CITATION: Elenskaya v. Rogovsky, 2014 ONSC 7393
COURT FILE NO.: FS-12-375955
DATE: 20141223

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
Maria Elenskaya	)	Arkadi Bouchelev, for the Applicant
	)	
Applicant	)	
	)	
– and –	)	
	)	
Vladimir Rogovsky	)	
	)	
Respondent	)	
	)	
	)	
	)	
	)	**HEARD:** November 18, 19 and 20, 2014

KITELEY J.

[1] The uncontested trial was heard on the afternoon of November 18, the morning of November 19 and the afternoon of November 20, 2014. I granted the divorce and reserved on the issues of equalization of net family property, spousal support and costs.

Background

[2] The Applicant and Respondent were married on February 13, 1991. According to the Applicant, they separated on February 20, 2011 when she came home to find the Respondent had removed his belongings. She said that he did not tell her where he went but she assumed that he had gone to California where his daughter lived. The Applicant is now almost 65 years old and the Respondent is almost 75 years old. Both of the parties had been previously divorced and both have adult children from those previous relationships. There are no children of this relationship.

[3] According to the Applicant, at the time of the marriage, she owned bonds worth approximately $30,000 through her investment account with Sun Life Financial that she said were sold during the marriage.

[4] At the time of the marriage, the Respondent owned the property municipally known as 330 Dixon Road, Apt. 604 which became their matrimonial home. She said that that property was sold by the Respondent in 2000 but she was not aware of what happened to the proceeds.

[5] In April 1991, the parties purchased the jointly owned property municipally known as 1131 Steeles Avenue West, Apt. 1103 and that became their matrimonial home. The purchase price was $180,000. The Applicant continues to reside in the condominium.

[6] Randy Bierworth is a real estate appraiser who was called as a witness. Based on his qualifications and experience, I ruled that he was an expert in the appraisal of residential real estate in Toronto and could give opinion evidence as to the fair market value of the condominium. As of November 2014, in his opinion, the fair market value is $400,000.

[7] The parties negotiated a joint line of credit which was registered by CIBC against title to the matrimonial home in August 2000. After the separation, the Applicant learned that on July 25, 2008, the Respondent withdrew the sum of $100,000 from the line of credit and, as she later learned, he used those funds to purchase GIC's which were deposited to his personal bank account with the Royal Bank of Canada. The Applicant said she only became aware of this liability after separation and that she has only managed to pay the minimum amount of interest. As of the date of the trial, the balance owing on the line of credit was still approximately $100,000.

[8] In 1997, the parties purchased an investment property municipally known as 8 Wellesley Street East, Suite 211. The purchase price was $176,476 including a down payment drawn from their joint account in installments totaling $45,000. Title was taken in joint names. In April 2006, the property was sold for $360,000. The mortgage had been discharged before sale, leaving net proceeds of $350,000.

[9] In her evidence, the Applicant (corroborated by Lilia Butko) said the Respondent was controlling and very abusive to her for many years. One of the subjects that created conflict was when she tried to get information from him about their finances. She said that he routinely responded by yelling and screaming at her. She came to be afraid of him and afraid of his anger. She said that while they were together, he arrived home earlier than she did and he always emptied the mail box before she got home so she did not have access to records. After he left in February 2011, she found some papers that he had left behind. That caused her to begin her quest for more information. Between what she found that he left behind and what she was able to obtain as a result of court orders and directions to financial institutions that he ultimately provided, the Applicant identified the following accounts:

(a) Ameritrade Account opened December 1, 2004 in the name of R & E Investments Inc. The initials of the name referred to each of their surnames. They each owned 50% of the shares of R & E Investments Inc. The account opening form indicates a transfer in the new account in the amount of $350,000U.S. from a brokerage account. The Applicant understood that it was a U.S. brokerage account.

(b) That corporate account became E*Trade Canada account ending #ND3. The first statement available is for the period ending December 31, 2006 and reflects the total value of accounts at $202,655. The last statement available is for the period ending March 31, 2008 with a month end portfolio value in the amount of $105,917.

(c) E*Trade Canada account in their joint names account ending #R4J. The first statement for the period June 1 to June 30, 2006 indicates the total value of the USD margin account was $440,015. The last statement available is for the period ending December 31, 2008 with a month end portfolio value in the amount of $55,210.

