COURT OF APPEAL FOR THE YUKON TERRITORY

Citation: ***Holmes v. Matkovich***,
2008 YKCA 10

Date: 20080717
Docket: 07-YU579

Between:

Kathleen Helen Holmes

Petitioner
(Respondent)

And

Vernon Cyril Matkovich

Respondent
(Appellant)

Before: The Honourable Madam Justice Newbury
The Honourable Madam Justice Kirkpatrick
The Honourable Mr. Justice Tysoe

P.R. Albi — Counsel for the Appellant

D. Hoffman — Counsel for the Respondent

Place and Date of Hearing: Yukon, Whitehorse
May 28, 2008

Place and Date of Judgment: Vancouver, British Columbia
July 17, 2008

Written Reasons by:
The Honourable Madam Justice Newbury

Concurred in by:
The Honourable Madam Justice Kirkpatrick
The Honourable Mr. Justice Tysoe

Reasons for Judgment of the Honourable Madam Justice Newbury:

[1] This appeal arises in matrimonial litigation that should have been resolved by a short trial, if not settled without a trial. However, the appellant, Mr. Matkovich, failed to comply with the applicable disclosure requirements and with three court orders requiring him to deliver documents and information relating to his income and assets. As a result, the chambers judge below ordered shortly before trial that the appellant's Answer and Counter-Petition be struck and that the matter proceed to trial "on an uncontested basis". In so ruling, Veale J. acknowledged (in reasons indexed as 2007 YKSC 05) that although an order striking pleadings under Rule 2 of the ***Rules of Court***, B.C. Reg. 221/90, is reserved for the most serious cases, such an order was appropriate in this instance. In his words:

> ... I am of the view that Mr. Matkovich has not failed to comply because of any misunderstanding of the law or the court orders. Rather, he has ignored the orders of this Court for a period of five months, in effect depriving Ms. Holmes of her right to a fair trial to establish the value of Mr. Matkovich's assets. It would be unfair to allow Mr. Matkovich to appear at trial to justify his failure to disclose and advance arguments at trial to undermine Ms. Holmes' evidence based upon the inadequate disclosure he has made.
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> I consider that the conduct of Mr. Matkovich strikes at the heart of the civil justice system. He has repeatedly ignored Court orders and now, at the last minute, provides partial disclosure. While the partial disclosure may render a contempt order somewhat harsh, it is appropriate to consider the remedy of striking his pleadings.
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> There is no evidence to indicate Mr. Matkovich will provide full disclosure at any time in the future, nor is there any evidence that he has retained counsel for trial or that he will return from Brazil for the trial. I should also indicate that in this jurisdiction, it is the rule rather than the exception that divorce cases go to trial within one year from retaining counsel. [At paras. 28-30.]

[2] Accordingly, the trial proceeded on January 29 and 30, 2007 before Veale J. and neither Mr. Matkovich nor anyone retained to represent him appeared. (Counsel who had acted for Mr. Matkovich at the previous chambers hearings had consistently informed the Court that she had not been retained to act at the trial.) Obviously, no evidence was adduced on Mr. Matkovich's behalf, although it appears the trial judge did consider what incomplete financial information had been provided at the earlier proceedings in chambers. Of course, the appellant was not examined on it, nor was Ms. Holmes cross-examined on her evidence.

Factual background

[3] The reasons of the trial judge are indexed as 2007 YKSC 15, and I refer the reader to them for the factual background of the parties and their marriage. For our purposes, it will be sufficient to note that they had lived together since 1988, were married in 2000, and separated in late 2005. They have one child, Lucas, born in 1990. At the time of trial, Mr. Matkovich was 45 years old and Ms. Holmes was 48. They lived a hard life, especially during the early years, when Mr. Matkovich was learning the mining trade and Ms. Holmes was, in the trial judge's phrase, "coming to grips with her drinking and smoking". (Para. 10.) They lived in Whitehorse, then in a cabin at Lake Laberge, then in a bus at Montana Creek (outside Dawson City), and in 1994 moved to a hay farm at Indian River which they purchased with financial assistance from Ms. Holmes' mother. The trial judge described their lives on the farm:

