
CANADA / JUDGMENT

Reid v. Reid

2017 BCCA 73

COURT

British Columbia Court of Appeal

DECIDED

16 February 2017

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2017 BCCA 73 Reid v. Reid

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Reid v. Reid,

2017 BCCA 73

Date: 20170216

Docket Nos.: CA42226; CA42572

Between:

Denise Isabelle Reid

Appellant

(Claimant)

And

Mark Christopher Reid

Respondent

(Respondent)

Before:

The Honourable Madam Justice Newbury

The Honourable Mr. Justice Groberman

The Honourable Mr. Justice Willcock

On appeal from: Orders of the Supreme Court of British Columbia, dated September 5, 2014 (Reid v. Reid, 2014 BCSC 1691, New Westminster Docket No. E38713) and January 22, 2015 (Reid v. Reid, 2015 BCSC 86, New Westminster Docket No. E38713)

Counsel for the Appellant:

G.K. Thomas

Counsel for the Respondent:

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Place and Date of Hearing:

Vancouver, British Columbia

May 5 and 6, 2016

Place and Date of Judgment:

Vancouver, British Columbia

February 16, 2017

Written Reasons by:

The Honourable Mr. Justice Groberman

Concurred in by:

The Honourable Madam Justice Newbury

The Honourable Mr. Justice Willcock

Summary:

The parties entered into a separation agreement in 2008 covering property division, and spousal and child support. The agreement gave Mr. Reid the couple's shares in Cityfone. In 2010, Cityfone was acquired by Rogers at a price greatly in excess of the value ascribed to it in the separation agreement. Ms. Reid did not share in the extraordinary and unexpected gains, and applied to set aside the separation agreement and in the alternative, for adjustments to spousal and child support. The judge found that Mr. Reid failed to disclose certain financial information in the negotiations leading up to the agreement, but that the non-disclosures were inconsequential. He refused to set aside the agreement, and also denied the application for spousal and child support adjustments. Ms. Reid appealed, seeking adjustments to spousal and child support. Held: appeal allowed in respect of 2010 child support only. The judge's finding that the non-disclosure was inconsequential was open to him. The separation agreement was procedurally and substantively fair, and governs spousal support. With respect to child support, the judge erred in interpreting

the agreement as precluding adjustment for changes in income. Mr. Reid's income in 2010 should have led to an increase in child support. The parties characterized the issue as one of retroactive support. While that description is of questionable accuracy, the court deals with the claim on that basis. Order varied to provide retroactive child support in respect of 2010.

Reasons for Judgment of the Honourable Mr. Justice Groberman:

- [1] The parties entered into a comprehensive agreement covering property division and spousal and child support in 2008, after separating in 2005. The couple's family assets included significant holdings in Cityfone, a mobile telecommunications provider. The shares were valued and allocated to Mr. Reid in the settlement.
- [2] In 2010, Rogers Telecommunications purchased Cityfone, paying considerably more for the shares than the value that had been assigned to them in negotiations leading up to the separation agreement. Mr. Reid made a considerable amount of money on the sale of the shares, and also from payments to him resulting from the takeover of the company by Rogers.
- [3] In 2011, Ms. Reid commenced an action seeking to set aside the separation agreement. Among her contentions were allegations that Mr. Reid had not properly disclosed material information regarding Cityfone in the negotiations leading up to the settlement agreement. Ms. Reid also sought to vary spousal and child support on the basis of Mr. Reid's increase in income in 2010.
- [4] After a lengthy trial in Supreme Court, the judge dismissed Ms. Reid's action. While he found that Mr. Reid had failed to disclose certain facts in the negotiations, he found that disclosure of those facts would not have had any material impact on the agreement. The judge declined to set aside or vary the settlement agreement. After receiving further submissions, the judge also declined to vary spousal or child support.
- [5] Ms. Reid appeals to this Court, arguing that the judge:
 - a) erred in failing to find that non-disclosure had an effect on the negotiation of child and spousal support provisions;
 - b) misapprehended evidence with respect to the amounts paid by Mr. Reid in child and spousal support and the relation between those amounts and the amounts payable under the Federal Child Support Guidelines and the Spousal Support Advisory Guidelines; and
 - c) erred in principle in failing to award retroactive child support.
- [6] For reasons that follow, I would allow the appeal, though only with respect to child support.

