
CANADA / JUDGMENT

Nicholl v. Nicholl

2020 BCCA 173

COURT

British Columbia Court of Appeal

DECIDED

23 June 2020

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2020 BCCA 173 Nicholl v. Nicholl

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Nicholl v. Nicholl,

2020 BCCA 173

Date: 20200623

Docket: CA46015

Between:

Tessa Anne Nicholl

Appellant

(Claimant)

And

Murray Arthur Nicholl, MTN Property Holdings Ltd.

and Thirdwave Enterprises Ltd.

Respondents

(Respondents)

Before:

The Honourable Mr. Justice Fitch

The Honourable Mr. Justice Butler

The Honourable Madam Justice DeWitt-Van Oosten

On appeal from: An order of the Supreme Court of British Columbia, dated
March 14, 2019 (T.A.N. v. M.A.N., 2019 BCSC 352, Vancouver Docket E132180).

Counsel for the Appellant:

M.J. Cochrane

Counsel for the Respondents:

P.M. Daykin, Q.C.

A. Dunn

Place and Date of Hearing:

Vancouver, British Columbia

February 13, 2020

Place and Date of Judgment:

Vancouver, British Columbia

June 23, 2020

Written Reasons by:

The Honourable Mr. Justice Butler

Concurred in by:

The Honourable Mr. Justice Fitch

The Honourable Madam Justice DeWitt-Van Oosten

Summary:

The appellant appeals the dismissal of her application to set aside the child and spousal support provisions agreed to in a comprehensive separation agreement. The appellant argues that the chambers judge erred by failing to determine the respondent's income for support purposes and in failing to conclude that the agreement did not substantially comply with the objectives of the Divorce Act. The appellant further argues that the judge misapplied the provisions of the Spousal Support Advisory Guidelines and the Federal Child Support Guidelines. Held: Appeal allowed in part. The judge erred in his approach to and application of the test in *Miglin v. Miglin*. That test requires the court to examine the factors outlined in the Divorce Act and consider whether the agreement operates in a way that reflects substantial compliance with the objectives of the statute. The analysis has two stages: the first considers the agreement at the time it was entered into and the second considers how the agreement operates at the time of the application. The judge failed to carry out the substantial compliance analysis at either stage of the *Miglin* test. The matter was remitted back to the trial court because, in the circumstances, the analysis could not be carried out for the first time in this Court. The appeal of the child support provisions was

dismissed. There was no basis upon which to interfere with the judge's exercise of discretion in deciding that child support should be determined under s. 3(2)(b) of the Guidelines, as the parties had agreed in the separation agreement.

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Reasons for Judgment of the Honourable Mr. Justice Butler:

- [1] The appellant, Tessa Nicholl, and the respondent, Murray Nicholl (together, the "couple") separated in November 2012 after a 24-year relationship. They have three children who were born in April 1994, June 1996 ("TN") and December 1997 ("BN"). Ms. Nicholl issued a notice of family claim (the "NOFC") in July 2013 seeking a divorce and orders respecting parenting, child support, spousal support and a division of family property. The couple owned assets of substantial value, including a family business. They retained experienced family law counsel and jointly appointed a business valuator to value the business. Prior to trial, the couple mediated a global settlement and entered into a comprehensive separation agreement dated October 1, 2015 (the "Agreement"). In the Agreement, the couple agreed to divide their assets equally and to share the children's expenses. They also agreed that Mr. Nicholl would pay modest spousal support to Ms. Nicholl for six years. The couple was subsequently divorced by an order dated April 21, 2016, which provided that all other claims were dismissed, as though on their merits.
- [2] The child support provisions in the Agreement were succinct. The couple agreed to "share equally all of the reasonable educational and living expenses" of the children until they had completed their post-secondary education, but the Agreement did not set out how that would be accomplished. Ms. Nicholl became dissatisfied with Mr. Nicholl's contribution to the children's expenses and, on March 20, 2018, brought an application for child support payments from Mr. Nicholl and for recovery of expenses relating to the children. In the course of the disclosure for that application, she learned that Mr. Nicholl's post-divorce income was much higher than she expected it to be. On September 10, 2018, she brought an application to determine Mr. Nicholl's income for support purposes and to increase the amount and duration of spousal support. Her applications were heard in chambers and dismissed in reasons indexed as T.A.N. v. M.A.N., 2019 BCSC 352 (the "Reasons").

- [3] On appeal, Ms. Nicholl says the Agreement operates unfairly. She says the chambers judge erred by failing to determine Mr. Nicholl's income for support purposes and in failing to conclude that the Agreement did not meet or substantially comply with the objectives of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.) either at the time it was signed, or at the time of the application. She further argues the chambers judge erred by misapplying the provisions of the Spousal Support Advisory Guidelines (the "SSAG") and the Federal Child Support Guidelines, SOR/97-105 (the "Guidelines"). She asks this Court to set aside parts of the Agreement, determine Mr. Nicholl's income for support purposes and make orders for child and spousal support both retrospectively and prospectively.
- [4] For the reasons that follow, I would allow the appeal, but only with respect to the spousal support order. In my view, the judge erred in his approach to and application of the test in *Miglin v. Miglin*, 2003 SCC 24. However, I am also of the view that this Court should not undertake the analysis that the judge was obliged to carry out in the court below. I would therefore remit the matter to the trial court to reconsider the application to set aside the spousal support provisions of the Agreement.

Background

- [5] The couple began their relationship when Ms. Nicholl was an undergraduate student and Mr. Nicholl was in the process of starting a student transportation business. Mr. Nicholl incorporated Thirdwave Enterprises Ltd. ("Thirdwave") in 1986 to carry on that business. He has continued to operate and expand Thirdwave, which has been very successful. When the couple separated, they had accumulated assets of significant value some of which, including Thirdwave, were held in a family holding company, MTN Property Holdings Ltd. ("MTN").
- [6] Throughout the marriage, Ms. Nicholl was the primary homemaker and caregiver for the children as well as the manager for a Whistler property they purchased. She obtained a Masters in pharmacology shortly after the marriage and went on to obtain a bachelor's degree in pharmacy in 1992. She completed a hospital residency program and accepted a full-time position at the Vancouver General Hospital. After their first child was born, the couple agreed that Ms. Nicholl would work part time so that she could also raise their children and support the family venture. She continued to do that for many years. In 2005, she took a 0.5-time position as a lecturer in the Faculty of Pharmaceutical Sciences at UBC. In 2011, she started a full-time tenure-track position as an instructor at UBC.
- [7] Throughout the marriage, Mr. Nicholl operated Thirdwave and handled the family finances.
- [8] Ms. Nicholl issued the NOFC on July 26, 2013. She sought child support, spousal support and a division of family property. In the NOFC, she alleged that Mr. Nicholl's annual line 150 income, based on a three-year average, was approximately \$672,000. She also alleged that his gross income was in excess of \$900,000 annually. In his response, Mr. Nicholl alleged that his income for support purposes was \$307,000.

