Discussion Paper:
The Presumption of Advancement and Property division under the *Family Law Act*

August 2016

Introduction:

The enactment of the Family *Law Act* (*FLA*) in 2013 made significant changes to the way property is divided in British Columbia. Under the *Family Relations Act* (*FRA),* "family property" was identified as property that was owned by one of the parties and used for a "family purpose". Under Part 5 of the *FLA*, BC joined most other provinces in moving to an excluded property regime, where property is divided based on its characterization as either "family property" or "excluded property". Unlike the *FRA*, "family property" is defined in section 84 of the *FLA* as property owned by one of the parties during their relationship which does not fall under one of the categories of "excluded property" listed in section 85 (1) of the *FLA*, (see **Appendix A**).

These reforms have meant the development of new case-law as BC courts interpret the *FLA*'s new provisions. Recent case-law has raised questions about how the new property division regime interacts with the common law presumption of advancement. There have been a number of court decisions in the last two years that gave different answers to the question of whether the presumption of advancement applies to Part 5 of the *FLA*. This discussion paper examines the implications of that case-law.

The ministry invites you to consider the questions raised in the following discussion paper and submit your comments by regular mail or email until September 30, 2016.

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Background:

Reforms made by Part 5 of the FLA:

The change to an excluded property regime was not the only reform made by Part 5 of the *FLA*. For example, unlike property division under the *FRA*, Part 5 of the *FLA* applies to married spouses and unmarried spouses who have lived together in a marriage-like relationship for a continuous period of at least two years. Also, section 86 of the *FLA* specifically authorizes the division of family debt. Under the *FRA*, parties and judges often divided family debt informally by reducing the value of family property against which the debt was owed.

Further, although the *FLA* retained the presumption that family property is generally divided equally between the spouses, it changed the standard to be used by a judge when determining if division should be other than equal. Under the *FRA*, the standard for "reapportionment" between the spouses under section 65 of the *FRA* was whether equal division of family property was "unfair" having regard to a list of factors. Under section 95 of the *FLA*, the standard is that equal division of family property would be "significantly unfair" having regard to a list of factors. That list includes many of the factors from section 65 of the *FRA* with some additions.

Another change is the concept that non-family property can be divided. Section 96 of the *FLA* provides for the possible division of "excluded property" in two circumstances:

> (1) if the family property or family debt cannot be divided because it is outside BC; or
>
> (2) if it would be "significantly unfair" not to divide excluded property considering only the duration of the relationship of the parties and "a spouse's direct contribution to the preservation, maintenance, improvement, operation or management of the excluded property". (See **Appendix A**).

However, the most significant reform in Part 5 is likely the move to an excluded property regime itself because it is a fundamental change in the way that "family property" is identified. Section 84(1) of the *FLA* describes "family property" as either:

(a) property owned by a spouse or a beneficial interest of one spouse in property as of the date of separation; or
(b) property or a beneficial interest in property acquired by a spouse after the date of separation if it is derived from property referred to in (a).

Section 84 (2) of the *FLA* includes a non-exhaustive list of the categories of property that are included as "family property" under the Act. In contrast, section 85 (1) of the *FLA* contains an

exhaustive list of categories of property that are "excluded property" and section 85(2) puts the onus on the person claiming that property is excluded to prove it.

Notable categories from the list of excluded property in section 85(1) include:

- property acquired by a spouse before the start of the spousal relationship (section 85(1)(a));
- inheritances to a spouse (section 85(1)(b));
- gifts to a spouse from a third party (section 85(1)(b.1)); and
- property "derived from property or the disposition of" excluded property (section 85(1)(g)).

Section 85(1) (g) is an important category because it allows the value of the excluded property to be 'traced' into other property if it is used to acquire that other property. This preserves the excluded status of the original property. Also, section 85(1)(b.1) provides that gifts received by a spouse from a third party are the excluded property of that spouse. This means that gifts received by a spouse from the other spouse are family property and subject to the presumption of equal division.

The operation of sections 84 and 85 together means that property owned by a spouse that cannot be proven to be "excluded property" is "family property" and subject to a presumption of equal division.

Although section 104 (2) of the *FLA* is a carry-over from the *FRA* (section 69 (2)), it plays a prominent role in the court decisions discussed below. Section 104 (2) provides:

> **104**(2) The rights under this Part are in addition to and not in substitution for rights under equity or any other law.

