

CANADA / JUDGMENT

Block v. Block

2024 BCSC 1803

COURT

Supreme Court of British Columbia

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2024 BCSC 1803 Block v. Block

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Block v. Block,

2024 BCSC 1803

Date: 20241002

Docket: E104246

Registry: Victoria

Between:

Deborah Ann Block

Claimant

And

Cyrus Paul Block

Respondent

Before: The Honourable Justice Iyer

Reasons for Judgment

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Place and Date of Trial:

Victoria, B.C.

January 8-12, 15-19 and 22-23, 2024

June 20-21, 2024

Place and Date of Judgment:

Victoria, B.C.

October 2, 2024

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INTRODUCTION

- [1] In this proceeding, Deborah Block seeks to set aside part of a separation agreement she entered into with her former spouse, Cyrus Block, in 2011. Ms. Block argues that the parts of the agreement relating to shares Mr. Block holds in a family company are unconscionable. She says that Mr. Block took advantage of her vulnerability and deliberately misrepresented his financial circumstances at the time of negotiations.
- [2] Mr. Block vigorously opposes Ms. Block's claim. He says that he complied fully with his disclosure obligations and that Ms. Block got the bargain she wanted. He argues that it is only in retrospect, having seen the value of the company increase dramatically, that Ms. Block regrets her bargain and is trying to change it.
- [3] The shares are unquestionably the former couple's most valuable asset.
- [4] Ms. Block also seeks orders for retroactive and ongoing spousal support and for retroactive child support under the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.) [Divorce Act] or the Family Law Act, S.B.C. 2011, c. 25 [FLA] on the basis of Mr. Block's misrepresentation of his income at the time of settlement and his failure to report changes in his income in the ensuing years.

BACKGROUND

Pre-Separation

- [5] Both parties are dual Canadian and American citizens. They met in the United States in 1989 and married in 1990. At the time, Mr. Block was working on cinematography projects. Ms. Block worked in environmental consulting.
- [6] Prior to the marriage, Mr. Block acquired a 15% interest in a closely-held family company, Block Communications Inc. ("BCI"). BCI is an American communications enterprise, with newspaper and cable operations. Mr. Block's shareholding interests of 36,382 non-voting common shares in BCI were held in two trusts, a mandatory trust and a discretionary trust, that his father set up for him.

- [7] Throughout their long marriage, Mr. Block and Ms. Block primarily lived off the income Mr. Block received from his shares in BCI ("BCI Shares") and investments flowing from that income stream. Mr. Block sat on BCI's Board of Directors from 1991 to 2019. He attended quarterly board meetings for which he was paid US \$2,000 per meeting. BCI also paid Mr. Block a US \$50,000 annual consulting fee. Prior to 2004, Mr. Block earned some income from cinematography.
- [8] The couple had twin daughters in November 1998. They owned a home in Santa Barbara, California, and purchased properties on Pender Island, building a house there. When the children were starting school, Ms. Block and Mr. Block enrolled them in a private school in Victoria and bought a home in Oak Bay.
- [9] Ms. Block stopped paid work shortly after the marriage. In 2006, she returned to work in environmental consulting. She left her job in 2009 and, in 2010, she opened her own environmental remediation business, which she continues to operate.

Separation

- [10] The couple separated in 2010, and Ms. Block filed a notice of family claim. The parties commenced settlement negotiations shortly afterwards. Both had legal representation.
- [11] From the outset, Mr. Block resisted Ms. Block's efforts to obtain disclosure of information about the BCI Shares, the trusts in which they were held and BCI's financial situation. He disclosed very little and very slowly. In April 2011, Mr. Block was fined \$5,000 for failing to produce a completed sworn F8 by the deadline stipulated in a consent order.
- [12] Mr. Block said that he did not himself possess information about the value of BCI or of the BCI Shares. Mr. Block said that he asked BCI for that information, but BCI said that he was not entitled to it and did not give it to him. When Ms. Block contacted BCI, it took the position that it was not required to disclose any financial information to her. BCI and Mr. Block refused to participate in a valuation of BCI Shares.
- [13] Eventually, the parties agreed to mediation. Prior to the mediation date, Mr. Block provided the following salient information about BCI Shares. He said that he could not transfer ownership of any BCI Shares to Ms. Block and that they could not be sold on the market or redeemed by BCI. He represented that the value of the BCI Shares was US \$218 per share, based on a 2008 share valuation prepared for tax purposes relating to the estate of Mr. Block's uncle.
- [14] Mr. Block's mediation brief emphasized that this share value was unreliable:

since the shares are not trading, have no market, and cannot be redeemed. The shares are minority non-voting shares in a private company and the economic value is simply in the level of dividends that the shares produce.

- [15] Mr. Block also said that BCI was in financial difficulty, implying that the value of the BCI Shares might decrease with a corresponding decrease in the dividend income they produced.
- [16] Mr. Block said his annual income was approximately \$237,700.
- [17] The mediation occurred on June 2, 2011. The terms of the agreement were recorded that day ("Settlement Terms"). There is no dispute about the division of assets set out in the Settlement Terms other than those relating to the BCI Shares. With respect to that asset, the Settlement Terms provided:
- a) Mr. Block would transfer 7,100 of the BCI Shares, representing about 19.5% of the BCI Shares ("Settlement Shares"), into a new trust that would have Ms. Block as the irrevocable income beneficiary, their children as the irrevocable capital beneficiaries, and all dividends, less applicable taxes, payable to Ms. Block during her lifetime ("Proposed Trust"); and
 - b) Mr. Block would pay Ms. Block child support of \$2,500/month, starting July 1, 2011, and reviewable annually commencing in January 2013. He would also pay the children's private school tuition fees through Grade 12, the amount of which would be grossed up and deducted from Mr. Block's income before calculating any changes to child support in future.
- [18] The Settlement Terms did not provide Ms. Block with any spousal support.
- [19] Mr. Block's lawyers started preparing documents for the Proposed Trust and sent drafts to Ms. Block, who sent them to Mr. Izard, her financial advisor.
- [20] Mr. Izard expressed concern that there was no certainty that the Proposed Trust would pay any dividends. He pointed out that Ms. Block would have no control over expenses it incurred, and that she would not be able to ensure that she would receive information from BCI in time to satisfy US tax filing obligations and avoid tax penalties.
- [21] Based on Mr. Izard's advice, Ms. Block told Mr. Block she no longer agreed to the Proposed Trust. Further negotiations ensued.
- [22] Mr. Block refused to pay Ms. Block the cash equivalent of the value of the Settlement Shares or of their cash flow. Instead, he offered to pay an amount equivalent to the dividend stream from the Settlement Shares, characterized as spousal support, to continue for Ms. Block's life. Ms. Block did not accept this offer, in part because of the risk that BCI might decrease the amount or frequency of the dividends.
- [23] Mr. Block then proposed that, based on the current annual dividend generated by the Settlement Shares, which he said was \$55,000, he would pay Ms. Block \$4,000 monthly as spousal support, tax deductible to him, regardless of whether the dividend stream from the Settlement Shares went up or down in future. In a letter dated November 30, 2011, Mr. McLachlan emphasized that Mr. Block would bear the risk if the dividends should decrease:

You have seen the state of the US economy and in the event of a decline in the shared dividends, the risk at \$4,000 per month guaranteed is all for Cyrus.

