
CANADA / JUDGMENT

McAdie v. McAdie

2019 BCSC 578

COURT

Supreme Court of British Columbia

DECIDED

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2019 BCSC 578 McAdie v. McAdie

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

McAdie v. McAdie,

2019 BCSC 578

Date: 20190416

Docket: E141679

Registry: Vancouver

Between:

Shawn Thomas McAdie

Claimant

And

Camille Grace McAdie a.k.a. Camille Grace Tellier

Respondent

Before: The Honourable Mr. Justice Ehrcke

Reasons for Judgment

Appearing on his own behalf:

S.T. McAdie

Counsel for the Respondent:

P.W. Cote

I.G. Tee

Place and Date of Trial:

Vancouver, B.C.

March 25-29, 2019

April 1-3, 2019

Place and Date of Judgment:

Vancouver, B.C.

April 16, 2019

INTRODUCTION

- [1] Mr. and Ms. McAdie were divorced from each other on February 20, 2015. They were able to resolve all parenting issues by a consent order following mediation in October 2018.
- [2] What remains outstanding are a number of issues regarding property, child support, and spousal support, and on those issues they proceeded to trial. Both parties testified and filed a large number of documents as exhibits. These are my reasons following that 8-day trial. For simplicity and clarity, I have rounded all monetary amounts to the nearest dollar.

BACKGROUND

- [3] Mr. and Ms. McAdie began dating in 1995 and purchased a home together in Mission, British Columbia. They were both working at the time. Mr. McAdie was doing long-haul trucking, and Ms. McAdie had a responsible position at the Bootlegger clothing company.
- [4] The couple married on July 26, 1997. Their first child was born in 2001, and the second in 2002. Ms. McAdie stopped working in order to stay home and raise the children. The two girls are now 16 and 17 years old and live with Ms. McAdie.
- [5] The family moved from time to time, living in various locations, including Chilliwack, Fort St. John, and Grand Prairie, Alberta.
- [6] The couple started a company called McAdie Ventures Ltd. ("McAdie Ventures") to handle Mr. McAdie's trucking business. They were each half-owners, holding 30 shares apiece.
- [7] Mr. McAdie also owns another company, 1494393 Alberta Ltd., into which he deposits his income, and which he uses as a holding company for his assets. Since 2014, he has also had an interest in a company called Coast Prairie Pile Ltd.
- [8] At some point-, probably around 2009, the couple purchased a condominium in Mexico, and Ms. McAdie tried living there with the children for about two and a half years. She did some photography for destination weddings, and the children went to a private school. Mr. McAdie was still running the business in Grand Prairie, but would fly to Mexico for a week at

a time. It was during this period that the couple had their first separation, although they eventually reunited as a family and bought a home in White Rock, British Columbia (the "Matrimonial Home") in 2012.

[9] The couple's final separation occurred on January 1, 2013.

THE SEPARATION AGREEMENT

[10] On May 17, 2013, the parties entered into a separation agreement (the "Separation Agreement"), which dealt, among other things, with the division of property, spousal support and child support. There was only one lawyer involved in the preparation of the Separation Agreement.

[11] The Separation Agreement listed the assets of the parties as follows:

- The Matrimonial Home;
- A 2006 Harley Davidson Motorcycle;
- A 2007 FJ Cruiser Toyota automobile;
- A 2006 Nissan Pathfinder automobile;
- A 2006 Nash Trailer on a lot in White Rock;
- McAdie Ventures Ltd.;
- 1494393 Alberta Ltd., including the following assets owned by 1494393 Alberta Ltd., namely,
 - A 2001 Boston Whaler Boat;
 - The Home in Bahia de Santa Cruz, Mexico;
 - The property at Mirador Chahue-Santa Cruz, Mexico;
 - The Condominium at Marina Park, Santa Cruz, Mexico.

[12] Part 6 of the Separation Agreement made the following provisions for the division of the assets. Ms. McAdie was to transfer all of her 30 shares in McAdie Ventures to Mr. McAdie. Mr. McAdie was to cause 1494393 Alberta to transfer the three Mexican properties to a new numbered company for Ms. McAdie.

[13] In addition, Mr. McAdie was required to direct McAdie Ventures to pay Ms. McAdie a total of \$140,000 in 4 equal payments of \$35,000 on April 1 each year from 2013 until 2016, and he also agreed to act as guarantor of those payments.

[14] As a result of the division, Ms. McAdie would take the three Mexican properties, the Toyota, the Nissan, the trailer and lot, and a one-half interest in the Matrimonial Home. She was also supposed to receive four cash payments totalling \$140,000.