The presumption of advancement:

When ownership of property is transferred from one person to another, there are generally two possible results: 1) the person receiving the property becomes the beneficial owner of the property, or 2) the person receiving the property holds it in trust for the transferor who remains the beneficial owner.

The presumption of advancement is a common law principle which operates in several areas of the law including trust, contract and family law. In the context of family law the common law principle provides that, absent evidence to the contrary, a transfer of property between married spouses constitutes a gift of the beneficial interest of that property from one spouse to the other. In other words, the spouse who receives the transfer becomes the beneficial owner

of the property. Historically the presumption has applied to married spouses only, although there is a discussion in one BC case to the contrary (noted below).

Although the principle existed when the *FRA* was in force, it had little relevance to the issue of property division because of how property was divided. Under the *FRA*, property was divided based on what was done with the property rather than when it was acquired or which spouse owned it. For example, under the *FRA* it did not matter whether real property was brought into the relationship by one of the parties or whether it was transferred during that relationship from the name of that spouse to the other. If both parties lived in or used the property then it was considered family property and presumed to be divided equally. Therefore, whether the principle of the presumption of advancement applied to the property division regime under the *FRA* was largely irrelevant.

The presumption of advancement has more relevance under the *FLA* which divides property based on who owned that property and when it was acquired. For example, under the *FLA,* real property brought into a relationship by one spouse is that spouse's excluded property and, generally, not divided. However, if that real property is transferred to the other spouse during the relationship of the parties, then whether the presumption of advancement is applicable to the property division regime under the *FLA* becomes a very relevant issue. If the presumption of advancement does apply then the answer to whether the property remains the excluded property of the spouse who brought it into the relationship is determined by whether the test to rebut the presumption of advancement is met. If evidence suggests the presumption does not operate, then the transfer is not a 'gift' between spouses and it remains the excluded property of the spouse who brought it into the relationship. If the presumption does operate, then the transfer is a 'gift' between the spouses and the property becomes family property subject to a presumption of equal division.

The opposing lines of British Columbia Supreme Court (BCSC) cases:

The BCSC decisions in: *Remmem v. Remmem* 2014 BCJ 2117 (August 15, 2014) (Remmem); *PG v. DG* 2015 BCSC 1454 (August 18, 2015) (PG); and *Andermatt v. Tahmasebpour* 2015 BCSC 1743 (September 25, 2015) (Andermatt), held that the presumption of advancement does not apply to property division under the *FLA*. Those cases found that the presumption was contrary to the clear intent of the new property division regime in the *FLA* and would severely affect the utility of tracing excluded property under section 85(1) (g) of the Act. The cases warned that applying the presumption would mean that any time excluded property was co-mingled with family property, it could lose its excluded character. For example, if an inheritance was deposited into a joint bank account, it could become family property. The judges in *Remmem*, *PG* and *Andermatt* did not accept that the absence of an explicit exclusion of the presumption

in the *FLA* meant that it continued to exist, and were also not persuaded by the argument that section 104(2) of the *FLA* (referred to below) suggests that the common law presumption continued.

In the intervening period between the cases of *Remmem* and *PG*, the BCSC issued decisions in *Wells v. Campbell*, 2015 BCSC 3, (January 6, 2015) (Wells) and *VJF v. SKW*, 2015 BCJ No 695 (April 16, 2015) (VJF). In both *Wells* and *VJF*, the BCSC decided that the lack of explicit language in the *FLA* abolishing the presumption, along with the existence of section 104(2) of the *FLA* supported a finding that the presumption continued to exist. *Wells* acknowledged some of the difficulties identified in *Remmem* with applying both the presumption and the new statutory property regime, but suggested that those difficulties did not lead to the conclusion that the presumption should be ignored.

The British Columbia Court of Appeal decision in *VJF*:

The issue reached the British Columbia Court of Appeal (BCCA) in *V.J.F.* v *S.K.W.*, 2016 BCCA 186 (April 28, 2016) (*VJF*). *VJF* involved the characterization of $2 million in proceeds from the sale of real property sold after the date of the separation. The $2 million was equal to the amount received by the husband from his former employer. Both the BCSC and the BCCA found that the payment from his former employer to the husband was a gift given to him during the relationship of the parties. The husband was a senior executive with his employer and the evidence was that the money was given to the husband as financial protection against future creditors of his employer. The husband's $2 million gift from his employer was used to purchase real property that was registered in the sole name of the wife. Both courts also accepted that one of the reasons for registering the house solely in the name of the wife was to protect it from future business creditors of the husband. After the parties separated, the house was sold and $2 million of the proceeds became the object of contention in the proceedings.