[24] On December 27, 2011, the parties signed a comprehensive separation agreement ("Separation Agreement").

[25] The Separation Agreement incorporated all of the Settlement Terms, other than the term containing the Proposed Trust. The following are the material clauses of the Separation Agreement:

- Clauses 7-8, which provide that Mr. Block will pay \$4,000/month spousal support to Ms. Block for her lifetime, tax deductible to him and taxable to her, binding on Mr. Block's estate.
- Clause 10, which provides that if the BCI Shares are sold, Ms. Block will have lifetime access to the capital representing the Settlement Shares in lieu of spousal support:

If Cyrus' shares of Block Communications Inc ("BCI") are to be sold during the course of Deborah's lifetime, the capital representing 7100 shares of BCI (shares to be representative of and similar to the nature and quality of the balance of shares owned by Cyrus on a pro rata basis) will be transferred to Deborah, the spousal support obligation will terminate, and Deborah will create an irrevocable direction in her will that capital in the same amount as that received by Deborah will be transferred to the Children on Deborah's death. If the shares of BCI are sold after Deborah's death, Cyrus will create an irrevocable direction in his will that the Children will receive those 7100 shares of BCI or the sale proceeds in full.

- Clause 11, which provides that no change in circumstances, no matter how extreme, would entitle either party to apply to vary the spousal support provisions.
- Clause 27, which provides that assets in the name of one party that are not specifically listed under the heading "Division of Assets and Liabilities" shall belong solely to that party (this includes the BCI Shares as they are not listed under that heading).
- Clause 33, which creates a presumption that any undisclosed assets are jointly owned as tenants in common.

[26] For convenience, I refer to clauses 7, 8 and 11 as the "Spousal Support Clauses", and to clauses 10, 27 and 33 as the "BCI Share Division Clauses".

[27] As set out in the Separation Agreement, the parties sought and obtained a divorce order, which was granted on June 8, 2012 ("Consent Order"). The Consent Order set out the terms in the Separation Agreement relating to parenting time, child support and spousal support. It did not incorporate the terms of the Separation Agreement relating to division of assets, including the BCI Shares. It simply stated that, by consent, all other claims in the Notice of Family Claim are dismissed.

Post-Separation

- [28] Ms. Block first sought disclosure of Mr. Block's tax returns to review child support in 2016. When Mr. Block did not respond, she applied to the court. Initially, Ms. Block sought orders compelling Mr. Block to contribute to extraordinary expenses, later amending her application to add a claim for retroactive child support. Justice Punnett heard the application. In his reasons for judgement issued in May 2018, Justice Punnett held that retroactive child support was payable commencing January 1, 2016, not earlier.
- [29] After obtaining some more disclosure from Mr. Block and receiving further legal advice, Ms. Block applied in September 2018 to vary Justice Punnett's order with respect to retroactive child support. In October 2019, she commenced an application to set aside the Separation Agreement as unconscionable. In May 2020, Justice Punnett considered both applications and directed that the matter be moved to the trial list.
- [30] For various reasons, including the pandemic, the trial did not proceed on scheduled dates. However, in the interim, Ms. Block obtained orders for further disclosure, an order restraining Mr. Block from disposing of the BCI Shares and orders for production of a valuation of the BCI Shares. As BCI refused to comply with an independent share valuation, that did not occur. The trial commenced before me in January 2024.

Positions of the Parties

- [31] Ms. Block seeks to set aside the BCI Share Division Clauses as unconscionable and to vary the Settlement Agreement's provisions for spousal support and child support. She seeks damages of approximately \$13,000,000, plus retroactive child and spousal support of roughly \$2,600,000 and substantially increased ongoing spousal support of \$15,000 per month.
- [32] In the alternative to her unconscionability claim, Ms. Block says that the Separation Agreement itself provides for variation in the event of financial non-disclosure and that variation is also permitted under s. 65 of the Family Relations Act, R.S.B.C. 1996, c. 128 [FRA]. [1] She submits that the same remedies are justified on these alternative grounds. Ms. Block also says that, in any event, variation of spousal and child support orders is justified under s. 17(1) of the Divorce Act.
- [33] Mr. Block argues that Ms. Block's claim to the Settlement Shares is time-barred, relying on the former Limitation Act, R.S.B.C. 1996, c. 266, and on the definition of "spouse" in the FRA. In the alternative, he argues that the Separation Agreement was not unconscionable and, in any event, neither it nor the FRA provide a foundation for granting Ms. Block any interest in the Settlement Shares.

- [34] Mr. Block agrees that he failed to disclose his ownership of 2,970 Class A Shares in BCI ("Class A Shares") at the time of settlement and Ms. Block is entitled to a 50% interest in them pursuant to clause 33 of the Settlement Agreement. Mr. Block acknowledges the court's ongoing jurisdiction under the Divorce Act to vary support. He agrees that he owes approximately \$56,000 in retroactive child support for 2016-2017 but says that variation of spousal support is not warranted.
- [35] It is against the background of these very different positions that I must resolve the issues in this case. I do so in the following steps. First, I address credibility and reliability. Second, I decide if any claims are time-barred. Third, I determine whether the BCI Share Division Clauses should be set aside and, if so, what award to make. Fourth, I address the support claims. Fifth, I set out the orders made.

CREDIBILITY AND RELIABILITY

- [36] Credibility and reliability are different but related concepts. Credibility refers to a witness's truthfulness, whereas reliability refers to the accuracy of their testimony, which depends on their ability to accurately observe, recall and recount the events in issue. A witness whose evidence is not credible is also not reliable. However, a credible witness's evidence may or may not be reliable: *Radacina v. Aquino*, 2020 BCSC 1143 at paras. 94-96.
- [37] The principal witnesses were Ms. and Mr. Block. The primary frailty in the evidence of both arises from their deeply-felt antipathy to each other. Its roots go back many years. The litigation, which itself has continued over the last eight years, has only increased their reciprocal animosity. Each party has genuinely come to believe a version of events that casts the other as the sole cause of what went wrong between them. These beliefs not only coloured their evidence about their marriage and its breakdown, but also about their conduct during settlement negotiations. As a result, neither is a reliable narrator of events.
- [38] Although I heard a great deal of evidence about what occurred during and after the marriage and who is to blame, the court's responsibility is to resolve only those evidentiary conflicts that are necessary to decide the legal issues. In doing so, I rely primarily upon the documentary record and on the evidence of reliable witnesses. Where that is not possible, I consider each party's testimony with caution.
- [39] Ms. Block called her financial advisor, Angus Izard, as an expert witness. Mr. Izard was qualified as an expert in accounting, taxation (including cross-border issues and US taxation), income calculation, and summarizing corporate financial statements. His expert reports were not contradicted and Mr. Block relies on some of his calculations. I have no reservations about relying on his evidence.
- [40] Mr. Block called Keith Wilkowski, VP of legal operations and government affairs for BCI. He also called William McLachlan, who was Mr. Block's family lawyer at the time of settlement.