> They initially lived in a blacksmith shop at the farm. Ms. Holmes and Mr. Matkovich worked together to saw the logs to build a shop. During this period, 1994 to 1996, Mr. Matkovich farmed and worked for placer miners. Ms. Holmes worked in the home as well as on the farm. There was still no running water and raising a family was strenuous work. She split wood, skinned moose, hauled water, gardened, looked after livestock and cooked and maintained the household. They were a partnership. Ms. Holmes also provided a steady stream of income from her inheritance while Mr. Matkovich learned the gold mining business.
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> In 1996, the shop was completed and they moved into the back of it where Ms. Holmes and Mr. Matkovich lived with their son as well as other family members from time to time. They lived in the back of the shop until a log home was completed. Ms. Holmes never resided in the log home as she began to have health problems and in 2005, she spent most of her time in Whitehorse where medical expertise was more accessible. In December 2005, she and Mr. Matkovich took his mother to Belize for a holiday. He apparently left her in Belize with his mother. [At paras. 15-6.]

[4] Ms. Holmes received a substantial inheritance from her mother, who died in 1996. As I have said, this made it possible for the couple to buy the Indian River farm (for $90,000); but in addition, Ms. Holmes became the beneficiary of a trust fund or annuity of some kind, the principal amount of which was $640,000. She receives the income and a portion of capital each year and the fund will be depleted in 2016, when she receives a final payment of $30,000.

[5] Ms. Holmes contributed the funds thus received to the support of the family, making it possible for Mr. Matkovich to pursue his mining ventures. Most of these are carried on through a company called 19651 Yukon Inc. (the "Company") in which Mr. Matkovich and a Mr. Morgan are equal shareholders. As the trial judge noted at para. 30 of his reasons, although the records of the Company that were in evidence at trial were incomplete, they were sufficient to show that its revenues had been

steadily increasing since 2001. Nevertheless, the lack of information posed obvious difficulties at trial, as the Court observed:

> Mr. Matkovich, Tom Morgan and 19651 Yukon Inc. have two joint venture agreements with Klondike Star Mineral Corporation and one with Klondike Gold Corporation. 19651 Yukon Inc. also has an equipment lease agreement with Klondike Star.
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> Clark Evaluation Services Ltd. filed a report estimating the fair market value of Mr. Matkovich's 50% shareholding in 19651 Yukon Inc. to be $102,000. Douglas Welsh, a chartered business evaluator, was unable to express a formal valuation opinion because of the lack of information. For example, there is no formal appraisal of the equipment consisting of the Nodwell drill, an excavator and a D8 Caterpillar and it appears that some equipment is not listed. There is also no evaluation of the mining claims owned by 19651 Yukon Inc.
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> The difficulty presented by the lack of information from Mr. Matkovich cannot be underestimated. Two of the agreements, the Joint Venture Agreement with Klondike Star Mineral Corporation dated June 28, 2006, and the Indian River Property dated December 2, 2004, provide for a net smelter return to Mr. Matkovich that could provide significant income to him. There is no evidence to establish a value of the joint ventures.
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> Mr. Matkovich also works for Klondike Star and his 2006 T4 income is for $91,000. This is consistent with the Financial Statement he filed on October 20, 2006, but it does not reflect the $40,000 in contract income in 2006 from 19651 Yukon Inc. He also received rental income from the D8 Caterpillar, which was originally owned jointly until his purchase of Ms. Holmes' interest in June 2006. The D8 Caterpillar earns $8,750 a month gross and it should net $70,000 a year, so I will impute that as additional income. The result is an annual income for Mr. Matkovich of $211,000 in 2006.
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> Mr. Matkovich has also staked a large number of placer and quartz mining claims in his personal name. Those claims are not part of the evaluation of the fair market value of Mr. Matkovich's shares in 19651 Yukon Inc. A mining recorder claim search indicates approximately 50 quartz claims. It is not possible to place an accurate value on these claims without the cooperation of Mr. Matkovich.
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> Mr. Matkovich is also the registered owner of a lesser number of quartz claims, six of which are referred to as Farm 1 -- 6 which have been kept out of the mining agreements referred to. I also assume that these are staked on the family farm. Mr. Matkovich is also a 25%

> owner in at least 87 quartz claims. No value has been placed on these assets. [At paras. 31-6; emphasis added.]

(Counsel agreed in this court that the $211,000 income figure referred to in para. 34 should be $201,000.)

The Trial Judgment

[6] The trial judge ordered that Lucas remain in the joint custody of his mother and father. He noted that Mr. Matkovich had not paid any child support other than the court-ordered amount of $1,164 per month commencing December 1, 2006 which had been based on an earlier estimate of his income at $130,000. However, since the trial judge found that Mr. Matkovich was earning $211,000 per annum, he ordered that the child support be increased to $1,555 per month.