The husband argued that the $2 million was originally excluded property pursuant to section 85 (1) (b.1) of the *FLA* and either remained excluded under that section, or became his excluded property by operation of section 85 (1) (g) of the *FLA* as "property derived from…the disposition of property referred to in any of paragraphs (a) to (f)". The wife argued that although the $2 million began as the husband's excluded property under section 85 (1)(b.1) of the *FLA*, its use in purchasing the house and the house's subsequent registration in her name, made the $2 million family property pursuant to section 84 (1) of the *FLA*. She further argued that the common law presumption of advancement was applicable to their situation and that it applied to make the $2 million a gift from him to her because the evidence did not rebut the presumption.

The BCSC agreed with the wife and held that the $2 million proceeds were family property. The husband appealed. The BCCA upheld the BCSC decision and in doing so ruled that the presumption of advancement does apply in division of family property cases under Part 5 of the *FLA*.

In its decision, the BCCA raised a number of significant issues about how sections of the *FLA* should be interpreted. This discussion paper highlights some of those issues and discusses their implications including:

- whether excluded property always remains excluded property;
- the impact of applying the presumption of advancement to Part 5 of the *FLA*;
- the interpretation of "derived from" in section 85 (1) (g) of the *FLA*; and
- the impact of section 104 (2) of the *FLA* on the operation of Part 5 of the *FLA*.

Discussion:

"Once excluded, always excluded":

The primary ground of appeal in *VJF* was that the trial judge erred in finding that the $2 million was family property. One of the husband's main arguments was the assertion that, under Part 5 of the *FLA*, if property is received by a spouse in circumstances that make it "excluded property", then as between the spouses, it remains excluded property at the date of separation. If the property is converted into another form, section 85(1)(g) is used to trace it and retain its excluded status. The husband argued that to hold otherwise was contrary to the intention of the *FLA* to increase certainty for the parties because it requires examining the intention of the parties and the circumstances surrounding the transfer.

Madam Justice Newbury writing for the Court of Appeal in *VJF* rejected the notion that excluded property is "frozen in time" such that it can be said that "once excluded, always excluded". She acknowledged that this argument offers the "lure of simplicity" (para 68) but decided that it could not be supported by the language of the *FLA*. She pointed out that section 84(1) of the *FLA* indicates that the date of separation is the date when property is divided, and therefore it is also the date when property is characterized as either excluded or family property. She indicated that in this case, on the date of separation the house from which the $2 million dollars came from was "owned" by the wife.

Madam Justice Newbury also pointed out that to accept that the character of excluded property could never change would be to effectively eliminate the concept of gifts between spouses, (para 71). She found nothing in the *FLA* that supported the position that Part 5 of the

FLA prohibits gifts between spouses, or in some way reverses those gifts. She expressed an opinion that it "is more consistent with fairness between spouses" to allow gifts between them to transfer ownership, rather than to allow that property to be recalled by the transferor at the date of separation, (para 69). Madam Justice Newbury pointed to the husband's argument that the transfer to the wife was effective to prevent his creditors from claiming that the property remained his, but not effective to prevent him from claiming the property under Part 5 of the *FLA.* She indicated that his position was "hypocritical at best", (para 70).

Madam Justice Newbury suggested that, "it would take much clearer wording to render them suddenly revocable or null or illegal," (para 75). As such, she held that a gift from one spouse to the other was possible under the provisions of the *FLA*, and in this case the husband lost the exclusion attached to the $2 million when he "voluntarily and unreservedly directed that the West 33rd property be transferred to Ms. W. and 'derived' no property from that disposition", (para 74).

Discussion question:

1. Is it more consistent with fairness between spouses for the *FLA* to provide that gifts of excluded property between spouses transfer beneficial ownership or to allow excluded property to always retain its excluded status? Consider the example of RRSP's or other investments purchased with the excluded property of one spouse and registered in the name of the other spouse? Should the value of the excluded property be returned to the transferor spouse or treated as family property under Part 5 of the *FLA*?

The Application of the Presumption of Advancement under Part 5 of the *FLA*:

As part of the finding that gifts between spouses are possible under Part 5 of the *FLA,* the Court of Appeal in *VJF* found that the common law principle of the presumption of advancement applies to determine whether a gift was made. If the presumption is not rebutted by the evidence, then a gift occurred and the recipient spouse becomes the owner of the property.