- [9] Some time after the NOFC was issued, the couple changed lawyers and decided to resolve the case without litigation. They each provided full financial disclosure, although Mr. Nicholl never actually swore a form F8. They arranged for their real property to be valued and the family home to be sold. They hired Paul McEwen of Ernst & Young to prepare a report valuing MTN and Thirdwave. After Mr. McEwen provided his report on June 18, 2014, Ms. Nicholl retained Ron Hooge, a business valuation expert, to review the report and provide assistance in the negotiations that followed. Throughout the negotiations, both Mr. Nicholl and Ms. Nicholl had senior experienced family law counsel acting for them.
- [10] Mr. McEwen opined that the market value of Mr. Nicholl's services to Thirdwave was \$182,000 per year. Using that figure, he concluded that the maintainable earnings of Thirdwave were between \$1.9 to \$2.5 million per year and that it had an enterprise value of between \$9.5 million and \$10 million. He opined that the value of MTN (which also included the Whistler property) as of August 31, 2013 was between \$9,920,000 and \$11,920,000 with a midpoint value of \$10,920,000: Reasons at paras. 61-63.
- [11] As a result of discussions between counsel, Mr. McEwen subsequently provided additional information with respect to the assumption used in his valuation of Thirdwave about the market value of Mr. Nicholl's services. At some time in the negotiations, an accountant provided a summary of income received by the couple from MTN and Thirdwave from 2009 to 2014, as well as Ms. Nicholl's UBC income. The following figures represent the couple's total incomes including bonuses from MTN. Ms. Nicholl's UBC income, which ranged from \$73,000 in 2009 to \$120,000 in 2014, is included in her total incomes noted here:

2014

2013

2012

2011

2010

2009

Murray

473,730

772,000

342,000

780,000

893,900

558,000

Tessa

530,000

857,000

291,000

348,000

181,000

175,000

[12] Following receipt of Mr. McEwen's report and additional information, counsel began settlement discussions. The couple attended at two mediation sessions in July 2015 with an experienced family law mediator. The couple ultimately agreed they would utilize a "butterfly" transaction to transfer half of the value of MTN to a holding company to be incorporated by Ms. Nicholl. That structure had the benefit of deferring tax consequences. The terms of the settlement were finalized and the Agreement was signed by the couple.

The Agreement

[13] The judge set out the relevant terms of the Agreement in paras. 8-11 of the Reasons. The couple agreed to a nearly equal division of the couple's cash, proceeds of sale of the family home, their respective retirement and pension accounts and their interest in MTN. The recitals to the Agreement included:

G. Tessa is a tenured Senior Instructor at the University of British Columbia in the Faculty of Pharmaceutical Sciences with an income of approximately \$130,000 per year.

H. Murray is the General Manager of Thirdwave Enterprises Ltd. drawing a base management salary of \$230,000 per year.

[14] Provisions relevant to the appeal include:

THE CHILDREN

2. Until such time as the Children complete their respective post-secondary education, Tessa and Murray will continue to provide for their support.
3. The Parties will share equally all of the reasonable educational expenses incurred by the Children, including but not limited to:
 - a. post-secondary expenses, including tuition, computers, books, phones, other school supplies, residence and meal plan, or if any Child is living independently, rent, food, utilities and other necessary supplies, and travel to and from university, to the extent that these expenses are not covered by funds available for the education of the children or any other funds available to each child from scholarships or bursaries;

- b. uninsured medical and dental expenses;
- c. cellular telephone plans; and
- d. such other expenses that the Parties may agree upon in writing, consistent with past practice.

SPOUSAL SUPPORT

- 4. Murray will pay to Tessa for Tessa's support \$2,150 per month (the "Spousal Support"), commencing on the first day of the month immediately following the Closing Date for the fixed term of six (6) years only after which Spousal Support shall forever end.
- 6. Except as specifically provided by paragraph 4 of this Agreement, and notwithstanding any material change of circumstances no matter how unforeseen or radical,
 - a. Neither party will claim interim or permanent support from the other; and
 - b. Each party gives up forever any claim for spousal support against the other.
- [15] The Agreement provided the couple would conduct a corporate reorganization of MTN which would pay \$5,400,000 (representing one half of the value of MTN) to Ms. Nicholl's holding company ("Tessco Holdings Ltd.") on a tax-deferred basis. The first payment of \$2 million was to be made on the closing date. The balance, \$3.4 million, was divided into six equal capital payments of \$566,667, to be made annually on the subsequent six anniversaries of the closing date. MTN was required to pay interest at 5% per annum on the balance owing. As a result of the reorganization, Mr. Nicholl would become the sole shareholder of MTN.
- [16] The Agreement contained standard provisions providing for a full release, including of spousal support claims. The couple acknowledged that the Agreement could only be amended by a further written agreement and that the couple had made full disclosure of their assets, liabilities, income and expenses and had received independent legal advice.

The Chambers Judgment

- [17] After setting out the factual background, the chambers judge began by identifying the relevant statutory provisions: ss. 15.2 and 17 of the Divorce Act and s. 164 of the Family Law Act, S.B.C. 2011, c. 125. He referred to *Sandy v. Sandy*, 2018 BCCA 182, for the proposition that a significant part of any analysis under s. 15.2 of the Divorce Act consists of determining whether there has been a significant and unanticipated change in the couple's circumstances since entering into a separation agreement.
- [18] The judge also cited *Miglin* for the two-stage test to be applied where a claimant applies for spousal support after they and their spouse had settled spousal support claims in an agreement. The judge continued at paras. 18-20:

At the first stage, the court looks to the circumstances in which the agreement was negotiated and executed to determine whether there is any reason to discount it, including any circumstances of oppression, pressure, or other vulnerabilities, and whether there was professional assistance: Miglin at paras. 80-81. The majority of the Court stated at para. 83:

Where vulnerabilities are not present, or are effectively compensated by the presence of counsel or other professionals or both, or have not been taken advantage of, the court should consider the agreement as a genuine mutual desire to finalize the terms of the parties' separation and as indicative of their substantive intentions. Accordingly, the court should be loathe to interfere. In contrast, where the power imbalance did vitiate the bargaining process, the agreement should not be read as expressing the parties' notion of equitable sharing in their circumstances and the agreement will merit little weight.

While independent legal advice is relevant, in *Rick v. Brandsema*, 2009 SCC 10 at para. 60, the Supreme Court of Canada rejected the proposition that independent legal advice in itself was sufficient to counteract the vulnerabilities of a party arising from historical power imbalance within a marriage. At para. 61, the Court commented that "where vulnerabilities have been compensated for by the presence of professionals, the agreement should be respected. But exploitation is not rendered anodyne merely because a spouse has access to professional advice."

At the second stage of the analysis, the court should determine "the extent to which enforcement of the agreement still reflects the original intention of the parties and the extent to which it is still in substantial compliance with the objectives of the Act": Miglin at para. 87; see also *L.M.P. v. L.S.*, 2011 SCC 64 at para. 20. The Court stressed that a certain degree of change is foreseeable and that the court should remain attentive to the parties' intentions, as reflected by the agreement: at para. 88.