Background

- [7] Mr. and Ms. Reid were married in 1986. At the time of marriage, Ms. Reid was 22 years old, and had a diploma in dietary technology from the Northern Alberta Institute of Technology. She was employed at a hospital in Edmonton as a dietary technician. Mr. Reid was 27 years old at the date of marriage. He had started a B.A. program at the University of Alberta but did not complete that program. He was working in a sales position at a mailing machine company.
- [8] About one year after the couple married, Ms. Reid obtained a position with Alberta Community and Occupational Health as a clerk. At about the same time, Mr. Reid opened a business in Edmonton, selling fax machines. In September 1988, the couple's first child was born. Ms. Reid stopped working outside the home to care for the child.
- [9] In August of 1989, Mr. Reid sold his business, and the family moved to Surrey, B.C. so that he could pursue a business opportunity there. He opened Reid Office Systems, selling fax machines and photocopiers.
- [10] In February 1991, the couple had a second child. Near the end of 1991, Ms. Reid considered a return to work, and obtained an offer of part-time employment as a dietary technician at a hospital. After considering the matter, however, the couple concluded that it would be better for the family if Ms. Reid continued to care for the children full-time. She did not take the job.
- [11] The couple's third child was born in July 1995. Ms. Reid continued to care for the children on a full-time basis, while Mr. Reid worked in his business, which was quite profitable. At some point, the couple incorporated Reid Capital Inc., a holding company that owned certain assets connected with Reid Office Systems. Mr. and Ms. Reid each held 50% of the shares in the holding company.
- [12] In 1996, they sold Reid Office Systems, but Mr. Reid continued to work for the company as general manager for about 15 months. Thereafter, in 1998, together with two other investors, he founded Cityfone Telecommunications Inc., a cell phone service provider.
- [13] Cityfone was a small player in the industry. It did not have its own network, but contracted with Microcell, which both owned a network and marketed its own cell phone services under the Fido brand. Companies like Cityfone are known in the industry as "mobile virtual network operators" or MVNOs.
- [14] In 1999, Reid Capital purchased Columbia Safe & Office Equipment Ltd., which operated under the name Columbia Business Systems. Mr. Reid hired a former employee of Reid Business Systems as the general manager of the business, and the general manager ultimately acquired a 40% stake in the business. Mr. Reid continued to devote his efforts to Cityfone, but also took a role in overseeing Columbia's operations.

- [15] In about 2000, Ms. Reid began to work part-time at Columbia Business Systems and in 2005 she started working there full-time.
- [16] Shortly after Ms. Reid began to work full-time, the couple separated. Ms. Reid remained in the matrimonial home, with two of the children, while Mr. Reid purchased a second residence, where he and the oldest child lived. Mr. Reid made support payments to Ms. Reid of \$7,000 per month, covering both child and spousal support.
- [17] The parties entered into a "collaborative divorce process" - a divorce process directed to attaining a negotiated settlement. Each party was represented by a lawyer trained in the collaborative process, and it was agreed that neither lawyer would act if the matter continued into litigation. Experts were retained and instructed jointly by the parties. There is an emphasis in the collaborative process on full disclosure. Counsel will generally cease to act if their clients have been guilty of non-disclosure.
- [18] At an early stage of negotiations, the parties accepted that property would be divided equally. By late May of 2008, they agreed that Mr. Reid would retain the interests in Cityfone, while Ms. Reid would take the couple's interests in Columbia.
- [19] In July 2008, after an emotional session of negotiations, the parties reached an agreement, which was later embodied in a comprehensive written separation agreement dated October 15 of that year.
- [20] The principal family assets that were divided were:
- Interests in Cityfone (shares and a debenture with attached warrants);
 - Reid Capital, which held 60% of the shares in Columbia;
 - A shareholder loan owed by Reid Capital to Mark Reid;
 - The matrimonial home;
 - Mr. Reid's home, purchased after the separation using family assets; and
 - RRSPs.
- [21] In valuing Columbia and Cityfone, the parties relied on a report by PricewaterhouseCoopers dated September 21, 2007. It valued the companies as of May 31, 2007. The agreement provided that Ms. Reid took title to the matrimonial home, and all interests in Columbia, while Mr. Reid retained his home and took the interests in Cityfone. The RRSPs were divided so as to give each party an equal share of the assets, as valued.
- [22] The separation agreement attributed income of \$310,000 per annum to Mr. Reid and \$72,000 to Ms. Reid. The figures were, apparently, estimates. The parties recognized that their actual incomes would fluctuate.

- [23] Based on these incomes, and on the custody arrangements whereby one child lived with Mr. Reid and two lived with Ms. Reid, Mr. Reid was required to pay \$3,341 to Ms. Reid in child support each month. Mr. Reid was also required to pay spousal support of \$3,500 per month until January 1, 2014.
- [24] The parties were divorced by court order dated August 17, 2009.
- [25] In 2010, Rogers Telecommunications purchased Cityfone at a value much higher than that set out in the PricewaterhouseCoopers report. This resulted in a large unanticipated financial gain for Mr. Reid, in which Ms. Reid did not share. In addition to significant gains on the sale of his shares, Mr. Reid benefitted from employment bonuses that accrued to him when control of the company changed. He was also able to take advantage of stock options that had been granted to him as a director of Cityfone.
- [26] In 2011, Ms. Reid sought disclosure of Mr. Reid's 2010 tax returns, and then commenced the current action. She contended that the separation agreement should be set aside, on grounds of "duress, undue influence, mistake, unconscionability, non-disclosure and/or misrepresentation and/or fraud", as well as other bases. If the agreement had been set aside, she would have been entitled to a share in the increased value of the Cityfone shares.
- [27] Ms. Reid also sought alternative relief, contending that the agreement should be declared to be unfair under s. 65 of the Family Relations Act, R.S.B.C. 1996, c. 128, and also seeking a variation of child and spousal support.

Trial and Original Reasons for Judgment

- [28] A great deal of evidence was heard by the trial judge in the course of a five-week trial. I need not detail all of the judge's conclusions. They are set out in his reasons for judgment, indexed as 2014 BCSC 1691. To summarize, however, he found that Cityfone was, in 2007 and 2008, a risky investment. It did not have sufficient assets to pay off debenture holders. Further, as a MVNO, it was in a somewhat precarious position, because it depended on a competitor (Rogers Telecommunications, which, by that time, had acquired Microcell) for network services.
- [29] Cityfone's contract with Rogers was for five years, terminating in 2011. The contract restricted Cityfone's marketing channels, as well as the companies it could partner with. Most importantly, it gave Rogers a right of first refusal on any sale of Cityfone. The right of first refusal made it unlikely that other potential purchasers would expend efforts trying to acquire Cityfone.
- [30] As the trial judge outlined, despite this handicap, Cityfone was able, in 2010, to generate interest on the part of TELUS, a large wireless operator. TELUS unexpectedly began to pursue acquisition of Cityfone in 2010. This led to a competitive bidding situation, with Rogers Telecommunications ultimately purchasing Cityfone at a much higher price than anticipated.

