work with Foreship.
- The respondent started work with Foreship on February 1, 2020. He says Foreship’s business, which is focussed on the cruise industry, was almost immediately and drastically impacted by COVID-19.
- On May 6, 2020, the president of Foreship advised the respondent via email that his hours would be reduced to part-time until August 1, 2020. As such, GBS income from Foreship for June and July, 2020 was $5,250 US per month rather than $10,500 US. (This email is the only document from Foreship included as an exhibit to the respondent’s affidavits.)
- The respondent anticipates that Foreship may announce further staff and budget cuts, and it is likely that the contract with GBS will be terminated.

[39] On receipt of the respondent’s affidavit material, the claimant requested that the respondent produce copies of all of his communications with Foreship, including the offer of employment and the employment contract, as well as his 2019 tax return and notice of assessment. The respondent has not produced any of this material. He says the employment contract is in a file at the Seattle office of Foreship, which closed in March. The respondent says he cannot access the file due to COVID-19 related border closures.

[95] The judge concluded (at para 41) that the evidence did not support a re-determination of the respondent’s income in 2020 at $65,000, rather than the $100,000 the judge had imputed in *Small #1*. She went on to express concern about disclosure in view of Mr. Small’s affidavit evidence:

[42] Of primary significance, the affidavit material raises concern that the respondent failed to disclose material evidence at trial about his income. While the respondent’s affidavit evidence is vague, perhaps deliberately so, about the timing of the job offer from Foreship, he deposes that he was successful on his fourth attempt to secure a US work visa on January 15, 2020. It is difficult to avoid the inference that Foreship had offered a contract to the respondent by the time the respondent testified at trial on January 6-8, 2020.

[43] At the very least, it is clear that the respondent had formally accepted employment with Foreship, and resigned his job at Acuva, by the time his closing submissions were

> delivered on January 24, 2020. In his closing submissions the respondent asserted that it was "absolute lunacy" to suggest he could earn an income of $163,000, when in fact (unbeknownst to the claimant and the Court) he had already accepted employment that paid more than $163,000. The respondent asked the Court to impute income to him based on his salary at Acuva when in fact he no longer worked for Acuva. He asked the Court take his $80,000 salary at Acuva at "face-value" as the best salary he could negotiate when he had in fact negotiated a salary of twice that amount.
>
> [44] Given this history, I am not prepared to accept the respondent's most recent affidavits at face-value. In the absence of any supporting documentation, I reject the respondent's assertions that GBS is on the brink of losing the Foreship contract and the respondent has no current alternative employment opportunities. I also accept the submission of the claimant that the amounts the respondent has deposited into his bank account to date in 2020 do not, in any event, support any reduction in his imputed income.
>
> [45] I therefore dismiss the respondent's application for a re-determination of his income for spousal and child support purposes in 2020. Given that the claimant has not cross-applied to re-open the trial to re-determine income based on the respondent's non-disclosure of the Foreship contract, I express no opinion on whether it would be appropriate to re-open in these circumstances.
>
> [Emphasis added.]

[96] In relation to the emphasized passage, Ms. Kirsanova submits that her attempt to re-open the trial to redetermine income was ignored by the judge in *Small #3*; hence her application to admit Mr. Small's affidavit evidence before us in order to have that issue considered. As we saw above in relation to the GBS shareholder loans, the judge expressed considerable concern in *Small #3* about Ms. Kirsanova's approach. To reiterate for ease of reference, the judge observed:

> [13] The claimant's application can best be described as an application to reopen the Trial Judgment, which is now the subject of an entered order, combined with an application to reopen the Post-Trial Judgment, which itself sought a reopening of the Trial Judgment. The claimant requests that I order the respondent to declare dividends as a means of reducing her shareholder loan debt, which is a form of relief that was not sought at trial and which I have already refused to grant in the Post-Trial Judgment.
>
> [14] The claimant says that reopening of the Post-Trial Judgment is warranted as a result of new information provided by the respondent in his reopening application filed July 29, 2020. This information is clearly not new but was, rather, in the claimant's possession at the time the original post-trial applications were argued.
>
> [Emphasis added.]