- [15] Mr. McAdie would keep the boat, the motorcycle, McAdie Ventures, all the shares of 1494393 Alberta Ltd., and a one-half interest in the Matrimonial Home.
- [16] Part 7 of the Separation Agreement made a special provision that Ms. McAdie would have exclusive occupation and possession of the Matrimonial Home until both children turned nineteen or married or became self-supporting, which essentially meant that she would have exclusive possession until October 2021. It was only after that time that the house would be sold and the net proceeds divided equally. Until that time, Mr. McAdie was required to fully pay all expenses relating to the mortgage, property taxes, fire and home insurance, and all maintenance and repairs.
- [17] The Separation Agreement recited Mr. McAdie's income as \$150,000 per year. Part 10 provided that he would pay spousal support of \$3,000 per month to Ms. McAdie on the first day of each month starting January 2013, with no end date stipulated. However, it was also agreed that he could satisfy his monthly spousal support obligation by making full payment of mortgage, taxes, insurance and maintenance on the Matrimonial Home, and that spousal support would be reviewed if the Matrimonial Home were sold.
- [18] In Part 12 of the Separation Agreement, Mr. McAdie agreed to pay Ms. McAdie \$4,000 per month in child support, being \$2,000 per month for each child.
- [19] Finally, in Part 14 of the Separation Agreement, Mr. McAdie agreed to take out and maintain a \$3,000,000 insurance policy on his life with Ms. McAdie named as the beneficiary.
- [20] After the Separation Agreement was signed, various properties were transferred according to its terms, and Mr. McAdie made payments on the mortgage and for child support up until 2015. Then, he testified that he experienced some hard times, including the death of his father, and he could no longer make all the payments. He asked Ms. McAdie to renegotiate. He wanted to sell the Matrimonial Home and divide the proceeds. He testified that she initially agreed, but then changed her mind. He referred to a series of emails (Exhibit 1) exchanged between them at the end of February 2015, from which it appears there was a disagreement when he insisted on using his own real estate agent rather than someone neutral as she suggested.
- [21] Ms. McAdie testified that Mr. McAdie stopped making the insurance and tax payments for the Matrimonial Home, and that ultimately, the house had to be sold pursuant to a court order. The Matrimonial Home was sold and the mortgage paid out on March 5, 2018. Since then, despite the terms of the Separation Agreement, Ms. McAdie and the children have had to live in smaller, rented accommodation.

ISSUES

- [22] Mr. McAdie would like to have an order that he is no longer required to pay spousal support to Ms. McAdie.

- [23] Ms. McAdie seeks orders for arrears of support payments and seeks a new division of property.
- [24] The fundamental issue about which the parties disagree is whether the Separation Agreement is valid and enforceable.
- [25] Mr. McAdie submits that the Separation Agreement was fair and reasonable, and that it should be enforced according to its terms, except that he would like to have spousal support come to an end.
- [26] Ms. McAdie takes the position that the Separation Agreement should be set aside, and the Court should consider anew the division of property, the proper amount of child support based on an accurate assessment of Mr. McAdie's income, and the proper amount and duration of spousal support.

THE SEPARATION AGREEMENT AND THE DIVISION OF FAMILY PROPERTY

- [27] The division of family property is dealt with under Part 5 of the Family Law Act, S.B.C. 2011, c. 25, including ss. 81-109.
- [28] "Family property" is defined in s. 84. Except for excluded property, all real and personal property that on the date of separation is either owned, or in which there is a beneficial interest held, by at least one spouse, is included in family property. Property acquired after separation and derived from family property may also be family property. Family property may include, among other things, shares in a corporation, money in a financial account, pension entitlements, and property owing to a spouse.
- [29] Subject to certain exceptions, ss. 81 and 87 provide that each spouse has a right upon separation to an undivided one-half interest in all family property as a tenant in common, and the value is the fair market value at the date of the court hearing or agreement.
- [30] Sections 92-94 deal with agreements respecting property:

92 Despite any provision of this Part but subject to section 93 [setting aside agreements respecting property division], spouses may make agreements respecting the division of property and debt, including agreements to do one or more of the following:

- (a) divide family property or family debt, or both, and do so equally or unequally;
- (b) include as family property or family debt items of property or debt that would not otherwise be included;
- (c) exclude as family property or family debt items of property or debt that would otherwise be included;
- (d) value family property or family debt differently than it would be valued under section 87 [valuing family property and family debt].

93 (1) This section applies if spouses have a written agreement respecting division of property and debt, with the signature of each spouse witnessed by at least one other person.