- [31] The judge concluded that the situation that resulted in the 2010 sale was unexpected and fortuitous. With respect to the 2007 valuation by PricewaterhouseCoopers, he said:
- [99] Ms. Reid has presented no opinion evidence challenging the PwC conclusion with respect to the valuation of the company as a whole. I conclude that her criticisms of the report do not undercut it or detract from its weight. There was nothing improper in its approach, methodology or scope. It was not based on inaccurate or incomplete information. I conclude that the PwC valuation of the company as a whole, as at its valuation date of May 31, 2007, was reasonable.
- [32] He also rejected the suggestion that Mr. Reid, at the time of the separation agreement negotiations, had knowledge that Cityfone was worth more than the PricewaterhouseCoopers report estimated in 2007. Finally, he found that there was no evidence that the value of the company had increased by the time the separation agreement was entered into:
- [180] There is no evidence to allow me to conclude the company had increased in value between the time of the PwC valuation and the separation agreement. As I stated above, the company's financial results were close to the projections used by PwC in its discounted cash flow analysis. It is true that an updated report may have resulted in an increased valuation if the further projected years called for increased revenues. However, no such analysis was provided by Ms. Reid. Moreover, Ms. Reid was warned that Cityfone's value may have increased from the PwC result and that she should get an update. She declined to follow this advice.
- [181] I also previously concluded that the sale price to Rogers cannot be assumed to be the value of the company at the time of the separation agreement, or that anyone knew the company was worth that much at the time of the separation agreement.
- [182] There was no material non-disclosure with respect to Cityfone and it was appropriately valued at the time.
- [33] While the judge rejected the suggestion that there had been any misrepresentation or lack of disclosure with respect to the overall value of Cityfone, he did find that Mr. Reid had improperly failed to disclose two events that occurred after the PricewaterhouseCoopers report, but before the separation agreement was entered into.
- [34] The first undisclosed event occurred in December 2007, when the board of directors of Cityfone resolved to allocate stock options to Mr. Reid. The options were not actually granted or priced until after the separation agreement had been executed, but the judge found that the resolution of the board of directors ought to have been disclosed.
- [35] The second undisclosed event occurred in May 2008, when the board of directors of Cityfone approved changes in Mr. Reid's compensation package. The changes improved Mr. Reid's compensation, so that his salary would be as high as \$233,000 for 2008 and \$250,000 for 2009, plus profit-sharing and bonuses. As well, the package included provisions that applied in

case of severance or of a change of control of the company. The changes had not been finalized at the time the separation agreement was entered into, but the judge found that the proposed changes ought to have been disclosed by Mr. Reid.

- [36] The judge considered that these failures to disclose did not have any material effect on the final agreement. With respect to the stock options, he noted that they were to be priced well-above the value of the Cityfone shares at the time they were allocated - in fact, the option price was set at \$.20 per share in October 2008, while the judge's reasons suggest that the fair value of a share was in the range of \$.12. The judge considered that the evidence did not support the idea that the share options had anything but nominal value when the agreement was entered into.
- [37] With respect to the remuneration package, the judge noted that the separation agreement attributed income to Mr. Reid that was in excess of the increased salary package, considering that the bonuses and profit sharing provisions were contingent. While the new package ought to have been disclosed, he found that there was nothing in it that took Mr. Reid's anticipated compensation beyond the figures on which the separation agreement was based.
- [38] While the lawyer who acted for Ms. Reid in the negotiations suggested that she may have sought a provision of review of spousal support or for a longer period of support if she had known of the compensation package, the judge evidently did not consider there was any realistic possibility that such modifications would have been incorporated in the agreement.
- [39] The judge rejected the other bases on which Ms. Reid argued the agreement should be set aside. He noted that she had had independent, competent legal advice throughout, then concluded:
- [171] I would add here that I do not find Ms. Reid to have had any vulnerability that was exploited.
- [172] There is, therefore, no basis to set aside the agreement on the basis of undue influence, fraud or duress, and I use those terms in a wider sense than they might bear in a business case. Nor is there a basis to set it aside for undue pressure, oppression, or other vulnerabilities.
- [40] He declined to set aside the agreement, but requested additional submissions on the issue of whether there should be a variation of spousal or child support.

The Trial Judge's Reasons for Judgment on Support Issues

- [41] In subsequent reasons, indexed as 2015 BCSC 86, the judge declined to order any variation of child or spousal support.
- [42] Ms. Reid sought to have both child and spousal support increased for the years 2008-2010, when Mr. Reid's income exceeded the amount attributed to him in the separation agreement. She also sought to have child support increased for the years 2011-2013. Mr. Reid's income fell below the amount attributed to him in the separation agreement during

that period, as he started a new company (a courier service) after Cityfone was purchased by Rogers. Ms. Reid contended Mr. Reid was underemployed after 2010, and that a higher income should be imputed to him.