[19] The chambers judge rejected Ms. Nicholl's arguments for setting aside the provisions of the Agreement pertaining to spousal support for the following reasons:

- i. He found that Ms. Nicholl did not have any particular vulnerability at the time the Agreement was entered into and that her circumstances were effectively accommodated by the assistance of legal counsel and her business valuator. He concluded that the Agreement represented a genuine mutual desire by the couple to "finalize the terms of their separation and as indicative of their substantive intentions.": at para. 29;
- ii. Under the second stage of the Miglin test, he considered whether there had been any unanticipated changes in the couple's circumstances. The chambers judge rejected Ms. Nicholl's contention that Mr. Nicholl's and Thirdwave's income were neither foreseen nor foreseeable. The judge found that the bonuses paid to Mr. Nicholl after the Agreement was signed were consistent with the amounts he received before its signing and Thirdwave's performance was "in the same range" before and after the signing of the Settlement Agreement: at paras. 50, 74. Because of these findings, and without making any findings as to the couple's incomes either at the time of the Agreement or the time of the application, the judge concluded that there were no unanticipated changes in the couple's financial circumstances; and

iii. He examined the equal division of \$16 million worth of assets and considered Ms. Nicholl's current assets. He noted that she had elected to invest in real property (for herself and the children) that would not produce investment income. He reviewed the amount and duration of spousal support ordered in other high-capital, high-income cases and concluded that the Agreement met the objectives of the Divorce Act at the time it was executed and that it was still in substantial compliance with those objectives: at para. 89.

[20] Having arrived at these conclusions, the judge found it unnecessary to consider Mr. Nicholl's "double recovery" argument. Mr. Nicholl had argued Ms. Nicholl should not receive an increase in spousal support because that would give her one half of the value of Thirdwave and a share in its future income which would amount to double recovery.

[21] The judge then turned to the child support application. Ms. Nicholl contended that the terms of the Agreement should be varied in favour of a determination of base child support and s. 7 expenses in accordance with s. 3(2)(a) of the Guidelines. She also sought an order setting out a process for resolving disputes about payment of the children's expenses. Mr. Nicholl contended that the objectives of child support as set out in s. 1 of the Guidelines were met by the terms of the Agreement.

[22] The judge found that the children had not withdrawn from their parents' care and were still entitled to continuing child support: at para. 107. He rejected Ms. Nicholl's application to have child support determined pursuant to s. 3(2)(a) of the Guidelines and found instead that Mr. Nicholl's obligation to pay support should be determined in accordance with s. 3(2)(b). Although the Agreement did not specify the amounts to be paid by Mr. Nicholl for base support or s. 7 expenses, the judge found that the children's needs had been met by the contributions of both parents. He also concluded that their needs would be met in the future: at para. 136. He declined to make any order to resolve the couple's dispute as to how much Mr. Nicholl owed Ms. Nicholl to equalize contributions to past expenses, noting that the couple could work that out.

Spousal Support Appeal

Issues on Appeal

[23] Ms. Nicholl raises two grounds of appeal:

1. Did the judge err in failing to determine the couple's incomes for support purposes and failing to consider the SSAG?
2. Did the judge err in principle in his consideration and application of the Miglin test?

Positions of the Parties

[24] Ms. Nicholl submits the judge erred by declining to make a determination of Mr. Nicholl's income for support purposes. She says the failure to do so led to errors in his conclusions about child and spousal support.

- [25] With regard to spousal support, Ms. Nicholl says the judge's failure to determine the couple's incomes, and in particular Mr. Nicholl's income, meant he could not properly assess whether the Agreement operated in a way that was unfair and did not reflect an equitable sharing of the economic consequences of the marriage and its breakdown. Ms. Nicholl says the judge should have determined the couple's current incomes in order to consider whether the Agreement operated fairly. Had the judge done so, he could have compared the amount and duration of support recommended by the SSAG with the spousal support provided by the terms of the Agreement. In making this argument, Ms. Nicholl notes that while the judge set out the couple's positions regarding their respective incomes, he failed to resolve conflicts or make any findings as to their incomes. She says the inadequacy and significant unfairness of the Agreement as it relates to spousal support would have been evident had the judge determined the couple's incomes and applied the SSAG.
- [26] Ms. Nicholl also argues the judge failed to properly apply the test set out in Miglin. While the judge concluded the Agreement met the objectives of the Divorce Act both at the time it was executed and at the time of the application, she says the judge failed to provide any analysis or explanation of how he reached that conclusion. The judge appears to have accepted Mr. Nicholl's argument that the amount and duration of spousal support was in line with what has been ordered in other high-capital, high-income cases. However, Ms. Nicholl says some of the cases relied upon predate the SSAG and, in any event, the judge did not analyze the couple's circumstances in comparison with those of the parties in the referenced decisions.
- [27] Mr. Nicholl says the judge made no error in principle or misapprehension of fact that would permit this Court to intervene. He argues the judge did not err in failing to determine the couple's Guidelines incomes. He says there is no need to do so when considering the Miglin test. That test does not require a trial judge on an initial support application to determine incomes or to apply the SSAG. The two-stage Miglin test requires a judge to consider the circumstances at the time an agreement was entered into. The judge did so and found that the Agreement was unimpeachable, both procedurally and substantively. Mr. Nicholl says there is no basis to challenge the judge's finding at the second stage of the Miglin test that there were no unforeseen or unforeseeable changes in the couple's circumstances. Further, Ms. Nicholl points to no error in the conclusion that the Agreement continued to reflect the couple's original intentions and met the objectives of the Divorce Act.
- [28] Mr. Nicholl emphasizes that the Agreement was a negotiated settlement with the benefit of expert professional advice. In light of the couple's circumstances and the interplay between the division of assets and determination of appropriate spousal support, there was a broad spectrum of possible arrangements they could have agreed to in order to meet the objectives of the Divorce Act. Mr. Nicholl says the Agreement must be considered as a whole and that spousal support cannot be looked at in isolation. He says it was significant that Thirdwave was valued as a stream of future income and that Ms. Nicholl received one half of that value. He says it would have been unfair for Ms. Nicholl to also receive an ongoing share of that future income as spousal support. The Agreement recognized that the payments received by

Ms. Nicholl for her share of Thirdwave had to be made out of that future stream of income. In these circumstances, Mr. Nicholl argues this Court should not lightly set aside the choices made by the couple with the assistance of their professional advisors.

Standard of Review

- [29] This appeal concerns two support orders. Spousal and child support orders require a judge to make important fact-based, discretionary decisions about the obligations of parents and spouses based on the objectives, values, factors and criteria established by the relevant legislation. On review, these decisions are necessarily afforded considerable deference. This Court should not interfere unless the reasons disclose an error in principle, a significant misapprehension of the evidence, or unless the award is clearly wrong: *Hickey v. Hickey*, [1999] 2 S.C.R. 518 at paras. 10-11. Additionally, this Court can interfere where the judge made a palpable and overriding error. Finally, the judge's interpretation of the Agreement engages questions of mixed fact and law and is owed deference on appeal: *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 at paras. 50, 54-55.