- (2) For the purposes of subsection (1), the same person may witness each signature.
- (3) On application by a spouse, the Supreme Court may set aside or replace with an order made under this Part all or part of an agreement described in subsection (1) only if satisfied that one or more of the following circumstances existed when the parties entered into the agreement:
 - (a) a spouse failed to disclose significant property or debts, or other information relevant to the negotiation of the agreement;
 - (b) a spouse took improper advantage of the other spouse's vulnerability, including the other spouse's ignorance, need or distress;
 - (c) a spouse did not understand the nature or consequences of the agreement;
 - (d) other circumstances that would, under the common law, cause all or part of a contract to be voidable.
- (4) The Supreme Court may decline to act under subsection (3) if, on consideration of all of the evidence, the Supreme Court would not replace the agreement with an order that is substantially different from the terms set out in the agreement.
- (5) Despite subsection (3), the Supreme Court may set aside or replace with an order made under this Part all or part of an agreement if satisfied that none of the circumstances described in that subsection existed when the parties entered into the agreement but that the agreement is significantly unfair on consideration of the following:
 - (a) the length of time that has passed since the agreement was made;
 - (b) the intention of the spouses, in making the agreement, to achieve certainty;
 - (c) the degree to which the spouses relied on the terms of the agreement.
- (6) Despite subsection (1), the Supreme Court may apply this section to an unwitnessed written agreement if the court is satisfied it would be appropriate to do so in all of the circumstances.

94 (1) The Supreme Court may make an order under this Division on application by a spouse.

- (2) The Supreme Court may not make an order respecting the division of property and family debt that is the subject of an agreement described in section 93 (1) [setting aside agreements respecting property division], unless all or part of the agreement is set aside under that section.

- [31] As can be seen, s. 92 recognizes that spouses may enter into agreements for property division; s. 93 sets out the circumstances under which such an agreement may be set aside; and s. 94 provides that the Court may make an order for property division, but only if any agreement that is already in place is first set aside under s. 93. Since Ms. McAdie seeks to have the Court make a new order respecting division of property, she must first satisfy the Court that the existing Separation Agreement should be set aside.
- [32] Ms. McAdie advances multiple bases for setting aside the Separation Agreement. First, she submits that Mr. McAdie failed to make full and honest disclosure of the assets. Second, she submits that the Separation Agreement was significantly unfair. Third, she submits that in failing to fulfil his obligations under the Separation Agreement, Mr. McAdie caused a fundamental breach, and the only satisfactory remedy for his breach is to set the Separation Agreement aside.

FAILURE TO DISCLOSE

- [33] Ms. McAdie's first position is that the Separation Agreement should be set aside under s. 93(3)(a) for lack of disclosure.
- [34] The importance of full disclosure and the consequences of a failure to disclose were discussed by the Supreme Court of Canada in *Rick v. Brandsema*, 2009 SCC 10. Although that case was decided under the former legislation (Family Relations Act, R.S.B.C. 1996, c. 128) many of the same principles are relevant. Delivering the judgment of the Court, Abella J wrote at paras. 47-49:
- [47] In my view, it flows from the observations and principles set out in *Miglin* [2003 SCC 24] 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.

- [35] In that case, the Supreme Court of Canada upheld the trial judge's decision that the negotiated agreement was unenforceable, because it was based on misleading information the husband had provided concerning assets.
- [36] On the evidence in the present case, I am satisfied that during negotiations for the Separation Agreement in 2013, Mr. McAdie deliberately hid from Ms. McAdie his plan to sell McAdie Ventures and he deceived her about the true value of her half-interest in that company.
- [37] Ms. McAdie testified that when she entered into the Separation Agreement, she was not aware of Mr. McAdie's plan to sell McAdie Ventures. She said he never discussed it, and he did not provide her with any documents. She was not provided with financial statements or tax returns of the company. She said he guessed at the value of the company and she relied on his valuation. She said he told her that if she did not agree to the sale of her shares, he was going to put the company up for auction. She testified that during the negotiations of the Separation Agreement, Mr. McAdie told her that if she got her own lawyer, and if he had to get his own lawyer, he would collapse the company and no one would get anything, so she just went along with the agreement.
- [38] Mr. McAdie testified on examination for discovery (Q136-146) that Ms. McAdie had no role in running McAdie Ventures and did not assist with bookkeeping or getting contracts. He said she did not know anybody associated to the industry. He testified: "Ms. McAdie didn't even know what I did." He testified (Q180-193) that at the time of the Separation Agreement, his accountant Karri Speaker at Fletcher Mudryk did an assessment of McAdie Ventures. In his trial testimony he said he orally told Ms. McAdie what McAdie Ventures was worth.
- [39] As is apparent, the evidence of Mr. McAdie and Ms. McAdie is in conflict on many points. Where their evidence conflicts, I accept the evidence of Ms. McAdie and reject that of Mr. McAdie. I found much of his testimony to be inconsistent and self-serving.
- [40] I find as a fact that at the time of entering into the Separation Agreement, Mr. McAdie did not disclose to Ms. McAdie that he was planning to sell McAdie Ventures, despite the fact that the negotiations for that sale were occurring at the same time. The Separation Agreement is dated May 17, 2013, and in his examination for discovery, Mr. McAdie said he was approached by the Horse Lake Investment Board ("Horse Lake") about the sale in March 2013 (Q309-318). He said Horse Lake purchased the first half of the shares of McAdie Ventures a few months later for \$750,000, and at the same time they negotiated the price for a purchase of the remaining half of the shares.