[43] With respect to child support, the biggest issue was whether there should be a variation based on Mr. Reid's 2010 income. It appears that both parties agreed that the issue should be treated as one of retroactive child support, and analyzed in accordance with the Supreme Court of Canada's decision in *D.B.S. v. S.R.G.*, 2006 SCC 37. In light of those positions, the judge stated:

[12] I conclude below that the matter is determinable by the principles laid out by the Supreme Court of Canada applicable to claiming retroactive child support. Given this and the position of the parties it is not necessary for me to deal with the interpretation of the child support review clause in the agreement. However, since I asked for submissions on the issue, I will express my view.

[44] The judge noted that the separation agreement did "not contain a specific clause saying that support may be reviewed upon a change of incomes in the parties." He referred to clauses 6.0(a) and (b) of the agreement:

6.0 The Child Support is reviewable as follows:

- (a) the parties may review the Child Support on the request of either party and, if necessary, revise it to ensure that it accords with the requirements of the [Federal Child Support Guidelines] and British Columbia Table by July 1st of every year, with the first review being in 2009;
- (b) either party may request, by delivering a written notice to the other, a review of the Child Support if
 - (i) a material change in circumstances, such as custodial changes or a change of a Child's primary residence lasting longer [than] sixty (60) days,
 - (ii) a change leading to undue hardship for either party as defined by the [Federal Child Support Guidelines];
 - (iii) a Child ceasing to be eligible for support,
 - (iv) a Child's need for support changes by reason of reaching the age of majority,
 - (v) a Child who ceased to be eligible for support becomes dependent again; or
 - (vi) upon Kathleen completing her first post-secondary degree;

[45] Ms. Reid contended that clause 6.0(a) contemplated an annual review of child support, based on the parties' incomes. The judge rejected that view:

- [14] I do not agree with that interpretation. It construes clause (a) in isolation from the balance of the section. Clause (a) allows a party to request a review, but the circumstances under which that request can be made are enumerated in the balance of the section. While clause 6.07(b)(i) says that a review may be requested if there is a material change in circumstances, a change in income is not listed as an example in that clause. Nor is it set out in any other clause. This must have been done deliberately in view of the fact that the agreement attributed income that the agreement states the parties knew would fluctuate. It is also notable that the agreement does not oblige the parties to exchange financial statements every year, nor does it require the parties to notify of a change in income.
- [46] The judge next considered whether, despite the absence of a review provision in the agreement, Mr. Reid's income justified a variation in the amount of child support.
- [47] In accordance with the positions taken by the parties, the judge treated claims for child support based on Mr. Reid's income for 2008-2010 as retroactive claims. He considered that the circumstances of the children could not justify a retroactive award:
- [32] In the present case, there is no basis to conclude that the children's needs were not met, nor did Ms. Reid argue otherwise. She did not go into debt to provide for the children. In her financial statements she showed expenses for the children for three years. For 2008 they were \$21,000 and for 2011 they were \$31,000, less than the child support she received. For 2013, she showed an increased amount of \$70,000, but that was unexplained. As pointed out by Mr. Reid, by 2013 spending more on the children was within Ms. Reid's discretion given that her own income was steadily increasing; Columbia Business Systems had almost \$1 million in retained earnings; she had paid off her mortgage; and she had over \$650,000 in RRSPs.
- [33] Without dealing with the issue of whether all of Mr. Reid's 2010 income should be used in calculating child support, the amount of retroactive support claimed by Ms. Reid - \$513,000 - cannot be justified as allowing the children to live the standard of life they enjoyed before the parties separated. It can only be seen as a transfer of wealth from Mr. Reid to Ms. Reid.
- [34] On this basis, even if I were to set aside the support provisions of the agreement, the retroactive support cannot be justified.
- [48] As I have indicated, Ms. Reid also contended for an increase in child support for 2011-2013, arguing that Mr. Reid's diminished income meant that he was deliberately underemployed. Mr. Reid, on the other hand, argued that the income attributed to him in the separation agreement (which was considerably higher than his actual income for 2011-2013) was a fair estimate of his earning potential, given the nature of his work. He did not seek any diminution in support payments for 2011-2013, but resisted Ms. Reid's application for an increase. The judge agreed with his position, and did not vary the child support for the years 2011-2013.

- [49] The judge then turned to Ms. Reid's claim for a variation of spousal support for the years 2008-2010. He cited *Miglin v. Miglin*, 2003 SCC 24 and *Rick v. Brandsema*, 2009 SCC 10, and said:
- [39] They are similar approaches in that they look at the process leading up to the agreement and whether the agreement comported with the objectives of the legislation. Although they dealt with different issues, the approach in *Rick* reiterated and built on what the Court said in *Miglin*. In *Miglin* the Court laid out two stages of analysis:
- Stage one examines the fairness of the negotiating process. If the court concludes that the process was satisfactory, then it addresses whether the agreement satisfied the objectives of the legislation.
 - If the court reaches the conclusion that the agreement satisfies the first stage, it then considers whether there has been a change in circumstances that was not contemplated by the parties such that the agreement should not be given significant weight.
- [40] When I asked for further submissions on the support issues in light of my other conclusions, I had the *Miglin* factors in mind with respect to the two elements of non-disclosure . While these are elements of unfairness leading up to the agreement, they were the only areas of concern in my prior judgment and did not justify the setting aside of the agreement as a whole. The question now is whether they should affect the support issue and if so how, or whether the support should be varied on other grounds.
- [50] Having found the process of negotiations to have been fair in his earlier reasons, the judge did not return to that issue in his reasons on support. In the latter reasons, he concentrated his attention on the question of whether the agreement satisfied the objectives of the legislation:
- [44] As made clear in *Miglin*, the issue before me is not what a judge would have awarded for support had there not been an agreement. In other words, I am not to perform the same analysis with respect to the 2010 income as a judge would on a support application. Rather, the issue for me is to construe the support provisions within the totality of the agreement in order to determine whether the provisions comply with the objectives of the Divorce Act. In that light, I make the following observations.
- [45] The income attributed to Mr. Reid in the 2008 agreement (\$310,000) was above his historic earnings and in accord with what his income was at the end of the year. (The dividend component for 2008 was accounted for by the parties in their division of assets.). The revised employment terms provided for a salary that was less than the attributed income, but allowed for further remuneration based on the performance of the company and a one-time change of control bonus. The outcome of these contingencies was unknown at the time the agreement was entered into. In particular, I held that there was no inkling of the sale of Cityfone to Rogers.