[7] The trial judge then asked himself, "Should Ms. Holmes be granted a 100% interest in the Indian River farm?" He quoted s. 13 of the ***Family Property and Support Act***, R.S.Y. 2002, c. 83 (the "Act"), noting that paras. (e) and (f) thereof were most relevant here – i.e., the extent to which the property was acquired by one spouse by inheritance or gift, and any other circumstances relating to the acquisition, preservation, maintenance, improvement or use of property "rendering it inequitable for the division of family assets to be in equal shares". In his view, both of these factors militated in favour of Ms. Holmes, whose money had (the trial judge stated at para. 14) purchased the farm, and whose hard work (along with that of Mr. Matkovich) had improved it considerably. In addition, the trial judge observed, the farm was "the only major asset that she can benefit from, either through maintaining

it or selling it if her health continues to deteriorate." (Para. 45.) He ordered that the farm and farm equipment, valued at $225,000 by Ms. Holmes, should be apportioned 100% in her favour.

[8] Later in his reasons, beginning at para. 59, the trial judge addressed the question, "Should Ms. Holmes receive an interest in the mining assets?". Noting that the parties had had a "marital and a business partnership", he found that Mr. Matkovich's mining and business assets were "family assets in the same way that the farm business was a family asset". To the extent that the mining assets were "non-family assets", he noted ss. 5, 13 and 14 of the Act, the purpose of which was to recognize that "child care and household management are as important to a family and a marital relationship as the creation of non-family assets." (Para. 61) He then concluded:

> With respect to the value of the mining assets, the valuation of Mr. Matkovich's shares in 19651 Yukon Inc. at $102,000 is a low estimate of the value of the mining assets. It does not take into account the value of the joint venture agreements or the value of quartz and placer claims of both Mr. Matkovich and the company.
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> Taking all this into consideration along with the transfer of 100% of the farm to Ms. Holmes, I order that Mr. Matkovich pay a lump sum of $50,000 to Ms. Holmes representing approximately 50% of Mr. Matkovich's share in 19651 Yukon Inc. The value of the placer and quartz claims is not known but the joint venture agreements suggest that they have considerable value. I award Ms. Holmes $50,000 as compensation for her contribution to their acquisition. I recognize that this may be undervaluing these assets but it is compensated to some extent by Ms. Holmes being awarded the family farm. There are also some smaller assets that can be transferred to Ms. Holmes. [At paras. 63-4.]

[9] The idea that the parties were a "marital partnership and a business partnership" was repeated in Veale J.'s treatment of Ms. Holmes' claim for spousal support. He noted her serious health problems (which include hepatitis C and depression) and stated that spousal support for her was "not only just but required to relieve her from economic hardship arising out of the marriage. It was simply not practicable to require economic self-sufficiency on her part after this marriage breakdown." (Para. 56.) The range suggested by the Spousal Support Advisory Guidelines was between $3,753 and $5,013 per month based on the $211,000 imputed to Mr. Matkovich and $44,000 imputed to Ms. Holmes. The trial judge reasoned that because Ms. Holmes was to receive 100% of the family farm, it would not be appropriate to award her an amount at the high end of the range, which would result in her having more net disposable income than Mr. Matkovich. The Court settled on the sum of $4,000 per month, which would provide for "some equality" in the parties' respective standards of living. (Para. 58.)

[10] After dealing with certain personal effects of the parties, the trial judge awarded Ms. Holmes costs on a special costs basis, "being the full recovery of her legal fees and disbursements". (Para. 68.)

[11] In the result, the Court's order may be summarized as follows (and here I quote from para. 40 of the appellant's factum):

(a) the parties share custody of Lucas, with his primary residence being with the Respondent;

(b) the Appellant's income be treated as $211,000 for the purposes of child and spousal support, and that the Appellant pay the

Respondent $4,000 per month for spousal support and $1,555 per month for child support, commencing February 1, 2007;

(c) the Appellant provide dental and health insurance for Lucas;

(d) the Respondent have 100% interest in the Farm, farming equipment, and furniture and personal effects at the Farm;

(e) the Appellant transfer securities held in his name to the Respondent, namely the Air North and Promithian shares and that she be sole owner of those shares;

(f) the Respondent have 100% interest in the trailer and her car;

(g) the Appellant pay the Respondent $50,000 for her 50% interest in 19651 Yukon Inc.;

(h) the Appellant pay the Respondent $50,000 for her 50% interest in his quartz and placer claims;

(i) the Appellant return the Respondent's gold wedding ring and that she be sole owner of the ring;

(j) the Appellant be sole owner of the shop equipment, mining equipment, and gun and ivory collections; and

(k) the Appellant pay the Respondent's full legal fees and disbursements for the trial.