Brief Summary

- [30] I have concluded that the judge erred in principle and, as a result of that error, he failed to properly apply the Miglin test. Failing to compare the provisions in the Agreement to the SSAG did not constitute a stand-alone error. However, the judge's failure to conduct a comprehensive analysis of the couple's incomes and standard of living on an ongoing basis led to a misapplication of the Miglin test. The Miglin test has two stages. At the first stage, the focus is on the circumstances under which the separation agreement was arrived. At the second stage, the focus is on the circumstances that exist at the time of the application to set aside the agreement. At both stages, the court is required to examine the factors outlined in the Divorce Act and consider whether the separation agreement operates in a way that reflects substantial compliance with the objectives of that statute. In my view, the judge failed to carry out the substantial compliance analysis at both stages of the Miglin test. Having failed to conduct the required analysis, I am of the view that this matter should be remitted back to the trial court to reconsider the application to set aside the spousal support provisions of the Agreement.
- [31] I pause to note that in their factums on appeal, as well as in the court below, counsel referred to both the federal and provincial legislation. As the couple was married for 22 years, child support and spousal support were sought pursuant to the Divorce Act, and the Agreement was filed in the trial court after the divorce order was made, it is clear that the relevant legislation on support matters is the Divorce Act. At the hearing of the appeal, counsel agreed that the Divorce Act is applicable. As this Court has said on a number of occasions, it is important for orders in family proceedings to correctly identify the applicable legislation: *Yu v. Jordan*, 2012 BCCA 367 at paras. 54-56; *Brown v. Brown*, 2020 BCCA 53 at paras. 96-98; *Nester v. Nester*, 2018 BCCA 453 (Chambers). This is so courts can

respect the differences in the two regimes. There is no need for litigants or courts to refer to both the federal and provincial legislation where one does not apply.

Legal Principles

[32] Before turning to the specific issues raised by this case, it is useful to review the provisions in the Divorce Act and the legal principles from Miglin that govern the proper approach to be applied on an application for spousal support where spouses have entered into a separation agreement that includes a release of future claims for support.

[33] Relevant provisions of the Divorce Act include:

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.

...

(4) In making an order under subsection (1) [], 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.

...

(6) An order made under subsection (1) [] 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.

17 (1) A court of competent jurisdiction may make an order varying, rescinding or suspending, prospectively or retroactively,

- (a) a support order or any provision thereof on application by either or both former spouses;

...

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

...

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

- (a) recognize any economic advantages or disadvantages to the former spouses arising from the marriage or its breakdown;
- (b) apportion between the former spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;
- (c) relieve any economic hardship of the former spouses arising from the breakdown of the marriage; and
- (d) in so far as practicable, promote the economic self-sufficiency of each former spouse within a reasonable period of time.

[34] In *Miglin*, the Court recognized that applications to set aside the spousal support provisions of an agreement should not be determined solely by measuring whether the terms of a comprehensive agreement advance the objectives of support set out in s. 15.2(6) of the Divorce Act. Instead, the agreement must be considered more broadly in light of all the objectives of the Divorce Act:

57 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.

[35] The Court stressed, at para. 66, that nothing in the Divorce Act requires parties to adhere strictly to the objectives in ss. 15.2(6) and 17(7) when arriving at a comprehensive agreement. The Court recognized the potential tension between those objectives and the policy goal of encouraging spouses to negotiate settlements allowing them the "autonomy and freedom to structure their post-divorce lives in a manner that reflects their own objectives and concerns."

- [36] The Court established a two-stage test to be applied on an application to set aside spousal support provisions in a separation agreement. The first stage examines the separation agreement at the time of its formation; the second stage does so at the time of the application for spousal support: at para. 64. The first stage of the Miglin test has two parts. First, the court inspects the circumstances in which the agreement was negotiated and executed: at para. 80. The court must be "alive to the conditions of the parties, including whether there were any circumstances of oppression, pressure, or other vulnerabilities": at para. 81. If a party is not vulnerable or if their vulnerability is effectively mitigated by counsel or other professionals, the court will consider the agreement as a "genuine mutual desire to finalize the terms of the couple's separation and as indicative of their substantive intentions": at para. 83. In these circumstances, the court should be "loathe to interfere".
- [37] At the second part of the first stage, the court looks to the substance of the agreement. The court will determine whether the agreement considers the factors and objectives listed in the Divorce Act, "thereby reflecting an equitable sharing of the economic consequences of marriage and its breakdown": at para. 84. The court looks at the agreement as a whole and will intervene only when the agreement significantly departs "from the general objectives of the Act". The court should determine whether the agreement significantly departs from the spousal support considerations in s. 15.2 as well as the objectives of "finality, certainty, and the invitation in the Act for parties to determine their own affairs": at para. 85.
- [38] Where a court determines that the agreement is not impugned based on the circumstances at the time of formation and was in substantial compliance with the general objectives of the Act, "the court should defer to the wishes of the parties and afford the agreement great weight": at para. 87. Nevertheless, at stage two of the Miglin analysis, a court can interfere after it assesses the extent to which enforcing the agreement still reflects the original intentions of the parties and the extent to which the agreement remains in substantial compliance with the Divorce Act objectives.
- [39] At stage two, the court may intervene if there has been a "significant change in the couple's circumstances": at para. 88. A claimant must show that because of the new circumstances, the terms of the agreement no longer reflect the couple's original intentions and the Divorce Act objectives. The claimant must show that the new circumstances were not reasonably anticipated by the parties and the new circumstances "have led to a situation that cannot be condoned". However, the test is not "strict foreseeability", as the question is the extent to which the agreement "can be said to have contemplated the situation before the court at the time of the application": at para. 89. However, the Court emphasized that it is important not to focus exclusively on whether a change occurred as that may obscure the inquiry that lies at the heart of the analysis:

90 The court's focus should be on the agreement's continued correspondence to the parties' original intentions as to their relative positions and the overall objectives of the Act, not on whether a change occurred per se.

[Emphasis added.]

[40] In summary, a court undertaking a Miglin analysis should:

Stage One

1. Inspect the circumstances at the time the agreement was entered into to determine if there is evidence of "oppression, pressure, or other vulnerabilities". If such negative circumstances existed, the "agreement will merit little weight".
2. If there are no such negative circumstances, determine whether the agreement considered the Divorce Act factors and complied with its objectives. If the agreement does not comply with those objectives, the intervention of a court is only warranted where the agreement operates in a way that reflects a "significant departure from the general objectives" of the Divorce Act.

Stage Two

If the court has not intervened at stage one, the court must still analyze the agreement at the time of the application for spousal support to consider whether it represents the parties' original intentions and whether it continues to comply with the Divorce Act. The claimant needs to demonstrate that new circumstances, not reasonably anticipated at the time of the agreement, warrant the court's intervention. The change in circumstances needs to be significant but need not be "radically unforeseen". However, the focus is not on whether a change occurred, but whether the agreement continues to represent the parties' intentions and continues to be in substantial compliance with the objectives.

Analysis

The Couple's Incomes and Comparison with the SSAG

- [41] Miglin was decided in 2003. The draft SSAG were first published in 2005 and finalized in 2008. Accordingly, Miglin offers no guidance on whether an agreement's consistency with the SSAG might factor into consideration of substantial compliance with the objectives of the Divorce Act.
- [42] It is accepted that the SSAG are intended to reflect the current law in Canada and to provide guidance for the appropriate range of support at the time of an initial application for spousal support. Accordingly, a comparison of the SSAG range for spouses with the same incomes as the parties will generally be of some value when testing compliance of an agreement with the objectives of the Divorce Act. This follows from this Court's recognition of the value of the SSAG as a useful tool: see *Yemchuk v. Yemchuk*, 2005 BCCA 406 at paras. 60-64; and *Redpath v. Redpath*, 2006 BCCA 338 at para. 38. In *Redpath*, Justice Newbury observed, at para. 42, that it may be an error of law to make a spousal support award that is substantially outside of the range set out in the SSAG. However, the Courts in *Yemchuck* and *Redpath*

were not focused on applications to set aside the amount or duration of spousal support that parties had agreed to in a separation agreement.