[97] Accordingly, the judge declined to consider adjusting Mr. Small's income upwards on the basis of the materials he filed for *Small #2*.

6.2 On appeal

6.2.1 The appellant's position

[98] Ms. Kirsanova seeks an order imputing income of $200,000 to Mr. Small, in place of the $100,000 imputed by the judge. She submits that the judge erred in principle in failing to apply the

FCSG, thereby entitling this court to interfere with the judge's exercise of discretion. This error, she says, consisted of a failure to conduct a step-by-step analysis as mandated by sections 16 through 18 of the *FCSG*. I set out those sections together with section 19, relating to imputing income:

> Calculation of annual income
>
> 16 Subject to sections 17 to 20, a spouse's annual income is determined using the sources of income set out under the heading "Total income" in the T1 General form issued by the Canada Revenue Agency and is adjusted in accordance with Schedule III.
>
> Pattern of income
>
> 17 (1) If the court is of the opinion that the determination of a spouse's annual income under section 16 would not be the fairest determination of that income, the court may have regard to the spouse's income over the last three years and determine an amount that is fair and reasonable in light of any pattern of income, fluctuation in income or receipt of a non-recurring amount during those years.
>
> …
>
> Shareholder, director or officer
>
> 18 (1) Where a spouse is a shareholder, director or officer of a corporation and the court is of the opinion that the amount of the spouse's annual income as determined under section 16 does not fairly reflect all the money available to the spouse for the payment of child support, the court may consider the situations described in section 17 and determine the spouse's annual income to include
>
> > (a) all or part of the pre-tax income of the corporation, and of any corporation that is related to that corporation, for the most recent taxation year; or
> >
> > (b) an amount commensurate with the services that the spouse provides to the corporation, provided that the amount does not exceed the corporation's pre-tax income.
>
> Adjustment to corporation's pre-tax income
>
> (2) In determining the pre-tax income of a corporation for the purposes of subsection (1), all amounts paid by the corporation as salaries, wages or management fees, or other payments or benefits, to or on behalf of persons with whom the corporation does not deal at arm's length must be added to the pre-tax income, unless the spouse establishes that the payments were reasonable in the circumstances.
>
> Imputing income
>
> 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;
> >
> > (b) the spouse is exempt from paying federal or provincial income tax;
> >
> > (c) the spouse lives in a country that has effective rates of income tax that are significantly lower than those in Canada;
> >
> > (d) it appears that income has been diverted which would affect the level of child support to be determined under these Guidelines;
> >
> > (e) the spouse's property is not reasonably utilized to generate income;

(f) the spouse has failed to provide income information when under a legal obligation to do so;

(g) the spouse unreasonably deducts expenses from income;

(h) the spouse derives a significant portion of income from dividends, capital gains or other sources that are taxed at a lower rate than employment or business income or that are exempt from tax; and

(i) the spouse is a beneficiary under a trust and is or will be in receipt of income or other benefits from the trust.

[99] The judge's primary error, Ms. Kirsanova argues, was in failing properly to apply section 17. Ms. Kirsanova agrees that it would not have been appropriate to rely on Mr. Small's "total income" for 2018 as per his T1 form given the manner in which the parties split income. Accordingly, she says, the judge should have followed the direction of section 17 to consider Mr. Small's income in light of the pattern over the preceding three years. As we saw above, a look at GBS's income over the previous three years demonstrated the following earnings:

2016 - $116,006
2017 - $155,412
2018 - $153,880

[100] Instead, Ms. Kirsanova maintains, the judge found that those earnings were unusually high because they involved lucrative short-term contracts. In doing so, she did not confine herself to the preceding three years, but instead undertook a "wide-ranging review" of Mr. Small's income from 2003 to 2018—an exercise not permitted by section 17—and failed to impute income based upon GBS's pre-tax income for the most recent taxation year in accordance with section 18(1).