On Appeal

[12] It is fair to say that Mr. Matkovich's full attention has now been drawn to this proceeding, which he had apparently taken so casually before. He has retained counsel and on his appeal, seeks to adduce "fresh evidence" that he says would change the result and should be admitted in the interests of justice. In general, he contends that the overall result of the property division arrived at by the trial judge was highly skewed in Ms. Holmes' favour and does not reflect his contributions "throughout the relationship". Whereas Ms. Holmes is left with 100% of the farm and related equipment (valued at $225,000), the trust fund (in respect of which no claim was or is made by Mr. Matkovich but of which there was approximately

$400,000 remaining at the trial date), a trailer purchased a few years ago for $24,500, a total of $100,000 owing to her by Mr. Matkovich, and shares having a value of roughly $10,000, he is left only with certain shop equipment valued at some $25,000, his mining claims (the value of which is uncertain), 50% of the shares of the Company (the value of which is also uncertain), and a D-8 Caterpillar (in respect of which he paid his wife $50,000 for her half-interest some time ago), which may or may not now be producing rental income.

[13] With respect to the farm in particular, Mr. Matkovich submits that the re-apportionment ordered at trial is "so clearly wrong that it amounts to an injustice" (see ***Olstead v. Olstead*** 1999 BCCA 211 at para. 5), and that the trial judge approached the issue on an incorrect footing by asking himself whether Ms. Holmes should receive the entire interest in the Indian River farm, rather than whether an equal division would be inequitable, as s. 13 requires. The appellant notes the comments of Donald J.A. for the Court in ***M.(S.B.) v. M.(N.)*** 2003 BCCA 300, 14 B.C.L.R. (4th) 90, concerning s. 65 of the ***Family Relations Act***, R.S.B.C. 1996, c. 128, a provision very similar to s. 13 of the Act:

> ... The Legislature created a presumption of equality - a presumption that can only be displaced by a demonstration that an equal division would be unfair. So the issue of fairness is not at large, allowing a judge to pick the outcome that he prefers from among various alternative dispositions, all of which may be arguably fair. He must decide, in accordance with the language of s. 65(1), that an equal division would be unfair before he considers apportionment. Otherwise, although an equal division would be fair, a reapportionment could be ordered on the basis that it is more fair, and that, in my opinion, is not what the statute intends. [At para. 23.]

[14] For her part, Ms. Holmes focuses on the result of the trial judge's reasoning rather than on the reasoning itself. She submits that he rightly considered that sub-paras. 13 (e) and(f) of the Act were relevant to her situation, and that given her poor health and the fact that her trust fund will run out in eight years' time, an equal division would have been unfair. Ms. Holmes relies on a decision of the British Columbia Court of Appeal in ***Narayan v. Narayan*** 2006 BCCA 561, 62 B.C.L.R. (4th) 116, where a reapportionment of the family home 100% to the wife was upheld. The Court noted in that case that the husband had dissipated approximately $50,000 in RRSPs and used the proceeds for drugs, gambling and other personal purposes, including the purchase of a new car. He had shirked his child support responsibilities, traded in the old family car, and had not provided proper financial disclosure pre-trial. The trial judge's overall apportionment was roughly 75/25 in the wife's favour, but the 75% took the form of 100% of the matrimonial home. Mr. Narayan argued that his "conduct" had been improperly used as a factor in the apportionment, but the Court of Appeal disagreed:

> In my view, there is no merit to this submission. Dissipation of assets and material non-disclosure are relevant circumstances which the court is entitled to take into account in making compensation orders, and in determining whether, and to what extent, the evidence of the non-disclosing party is trustworthy. Here, Mr. Narayan argued that both parties dissipated the RRSPs prior to separation, yet he failed to provide the documents within his control to support his submission. In the result, the trial judge drew inferences adverse to Mr. Narayan. He gave reasons for so doing. To the extent that dissipation of assets and non-disclosure constitute "conduct" they were relevant for the limited purposes for which they were relied upon by the trial judge. [At para. 27.]