(d) Scotia I*Trade investment account ending #791 was opened in their joint names. The first statement available is for the month of December 2009 and includes a market value of $30,156. The last statement available is for March 2011 which reflects a balance in cash of $6.

(e) Scotia I*Trade investment account ending #125 was opened in their joint names. Tab 7 of Exhibit 5 includes a confirmation notice of settlement on March 18, 2010 of the sale of securities which yielded $36,249US.

(f) Scotia I*Trade investment account ending #104 was opened in the name of the Respondent in trust for the grandson of the Applicant. It had less than $200 in assets. Scotia I*Trade investment account ending #018 was opened in the name of the Respondent in trust for another grandson of the Applicant. It had less than $200 in assets.

(g) CIBC joint line of credit account ending #239. On July 25, 2008, a cheque in the amount of $100,000 was written leaving a balance owing on the line of credit in the amount of $100,100.64.

(h) CIBC account ending #131 was opened in their joint names. The only statement available is for the period ending April 30, 2010 and includes withdrawals of $36,900, $30,000, $35,000, $4,725 and $1,235 as well as deposits to an ETrade account of $36,850, $69,700, and $1,235.

(i) RBC account ending #344 in the name of the Respondent. On July 25, 2008, it shows a purchase of a non-redeemable GIC in the amount of $100,000.

(j) RBC Direct Investing Inc. account ending #821 in the name of the Respondent. Confirmation notices reflect purchases of securities on July 28, 2009 for a net amount of $20,853 US and another purchase that same date for a net amount of $21,058; on October 21, 2009 for a net amount of $58,509US; on April 15, 2010 for a net amount of $60,525US.

(k) Bank of America account in Tampa, Florida in their joint names account ending #920. Exhibit 5 at Tab 14 includes statements dated in August and December 2009. The balance on the latter was $6,975.

[10] In 1987, the Applicant arrived in Canada and became self-employed working from her home as a fashion consultant. In 1990, she started her own clothing store that she operated for 15 years. She said that she made a living but it was not profitable. She estimated her gross income at about $20,000 and net income of about $15,000 annually. From about 2005 to 2009, she was not working outside the home. In 2009, she got a job as a sales associate for a clothing store. She estimated her 2009 income at $17,000 and she thought it had gradually increased over 2012 and 2013. Her Tax Return Information forms or Notices of Assessment indicate her line 150 income as follows:

Year	**Line 150**
2008	$23,755 (consisting of interest and investment income $13,846) and other income of $9,909)
2009	$ 1,161 (consisting of T4 earnings)
2010	$16,037 (consisting of T4 earnings)
2011	$17,261 (consisting of T4 earnings including commissions)
2012	$23,578 (consisting of T4 earnings of $27,947 minus net business income)
2013	$26,209 (consisting of T4 earnings)

[11] She had been laid off because the store went bankrupt and she was receiving EI in the amount of $1,180 per month. At the time of the trial, her modest budget totaled $3164 per month.

[12] At the time they married, the Applicant said that the Respondent was working as a civil engineer. She recalled that about a year after they married, he was laid off and in about 1992, he became self-employed as a limousine driver. He retired from that business in 2005 or 2006. She said he never told her what he earned but she believed he was making more than she was. She said that they both contributed to the household expenses.

Procedural History

[13] In the Application issued on February 10, 2012 the Applicant sought a divorce, equalization of net family properties, exclusive possession of the matrimonial home, freezing assets and sale of family property. Counsel for the Respondent filed an Answer dated March 14, 2012 in which he disputed her claims and asked for costs and prejudgment interest. In his

Answer and in his Form 13.1 Financial Statement sworn March 14, 2012, he showed his address in Los Angeles California.

[14] A case conference was held on June 1, 2012 at which time, Horkins J. directed the Applicant to provide disclosure; ordered the Applicant to advise by the end of July whether she intended to buy out the Respondent's interest in the matrimonial home or agree to a sale of the property and she scheduled the settlement conference for September 21, 2012. She permitted the Respondent to join the settlement conference by telephone from California. It is not clear whether he had counsel at that case conference.

