
CANADA / JUDGMENT

Megson v. Megson

2014 BCSC 2467

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Supreme Court of British Columbia

DECIDED

31 December 2014

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2014 BCSC 2467 Megson v. Megson

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Megson v. Megson,

2014 BCSC 2467

Date: 20141231

Docket: E132947

Registry: Victoria

Between:

Michael Alexander Megson

Claimant

And

Shawn Denise Megson

Respondent

Before: The Honourable Mr. Justice Fitch

Reasons for Judgment

Counsel for the Claimant:

Andrea Duncan

Craig Vaughan

Counsel for Respondent:

Megan Ellis, Q.C.

Place and Dates of Trial:

Victoria, B.C.

September 15-19, 2014

Place and Date of Judgment:

Victoria, B.C.

December 31, 2014

A. Introduction

- [1] Michael Megson (the "claimant") and Shawn Megson (the "respondent") were married on October 17, 1981. They separated on June 16, 2008.
- [2] On December 4, 2009 they entered into a comprehensive separation agreement addressing the division of their property, basic child support and s. 7 expenses, and spousal support.
- [3] The terms of the separation agreement were never incorporated into a court order and did not form part of the divorce order made January 20, 2010.
- [4] Paragraph 8 of the separation agreement obliges the claimant to pay the respondent \$25,000 per month in spousal support with the right to a review of both quantum and entitlement to spousal support as of August 1, 2017, regardless of whether there has been a change in circumstances.
- [5] Paragraph 9 of the separation agreement provides that either party may apply to the court to vary or terminate spousal support on a material change in circumstances.
- [6] Relying on paragraph 9 of the agreement, and s. 164(5) of the Family Law Act, S.B.C., 2011, c. 25 (FLA), the claimant contends that a drop in his income, first experienced in early 2013, together with an improvement in the condition, means and needs of the respondent, constitutes a material change in circumstances since the agreement was entered into. He seeks a reduction in spousal support mirroring what he says his reduction in income has been. He suggests that his obligation to pay spousal support should be reduced to about \$12,500 per month, retroactive to February 1, 2013.
- [7] The respondent says the claimant's circumstances have not materially changed since the agreement was executed. She submits that the claimant made a number of post-separation agreement business decisions and investments, some of which were foreseen when the agreement was entered into, as well as other personal choices that have likely increased his overall net worth but impaired his short-term income flow. In particular, she submits that the diversion of pre-tax corporate income away from the payment of bonuses to the claimant in order to service debt related to the acquisition by him of capital assets, is not a material change in circumstances warranting a reduction in spousal support. Further, she

resists the notion that income should be imputed to her relating to the operation of a wine importing and distributing company she formed shortly after the separation.

- [8] In addition, the respondent, by counterclaim, makes an originating application for spousal support pursuant to s. 15.2 of the Divorce Act, R.S.C. 1985, c. 3 (the "Act"). She relies on the principles in *Miglin v. Miglin*, [2013] 1 S.C.R. 303, 2003 SCC 24 and, in particular, those applicable at the first stage of the *Miglin* inquiry. She invites the Court to examine the circumstances in which the separation agreement was executed and conclude that the terms of the agreement should not stand due to fundamental flaws in the negotiation process. Should the Court be satisfied that the conditions under which the agreement was negotiated were satisfactory, the respondent submits that the amount of monthly spousal support the claimant is obliged to pay and the spousal support review term of the separation agreement constitute a significant departure from the objectives of a spousal support order as enumerated in the Act. She submits that this state of affairs warrants the intervention of the Court and the making of an order inconsistent with these two terms of the separation agreement. In particular, the respondent submits the Court should make an order, retroactive to 2011, obliging the claimant to pay spousal support in the amount of \$46,000 per month. Further, she submits she has a strong claim to compensatory support, which should be of an indefinite duration. She seeks an originating court order that would not be subject to a right of review in 2017.

B. The Evidence at Trial

- [9] Five witnesses were called at trial: the claimant; the respondent; Stewart Brown; Nick Lott; and Jane Henderson.
- [10] Mr. Brown, a chartered accountant, has a long-standing personal and professional relationship with both parties. For the last 20 years, he has provided accounting services in relation to the claimant's primary business interests, including: Megson Fitzpatrick Insurance Services Inc. ("MFI"); Merit Town and Country Insurance Services Ltd. ("Merit"); Shelbourne Properties Ltd. ("Shelbourne"); and Megatron Holdings Ltd. ("Megatron"), which was established in December 2013 to hold all of the claimant's shareholdings in MFI, Merit and Shelbourne.
- [11] MFI is a general insurance brokerage firm based in Victoria that was founded by the claimant's father. At the time of the separation agreement, the claimant owned a 34.054% stake in MFI, representing an undiscounted value of \$5,789,180.
- [12] Merit is in the same business as MFI. MFI is the main operating company. Merit operates as the brokerage firm arm of MFI. At the time of separation, the claimant held 20% of the common shares and 25% of the preferred shares of Merit, valued at \$1,000,000. Merit was wholly acquired by MFI in January 2014 for \$4,750,000. The details of that transaction will be set out later in these reasons.

- [13] Shelbourne is a holding company that owns the commercial strata housing MFI's head office. Shelbourne is owned equally by the claimant and his business partner, David Fitzpatrick. MFI pays fair market value rent to Shelbourne. At the time of the separation agreement, the claimant owned (and continues to own) 50% of the shares in Shelbourne.
- [14] Mr. Brown was called by the claimant as a fact-based witness. The claimant did not seek to have him qualified to give opinion evidence.
- [15] The parties waived settlement privilege to enable an exploration of the circumstances in which the final separation agreement was negotiated. Mr. Lott acted for the claimant in the negotiations leading to the execution of the final separation agreement dated December 4, 2009. Ms. Henderson acted for the respondent. At the time of the negotiations, both were very experienced family law practitioners.

C. The Relationship between the Parties, their Respective Roles in the Marriage, and the Events Leading up to the Separation

- [16] The claimant is 60 years of age. The respondent is 55 years of age. Their marriage lasted 27 years. They have two adult children.
- [17] In 1973, the claimant began working for his father's company, Megson Insurance, a Victoria-based general insurance brokerage firm. In 1977, he bought his father's interest in the firm. He was the sole principal of Megson Insurance for about 18 months before Mr. Fitzpatrick became a 50% owner of MFI in 1978. They have been business partners, and friends, ever since. They have never had a dispute relating to the operation of MFI or its related entities.
- [18] The respondent graduated from high school in 1977 and attended Simon Fraser University for 2 ½ years, studying history and sociology, before taking a break from school. Thereafter, she worked for Eaton's in their management training program. She met the claimant in 1980. She completed the management training program with Eaton's in 1981.
- [19] The parties married on October 17, 1981.
- [20] The respondent worked full time for Eaton's as a sales manager until she gave birth to their first child in 1984.
- [21] She worked in the human resources department for Eaton's on a part-time basis after their first child was born. Although the claimant had no specific memory of this, the respondent testified, and I accept, that she also sometimes helped at the offices of MFI, including as a receptionist. In addition, the respondent assisted with human resource issues, including by recommending job applicants for hire, and discussing with the claimant motivational strategies for MFI staff.
- [22] The parties celebrated the birth of their second child in 1987.
- [23] They purchased the former matrimonial home on Gulfview Place in 1991.

- [24] Eaton's declared bankruptcy in 1999. The respondent was out of the workforce until 2001 when she obtained employment as a special events manager for Sears. She worked four days a week and earned about \$25 per hour.
- [25] In 2001, the parties purchased a cottage on Sproat Lake with funds the respondent inherited from her mother.
- [26] Although the claimant also had no recollection of this, the respondent testified, and I accept, that her work outside the home caused tension in their relationship. The claimant expressed to her his preference that she be available to their family rather than working in a low-paying job.
- [27] Sears folded in 2002. Between 2002 and 2008, the respondent volunteered her time to various community and charitable causes but otherwise devoted herself to her family.
- [28] In 2002, the respondent also began taking university-level courses relating to the wine industry, with aspirations to become a sommelier. To gain experience, she volunteered to work as a wine representative for a businesswoman who was already established in the industry. The respondent's volunteer work involved featuring products at wine tastings in private stores. By 2008, the respondent was contemplating establishing a wine importing business to be called Earth Wines, but the idea had not come to fruition when the separation occurred.
- [29] The marriage was, in many respects, a traditional one. The claimant worked long hours to establish himself in the insurance business. Although it is apparent the claimant took an active and supporting role in raising the children, the respondent was primarily responsible for child care, household tasks and managing the affairs of the home. Her attention to domestic matters permitted the claimant to develop his skills and reputation in the insurance industry, and contributed significantly to their financial success.
- [30] The claimant testified that after the birth of their second child, the respondent was a "homemaker". He agreed she played the role of the wife of a prominent local businessman. They entertained frequently and she travelled with him on business trips. She supported him throughout the marriage as MFI grew and profited. She also supported him through a particularly busy year when he was president of the British Columbia branch of his professional association.
- [31] The claimant controlled the family finances and, over time, financial matters became a source of tension between the parties. As the respondent put it, money was never an easy topic of discussion. She said some of the claimant's earnings would be deposited into a joint account they used to run the house and that she had to go "cap in hand" to him for additional money if funds in the joint account ran short. He reminded her on these occasions that he was the one earning an income, and that he was responsible for the family finances. The claimant agreed there was conflict in the relationship about the amount of money being deposited to their joint account. He agreed that money "was an issue" but had little

recollection of specifics and no recollection of telling the respondent that he was the one who was earning an income. In fairness, he said that he may have said this and noted that it was a long marriage.

- [32] The respondent testified that, before the separation, she was unsure of the value of the family assets they shared. She testified the claimant received some of their financial statements at his office.
- [33] The respondent opened a chequing account in 1998 in an effort to establish a credit rating and obtain her own credit card.
- [34] The parties separated on June 16, 2008 when the respondent left the former matrimonial home. She lived in the Sproat Lake cottage until September 2008 at which time she moved to rental accommodations in Vancouver. She testified that she had family and friends in Vancouver at the time, including one of her daughters, and thought Vancouver would serve as a better base for developing the business of Earth Wines. In addition, the respondent believed it would be better moving forward if both parties did not live in Victoria.
- [35] Before the separation occurred, discussions were ongoing about the sale of MFI shares by the claimant and Mr. Fitzpatrick to the junior partners of the firm (the "minority shareholders"). These discussions were part of a succession plan involving the acquisition of MFI shares by the minority shareholders that began in 2003.
- [36] The fair market value of MFI as of July 31, 2008 was determined by Berris Mangan, a chartered accountant and business valuation firm, to be \$17 million.
- [37] Shortly after the separation, an agreement was reached between the claimant and Mr. Fitzpatrick, on the one hand, and the minority shareholders on the other, that the minority shareholders would be offered additional shares in MFI based on the \$17 million valuation, less a 5% minority shareholder discount. This acquisition of shares by the minority shareholders was completed in August 2008. In exchange for the shares, the claimant received from the minority shareholders promissory notes totalling \$1,170,875. The minority shareholders agreed to pay the claimant for the MFI shares they acquired in equal monthly installments plus interest at the prime rate charged by the Bank of Montreal. Payments to the claimant on the minority shareholder promissory notes began in January 2009.
- [38] As noted earlier, following the August 2008 sale of shares to minority shareholders, the claimant held 34.054% of the shares of MFI.
- [39] It was contemplated in 2008 that the minority shareholders would acquire additional shares of MFI in July 2011. In fact, this further acquisition of shares by the minority shareholders from the claimant and Mr. Fitzpatrick did not occur until January 2013.