[15] I agree that the trial judge's approach to s.13 in the case at bar was wrongly stated, and that although there are some similarities between this case and ***Narayan***, the case is distinguishable. Most notably, Mr. Matkovich has not dissipated assets as Mr. Narayan did. But as counsel for Mr. Matkovich acknowledged, it is difficult to determine whether the result in the present case was as unfair as he suggests without accurate and complete information concerning the value of the assets held by him and concerning his contribution to the acquisition, maintenance and improvement of all the family assets, in particular the farm.

[16] Normally, one would conclude that by ignoring three court orders and not appearing at the trial, Mr. Matkovich got the result he deserved (and should have expected). However, the fresh evidence he now seeks to adduce would, if credible, appear to provide something of an explanation for his failure – he would say inability – to make proper financial disclosure. In his first affidavit, dated December 3, 2007, he deposes that he and Mr. Morgan were very far behind in their record-keeping and that indeed the Company had not filed income tax returns or produced financial statement since its inception. He says Mr. Morgan had the information needed for these purposes but did not respond to Mr. Matkovich's requests. He deposes that he hired a bookkeeper in the fall of 2007 to sort out the financial statements, but after approximately three months, she told him "the situation was too complicated" and that she would not be able to produce the statements. When Mr. Matkovich was ordered to file his Answer and Counter-Petition and personal financial statement in October 2006, he deposes that he was not able to include information relating to the Company because the tax returns and financial statements were still not complete.

[17] Another order was made by Veale J. in December 2006 for the filing of a personal financial statement and list of documents by January 5, 2007. When he learned of this order, Mr. Matkovich deposes that he retained Mr. Hirtle of BDO Dunwoody LLP to produce financial statements by the deadline, but only drafts could be produced, as Mr. Morgan was still not forthcoming. Attached to Mr. Matkovich's affidavit is correspondence from Mr. Hirtle explaining what was still missing and enclosing the "draft" financials.

[18] In his second affidavit, dated March 4, 2008, Mr. Matkovich purports to explain his failure to appear at trial. He states that his lawyer at the time, Ms. Murrin, did appear on his behalf at the hearing of Ms. Holmes' application to have his Answer and Counter-Petition struck and to have her action proceed on an uncontested basis. Mr. Matkovich continues:

> I spoke with Ms. Murrin via telephone on January 9, 2007 and she advised me of the outcome of the hearing. She informed me and I believed that I had been "kicked out" of the proceedings. She further informed me that I was not allowed to attend or participate in the trial, and that counsel could not appear on my behalf. Ms. Murrin did not at any time inform me that I had a right to appear (or have counsel appear on my behalf) at trial to challenge the Respondent's evidence and make submissions.
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> Had I known that I had a right to appear at trial, or have counsel appear on my behalf, I would have appeared and would have ensure that counsel, either Ms. Murrin or otherwise, appeared at the trial that took place on January 29 and 30, 2007. [Emphasis added.]

In the same affidavit, he deposes that he is no longer employed by Klondike Star and is not earning income "from any source", and disputes as "vastly overstated" the values used by the trial judge for asset division purposes. As well, he says, he does

not have enough equity in the Company to pay the amounts he has been ordered to pay Ms. Holmes, and that he would need to withdraw some $89,000 from the Company to pay her $50,000—a tax consequence that (not surprisingly) was not considered by Veale J.

[19] In response to the application to adduce fresh evidence, Ms. Holmes emphasizes that Ms. Murrin had made it clear throughout the entire proceedings that she was not going to be representing Mr. Matkovich at trial. More to the point, Ms. Holmes contends that it would be "extremely prejudicial and manifestly unfair" to her if Mr. Matkovich were permitted to adduce evidence that could have been adduced at trial. As for the credibility of the proffered evidence, she reminds us that Mr. Matkovich breached three court orders and was found in contempt of court during the pre-trial proceedings and failed for an entire year to comply with requests for disclosure. Ms. Holmes characterizes the proffered evidence as "highly suspect" (quoting from ***Appel (Public Trustee of) v. Dominion of Canada General Insurance Co.*** (1997) 39 B.C.L.R. (3d) 113 (C.A.), at para. 34) because in Ms. Holmes' words, it is "adduced by an unsuccessful litigant who is upset with the outcome of trial".