[15] In an order dated November 19, 2012, Jarvis J. directed the Applicant to produce the documents specified by Horkins J. in her endorsement within 45 days. He set the trial for April 22, 2013 for 2 days. He gave leave to the Applicant to deliver a fresh Application within 10 days and then allowed the Respondent to deliver an Amended Answer "if so advised". He ordered the Applicant to pay costs thrown away fixed at $1,200 forthwith. The Respondent had a lawyer at this motion. There is no subsequent endorsement but that trial date must have been vacated.

[16] In the fresh Application dated November 23, 2012 the Applicant also asked for spousal support, a tracing order, costs and prejudgment interest.

[17] On January 24, 2014, Horkins J. held a Trial Management Conference. She directed the Applicant to produce documents relevant to the spousal support claim. She noted that the Applicant wanted to amend the Application again to advance a claim for unequal division of property. She noted that the Applicant took the position that the Respondent had not produced various financial records but observed that if they were joint accounts then the records were available to the Applicant. She made an order that the Applicant bring a motion on March 6, 2014 seeking disclosure that she said was missing and seeking leave to amend to claim an unequal division of property. She ordered that, by March 31, 2014, the parties exchange income tax returns and notices of assessment for 2011, 2012 and 2013 (when available) unless already produced. She adjourned the TMC to continue before her on May 23, 2014 and she gave permission for the Respondent to join the TMC by telephone from California. If not settled on May 23, 2014, she indicated that she would set a trial date. The Respondent had a lawyer, different from the lawyer on November 19, 2012.

[18] On March 6, 2014, the parties agreed to an order that the Applicant would amend her Application; that the Amended Application would be served and filed by March 20, 2014; that, within 45 days, the Respondent would provide statements for all bank accounts held by him (separately or jointly with a third party other than the Applicant) for the period September 1, 2010 to date; that the Respondent would provide an accounting regarding these specific transactions:

(a) from RBC account # ending 481 in the name of the Respondent:
July 29, 2008 withdrawal of $100,000

(b) from the joint CIBC account # ending 131:

April 1, 2010	withdrawal of $36,900
April 20, 2010	withdrawals of $30,000 and $35,000
April 21, 2010	withdrawal of $4,725
April 29, 2010	withdrawal of $1,235

(c) from joint E-Trade account # ending R4J

July 2008	withdrawal of $67,486
	withdrawal of $53,750.

The consent order also provided that the Respondent would provide statements from his RBC account; that the Respondent would provide from CIBC, RBC and Scotia Bank confirmation as

to whether he held any other accounts at any of those institutions other than those he had already disclosed, and if so, disclose them. On this occasion, a third lawyer represented Mr. Rogovsky.

[19] In the Application that was amended on March 6, 2014, in addition to the tracing order contained in the fresh Application, the Applicant asked for an order for accounting; an order compelling the Respondent to return/repay family funds misappropriated before and/or after separation; and an order for the unequal distribution of net family properties.

[20] On May 12, 2014, Mr. Rogovsky served a Notice of Change in Representation indicating that he was acting for himself. His address in that notice was in Marina del Rey, California.

[21] At the TMC held on May 23, 2014, Horkins J. noted that settlement was not possible. The Respondent had filed a TMC brief using an address on Yonge Street. He participated without counsel and he took the position that he knew nothing about the consent order dated March 6, 2014 and that he had served a Notice of Change in Representation dated April 17, 2014 that had been faxed to the Applicant's counsel on May 5, 2014. Horkins J. noted that the Respondent confirmed that he would comply with the March 6 order. She gave directions for the issuing and entry of the March 6 order. She noted the Respondent's assertion that he had not received disclosure from the Applicant but that counsel for the Applicant reported that it had been given to his lawyer. She directed the Respondent to obtain his file from his former lawyer. She reported that the parties each sought questioning.

[22] In her order, Horkins J. directed the Respondent to comply with the March 6 order no later than June 30 and if he failed to do so, the Applicant could move to strike his Answer; that the Respondent make best efforts to obtain his file from his former lawyer and if, after reviewing the file and obtaining the Applicant's disclosure he believed that the Applicant had not complied with all relevant and reasonable disclosure, he could bring a motion to obtain disclosure from her; that the Respondent request his file from his former lawyer within 7 days and if the lawyer did not respond, he should bring a motion no later than June 30, 2014; that the parties could conduct questioning limited to 3 hours each and that it would take place on July 15, 2014 at

10:00 a.m.; that the Respondent was not permitted to question the Applicant if he failed to comply with the March 6 consent order; if before July 15, 2014 a judge found that the Applicant was in default of her disclosure obligation, then the Applicant would not be permitted to question the Respondent; the trial was set for the week of November 17, 2014 estimated 4-5 days; that the parties attend a final TMC on October 1, 2014 at 10:00 a.m. and must complete the Trial Scheduling Endorsement Form with up to date conference briefs. She ordered that the Respondent could be served at an email address and at a residential address on Yonge St. Mr. Rogovsky did not have a lawyer at the time of this TMC.