- [43] S.E. v. J.E., 2013 BCCA 540 is more directly relevant to this appeal. In that case, the parties had entered into a consent order following a two-day mediation on the eve of trial. The wife later challenged the spousal support provisions of the consent order. Her challenge was dismissed by the trial judge. As here, one of the primary issues at trial was whether the agreement had been negotiated in a way that was procedurally fair. That issue was not pursued on appeal. The main issue on appeal was whether the judge had properly weighed the substance of the agreement against the wife's compensatory claim to spousal support and the objective of promoting self-sufficiency.
- [44] In allowing the appeal, Justice Harris observed, at para. 41, that, "[i]nsofar as the [SSAG] offers guidance", the appellant spouse, who "gave up her own career, supported her husband's, and took primary responsibility for the care for the children", could have a claim to spousal support of substantial duration. However, he was careful to note that there is no requirement for the spousal support terms in a separation agreement to be measured against the SSAG:
- [42] I pause to note that I am not suggesting that when a court is assessing whether an agreement substantially complies with the objectives of the Divorce Act, the effect of the agreement must be explicitly compared to the results indicated under the SSAG. Parties can legitimately negotiate valid agreements that depart from the Guidelines, particularly when other issues are being resolved. But in this case, such a comparison does illuminate, in broad terms, the degree to which this agreement shows a significant variation from what the SSAG suggests as an appropriate award.
- [Emphasis added.]
- [45] I agree that when a court undertakes the Miglin analysis, there is no absolute requirement to compare the spousal support provisions in a separation agreement with the range and duration of support calculated in accordance with the SSAG. There are two reasons for this. First, to determine whether an agreement substantially complies with the objectives of the Divorce Act, a judge must broadly consider all of the objectives that are relevant to whether the agreement reflects "an equitable sharing of the economic consequences of marriage and its breakdown": Miglin at para. 84. The economic consequences can be shared equitably through division of assets and debt, the way special and extraordinary expenses for children are divided between spouses, as well as by the provision for spousal support.
- [46] The court must also consider finality, certainty and the benefit of allowing spouses to settle their own affairs under terms that are agreeable to them. The breadth of the considerations and the resort to alternative ways of equitably sharing the economic consequences of a marriage and its breakdown will mean that in some cases a court will be able to readily conclude that the agreement is in substantial compliance with the objectives of the Divorce Act without looking at the SSAG. That is in part because it is only a significant departure

from the general objectives of the Divorce Act that will warrant a court's intervention.

- [47] The second reason arises from the scope and design of the SSAG. While this Court has recognized the utility of the SSAG, it must be remembered that they are "advisory guidelines" and thus are not intended to be written in stone. As the SSAG itself states, the guidelines are "intended to be informal guidelines that operate on an advisory basis only, within the existing legislative framework": SSAG at 14 (Emphasis in original). If a court can determine whether an agreement substantially complies with the Divorce Act objectives without comparing the agreement with the SSAG, there is no requirement to do so. That is particularly the case where one of the spouses is a high income earner as the SSAG are considered to be discretionary for spouses with income above \$350,000. Above that income level, "the formulas should no longer be automatically applied to divide income": SSAG at 110.
- [48] While a judge is not required to explicitly compare an existing agreement's spousal support provisions with the SSAG, the judge must nonetheless analyze how the terms of the agreement accommodate an equitable sharing of the economic consequences of the marriage and its breakdown. Such an analysis is essential to properly assess whether the agreement substantially complies with the objectives of the Divorce Act. That analysis will usually require the judge to consider the couple's incomes after separation. This is particularly the case where the marriage was of long duration. As noted in *Moge v. Moge*, [1992] 3 S.C.R. 813 at 870, the longer a marriage endures, the greater the presumptive claim to equal standards of living:

Although the doctrine of spousal support which focuses on equitable sharing does not guarantee to either party the standard of living enjoyed during the marriage, this standard is far from irrelevant to support entitlement (see *Mullin v. Mullin* (1991), *supra*, and *Linton v. Linton*, *supra*). Furthermore, great disparities in the standard of living that would be experienced by spouses in the absence of support are often a revealing indication of the economic disadvantages inherent in the role assumed by one party. As marriage should be regarded as a joint endeavour, the longer the relationship endures, the closer the economic union, the greater will be the presumptive claim to equal standards of living upon its dissolution

[Emphasis added.]

- [49] This Court has also repeatedly observed that after a long marriage, spouses should have approximately the same standard of living upon separation without unreasonably encroaching on capital: see *McKenzie v. McKenzie*, 2014 BCCA 381 at para. 108; *Bell v. Bell*, 2009 BCCA 280; and *Chutter v. Chutter*, 2008 BCCA 507.
- [50] Applying these principles to the present situation, the judge did not err in principle by failing to compare the spousal support provisions of the Agreement with the ranges for amount and duration of spousal support that would be obtained by using the SSAG for spouses in similar circumstances. However, given Ms. Nicholl's arguably strong claim to compensatory support and the length of the relationship, the judge was required to analyze

the extent to which the Agreement provided for an equitable sharing by the couple of the economic consequences of the marriage and its breakdown. In order to do so, it was not enough to determine that the couple shared the family property equally, even where that equal division left each with property worth in excess of \$8 million. The judge needed to assess whether the Agreement would also provide the couple with a roughly equal standard of living taking into account their past and ongoing incomes, return from investment, and their obligations under the Agreement including spousal and child support. As I will explain, the judge did not carry out that analysis. This, in turn, meant that he was unable to consider in a meaningful way whether the Agreement was (and remains) in substantial compliance with the objectives of the Divorce Act, including the spousal support objectives in s. 15.2.

Application of the Miglin Test

- [51] It is readily apparent from a review of the Reasons that the chambers judge did not properly apply the Miglin test. He began his analysis by considering the first part of stage one of the test: he examined the circumstances at the time the Agreement was entered into to determine if there was evidence of "oppression, pressure, or other vulnerabilities". This issue was contested as Ms. Nicholl maintained that she was under a great deal of stress in part because of the circumstances that led her to obtain a protection order at the time of the separation, and in part because of the historical power imbalance in the relationship. The chambers judge appropriately considered the evidence and arguments directed at this portion of the Miglin test and he rejected Ms. Nicholl's position: at paras. 24-29.
- [52] However, the chambers judge failed to consider the second part of stage one of the test. He did not analyze the substance of the Agreement for whether, at the time the couple entered into it, the Agreement substantially complied with the objectives of the Divorce Act. Instead, he moved directly to the second stage of the test: at paras. 29-30. This may have occurred because the appellant's argument in the court below misstated the test by omitting the second part of stage one of the Miglin test.
- [53] Having omitted the second part of the first stage of Miglin, the judge considered the question of whether there had been a significant change in circumstances by setting out some of the evidence concerning "the personal parties' incomes" (at paras. 36-50) and the "value of MTN and Thirdwave" (at paras. 51-71), as well as the couple's positions on those matters. Notably, the chambers judge made no finding as to the couple's incomes at the time of the Agreement or at the time of the application. He addressed the question of foreseeability and found that the post-settlement management fees and bonuses declared to Mr. Nicholl were less than what the couple drew out of the business during the marriage. He also found that the bonuses paid following the signing of the Agreement were consistent with those received before its signing: at paras. 47, 50. He concluded this analysis by rejecting Ms. Nicholl's argument that Mr. Nicholl's income was neither foreseen nor foreseeable at the time the Agreement was signed: at paras. 72-74.