[41] In his Examination for Discovery, Mr. McAdie testified:

Q390 Mr. McAdie, in the sale of in McAdie Ventures to - to the Horse Lake Band Council investment group, did they complete their own independent assessment of the value of McAdie Ventures?

A I don't know.

Q391 And so during the negotiation process were you ever presented with an alternative value of McAdie Ventures?

A No.

Q392 So how did the two of you come up with the sale price?

A When they were willing to purchase is when I asked Kari to give me an assessment what the company would be worth and then that was presented.

Q393 Did they accept the first offer?

A Yep. Because they were only buying 50 per cent.

Q394 Now the purchase price of the other - the other 50 per cent was also negotiated at the same time; correct?

A Correct.

Q395 So you negotiated the value of the whole company at that initial phase; correct?

A Yes.

Q396 And then it was the - the sequence of the payments that were negotiated as well; correct?

A Can you clarify that?

Q397 The timing - sorry, the timing of the payments were negotiated so the timing of the first payment was immediate, and the timing of the second payment was when they no longer required your services; is that correct?

A Correct. Yes.

[42] At trial, Mr. McAdie testified that Horse Lake did not want to deal with anyone other than Mr. McAdie, and that is why Ms. McAdie's 30 shares were first transferred to Mr. McAdie and subsequently from him to Horse Lake. I find that explanation strange. Given that Horse Lake wanted to have only Mr. McAdie as its business partner in the company, that objective could have been more simply accomplished by having Ms. McAdie sell her 30 shares directly to Horse Lake, after which, she would no longer be a part of the company. The most plausible explanation for structuring the transaction in such a way that Mr. McAdie would be a brief intermediary holder of those 30 shares before transferring them to Horse Lake is that Mr. McAdie wanted to hide from Ms. McAdie the fact that the company was being sold, and a plausible reason for keeping her ignorant of the sale was to prevent her from having an

accurate understanding of the value of her half interest in McAdie Ventures.

- [43] The first Share Purchase Agreement between Mr. McAdie and Horse Lake dated June 28, 2013, specified a price of \$750,000 for the first 30 shares. This is confirmed by a Promissory Note dated July 1, 2013 specifying three payments of \$250,000 each. In addition, Horse Lake entered into a Services Contract with Mr. McAdie whereby he would be paid \$17,500 plus 5% GST for a total of \$18,375 per month for three years.
- [44] The second Share Purchase Agreement, dated February 1, 2015, provided for Horse Lake's purchase of the remaining 30 shares of McAdie Ventures from Mr. McAdie. Article 2.2 of that agreement specified a purchase price for those 30 shares of \$1,300,000, and it set out a payment schedule, which again, was confirmed by a Promissory Note.
- [45] Mr. McAdie takes the position that he was not actually paid the full price specified in the Share Purchase Agreements and Promissory Notes, but the evidence proves otherwise.
- [46] At trial, Mr. McAdie was cross-examined extensively about the banking records of his holding company, 1494393 Alberta Ltd., as well as numerous other records and documents. That evidence establishes that no payments were missed by Horse Lake. Mr. McAdie agreed that the large payments into the holding company would not have come from any source other than the sale of McAdie Ventures. Looking just at the payments of \$50,000 or more from December 13, 2013 to July 19, 2017, the total is \$2,230,128.97. In addition to these large payments, the evidence showed additional deposits of almost one million dollars, for a total income into 1494293 Alberta Ltd. from 2013-2017 of \$3,206,457.
- [47] I find, therefore, that at the time of the Separation Agreement, Mr. McAdie deliberately kept Ms. McAdie ignorant of the true value of McAdie Ventures. We now know from Mr. McAdie's sale of the company to Horse Lake that the total value of all the shares in the company was \$2,050,000 (not counting the value of the Services Contract that Mr. McAdie obtained as part of the sale). On an equal apportionment, as would be presumed on a property division under the Family Law Act, Ms. McAdie's interest in the company was worth \$1,025,000.
- [48] Under the terms of the Separation Agreement, Ms. McAdie transferred her \$1,025,000 interest in McAdie Ventures to Mr. McAdie. What did Mr. McAdie transfer to her in return? We need not consider the boat, the cars, the motorcycle, the trailer and the lot, since the value of those items was divided almost equally between them - approximately \$32,000 each. The only large piece of property that was transferred to Ms. McAdie was the Mexican real estate, consisting of three properties. Mr. McAdie said they were initially purchased for US\$600,000, which would be roughly equivalent to \$600,000 Canadian, as the Canadian and US dollar exchange rate at the time was close to par. However, Mr. McAdie did not provide any documentation to substantiate that value.
- [49] A more accurate indicator of their value is the eventual sale price. When the Mirador and Marina properties were sold, the net proceeds that were deposited into Ms. McAdie's account amounted to \$131,659 and \$132,897 respectively. The Bahia property has not yet