[23] On August 21, 2014, Backhouse J. heard a motion brought by Mr. Rogovsky. Her endorsement is as follows:

> Mr. Rogovsky seeks copies of joint account statements and copies of accounts in his name which he authorized the applicant to obtain. These statements are available to Mr. Rogovsky. It is not the Applicant's obligation to provide copies of these. If the Applicant relies on them they will have to be produced by her in advance of trial in a document brief.
>
> With respect to his motion that seeks support, he did not claim support in his Answer. He advises that he does not really want support – only if she obtain support would he then want it. He has not sought leave to amend his Answer. He is self-represented. The trial date is scheduled for November 17, 2014. If he wishes to amend his Answer to claim spousal support he shall have leave to do so on or before September 11, 2014 by serving and filing an amended Answer. If he does not do so by that date then he shall not be able to make this claim at trial.
>
> The Applicant deposes that the Respondent has not complied with the consent order for disclosure which required that he account for large sums removed by him from bank accounts and line of credit (eg $100,000 shortly before separation). He has produced today a July 18, 2014 letter to applicant's counsel purporting to comply. I have reviewed this. It does not explain why those amounts were removed and does not show where the monies were transferred – ie a bank deposit statement. I have advised him that if he does not comply, he will not be allowed to give evidence at trial in regard to these amounts and the only evidence the court will have to decide the case will be the applicant's evidence.
>
> The Respondent asserts for the 1st time in these proceedings that the applicant has $1 million. He bases this on the fact that she retained her own earnings and he supported the family. He asserts that it is not fair that he has to make disclosure and she does not. I am not satisfied that there is any merit to this request and the request that she be ordered to make further disclosure is dismissed.
>
> Costs to Applicant fixed in the amount of $750.00 payable within 30 days.

[24] The address for the Respondent on his Notice of Motion was the Yonge St. address referred to in the May 23 endorsement of Horkins J.

[25] On September 25, 2014, I heard the motion by the Applicant to strike the Answer of the Respondent for failure to comply with the consent order dated March 6, 2014. Mr. Rogovsky was self-represented. In that endorsement, I wrote the following:

> This is a motion by the wife to strike the Answer of the Respondent for failure to comply with the consent order dated March 6, 2014. Pursuant to paragraphs 3 to 5, the Respondent was required to provide disclosure and an accounting. In particular, he was required to provide an accounting of the withdrawal of $100,000 on July 29, 2008; two withdrawals totaling approximately $120,000 in July 2008; and 4 withdrawals totaling approximately $100,000 in April, 2010. At the time of the Trial Management Conference on May 23, 2014, Justice Horkins found that he had not complied and ordered that he do so no later than June 30, 2014.
>
> Mr. Rogovsky has not complied with that order. He has provided copies of withdrawals for the 2010 transactions. He has provided a letter dated July 18, 2014 and another dated September 5, 2014 in which he explains what has happened with the funds. He has not provided any documentation to show what financial institution or account into which those funds were deposited; nor has he provided proof of all of the expenditures. The letters of explanation do not suffice.
>
> Mr. Rogovsky says that he withdrew the funds and gave them to his daughter. His daughter is currently in Europe but she has not been in Europe since March 6, 2014. If he did give her such substantial amounts of money, he could have asked her for her documentation to prove deposits and withdrawals.
>
> Mr. Rogovsky has no intention of complying with the order. There is no point in giving him further time to comply because he will not do it.
>
> Mr. Rogovsky does not accept that he has an obligation to provide such disclosure, even though when the order was originally made, he had counsel and the order was made on consent.
>
> Pursuant to rule 1(8), the court must decide as to the consequences of a failure to comply. In this case, Mr. Rogovsky has failed to comply with two orders. He has no intention of complying now. He does not accept that he has responsibility to comply. I am driven to the conclusion that it is necessary for a just determination of the application that his Answer be struck. There is no alternative.
>
> **ORDER TO GO AS FOLLOWS**:
>
> The Answer dated March 14, 2012 is struck out.