[101] In Ms. Kirsanova's submission, properly applying ss 17 and 18 of the *FCSG*, the judge should have assessed GBS's recent earnings in light of its historical pre-tax income in the three-year period from 2016–2018 only. The fairest result, she says, would have been to impute income based on the 2018 pre-tax income of $153,880. The judge should then have added back personal expenses deducted by Mr. Small from the income of GBS, resulting in a conservative imputation of $177,754. Given Mr. Small's prospects, a fairer figure would be $200,000.

[102] These errors, Ms. Kirsanova asserts, were compounded when the judge found in *Small #2* that Mr. Small had failed to disclose material evidence, yet in *Small #3* denied Ms. Kirsanova an opportunity to reopen the trial to address this. The evidence Mr. Small relied on in *Small #2* should be admitted as fresh evidence on this appeal, and supports an imputation of income in the amount of $200,000.

6.2.2 The respondent's position

[103] Mr. Small submits that Ms. Kirsanova's argument essentially asks this Court to reach a

different conclusion from the judge in the exercise of her discretion. The standard of review does not permit this in the absence of an error in principle or law, which Ms. Kirsanova has failed to establish. The judge cited the correct sections of the *FCSG*, reviewed the appropriate facts and applied the correct test for the imputation of income under section 19, being reasonableness.

[104] With respect to the evidence adduced in *Small #2*, Mr. Small maintains that, properly understood, it is entirely consistent with the position Mr. Small took at that hearing: his imputed income ongoing should in fact be reduced to $80,000. It does not support the position of Ms. Kirsanova.

6.2.3 Discussion

[105] At trial, Mr. Small took the position that, notwithstanding his earnings history, the income upon which spousal support should be based was his then-current income of $80,000. Ms. Kirsanova asked the judge to apply section 19 of the *FCSG* to impute an income to Mr. Small of $163,000. Before us, her position seems to be that the judge erred in using section 19; rather, she ought to have applied sections 16 through 18. We, on the other hand, should apply section 19 to impute an income to Mr. Small of $200,000.

[106] In my view, this case illustrates why the Supreme Court of Canada has emphasized that “the discretion involved in making a support order is best exercised by the judge who has heard the parties directly” (*Hickey* at para 12), and, further, that trial judges are entitled to the presumption of correct application (*GF* at para 79).

[107] This was no ordinary situation. The judge reviewed the legal framework correctly, setting out the relevant provisions of the *FCSG*. She then turned to consider the process of imputing income as sought by Ms. Kirsanova, and set out the correct legal principles. The judge found, on the evidence, that the determination of Mr. Small’s reasonable earning capacity was complicated by the inconsistent pattern of his earnings over time because he had not followed a standard employment path. Her review of his earnings history over several years led her to two conclusions: (1), the evidence did not support Ms. Kirsanova’s position that an income of $163,000 should be imputed to Mr. Small, and (2), the evidence did not support Mr. Small’s position that his then current income of $80,000 fairly reflected his reasonable earning capacity. She then applied the test of reasonableness to determine that $100,000 was a fair and reasonable estimate of his annual income for support purposes as of the date of trial and should therefore be imputed to him. In doing so, she proceeded under s 19 to “impute such amount of income to [Mr. Small] as [the court] considers appropriate in the circumstances”, finding him under-employed given his demonstrated capacity.

[108] I see no material error in this approach. In the context of determining what income should reasonably be imputed to Mr. Small in the unusual circumstances before her, the judge undertook an

extensive review of the evidence and considered Ms. Kirsanova's submission concerning amounts to be added back to reflect deductions Mr. Small made of personal expenses from his business income. I consider that the judge must be taken to have analysed Mr. Small's income through GBS appropriately. Moreover, it was open to the judge to review Mr. Small's earnings history for some considerable period in order to ensure that she had a proper understanding of his capacity. Mr. Small described this as diligence, not error, and I agree.

[109] The question then becomes whether the "fresh evidence" ought to have been taken into account by the judge, and whether it dictates a different conclusion in this Court.

