

CANADA / JUDGMENT

## Nicholl v. Nicholl

2021 BCSC 276

COURT

Supreme Court of British Columbia

DECIDED

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2021 BCSC 276 Nicholl v. Nicholl

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Nicholl v. Nicholl,

2021 BCSC 276

Date: 20210222

Docket: E132180

Registry: Vancouver

Between:

Tessa Anne Nicholl

Claimant

And

Murray Arthur Nicholl, MTN Property Ltd. and Thirdwave Enterprises Ltd.

Respondents

Before: The Honourable Madam Justice MacNaughton

Reasons for Judgment

Counsel for the Claimant:

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Place and Date of Trial/Hearing:

Vancouver, B.C.

January 21, 2021

Place and Date of Judgment:

Vancouver, B.C.

February 22, 2021

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- [1] The parties appeared before me at a case management conference to resolve certain procedural issues relating to the rehearing of this matter. The Court of Appeal remitted this matter back to the trial court "to reconsider the [claimant's] application to set aside the spousal support provisions" of the parties' separation agreement.
- [2] The question is whether new evidence should be heard at the rehearing. Specifically, the issues to be decided are:
- (a) Should the rehearing be based on the financial circumstances of the parties at the time of the original hearing of Ms. Nicholl's application to set aside the support provisions of the separation agreement or, on the financial circumstances at the time of the rehearing?
  - (b) Should the application record on the rehearing contain only those materials that were previously before this Court, or should either party be permitted to submit additional evidence?
  - (c) If new evidence is permitted, what should it be?

## **Brief Introduction**

- [3] The parties separated in November 2012 after a 24-year relationship. They entered into a Separation Agreement dated October 1, 2015 (the "SA"), settling all of the financial issues arising from the breakdown of their marriage. It provided that the parties would divide their assets roughly equally, including a family business, and share the expenses of the three children of the marriage. The SA also provided that Mr. Nicholl would pay Ms. Nicholl

spousal support for six years. The six year duration mirrored the time frame in which Ms. Nicholl was to receive her share of the family business.

- [4] The parties were divorced by order dated April 21, 2016. The order provided that all other claims were dismissed as though tried on their merits.
- [5] On September 10, 2018, Ms. Nicholl applied to set aside the spousal support provisions in the SA and sought an order that Mr. Nicholl pay her spousal support in accordance with the parties' respective Guideline incomes under the Spousal Support Advisory Guidelines commencing January 1, 2016, and continuing on the 1st day of every month thereafter.
- [6] Ms. Nicholl's application was heard by Chief Justice Hinkson on November 13 and December 12, 2018. At the hearing, Ms. Nicholl filed a March 16, 2018, Form F8 financial statement. It included copies of her 2015-2017 personal income tax returns and copies of the financial statements for her holding company, Tessco Holdings Ltd. ("Tessco"), for the fiscal years ending December 31, 2016, and 2017.
- [7] Mr. Nicholl filed a May 4, 2018, Form 8 financial statement. He included copies of his 2015-2017 personal income tax returns and copies of the financial statements for Thirdwave Enterprises Ltd. ("Thirdwave") and MTN Property Holdings Ltd. ("MTN") for the 2015-2017 fiscal years.
- [8] Chief Justice Hinkson released his reasons for judgment on March 14, 2019. His reasons are indexed as T.A.N. v. M.A.N., 2019 BCSC 352. He dismissed Ms. Nicholl's application.
- [9] Ms. Nicholl appealed Hinkson C.J.'s order. The appeal was heard by the Court of Appeal on February 13, 2020. The court issued its judgment on June 23, 2020. The reasons are indexed as: Nicholl v. Nicholl, 2020 BCCA 173 (the "Appeal Reasons").
- [10] The court remitted the matter to the trial court on the basis that Hinkson C.J. had not properly applied the analysis in Miglin v. Miglin, 2003 SCC 24.
- [11] The Court of Appeal gave specific directions on the legal test to be applied on the rehearing. Those directions are set out in paras. 4, 30, 36, 38, 40, 61, 65-67, and 70-72 of the Appeal Reasons. The Appeal Reasons gave no further guidance as to how the rehearing should proceed. In particular, it gave no direction as to the form of the rehearing, the evidence to be considered on it, or whether the second stage of the Miglin analysis is to be applied based on the financial and other information available in 2018, the date of the original hearing before Hinkson C.J., or at the time of the rehearing before me.
- [12] At para. 75 of the Appeal Reasons, the court said, in part:
- [75] It is for the trial court to decide whether the [SA] 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.