been sold, and its value is estimated at \$90,000. The total value of the three Mexican properties is therefore \$354,556. It must be remembered, however, that what Mr. McAdie was transferring to Ms. McAdie under the Separation of Agreement was not that full amount, but only his half interest in it, \$177,278.

- [50] Accordingly, under the property division set out in the Separation Agreement, Ms. McAdie transferred her \$1,025,000 interest in McAdie Ventures to Mr. McAdie, and in return, he transferred his \$177,278 interest in the Mexican properties to her. I have no difficulty in coming to the conclusion that this was an unconscionable bargain. The gross imbalance was not equalized by the fact that he was supposed to make payments to her totalling \$140,000. Even if those payments had been fully made, which they were not, he would have received more than three times what she received under the Separation Agreement.
- [51] Mr. McAdie was able to persuade Ms. McAdie to sign this very one-sided Separation Agreement by keeping her ignorant of the fact that he was in the process of selling McAdie Ventures and by hiding from her what he knew about the company's true value. That process of deceit was facilitated by ensuring that only one lawyer would be involved in the process and by drafting the Separation Agreement in such a way that it contained no recitals of the value of any of the property.
- [52] I find that Mr. McAdie's deliberate non-disclosure resulted in Ms. McAdie being in a position of vulnerability and ignorance, which he improperly took advantage of, and as a result, she did not understand the nature and consequence of the Separation Agreement.
- [53] I make this finding despite the certificate of independent legal advice that Ms. McAdie signed on May 21, 2013. That certificate was apparently completed by the same lawyer who drafted the agreement and who witnessed both parties' signatures. I find that Ms. McAdie did not have any truly independent legal advice because, as she testified, Mr. McAdie told her during the negotiations that if she got her own lawyer and he had to get his own lawyer, he would collapse the company and no one would get anything.
- [54] The property division under the Separation Agreement should therefore be set aside pursuant to s. 93(3)(a),(b), and (c) of the Family Law Act.

FUNDAMENTAL BREACH OF CONTRACT

- [55] Having come to the conclusion that the property division under the Separation Agreement ought to be set aside pursuant to s. 93(3)(a),(b), and (c) of the Family Law Act, it is not strictly necessary to consider Ms. McAdie's alternative submission that the property division ought to be set aside on that basis of fundamental breach by Mr. McAdie.
- [56] Nevertheless, I observe that on the evidence, Mr. McAdie clearly failed to fulfill several of his significant obligations under the contract.

- [57] He did not, as required, take out and maintain a \$3,000,000 insurance policy on his life with Ms. McAdie named as the beneficiary.
- [58] He did not, as required, direct McAdie Ventures to pay Ms. McAdie a total of \$140,000. To date, only \$44,500 of that amount has been paid.
- [59] He did not, as required, fully pay all expenses relating to the mortgage, property taxes, fire and home insurance, and all maintenance and repairs on the Matrimonial Home. As a result, the house had to be sold and Ms. McAdie lost a fundamental benefit to which she was entitled under the contract, namely, her right to live in the Matrimonial Home with the two children until the youngest turned nineteen, married, or became self-supporting.
- [60] Moreover, Mr. McAdie's failure to fulfill his obligations cannot be explained by impecuniosity. As just one illustration of the fact that he had discretionary income which he chose not to use in fulfilment of his obligations to Ms. McAdie, Mr. McAdie's credit card statements show that he spent, at Michael Anthony Jewellers in Edmonton, \$44,375 on December 4, 2015; \$25,000 on April 26, 2016; and \$10,477 on June 16, 2016. He testified at trial that the latter two payments were for wedding rings for himself and his new wife. He testified that the payment in December 2015 was not for jewellery, but rather for an investment that went bad. Even if I were to accept that testimony as true, it would still not explain why he chose to make a risky investment of \$44,375 at a time when he could have used those funds towards fulfilling his obligations under the Separation Agreement.
- [61] Mr. McAdie's failure to fulfil his obligations deprived Ms. McAdie of a fundamental benefit under the Separation Agreement, namely, her right to live in the Matrimonial Home with the children. As the house has been sold, this cannot be remedied by an order for specific performance.
- [62] If necessary, therefore, the property division under the Separation Agreement could also be set aside pursuant to s. 93(3)(d) of the Family Law Act, on the basis that Mr. McAdie's fundamental breach is a circumstance that would under common law render the contract voidable.