- [54] The analysis clearly attempts to satisfy part of the stage two test under Miglin: the judge considered whether there were new circumstances not reasonably anticipated at the time of the Agreement that could warrant the court's intervention. However, the chambers judge did not address at either stage of the Miglin test the critical question of whether the Agreement was in substantive compliance with the objectives of the Divorce Act. Indeed, at the second stage of the Miglin test, the judge focused on the question of whether "a change occurred *per se*" rather than on whether the Agreement carried out the couple's original intentions as to their relative positions and satisfied the overall objectives of the Act: Miglin at para. 90.
- [55] At paras. 79-84, the chambers judge referred to Mr. Nicholl's argument that the amount and duration of support in the Agreement was consistent with other high-capital, high-income cases. However, although noting the outcomes of those cases, he did not analyze whether the couple's circumstances were similar to or different from those cases. At paras. 72 and 89, the chambers judge concluded that the Agreement met the objectives of the Divorce Act when it was executed and that it is still in substantial compliance. However, his statements are conclusory and he provided no analysis to support the conclusion. He did not refer to the relevant objectives and explain how they were satisfied by the provisions of the Agreement.
- [56] I appreciate that just because a judge failed to refer to some aspect of the relevant legal test does not, on its own, mean that the judge failed to apply that test: *Hug v. Bliss* (1998), 57 B.C.L.R. (3d) 30 at para. 12; *Hersey v. Hersey*, 2016 ONCA 494 at para. 14. However, having considered the entirety of the Reasons, I am satisfied that the judge did not properly apply the Miglin test to the couple's unique circumstances.
- [57] The error in principle committed by the chambers judge is very similar to the error identified by Justice Harris at paras. 33-34 in *S.E.*:

In my view, the trial judge nevertheless fell into error in failing to take his analysis one step further by measuring, more explicitly, the value of the spousal support settlement against the principles established by *Moge* and the criteria set out in s. 15.2 of the Divorce Act. That analysis needed to be undertaken to determine whether, on these facts and in light of *S.E.*'s claim to compensatory support, the settlement agreement as a whole substantially complied with the objectives of the Divorce Act, including those in s. 15.2.

In my opinion, the trial judge erred in failing to adequately test the agreement against the criteria in s. 15.2, particularly the four factors set out in s. 15.2(6), in order to assess it in light of the conditions, means, needs and other circumstances of the parties. More particularly, the judge referred to the objectives of autonomy, finality and certainty without explicitly weighing the substance of the agreement against *S.E.*'s compensatory claim to spousal support or the objective of promoting self-sufficiency.

- [58] This was not a case where it was possible for the chambers judge to readily conclude that the Agreement was in substantial compliance with the objectives of the Divorce Act. Not only does Ms. Nicholl appear to have a strong claim to compensatory support, this was a

marriage of long duration. The relationship easily satisfies the description of a "joint endeavour" and a "close economic union". In these circumstances, one would expect the Agreement to leave the couple in a position of substantial economic equality. In other words, to meet the objectives of the Divorce Act, the Agreement should divide assets equally and place the couple in a position where they would continue to enjoy a similar standard of living. In order to consider whether the Agreement accomplished that, the chambers judge needed, as noted in S.E., to take his analysis one step further.

- [59] I will explain why I have arrived at this conclusion by referring to some of the issues raised by the circumstances of this case that needed to be considered in relation to the objectives set out in the Divorce Act.

The Intent of the Agreement

- [60] I have indicated that the intent of the Agreement was to leave the couple in a position of substantive economic equality. Such an intent would be consistent with the objective of having the couple equitably share the economic consequences of the marriage and its breakdown. That intent is evident from some of the provisions in the Agreement. The substantial family property that the couple built up over the years of their relationship was divided equally. In addition, the child support provisions required the couple to continue to provide support for the children and to share equally all of their educational and other expenses. The inference to be drawn from these provisions is that the Agreement would leave the couple with roughly equal incomes from which to provide for those needs.

The Couple's Incomes

- [61] The judge set out evidence of the couple's incomes and Ms. Nicholl's submissions about Mr. Nicholl's total available income from Thirdwave: at paras. 46-48. He also described and accepted Mr. Nicholl's contention that the bonuses paid out in the past were consistent with those paid after the Agreement. What he failed to do is attempt to determine the income available to the couple on an ongoing basis as a result of the provisions of the Agreement. This was not an easy task, particularly with regard to Mr. Nicholl. It would have involved an assessment of the income that would be available to Mr. Nicholl for support purposes, taking into account the pre-tax income of Thirdwave, Mr. Nicholl's obligations to pay for Ms. Nicholl's interest in Thirdwave and to pay spousal support. His income could then be compared with the income that was reasonably anticipated to be available to Ms. Nicholl from investments using her share of the family property, taking into account her employment income and the spousal support payments.

- [62] By simply stating that the bonuses paid by Thirdwave following the signing of the Agreement were consistent with those paid before its signing, the judge failed to consider a key issue. While that question is relevant to an assessment of the existence of a significant change of circumstances, it does not deal with the fundamental question of whether the provisions of the Agreement were consistent with the objectives of the Divorce Act. As I have already indicated, the judge did not analyze that issue at either stage of his Miglin analysis.
- [63] As Ms. Nicholl argues, it appears that the Agreement has left the couple with very different levels of income and thus different standards of living. At the hearing of the application, Ms. Nicholl argued that her total income for the years after the Agreement was signed (2016 and 2017) was: \$334,511 and \$368,435. By comparison, she argued that Mr. Nicholl's income was between \$953,118 and \$1,378,118 for 2016 and \$626,112 and \$1,257,112 for 2017 (depending on whether certain bonuses are excluded). There was clear evidence before the judge to support these submissions. The chambers judge should have considered whether the Agreement in fact left the couple in disparate positions; and, if it did, whether there were reasons for that consistent with the Divorce Act objectives.

Compensatory Entitlement

- [64] Ms. Nicholl's affidavit material sets out the circumstances that she says establish a strong claim to compensatory entitlement. She describes the opportunities she did not pursue--medical school and an academic career--at the early stages of the relationship in order to support Mr. Nicholl in his efforts to establish Thirdwave. Later, in the relationship, having obtained a degree in pharmacy, she worked part time for 15 years to be the primary caregiver for the children. While she continued to work, she was unable to advance her career fully as the couple prioritized developing the family business that was operated by Mr. Nicholl. In retrospect, this was a beneficial financial decision for the couple. An equitable sharing of the consequences of a marriage and its breakdown includes sharing in the positive economic consequences.
- [65] The chambers judge did not consider or decide the nature or strength of Ms. Nicholl's entitlement to spousal support. In this Court, Mr. Nicholl argued that Ms. Nicholl has, at best, a weak claim to compensatory support. The couple's positions on compensatory support are very different and should have been resolved. I would adopt the observation made by Justice Harris in S.E. at para. 52:

The trial judge did not explicitly test the agreement against the compensatory objectives of the Divorce Act. In light of what I have said, I do not think one could reach the conclusion that this agreement does substantially comply with those objectives: indeed there is reason to doubt that it does. However, given the problems identified earlier, it is not possible for this Court to reach a definitive conclusion on the point.