Madam Justice Newbury repeated that, just like with the concept of "gift", the Legislature could have used much clearer language if it had actually intended to abolish the common law presumption of advancement. She explicitly disagreed with the suggestion in *Remmem* and other BCSC decisions that the proper operation of Part 5 required the presumption to be disregarded. She rejected the idea that Part 5 of the *FLA* was a "'complete code' that 'descends as between the spouses' and eliminates common law and equitable principles relating to property", (para 74). Instead she suggested that the statute "builds on those principles, preserving concepts such as gifts and trusts, and evidentiary presumptions such as the presumption of advancement", (para 74).

She noted that other provinces with similar property division regimes contain legislation that specifically abolishes or otherwise deals with the presumption and suggests that BC could have done the same if the presumption was not intended to apply under the *FLA*.

The legislative provisions from Alberta, Saskatchewan and Ontario that address the issue are attached in **Appendix B** and are discussed briefly below.

Section 36(1) of Alberta's *Matrimonial Property Act* abolishes the application of the presumption of advancement as between spouses generally, but then reinstates its effects in section 36(2). Section 36(2)(a) indicates that despite section 36(1), when "property" is placed in joint names, in the absence of evidence to the contrary, the property is jointly owned by the spouses. Section 36(2)(b) provides that (2)(a) includes money on deposit with a financial institution.

Section 50 of Saskatchewan's *Family Property Act* does something similar to section 36 of Alberta's *Matrimonial Property Act*. Section 50 abolishes the presumption except for jointly held property which includes money in joint bank accounts. In addition, section 50(1) of Saskatchewan's *Family Property Act* alludes to the fact that the common law presumption only applies to married spouses. Even though the Act applies to the division of property between married and some unmarried spouses, section 50(1) only abolishes the presumption of advancement for married spouses. This suggests that the presumption does not apply to non-married spouses and therefore there is no need to abolish it for those spouses.

In Ontario, section 14 of the *Family Law Act* does not mention the presumption of advancement by name but instead indicates that the law of the presumption of a resulting trust shall be applied as between spouses as if they were not married. This effectively prevents the presumption of advancement from applying. Section 14 addresses jointly held property in a similar way to the Alberta and Saskatchewan provisions.

In BC, the BCSC decision in *J.B. v. S.C.*, 2015 BCSC 2136, (November 2015), (decided prior to the BCCA decision in *VJF*), addressed the issue of whether the presumption of advancement applies to married and unmarried spouses. Although the Court did not find it necessary to adjudicate on the issue because it followed the BCSC cases which held that the presumption did not apply in BC, it commented that if the presumption did apply it should apply to both married and non-married spouses in the same way.

The BCCA in *VJF* also alluded to the issue when it held that the Legislature could have abolished the presumption using clearer language. In paragraph 77 of the decision, the Court indicated

that the Legislature also could have clarified whether the presumption applied to both married and unmarried spouses.

Discussion Questions:

2. The BCCA decision in *VJF* suggests that a spouse who wants to rebut the presumption of advancement can enter into an agreement that sets out that property exchanged between them is not a gift. Is this a practical way for spouses to address the issue?

3. Should consideration be given to amending the legislation to explicitly abolish the presumption of advancement for the purposes of Part 5 of the *FLA* entirely? Or, should consideration be given to adopting the approach used in other provinces?

4. If the presumption is not abolished for purposes of Part 5 of the *FLA*, should the *FLA* be clarified to ensure that the presumption also applies to those non-married spouses to whom Part 5 of the *FLA* applies?

The interpretation of "derived from" in section 85 (1) (g) of the *FLA*:

The decision in *VJF* also found that the language of the section did not support the husband's argument that section 85 (1) (g) of the *FLA* could be used to trace the $2 million proceeds. The Court found that in order for a transaction to fit within section 85 (1) (g) of the *FLA* there was a need for the transferor to "derive" something. At paragraph 57 of the decision, the Court held that:

> "There is little doubt that Mr. F. 'disposed of' the $2 million he received from M.I. when he used the funds to purchase the West 33rd property in his wife's name and to pay some construction costs. If the property had been purchased in his own name, there is no doubt the ultimate proceeds from the sale of the property would constitute "property derived from the disposition" of excluded property and would have remained excluded property under section 85(1)(g). Instead, Mr. F., for the protection of himself and his family, paid $2 million to the previous owner of the property and directed it be put into Ms. W's name and he paid some construction costs. The question arises what he 'derived from' this disposition." (para 57)

This passage appears to suggest that in order for excluded property to be traced into another form or into other property, there must be a benefit coming back to the transferor.