[40] The disposition of further MFI shares by the claimant in January 2013 corresponds to the date on which he asserts that a material change in circumstances occurred. The sale of additional MFI shares, and the corresponding reduction in the claimant's dividend income, is one of the factors he relies on in asserting that a material change in circumstances has occurred warranting a significant downward variation of his monthly spousal support payments. In addition, the claimant says that his income was further reduced as a consequence of: (1) MFI's decision to acquire a new operating system in 2013, together with additional support staff costs attributable to this acquisition; and (2) a reduction in income on MFI's personal lines business attributable to insurers reducing the percentage commission they pay to MFI.

D. The Interim Separation Agreement: December 1, 2008

- [41] The claimant paid the respondent \$10,000 in interim monthly spousal support from the June 2008 separation date.
- [42] The parties entered into an interim separation agreement on December 1, 2008. The claimant agreed, on a without prejudice basis, to continue paying the respondent \$10,000 per month. Mr. Lott acted for the claimant in the preparation of the interim agreement. He testified that the \$10,000 per month spousal support figure was given to him by the claimant. It was not the subject of negotiations. Mr. Lott also testified that the interim agreement was executed before financial disclosure was made. He drafted the interim agreement based on the claimant's instructions, sent it to the respondent and received a signed copy back from her.
- [43] The claimant testified that the interim payments of \$10,000 per month came about as a result of request from Ms. Henderson made on behalf of the respondent. I accept Mr. Lott's recollection of events on this issue.
- [44] The parties later agreed that the claimant's 2008 Guidelines income was \$1,211,541.59.
- [45] Based on this, the respondent submits that the claimant, while living in the matrimonial home and controlling all of the parties' assets, except for the Sproat Lake cottage, agreed to pay her less than 10% of his gross income in interim spousal support.
- [46] The claimant disputes this contention. He submits that he paid the respondent \$10,000 per month in spousal support from the date of the separation, plus \$365,571 in three installments (\$30,000, \$65,000 and \$270,571) between the separation in June 2008 and May 2009. He says that over a 12-month period this equates to \$38,750 per month in spousal support.

- [47] The respondent counters that the \$30,000 payment was for spousal support for the months of June, July and August 2008 and that the claimant continued to pay her \$10,000 per month thereafter. She says that the two additional payments of \$65,000 and \$270,571 were lump sum payments of capital made by the claimant as advances on account of the division of family assets.
- [48] There is no doubt that these payments were made. A statement reconciling amounts the parties owed one another was prepared by Mr. Brown on October 14, 2009 (Annexure "C"). Mr. Brown confirmed that these three payments reflect lump sum payments made by the claimant to the respondent. He was not, however, asked to comment on whether these payments were spousal support payments or advances on the equalization of family assets. Neither of the parties addressed this issue in their evidence. While the state of the record on this point is less than clear, I find that the two payments of 65,000 and \$270,571 were not retroactive spousal support payments but represent advances on asset division. This conclusion is justified by the terms of Annexure "C" and the language of "Recital D (2)" and "Recital I" in the final separation agreement.

E. The Final Separation Agreement: December 4, 2009

- [49] As noted earlier, both parties were represented by experienced and capable family law practitioners before the final separation agreement was signed. Further, I am satisfied on the evidence that full financial disclosure was made by both parties before this agreement was signed.
- [50] For the purposes of the agreement, and in accordance with requirements of sections 15 to 20 and Schedule III of the Federal Child Support Guidelines (FCSG), the claimant was determined to have a three-year (2006-2008) average income of \$1,265,470.
- [51] The agreement contemplates the respondent earning future income from Earth Wines in an amount under \$50,000 per year.
- [52] Following negotiations, the parties were able to identify their family assets, value those assets, and agree to the terms upon which they would be split.
- [53] The claimant transferred his interest in the Sproat Lake cottage to the respondent. The respondent transferred her interest in the former matrimonial home on Gulfview Place to the claimant. The assessed value of the two properties was roughly equivalent.
- [54] The parties equally divided their RRSP holdings totalling approximately \$600,000 and non-registered GICs totalling about \$480,000. They also agreed to divide vehicles and a speedboat they owned on separation.
- [55] A schedule reflecting the agreement of the parties on the valuation of their corporate assets was prepared by Mr. Brown and attached to the final separation agreement as Annexure "B".

- [56] As the 2008 minority shareholder promissory notes payable to the claimant were not transferable, the parties agreed that monthly payments on the minority shareholder notes would be equally divided between them. The respondent's one-half share of the total amounts owing under the minority shareholder notes was \$585,438.
- [57] Valuation of the claimant's remaining MFI shares, his principal corporate holding, was determined in the following way. The claimant owned 34.054% of the common shares of MFI when the final separation agreement was executed. In June 2008 Berris Mangan valued MFI at \$17,000,000. This valuation was obtained in contemplation of the sale of MFI shares to the minority shareholders.
- [58] To calculate the claimant's net corporate worth and the equalization payment due the respondent, the claimant's MFI shares were made the subject of the same 5% minority shareholder discount negotiated at the time of the sale to the minority shareholders. This resulted in a valuation of all shares in MFI at \$16,150,000. The shares in MFI were further discounted by 17.03%. Mr. Brown testified that the 17.03% discount relates to estimated future capital gains tax that would be paid on disposition of the shares. While capital gains tax is 22%, this amount would not be paid until the disposal of the shares at a future date. Mr. Brown testified that, as a consequence, the discount is usually reduced to between 10% and 11%. He testified that, in this case, the claimant wanted a greater discount on the shares because his family started the business. Although the issue became a contentious one in negotiations leading up to the execution of the final separation agreement, the shares were, in fact, further discounted by 17.03% to reach a discounted value of \$13,400,000. Based on this figure, the claimant's 34.054% share holdings in MFI were valued at \$4,563,236. I note here that the claimant's shares were discounted despite the fact that he and Mr. Fitzpatrick together controlled the majority of MFI shares.
- [59] The claimant's 20% ownership of the common shares of Merit was valued at \$800,000. His 25% ownership of the preferred shares in Merit was valued at \$200,000.
- [60] The claimant's total net worth from corporate holdings (MFI, Merit and Shelbourne) was estimated to be \$8,060,776. The respondent's one-half share was, therefore, \$4,030,388. After deducting \$585,438 due to the respondent as her one-half share of the amounts payable by the minority shareholders under the promissory notes, the equalization payment due the respondent was determined to be \$3,445,000.
- [61] The equalization payment owed by the claimant to the respondent, and the manner in which it would be paid, was addressed in paragraph 18 the final separation agreement:

EQUALIZING PAYMENT

18. To equalize the division of their assets and to make the adjustments referred to in Recital I respecting disabilities or advantages and disadvantages arising out of the marriage or otherwise between the parties, and the needs of each of them to become and remain economically independent and self-sufficient, when this Agreement is signed Michael agrees:
- (a) To pay Shawn \$2,620,968 for her interest in all Michael's assets apart from the Merit shares, on the following terms:
- i. The full amount is to be secured by a promissory note dated August 1, 2009 (Shawn's note);
 - ii. Michael will make monthly interest only payments on Shawn's note commencing August 1, 2009, based on the Bank of Montréal prime rate plus 1%, compounded and adjusted semi-annually, on November 15th and May 15th, during the term of the note;
 - iii. Shawn's note will be due and payable on Michael's death or 10 years after the date the note is signed by Michael, whichever date occurs first;
 - iv. For clarity, the amount to be paid by Michael pursuant to this clause is arrived at as follows:
\$3,445,000 (shown in Annexure "B"), less \$24,032 (owing by Shawn to Michael in Annexure "C") [representing adjustments made for various bank accounts, a GIC and monies paid on the minority shareholder notes to the date of the final separation agreement];
 - v. The \$400,000 paid by Michael to Shawn after August 1, 2009 will be credited against the principal of Shawn's note from the date he paid it.
- (b) Shawn and Michael agree:
- i. Shawn hereby grants Michael an option (the "Option") to purchase all her shares and interest in Merit Town & Country Insurance Services Ltd. ("Merit") as described in Annexure "B" for \$800,000 by giving written notice of exercise of such option to Shawn on or before June 30, 2010;
 - ii. Upon exercise of the Option the purchase price shall be secured as follows:
 - 1) The amount is to be secured by a promissory note dated as of the date of exercise of the Option ("Shawn's second note");
 - 2) Interest will accrue on Shawn's second note commencing August 1, 2009, based on the Bank of Montréal prime rate plus 1%, compounded and adjusted semi-annually, on November 15th and May 15th, during the term of the note;
 - 3) Michael will make monthly interest only payments on Shawn's second note upon the transfer of the Merit shares to Michael pursuant to the option;

- 4) Shawn's second note will be due and payable on Michael's death or 10 years after the date the second note is signed by Michael, whichever date occurs first.
- (c) Should Michael in the future sell any of [his corporate] shares 50% of the net sale proceeds therefrom shall be paid to Shawn to reduce the balance owing on Shawn's notes. If Michael sells shares for a net amount that is more than the then outstanding balance owing on the notes, the balance owing on Shawn's notes is to be paid off.
- [62] To summarize, the value of the Megsons' MFI shares before being discounted was \$5,789,180 (34.054 % of \$17,000,000). The respondent received credit for 50% of a discounted value of \$4,563,236. The respondent retained the common shares in Merit for an undiscounted amount of \$800,000, but the claimant received the preferred shares in Merit and an option to purchase the common shares on the same terms as the MFI (and Shelbourne) shares - an option he exercised in 2010. He also retained the income stream from the Merit shares. In short, the agreement with respect to asset division is such that the claimant received all the benefit attached to ownership of the shares. The respondent received an equalization payment in the form of promissory notes at prime plus 1%. The claimant was not obliged to pledge security for the loan. He was not obliged to make any payment toward the principal amount due under the notes for up to 10 years unless he sold shares, in which case 50% of the net sale proceeds were to be paid to the respondent to reduce the amount owing on the notes. At the same time, he had no restriction on pre-paying the principal amount of the loans secured by the promissory notes.
- [63] When asked in chief how he planned to pay off the promissory notes, the claimant testified that, short of winning the lottery, he thought he would have to sell a portion of his interest in MFI. Despite this, the claimant acknowledged in cross-examination that, in relation to the division of corporate assets, he "probably couldn't get as good a deal anywhere else".
- [64] Paragraphs 8 and 9 of the final separation agreement address spousal support:

SPOUSAL SUPPORT

8. Michael will pay Shawn \$25,000 per month spousal support commencing August 1, 2009 with the right to a review of both quantum and entitlement to spousal support as of August 1, 2017, regardless of whether there has been a change in circumstances.
9. Either party may apply to the court to vary or terminate spousal support upon a material change in circumstances.
- [65] The division of amounts payable pursuant to the minority shareholder promissory notes was addressed in paragraph 14:

MINORITY SHAREHOLDER NOTES

14. Michael and Shawn agree the monthly payments on the minority shareholder notes will be equally divided between them, with each party being responsible to declare such payments on their own income tax returns annually. Michael will be a trustee for Shawn of her share in the notes and agrees the monthly payments to Shawn will be made by automatic bank transfer. Shawn agrees she has been receiving her share of the monthly payments since August 1, 2009.

[66] The final separation agreement addressed the resolution of disputes in paragraph 26:

DISPUTES

26. If a dispute arises concerning this Agreement, the parties will use best efforts to resolve the dispute through mediation before taking court proceedings.