- [41] Mr. Wilkowski was a straightforward witness who responded to questions in a forthright manner. Ms. Block does not challenge his credibility or reliability. I rely on his evidence.
- [42] I reach a different conclusion about Mr. McLachlan. He was evasive and defensive in cross-examination, and his recollection was poor. For example, he testified on examination in chief that he sent a request to BCI for the information Ms. Block was seeking. On cross-examination, he reluctantly acknowledged that there was no record of such a request. He had to agree that he did not know whether he ever asked BCI for information but only believed he had done so. Mr. McLachlan agreed that he had stated Mr. Block's guideline income to be \$233,428.41 in the Consent Order. When shown that this figure was inaccurate, he could not remember where the figure came from. I treat his evidence with caution.

LIMITATION DEFENSE

- [43] During oral submissions, Mr. Block conceded that the applicable statute is the Limitation Act, S.B.C. 2012, c. 13 [2012 Limitation Act], abandoning reliance on the former limitation statute.[2] Section 6 of the 2012 Limitation Act creates a basic limitation period that requires commencement of a court proceeding within two years from the day on which the claim is discovered.

- [44] Section 8 creates general rules about when a claim is discovered:

8 Except for those special situations referred to in sections 9 to 11, a claim is discovered by a person on the first day on which the person knew or reasonably ought to have known all of the following:

- (a) that injury, loss or damage had occurred;
- (b) that the injury, loss or damage was caused by or contributed to by an act or omission;
- (c) that the act or omission was that of the person against whom the claim is or may be made;
- (d) that, having regard to the nature of the injury, loss or damage, a court proceeding would be an appropriate means to seek to remedy the injury, loss or damage.

- [45] As the Supreme Court of Canada stated with respect to an analogous section of New Brunswick's limitations act, a claim or cause of action is discovered when the claimant has actual or constructive knowledge of the material facts from which a plausible inference of liability can be drawn: *Grant Thornton LLP v. New Brunswick*, 2021 SCC 31 at para. 42. The "plausible inference of liability" standard requires more than suspicion or speculation but less than certainty of liability or knowledge of all of the constituent elements of the claim: *Grant Thornton* at paras. 46-47.

- [46] In *Grant Thornton*, the plaintiff province alleged that the defendant had acted negligently in its audit of a company. The plaintiff claimed it relied on this audit in guaranteeing loans taken out by that company. The Supreme Court held that the claim was discovered on the date the plaintiff received the findings from an accounting report it commissioned after

learning it had to pay out on the loan guarantees. This report stated that the company's financial statements had not been prepared in accordance with generally accepted accounting principles, contrary to what the defendant had stated in its audit.

- [47] The Supreme Court held that receipt of this information created a plausible inference of liability. It was not necessary for the plaintiff to know facts about every element of a negligence claim, such as the defendant breaching the standard of care, for the limitation period to begin running: *Grant Thornton* at paras. 48, 51-55.
- [48] Ms. Block applied to set aside the Separation Agreement as unconscionable on October 18, 2019. The elements of unconscionability are inequality of bargaining power and an improvident bargain: *Uber Technologies Inc. v. Heller*, 2020 SCC 16 at para. 65. In the context of separation agreements, a party's failure to make complete and accurate financial disclosure can ground an unconscionability claim: *Rick v. Brandsema*, 2009 SCC 10 at paras 47-49.
- [49] Ms. Block's claim is statute-barred if she knew facts supporting an inference that Mr. Block's financial disclosure was inaccurate or incomplete before October 18, 2017.
- [50] Ms. Block did not learn until well after that date that, contrary to Mr. Block's representations, the Settlement Shares could have been sold or redeemed under certain circumstances, or even transferred to her while she was still Mr. Block's spouse. To the extent that her unconscionability claim is based on that misrepresentation, it is not statute-barred.
- [51] However, Ms. Block's unconscionability claim is also based on Mr. Block's misrepresentation of the value of the BCI Shares. To that extent, the success of Mr. Block's limitation defence turns on whether Ms. Block knew or ought to have known prior to October 18, 2017, facts supporting an inference that Mr. Block had misrepresented the value of the BCI Shares as US \$218 per share.
- [52] Ms. Block received Mr. Block's updated F8 on October 17, 2017. It informed her that Mr. Block had wound up the mandatory trust and now directly owned those BCI Shares. This F8 also informed Ms. Block for the first time that Mr. Block also owned the Class A Shares. However, unlike the F8 Mr. Block had provided to Ms. Block at the time of settlement, which stated a share value of US \$218, the October 2017 F8 states that the value of the BCI Shares and the Class A Shares is "unknown". This information cannot support an inference that Mr. Block had misrepresented the value of the BCI Shares.
- [53] Mr. Block submits that the high figure for his 2012 income recorded in the five-year summary in his 2014 Canadian tax return means that Ms. Block knew or ought to have known that "something was going on, something was different." I accept that Ms. Block received this document on or before October 17, 2017. The summary states:

2010 \$283,777

2011 \$350,172

2012 \$939,026

2013 \$78,657

2014 \$373,344

[54] Assessed objectively, I agree that the very high income recorded for 2012 grounds a suspicion about the accuracy of Mr. Block's representation about his income at the end of 2011, when the Separation Agreement was signed.

[55] However, that suspicion is not enough. Mr. Block's disclosure of his 2012 income does not give rise to a plausible inference that Mr. Block misrepresented the value of the BCI shares in 2011. There could be a number of reasons for the dramatic increase in Mr. Block's 2012 income, including that it was unanticipated at the time of settlement or the rise was unrelated to the BCI Shares. I find that this information did not provide Ms. Block with the material facts to support a plausible inference that she had an unconscionability claim against Mr. Block.

[56] It was in April 2018 that Ms. Block received disclosure of information about the value of Mr. Block's BCI Shares in the form of investment statements, "K1" forms and grantor trust letters. She forwarded them to Mr. Izard for analysis. In his report dated September 7, 2018, he advised her that this information implied a value of US \$469 per share on December 31, 2012. He wrote that, as this was over double the share value represented by Mr. Block in December 2011, it raised questions about the true value of the BCI Shares at the time of settlement and whether Mr. Block had withheld relevant information.

[57] As occurred in *Grant Thornton*, I find that Ms. Block first learned the material facts necessary to support a plausible inference that she had an unconscionability claim on September 7, 2018, when she received Mr. Izard's report. As Ms. Block initiated this proceeding within two years of receiving the report, Mr. Block's limitation defence fails.

[58] Although this is sufficient to dispose of the issue, I do not accede to Ms. Block's submission that the discovery date was in April 2019. This was when she received a legal opinion that she had unconscionability, fraud, and breach of trust claims against Mr. Block. The discovery date turns on when material facts are disclosed, not on when a plaintiff receives legal advice. It is unnecessary to address Ms. Block's alternative argument that the extended limitation period in s. 12 of the 2012 Limitation Act applies.

SETTING ASIDE THE SEPARATION AGREEMENT

- [59] Importantly, Ms. Block does not take issue with the whole of the Separation Agreement. She only seeks to set aside the BCI Share Division Clauses as unconscionable. In the alternative, she says that the Separation Agreement provides for variation in the event of material non-disclosure. In the further alternative, Ms. Block relies on s. 65 of the FRA, which permits the court to vary the division of property in a marriage agreement where it is unfair.
- [60] Mr. Block says the Separation Agreement is not unconscionable. He does not separately address Ms. Block's argument about the Separation Agreement providing for variation in the event of nondisclosure. He submits that the FRA does not apply since Ms. Block does not meet its definition of "spouse".