Discussion Questions:

5. The Court of Appeal decision suggests that section 85(1)(g) can be used to retain the status of excluded property only if: the test of the presumption of advancement is met; and there

is property or some other benefit returning to the transferor spouse. Because section 85(1)(g) applies only between spouses, are there scenarios in which a transferor spouse will receive a benefit from the transferee spouse such that section 85(1)(g) can apply? For example, assuming a finding that the test of the presumption of advancement was met, if the facts of *VJF* were that the purchased property was registered in the joint names of the spouses rather than the sole name of the wife, would that difference have constituted a returning 'benefit' to the husband?

The application of sections 95 and 96 of the FLA:

Regardless of whether or not the presumption of advancement is found to apply to Part 5 of the *FLA*, Part 5 includes the authority for a Court to divide both excluded property and family property as it deems appropriate. Section 95 of the *FLA* allows a court to divide family property unequally if it determines that it would be "significantly unfair" in the circumstances not to do so, and similarly section 96 of the *FLA* also allows a court to divide excluded property if it would be "significantly unfair" not to. Each section has different factors to consider and the situations in which section 96 can be used are restricted, but there is discretion given to a court to divide both types of property in appropriate circumstances.

The decisions of the Court of Appeal and BCSC in *VJF* offer examples of the use of section 95 and section 96.

After affirming the BCSC's decision in *VJF* that the $2 million proceeds were family property, the BCCA considered whether section 95 applied. After a brief review of the arguments offered in favour of an unequal division in favour of the husband, the Court upheld the BCSC decision to divide the proceeds equally between the parties. Madam Justice Newbury considered the length of the relationship, the existence of the husband's employment relationship before the marriage, and the contribution of the wife to the husband's career, and found that, while circumstances of the case could support an unequal division in his favour, they did not meet the "high threshold" of being "significantly unfair", (para 81).

In making its "high threshold" comment, the BCCA pointed to the following passage in the BCSC case of *Jaszczewska* v. *Kostanski*, 2015 BCSC 727 which contains quotes from a number of other decisions on the issue:

> "[166] In *L.G. v. R.G.*, 2013 BCSC 983 (CanLII), as para. 71, Justice N. Brown stated:
>
> > In my view, the term "significantly unfair" in s. 95(1) of the FL essentially is a caution against a departure from the default of equal division in an attempt to

> achieve "perfect fairness". Only when an equal division brings consequences sufficiently weighty to render an equal division unjust or unreasonable should a judge depart from the default equal division.

[167] Similar statements were made in *Remmem v. Remmem*. In that case, at para. 44, Justice Butler noted:

> …The Concise Oxford English Dictionary defines "significant" as "extensive or something weighty, meaningful, or compelling. In other words, the Legislature has raised the bar for a finding of unfairness to justify an unequal distribution. It is necessary to find that the unfairness is compelling or meaningful having regard to the factors set out in s. 95(2).

[168] In *Slavenova v. Ranguelov*, 2015 BCSC 79 (CanLII), 2015, BCSC 79, at para. 60, the court said:

> The "significant unfairness" contemplated by s. 95 requires much more than differing financial contributions in a relationship. Exactly equal contribution is more likely exceptional than commonplace. The new regime under the *FLA* recognizes that partners will come to a relationship in differing circumstances and accounts for those in the concepts of "family property" and "excluded property". The starting point in the division of property analysis already applies significant exclusions.

[169] In *Nearing v. Sauer*, Justice Fleming stated at para. 141:

> Section 95(2) does not appear to allow for the wide ranging examination of each spouse's contribution to the accumulation of family assets and their respective capacities that occurred pursuant to s. 65(1)(f)."

Jaszczewska considered whether an unequal contribution to the accumulation of family property justified an unequal division under section 95 of the *FLA*. The Court decided that the "minor direct and indirect contributions to the acquisition, maintenance and enhancement of the family property" by one of the parties made an equal division "significantly unfair" and ordered an unequal division of family property in favour of the other party.