[67] Paragraph 40 of the final separation agreement contains the following acknowledgments:

ACKNOWLEDGMENTS

40. Each of the parties acknowledges that he or she:
- a) has had independent legal advice in respect of rights against and obligations to the other party under the law and this Agreement;
 - b) has read the entire Agreement carefully;
 - c) knows and understands the contents of this Agreement;
 - d) is fully aware of the effect, purpose and intent of this Agreement;
 - e) is signing this Agreement voluntarily without any undue influence or coercion by the other;
 - f) has fully disclosed financial means and circumstances to the other;
 - g) is satisfied with the settlement of all matters in dispute between the parties, including the division of assets and allocation of responsibility for debts;
 - h) is satisfied that this Agreement provides adequately for personal present and future needs;
 - i) after the terms of this Agreement are carried out, will be able to pay current and reasonably foreseeable debts and obligations as they fall due;
 - j) believes that this Agreement will not result in circumstances that are unconscionable or unfair to the other party; and
 - k) understands that the provisions of this Agreement, if considered by the Supreme Court to be substantially unfair due to the non-disclosure of a material fact, may be reviewed and varied by the Court despite the mutual agreement of the parties that this agreement is final and binding.

F. Negotiations that Led to the Final Separation Agreement

[68] On July 13, 2009, the parties, their counsel, and Mr. Brown participated in a day-long meeting resulting in the preparation by Mr. Lott of a Settlement Memorandum.

[69] The negotiations centered on the following contentious points:

- the amount the claimant should pay the respondent per month in spousal support;
- whether the agreement would incorporate a term giving the claimant a right to review quantum and the respondent's entitlement to spousal support without demonstrating a change in circumstances and, if so, when that right to review would arise;
- the extent to which the MFI shares would be discounted;
- whether the respondent would retain an ownership interest in the companies and, if she did, whether a butterfly transaction would be required to preserve her separate shareholdings;
- if the claimant retained the corporate shareholdings, the terms of the buyout and, in particular, how the respondent would be compensated for her one-half interest in the parties' corporate holdings; and
- whether the contemplated sale of additional MFI shares by the claimant to the minority shareholders would be defined in the agreement to constitute a "material change in circumstances".

[70] With respect to the respondent's entitlement to spousal support, the claimant testified that, going into the meeting on July 13, 2009, he was hopeful he would not have to pay any spousal support after asset division. Mr. Brown testified the claimant told him he did not think he would have to pay spousal support after property division issues were settled.

[71] With respect to the quantum of spousal support, and given that the claimant's gross annual income exceeded \$350,000, it was recognized that application of the Spousal Support Advisory Guidelines (SSAG) was discretionary. Proposals were made on the respondent's behalf based on the SSAG, including at the meeting on July 13, 2009. The respondent recalls a Guidelines amount of \$40,000 per month being written on a white board during the meeting. The respondent testified the claimant became emotional, said he could not afford to make such a monthly payment and that he would not consider it. The claimant does not recall these events. I accept the respondent's evidence on this point as it is consistent with the other evidence I do accept, including the evidence of Ms. Henderson, and the evidence of Mr. Brown who agreed that the claimant became visibly upset and strongly resisted paying spousal support during the meeting.

- [72] The respondent testified the gist of the discussion was that if she wanted to leave with a deal, she would have to accept \$25,000 per month in spousal support. While I accept the evidence of the claimant and Mr. Lott that the spousal support terms of the final separation agreement were the product of negotiations between the parties, it is apparent from the evidence as a whole that the claimant was not prepared to entertain discussion of a monthly payment that exceeded \$25,000.
- [73] Ms. Henderson testified that \$25,000 per month in spousal support was less than her SSAG calculations, and she advised the respondent, in the presence of others in attendance at the meeting, not to accept the claimant's offer. The respondent confirmed Ms. Henderson's evidence on this point. Although the claimant testified he had no recollection of Ms. Henderson advising the respondent not to agree to spousal support payments of \$25,000 per month, I accept that this advice was given to the respondent during the meeting.
- [74] The respondent testified that the deal would not have been done had she not agreed to accept a spousal support payment of \$25,000 per month. She agreed to accept the offer because a resolution of the matter would enable her to get on with her life and invest in Earth Wines. In addition, the respondent testified that she understood the claimant was speaking to their children throughout the negotiations about the financial devastation he would experience as a consequence of the separation. The respondent recalled one occasion on which the claimant said, in the presence of one of their children, that she needed to suffer for leaving him. The respondent acknowledged in her evidence that this was an emotional time for both of the parties, but said she harboured deep-seated concerns about the disruptive impact the claimant's remarks would have on their children. Mr. Brown confirmed the respondent's evidence that she expressed during the meeting a need for finality and certainty.
- [75] The respondent gave similar evidence about her eventual acceptance of the term in the final separation agreement giving the claimant a right to review both quantum and her entitlement to spousal support as of August 1, 2017, regardless of whether there has been a change in circumstances. The respondent testified that she did not want this term, but acceded to the claimant's position on this point to achieve a settlement. Ms. Henderson was not asked to address this issue. Mr. Lott recalled the parties agreeing to an eight-year review term. The claimant testified that the respondent offered an earlier right of review if he agreed to pay \$30,000 per month in spousal support. He testified that the parties subsequently agreed to a lower monthly payment and a later right of review.
- [76] The claimant noted that the children were adults at the time of the separation and that while he may have said "some things" to them, he had no recollection of telling the children their mother should be punished for leaving him.

- [77] The claimant was adamant that he wanted to retain the corporate shares. By May 2009, the respondent agreed to be bought out but made clear she wanted to be paid in full for her one-half interest in their corporate assets. The possibility of dividing the shares held by the parties through a butterfly transaction was taken off the table.
- [78] The claimant had discussions with the Bank of Montreal about financing a share buyout but declined to proceed in this direction as it would involve MFI providing a corporate guarantee for the loan. He told the respondent the only way the deal could be done is if she agreed to finance his acquisition of her one-half interest in their corporate holdings. The respondent did not wish to proceed in this way, but agreed to accept the promissory notes as payment because a deal would not otherwise be reached. Ms. Henderson testified, and I accept, that by the July 2009 meeting both parties understood that the respondent would finance the claimant's acquisition of her one-half interest in their corporate shareholdings.
- [79] The respondent testified that the extent to which MFI shares should be discounted was the subject of heated discussions between the parties. The claimant denied there was any disagreement or argument about the minority shareholder discount he should get on the valuation of his MFI shares. He said Mr. Brown simply presented it in this way, and there was no real discussion about it. The claimant testified the argument was about whether the respondent would retain corporate shares or whether he would buy her out. I do not accept the claimant's recollection on this point. It is inconsistent with the rest of the evidence I do accept, including the evidence of Ms. Henderson who testified that the amount by which the MFI shares would be discounted was a "critical issue" in the negotiations, and the evidence of Mr. Brown who testified that the claimant pressed the respondent to accept higher share discount than would normally be used.
- [80] The respondent testified the claimant became quite emotional about the discount issue during the meeting. She said she eventually agreed to a total discount of 22.03% to move the discussions forward, and because she thought it would buy goodwill in her future dealings with the claimant. With respect to the discount on the MFI shares, Ms. Henderson testified that the respondent wanted to get a deal done and was going to have to make concessions, including in relation to the claimant's proposed discount, to achieve a settlement.
- [81] Ms. Henderson's evidence tends to support the respondent's experience of the negotiations leading up to the final separation agreement. She described the claimant as petulant and demanding, and unwilling to make concessions. By contrast, she described the respondent as "extremely accommodating". She testified that the atmosphere of the meeting was such that it was clear the respondent was going to have to make concessions to achieve an agreement.
- [82] When the final separation agreement was concluded, it was contemplated that the claimant would sell additional MFI shares to the minority shareholders in 2011. Ms. Henderson, for the respondent, would not agree to the inclusion of language in the agreement that would define a further disposition of MFI shares by the claimant as a material change in

circumstances. Communications between counsel at the relevant time, and Ms. Henderson's evidence, confirm that she was not prepared to define what might constitute a material change in circumstances "in the abstract". As a result of Ms. Henderson's position on this point, the claimant's proposed language defining a further share sale to be a material change in circumstances was not included in the final separation agreement.

- [83] It is common ground that shortly after the July 2009 meeting, the claimant sought to renegotiate what had been agreed to in the Settlement Memorandum. Specifically, the claimant sought to increase the time for payment on the promissory notes from 10 to 15 years, and cap the interest rate payable under those notes. The respondent refused to agree to either of these proposed changes.
- [84] Based on the calculation of the parties' respective incomes as reflected in the final separation agreement (which included receipt by the respondent of income under the MFI and minority shareholder promissory notes and spousal support payments, but did not otherwise impute to her any income in relation to the operation of Earth Wines) the SSAG mid-point would have been about \$38,000 per month. Spousal support in the amount of \$25,000 per month left the respondent with approximately 34% of their net disposable income.
- [85] Following execution of the final separation agreement, the respondent began receiving each month: \$25,000 in spousal support payments; \$8,000 in payments on the MFI promissory note (this amount was reduced to \$6,375 per month by the middle of 2010 largely as a result of two principal payments made by the claimant on the MFI note in August and December 2009 totalling \$650,000) and \$5,865 representing her one-half share of the amounts being paid to the claimant by the minority shareholders.

G. The Claimant Exercises His Option to Purchase the Merit Shares from the Respondent

- [86] In March 2010, the claimant exercised his option to purchase the respondent's shares in Merit for \$800,000. As contemplated by the terms of the final separation agreement, the respondent received from the claimant a promissory note for the whole of the purchase price at prime plus 1%.
- [87] The claimant made a principal payment on this promissory note of \$600,000 in June 2010 by taking out a mortgage on his house (the former matrimonial home). He testified that his mortgage interest rate was 3.65%, which was tax deductible. His effective cost of borrowing these funds was, accordingly, less than 2%. By taking out the mortgage, he reduced the amount he owed the respondent under the Merit promissory note (on which he was paying 3.5%) and exchanged that debt for a mortgage on which he was paying an effective interest rate of less than 2%, thus achieving an overall savings.

- [88] The claimant paid the balance owing under the Merit promissory note (\$229,672) in January 2013 after selling more of his MFI shares to minority shareholders. The circumstances of this transaction are discussed in greater detail below.

H. Changes in the Claimant's Compensation

- [89] Before 2009, the claimant received an annual salary from MFI of about \$100,000 per year, plus an annual management fee from Merit totalling \$60,000 per year. The claimant did receive some dividend income between 2006 and 2008, but the vast majority of his compensation was received by way of a balloon payment taken as a bonus against MFI's end of fiscal year earnings. For example, in 2007 the claimant earned \$1,242,035 in employment income (about \$1,100,000 of which was received as a bonus payment) and \$30,797 in taxable dividends. In 2008, the claimant earned \$1,060,997 in employment income (about \$900,000 of which was received as a bonus payment) and \$28,704 in taxable dividends. The claimant would receive the bonus payment the year after it was declared. Accordingly, the claimant's income in 2008 reflected the bonus declared in 2007.
- [90] From 2009, the claimant began receiving a much larger portion of his total income as taxable dividends. For example, in 2009 he received \$493,475 in employment related salary or bonuses, and \$626,783 in taxable dividends. His total income in 2009 was \$1,219,672. In 2010, the claimant received \$270,045 in employment related salary or bonuses, and \$685,655 in taxable dividends. His total income in 2010 was \$1,031,259. In 2011, the claimant received \$230,772 in employment related salary or bonuses, and \$971,202 in taxable dividends. His total income in 2011 was \$1,306,882. In 2012, the claimant received \$167,800 in employment related salary or bonuses, and \$1,109,077 in taxable dividends. His total income in 2012 was \$1,371,905.
- [91] The claimant testified, and Mr. Brown confirmed, that after 2009 it became more advantageous from a tax perspective for the claimant to receive income as taxable dividends rather than employment related salary and bonuses.
- [92] The claimant did not actually receive the amount of taxable dividends reported on his tax return because taxable dividends are grossed up for reporting purposes.
- [93] Mr. Brown testified that the gross up for eligible dividends is between 40% and 42%. Non-eligible dividends are grossed up by 25% for tax purposes.
- [94] The following chart illustrates the actual dividends received by the claimant between 2009 and 2013:

2009: \$626,782 reported as taxable dividends

\$413,945 in eligible dividends = \$295,675 before 40% gross up

\$212,837 in non-eligible dividends = \$170,269 before 25% gross up

Amount of actual dividends before gross up = \$465,944

2010: \$696,799 reported as taxable dividends

\$552,787 in eligible dividends = \$394,847 before 40% gross up

\$144,012 in non-eligible dividends = \$115,209 before 25% gross up

Amount of actual dividends before gross up: \$510,056

2011: \$971,202 reported as taxable dividends

\$833,140 in eligible dividends = \$595,100 before 40% gross up

\$138,061 in non-eligible dividends = \$110,448 before 25% gross up

Amount of actual dividends before gross up: \$705,548

2012: \$1,191,577 reported as taxable dividends

\$1,109,077 in eligible dividends = \$792,197 before 40% gross up

\$82,500 in non-eligible dividends = \$66,000 before 25% gross up

Amount of actual dividends before gross up: \$858,197

2013: \$531,570 reported as taxable dividends

\$531,570 in eligible dividends = \$379,692 before 40% gross up

Amount of actual dividends before gross up: the \$379,692

[95] Mr. Brown explained in cross-examination that the claimant would have to pay 43.7% tax on salary or bonuses whereas, on eligible dividends, he pays about 25% tax. As a rule of thumb, in terms of what the claimant would net after taxes, \$1,000,000 received as salary is roughly the equivalent of \$750,000 received as eligible dividends.