Unconscionability

- [61] In *Rick*, the Supreme Court of Canada extended the test established in *Miglin v. Miglin*, 2003 SCC 24 to a claim of unconscionability in a separation agreement that provided for property division. It emphasized the importance of complete and accurate financial disclosure and clarified that failure to satisfy that obligation can justify judicial intervention:
- [47] In my view, it flows from the observations and principles set out in *Miglin* that a duty to make full and honest disclosure of all relevant financial information is required to protect the integrity of the result of negotiations undertaken in these uniquely vulnerable circumstances. The deliberate failure to make such disclosure may render the agreement vulnerable to judicial intervention where the result is a negotiated settlement that is substantially at variance from the objectives of the governing legislation.
- [48] Such a duty in matrimonial negotiations anchors the ability of separating spouses to genuinely decide for themselves what constitutes an acceptable bargain. It also helps protect the possibility of finality in agreements. An agreement based on full and honest disclosure is an agreement that, *prima facie*, is based on the informed consent of both parties. It is, as a result, an agreement that courts are more likely to respect. Where, on the other hand, an agreement is based on misinformation, it cannot be said to be a true bargain which is entitled to judicial deference.
- [49] Whether a court will, in fact, intervene will clearly depend on the circumstances of each case, including the extent of the defective disclosure and the degree to which it is found to have been deliberately generated. It will also depend on the extent to which the resulting negotiated terms are at variance from the goals of the relevant legislation. As *Miglin* confirmed, the more an agreement complies with the statutory objectives, the less the risk that it will be interfered with. Imposing a duty on separating spouses to provide full and honest disclosure of all assets, therefore, helps ensure that each spouse is able to assess the extent to which his or her bargain is consistent with the equitable goals in modern matrimonial legislation, as well as the extent to which he or she may be genuinely prepared to deviate from them.

- [62] The fact that Ms. Block had access to professional advice from her lawyer and her financial advisor does not preclude a finding of unconscionability: Rick at para. 61. Further, the incorporation of settlement terms into a consent order does not oust the court's jurisdiction: Rick at para. 64.
- [63] More recently, in *Anderson v. Anderson*, 2023 SCC 13, the Supreme Court revisited the question of when courts should intervene in a domestic contract, confirming that the reviewing judge must consider both the fairness of the bargaining process and the fairness of the bargain reached:
- [3] This Court's jurisprudence on domestic contracts, including *Miglin*, recognizes that the breakdown of a spousal relationship is often wrought with emotional turmoil and can give rise to vulnerabilities that undermine the fairness of domestic contracts. The devastating impact of a separation means that parties to a separation agreement may be "ill-equipped to form decisions of a permanent and legally binding nature" (J. D. Payne and M. A. Payne, *Dealing with Family Law: A Canadian Guide* (1993), at p. 78, quoted in *Miglin*, at para. 74). *Miglin* and the cases that follow it therefore signal to courts to approach domestic agreements with caution and to have regard to important procedural protections that help ensure the deal struck is fair. Moreover, while this Court has long supported the freedom of parties to settle their domestic affairs privately, respect for private ordering cannot be permitted to thwart the public policy objectives enshrined in family law legislation. Therefore, in deciding how much weight to give the agreement, a reviewing judge generally examines both the fairness of the bargaining process and the substance of the agreement, in accordance with the legislative scheme.
- [64] The Supreme Court wrote that judicial intervention is warranted where non-disclosure enables one party to mislead the other or to exploit an informational asymmetry. "The focus is on prejudice resulting from uneven access to information": *Anderson* at para. 67

Procedural Unfairness

- [65] I turn first to the bargaining process. Ms. Block testified about the stresses and pressure she experienced during settlement negotiations. Her evidence does not persuade me that the stress and pressure that she experienced rose to the level of psychological exploitation discussed in *Rick* and subsequent cases.
- [66] Ms. Block had legal representation and expert financial advice throughout, the adequacy of which was not challenged before me.[3] While the mere fact of access to professional advice may not compensate for vulnerabilities (*Rick* at para. 60), Ms. Block has not established that the advice she received was inadequate or that her vulnerabilities impaired her ability to understand it. I accept that Ms. Block was pressured by her lawyer, Greg Harney, to pay his outstanding legal fees. However, that fact does not establish that Mr. Harney's representation of Ms. Block created procedural unfairness.

- [67] Mr. Block clearly had the stronger bargaining position because the income on which he and Ms. Block lived came from his BCI Shares. In his testimony, Mr. Block implied that he did not have access to more or better information about BCI than Ms. Block. He portrayed himself as an outsider within the Block family, saying his half-brothers ran BCI. Although he was a shareholder, sat on the Board of Directors and attended every quarterly directors' meeting, Mr. Block said that he "wasn't good" at reading financial statements. He said he did not think that valuation of the BCI Shares was particularly relevant during settlement negotiations because it was their dividends that provided an income stream. He added that, while the Board of Directors had to vote to approve dividends, it simply rubber-stamped the decisions of the executive committee. Mr. Block also testified that he could not recall if he ever asked BCI for information about the BCI Shares.
- [68] I find Mr. Block's minimization of his knowledge about BCI and the BCI Shares unconvincing. This was the source of virtually all of his income. He had American legal counsel who represented him in matters relating to BCI and the BCI Shares. As a director and shareholder, he had rights of access to BCI's financial information. He testified that he spoke to his half-brothers every few months.
- [69] Ms. Block submits that the bargaining process was unfair because Mr. Block exploited his informational advantage. She says Mr. Block, with BCI's assistance, deliberately withheld significant information about the BCI Shares from her and thwarted her efforts to obtain disclosure. Ms. Block submits that Mr. Block made material misrepresentations that caused her to first give up her claim for the outright transfer of the Settlement Shares to her in favour of the Proposed Trust, and subsequently, to reject the Proposed Trust in favour of the BCI Share Division Clauses and Spousal Support Clauses. These misrepresentations fall into two categories:
- Restrictions on disposition of the BCI Shares:
 - o That Mr. Block could not transfer the Settlement Shares to Ms. Block;
 - o That Mr. Block could not move the BCI Shares from the trusts to his personal name; and
 - o That Mr. Block could not sell the BCI Shares.
 - Financial information about BCI and the value of the BCI Shares:
 - o That Mr. Block could not obtain financial information from BCI, including its value and that of the BCI Shares;
 - o That a share valuation would cost hundreds of thousands of dollars; and
 - o That the per share value of the BCI Shares was US \$218.