Mr. Rogovsky may bring a motion on 5 business days' notice for an order seeking to reinstate the Answer provided that his affidavit contains evidence and documents that fully complies with the order made March 6, 2014.

Mr. Rogovsky is entitled to the following:

a. To be given notice of court events;
b. To attend at court events (including the Trial Management Conference on October 1, 2014 and the trial scheduled for the week of November 17, 2014) for purposes of observation only.

Mr. Rogovsky is not entitled to do the following:

a. To participate in any court event;
b. To give oral evidence at any court event;
c. To give affidavit evidence at any court event;
d. To make submissions at any court event.
e. To bring any motion to the court for any relief.

Because his Answer has been struck and Mr. Rogovsky is not entitled to bring any motions to this court, the motion brought by Mr. Rogovsky returnable today in which he seeks an order requiring Ms. Elenskaya to provide certain disclosure is dismissed.
Mr. Rogovsky shall pay costs of today fixed in the amount of $1,500.

[26] On October 1, 2014, Mesbur J. held the Trial Management Conference. Mr. Rogovsky had filed his TMC brief prior to the hearing of the motion on September 25, 2014 but he did not attend. Mesbur J. confirmed the trial date for the week of November 17 for 3 days. She ordered that the trial record and expert report need not be served on the Respondent unless he moved successfully to have his Answer reinstated. And she ordered that her endorsement and the Trial Scheduling Endorsement be included in the Trial Record.She permitted the Applicant's Amended Application (which had been served) to be filed and included in the Trial Record.

Analysis

A. Equalization of Net Family Property

[27] The Applicant's objective is that an order be made vesting title to the condominium in her name. I calculate his equity in the condo as follows: current value[1] $400,000 minus notional disposition costs at 2.5% = $10,000 minus balance on line of credit $100,000 = $290,000 divided by 2 = $145,000.

[1] Since the condominium is jointly owned, I rely on the current value not the valuation date value.

[28] The Applicant's evidence is that the parties separated on February 20, 2011. In the absence of other evidence, I accept February 20, 2011 as the Valuation Date.

[29] As indicated above, the evidence of the Applicant and the records that are available demonstrate that Mr. Rogovsky had control over substantial amounts of money. Notwithstanding repeated orders for him to account for the location of the funds and in particular, the amounts referred to in the March 6, 2014 order, he failed to do so. Counsel for the Applicant obtained as many records as possible from financial institutions in an effort to trace these substantial amounts of money. Because of the challenges posed by Mr. Rogovsky's non-compliance with his disclosure obligations, counsel for the Applicant asks that the court draw inferences against Mr. Rogovsky.

[30] In the evidence and in his closing submissions, Mr. Bouchelev attempted to identify transactions between and amongst the available accounts that demonstrated that Mr. Rogovsky had moved funds for which there was no explanation or accounting. He made the following calculation based on electronic fund transfers:

Exhibit	**ETF**	**Total**
Ex. 5 Tab 1 E*Trade joint account ending #R4J 26 transactions between December 18, 2007 and December 16, 2008 **TOTAL**		**$157,896**
Ex. 5 Tab 5 Scotia ITrade account ending #791 March 31, 2010 April 19, 2010 April 28, 2010 **TOTAL**	 $36,850 $69,700 $ 1,235	 **$107,785**
Ex. 5 Tab 4 E*Trade corporate account in joint names ending #ND3 October 5, 2007 December 24, 2007 **TOTAL**	 $ 600 $2,000	 **$ 2,600**
Ex. 5 Tab 7 Scotia ITrade joint account ending #125 Confirmation notice of sale **TOTAL**	 $36,260	 **$36,260**
Ex. 5 Tab 10 CIBC joint line of credit Withdrawal July 25, 2008 **TOTAL**	 $100,000	 **$100,000**

GRAND TOTAL		**$510,458**

[31] Mr. Bouchelev took the position that the amount of $510,458 ought to be reflected as cash at valuation date to the credit of the Respondent. At the conclusion of the trial, Mr. Bouchelev prepared a net family property that was designed to do just that which indicates as follows:

Value of Property Owned at Valuation Date	**Applicant**	**Respondent**
Matrimonial home – 1131 Steeles Ave. W. Apt. 1103 using current value because jointly owned	$200,000	$200,000
Furniture	$ 2,000	
Cash	$ 100	$510,458
Total Value of Property owned at Valuation Date A.	**$202,100**	**$710,458**
Liabilities at Valuation Date		
CIBC – joint secured line of credit	$ 50,000	$ 50,000
Credit card debt	$ 1,200	
Total Liabilities at Valuation Date B.	**$ 51,200**	**$ 50,000**
Net Family Property **A. minus B.**	$151,000	$660,458
Equalization Payment owed by Respondent to Applicant	**+ $254,729**	**-$254,729**

[32] That NFP calculation did not reflect any pre-marital deductions for either of the parties and allocated all of the unexplained electronic fund transfers to Mr. Rogovsky as "cash". Based on that calculation, the Respondent would owe an equalization payment that exceeded his equity in the matrimonial home.

[33] Notwithstanding the heroic efforts by the Applicant and Mr. Bouchelev to reconstruct the movement of funds, in the end result, without Mr. Rogovsky's co-operation, the ultimate disposition of substantial amounts of money will not be known. I agree that the court should draw inferences against Mr. Rogovsky including the inference that if he had properly disclosed as he was required to do, it would be evident that he did have substantial amounts of liquid assets available to him which would be subject to equalization. However, I take a more conservative approach than that of counsel for the Applicant.

[34] It is admitted that at the time of the marriage, Mr. Rogovsky owned 330 Dixon Road, Apt. 604. In his Form 13.1 sworn March 14, 2012, Mr. Rogovsky said that the value at the date of marriage was $105,000. It was sold in 2000 but the Applicant does not know the destination of the proceeds of sale. Mr. Rogovsky also asserted that he owned two vehicles and jewellery totaling $14,250 at the date of marriage. He also listed a TD chequing account in his name at date of marriage in the amount of $3,000 and a term deposit in the amount of $180,000 with this description: "TBD – all of the funds in this account were used for the purchase of the Matrimonial Home in or about May 1991".

[35] In total, Mr. Rogovsky asserted that the value of his pre-marriage deductions was $302,250. I do not allow any of those deductions. Even with the admission by the Applicant that he owned the condominium on Dixon Road, it was incumbent on him to document his pre-marital assets and identify where the proceeds of sale ended up. It is inappropriate to consider allowing him a deduction for an amount described as "TBD".

[36] That leaves the challenge of determining how to reflect the substantial amounts of cash at valuation date. In his Form 13.1 sworn March 14, 2012, Mr. Rogovsky reflected three accounts: RBC in his name in the amount of $2,000; joint CIBC in the total amount of $100; the TD Canada Trust account that had been in his name at the date of marriage (but had subsequently become joint) in the total amount of $1,200. None of those entries have account numbers. That Form 13.1 does not refer to any substantial amounts of cash.[2] Given the documents referred to in paragraph 9 above, I do not accept that the Form 13.1 bears any semblance of reality.

[2] In the context of his motion in August 2014 and the Applicant's motion in September 2014, Mr. Rogovsky filed affidavits attached to which were some documents. They are not evidence before me in this trial.

[37] I will draw inferences against Mr. Rogovsky that if he had properly disclosed, it would have increased his net family property and therefore increased the equalization payment he owed to the Applicant for the following reasons.

[38] First, the proliferation of accounts, most of which were in joint personal or corporate names indicate that there were substantial assets in the period commencing in 2004. Based on the analysis done by the Applicant, funds moved from one account to another; and from known accounts to unknown destinations. For the most part, the Applicant had no knowledge of the accounts and did not participate in the transactions. The knowledge of all of the details rests with the Respondent.

[39] Second, the Respondent was selective about what he did produce leaving the Applicant and her counsel to dig up as much documentation as possible. Had the Respondent not left behind a few documents which led her to accounts and to transactions, she would never have been able to pursue the documentation that she has obtained. The Respondent has woefully failed to provide comprehensive financial disclosure as required by the *Family Law Rules*.

[40] Third, the Respondent has indicated that he lived in Los Angeles and then in Marina del Rey. More recently, he has provided an address in Toronto but there is no evidence that he lives there. If he is resident in the United States, he would have filed tax returns in that country. He has provided no U.S. documentation.