- [46] The dividend income was a tax-efficient mechanism to distribute the cash received from Rogers for the sale of the company and is therefore tantamount to capital. The other monies arose because of the sale.
- [47] The effect of the agreement is shown by a comparison. Assume the parties' line 150 incomes (adjusted for the support that had been paid) are used to calculate spousal support instead of the incomes attributed in the agreement. Assume also that only the salary portion of Mr. Reid's 2010 income is taken into account. Using the mid-range Spousal Support Guidelines, Mr. Reid, in the aggregate, would have overpaid support for 2008 to 2014. The same result is reached if Mr. Reid's 2009 income were used for 2010. While the parties disagree as to their calculations, there would be an overpayment no matter which was used.
- [51] Despite the judge's recognition that the issue was not one of assessing what support would have been ordered in the absence of any agreement, he appears to have relied on just such an assessment. He explained:
- [49] Because of the non-disclosures I am dealing with, I do not put any emphasis on the strong finality clauses in the agreement. Even then, however, on the basis of all of the facts, I cannot find that the spousal support provisions did not meet the objectives of the Divorce Act.

Did the Trial Judge Err in his Treatment of the Non-disclosures?

- [52] On this appeal, Ms. Reid no longer takes the position that the separation agreement ought to be set aside, nor does she seek to interfere with the division of property in the separation agreement. Her first ground of appeal, however, is based on the judge's treatment of the non-disclosures. She says that he ought to have provided a remedy for them by ordering child and spousal support in excess of the amounts set out in the agreement.
- [53] The appellant begins her argument with the proposition that, in the context of negotiations surrounding the consequences of marital breakdown, full disclosure of a party's financial situation is paramount. She cites the view expressed in an oft-cited passage from *Cunha v. Cunha* (1994), 99 B.C.L.R. (2d) 93 (S.C.):
- [9] Non-disclosure of assets is the cancer of matrimonial property litigation. It discourages settlement or promotes settlements which are inadequate. It increases the time and expense of litigation. The prolonged stress of unnecessary battle may lead weary and drained women simply to give up and walk away with only a share of the assets they know about, taking with them the bitter aftertaste of a reasonably-based suspicion that justice was not done. Non-disclosure also has a tendency to deprive children of proper support.
- [54] In the case before us, the judge based his analysis on his reading of *Miglin v. Miglin* and *Rick v. Brandsema*. Both parties agree that those cases are the leading authorities to be applied.

- [55] In *Miglin*, the Supreme Court of Canada considered the general approach courts should take to applications for spousal support where the parties have executed a final agreement purporting to settle that issue. The Court saw the issue as one of balancing the objectives of spousal support under the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.) with societal interests in finality and in having parties resolve their matrimonial affairs by agreement. The Court mandated a broad-ranging examination of the circumstances of the parties, both at the time the agreement was entered into, and at the time of the application.
- [56] The Court divided the inquiry into two stages. At the first stage, a judge must consider the circumstances that existed at the time the agreement was entered into. Particular attention must be paid to circumstances in which one party exploited an unfair negotiating advantage:
- [81] It is difficult to provide a definitive list of factors to consider in assessing the circumstances of negotiation and execution of an agreement. We simply state that the court should be alive to the conditions of the parties, including whether there were any circumstances of oppression, pressure, or other vulnerabilities, taking into account all of the circumstances, including those set out in s. 15.2(4)(a) and (b) [of the Divorce Act] and the conditions under which the negotiations were held, such as their duration and whether there was professional assistance.
- [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.
- [57] The next inquiry within the first stage of the *Miglin* test is an examination of whether the agreement, at the time it was entered into, comported with the goals of the underlying legislation:
- [84] Where the court is satisfied that the conditions under which the agreement was negotiated are satisfactory, it must then turn its attention 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 marriage and its breakdown. Only a significant departure from the general objectives of the Act will warrant the court's intervention on the basis that there is not substantial compliance with the Act. The court must not view spousal support arrangements in a vacuum, however; it must look at the agreement or arrangement in its totality, bearing in mind that all aspects of the agreement are inextricably linked and that the parties have a large discretion in establishing priorities and goals for themselves.