- [70] Notably, Mr. Block does not dispute that made these representations or that they are false. Rather, he says that he was labouring under the same misapprehensions at the time of settlement and he only discovered later that they were inaccurate. In other words, Mr. Block says there was no prejudice to Ms. Block because both parties relied on the same (mis)information.
- [71] The evidence does not support Mr. Block's position.
- [72] The Code of Regulations governing BCI, which Mr. Block admitted that he had read, expressly permits the transfer of shares to a spouse and also permits the sale of shares, subject to first offering them to BCI and other shareholders. This information is also printed on Mr. Block's BCI Share certificates, which were in his possession. With respect to impediments on removing the BCI Shares from the trusts, Mr. Block admitted that he signed documents respecting his half-brothers' removal of their shares from their trusts prior to 2011 but said he did not realize what he was signing. I do not accept that Mr. Block would have signed such documents without knowing what they were. I find Mr. Block knew or reasonably ought to have known at the time of settlement that the BCI Shares could be transferred to Ms. Block and that at least some of them could be taken out of the trusts or sold.
- [73] As a shareholder and director, Mr. Block had a right to BCI's financial information. If he chose not to exercise that right in the face of Ms. Block's requests for information, he did so deliberately. BCI's financial information showed that BCI's value was increasing significantly in 2010 and 2011 as compared to 2008. Mr. Block attended quarterly Board meetings during this period at which BCI's performance and value were discussed. I do not believe Mr. Block's assertions that he was unaware of the significant improvement in BCI's financial status. Although BCI's shares were non-trading, its financial performance enhanced the value of the company, including the value of its shares, and also affected redemptions and dividends. I find that Mr. Block knew, or reasonably ought to have known, this state of affairs and did not disclose it to Ms. Block.
- [74] Mr. Block's superior access to information relating to the value of the BCI Shares meant that he had a positive obligation to disclose it to Ms. Block. He was not entitled to insulate himself from this information. The courts have consistently emphasized that the duty to provide full and frank disclosure of financial information includes taking steps to obtain it. A party's failure to obtain and provide information about share values to which the party had access is a basis for setting aside a separation agreement: *Chateauvert v. Chateauvert*, 2018 ABQB 2 at para. 272.
- [75] Mr. Block not only refused to disclose information about BCI to Ms. Block, he took steps to ensure that Ms. Block could not get that information from BCI. Mr. McLachlan communicated with BCI about how to resist Ms. Block's disclosure requests to it, suggesting that it retain counsel in British Columbia. Mr. McLachlan told Ms. Block that Mr. Block had no audited financial statements for BCI for the past three years. BCI's British Columbia

counsel told Ms. Block that Mr. Block had no authority to produce BCI's financial information to anyone and that BCI did not consent to the production of such information to Ms. Block.

- [76] Mr. McLachlan represented, in a letter responding to Mr. Harney's suggestion that the parties conduct a joint valuation of BCI Shares, that the cost would be in the "hundreds of thousands of dollars." I agree that this is further evidence of how Mr. Block tried to discourage Ms. Block from obtaining information about the BCI Shares. However, in my view, it was not reasonable for Ms. Block to rely on what Mr. McLachlan said without making independent inquiries before deciding not to proceed with a share valuation.
- [77] Ms. Block has not proved that Mr. Block actually knew at the time of settlement that the value of the BCI Shares was more than US\$218 per share. Ms. Block points to a 2010 share valuation reporting the value of the BCI Shares as US\$407 per share. However, that valuation was performed for the purposes of a pre-nuptial agreement for Mr. Block's half-brother, Allan, and it was provided in confidence to Allan Block's personal lawyer. Mr. Block was not asked when he received this document. It was disclosed to Ms. Block in 2021.
- [78] Mr. Block said that the income he disclosed in his 2011 F8 at the time of settlement was his 2009 income, which was less than his 2010 and 2011 income. The income reported on Mr. Block's 2011 F8 is \$237,675.93, and his income stated in the Consent Order is \$233,428.41. However, his line 150 income from his 2010 and 2011 tax returns (both of which he would likely have had before the Consent Order was entered) are \$283,776 and \$350,172 respectively. Mr. Block did not explain these discrepancies.
- [79] Did Mr. Block's actions prejudice Ms. Block in the bargaining process? In my view, they did. Mr. Block misrepresented the restrictions on transfer of the BCI Shares. This led Ms. Block to believe that Mr. Block could not transfer them to her and that he could not take them out of the trusts when he knew, or reasonably ought to have known, this information was false. He represented that the per share value was US\$218 and blocked all efforts by Ms. Block to obtain information that could have supported a greater share value, when he had access to that information. He also under-reported his income.
- [80] In my view, Mr. Block's conduct amounts to intentional misrepresentation analogous to that found in *Akkor v. Roulston*, 2009 BCSC 258 at paras. 134-155, where the court found that an intentional misrepresentation was an independent basis for setting aside a separation agreement.
- [81] I conclude that Ms. Block has established procedural unfairness.

Substantive Unfairness

- [82] Under this heading, I must consider whether or not the bargain reached was in substantial compliance with the general objectives of the FRA.

- [83] Ms. Block claims only that the part of the Separation Agreement relating to the BCI Shares is unconscionable. She does not challenge the division of any other assets. Further, both parties accept the fairness of the apportionment of 19.5% of the BCI Shares (that is, the Settlement Shares) to Ms. Block with the remainder to Mr. Block. In other words, both accept that this division is in substantial compliance with the general objectives of the FRA. Based on the law at the time of settlement, I agree that the division falls within the range for division of such assets.
- [84] Having determined that the apportionment is in substantial compliance with the objectives of the FRA, the question becomes whether the treatment of the BCI Shares in the Separation Agreement is in substantial compliance with that apportionment.
- [85] The answer to that question is complicated by the fact that the Separation Agreement conflates property division and spousal support. The Spousal Support Clauses provide Ms. Block with an income stream of \$4,000 per month for her lifetime that is taxable to her and tax-deductible to Mr. Block. This bears the hallmarks of spousal support. However, clause 10, which appears under the heading "Spousal Support" in the Separation Agreement, actually concerns property division, because it provides Ms. Block with a contingent proprietary interest in the Settlement Shares: if Mr. Block sells the BCI Shares, Ms. Block will receive an amount equivalent to their capital value for her lifetime and "the spousal support obligation will terminate".
- [86] It is obvious that the Settlement Agreement gave Ms. Block far less than the equivalent of the value of the Settlement Shares. Even using the low share value of US\$218 per share disclosed by Mr. Block at the time of settlement, the value of the Settlement Shares at that time was roughly US\$1,516,000. Ms. Block did not receive anything representing that capital value. Instead, she received a monthly sum that was restricted to an estimate of the projected dividend income from the Settlement Shares. Only if Mr. Block sold his BCI shares would Ms. Block receive their capital value. Under the Settlement Agreement, Ms. Block gave up her proprietary interest in a very valuable asset in return for spousal support, except for the possibility that Mr. Block might sell the BCI Shares.
- [87] There is no question that Ms. Block would have been entitled to spousal support in light of the parties' long marriage and the fact that Ms. Block gave up paid work for a substantial part of it. Under the Separation Agreement, Ms. Block effectively gave up her entitlement to the Settlement Shares in return for spousal support when, under the FRA, she would have received both.
- [88] I conclude that the treatment of the BCI Shares in the Settlement Agreement was substantively unfair. I set aside the BCI Share Division Clauses as unconscionable. In light of my conclusion, it is not necessary to address Ms. Block's alternative arguments.