[Emphasis added.]

Mr. Nicholl's Arguments to Justify Spousal Support Provisions

- [66] Mr. Nicholl advanced three principal arguments in both courts to justify the provisions in the Agreement that would leave Ms. Nicholl with a lower income. First, he submitted that if Ms. Nicholl was to receive spousal support based on his income from Thirdwave, this would amount to double recovery as she had already received one half of the value of the company. Second, he argued that he was taking on all of the risk associated with operating Thirdwave while she received a half share of the value of the company with no risk. Finally, he argued that the support payments were based in part on the fact that he was required to pay Ms. Nicholl for her share of MTN over six years and this had to be funded from Thirdwave.
- [67] The judge did not consider any of these arguments as he was of the view that he did not need to do so. I disagree. If, as appears to be the case, Ms. Nicholl is left in a position where her future income and standard of living are markedly different from Mr. Nicholl's, the judge needed to engage with the arguments advanced by Mr. Nicholl to support the provisions of the Agreement. While these arguments were also made in this Court, given the disposition that I propose, I will provide only brief comments on them.
- [68] In advancing the "double recovery" or "double dipping" argument, Mr. Nicholl relied on the decision in *Boston v. Boston*, 2001 SCC 43. He says Thirdwave was valued as a stream of future income and that Ms. Nicholl received one half of that value. Accordingly, he says it would be unfair to allow Ms. Nicholl to receive spousal support based on an ongoing share of that future income. In essence, he says the property settlement has already given her that future income. Ms. Nicholl says the judge should have considered Mr. Nicholl's argument because it is lacking in merit and would have demonstrated that Mr. Nicholl's ongoing income from Thirdwave needs to be taken into account in assessing her claim for spousal support. She argues that there is a significant difference between the division of a pension between spouses and the equalization of the value of an income-producing business that remains in the control of one spouse.
- [69] I agree with Ms. Nicholl that considering this issue would have assisted the judge in assessing whether the Agreement complies with the objectives of the Divorce Act. I am also of the view that Ms. Nicholl's position that there is an important distinction between dividing pensions and the value of a family corporation is correct. This was emphasized in *Boston* at para. 57:

Pension income is obviously different from business income or income from an investment. See T. Walker, "Double Dipping: Can a Pension Be Both Property and Income?", in *Best of Money & Family Law*, vol. 9, No. 12, 1994, in which the author argues that pensions should not be treated as other assets subject to equalization consideration. When a pension produces income the asset is being liquidated. The same capital that was equalized is being converted into an income stream. By contrast, when a business or investment is producing income, that income can be spent without affecting the asset itself. In fact, the business or asset may continue to increase in value. The value of the business or investment can be equalized, but neither is depleted solely by

producing income.

[Emphasis added.]

- [70] Here, Mr. Nicholl was left with a valuable income-producing asset that was owned by the couple throughout their relationship. Payment of Ms. Nicholl's share of the asset does not diminish the company's value; indeed, Thirdwave may continue to increase in value. Further, the acquisition by Mr. Nicholl of Ms. Nicholl's interest in the company would not change the company's ability to produce income.
- [71] It is more difficult to assess Mr. Nicholl's argument that any difference in the couple's post-Agreement income prospects is justified by the risk he was assuming. However, it is evident that the issue of future risks to the business would have been a factor considered in the valuation of Thirdwave. It was valued as a going concern based on the estimated range of maintainable earnings using a multiple that would necessarily take future risks into account. If risk has been considered in valuing the company, it is not clear how it has to be considered again to discount the income Mr. Nicholl receives from the company that would normally be considered to be available for support purposes. Nevertheless, the issue should have been dealt with by the judge as it was raised in the couple's submissions. It provides another way to consider and weigh the various objectives of the Divorce Act.
- [72] Mr. Nicholl's third argument, that any support obligation should be reduced or eliminated because he is required to pay Ms. Nicholl for her share of Thirdwave out of company earnings, should also have been considered as part of the balancing of the various objectives. In other words, did the structure of the Agreement for payment to Ms. Nicholl of her interest in Thirdwave justify the apparent inequality in streams of income? Ms. Nicholl received the value of her interest in the family business in a relatively short period of time. The Agreement brought certainty and finality to the separation of their intertwined financial lives. The cost and value of these terms of the Agreement to both Mr. Nicholl and Ms. Nicholl are relevant to a consideration of whether it substantially meets the objectives of the Divorce Act.

Consideration of Other High-Capital, High-Income Cases

- [73] Mr. Nicholl argues that the judge's analysis of other high-capital, high-income cases satisfied the requirement for consideration of whether the Agreement was in substantial compliance with the objectives of the Divorce Act. As Ms. Nicholl argued, the difficulty with this argument is that the judge provided no analysis of those cases to allow any meaningful comparison with the couple's circumstances.
- [74] In short, the judge's summaries of other decisions does not satisfy the requirement to fully analyze the circumstances of this case in light of the factors and objectives of the Divorce Act to determine whether the Agreement is in adequate compliance.

Disposition

[75] The final question on spousal support is the appropriate disposition of the appeal. I have been careful not to embark on a detailed analysis of the issues and concerns raised by the circumstances of this case. I have merely highlighted some of the questions the chambers judge should have answered in the course of the Reasons. It is for the trial court to decide whether the Agreement substantially complies with the Divorce Act objectives and reflects an equitable sharing of the economic consequences of the marriage and its breakdown. That decision is discretionary and must be fact-based, considering the relevant objectives, values, factors and criteria. As the judge did not undertake this task at the hearing of the application, I am of the view that this Court should not do so for the first time on appeal. I am of the view that it is appropriate to remit the matter to the trial court for reconsideration.

Child Support Appeal

Issues on Appeal

[76] Ms. Nicholl raises two grounds of appeal:

1. Did the judge err in applying s. 3(2)(b) of the Guidelines to determine Mr. Nicholl's child support obligations?
2. Did the judge err in concluding the Agreement contains reasonable provisions for the support of the children?

[77] Ms. Nicholl applies to set aside the child support provisions of the Agreement for the two youngest children. At the time of the application, TN was 22 years old and was in her final year at Concordia University in Montreal. BN was 21 years old and in a one-year program at the Vancouver Film School. Both children were contemplating further studies. In the three years since the Agreement was signed, the couple had paid all of the children's educational and living expenses. The total amount paid for each child was in excess of \$100,000. The judge found that neither child had withdrawn from the care of their parents. However, he declined to make an order for monthly child support and payment of s. 7 expenses, finding that the children's needs had been met in the past and would be met in the future by provisions in the Agreement. He concluded that reasonable arrangements had been made for the support of the children.

Positions of the Parties

[78] Ms. Nicholl says the judge erred when he failed to determine Mr. Nicholl's income for support purposes and thus ignored the primary objective of child support as set out in s. 1(a) of the Guidelines: "to establish a fair standard of support for children that ensures that they continue to benefit from the financial means of both spouses after separation." She argues that the judge erred by focusing solely on the children's needs without considering the financial ability of each parent as required by the authorities. The judge's failure to determine Mr. Nicholl's income also meant he did not consider Mr. Nicholl's financial ability

to contribute to support of the children as he was required to do pursuant to s. 3(2)(b) of the Guidelines. In the alternative, and relying on other cases involving high income earners, Ms. Nicholl says the judge should have made an order that Mr. Nicholl pay her, as the custodial parent, a substantial monthly amount to her in addition to his contributions to the children's expenses.