I. The Claimant Sells Additional MFI Shares to the Minority Shareholders: January 17, 2013

[96] As noted earlier, both parties were aware when the final separation agreement was executed that the claimant and Mr. Fitzpatrick intended to sell additional shares in MFI to the minority shareholders. Although it was anticipated that this transaction would complete in 2011 it did not, in fact, complete until 2013. There was no minority shareholder discount applied to the 2013 purchase of MFI shares by the junior partners.

[97] Even though this further disposition of shares to the minority shareholders was within the contemplation of the parties when the final separation agreement was executed, and was not defined in the agreement as a material change in circumstances, on July 12, 2011 (just 19 months after the execution of that agreement) the claimant wrote the respondent this email:

I am writing you this email to give you a heads up as to a future change in circumstances which will impact both of us.

As you may remember, I have an obligation (which pre-dates our separation) to sell [additional] shares to my junior partners with an effective date of Aug 01/11

The impact on [sic] this share sale will be twofold:

1. You will receive a significant lump sum of cash (at least 50% of the sale less applicable taxes) which will serve to reduce the principal owing you;
2. As you know, the largest contributor to my annual income is the dividends received from my % share ownership in the business. Subsequent to the share sale my annual income will be reduced accordingly, which will affect the ability to maintain your monthly support payment at its current level.

I thought it was important to let you know of these pending changes so you, like myself, can plan around this change to our respective financial pictures going forward. Once the details of the sale become clearer and the impact of this change is known, I will contact you and review the matter so we can work on a fair and equitable solution for each of us going forward.

[98] On January 3, 2013 the claimant sent another email to the respondent advising that:

I am in the process of finally closing the deal to sell a good portion of my shares in MFI and I am pleased to advise you that it is my intention to pay you out in full on the promissory notes

The sale of the shares and the repayment of the promissory notes obviously constitutes a material change in circumstances and thus it will necessitate altering the terms of our agreement. Given this I thought it would be prudent to give you a heads up that you will be receiving a letter from my lawyer on or about January 17th outlining the proposed changes to our agreement along with a cheque in full payment of the promissory notes.

[99] The claimant sent these emails despite acknowledging in his examination in chief that he did not know how much change would have to occur for it to qualify as a "material change in circumstances" under the final separation agreement.

[100] On January 17, 2013 the claimant sold 27% of his shares in MFI (representing 9.054% of the total shares in MFI) to his junior partners for \$1,629,783. The payment was based on an updated Berris Mangan valuation of MFI of \$18,000,000. The claimant was not obliged to sell this number of shares to the minority shareholders and, in fact, sold 3.652% (or 403,200) more of his shares than did Mr. Fitzpatrick. As a consequence of the sale, the claimant received \$657,392 more than the amount received by Mr. Fitzpatrick. The sale left the claimant with a 25% interest in MFI. Based on the \$18,000,000 valuation, the claimant, despite receiving significant shareholder payments since 2009, continued to hold shares in MFI valued at \$4,500,000. It will be recalled that the discounted value of the 34.054% of MFI shares the claimant held at separation were valued at \$4,563,000.

- [101] It should be noted that Mr. Brown testified the claimant was earning somewhere between 11% and 16.6% on his MFI shares at the time of the sale. He used the proceeds of this share sale to pay off debt owed to the respondent under the promissory notes in respect of which he was then paying 4% interest.
- [102] The claimant testified he was aware that a reduction in his MFI shareholdings from 34% to 25% would reduce his monthly cash flow.
- [103] By the terms of the separation agreement, the claimant was obliged to apply 50% of the net proceeds of the share sale (estimated to be \$637,891 net of capital gains tax) to pay down the promissory notes held by the respondent.
- [104] Despite this, the claimant elected to pay the entire amount he owed the respondent on the two promissory notes. The amount then outstanding on the MFI promissory note was \$1,958,107. The amount then outstanding on the Merit promissory note was \$229,481. Factoring in an additional sum for accrued interest, the claimant issued a cheque to the respondent for \$2,192,623 representing payment in full of the amounts outstanding under both promissory notes ("the share payout").
- [105] The share payout proceeds were sourced from the \$1,629,782 the claimant received on the disposition of further MFI shares to the minority shareholders, and an additional \$500,000 in cash he had accumulated since 2008. It was put to the claimant in cross-examination that he must have concluded he could not make more than 4% (roughly what he was paying the respondent on the promissory notes) by investing a portion of this money in some other way. The claimant testified that he chose to pay off debt as a matter of personal choice rather than use the money for anything else.
- [106] From the respondent's perspective, full payment on the promissory notes would only make a significant difference to her situation if she was able to invest the funds she received at a significantly higher rate than prime plus 1%. In fact, the respondent testified she is now receiving between 4.5% and 5% on her investments. This is only marginally higher than the interest she was earning on the promissory notes.
- [107] The claimant also elected to make lump sum principal payments on his mortgage of \$120,000 in 2012, and \$100,000 in 2013. In addition, he recently increased his monthly mortgage payments. He did so despite the fact that the debt carrying cost of his mortgage loan is less than 2%. The claimant's mortgage on the Gulfview property will be paid off in the next year. Once again, the claimant attributed these prepayments to a personal decision to pay down debt.
- [108] The claimant acknowledged in cross-examination that he chose to accelerate the payment of "cheap debt" -- the promissory notes owed to the respondent and his mortgage -- by using the money he was paid from the sale of MFI shares to minority shareholders along with other sums of money he had invested at the time. He denied doing this as a strategy to reduce his income.

[109] By letter dated January 23, 2013 the claimant's then lawyer (not Mr. Lott) wrote the respondent's then lawyer (not Ms. Henderson) this letter:

Variation of Spousal Support

Mr. Megson characterizes the payment to Ms. Megson of the share payout as a material change in circumstances, pursuant to paragraph 9 of the Separation Agreement, which entitles him to vary (not to terminate) the amount of spousal support that he pays to her.

Mr. Megson proposes to calculate the amount of spousal support that he should now pay by applying the Spousal Support Advisory Guidelines. It is, therefore, necessary to determine the Guideline income for each of the parties.

Mr. Megson's Guideline Income

Mr. Megson's obligation to pay spousal support to Ms. Megson in the Separation Agreement was based on his Guideline income of \$1,265,470. That Guideline income included salary and dividend income that he received from MFI

until full payment of the promissory notes, it was appropriate to include all of the dividend income Mr. Megson received from MFI in calculating Mr. Megson's Guideline income.

With the payment of the share payout, Mr. Megson says that he has paid to Ms. Megson her share of the capitalized value of the income from MFI and Merit that he will continue to receive and, therefore, these various sources of income, that were capitalized and that he now receives, should be excluded from the calculation of his Guideline income

Mr. Megson says, therefore, that his Guideline income for the purposes of the new spousal support payment should be \$167,800 calculated as follows:

- i. salary income from MFI - \$100,000 per annum;
- ii. car allowance from MFI - \$7,800 per annum; and
- iii. bonus income from Merit - \$60,000 per annum.

[110] Less permissible deductions from income, Mr. Megson's Guidelines income was said to be \$156,551.

[111] This letter from the claimant's counsel also proposed imputing to the respondent a Guidelines income of \$45,000 per annum to take into account the income earning capacity of Earth Wines.

[112] Mr. Megson's then counsel advised that, based on these amounts, the SSAG mid-range was \$4,067 per month. He proposed varying the amount of monthly spousal support to this amount effective February 1, 2013, one week from the date of the letter. He noted that if the parties could not agree on the proposed variation, paragraph 26 of the separation agreement (the dispute resolution provision) would apply.

- [113] The respondent rejected the claimant's position. She argued that payment of the promissory notes was expressly contemplated by the agreement and could not be considered a material change in circumstances that would give rise to variation in spousal support. Despite this, and the existence of the provision in the final separation agreement respecting dispute resolution, the claimant proceeded, in February 2013, to reduce his monthly support payments to \$12,500.
- [114] In June 2013, after mediation proved unsuccessful, the claimant reinstated his \$25,000 per month spousal support payment and paid off arrears owing as a consequence of his unilateral decision to reduce in half his spousal support obligations in February 2013.
- [115] When the claimant was asked to justify in cross-examination his unilateral decision to reduce spousal support by 50% upon selling 27% of his MFI shares (thereby reducing his income from MFI by no more than 27% provided MFI's income remained the same) the claimant admitted this was a terrible mistake and attributed it to poor legal advice.
- [116] The claimant commenced the action to reduce his spousal support payments on August 28, 2013. In "Schedule 3 - Spousal Support" to the claimant's Notice of Family Claim, he reported that his projected gross annual income for 2013 would be \$843,000. I pause to note that seven months earlier the claimant's then lawyer advanced the position that his Guidelines income was \$156,551. The claimant estimated the respondent's gross annual income to be \$115,000, comprised of income she earns from investments, plus self-employment income (from Earth Wines) of \$45,000.
- [117] As counsel for the respondent noted, if the Court accepted the incomes set out in the claimant's pleadings, the SSAG mid-range reflects a spousal support payment of \$24,901 per month, almost exactly what the claimant has been paying since execution of the final separation agreement.

J. Increased Operational Costs: June - November 2013

- [118] The claimant testified that MFI purchased a new broker management system in 2013 at a cost of about \$944,000, plus annual maintenance costs of \$200,000. MFI borrowed \$400,000 to implement the system. To service the new management system, MFI was obliged to create another support staff position and, as a result, incurred additional salary costs.
- [119] In addition, the claimant testified that in 2013 MFI experienced a reduction in income on its personal lines following a reduction in commission paid on this business.
- [120] In cross-examination, the claimant testified that the loan to finance the new management system will be paid off in five years. He acknowledged that the system was acquired because it is expected to generate organizational efficiencies and essentially pay for itself.