[41] Fourth, in his submissions during the motion I heard on September 25, 2014, Mr. Rogovsky said that he had withdrawn funds and had given them to his daughter. That was not evidence and he did not provide any such evidence in that motion. Indeed, he mentioned it as a reason for explaining his delayed non-disclosure. But from that submission I infer that it is highly likely that he has indeed transferred significant funds to his daughter and, because she resides in the U.S., it would be very challenging to engage her in the fact-finding process in this Ontario proceeding.

[42] Fifth, it is clear from his Notices of Assessment referred to below, that he had substantial interest and other investment income in 2008 and 2009 and still a substantial amount in 2010. I consider it highly unlikely that the assets which generated interest and other investment income ceased to exist. I infer that the assets have been moved or transformed and not disclosed.

[43] Last, in his Form 13.1 Financial Statement sworn March 14, 2012, he failed to complete Part 8: Disposed-of Property which requires the deponent to show by category the value of all property that he disposed of during the two years immediately preceding the making of the statement.

[44] For all of those reasons, I do agree that a substantial amount ought to be attributed to Mr. Rogovsky at valuation date. I do not accept the total of the electronic fund transfers partly because there is likely overlap between and amongst the accounts and therefor the risk of double-counting. In the circumstances of this case in which the inability to arrive at a verifiable amount

is caused directly by the Respondent, I am satisfied that it would be fair to the Applicant and reasonable to both the Applicant and the Respondent if I allocate an amount of "cash" that would cause him to be required to make an equalization payment roughly equivalent to his half interest in the matrimonial home as follows:

Value of Assets at Valuation Date	**Applicant**	**Respondent**
1131 Steeles Avenue West, unit 1103 Jointly owned – 50% of fair market value at November 2014	$200,000	$200,000
Furniture	$ 2,000	
Cash	$ 100	$300,000
Total value of assets at Valuation Date A.	**$202,100**	**$500,000**
Less Liabilities at Valuation Date		
CIBC line of credit - joint – 50%	$ 50,000	$ 50,000
Credit card debts	$ 1,200	
Total Liabilities at Valuation Date B.	**$ 51,200**	**$ 50,000**
Net Family Property **A. minus B**.	$150,900	$450,000
Equalization Payment: Respondent owes Applicant	+$149,550	-$149,550

[45] The Applicant has made an alternative submission, namely that the equalization of the net family property would be unconscionable and that, pursuant to s. 5(6) of the *Family Law Act*, the Court should increase the amount required to be paid by the Respondent. That submission relies principally on the fact that, unbeknownst to the Applicant, the Respondent drew $100,000 on the joint line of credit and apparently used it to purchase GIC's in an account in his own name for which he did not account at valuation date. I agree that in the context of their modest financial circumstances, that resulted in a significant reduction in their total net family property. Furthermore, the secrecy with which he drew the funds and his persistent failure to account for it means that a division of the net family property in unequal shares that left the Applicant with all of the equity in the matrimonial home would be consistent with s. 5(6)(b), (d) and (h). Because of the approach I have taken in paragraph 44, I need not make an order pursuant to s. 5(6).

[46] Given the conduct of the Respondent in abandoning the Applicant, leaving her with a significant liability, failing to provide disclosure, not appearing to have assets in Ontario from

which the Applicant could collect an equalization payment, this is an appropriate case for a vesting order pursuant to s. 9(1)(d)(ii).

[47] Before leaving the property issues, I recognize that I have not allowed the Applicant a pre-marital deduction for the $30,000 she says she had in cash. She provided no documentation of any kind. I appreciate that it is many years ago and documentation might not be available. However, I have drawn inferences against the Respondent for failure to disclose at date of marriage. I am not prepared to ignore that deficiency when it comes to the Applicant.

B. Spousal Support

[48] Based on her evidence referred to above, the Applicant is entitled to spousal support for these reasons. The parties were together for 20 years during which time they pooled their resources. For the period of about 2005 to 2009, the Applicant was not employed outside the home and the Respondent was the only breadwinner. The Applicant was left at a serious economic disadvantage as a result of the breakdown of the marriage in early 2011 when the Respondent abandoned her, leaving her to manage a significant debt that he had created. Since then she has lost her job, not on account of her conduct but because the business went bankrupt. She is now almost 65 years old and is currently unemployed.