- [13] In submissions, both counsel agree that, absent specific direction from the Court of Appeal, the process for the rehearing is within the control of the trial court as master of its own processes.
- [14] The parties agree that the rehearing of Ms. Nicholl's application for spousal support is to be decided under s. 15 of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.) and is to take into account the spousal support objectives in s. 15.2. However, the parties take different positions on the issues. In essence, Ms. Nicholl argues that the rehearing should be based solely on the information that was before Hinkson C.J. Mr. Nicholl takes the opposite position.

### Mr. Nicholl's Submissions

- [15] Mr. Nicholl submits that Miglin sets out a two-stage test to be applied on an application to set aside spousal support provisions in a separation agreement. At the first stage, the court examines the separation agreement at the time of its formation; at the second, the court examines the separation agreement at the time of the application.
- [16] Mr. Nicholl submits that the Appeal Reasons made it clear that the enquiry that should have been undertaken at the second stage of the Miglin analysis is the extent to which the SA still reflects the parties' original intention and the extent to which it is still in substantial compliance with the objectives of the Divorce Act: see paras. 18, 38. The wording "still" suggests an ongoing or continuing inquiry, not one to be conducted solely on the basis of past information.
- [17] Mr. Nicholl also submits that at the appeal, Ms. Nicholl successfully argued that Hinkson C.J. erred in not conducting a comparison of the parties' respective incomes, and the Court of Appeal has directed the trial court to do so. He says that there are a number of difficulties associated with that task:
- i. Ms. Nicholl derives her income from her employment at UBC, the real estate that she owns personally and corporately, and the investments that she holds personally and corporately.
  - ii. In contrast, Mr. Nicholl derives his income from Thirdwave, but Thirdwave's capacity to pay him income is limited by the compensation payments that are owed to Ms. Nicholl's company, Tessco, under the SA.
- [18] To properly conduct the comparison of incomes as directed by the Court of Appeal, Mr. Nicholl says that I will need current information on these sources of income.
- [19] Mr. Nicholl submits that I have also been directed to consider the issues of double recovery or double dipping. He submits that he should have the opportunity to provide evidence with respect to that issue. He submits that if, for the purposes of calculating spousal support, his income had been set higher, spousal support would have increased, but the capital payment to Ms. Nicholl would have been reduced.

- [20] He seeks to refute para. 70 of the Appeal Reasons which surmised that, after the compensation payment to Ms. Nicholl is completed, he will still have a company worth at least as much, or more, than its valuation at the time the parties signed the SA. He says that there is compelling evidence that is not the case. That is critical because, while I have jurisdiction to make a spousal support award that differs from the support provisions of the SA, I do not have jurisdiction to change those provisions of the SA that relate to the division of property. He seeks the ability to call evidence on the depreciation of Thirdwave's assets, his efforts to sell the business, and contracts gained and lost.
- [21] Mr. Nicholl also says that the Appeal Reasons ask me to consider the allocation of risk as reflected in the SA. Ms. Nicholl elected to receive cash rather than a continuing interest in the business, and Mr. Nicholl accepted the risk that the business would go up or down in value. To properly assess that issue, Mr. Nicholl submits that I should hear evidence about any material changes in the income or value of the business.
- [22] Finally, Mr. Nicholl relies on an efficiency argument. If the rehearing is conducted based only on the evidence that was before Hinkson C.J. in 2018, and I make a spousal support order that differs from the SA retroactive to January 2016, Mr. Nicholl will have no choice but to apply to vary that order, based upon unforeseen changes of circumstances that have taken place since 2018. He says that there is a need for further evidence on this matter. The parties should avoid a multiplicity of proceedings and there is an unfair risk to Mr. Nicholl that he will not be successful in persuading a court that there has been a material change in circumstance which should result in a variation of spousal support.