[20] I must say that I have a great deal of sympathy with Ms. Holmes' position. She and her counsel have obviously complied with all disclosure obligations and attempted to provide the trial court with some idea of the value of Mr. Matkovich's mining and business assets. It was not their fault that Mr. Matkovich at best neglected to communicate with the Court (either directly or through Ms. Murrin)

about the difficulties he was having with his partner, or at worst, that he simply chose to ignore the court orders, perhaps in hopes of forcing Ms. Holmes to accept a "negotiated" settlement favourable to him. On the other hand, if Mr. Matkovich was truly misled into thinking he was not entitled to appear at trial to present evidence and make submissions (and on this point he has not provided any corroboration from his lawyer at the time), and if he was making efforts prior to the order of January 8, 2007 to produce the required financial information, then it would appear that his conduct was not of the most egregious kind that warrants an order under Rule 2(5): see ***Homer Estate v. Eurocopter S.A.*** 2003 BCCA 229, 12 B.C.L.R. (4th) 321, at para. 4. In such event, it would be unjust for him now to be subject to the order made in his absence at the end of the trial.

[21] I note parenthetically that Mr. Matkovich attempted to appeal the order of January 8, 2007 but failed to keep that appeal "on track", in the words of Mr. Justice Gower at para. 52 of reasons indexed as 2008 YKCA 02. In the course of those reasons, Gower J.A. also noted that Veale J. had not specified which sub-rule he was relying on as authority for his order that the trial proceed "on an uncontested basis". Gower J.A. thought it more likely that Veale J. was relying on sub-rule 2(5)(g), in which event Veale J. could have intended either that the proceeding continue as though no appearance had been entered or as if no defence had been filed. If it was the latter, Gower J.A. suggested that Mr. Matkovich may still have been entitled to appear at the trial, cross-examine and present evidence and submissions. He continued:

> Having said all that, I only raise the question because, by ordering that the trial proceed on an "uncontested basis" Mr. Matkovich may have believed that he could not appear at the trial, or if he did, that he would be unable to contest any of the evidence or submissions by Ms. Holmes, so there would be little point in doing so. Any potential confusion here would have been made worse by the fact that Mr. Matkovich, at that point, was apparently unrepresented by trial counsel. [Para. 50.]

[22] It is apparent that there are many other unanswered questions about Mr. Matkovich's conduct. It is unclear whether he made any attempt through his lawyer to explain to the Court below the difficulties he says he was experiencing in compiling the required financial information prior to the order of January 8, 2007. We do not know whether Mr. Morgan was in fact as non-cooperative as his partner alleges, or whether Mr. Matkovich did exercise due diligence. Nor do we know whether the financial information now provided is complete and will stand up to scrutiny. Thus if we were to decide this appeal on the evidence as now presented, and without findings of fact having been made regarding the new evidence, we would be proceeding on shaky ground indeed.

[23] With great hesitation (especially given the state of Ms. Holmes' health), I have reached the conclusion that those aspects of the trial judge's order dealing with the division of assets between the parties should be stayed and remitted for re-trial, on condition that Mr. Matkovich will pay as special costs all of Ms. Holmes' legal fees and disbursements in connection with the trial and this appeal. I would hope that the re-trial can be heard at the soonest possible date. If Ms. Holmes' costs have not been paid and the trial has not been set down by October 15, 2008, I would also

order that Ms. Holmes shall be entitled to apply to this court to have the stayed portions of the trial judge's order reinstated with effect from March 30, 2007.

Spousal Support

[24] Turning finally to spousal support, Mr. Matkovich contends that the order to pay Ms. Holmes $4,000 per month is excessive, particularly in view of events that have arisen post-trial. Aside from those events, however, it is said the trial judge erred in computing Mr. Matkovich's income with reference to what he receives for the use of the D-8 Cat and from the Company, given that he has been ordered to buy out Ms. Holmes' interests in those assets. It would, he says, be "double dipping" or "double recovery", within the meaning of ***Boston v. Boston*** [2001] 2 S.C.R. 413, for Ms. Holmes to receive support payable out of the use of these assets when he has had to pay for her interest in them as part of the asset division.

[25] The term "double recovery" was defined by Major J. for the majority in ***Boston*** as follows:

> The term "double recovery" is used to describe the situation where a pension, once equalized as property, is also treated as income from which the pension-holding spouse (here the husband) must make spousal support payments. Expressed another way, upon marriage dissolution the payee spouse (here the wife) receives assets and an equalization payment that take into account the capital value of the husband's future pension income. If she later shares in the pension income as spousal support when the pension is in pay after the husband has retired, the wife can be said to be recovering twice from the pension: first at the time of the equalization of assets and again as support from the pension income. [At para. 34.]