Remedy

- [89] As I have found the BCI Share Division Clauses unconscionable and Ms. Block does not challenge the allocation to her of 19.5% of the BCI Shares, it follows that she should be awarded the Settlement Shares.
- [90] The parties agree that the Settlement Shares cannot now be transferred to Ms. Block. In *Rick*, the Supreme Court of Canada held that damages in the form of "equitable compensation" should be awarded where restitution is not possible: *Rick* at paras. 66-69. This Court has followed this approach, making compensation orders to achieve a result equivalent to the appropriate division of family assets: see e.g., *L.E.M. v. D.M.I.*, 2013 BCSC 450; *S.L.C. v. C.J.R.C.*, 2014 BCSC 1814.
- [91] Ms. Block submits that the valuation date should be the date of trial. She relies on a 2020 valuation of BCI as the best evidence of that value ("2020 Valuation"). It reported a per share value for the BCI Shares as US \$1,309 per share and for the Class A Shares as US \$66.67 per share on a minority interest basis. Mr. Block did not address this issue.
- [92] In *Janis v. Janis*, 2016 BCCA 364 at paras. 54-55, the Court of Appeal held that the presumptive valuation date when making a compensation order under s. 66 of the FRA is the date of trial; however, fairness is the overriding consideration. I agree that the trial date is the appropriate valuation date in this case and the best evidence available is the 2020 valuation.
- [93] I conclude that Ms. Block is entitled to an amount representing the value of the Settlement Shares and the Class A Shares as of the date of trial based on the 2020 Valuation, plus 19.5% of the dividends Mr. Block received on the BCI Shares. Further, she is entitled to 50% of the dividends he received from the Class A Shares, from January 2012 to the trial date. This amount is net of taxes and applying the average exchange rate for each year.

SUPPORT CLAIMS

- [94] As the parties agree that the court has jurisdiction under the Divorce Act to vary child support and spousal support, I will consider variation under that statute. Ms. Block seeks a retroactive variation of child support in the amount of approximately \$535,000. Mr. Block submits that he owes \$56,064 in retroactive child support. Ms. Block seeks retroactive spousal support in the amount of roughly \$2,500,000 and ongoing spousal support in the amount of \$15,000 per month for her lifetime. Mr. Block opposes any retroactive or ongoing spousal support award.

Retroactive Child Support

- [95] The dispute between the parties on this issue is not whether a retroactive award should be made, it is about the amount of the award, including the retroactivity date.

[96] In *Colucci v. Colucci*, 2021 SCC 24 at para 38, the Supreme Court of Canada reaffirmed the four factors it first articulated in *D.B.S. v. S.R.G.*, 2006 SCC 37, governing the analysis of whether a retroactive child support order should be made. Those factors are:

- a) whether the recipient parent's delay in seeking variation is reasonable in the circumstances,
- b) the payor parent's conduct,
- c) the circumstances of the child, and
- d) whether any hardship would result from a retroactive award.

[97] While the date of retroactivity is often the date on which the payor parent received effective notice, the period may be extended where the payor failed to disclose material information. Writing for the Court in *Colucci*, Justice Martin described the evolution of this principle at paras. 41-43:

41 Since *D.B.S.*, various courts have accepted and acted upon the principle that failing to disclose an increase in income is blameworthy conduct justifying variation to the date of the change [citations omitted]. "Blameworthy conduct", as that concept has developed in the cases, does not simply extend to the most egregious cases of deception or intentional evasion, like this case. It may also extend to cases of mere passivity and "taking the path of least resistance" (*Burchill*, at para. 30).

42 Most recently, in *Michel*, my colleague Brown J. (speaking for the Court on this point) confirmed that "the date of effective notice is not relevant when a payor parent has engaged in blameworthy conduct (irrespective of the degree of blameworthiness)", including failure to disclose material information (para. 36; see also para. 33). Payor parents are "subject to a duty of full and honest disclosure" (para. 33). Where the payor fails to comply with this duty and leaves the recipient unaware of increases in income, a retroactive award "will commonly be appropriate" because non-disclosure "eliminates any need to protect [the payor's] interest in the certainty of his [or her] child support obligations" (paras. 32 and 34).

43 In practice, then, the date of retroactivity is frequently adjusted to align with the date of the material increase in income, despite the "general rule" of varying to the date of effective notice in *D.B.S.* (para. 118). It would be "untenable to suggest that a parent who fails to provide financial disclosure can assume that the amount being provided is adequate because the recipient parent has not brought a court application" (*Brear*, at para. 74, per *Pentelchuk J.A.*). Further, even where the payor has disclosed increases in income, the *D.B.S.* factors may support extending a retroactive increase of support back to the time of the change in income.

(Emphasis added.)

- [98] In the Consent Order entered in June 2012, Mr. Block represented that his income for purposes of the Guidelines was \$233,428.41. Presumably, Mr. Block would have known by then that his line 150 income for 2011 was \$350,172. Even if he did not, Mr. Block's line 150 income in 2010 was \$283,776. Mr. Block did not offer any justification for using a lower figure.
- [99] In oral submissions, Mr. Block conceded the retroactivity date should run from 2014 to the end of November 2017, "not necessarily 2013." It is not clear to me why Mr. Block excludes 2013. The concerns set out in Colucci persuade me that Mr. Block's blameworthy conduct in failing to disclose his true income at the time of settlement justifies a retroactive award commencing in January 2013.
- [100] Mr. Block did not disclose to Ms. Block any of the often-significant changes to his income over the following years. According to Mr. Block, his income for 2012 through 2017 should exclude any capital gains he received and should be based on his average income over the preceding three years. According to Ms. Block, Mr. Block's income for those years should include capital gains as well as the unreasonable personal expenses Mr. Block claimed as business expenses. Both parties rely on the figures in Mr. Izard's expert report. The following table shows Mr. Block's figures (his line 150 income after deducting capital gains) and Ms. Block's figures (Mr. Block's line 150 income including capital gains and unreasonable business expense claims):

Taxation Year

Mr. Block' Figures

Ms. Block's Figures

2012

724,874

1,708,648

2013

78,657

107,019

2014

373,344

427,266

2015

506,684

595,267

2016

402,168

437,507

2017

496,562

1,189,957

[101] The differences between these figures show the impact of the parties' different positions on treatment of capital gains, income-averaging, and business expenses.

[102] Section 6 of Schedule III of the Guidelines requires that capital gains in excess of capital losses be included in a spouse's income. As explained in *M.A.M. v. D.L.L.*, 2018 BCSC 2114, where there is a return of capital that the recipient uses as income, the capital gain should be included in income. However, where the capital gain is used to generate other income (for example, through reinvestment), only the income generated, not the capital gain itself, should be included in income. The Court in *M.A.M.* at para. 88 referred to the factors set out in *Dunnett v. Dunnett*, 2018 BCCA 262 at para. 25, that assist in determining how to treat such revenue:

Is the non-recurring gain or fluctuation actually in the nature of a bonus or other incentive payment akin to income for work done for that year?

Is the non-recurring gain a sale of assets that formed the basis of the payor's income?

Will the capital generated from a sale provide a source of income for the future?

Are the non-recurring gains received at an age when they constitute the payor's retirement fund, or partial retirement fund, such that it may not be fair to consider the whole amount, or any of it, as income for child support purposes?

Is the payor in the business of buying and selling capital assets year after year such that those amounts, while the sale of capital, are in actuality more in the nature of income?

Is inclusion of the amount necessary to provide proper child support in all the circumstances?

Is the increase in income due to the sale of assets which have already been divided between the spouses, so that including them as income might be akin to redistributing what has already been shared?

Did the non-recurring gain even generate cash, or was it merely the result of a restructuring of capital for tax or other legitimate business reasons?