[110] Once again, context is essential. The evidence was adduced by Mr. Small in *Small #2* to support his contention that, due to COVID, his income was impacted negatively and that the imputation of $100,000 should be reduced to $65,000. The judge was concerned by this evidence because it suggested that at least by the time of final argument at the close of the trial, Mr. Small knew, but failed to disclose, that he was soon slated to earn approximately $160,000, considerably more than his then current income of $80,000. At the same time, Mr. Small's new evidence indicated that this greater income-earning opportunity quickly evaporated due to COVID-19, reducing to an amount well below $100,000, and likely to reduce still further.

[111] Understandably, Ms. Kirsanova objected to any re-determination of Mr. Small's income, challenging the completeness of his disclosure and the reliability of his affidavit evidence.

[112] It was not until *Small #3* that Ms. Kirsanova sought to have an upwards re-determination of Mr. Small's income, based on the same evidence. By then, the judge was *functus*, and I see no error in her rejecting Ms. Kirsanova's application at that time. It was always open to Ms. Kirsanova to apply for a re-determination of Mr. Small's evidence based on a material change in circumstances. That, of course, would require a full and proper evidentiary record, and the same applies to considering that evidence in this Court. As it is, the record is incomplete and unsatisfactory for the same reasons raised by Ms. Kirsanova in *Small #2*. The question of Mr. Small's post-trial income should properly be considered either by means of a review or on the basis of a material change in circumstances, with proper evidence including supporting documentation. As will be seen in the next section, I have concluded that a review should be conducted of Ms. Kirsanova's spousal support. That is when the full circumstances surrounding Mr. Small's post-trial income should be considered.

[113] I would not accede to this ground of appeal.

7. THE FOURTH ISSUE: IMPOSING A TIME LIMIT FOR THE PAYMENT OF SPOUSAL SUPPORT

7.1 The judgment below

[114] This issue was fully covered in *Small #1*. The judge dealt with it as follows, concluding that

Mr. Small should pay monthly spousal support in the amount of $850 for a further six years:

> [272] In light of my findings regarding the imputation of income, neither of the parties' *SSAG* calculations are of assistance in determining the appropriate level of support. I accept the respondent's submissions that s. 7 expenses ought to be factored into the *SSAG* calculation, but I do not agree with the amount he has included. In my view, $19,500 is a reasonable estimate of s. 7 expenses for the purpose of the *SSAG* calculation. This amount is sufficient to cover the estimates of the children's tuition, medical expenses, RESP contributions, and a modest amount of hockey-related expenses. For the reasons already stated, I do not agree that the children's cell phone costs are a proper s. 7 expense.
>
> [273] Using incomes of $100,000 and $35,000 for the respondent and claimant respectively, and including $19,500 in s. 7 expenses, the "with child" *SSAG* calculation suggests a low, mid, and high range of monthly spousal support of $314, $654, and $1,008, for a duration of 6.35 to 12.7 years.
>
> [274] In my view, an award of spousal support in the mid to upper range is appropriate in this case. There are two factors that I find particularly persuasive in locating support along the range. The first is the strength of the claimant's compensatory claim to spousal support in light of the career sacrifices she made to support the family and the respondent's various business activities. The second, and related, factor that warrants support above the mid-range is that the claimant faces inherent employment disadvantage relative to the respondent as a result of the sacrifice she made in giving up an established career in moving from Russia to Canada. While the claimant is certainly to be encouraged to work towards a position of self-sufficiency, it can be expected to take her longer to do so than might otherwise have been the case.
>
> [275] I consider that it is fair in the circumstances to order the respondent to pay the claimant monthly spousal support in the amount of $850. While I acknowledge that this will result in some disparity in terms of the parties' net disposable income, I nevertheless find that support at this level is justified by the factors I have identified. As for duration, in my view it is appropriate for the respondent's spousal support obligation to continue for a further six years, terminating as of May 30, 2026.

7.2 On appeal

7.2.1 The appellant's position

[115] The challenge here is to the duration of the judge's support order. Ms. Kirsanova submits that the judge erred in imposing a cut-off date, and in doing so failed to apply the *SSAG* properly. In particular, Ms. Kirsanova asserts, the judge misapprehended the situation and failed to take into account that she was pronouncing an initial order for "with children" support (the previous order having been a consent interim order). Such an initial order should, as a matter of principle, be indefinite in the absence of a compelling reason to the contrary. No such compelling reason was identified by the judge.