The BCSC decision in *VJF* did not include an analysis under section 95 of the *FLA*. Even though it found that the proceeds were family property, the Court considered section 96 of the *FLA* instead. Based on its review, the Court held that, had the proceeds been determined to be "excluded property", it would have held that the circumstances met the test of "significantly

unfair" under section 96 and would have divided them equally between the parties. The Court based its finding on the almost 10-year relationship of the parties and the contributions made by the wife to the "preservation, maintenance, and following separation, improvement and management of the Vancouver property", (para 84). The Court suggested that to do otherwise would be "significantly unfair".

Discussion questions:

6. The BCCA decision in *VJF* alludes to the usefulness of the presumption of advancement to ensure fairness between spouses. If the presumption of advancement continues to apply to matters under Part 5 of the *FLA*, does section 95 of the *FLA* provide sufficient flexibility to allow a Court to address any alleged unfairness caused by excluded property being converted to family property?

7. If the presumption of advancement is specifically abolished regarding matters under Part 5 of the *FLA*, does section 96 of the *FLA* provide sufficient flexibility to allow a Court to address any alleged unfairness that results from the tracing of excluded property?

Section 104 (2) of the FLA:

Section 104 (2) of the *FLA* indicates the following:

> **"104** (2) The rights under this Part are in addition to and not in substitution for rights under equity or any other law."

The BCCA in *VJF* mentions section 104 (2) of the *FLA* as a provision that supports the interpretation that the presumption of advancement continues to apply respecting the division of family property under Part 5 of the *FLA*. However, Madam Justice Newbury stopped short of saying it was determinative of the issue because she expressed doubts that the presumption was a "right" within the meaning of the section.

The BCSC decision in *VJF* however, drew a more direct line between the existence of the common law presumption and section 104(2) of the *FLA*, (para 67).

Discussion Questions:

8. Are there other "rights under equity or any other law" that may interact with Part 5 of the *FLA* which require examination?

Appendix A:

Selected sections from Part 5 of British Columbia's *Family Law Act*:

Family property

84 (1) Subject to section 85 *[excluded property]*, family property is all real property and personal property as follows:

(a) on the date the spouses separate,

(i) property that is owned by at least one spouse, or

(ii) a beneficial interest of at least one spouse in property;

(b) after separation,

(i) property acquired by at least one spouse if the property is derived from property referred to in paragraph (a) (i) or from a beneficial interest referred to in paragraph (a) (ii), or from the disposition of either, or

(ii) a beneficial interest acquired by at least one spouse in property if the beneficial interest is derived from property referred to in paragraph (a) (i) or from a beneficial interest referred to in paragraph (a) (ii), or from the disposition of either.

(2) Without limiting subsection (1), family property includes the following:

(a) a share or an interest in a corporation;

(b) an interest in a partnership, an association, an organization, a business or a venture;

(c) property owing to a spouse

(i) as a refund, including an income tax refund, or

(ii) in return for the provision of a good or service;

(d) money of a spouse in an account with a financial institution;

(e) a spouse's entitlement under an annuity, a pension plan, a retirement savings plan or an income plan;

(f) property, other than property to which subsection (3) applies, that a spouse disposes of after the relationship between the spouses began, but over which the spouse retains authority, to be exercised alone or with another person, to require its return or to direct its use or further disposition in any way;

(g) the amount by which the value of excluded property has increased since the later of the date

(i) the relationship between the spouses began, or

(ii) the excluded property was acquired.

(2.1) For the purposes of subsection (2) (g), any increase in value of a beneficial interest in property held in a discretionary trust does not include the value of any property received from the trust.

(3) Despite subsection (1) of this section and subject to section 85 (1) (e), family property includes that part of trust property contributed by a spouse to a trust in which

(a) the spouse is a beneficiary, and has a vested interest in that part of the trust property that is not subject to divestment,

(b) the spouse has a power to transfer to himself or herself that part of the trust property, or

(c) the spouse has a power to terminate the trust and, on termination, that part of the trust property reverts to the spouse.

Excluded property

85 (1) The following is excluded from family property:

(a) property acquired by a spouse before the relationship between the spouses began;

(b) inheritances to a spouse;

(b.1) gifts to a spouse from a third party;

(c) a settlement or an award of damages to a spouse as compensation for injury or loss, unless the settlement or award represents compensation for

(i) loss to both spouses, or

(ii) lost income of a spouse;

(d) money paid or payable under an insurance policy, other than a policy respecting property, except any portion that represents compensation for

(i) loss to both spouses, or

(ii) lost income of a spouse;

(e) property referred to in any of paragraphs (a) to (d) that is held in trust for the benefit of a spouse;

(f) a spouse's beneficial interest in property held in a discretionary trust
  (i) to which the spouse did not contribute, and
  (ii) that is settled by a person other than the spouse;

(g) property derived from property or the disposition of property referred to in any of paragraphs (a) to (f).