Does the inclusion of the amount result in wealth distribution as opposed to proper support for the children?

- [103] The onus is on the recipient of the capital gain to demonstrate that a share redemption resulted in a redistribution of capital, and that it was not treated as income: M.A.M. at para. 109.
- [104] Relying on M.A.M., Mr. Block says that I should deduct the amount of the share redemptions from his income. However, he has not tendered evidence establishing that he used the redemptions as capital rather than income. I conclude that Mr. Block has not satisfied his burden on this issue.
- [105] I do not accept Mr. Block's position that his income for child support purposes should be based on a three-year average. A retroactive child support award should be based on what the payor actually earned because that figure is now known. This is because a payor spouse ought not to benefit from their failure to comply with disclosure obligations: *Evans v. Evans*, 2023 BCSC 2171 at paras. 29-32; *Hsieh v. Lui*, 2017 BCCA 51 at para. 49.
- [106] Turning to the deduction for unreasonable business expenses, Mr. Izard testified that he treated all of Mr. Block's business expenses as unreasonable because Mr. Block failed to provide documentation justifying those deductions that Mr. Izard had requested. However, Mr. Izard acknowledged that Mr. Block would have had some reasonable business expenses. He was not asked to quantify them and there is no evidence about what a reasonable figure would be. Based on the evidence I have, I consider it fair to allow 20% of the business expenses claimed by Mr. Block as reasonable business expenses.
- [107] Mr. Block did not refer to s. 4 of the Federal Child Support Guidelines, S.O.R./97-175 ("Guidelines"), which permits the court to order less than the table amount in respect of that part of a payor spouse's income that is over \$150,000 per year, having regards to the means, needs and circumstances of the children, and the financial ability of each spouse to contribute to their support. I take from this that he is content to pay the table amount based on his income as I have determined it.
- [108] In conclusion, Ms. Block is entitled to a retroactive order for child support in the table amount for each year commencing January 2013 through the end of November 2017, based on Mr. Block's line 150 income for the previous taxation year, plus the value of any share redemptions he received that year, and less 20% of his claimed business expenses for that year. As reflected in Ms. Block's calculations, the grossed-up tuition fees paid by Mr. Block should also be deducted from his income.

Spousal Support

- [109] Ms. Block seeks retroactive variation of spousal support back to the time of separation in the amount of approximately \$2,500,000 and ongoing spousal support in the amount of \$15,000 per month.

[110] I have found that Ms. Block was entitled to spousal support.. The questions are whether the Spousal Support Clauses may be varied and, if so, the amount of a retroactive award.

Grounds for Variation

[111] The Settlement Agreement included a finality clause, stating that no change in circumstances would permit variation. Such a term does not oust the court's jurisdiction under s. 17 of the Divorce Act; the Consent Order is merely final subject to s. 17 (L.M.P. v. L.S., 2011 SCC 64, at para 40, citing Miglin; G.(L.) v. B.(G.), [1995] 3 S.C.R. 370, 1995 CanLII 65).

[112] Section 17 of the Divorce Act authorizes the court to vary, rescind or suspend a spousal support order. Subsection 17(4.1) establishes the test for variation:

(4.1) Before the court makes a variation order in respect of a spousal support order, the court shall satisfy itself that a change in the condition, means, needs or other circumstances of either former spouse has occurred since the making of the spousal support order or the last variation order made in respect of that order, and, in making the variation order, the court shall take that change into consideration.

[113] The court have established that the test requires the applicant to demonstrate a "material change of circumstances" from the time of the last order or variation: L.M.P. at paras. 31, 32, 42. The change needs to be one that "if known at the time, would likely have resulted in different terms": L.M.P. at para. 32. Significant changes in income may not be material for the purpose of s. 17(4.1) if they were "actually contemplated by the parties by the terms of the order at the time of the order": L.M.P. at para. 39.

[114] I find that the parties did not contemplate at the time of the Separation Agreement that Mr. Block's income would increase to the extent it has, or that his income would include substantial proceeds from share redemptions in 2012, 2017 and 2020. While Mr. Block had information suggesting that his income might significantly increase, he did not disclose it to Ms. Block. Instead, as I have found, he misrepresented BCI's financial situation, including the future revenue the BCI Shares would likely generate.

[115] In light of this, I am satisfied that the threshold for variation has been satisfied.

Retroactive Spousal Support

[116] Section 17(7) of the Divorce Act sets out the objectives the court should consider in exercising its discretion to vary support:

(7) A variation order varying a spousal support order should

(a) recognize any economic advantages or disadvantages to the former spouses arising from the marriage or its breakdown;

- (b) apportion between the former spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;
 - (c) relieve any economic hardship of the former spouses arising from the breakdown of the marriage; and
 - (d) in so far as practicable, promote the economic self-sufficiency of each former spouse within a reasonable period of time.
- [117] The court must determine how to vary the order in light of the change in circumstances, but it should not weigh all the factors to make a fresh order, unless the circumstances require rescission of the order: L.M.P. at para. 47.
- [118] Once a material change is established, there is a presumption in favour of retroactive variation to the date the payor gave the recipient effective notice, up to three years from formal notice of the application to vary. The court must consider the D.B.S factors in deciding whether to depart from that date: Colucci at para. 114.
- [119] D.B.S. establishes that a retroactive increase of support in circumstances where a payor always had the obligation to pay spousal support is "not truly retroactive"; rather, it "enforce[s] an obligation that should have been fulfilled already": D.B.S. at paras. 67-69; Colucci at para. 37. Further:

The date when increased support should have been paid, however, will sometimes be a more appropriate date from which the retroactive order should start. This situation can most notably arise where the payor parent engages in blameworthy conduct. Once the payor parent engages in such conduct, there can be no claim that (s)he reasonably believed his/her child's support entitlement was being met. This will not only be the case where the payor parent intimidates and lies to the recipient parent, but also where (s)he withholds information. Not disclosing a material change in circumstances -- including an increase in income that one would expect to alter the amount of child support payable -- is itself blameworthy conduct. The presence of such blameworthy conduct will move the presumptive date of retroactivity back to the time when circumstances changed materially. A payor parent cannot use his/her informational advantage to justify his/her deficient child support payments.

D.B.S., at para. 124. [Emphasis added.]

- [120] The factors governing retroactive child support claims apply as adjusted, to retroactive spousal support claims: Kerr v. Baranow, at para. 207. They are:
- (i) reasonable excuse for any delay in seeking support;
 - (ii) blameworthy conduct by the payor;
 - (iii) the circumstances of the support recipient; and

(iv) hardship occasioned by a retroactive award.

[121] Because there is no presumptive entitlement to spousal support and no related fiduciary relationship between the spouses, concerns about notice, delay and misconduct generally carry more weight in relation to claims for spousal support: Kerr at para. 208.

[122] Ms. Block sought spousal support in October 2019, about one year after she first learned the material facts relating to Ms. Block's misrepresentations of his financial circumstances in September 2018. She acted within a reasonable a time. Mr. Block's blameworthy conduct is significant and dates back to the time of settlement negotiations.