K. MFI's Acquisition of Merit in January 2014

- [121] In January 2014, MFI acquired Merit for \$4,757,000. MFI financed the whole of its acquisition of Merit and paid Merit's shareholders in cash.
- [122] The claimant was, through Megatron, a shareholder of Merit and received \$974,000 from MFI for his Merit shares.
- [123] As a 25% shareholder in MFI, the claimant acquired a 25% stake in what was Merit. With the acquisition of Merit, the value of MFI is now approximately \$22,757,000 (the \$18,000,000 Berris Mangan valuation plus the value of Merit) less the amount owed on the bank loan to buy Merit. As the loan is paid off, the value of MFI will increase. The loan will be paid off in 10 years. At that time, and even assuming no increase in value, the claimant will have a 25% share of the company worth \$22,757,000, or corporate assets totalling \$5,689,250. The claimant agreed that his hope and expectation is that his dividends will increase as MFI debt relating to the acquisition of Merit is paid.
- [124] The claimant testified that one of the conditions of the loan MFI took out to acquire Merit was that a certain amount of money had to be kept as retained earnings in MFI as equity for the loan. This debt servicing ratio has had an impact on MFI's ability to pay shareholders from corporate earnings.
- [125] The claimant acknowledged that MFI decided to acquire Merit because it was anticipated there would be an economic benefit to be derived from the amalgamation of the two companies. The purchase of Merit by MFI was also seen as a way of facilitating the growth of the business. Mr. Brown testified that he thought it was a good idea for MFI to acquire Merit because it was a growing company and it was better to operate the business as one entity and realize savings in shared resources.

L. Shelbourne

- [126] In 2013, the strata unit owned by Shelbourne and rented by MFI was assessed at \$1,121,000. Shelbourne is owned in equal shares by the claimant and Mr. Fitzpatrick. Each of them borrowed \$300,000 to loan to Shelbourne. Shelbourne, in turn, owes the claimant and Mr. Fitzpatrick this amount, some of which has now been retired. The claimant's bank loan will be paid by the end of this year. After that, the income stream from Shelbourne (of which about \$28,000 per year is available to the claimant) will likely be applied to pay shareholders loans and, thereafter, will be available to be taken as income.
- [127] At the time of separation, the claimant's shares in Shelbourne were valued at \$50,000. In 2013, the claimant's shares in Shelbourne were worth about \$166,000.

M. The Claimant's Current Circumstances

- [128] In 2013, the claimant received \$171,100 in employment related salary or bonuses, and reported \$531,570 in eligible taxable dividends. As noted earlier, the amount of actual dividends received by the claimant in 2013 was \$379,692. In addition, he reported a \$750,554 taxable capital gain on the sale of shares to the minority shareholders. The claimant's total income in 2013 (including the taxable capital gain) was \$1,508,770.
- [129] As noted earlier, the claimant used all of the funds he received from the sale of additional MFI shares to minority shareholders to pay the full amount owing to the respondent on the promissory notes. His debt to her resulting from the equalization of their corporate assets has now been retired.
- [130] The claimant continues to receive \$100,000 in annual income from MFI. As Merit has been acquired by MFI, the claimant no longer receives a management fee from Merit. He receives monthly dividend payments from MFI between \$22,000 and \$27,500. From January to the end of April 2014, he was receiving \$22,000 per month in dividend payments. Since May 2014, he has been receiving \$27,500 per month in dividend payments. In addition, the claimant is owed \$276,000 in contingent profit commissions that have not yet been paid to him by MFI. As I understood Mr. Brown's evidence, this amount will be paid in 2015.
- [131] The claimant currently has about \$960,000 invested in Megatron. He holds RRSPs having a current market value of about \$445,000. His non-registered investments total about \$246,000. He continues to carry a mortgage on the former matrimonial home on Gulfview with a balance of just over \$200,000.
- [132] The claimant agreed in cross-examination that market conditions in the insurance industry have been stable over the past few years. He also agreed with a proposition put to him in cross-examination that the minority shareholders in MFI are acquiring additional shares in the company because they consider it to be a good investment.
- [133] Since the final separation agreement was executed, the claimant's obligation to pay child support has come to an end. By my calculations, the claimant was paying \$2,720 per month in child support.
- [134] The claimant denied in cross-examination that what lies at the root of his application is a belief, on his part, that the respondent should have to accept the consequences of MFI's investment decisions that have a short to medium-term impact on his cash flow. He did acknowledge, however, that while the decisions he has made since the final separation agreement have made his income situation worse, his expenses have decreased since paying off the promissory notes owing to the respondent and most of his mortgage on the Gulfview property.

[135] The claimant also agreed in cross-examination that he has arranged his corporate affairs to build up assets and to take on debt. When it was put to him there was not very much difference in his overall financial situation, he replied, "I guess".

N. The Respondent's Circumstances: From Separation to the Present

[136] As noted earlier, the respondent moved to Vancouver in September 2008 and rented a 1,300 square foot townhouse for a year. She purchased that townhouse in 2009 for \$860,000.

[137] In 2010, the respondent gifted her current partner \$240,000 to buy a boat.

[138] In March 2013 the respondent purchased a property in North Saanich on Vancouver Island with her current partner for \$820,000. This property was purchased with some of the money the respondent received from the payout of the promissory notes (\$700,000). The respondent invested the balance of the money she received on payout of the promissory notes (\$1,300,000 - \$1,400,000) with Nesbitt Burns.

[139] In August 2014 the respondent sold her Vancouver townhouse for \$1,005,000 and purchased a duplex in the same neighbourhood for \$2,046,000.

[140] In September 2014 the respondent sold the North Saanich property for \$865,000. She used the proceeds from the sale of this property to apply to the purchase price of the duplex. The respondent's monthly mortgage payment is about \$2,400.

[141] The respondent continues to own the Sproat Lake property.

[142] She pays property taxes on the duplex and the Sproat Lake property totalling about \$760 per month.

[143] The respondent launched Earth Wines, her wine importing business, in 2009 and made her first sales in 2010. She testified it has taken her about 3 ½ years to develop relationships with wineries and establish her reputation in the industry. The respondent works seven days a week and, on average, between 25 and 30 hours per week. She testified she now has a very good portfolio of wines. She testified that her 2014 sales are going well and that Earth Wines has been a tremendous confidence booster for her.

[144] The respondent's gross sales have increased from \$15,000 in 2010 to slightly over \$60,000 in 2013. The business has not yet generated a net income. In 2013, the respondent reported net business losses of just over \$30,000. She testified that her expectation, based on the experience of others in the industry, was that the business would not turn a profit for the first two or three years.

[145] The respondent reports monthly expenses totalling \$23,123.

[146] The respondent has non-registered investments totalling \$1,438,290. In addition, the respondent holds registered investments totalling about \$545,000.

[147] In cross-examination, the respondent testified she has not had paid employment since her position as special events coordinator for Sears came to an end in 2001.

O. Analysis

(1) The Claimant's Notice of Family Claim: Has there been a material change in circumstances warranting a reduction in the claimant's monthly spousal support payments?

(a) The Agreement and Legislative Context

[148] As noted earlier, the claimant relies on his contractual right, reflected in paragraph 9 of the final separation agreement, to apply to the court to vary or terminate spousal support upon a material change in circumstances.

[149] In addition, the claimant relies on s. 164(5) of the FLA. This provision gives the court authority to set aside or replace with an order all or part of an agreement if satisfied that the agreement is "significantly unfair" having regard to a number of enumerated considerations including, "any changes, since the agreement was made, in the condition, means, needs and other circumstances of a spouse."

[150] For ease of reference, the relevant provisions of the FLA are:

Objectives of spousal support

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.

Setting aside agreements respecting spousal support

164 (1) This section applies if spouses have a written agreement respecting spousal support, with the signature of each spouse witnessed by at least one person.

...

- (3) On application by a spouse, the court may set aside or replace with an order made under this Division 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 income, 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 party'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 court may decline to act under subsection (3) if, on consideration of all of the evidence, the court would not replace the agreement with an order that is substantially different from that set out in the agreement.
- (5) Despite subsection (3), the court may set aside or replace with an order made under this Division 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: [Emphasis added.]
- (a) the length of time that has passed since the agreement was made;
 - (b) any changes, since the agreement was made, in the condition, means, needs or other circumstances of a spouse; [Emphasis added.]
 - (c) the intention of the spouses, in making the agreement, to achieve certainty;
 - (d) the degree to which the spouses relied on the terms of the agreement;
 - (e) the degree to which the agreement meets the objectives set out in section 161 [objectives of spousal support].
- (b) The Applicable Test

[151] Dealing first with the terms of the agreement, while it is true the parties did not define what would amount to a "material change in circumstances", the phrase is a term of art having a particular and settled meaning in the law; one that would have been known to the parties on execution of the agreement.

[152] A material change in circumstances was defined in *Willick v. Willick*, [1994] 3 S.C.R. 670, a child support case, to mean:

[21] a change, such that, if known at the time, would likely have resulted in different terms. The corollary to this is that if the matter which is relied on as constituting a change was known at the relevant time it cannot be relied on as the basis for variation.

- [153] The test is the same where a variation is sought in relation to spousal support: *L.G. v. G.B.*, [1995] 3 S.C.R. at para. 48; *L.M.P. v. L.S.*, [2011] 3 S.C.R. 775, 2011 SCC 64 at paras. 29-46.
- [154] As Proudfoot J.A. put it in *Carter v. Carter* (1991), 58 B.C.L.R. (2d) 45, 34 R.F.L. (3d) 1 (C.A.), a material change is one that is substantial, unforeseen and continuing.
- [155] A change can be a material one, even if it was within the general contemplation of the parties at the time of the prior agreement, if they made a conscious decision to leave it out because it was sufficiently complex, or the extent of its impact was unknowable: *Stones v. Stones*, 2004 BCCA 99. In such a situation, I think it is fair to say that the change is simply too unpredictable to be "foreseen" when the agreement was entered into.
- [156] Under the Act, the onus is on the party seeking a variation to establish a material change in circumstances. I see no reason to depart from this rule in circumstances where the applicant relies on a material change in circumstances clause that forms part of a separation agreement.
- [157] With respect to the claimant's alternative argument premised on s. 164(5) of the FLA, I do not see how reliance on this provision expands his entitlement to the relief sought, or in any way lowers the threshold change test. Indeed, the opposite may be true.
- [158] First, the language used in s. 164(5) of the FLA for setting aside or replacing with an order all or part of an agreement is, in essence, the same language used in s. 17(1)(4.1) of the Act for varying a spousal support order. In my view, the Willick test applies. The change must be substantial, unforeseen and continuing. Although the claimant correctly notes that there is no mention of foreseeability or of the need for a material change in circumstances to be demonstrated under s. 164(5) of the FLA, neither is there mention of these requirements in s. 17(1)(4.1) of the Act. Despite this, the Willick test requires that attention be paid to the circumstances at the relevant time and what was then in reasonable contemplation of the parties.
- [159] Second, the type of change motivating judicial intervention under s. 164(5) is change resulting in significant unfairness. What is contemplated is judicial intervention where the change is so substantial that the agreement negotiated by the parties has, in light of that change, become significantly unfair. The threshold standard could not possibly be lower than a material change in circumstance. Further, the suggestion that an agreement has become significantly unfair as a consequence of changes since the agreement was made in the condition, means, needs or other circumstances of a spouse would have to take account of what was foreseen at the relevant time. While not necessarily determinative, what was foreseen by the parties will have a bearing on the question of whether a change has rendered an agreement significantly unfair.
- [160] Third, the policy purposes underlying a threshold material change requirement that includes consideration of what was foreseen by the parties remain the same whether a variation is sought in relation to an agreement containing a material change clause, under

the Act or the FLA. The policy considerations animating this test include: the need for stability in spousal support orders to promote certainty and predictability and to enable the parties to plan their affairs in reliance on the order; discouraging re-litigation; and avoiding inconsistent exercises of discretion by successive judges hearing the same case.