[49] I turn to the question of the Respondent's ability to pay.

[50] In his Form 13.1 sworn March 14, 2012, the Respondent indicated that his income consisted of $500 per month (in the category of pension income including CPP and OAS) and $16.67 per month (in the category of "other sources of income") for a total of $516.67 per month. In that statement he also asserted that "last year" (presumably 2011) his gross income from all sources was $6,000. He attached the equivalent of Notices of Assessment for 2008, 2009 and 2010 that showed the following:

	2008	**2009**	**2010**
Old Age Security	$ 3,649	$ 3,722	$ 3,733
CPP or QPP	$ 1,839	$ 1,885	$ 1,893
Interest and other investment income	$13,846	$13,357	$ 6,408
Other income	$ 9,909	$ 9,640	
Line 150 Total income	**$29,243**	**$28,604**	**$12,034**

[51] At Tab 17 of the continuing record there is the equivalent of Mr. Rogovsky's 2012 Notice of Assessment which indicates that his OAS was in the amount of $3,906 and his CPP was in the amount of $1,979 for a total income of $5,885. That Notice of Assessment was not put in evidence at the trial. But I would disregard it in any event because the evidence does indicate that he has been living in California from which I infer that he likely has income reported to U.S. authorities that he has not disclosed in these proceedings.

[52] The Respondent is in his 74th year. It is unlikely that he is working. However, as indicated above, it is also likely that he has significant undisclosed assets.

[53] The Respondent has made it a challenge to determine the amount of spousal support because of his non-compliance with his disclosure obligations. I intend to make an order of a modest amount on the assumption that if the Applicant does obtain accurate information as to his income, she could bring a Motion to Change. The amount ordered is 50% of his income in his 2012 Form 13.1.

[54] The Respondent has made no payments since the date of separation and for that reason, the order for spousal support should be retroactive to March 1, 2011.

Costs

[55] In the order dated November 19, 2012, Jarvis J. ordered the Applicant to pay costs in the amount of $1,200. In her order dated August 21, 2014, Backhouse J. ordered the Respondent to pay costs in the amount of $750 and in my endorsement dated September 25, 2014, the Respondent was ordered to pay costs in the amount of $1,500. I am not confident that the Applicant did pay the initial costs order so I will err on the side of caution and conclude that the net amount of costs owed by the Respondent is $1,050.

[56] Counsel for the Applicant has provided a costs outline in which he seeks partial indemnity costs for the balance of the proceeding in the amount of $26,800 plus HST on fees in the amount of $3,484 plus disbursements in the amount of $1,744 for a grand total of $32,028. Given the challenges posed by the Respondent's conduct, I consider the costs outline to be reasonable.

ORDER TO GO AS FOLLOWS:

[57] The Respondent owes to the Applicant an equalization payment of $149,550.

[58] In order to satisfy the obligation to make that equalization payment, title to the property municipally known as 1131 Steeles Ave. West, #1103, Toronto, Ontario M2R 3W8 is vested absolutely in the Applicant. (Legal description to be inserted into the order when signed and entered.)

[59] Commencing March 1, 2011 and on the first of each month thereafter, the Respondent shall pay spousal support fixed in the amount of $250 per month.

[60] The Respondent shall pay arrears of spousal support accumulated from March 1, 2011 to and including December 1, 2014 in the amount of $11,500.

[61] Support Deduction Order to Issue.

[62] The Respondent shall pay to the Applicant costs fixed in the amount of $32,028 of which 50% or $16,014 shall be enforced by the Director of the Family Responsibility Office as spousal support.

[63] The Respondent shall pay to the Applicant costs arising from the orders made November 19, 2012, August 21, 2014 and September 25, 2014 in the net amount of $1050.

[64] The Respondent shall pay post judgment interest on the arrears of spousal support and prospective support and costs at the rate in effect as of the date of this judgment.

[65] The Applicant may take out the order that reflects this endorsement without approval from the Respondent.

Kiteley J.

Released: December 23, 2014

CITATION: Elenskaya v. Rogovsky, 2014 ONSC 7393
COURT FILE NO.: FS-12-375955
DATE: 20141223

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

Elenskaya

AND

Rogovsky

REASONS FOR JUDGMENT

Kiteley J.

Released: December 23, 2014