### Ms. Nicholl's Submissions

- [23] Ms. Nicholl submits that the Appeal Reasons highlight my obligation to assess the parties' relative incomes at the time of the original hearing before Hinkson C.J. She argues that the focus of the second stage of the Miglin analysis is whether the SA represents the parties' original intentions and whether it continues to comply with the Divorce Act "at the time of the application to set aside the agreement". She says that analysis should be based on the evidence and circumstances at the time of the application before Hinkson C.J.
- [24] Ms. Nicholl also submits that there was sufficient information before Hinkson C.J. on which he could have made findings about the incomes of the parties in 2018 and to address the second stage analysis in Miglin; therefore, the evidence before me at the rehearing should be only that contained in the previous record. The Miglin analysis should be applied at the rehearing as it should have been applied when the application was first brought and heard.
- [25] Ms. Nicholl submits that it is only on this basis that she may be afforded the judgment to which she was entitled in 2018, had Hinkson C.J. taken the proper approach. As she puts it in her submissions, "it simply cannot be that she will be denied judgment based on the parties' financial circumstances at the time of the original hearing as a very consequence of the errors made by the chambers judge at that time."

## Analysis and Conclusion

- [26] It is clear that the Court of Appeal can and does give direction to the trial court as to the manner of rehearing a matter remitted to it, see for example: *Murphy v. Murphy*, 2007 BCCA 500; *Chapman v. Summer*, 2007 BCCA 103; and *Morck v. Morck*, 2013 BCCA 186. As I have said, no direction was given in this case.
- [27] I accept that in the absence of direction, I must determine the process for rehearing. There is little judicial guidance as to the factors that should inform my decision. However, fairness of the hearing to both parties should govern any procedural decision.
- [28] In *Aelbers v. Aelbers*, 2010 BCSC 1574, Justice Fenlon, when a member of this Court, reheard an application by the plaintiff to retroactively increase spousal support payable to her by the defendant. An earlier decision with respect to the plaintiff's application had been successfully appealed and referred back to the trial court for rehearing without direction. Justice Fenlon considered evidence with respect to the defendant's income that had not been available at the original hearing in addition to the past financial information. The reasons do not indicate whether the parties agreed to proceed in this manner. It does not appear to have been controversial.
- [29] I am satisfied that, in the circumstances of this case, a hybrid approach is appropriate. The rehearing should be decided based on the record that was before Hinkson C.J. supplemented by current financial information.
- [30] Many of Ms. Nicholl's submissions focus on an argument that she should not be denied the benefit of the judgment she would have been entitled to if the Miglin analysis had been properly applied in 2018. That submission presumes an outcome in her favour and does not take into account the possibility that, properly applied, the Miglin analysis would have resulted in her application for spousal support being dismissed.
- [31] In my view, it would do both parties a disservice to ignore the time that has passed since the original decision and since the decision of the Court of Appeal. As a result, I order that:
- (a) the rehearing be based on the financial information before Hinkson C.J. in 2018 supplemented by the parties' current financial information;
  - (b) the rehearing will first determine the issues as of the date of the hearing before Hinkson C.J. and, if a spousal support order is made, will then consider whether it should be varied to take into account current circumstances;
  - (c) each party is to file a new Form 8 Financial Statement with the requisite attachments, including personal income tax returns and corporate financial statements for the years since the hearing before Hinkson C.J.;

- (d) Ms. Nicholl is to provide evidence of her current income from all sources including employment income, rental income from personally and corporately owned real estate, and investment income from personally and corporately owned investment accounts;
- (e) Mr. Nicholl is permitted to adduce evidence as to:
  - (i) his efforts to sell Thirdwave,
  - (ii) any arm's length third party offers he has received, and
  - (iii) material changes in Thirdwave's business since the hearing before Hinkson C.J.;
- (f) if the parties wish to include further evidence not addressed by this order, they may agree to do so or appear for further directions;
- (g) after the exchange of the information, and any cross-examinations with respect to the new information, the rehearing will proceed as a chambers hearing set for a minimum of two days. The length of the hearing may be extended to accommodate any new arguments.

"MacNaughton J."

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