[161] Finally, s. 164(5) requires consideration of all the enumerated circumstances in determining whether an agreement has become significantly unfair. While it may be that a change in circumstances is the most dominant consideration, regard would have to be paid to all the other considerations including: the length of time that has passed since the agreement was made; the intention of the spouses, in making the agreement, to achieve certainty; and the degree to which the spouses relied on the terms of the agreement. These additional considerations could not possibly operate to lessen the burden the claimant has to meet to obtain a variation of the spousal support terms of the agreement. If anything, they elevate the burden he must meet.

[162] Put differently, the claimant could not fail to meet the material change in circumstances test under the agreement but meet the test in s. 164(5) of the FLA. For this reason, I will concentrate on the claimant's contractual authority to seek a variation of his monthly spousal support payments upon demonstrating a material change in circumstances.

(c) Application of the Material Change in Circumstances Test to the Case at Bar

[163] When the agreement was signed in December 2009, the claimant's three-year average income (the figure upon which spousal support was based) was \$1,265,470.

[164] In 2013, the claimant reported total income of \$1,508,770 on line 150 of his tax return. His income consisted of:

- \$171,000 in employment income;
- \$531,570 in taxable dividends;
- \$27,276 in interest and investment income;
- \$750,554 in taxable capital gains;
- \$25,000 in RRSP income; and
- \$3,268 from other income sources.

[165] The starting point for the determination of income under the SSAG is the definition of income under the FCSG. The next step is to make whatever adjustments to that amount are required by Schedule III to the FCSG. Once these two steps are completed, the court must look to sections 17-20 of the FCSG to determine whether any of the exceptions addressed in those provisions apply and, if they do, the effect should be given on the facts of the case: *Vincent v. Vincent*, 2012 BCCA 186 at para. 35.

[166] The claimant submits that pursuant to s. 5 of Schedule III, the taxable amount of dividends he reported in 2013 should be replaced by the actual amount of the dividends he received, or \$379,692. While I accept the claimant's position on this point (see *De Goede v. De Goede*, [1999] B.C.J. No. 330 at paras. 18-19 and *Dewey v. Dewey*, 2009 BCSC 1674 at para. 6) it does not take account of s. 19(1)(h) of the FCSG permitting the imputation of income to a spouse where that spouse derives a significant portion of income from dividends that are taxed at a lower rate than is employment or business income. I am satisfied that income should be imputed to the claimant under this provision. In the absence of expert evidence on the point, it is difficult to determine exactly how much income should be imputed to take account of the tax benefits the claimant realizes as a consequence of now receiving most of his income as dividend payments. For 2013, something approaching \$100,000 would likely be fair.

[167] Next, the claimant submits that his receipt of capital gains income from the sale of MFI shares in 2013 is a non-recurring amount and it would be unfair to include it in the determination of his income. Section 16 of the FCSG provides that, subject to sections 17 to 20, a spouse's annual income is determined using the sources of income set out under the heading "Total income" on line 150 of that spouse's tax return. Section 17 provides:

If the court is of the opinion that the determination of a spousal's annual income under section 16 would not be the fairest determination of that income, the court may have regard to the spouse's income over the last three years and determine an amount that is fair and reasonable in light of any pattern of income, fluctuation in income or receipt of a nonrecurring amount during those years.

[168] If the capital gain is excluded and the dividends are not grossed up, the claimant's 2013 adjusted income is \$547,432. It is on this basis the claimant contends his income has been reduced roughly by one-half since the agreement was signed and that there should be a corresponding 50% reduction in his spousal support payments. In the result, he seeks a reduction in monthly spousal support from \$25,000 to \$12,500, retroactive to February, 2013 when he says his income was reduced.

[169] I agree with the claimant's position that the taxable capital gain he realized on the disposition of additional MFI shares in 2013 should not be treated as income. These funds (50% of the net proceeds of which the claimant was obliged to apply to the promissory notes held by the respondent) were realized on the disposition of a capital asset upon which income was earned. The funds do not represent a bonus or income for work done. The gain is non-recurring and cannot properly be regarded as enhancing the income or financial means of the claimant: see *Brown v. Brown*, 2014 BCCA 152 at para. 35; *Ewing v. Ewing*, 2009 ABCA 227 at paras. 28-35; *J.M.D. v. R.M.J.D.*, 2011 BCSC 1295 at para. 24.

- [170] I do not, however, agree with the claimant's position that income should be imputed to the respondent for intentional under-employment under s. 19(1) of the FCSG or with his position that it is appropriate to impute investment income of \$150,000 per year to the respondent (based on a 5% return on an asset pool of \$3,000,000).
- [171] The claimant's position on the imputation of income fails to take proper account of the traditional roles the respondent discharged throughout the marriage, her relatively limited experience in the workforce, her age, her limited business experience and the fact that the disadvantages flowing from the dissolution of the marriage fell disproportionately on her shoulders. That the respondent has not shown a profit from the operation of Earth Wines is not, I am satisfied, attributable to lack of effort. I am satisfied that the respondent has worked hard to establish herself in her chosen field of endeavour. On the evidence before me, the respondent's post-separation trajectory in terms of earnings is not at all unusual and attributable to the economic disadvantages she experienced upon the breakdown of the marriage.
- [172] I am also satisfied that the claimant overstates the investment income the respondent should reasonably be expected to be earning on the assets she holds. The claimant's calculations fail to take account of the higher cost of living in Vancouver, particularly in relation to housing, or the manner in which the respondent was compensated for her one-half share of the parties' corporate assets.
- [173] In my view, the respondent should be expected to earn 4% to 4.5% on between \$2,000,000 and \$2,500,000, or between \$80,000 and \$112,500 per year. This is not significantly different from the \$105,000 the respondent was anticipated to earn at the time of the final separation agreement from interest payments made on the promissory notes she held. In short, there is no material change in the respondent's circumstances.
- [174] My acceptance of the claimant's position that the taxable capital gain reported on his 2013 return should not be treated as income does not, however, end the matter.
- [175] While the claimant has sustained a short to medium-term income reduction, I am satisfied that his overall position has not materially changed since the final separation agreement was executed.
- [176] The claimant has made investment decisions and other personal choices impairing his short to medium-term cash flow but increasing his net worth. I am not satisfied he has demonstrated a material change in circumstances since the agreement was entered into to justify downward variation of his monthly spousal support payments.
- [177] Since the separation agreement, the claimant has paid, in full, his indebtedness to the respondent for her one-half interest in their corporate holdings. His obligation to pay \$8,000 per month in interest payments to the respondent on the MFI promissory note no longer exists. His indebtedness to her for his acquisition of her Merit shares has also been retired. He no longer is obliged to pay \$2,720 per month in child support or his

proportionate share of s. 7 expenses. The claimant's bank loan in relation to Shelbourne, which was being paid down at \$50,000 per year, is almost fully paid.

[178] The claimant's income has decreased in the short to medium-term. That decrease is attributable to the following factors:

- The claimant funded acquisition of the respondent's shares in Merit by taking on additional debt. He took out a \$600,000 mortgage on the former matrimonial home to immediately reduce the amount owed to the respondent under the Merit promissory note. His obligation to service this debt obviously affects his monthly cash flow. It is noteworthy that the claimant has recently increased his monthly mortgage payments and made two discretionary lump sum principal payments of \$120,000 in 2012 and \$100,000 in 2013. The claimant justified his decision to accelerate the payment of debt and diminish his cash flow as a personal one, designed to eliminate debt;
- The sale of 27% of the claimant's shares in MFI to the minority shareholders. The claimant was not obliged to dispose of the number of shares he did. In fact, he sold 3.652% more of his shares than did Mr. Fitzpatrick, garnering an additional \$657,392 from the share sale. I make two points about the sale. First, the sale of additional shares to minority shareholders, and its impact on the claimant's income stream, was foreseen by the parties when the final separation agreement was executed. While the extent of the impact on the claimant's income stream could only be known once the claimant determined the number of shares he was prepared to sell to the minority shareholders above and beyond his commitment to them, the claimant knew that the share sale would have an impact on his monthly cash flow and was in a position to gauge that impact before proceeding to divest himself of MFI shares. Second, the claimant made a considered decision to sell more shares to the minority shareholders than he was obliged to sell. Despite the fact the claimant was earning between 11% and 16.6% on his MFI shares at the time of the sale to the minority shareholders, he exercised his discretion to sell additional shares he was not obliged to sell and use the proceeds to pay debt owed to the respondent under the promissory notes in respect of which he was paying only 4%. The claimant did this as a personal choice to quickly retire debt, even though he knew it would reduce his income stream;
- The claimant's decision to apply all of the net proceeds from the sale of MFI shares to the debt he owed to the respondent. The claimant was only obliged to apply 50% of the net proceeds of that sale towards payment of the respondent's promissory note. He elected not to retain any portion of the money he earned from the minority shareholder sale, but to apply all of the proceeds to quickly retire debt owed to the respondent under the MFI and Merit promissory notes;
- The \$4,750,000 bank loan taken out by MFI to purchase Merit. MFI was not obliged to purchase all of Merit, but determined to do so as a capital investment in order to expand MFI's business. As the claimant was a shareholder in Merit, he received (and invested) \$974,000 from MFI for his Merit shares. MFI's decision to expand its asset base by acquiring Merit and to finance the entirety of that acquisition, has impaired the ability of MFI to pay shareholders from corporate

earnings. As security for the loan, the bank requires that a certain amount of money must be kept by MFI as retained earnings. As a consequence, the retained earnings of MFI doubled between 2012 and 2013 and now stand at \$658,000. MFI purchased Merit because the acquisition was a way of facilitating business growth and reducing operating expenses by sharing resources. In addition, the acquisition of Merit, while undoubtedly a prudent business decision, cannot be characterized as an expense necessary to the maintenance of MFI's normal business operations. Rather, it was an investment. MFI is devoting corporate income previously used to pay shareholders to fund a capital acquisition and build up its retained earnings as equity for the loan to acquire Merit;

· The acquisition by MFI of a new operating system - a system that will be paid for by 2018. It must also be recalled that the system was acquired because it is expected to generate organizational efficiencies and pay for itself over time.

[179] The claimant now holds a 25% stake in MFI/Merit, estimated to be worth \$22,757,000 in early 2013. His corporate interest as of January 2014 may be valued at approximately \$5,689,520. The claimant's situation is not materially different than it was in 2009. Despite taking considerable draws in income and dividend payments from MFI, and paying the respondent's share of their corporate assets about four years after execution of the final separation agreement, the claimant's corporate holdings are worth virtually the same as they were at the time of the separation.

[180] The earnings of MFI have not materially changed. What has changed is the use of corporate income. What was previously being distributed to shareholders is now being used to pay for acquisitions related to the expansion of MFI's business. In these circumstances, consideration must be given to the inclusion as income of all or part of the claimant's share of the pre-tax income of MFI.