DIVISION OF FAMILY PROPERTY UNDER THE FAMILY LAW ACT

- [63] Having set aside the Separation Agreement respecting property division, it is necessary to replace it with an order under the Family Law Act. Ms. McAdie seeks an equal division based on fair market value at the time of trial, pursuant to ss. 81 and 87.
- [64] Both parties have submitted "Scott Schedules" with their proposals for division. I find on all the evidence that the schedule submitted by Ms. McAdie accurately sets out the family property subject to division and the fair market value at the time of trial. It also sets out under the heading "Notes" the basis for the determination of value, and under the heading "Reference" the tab number from Exhibit 4 containing the relevant supporting documents. That schedule is as follows:

- [65] As can be seen, on an equal apportionment, each party would be entitled to property valued at \$1,503,038, but in fact, Mr. McAdie has received \$2,992,619, whereas Ms. McAdie has received only \$699,984. In order to achieve an equal apportionment between the two parties, Mr. McAdie must make an equalization payment to Ms. McAdie in the amount of \$803,054.
- [66] As well, there shall be an order that the parties divide evenly any Canada Pension Plan credits earned by either of them from January 1, 1995 to January 1, 2013.

CHILD SUPPORT

- [67] Pursuant to the terms of the Separation Agreement, Mr. McAdie was to pay a total of \$4,000 per month support for the two children. He paid that amount from January 2013 through November 2015. He then paid \$1,140 per month from December 2015 through September 2016. He then stopped paying altogether, until FMEP enforcement started. In total, from January 2013 through March 2019, he has paid \$186,485 in child support.
- [68] Clearly, Mr. McAdie has fallen short of his child support obligations, but to determine the amount of the shortfall, it is necessary to determine his income.
- [69] Part 12 of the Separation Agreement listed Mr. McAdie's income for child support purposes as \$150,000. It also provided that the amount of child support may be reviewed each year "to ensure compliance with the Federal Child Support Guideline Table amounts."
- [70] In fact, Mr. McAdie's income in 2013 when the Separation Agreement was signed was not \$150,000. According to the declaration at line 150 of his income tax returns, Mr. McAdie's income for the years 2013 to 2017 was as follows:
- 2013 \$471,450
- 2014 \$120,360
- 2015 \$145,760
- 2016 \$173,472
- 2017 \$253,890
- [71] Mr. McAdie has not provided tax returns for subsequent years. He testified that he is now working on a salaried basis, and he submitted pay stubs from Northern Mat & Bridge LP (Exhibit 3) showing pay of \$16,667 for the period from January 1, 2019 to February 28, 2019.
- [72] Ms. McAdie submits that his 2018 taxable income may be estimated, based on an average of the years 2013-2017, as \$232,986.

- [73] Using Mr. McAdie's line 150 income as a basis for determining his child support obligations under the Child Support Guidelines, he should have been paying \$6,154 per month for 2013, \$1,739 per month for 2014, \$2,052 per month for 2015, \$2,400 per month for 2016, \$3,385 per month for 2017, and \$3,138 per month from January 2018 to the present, for a total of \$235,830. Subtracting the \$186,485 that he has actually paid, that leaves arrears of \$49,345.
- [74] There is another method of determining Mr. McAdie's income, since he uses his holding company, 1494393 Alberta Ltd., for the deposit of the money he earns.
- [75] Section 18 of the Federal Child Support Guidelines, SOR/97-175 provides:
- 18 (1) Where a spouse is a shareholder, director or officer of a corporation and the court is of the opinion that the amount of the spouse's annual income as determined under section 16 does not fairly reflect all the money available to the spouse for the payment of child support, the court may consider the situations described in section 17 and determine the spouse's annual income to include
- (a) all or part of the pre-tax income of the corporation, and of any corporation that is related to that corporation, for the most recent taxation year; or
 - (b) an amount commensurate with the services that the spouse provides to the corporation, provided that the amount does not exceed the corporation's pre-tax income.
- (2) In determining the pre-tax income of a corporation for the purposes of subsection (1), all amounts paid by the corporation as salaries, wages or management fees, or other payments or benefits, to or on behalf of persons with whom the corporation does not deal at arm's length must be added to the pre-tax income, unless the spouse establishes that the payments were reasonable in the circumstances.
- [76] Pursuant to s. 18 of the Child Support Guidelines, all or part of the pre-tax income of Mr. McAdie's holding company may be considered in determining his income for child support purposes.
- [77] For the years 2013 to 2017, the average net revenue per year deposited in the account of 1494393 Alberta Ltd., not including the \$2,050,000 sale proceeds of McAdie Ventures, is \$231,291. Mr. McAdie has not provided a credible reason why that amount should not be considered his income available for child support purposes.
- [78] Using Mr. McAdie's income as determined under s. 18 of the Child Support Guidelines, he should have been paying \$3,118 per month, for a total of \$234,330. Subtracting the \$186,485 that he has actually paid, that leaves child support arrears of \$47,845.