- [85] When examining the substance of the agreement, the court should ask itself whether the agreement is in substantial compliance with the Divorce Act. As just noted, this "substantial compliance" should be determined by considering whether the agreement represents a significant departure from the general objectives of the Act, which necessarily include, as well as the spousal support considerations in s. 15.2, finality, certainty, and the invitation in the Act for parties to determine their own affairs. The greater the vulnerabilities present at the time of formation, the more searching the court's review at this stage.
- [58] The second stage of the Miglin inquiry is concerned with events that occur after the agreement is entered into. Even if the agreement was entirely proper at its inception, unforeseen circumstances may lead a court to award spousal support notwithstanding a separation agreement that purported to finally determine the issue:
- [87] Where negotiation of the agreement is not impugned on the basis set out above and the agreement was in substantial compliance with the general objectives of the Act at its time of creation, the court should defer to the wishes of the parties and afford the agreement great weight. Nevertheless, the vicissitudes of life mean that, in some circumstances, parties may find themselves down the road of their post-divorce life in circumstances not contemplated. Accordingly, on the bringing of an application under s. 15.2, the court should assess 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.
- [59] While Miglin discussed the general nature of the inquiry, *Rick v. Brandsema* dealt more particularly with the failure of a party to disclose financial information at the time an agreement was negotiated. The Court held that the failure of a party to give full and honest financial disclosure during negotiations could result in the setting aside of the agreement:
- [46] [C]ontractual autonomy depends on the integrity of the bargaining process. Decisions about what constitutes an acceptable bargain can only authoritatively be made if both parties come to the negotiating table with the information needed to consider what concessions to accept or offer. Informational asymmetry compromises a spouse's ability to do so (*Leskun v. Leskun*, 2006 SCC 25, [2006] 1 S.C.R. 920, at para. 34; Marcia Neave, "Resolving the Dilemma of Difference: A Critique of 'The Role of Private Ordering in Family Law'" (1994), 44 U.T.L.J. 97, at p. 117; Penelope E. Bryan, "Women's Freedom to Contract at Divorce: A Mask for Contextual Coercion" (1999), 47 Buff. L. Rev. 1153, at p. 1177).
- [47] In my view, it flows from the observations and principles set out in Miglin that a duty to make full and honest disclosure of all relevant financial information is required to protect the integrity of the result of negotiations undertaken in these uniquely vulnerable circumstances. The deliberate failure to make such disclosure may render the agreement vulnerable to judicial intervention where the result is a negotiated settlement that is substantially at variance from the objectives of the governing legislation.

- [48] Such a duty in matrimonial negotiations anchors the ability of separating spouses to genuinely decide for themselves what constitutes an acceptable bargain. It also helps protect the possibility of finality in agreements. An agreement based on full and honest disclosure is an agreement that, *prima facie*, is based on the informed consent of both parties. It is, as a result, an agreement that courts are more likely to respect. Where, on the other hand, an agreement is based on misinformation, it cannot be said to be a true bargain which is entitled to judicial deference.
- [60] As it had in *Miglin*, the Court in *Rick* emphasized that the inquiry is a nuanced one, that must examine all of the circumstances of the case:
- [49] Whether a court will, in fact, intervene will clearly depend on the circumstances of each case, including the extent of the defective disclosure and the degree to which it is found to have been deliberately generated. It will also depend on the extent to which the resulting negotiated terms are at variance from the goals of the relevant legislation. As *Miglin* confirmed, the more an agreement complies with the statutory objectives, the less the risk that it will be interfered with. Imposing a duty on separating spouses to provide full and honest disclosure of all assets, therefore, helps ensure that each spouse is able to assess the extent to which his or her bargain is consistent with the equitable goals in modern matrimonial legislation, as well as the extent to which he or she may be genuinely prepared to deviate from them.
- [61] It is important to note, as well, that the Court in *Rick* emphasized the importance of the trial judge's role in assessing and characterizing the evidence:
- [30] It is inherent in disputes generally, and matrimonial conflicts in particular, that parties have inconsistent versions of the underlying events. It is the trial judge's job as judicial historian to sift through the record, watch and listen to the parties, and determine which version of disputed events is the most reliable. Findings of fact and factual inferences made at trial, as a result, are not to be reversed unless there is "palpable and overriding error", or a fundamental mischaracterization or misappreciation of the evidence.
- [62] The trial judge in the case before us carefully examined the evidence that was presented. He concluded that the only issue of concern with respect to the circumstances of negotiation of the agreement was Mr. Reid's non-disclosure of two matters: a decision of the board of directors of Cityfone to grant him stock options and a promised increase in his compensation package.
- [63] The judge recognized the importance of full and honest disclosure in the context of the negotiation of matrimonial agreements. He was also concerned, however, not to overstate the severity of the breaches in this case. The non-disclosure, while not accidental, was, in his view, of limited importance. In the case of the stock options, he found that their value, at the time of the agreement, was nominal. With respect to the compensation package, he found that the amount at issue was within the range contemplated by the parties.