[181] Whether corporate income should be included turns, in this case, on the application of s. 18(1)(a) of the FCSG:

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

- [182] In *Kowalewich v. Kowalewich*, 2001 BCCA 450, Huddart J.A. comprehensively analyzed s. 18 and noted that its purpose is to allow the court to lift the corporate veil to ensure that money received as income by the paying party fairly reflects all of the money available for the payment of support. She held (at para. 48) that s. 18 applies not only to a spouse who wholly controls a corporation, but also to one who shares ownership and control with others.
- [183] The onus rests with the payor to establish that the company's pre-tax income is not available because reinvestment of it is necessary to sustain the company as a viable enterprise: *Hausmann v. Klukas*, 2009 BCCA 32 at para. 51.
- [184] In *McKenzie v. McKenzie*, 2014 BCCA 381, a company's decision to pay down mortgage debt to sustain itself as a viable enterprise led to a conclusion that the funds so applied were not available for spousal support purposes. In that case, the Court noted (at para. 103) that the mortgage payments were part of a well-established and ordinary pattern of investment in the corporation's capital assets. The Court also noted (at para. 101) that the mortgages were long-standing, and there was no suggestion the company acquired the properties or incurred debt to manipulate amounts that might be available for support purposes.
- [185] While I might be inclined to view the acquisition of the operating system as a necessary investment in the corporation's capital assets, the decision of MFI to acquire Merit for \$4,757,000 was a decision to expand the business operations of MFI and to take on considerable debt to fund that acquisition. I am satisfied that monies previously available for distribution to shareholders but now applied to the servicing of debt (whether as debt repayment or the accumulation of retained earnings) is money that should be attributed to the claimant. I agree with the position of the respondent that the exclusion of income redirected to fund capital acquisitions that represent an expansion of a company's holdings, rather than maintenance of its existing operations, is not consistent with the overall approach of the Guidelines. I emphasize that a finding of availability does not require the court to find bad faith or the existence of a scheme to reduce amounts that might otherwise be available for support purposes: *Kowalewich*, at para. 40. I make no such finding in this case.
- [186] While the exercise of imputing income assists in the determination of support payments, it does not require that a company pay all "available" income to a payor. As explained in *Gosse v. Sorenson-Gosse*, 2011 NLCA 58, 12 R.F.L. (7th) 1 at para. 9, "Imputing is only a theoretical exercise for the purpose of making 'the fairest determination' of an income level by which to judge the level of responsibility the shareholding spouse should have "
- [187] MFI's acquisition of Merit does not reflect an expenditure of funds necessary to maintain MFI's existing operations. Rather, it was an investment designed to expand MFI's holdings.
- [188] I agree with the respondent's position that MFI's earnings have been redirected at the corporate level away from bonuses or dividends and into new assets. Those assets represent value to the claimant, even if that value is not immediately accessible. I am

satisfied that it is appropriate to impute to the claimant a portion of the corporate income MFI is using to fund the acquisition of Merit - money that would have been distributed to the claimant as dividends had the acquisition not occurred. MFI is paying \$48,732 per month to the bank to service its loan to acquire Merit. As the claimant holds a 25% stake in Merit, it is reasonable to suppose that roughly 25% of this amount (\$12,183 per month) would have been paid to him had MFI not made the decision to acquire Merit. I would impute this amount to the claimant under s. 18 of the FCSG.

[189] By way of summary, the reduction in the claimant's income flowing from the disposition of MFI shares to the minority shareholders was foreseen when the agreement was executed. As such, it does not qualify as a material change in circumstances. The claimant exercised his discretion to sell to the minority shareholders a larger block of MFI shares than he was required to dispose of. That he disposed of shares earning him a return of 11% to 17% to retire debt owed to the respondent on which he was paying 4%, reflects a personal choice on his part to accelerate the retirement of debt attributable to the division of family assets knowing that the decision to do so would affect his income flow. The same can be said of the claimant's decision to take on additional debt (by re-mortgaging his house) to assist in facilitating prompt payout of the respondent's interest in their corporate shareholdings. Finally, the claimant participated in a decision to expand MFI through the acquisition of Merit knowing that it would diminish the funds available for payout to MFI's shareholders. All of these discretionary decisions had a predictable impact on cash flow. The claimant cannot shift to the respondent the foreseen consequences of the discretionary steps he has taken to: (1) quickly retire debt; and (2) expand his corporate holdings.

[190] For the foregoing reasons, I am not satisfied that the claimant has established there has been a material change in the condition, means, needs or other circumstances of either party that is substantial, unforeseen and continuing and that, if known in December 2009, would likely have resulted in a different agreement. As a result, the claimant's application to vary his monthly spousal support payments is dismissed.

(2) The Respondent's Counterclaim: Applying Miglin to the Case at Bar

(a) The Objectives of Spousal Support

[191] The following provisions of s. 15.2 of the Divorce Act are relevant in this case:

Spousal support order

15.2(1) A court of competent jurisdiction may, on application by either or both spouses, make an order requiring a spouse to secure or pay, or to secure and pay, such lump sum or periodic sums, or such lump sum and periodic sums, as the court thinks reasonable for the support of the other spouse.

...

Factors

- (4) In making an order under subsection (1) or an interim order under subsection (2), the court shall take into consideration the condition, means, needs and other circumstances of each spouse, including
 - (a) the length of time the spouses cohabited;
 - (b) the functions performed by each spouse during cohabitation; and
 - (c) any order, agreement or arrangement relating to support of either spouse. [Emphasis added.]

...

Objectives of spousal support order

- (6) An order made under subsection (1) or an interim order under subsection (2) that provides for the support of a spouse should
 - (a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;
 - (b) apportion between the 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 spouses arising from the breakdown of the marriage; and
 - (d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.

[192] In *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420, the Court identified three grounds for entitlement to spousal support: compensatory (engaging primarily the first two objectives in s. 15.2(6)); non-compensatory (engaging primarily the third and fourth objectives in s. 15.2(6)); and contractual. Where a claim for spousal support is grounded in compensatory and non-compensatory considerations, it is not a question of choosing one model over the other, but applying the relevant factors and striking a balance that best achieves justice in the particular case: *Bracklow* at para. 32.

[193] The theoretical underpinnings of compensatory and non-compensatory spousal support and the relationship between the two were addressed by Fleming J. in *T.T. v. J.M.H.*, 2014 BCSC 451:

[120] It is trite law that compensatory support is intended to provide redress to the recipient spouse for his or her efforts which conferred an economic benefit or advantage on the other spouse, and for his or her economic disadvantage arising from the marriage or its breakdown: *Chutter v. Chutter*, 2008 BCCA 507 at paras. 50-51, leave to appeal ref'd [2009]

S.C.C.A. No. 41 [Chutter]. The courts recognize that assuming primary child care and household responsibilities, in particular, often results in lower earning potential and fewer prospects for financial success in the future: Chutter at para. 50. Where non-compensatory principles also apply, spousal support aims to narrow the gap between the needs and means of the spouses. The concept of need, however, goes beyond the basic necessities of life and varies according to the circumstances of the parties. In longer marriages the courts measure need against the marital standard of living or the payor's post-separation standard of living: Chutter at para. 59; Hodgkinson v. Hodgkinson, 2006 BCCA 158 at paras. 68-69.

[121] Most awards, particularly those made following the breakdown of a long-term marriage, involve a consideration of both theories of support. The importance of both theoretical bases for spousal support was underscored in Bracklow at para. 32:

... The federal and provincial legislatures, through their respective statutes, have acknowledged both models. Neither theory alone is capable of achieving a just law of spousal support. The importance of the policy objectives served by both models is beyond dispute ... It is not a question of either one model or the other. It is rather a matter of applying the relevant factors and striking the balance that best achieves justice in the particular case before the court. [*Italics emphasis added.*]

[122] In both Moge and Bracklow, the Supreme Court of Canada made it clear that marriage is a joint endeavour, and the longer the relationship endures and the closer the economic unit, the greater the presumptive claim will be to an equal standard of living on dissolution. Here the parties were married for 17 years before they separated. It was not therefore a long marriage of 20 years or more but one at the upper end of the medium range. However, the parties were throughout that time part of a very close economic unit, strengthening the claimant's "presumptive claim to equal standards of living upon its dissolution": Moge at para. 84. In W. v. W., 2005 BCSC 1010, Madam Justice Martinson, commenting on the interpretation of Moge in British Columbia, discussed the relevance of the parties' standards of living in the context of spousal support as follows (at para. 12):

Throughout the marriage, each spouse makes decisions that accommodate the economic and non-economic needs of the other. The decisions include the way in which child care and other family responsibilities will be handled and the way careers will develop. These decisions can have a significant impact upon the income earning ability of each at the time of separation. Yet it is not easy to determine exactly the relationship between these decisions and the consequent benefits and detriments to each spouse. The rough equivalency of standard of living approach has operated as a workable substitute to assess compensatory claims ... [*Emphasis and citations omitted.*]

(b) Making a Spousal Support Order Inconsistent with an Agreement

[194] Both parties agree that the framework developed in Miglin applies to the determination of the respondent's counterclaim.

[195] An initial application for spousal support inconsistent with a pre-existing agreement triggers a two-stage inquiry. At the first stage, the court is obliged to determine whether the agreement was negotiated under satisfactory conditions and whether its terms, when negotiated, were in substantial compliance with the Act. At the second stage, the court assesses whether the agreement continues to reflect the original intention of the parties and the extent to which it is still in substantial compliance with the objectives of the Act.

[196] Here, only the first stage of the Miglin test is at issue.

[197] In Miglin, at para. 46, the Court emphasized that a contextual assessment of all the circumstances is required:

... This includes the content of the agreement, in order to determine the proper weight it should be accorded in a s. 15.2 application. In exercising their discretion, trial judges must balance Parliament's objective of equitable sharing of the consequences of marriage and its breakdown with the parties' freedom to arrange their affairs as they see fit. Accordingly, a court should be loathe to interfere with a pre-existing agreement unless it is convinced that the agreement does not comply substantially with the overall objectives of the Divorce Act. This is particularly so when the pre-existing spousal support agreement is part of a comprehensive settlement of all issues related to the termination of the marriage. Since the issues, as well as their settlement, are likely interrelated, the support part of the agreement would at times be difficult to modify without putting into question the entire arrangement.

[198] Parliament has, by virtue of s. 15.2(4)(c) of the Act, vested in courts the discretion to review and reject the terms of pre-existing agreement: Miglin at para. 51; L.M.P. v. L.S., [2011] 3 S.C.R. 775, 2011 SCC 64 at paras. 14-15 and 20. The discretion should not, however, be exercised lightly. Nothing in the language of s. 15.2(4) or (6) obliges a court to proceed on a footing that any agreement by the parties will be enforceable only when its provisions substantially mirror what a trial judge, unfamiliar with the parties' motivations and subjective understanding of their relationship and goals, would have awarded on the basis of these criteria alone. As the Court explained in Miglin:

55 To impose on all separating or divorcing persons an obligation to adhere strictly and exclusively to the statutory spousal support objectives denies them the autonomy to organize their lives as they see fit and to pursue their own sense of what is mutually acceptable in their individual circumstances. Accordingly, the spousal support objectives should not operate so as to preclude parties from bringing their own concerns, desires and objectives to the table in negotiating what they view as a mutually acceptable agreement, an agreement they consider to comply substantially with the objectives of the Act. In that way, the policy goals of autonomy and certainty will be rendered consistent with Parliament's recognition of "the diverse dynamics of the many unique marital relationships" (Bracklow, *supra*, at para. 35).

56 This is not to suggest that courts should prioritize the policy goal of autonomy to the exclusion of all other concerns. Nor are we suggesting that courts should condone agreements that manifestly prejudice one party. The trial judge would endorse a seemingly unlimited discretion

to disregard pre-existing agreements and impose his own view of what, in light of the spousal support objectives, constitutes equitable sharing of the consequences of the marriage breakdown. In contrast, we are of the view that what constitutes equitable sharing in this sense cannot be informed solely by the list of objectives set out in s. 15.2(6) of the Act

57 We are of the view that, rather than trying to measure whether the terms of a comprehensive agreement advance the objectives of support set out in s. 15.2(6), trial judges must consider the agreement more broadly in light of all the objectives of the Divorce Act. These objectives of the Act as a whole, as compared with the objectives set out in s. 15.2(6), include the compelling policy goals of certainty, autonomy and finality. These legislative objectives require the trial judge to consider the extent to which the agreement represents a final settlement of the issues, negotiated under unimpeachable conditions, to which both parties agreed and on which each of them intended to rely. It is only then that the judge will consider whether the agreement must nevertheless be set aside in full or in part because it is not in substantial compliance with the broader objectives of the Act.