7.2.2 The respondent's position

[116] Mr. Small points out that he has been paying spousal support both informally from October 2015 to November 2018 through the GBS shareholder loans, and formally since the order of November 2018. The six years to follow from the date of trial (May 7, 2020) is therefore on top of

some 4½ years of support. In Mr. Small's submission, the judge's exercise of her discretion is critical to the execution of the application of the *SSAG*, and the judge did her homework in this case. She properly considered the conditions, means, needs and other circumstances of each spouse in accordance with s. 15.2(4) of the *Divorce Act*, RSC 1985, c 3 (2nd Supp), and made no palpable and overriding error.

7.2.3 Discussion

[117] Once again, Ms. Kirsanova raises an argument in this Court that she failed to give the judge an opportunity to consider at trial. In the court below, she placed *SSAG* support calculations before the judge based on an imputed income of $163,000 to Mr. Small and $35,000 to herself. Her calculations yielded a range of support for a duration of 6.5 to 13 years from the date of separation (October 2015). She sought an order for lump-sum support based on the present value of an award of spousal support in the mid-range of those calculations, for a duration of eight years (to October 2023). She did not submit, as she does now, that the order should be indefinite, subject to review.

[118] The fact remains that what she now says is in fact consistent with the structure of the *SSAG*. That structure contemplates that in the case of spouses with dependent children, initial orders should be "indefinite (duration not specified) in form, subject to the usual processes of review or variation". At the same time, the *SSAG* provides an understood outside limit on the cumulative duration of spousal support that will inform the process of review and variation: see Carol Rogerson & Rollie Thompson, *Spousal Support Advisory Guidelines* (Ottawa: Department of Justice, July 2008) at § 8.5 and § 8.5.2.

[119] It is clear that the judge did not have regard to this structural principle—for an obvious reason: the parties did not raise or rely on it. Nevertheless, it remains an important factor that was not discussed or considered. I should not be taken as saying that in all such cases it must be wrong to impose a time limit as the judge did, but if a durational limit is to be imposed, the judge should explain her basis for departing from the structure of the S*SAG*. The result, through no fault of the judge, was an error in principle.

[120] I would therefore vary the judge's order by deleting the term requiring Mr. Small to pay spousal support until May 30, 2026, and replace it with the term that he pay spousal support of $850 per month indefinitely, subject to a review to be conducted on or after October 6, 2024 (nine years post-separation). Of course, it remains open to Ms. Kirsanova to seek to vary the judge's spousal support order on the ground of material change in circumstances before that time, should she consider that there are grounds for doing so.

8. DISPOSITION

[121] For these reasons, I would allow the appeal in part by:

a) setting aside the order that each party owes $136,070.37 of the GBS shareholder loan debt, substituting an order that Ms. Kirsanova's share of the GBS shareholder loan debt comes to $88,948.50, and requiring GBS to reimburse to Ms. Kirsanova the sum of $47,051.50 from the monies paid by her to GBS pursuant to the order in *Small #3*,

b) setting aside the order that Mr. Small shall reimburse Ms. Kirsanova $2,351 for the purchase of the BMW X3, and substituting an order that Mr. Small reimburse Ms. Kirsanova the sum of $21,351.

c) Varying the order that Mr. Small pay spousal support to Ms. Kirsanova in the amount of $850 per month until May 30, 2026, by requiring Mr. Small to pay spousal support of $850 per month indefinitely, subject to a review to be conducted on or after October 6, 2024.

[122] I would direct that the parties bear their own costs. The primary errors Ms. Kirsanova has successfully established would likely have been avoided had she prosecuted her case appropriately in the court below.

"The Honourable Mr. Justice Grauer"

I AGREE:

"The Honourable Mr. Justice Groberman"

I AGREE:

"The Honourable Mr. Justice Marchand"