(2) A spouse claiming that property is excluded property is responsible for demonstrating that the property is excluded property.

Unequal division by order

95 (1) The Supreme Court may order an unequal division of family property or family debt, or both, if it would be significantly unfair to

(a) equally divide family property or family debt, or both, or

(b) divide family property as required under Part 6 *[Pension Division]*.

(2) For the purposes of subsection (1), the Supreme Court may consider one or more of the following:

(a) the duration of the relationship between the spouses;

(b) the terms of any agreement between the spouses, other than an agreement described in section 93 (1) *[setting aside agreements respecting property division]*;

(c) a spouse's contribution to the career or career potential of the other spouse;

(d) whether family debt was incurred in the normal course of the relationship between the spouses;

(e) if the amount of family debt exceeds the value of family property, the ability of each spouse to pay a share of the family debt;

(f) whether a spouse, after the date of separation, caused a significant decrease or increase in the value of family property or family debt beyond market trends;

(g) the fact that a spouse, other than a spouse acting in good faith,

(i) substantially reduced the value of family property, or

(ii) disposed of, transferred or converted property that is or would have been family property, or exchanged property that is or would have been family property into another form, causing the other spouse's interest in the property or family property to be defeated or adversely affected;

(h) a tax liability that may be incurred by a spouse as a result of a transfer or sale of property or as a result of an order;

(i) any other factor, other than the consideration referred to in subsection (3), that may lead to significant unfairness.

Division of excluded property

96 The Supreme Court must not order a division of excluded property unless

(a) family property or family debt located outside British Columbia cannot practically be divided, or

(b) it would be significantly unfair not to divide excluded property on consideration of

(i) the duration of the relationship between the spouses, and

(ii) a spouse's direct contribution to the preservation, maintenance, improvement, operation or management of excluded property.

Rights under this Part

104(1) If there is a conflict between this Part and the *Partition of Property Act*, this Part prevails.

(2) The rights under this Part are in addition to and not in substitution for rights under equity or any other law.

Appendix B:

Alberta's *Matrimonial Property Act*, section 36:

Presumption of advancement

36 (1) In making a decision under this Act, the Court shall not apply the doctrine of presumption of advancement to a transaction between the spouses in respect of property acquired by one or both spouses before or after the marriage.

(2) Notwithstanding subsection (1),

(a) the fact that property is placed or taken in the name of both spouses as joint owners is proof, in the absence of evidence to the contrary, that a joint ownership of the beneficial interest in the property is intended, and

(b) money that is deposited with a financial institution in the name of both spouses is deemed to be in the name of the spouses as joint owners for the purposes of clause (a).

Saskatchewan's *Family Property Act*, section 50:

Presumption of advancement abolished

50(1) The rule of law applying a presumption of advancement in questions dealing with the ownership of property as between spouses who are legally married is abolished, and in its place the rule of law applying a presumption of a resulting trust shall be applied in the same manner as if the spouses were not married.

(2) Notwithstanding subsection (1):

(a) the fact that property is placed or taken in the name of both spouses as joint owners or tenants is proof, in the absence of evidence to the contrary, that each spouse is intended to have, on a severance of the joint ownership or tenancy, a one-half beneficial interest in the property; and

(b) money that is deposited with a financial institution in the name of both spouses is deemed to be in the name of the spouses as joint owners for the purposes of clause (a).

(3) Subsection (1) applies notwithstanding that the event giving rise to the presumption occurred before the coming into force of this section or section 50 of The Matrimonial Property Act.

Ontario's *Family Law Act*, section 14:

Presumptions

14. The rule of law applying a presumption of a resulting trust shall be applied in questions of the ownership of property between spouses, as if they were not married, except that,

(a) the fact that property is held in the name of spouses as joint tenants is proof, in the absence of evidence to the contrary, that the spouses are intended to own the property as joint tenants; and

(b) money on deposit in the name of both spouses shall be deemed to be in the name of the spouses as joint tenants for the purposes of clause (a).