[79] As can be seen, there is little difference in the amount of child support arrears owing using the two different methods for determination of income. Ms. McAdie suggests using the method based on s. 18 of the Child Support Guidelines. I agree that that approach is probably more accurate. It is also more favourable to Mr. McAdie. Accepting that approach, I find that Mr. McAdie owes \$47,845 in arrears of child support.

SPOUSAL SUPPORT

[80] Pursuant to Part 10 of the Separation Agreement, Mr. McAdie was required to pay spousal support of \$3,000 per month to Ms. McAdie starting January 2013. There was no end date specified. The parties also agreed that the spousal support obligation could be satisfied by Mr. McAdie making the mortgage, taxes, insurance and other payments on the Matrimonial Home, and that spousal support would be reviewed if the Matrimonial Home were sold.

[81] Mr. McAdie made the mortgage payments on the Matrimonial Home from January 2013 through February 2018. The house was sold pursuant to court order on March 5, 2018 because Mr. McAdie had failed to make other required payments, such as insurance and taxes.

[82] Because Mr. McAdie was making the mortgage payments, Ms. McAdie is not pursuing any claim for arrears of spousal support during the period from January 2013 through February 2018. However, from March 2018 onward, she submits that he does owe her spousal support, and that the amount should be based on a fresh determination of Mr. McAdie's income. Since March 2018, Mr. McAdie has paid no spousal support except for a total amount of \$2,184 pursuant to an interim order of Master Taylor.

[83] Mr. McAdie submits that the Court should make an order terminating his obligation to pay spousal support, since in his submission, enough time has passed to give Ms. McAdie a sufficient opportunity to become self-sufficient.

[84] Section 164(3) of the Family Law Act provides that the court may set aside or replace any provision in a written agreement respecting spousal support. The permitted grounds for doing so are similar to those set out in s. 93(3) respecting property division.

[85] Section 164(4) provides that the court may decline to act under subsection (3) if, on all the evidence, the court would not replace the agreement with an order that is substantially different.

[86] There can be no question that under the Family Law Act, Ms. McAdie would be entitled to spousal support even if there had not been the Separation Agreement.

[87] Section 161 of the Family Law Act sets out the objectives of spousal support. It provides:

161 In determining entitlement to spousal support, the parties to an agreement or the court must consider the following objectives:

- (a) to recognize any economic advantages or disadvantages to the spouses arising from the relationship between the spouses or the breakdown of that relationship;
- (b) to apportion between the spouses any financial consequences arising from the care of their child, beyond the duty to provide support for the child;
- (c) to relieve any economic hardship of the spouses arising from the breakdown of the relationship between the spouses;
- (d) as far as practicable, to promote the economic self-sufficiency of each spouse within a reasonable period of time.

[88] With respect to the amount and duration of spousal support, s. 162 provides:

162 The amount and duration of spousal support, if any, must be determined on consideration of the conditions, means, needs, and other circumstances of each spouse, including the following:

- (a) the length of time the spouses lived together;
- (b) the functions performed by each spouse during the period they lived together;
- (c) an agreement between the spouses, or an order, relating to the support of either spouse.

[89] These provisions are similar to those found in ss. 15.2(4) and (6) of the Divorce Act, R.S.C., 1985, c. 3 (2nd Supp.).

[90] Mr. and Ms. McAdie were together from 1995 until 2013, a period of 18 years. Ms. McAdie had a responsible job at Bootlegger for some 12 years, during which she moved up from sales into management, with responsibility for opening new outlets. After working at Bootlegger, she took some schooling in 2000 for esthetics, and worked at the Estée Lauder cosmetics department in The Bay. When their eldest child was born, Ms. McAdie did some work for the esthetics school, teaching protocols for manicure and pedicures on a part-time basis, earning \$15 per hour. She discontinued working when she became pregnant with their second child. From that time on, she assumed the primary responsibility of raising and caring for the children. This is a significant factor in determining entitlement to support on a compensatory basis: *Chutter v. Chutter*, 2008 BCCA 507, at paras. 50-51.