- [79] Mr. Nicholl says it was appropriate for support to be determined under s. 3(2)(b) of the Guidelines rather than under s. 3(2)(a). He says the judge correctly found that the arrangements for the support of the children in the Agreement were reasonable.

Standard of Review

- [80] The standard of review, as set out above, is deferential; this Court should not interfere unless the reasons disclose an error in principle, a significant misapprehension of the evidence, or the award is clearly wrong. Ms. Nicholl does not allege any misapprehension of evidence or argue that the award is clearly wrong. She says the judge erred in principle in his approach. I disagree. In my view, Ms. Nicholl has not demonstrated any error in principle.

Analysis

- [81] Section 15.1(3) of the Divorce Act provides that a court making an order for child support, shall do so in accordance with the applicable guidelines. However, s. 15.1(7) provides:

Notwithstanding subsection (3), a court may award an amount that is different from the amount that would be determined in accordance with the applicable guidelines on the consent of both spouses if it is satisfied that reasonable arrangements have been made for the support of the child to whom the order relates.

- [82] The presumptive rule in the Guidelines is that the amount of child support payable by a payor parent should be the amount determined using the applicable table. However, courts have the discretion to award a different amount if it is appropriate to do so in all of the circumstances:

1 The objectives of these Guidelines are

- (a) to establish a fair standard of support for children that ensures that they continue to benefit from the financial means of both spouses after separation;

3 (1) Unless otherwise provided under these Guidelines, the amount of a child support order for children under the age of majority is

- (a) the amount set out in the applicable table, according to the number of children under the age of majority to whom the order relates and the income of the spouse against whom the order is sought; and
- (b) the amount, if any, determined under section 7.

- (2) Unless otherwise provided under these Guidelines, where a child to whom a child support order relates is the age of majority or over, the amount of the child support order is
 - (a) the amount determined by applying these Guidelines as if the child were under the age of majority; or
 - (b) if the court considers that approach to be inappropriate, the amount that it considers appropriate, having regard to the condition, means, needs and other circumstances of the child and the financial ability of each spouse to contribute to the support of the child.

[83] Ms. Nicholl's submissions focus on the judge's failure to determine Mr. Nicholl's income and award child support by applying the Guidelines as if the children were under the age of majority. These submissions are based on the assumption that the judge erred in finding that it would have been inappropriate to award child support pursuant to s. 3(2)(a) of the Guidelines and that the arrangement for child support in the Agreement was not a reasonable arrangement.

[84] In my view, there is little merit to either of these arguments. The judge considered the couple's agreement to share equally all of the reasonable expenses for their adult children while they were continuing their education. It was clear from the evidence that the children were fully supported by their parents who were attempting to follow the provisions in the Agreement. TN had all of her educational and living expenses paid for directly by the couple. BN was living in a condominium owned by his mother and had his educational and living expenses paid directly by his parents. As the judge noted, the categories of expense that the couple agreed to pay was very broad and included rent, food, utilities, supplies, travel to and from school and cellular telephone plans. Quite simply, the children wanted for nothing. In other words, in accordance with the objectives of the Guidelines, the children were provided with a fair standard of support and they continued to benefit from the financial means of both parents.

[85] Two decisions of this Court have concluded that for adult children the choice between the presumptive approach and the approach under s. 3(2)(b) is discretionary depending on the circumstances of the case. In *De Beck v. De Beck*, 2012 BCCA 465, Justice Smith noted at para. 56:

Just as the absence of a challenge to the "usual Guidelines approach" under s. 3(2)(a) should not preclude a consideration of s. 3(2)(b), similarly the fact that an adult child is attending a post-secondary institution while living at home should not in my view foreclose a consideration of the approach under s. 3(2)(a). In each case, the choice between applying s. 3(2)(a) and s. 3(2)(b) will be a discretionary one that will be governed by the circumstances of that case.

[Emphasis added.]

[86] In *W.P.N. v. B.J.N.*, 2005 BCCA 7, Justice Levine reviewed the approach taken by courts when determining support for an adult child who remains a child of the marriage because of continued attendance at a university. She concluded that "in principle, support for an adult

child who is entitled to child support because of his or her attendance at a post-secondary institution generally should be determined under s. 3(2)(b)": at para. 42. However, in W.P.N., the Court upheld the provisions in a separation agreement that required the father to pay support under s. 3(2)(a). In doing so, Justice Levine expressed the view that awards determined under s. 3(2)(b) could include amounts for special and extraordinary expenses under s. 7:

- [45] In my view, child support determined under s. 3(2)(b) does not necessarily preclude a specific award for "special and extraordinary expenses" under s. 7, where appropriate. The existence of a separation agreement that expressly deals with specific expenses may lead to such an approach.
- [87] Here, as the chambers judge recognized, the provision for child support in the Agreement was driven by the couple's recognition that the children would not remain children of the marriage under the Divorce Act for child support purposes for much longer. In the circumstances, the couple did not agree to require Mr. Nicholl to pay child support on a monthly basis using the Guidelines. Rather, they agreed to an arrangement consistent with s. 3(2)(b): they would equally pay all of the children's living and educational expenses while they were in attendance at post-secondary institutions. In other words, they agreed to equally share special and extraordinary expenses as they expansively defined them.
- [88] While provisions for child support in a separation agreement can be set aside if the arrangements are not reasonable, s. 15.1(7) specifically permits spouses to come to an agreement for child support that differs from the amounts payable under the Guidelines. As noted in *D.B.S. v. S.R.G.*, 2006 SCC 37 at para. 78, such agreements are entitled to considerable weight:

In most circumstances, however, agreements reached by the parents should be given considerable weight. In so doing, courts should recognize that these agreements were likely considered holistically by the parents, such that a smaller amount of child support may be explained by a larger amount of spousal support for the custodial parent. Therefore, it is often unwise for courts to disrupt the equilibrium achieved by parents.

- [89] In my view, there is no basis upon which to interfere with the judge's exercise of discretion in deciding that child support should be determined under s. 3(2)(b). There is no principled reason to set aside the child support provisions of the Agreement. As I have already noted, the intent of the Agreement was to leave them in positions of relative economic equilibrium. They decided they would provide equal support for the children while they finished their education.
- [90] Similarly, I would not interfere with his conclusion that the Agreement contains reasonable provisions for the support of the children. The couple has managed to provide the children with reasonable and adequate support that is commensurate with the financial resources available to them. While they have had some disagreement about how to ensure that their contributions are in fact equal, the judge was of the view that the couple would be able to

work out the relatively minor differences between them. The imprecise provisions in the Agreement are certainly not a model to be followed where there is any prospect of conflict. But in the circumstances, the judge's decision to uphold the child support provisions of the Agreement is entitled to deference.

[91] In summary, I would not give effect to this ground of appeal.

Disposition

[92] I would allow the appeal of the decision to uphold the spousal support provisions of the Agreement. I would remit that matter to the trial court to reconsider those provisions. I would dismiss the appeal of the decision to uphold the child support provisions of the Agreement.

"The Honourable Mr. Justice Butler"

I AGREE:

"The Honourable Mr. Justice Fitch"

I AGREE:

"The Honourable Madam Justice DeWitt-Van Oosten"

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