He continued:

> Double recovery appears inherently unfair in cases where, to a large extent, the division or equalization of assets has addressed the compensation required. In equalizing the spouses' net family properties, the husband or wife as the case may be must include the future right to the pension income as "property" on his or her side of the ledger. This means that the pension-holder must, on separation or divorce, transfer real assets of equal value to the pension to the other spouse in order to retain the pension under the property accounting.
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> The pension-holder cannot divide the actual pension as it cannot be accessed until retirement. The pension entitlement cannot be sold or transferred. The apparent unfairness arises when the other spouse receives support payments from the pension income after the pension-holder retires. Professor James G. McLeod stated in his annotation to *Shadbolt v. Shadbolt* (1997), 32 R.F.L. (4th) 253, at p. 253: "Put another way, [the pension-holding] spouse receives nothing in return for the real assets transferred to his or her partner in order to retain his or her pension under the property accounting." [At paras. 35-6.]

[26] Mr. Matkovich submits that similar reasoning can be applied outside the pension context, citing ***Thompson v. Thompson*** 2006 BCSC 130 and ***Bedi v. Bedi*** (2004) 13 R.F.L. (6th) 40 (Ont. S.C.J.). As other courts have noted, however, a pension is different from most other income-producing assets. Thus in ***Poirier v. Poirier*** (2005) 19 R.F.L. (6th) 197 (Ont. S.C.J.), the Court stated:

> *Boston* deals with a very special asset, namely a pension plan. A pension has no value aside from the income stream it represents. Here the dealership represents a real asset which continues not only to provide a lucrative income stream, it also continues to have a real value which can be sold, transferred or otherwise disposed. I fail to see any unfairness. Mrs. Poirier has her half of the value of the shares converted into a liquid asset earning interest and Mr. Poirier has his half of the value of the shares invested in a business earning business income. It is only the parties' respective incomes, not the divided asset, which are considered for the purpose of fixing spousal support. [At para. 40; emphasis added.]

Similar reasoning was expressed by the British Columbia Court of Appeal in ***Litton v. Litton*** 2006 BCCA 494, at para. 22.

[27] In my view, the "double recovery" argument does not apply here: Mr. Matkovich retains the D-8 Cat and his shares in the Company as capital assets which he may sell or transfer at any time. He may also continue to earn income from them without liquidating the assets in the way a pension is liquidated as income is paid out. (***Boston***, para. 57.) I would not accede to the argument that the trial judge erred in failing to apply ***Boston*** to reduce the income imputed to Mr. Matkovich from the rental of the D-8 Cat or from his shares in the Company.

[28] Still on the topic of spousal maintenance, Mr. Matkovich also submits, on the basis of new affidavit material he seeks to file, that the order is now manifestly unjust because his employment with Klondike Star was terminated subsequent to the trial and, he says, he is "not currently earning income from any source." Further, his current wife has given birth to a child whom he must support and Lucas is living with his family. Mr. Matkovich says he was unable to pay Ms. Holmes the spousal support ordered by the trial judge, and was in arrears of $30,000 as at March 2007.

[29] It is not our function to vary orders based on post-trial developments. This evidence of "change in circumstance" may be brought forward in Supreme Court as part of an application to vary the existing order. Mr. Matkovich may well seek an order that is retroactive to the date on which he lost his employment – although it was found not to be his only source of income – but that is also a matter for the court below. I would dismiss the application to adduce fresh evidence regarding the

changes in Mr. Matkovich's income and family situation; and I would dismiss his appeal of the spousal support order.

Disposition

[30] I would allow the appeal only to the extent of staying the property aspects of the trial judge's order, and remitting those matters to the court below, on condition that if by October 15, 2008, the appellant has not paid Ms. Holmes her special costs of the trial and appeal and set the matters down for rehearing, Ms. Holmes shall be at liberty to apply to this court to have the trial judge's order reinstated with effect from the original date thereof. The child and spousal support orders remain unaffected.

[31] We are indebted to counsel for their able assistance.

The Honourable Madam Justice Newbury

I Agree:

The Honourable Madam Justice Kirkpatrick

I Agree:

The Honourable Mr. Justice Tysoe