[91] After separation, Ms. McAdie started working again in 2015. She did some training in Crossfit and became certified as a personal trainer. She then decided to go back into esthetics and was hired at Casbah Spa, where she received training on skincare lines and protocols of the spa. After two and one-half years she moved to a smaller boutique-style spa, and nine months later, she started at La Chic Skin Boutique, where she currently works as an esthetician. Her hours are sporadic, but her goal is to work full-time.

[92] I am satisfied that following the breakdown of their marriage, Ms. McAdie is entitled to spousal support on a contractual basis pursuant to the Separation Agreement, but also on a compensatory and on a needs-based approach, as set out in *Moge v. Moge*, [1992] 3 S.C.R. 813 and *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420.

[93] Ms. McAdie's declared income at line 150 of her income tax returns for the years 2013 to 2018 was as follows:

2013 \$80,200

2014 \$37,501

2015 \$1,592

2016 \$15,231

2017 \$22,341

2018 \$16,137

[94] Based on those income figures for Ms. McAdie, and an average income of \$231,291 for Mr. McAdie as determined from the net deposits into his holding company, 1494393 Alberta Ltd., Ms. McAdie has prepared Divorcemate calculations using the "With Child Support" formula under the Spousal Support Advisory Guidelines. The result for the year 2018 is a low of \$3,898, a mid-range of \$4,498, and a high of \$5,085.

[95] I am satisfied that the amount of spousal support set out in the Separation Agreement should be replaced by an order under the Family Law Act, as the spousal support under the agreement was based on a misrepresentation by Mr. McAdie that his annual income was \$150,000.

[96] As Ms. McAdie is not advancing a claim for spousal support during the period that Mr. McAdie was making the mortgage payments, I would make an order that the amount of spousal support Mr. McAdie is required to pay to Ms. McAdie be fixed at \$4,500 per month commencing March 1, 2018. As he has paid only \$2,184 from March 2018 until the present, he must pay arrears of \$56,316, and pay on-going spousal support in the amount of \$4,500 per month from April 1, 2019 onward. As this was a long-duration, traditional marriage, the order will be for an indefinite period.

SUMMARY AND CONCLUSION

[97] The property division provisions of the Separation Agreement are set aside pursuant to s. 93 of the Family Law Act and replaced with an order that the family property be divided equally in accordance with the Schedule set out earlier in these reasons.

[98] In order to achieve an equal apportionment between the two parties, Mr. McAdie must make an equalization payment to Ms. McAdie in the amount of \$803,054.

- [99] As well, there shall be an order that the parties divide evenly any Canada Pension Plan credits earned by either of them from January 1, 1995 to January 1, 2013.
- [100] For support purposes, and in accordance with s. 18 of the Federal Child Support Guidelines, Mr. McAdie's income is considered to be the average net revenue per year deposited in the account of 1494393 Alberta Ltd., not including the \$2,050,000 sale proceeds of McAdie Ventures, which is \$231,291 per year.
- [101] On the basis that Mr. McAdie's annual income is \$231,291, I find that he owes \$47,845 in arrears of child support. Going forward, he must pay \$3,118 per month in support for the two children commencing April 1, 2019. Extraordinary expenses of the children under s. 7 of the Federal Child Support Guidelines are to be shared in proportion to the parties' incomes.
- [102] Ms. McAdie is entitled to indefinite spousal support. As Mr. McAdie did not accurately disclose his income, the amount of spousal support set out in the Separation Agreement will be replaced by an order under the Family Law Act.
- [103] As Ms. McAdie is not advancing a claim for spousal support during the period that Mr. McAdie was making the mortgage payments, I order that the amount of spousal support Mr. McAdie is required to pay to Ms. McAdie is fixed at \$4,500 per month commencing March 1, 2018. As he has paid only \$2,184 from March 2018 until the present, he must pay arrears of \$56,316, and pay on-going spousal support in the amount of \$4,500 per month from April 1, 2019 onward.
- [104] Mr. McAdie and Ms. McAdie are to cooperate in making arrangements to either sell the Bahia property or agree to its value in a subsequent buyout.
- [105] Both parties shall exchange full financial information as would be required if the parties were to exchange Form F8 financial statements, including any corporate tax returns, corporate notices of assessment, and financial statements in any corporation a party has an interest in, to the other by June 30 of each year, commencing in 2020.
- [106] If the parties are unable to agree as to costs, they may appear before me for submissions.

The Honourable Mr. Justice W.F. Ehrcke

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