...

78 Therefore, in searching for a proper balance between consensus and finality on the one hand, and sensitivity to the unique concerns that arise in the post-divorce context on the other, a court should be guided by the objectives of spousal support listed in the Act. In doing so, however, the court should treat the parties' reasonable best efforts to meet those objectives as presumptively dispositive of the spousal support issue. The court should set aside the wishes of the parties as expressed in a pre-existing agreement only where the applicant shows that the agreement fails to be in substantial compliance with the overall objectives of the Act. These include not only those apparent in s. 15.2 but also, as noted above, certainty, finality and autonomy. [Emphasis added].

[199] At the first stage of the Miglin analysis the court looks to the circumstances in which the agreement was negotiated and executed to determine whether there is any reason to discount it. Relevant factors include whether there were circumstances of oppression, pressures or other vulnerabilities taking into account the length and nature of the relationship, and the conditions under which the negotiations were held, including their duration and whether the parties were represented. The Court in Miglin noted that "the degree of professional assistance received by the parties will often overcome any systemic imbalances between the parties" (at para. 82).

[200] In the absence of evidence demonstrating a fundamental flaw in the negotiation process, the court should consider the agreement as reflecting a genuine and mutual desire to finalize the terms of the parties' separation and as indicative of their substantive intentions (at para. 83).

[201] Where the court is satisfied that the conditions under which the agreement was negotiated were satisfactory, the focus of the inquiry at the first stage of the Miglin inquiry turns to the substance of the agreement. The court must determine the extent to which the agreement takes into account the factors and objectives listed in the Act, thereby reflecting an

equitable sharing of the economic consequences of the marriage and its breakdown. Only a "significant departure" from the objectives set out in the Act will warrant the court's intervention on grounds that the agreement is not in substantial compliance with the Act (at para. 84). Further, the adequacy of a spousal support arrangement must not be assessed in a vacuum, but must take into account the totality of the agreement and the broad discretion the parties are afforded in establishing for themselves priorities and goals, including the achievement of finality and certainty. Importantly, assessment of whether an agreement is in substantial compliance with the Act will necessarily permit a broader range of acceptable settlements than would be the case if an obligation existed to test agreements narrowly against the support order objectives in s. 15.2(6) of the Act. Finally, the two inquiries that form the first stage of a Miglin analysis are not neatly compartmentalized. As the Court pointed out (at para. 85) the greater the vulnerabilities present at the time of the formation of the agreement, the more exacting a court's review will be of whether that agreement is in substantial compliance with the objectives underlying the Act.

- [202] Against this background, the respondent submits, and I agree, that she has a strong claim to compensatory support. The respondent supported the claimant in developing the business of MFI and took on what might be described as a traditional role in the marriage - one emphasizing the important tasks of child rearing and tending to the affairs of the home. The division of responsibilities as between the parties along traditional lines resulted in a significant economic disadvantage to the respondent on the dissolution of their lengthy union.
- [203] Turning first to the circumstances in which the agreement was negotiated, I am not persuaded that the evidence establishes a fundamental flaw in the negotiation process rooted either in the manner in which the negotiations were undertaken, or a power imbalance between the parties that manifested itself in an exploitation of the respondent's vulnerabilities. Financial disclosure had been made by the claimant at the time the final separation agreement was executed. Both parties were represented by experienced counsel. The negotiations were lengthy and detailed. The negotiations concerning spousal support formed part of a much broader agreement between the parties respecting the division of their assets. The respondent made significant concessions on some points. She refused to budge on others, including whether the agreement should seek to define what constitutes a material change in circumstance for the purposes of triggering a spousal support variation application. While I have no doubt that both parties felt vulnerable and experienced considerable emotional upheaval at the time of the negotiations, as the Court noted in Miglin these factors are inherent in any negotiated settlement of a marital dispute; they did not manifest themselves in a unique or particularly unusual way in this case. Moreover, I am satisfied that any systemic imbalance between the parties was overcome by the fact that the respondent received professional assistance and advice throughout the negotiations. In the result, the final separation agreement should be accorded significant weight. I find that it represents a genuine, mutual desire to finalize the terms of the separation, and reflects the considered choices each of the parties made.

- [204] The respondent also submits that the agreement is not in substantial compliance with the objectives enumerated under the Act. She focuses on two points in support of this submission: (1) the amount of monthly spousal support payments the agreement obliges the claimant to pay; and (2) the provision of the agreement providing for the right to a review of both quantum and entitlement to spousal support as of August 1, 2017.
- [205] On the question of quantum, the respondent submits on the basis of the parties' 2009 Guidelines incomes (the claimant \$1,150,000; the respondent \$105,000) application of the SSAG would result in a mid-range spousal support payment of approximately \$38,000 per month. At the mid-range, the claimant would have about 54% of net disposable income, while the respondent would have about 46% of net disposable income. By contrast, she submits that, based on a \$25,000 per month spousal support payment, the effect of the final separation agreement was to grant to the claimant 66% of net disposable income. The respondent argues that the quantum of monthly spousal support payments, as reflected in the agreement, fails to give adequate expression to her presumptive claim to an equal standard of living upon the dissolution of the marriage. She seeks an award of spousal support in the amount of \$46,000 per month retroactive to 2011.
- [206] On the issue of retroactivity, the respondent gave no notice to the claimant that she would be seeking a retroactive increase in the amount of monthly spousal support payments until the counterclaim was filed on June 29, 2014. The delay is unexplained. The claimant draws my attention to the considerations addressed in *D.B.S. v. S.R.G.*, [2006] 2 S.C.R. 231, 2006 SCC 37 at paras. 94-104, including those that mandate inquiry into why support was not sought earlier. These considerations apply to claims for retroactive spousal support, but may be weighed differently in light of the different legal principles and objectives that underpin child as compared with spousal support: *Kerr v. Baranow*, [2011] 1 S.C.R. 269, 2011 SCC 10 at para. 207.
- [207] Fairly negotiated agreements should not be overridden unless they depart significantly from the norms underlying the statutory objectives of spousal support. As a practical matter, the "significant departure" test will often be difficult to meet in circumstances where a party signed an agreement with the benefit of legal advice, in the absence of evidence demonstrating exploitation of vulnerabilities, and in circumstances where execution of the agreement reflects an informed choice made after full financial disclosure.
- [208] Viewing the final separation agreement as a whole, I am not persuaded that the clause obliging the claimant to pay \$25,000 per month in spousal support significantly departs from the objectives of the Act. That the respondent might have negotiated a more favourable spousal support arrangement had she held out longer, or litigated the matter, does not entitle her to the relief she seeks. That application of the SSAG to the parties' respective Guidelines incomes in 2009 suggests a larger monthly spousal support payment than the respondent agreed to is similarly not dispositive of the issue, particularly in a case where application of the SSAG is discretionary. The SSAG provide for a ceiling income level for the paying spouse above which any income sharing formula gives way to discretion. In

accordance with chapter 11.1 of the SSAG, after the payor's gross income rises above a ceiling of \$350,000, the formulas should no longer be automatically applied to divide income.

- [209] Further, as noted in Miglin (at para. 85) the objectives of the Act include not only the spousal support considerations reflected in s. 15.2, but the interests of certainty and the invitation extended in the Act for parties to determine their own affairs. It is obvious that the respondent placed a premium on certainty and the relatively prompt resolution of her financial affairs by entering into an agreement that would enable her to comfortably move on with her life. It is apparent that the respondent has, by entering the agreement, achieved her goal. In addition to receiving one-half of the parties' personal and corporate assets, the respondent is in receipt of spousal support payments totalling \$300,000 per year. In these circumstances, I decline to make an originating (and retroactive) spousal support order along the lines sought by the respondent.
- [210] I turn next I consider whether the clause in the agreement giving the claimant a right to review both quantum and entitlement to spousal support as of August 1, 2007 (7 ½ years after the agreement was executed) is a significant departure from the general objectives of the Act.
- [211] The respondent argues she has a right to indefinite support based on the "rule of 65" addressed in chapter 7.5.3 of the SSAG. The rule applies in cases where the marriage is shorter than 20 years if the years of marriage plus the age of the support recipient at the time of separation equals or exceeds 65. The respondent was 49 years of age when the separation occurred. The marriage lasted close to 27 years. Thus, the respondent submits that the rule of 65 is applicable and an order for indefinite support is appropriate.
- [212] Given the length of the parties' marriage (more than 20 years) it is unclear to me why the respondent considers it to be necessary to invoke the rule of 65 in support of her application. The applicable formula under the SSAG provides for indefinite support in circumstances where the marriage has been 20 years or longer in length. It adds nothing to the respondent's argument to assert a claim of entitlement to indefinite support via a different route.
- [213] In assessing this argument, it is also important to recall the meaning of "indefinite" support as that word is used in the SSAG:

Under the Advisory Guidelines an order for indefinite support does not necessarily mean permanent support, and it certainly does not mean that support will continue indefinitely at the level set by the formula.

Under the current law, orders for indefinite support are open to variation as the parties' circumstances change over time and may also have review conditions attached to them. The Advisory Guidelines do nothing to change this: "indefinite" support means support that is subject to the normal process of variation and review.

Through the process of review and variation the amount of spousal support may be reduced, for example if the recipient's income increases or if the recipient fails to make reasonable efforts to earn income and income is imputed. Support may even be terminated if the basis for entitlement disappears. It is true that current law supports the idea that after long marriages spousal support will often be permanent, even if the amount is subject to reduction to reflect the recipient's obligation to pursue self-sufficiency.

In practice, however, most orders for indefinite support after long marriages will be significantly modified, if not eliminated, after the retirement of the payor and the receipt of pension income by the payor and the recipient. "Indefinite" often means "until the payor reaches 65". [Emphasis in original].

[214] What the respondent seeks is a judicial order preventing the claimant from exercising the right he bargained for - a right to review both quantum and entitlement to spousal support in August 2017. Such an order would tie the claimant's ability to vary his obligation to pay spousal support of \$25,000 per month to the demonstration of a material change in circumstances warranting downward modification of the order.

[215] In my view, the review clause in the agreement is not a significant departure from the objectives enumerated in the Act warranting judicial intervention and the imposition of a spousal support order of an indefinite duration.

[216] First, it is inappropriate to look at the review term in isolation. Clearly, it came about as a result of negotiations that linked together the review date and the amount of spousal support to be paid per month. It is difficult to uncouple these two issues now.

[217] In addition, the spousal support terms of the agreement form part of a comprehensive and complex scheme for the division of the parties' considerable wealth. While this Court certainly has the authority to make an order eliminating the right of review but leaving unchanged the quantum of spousal support (Miglin at para. 86), I am not prepared to do so in this case. In my view, doing so would give inadequate weight to the invitation the Act extends to all parties to determine for themselves their financial destiny.

[218] That application of the SSAG formula would result in an indefinite spousal support award does not change my view. Departure from the SSAG does not necessarily give rise to a conclusion that an agreement reached by the parties following extensive negotiations and with the benefit of experienced counsel is not in substantial compliance with the objectives underlying the Act.

[219] In addition, and looking at the matter through a practical lens, the respondent has such a strong claim to compensatory support that there is no realistic prospect that her entitlement to spousal support will be at risk in 2017. What will be in issue is the amount of spousal support the claimant should pay from that date forward. The claimant will not have to meet a material change in circumstances threshold to invite judicial determination of that issue. That he will not have to do so 7 ½ years from the date of the agreement does not,

in my view, constitute a significant departure from the objectives underlying the Act.

[220] For these reasons, the counterclaim is also dismissed.

P. Costs

[221] In light of the disposition of these two matters, I am inclined to the view that the parties should bear their own costs. I would, however, grant leave to the parties to speak to the issue of costs should that be required.

"FITCH J."

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