- [64] Ms. Reid argues that the judge made a palpable and overriding error in finding that the value of the stock options was negligible, and in failing to emphasize certain changes to Mr. Reid's compensation package that would take effect on any change of control of Cityfone. She points to the events of 2010 as the best proof of the value of those items. She also emphasizes evidence given by her and by the lawyer who conducted negotiations on her behalf, to the effect that their negotiating stance may have been different had they had full disclosure.
- [65] In my view, the trial judge was entitled to treat that evidence with scepticism. While the evidence of the plaintiff and her lawyer may well have been honestly given, it was self-serving and amounted only to an "opinion about what [s]he would have done in a situation which never arose" (Arndt v. Smith, [1997] 2 S.C.R. 539 at para. 8). The judge had to temper that evidence with his assessment of more objective evidence concerning the course of the negotiations.
- [66] With respect to the valuation issues, the judge undertook what he aptly described as a "granular analysis" of the events at Cityfone between 2008 and 2010. His findings of fact were well-supported by the evidence, and are entitled to deference.
- [67] In 2008, the undisclosed stock options and compensation package were, in some ways, akin to a lottery ticket - they had some small potential to become financially significant in the future, but their actual value at the time of the negotiations was minimal.
- [68] Given his finding that the undisclosed financial information had negligible impact on the value of property divided in the separation agreement, and on the likely income of Mr. Reid during the years he would be paying support, I am not persuaded that the trial judge erred in refusing to grant any remedy in respect of the incomplete financial disclosure by Mr. Reid in 2008.

Did the Judge Err in Comparing Actual Spousal Support Paid with the SSAG?

- [69] The second consideration that the Court had to address in the Miglin analysis was whether the separation agreement comported with the objectives of the underlying legislation.
- [70] As I have indicated, the judge approached this issue primarily by comparing amounts Mr. Reid actually paid in spousal support with amounts that might have been ordered in the absence of any agreement. The judge concluded that Mr. Reid's payments exceeded those that he would have been ordered to make in the absence of an agreement.
- [71] Ms. Reid takes exception to that finding. She notes that, in making his calculations, the judge excluded large amounts of Mr. Reid's 2010 income. Further, without analyzing the matter, he assumed that support would have been ordered at the mid-point of the Spousal Support Advisory Guidelines, and he did not fully analyze the duration of support.

[72] In my view, nothing is to be gained by analyzing, in detail, the judge's findings with respect to amounts of support that might theoretically have been ordered had there been no agreement. The question is not one of whether the payments under the agreement mirror those that would have been ordered in the absence of an agreement, but rather whether the agreement comported with the objectives and factors that needed to be considered in setting spousal support.

[73] In Miglin, the underlying legislation was the Divorce Act, and the objectives were explicitly set out in the statute:

15.2(6) An order 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.

[74] While the Family Relations Act, R.S.B.C. 1996, c. 128 did not include such a concise statement of objectives, the spousal support objectives under that statute were similar:

89(1) A spouse is responsible and liable for the support and maintenance of the other spouse having regard to the following:

- (a) the role of each spouse in their family;
 - (b) an express or implied agreement between the spouses that one has the responsibility to support and maintain the other;
 - (c) custodial obligations respecting a child;
 - (d) the ability and capacity of, and the reasonable efforts made by, either or both spouses to support themselves;
 - (e) economic circumstances.
- (2) Except as provided in subsection (1), a spouse or former spouse is required to be self sufficient in relation to the other spouse or former spouse.

93(1) Subject to the Divorce Act (Canada), a court may make an order

- (b) under section 89 , by paying to the person designated in the order the amount the court considers reasonable.
- (4) If a spouse will be living separate and apart from the spouse against whom the application is made, the court may, as it considers appropriate, adjust the amount of its order under subsection (1)(b) to take into account the needs, means, capacities and economic circumstances of each spouse, including the following:
 - (a) the effect on the earning capacity of each spouse arising from responsibilities assumed by each spouse during cohabitation;
 - (b) any other source of support and maintenance for the applicant spouse;
 - (c) the desirability of the applicant spouse having special assistance to achieve financial independence from the spouse against whom the application is made;
 - (d) the obligation of the spouse against whom application is made to support another person;
 - (e) the capacity and reasonable prospects of a spouse obtaining education or training.
- [75] The separation agreement in this case was negotiated with the assistance of very experienced, specialized lawyers who were familiar with both the general objectives of the Family Relations Act and with the details of the statute and its application by the courts. The judge rejected the notion that either party took advantage of vulnerability of the other. The settlement was based on an equal split of the family's property. It is evident that both parties approached the agreement with the idea that it would form the basis for Ms. Reid quickly attaining financial independence.
- [76] Ms. Reid had an entitlement to support on a compensatory basis, and possibly also on a non-compensatory basis. It is important to note, however, that Ms. Reid emerged from the marriage with some business experience, and a significant operating business to run. This was not a case in which she had abandoned a career in favour of managing the family and was then left with no real ability to generate income after the marital breakdown.
- [77] It is evident that the parties placed considerable emphasis on certainty and finality in entering into the agreement. The recitals included the following:

N. The Parties:

- (a) intend this Agreement to be
 - i. the final settlement and release of their respective rights in and to the property of the other and the property held by them jointly;
 - ii. the final settlement of their respective rights in the estate of the other;
 - iii the final settlement of any claim for spousal support, whether contractual, compensatory or non-compensatory;

iv. the final settlement, as between the parties, of the division of responsibility for debt in the name of either party;

v. the final adjustments respecting

A. disabilities or advantages and disadvantages arising out of the marriage or otherwise between the parties;

B. the needs of each of them to become and remain economically independent and self-supporting; and

vi. the final settlement of all issues otherwise arising out of their marriage;

[78] The agreement also contained a clause incorporating the recitals into the agreement:

1.02 The parties agree that the recitals to this Agreement are incorporated herein and form part of this Agreement.

[79] The judge also noted the following provisions of the agreement demonstrating the parties' desire to finally settle the matter of spousal support obligations:

4.00 SELF-SUFFICIENCY

4.01 Subject to the performance of this Agreement, Denise and Mark covenant and agree that they will each support and maintain themselves. Each of the parties acknowledges that he or she has adequate skills and means to earn sufficient income to enable them through resources to support and maintain themselves and, accordingly, abandon any claim, both present and future, for interim or permanent spousal support from the other, subject only to the provisions of this Agreement.