[123] Economic hardship can arise where a spouse is financially disadvantaged by the breakdown in the marriage: Hathaway v. Hathaway, 2014 BCCA 310 at paras. 52-57. During most of the marriage, Ms. Block did not participate in the paid workforce. She returned to employment in 2006 and started a business in 2010. Mr. Block agreed that her income was "minimal" at the time of separation.

[124] The evidence establishes that Ms. Block was disadvantaged by the breakdown of the marriage. Her average annual income since separation, excluding support paid by Mr. Block is roughly \$58,000. By contrast, Mr. Block's average annual income over this period, excluding income from redemptions of BCI Shares, was roughly \$580,000. Ms. Block's standard of living after marriage breakdown was lower than the standard of living she had during the marriage.

[125] Mr. Block points to Ms. Block's current net worth, which he says is over \$5,000,000 and her entitlement to \$4,000 a month in spousal support to say that she is not suffering economic hardship. This misses the point. The economic hardship assessment is relative, based on a comparison between the standard of living during the marriage and after it, not on an objective assessment of what constitutes a reasonable standard of living. I conclude that Ms. Block suffered some economic hardship.

[126] Mr. Block does not dispute Ms. Block's estimate of his net worth as over \$60,000,000. He says that a retroactive award will cause him hardship because his assets, which include but are not confined to the BCI Shares, are not liquid. However, other than pointing to the restrictions on disposition of the BCI Shares, Mr. Block has not led evidence about the difficulty he would have raising the money to satisfy an award. This makes it impossible to apply the analysis in Kerr, which requires me to consider what Mr. Block can currently afford without disrupting his ability to manage his finances should an award be granted: Kerr, at para. 212.

[127] Mr. Block's annual income is significant. Based on Mr Izard's report, Mr. Block's average line 150 income from 2020 through 2022 was \$1,068,018. Bearing in mind that such awards must be structured to minimize hardship (D.B.S. at para 116), I find that Mr. Block has not established that a retroactive spousal support award will cause him hardship.

- [128] I conclude that Ms. Block is entitled to a retroactive spousal award running from January 1, 2012, the date identified in her submissions.
- [129] Turning to the amount of the award, Ms. Block submits that Mr. Block should pay retroactive spousal support of \$2,539,836. However, Ms. Block's calculations do not consider the following:
- a) that as a result of these reasons, Ms. Block's income should include 19.5% of the dividend income from the BCI Shares and 50% of the dividend income Mr. Block received from the Class A Shares, and Mr. Block's income should be correspondingly reduced;
 - b) Mr. Block has already reported and paid taxes on all the BCI Share dividend and Class A Share dividend income;
 - c) Ms. Block's spousal support calculations assume that Ms. Block will declare and pay taxes on spousal support amounts calculated, and that the spousal support amounts calculated will be tax deductible to Mr. Block, but there is no evidence about whether the Canada Revenue Agency would permit these retroactive adjustments;
 - d) Ms. Block has reported spousal support of \$48,000 each year and paid taxes on this support, and this amount has been tax deductible to Mr. Block;
 - e) the income figures used by Ms. Block treat all of Mr. Block's business expenses as unreasonable, while I have found that 20% of the business expenses claimed by Mr. Block should be allowed as reasonable business expenses; and
 - f) unlike child support, spousal support is not adjusted annually to account for variations in income.
- [130] Mr. Block's submissions on this issue reproduce sections of the SSAG dealing with ceilings and floors that may be applied to high income earners. However, he does not say how that should affect the calculation of retroactive spousal support in this case. Rather, he submits that Ms. Block should not be awarded any retroactive spousal support or, in the alternative, "[i]f there is any compensation due to Ms. Block, which is denied, it should be a small lump sum to compensate her for her bad choices."
- [131] The parties have not provided the court with a reliable basis for calculating the amount of a retroactive spousal support award.[4]
- [132] The court must do the best it can with the evidence presented. Considering the factors laid out above, and the objectives of a spousal support variation order, I consider that a lump sum award of retroactive spousal support of \$1,000,000 is appropriate. This amount is equivalent to approximately \$7,500 per month over 11 years (from January 1, 2012 through 2022), in addition to the \$4,000 per month that Ms. Block has already received in support payments.

Ongoing Spousal Support

- [133] Ms. Block seeks ongoing spousal support in the amount of \$15,000 per month. I order that Mr. Block pay ongoing spousal support of \$11,500 per month, commencing January 1, 2023. In awarding this amount, I have considered the circumstances of the parties and the factors and objectives set out in these reasons. The award is consistent with the retroactive spousal support award I have made, in that \$1,000,000 over 11 years is equivalent to approximately \$7,500 per month, to which the existing \$4,000/month amount must be added.
- [134] As it is not possible to estimate the incomes of the parties going forward in light of the awards I have made, I order that spousal support is reviewable, with respect to both quantum and entitlement, 12 months after the payments for the BCI Shares, Class A Shares, and retroactive child and spousal support, as ordered in these reasons, have been completed (that is, 12 months after the last payment on account of these awards to Ms. Block).

ORDERS

- [135] Mr. Block shall pay to Ms. Block the amount representing the value of the Settlement Shares and the Class A Shares as of the date of trial based on the 2020 Valuation, plus 19.5% of the dividends Mr. Block received on the BCI Shares and 50% of the dividends he received from the Class A Shares, from January 2012 to the trial date, the total net of taxes and applying the average US-Canadian exchange rate for each year.
- [136] Pursuant to Rule 18-1 of the Supreme Court Family Rules, I direct that an accounting be held by the Supreme Court registrar, with the result of the accounting to be certified by the registrar. The accounting will determine the amount Mr. Block shall pay to Ms. Block in respect of the division of the BCI Shares. The evidence the parties must provide to the registrar shall include the applicable taxes and exchange rates. Prior to filing the notice of appointment setting the accounting, the parties shall schedule a pre-hearing conference before the registrar.
- [137] Mr. Block shall pay Ms. Block \$1,000,000 in retroactive spousal support;
- [138] Mr. Block shall pay Ms. Block as retroactive child support the sum representing the Guidelines table amount for each year commencing January 2013 through the end of November 2017, based on Mr. Block's line 150 income for the previous taxation year including any share redemptions he received, less 20% of his claimed business expenses for that year and less grossed-up tuition fees for that year.
- [139] The registrar shall determine a payment schedule pursuant to which Mr. Block shall pay Ms. Block the amounts owing pursuant to the three orders stated above.
- [140] Mr. Block shall pay ongoing spousal support in the amount of \$11,500 per month, commencing January 1, 2023.

[141] The ongoing spousal support order is reviewable, with respect to both quantum and entitlement, 12 months after Mr. Block has made the final payment pursuant to the payment schedule.

[142] Ms. Block seeks to speak to costs. If the parties cannot settle costs, they have leave to bring a costs application before another presider.

"Iyer J."

[1] The parties agree that the FRA is the applicable statute.

[2] Under this heading, Mr. Block also argued that Ms. Block cannot make a claim under s. 65 of the FRA because she is not a "spouse." As this is not a true limitation argument, I do not address it in this section.

[3] Although Ms. Block has commenced legal proceedings against her lawyer concerning his representation of her, this is not a basis for a finding that she had inadequate legal representation.

[4] I appreciate the difficulty of providing evidence and helpful submissions about damages where there are multiple options depending on the court's determination of liability issues. In such cases, a bifurcated hearing may be appropriate.

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