4.02 Except as specifically provided in this Agreement, Denise hereby waives and releases any claim for interim or permanent spousal support from Mark on a permanent basis. The waiver and release of spousal support in this Agreement shall endure and survive the granting of any Order for divorce, notwithstanding any change in the circumstances of either or both parties, and whether or not any such change in circumstances was foreseeable, catastrophic or causally connected to the marriage. Denise will irrevocably instruct her Solicitor to consent to an order of the Court dismissing any claim by her for spousal support except in accordance with this Agreement.

4.03 Mark hereby waives and releases any claim for interim or permanent spousal maintenance and support from Denise on a permanent basis. The waiver and release of spousal support in this Agreement shall endure and survive the granting of any Order for divorce, notwithstanding any change in the circumstances of either or both parties, and whether or not any such change in circumstances was foreseeable, catastrophic or causally connected to the marriage. Mark will irrevocably instruct his Solicitor to consent to an order of the Court dismissing any claim by him for spousal support except in accordance with this Agreement.

7.03 Save and except only for claims to enforce the terms of this Agreement, Denise hereby covenants and agrees that she will make no claim whatsoever against Mark for spousal support, including any application to vary quantum or duration of the spousal support provided for in this Agreement.

7.04 Mark hereby covenants and agrees that he will make no claim whatsoever against Denise for spousal support and hereby waives and abandons any such claim.

7.05 The parties separately acknowledge and agree that this is a final agreement concerning spousal support and, in consideration of the settlement terms contained in this Agreement and notwithstanding any change of circumstances no matter how unforeseen or catastrophic,

- a) neither party will claim interim or permanent spousal support from the other except as specifically provided for in this Agreement;
- b) each party hereby gives up forever any claim for support against the other, and
- c) forthwith upon request, each will consent to an order of the Court dismissing any such claim for spousal support, whether needs-based, contractual or compensatory, as if tried on the merits.

[80] I do not suggest that all of these provisions were strictly enforceable, nor that they constitute a complete answer to Ms. Reid's claim. They do, however, indicate a strong intention toward finality, and affirm that the parties understood the objectives of the applicable legislation.

[81] Again, in Miglin, the Court cautioned against courts too readily intervening to depart from provisions in negotiated agreements:

[84] Only a significant departure from the general objectives of the Act will warrant the court's intervention on the basis that there is not substantial compliance with the Act. The court must not view spousal support arrangements in a vacuum, however; it must look at the agreement or arrangement in its totality, bearing in mind that all aspects of the agreement are inextricably linked and that the parties have a large discretion in establishing priorities and goals for themselves.

[82] The judge's factual findings and the background to the separation agreement preclude any assertion that the agreement, when entered into, failed to substantively conform with the objectives of the Divorce Act or the Family Relations Act. It was a substantively fair agreement that took into account the objectives and factors set out in the statutes.

[83] While the second stage of the Miglin analysis allows a court to consider unforeseen events that occur after an agreement has been entered into, there is no basis, in the case before us, to find that the events that occurred would justify a departure from the provisions of the agreement in respect of spousal support. Ms. Reid's standard of living is a high one; there is no suggestion that it has diminished since the divorce. Her financial position is an enviable one, and she has been successful in her business. Mr. Reid's unexpected good fortune is not,

in and of itself, a basis for departing from the separation agreement.

- [84] In the result, even if the accuracy of the judge's conclusion that Mr. Reid has paid more spousal support under the agreement than he would have in the absence of an agreement is debatable. I am not persuaded that there is any basis to depart from the provisions of the agreement in respect of spousal support.

Child Support

- [85] I turn, then to the issue of child support, the most difficult issue on this appeal. As I have indicated, the judge found that the separation agreement contained no provision allowing child support to be adjusted based on the parties' incomes. He considered that the children's needs were adequately provided for in the agreement, and for that reason denied what was described as "retroactive" support.
- [86] I will begin the analysis of the child support issue with some observations regarding child support and separation agreements. Child support obligations are frequently set out in separation agreements. Typically, such agreements set out mechanisms for the spouses to share financial information, and to provide for periodic reviews of the amount of child support. Occasionally, where the parties wish to agree to an amount of child support in excess of the amounts required by the Federal Child Support Guidelines, such support will be set out in the agreement, with more limited scope for variation.
- [87] Child support provisions in separation agreements are not subject to the same level of deference that spousal support provisions enjoy. In *Kopp v. Kopp*, 2012 BCCA 140, Levine J.A. explained:
- [35] Miglin dealt with an initial application for spousal support four years after the parties had entered into a comprehensive separation agreement which contained a clause releasing the spouses' claims of spousal support. The majority of the Supreme Court held that "a fairly negotiated agreement that represents the intentions and expectations of the parties and that complies substantially with the objectives of the Divorce Act as a whole should receive considerable weight" (at para. 4). That approach recognizes the policy goal of negotiated settlement, reflected in s. 15.2(4)(c) of the Divorce Act (which requires a court, on an initial application for spousal support, to take into consideration any agreement relating to support of either spouse), and reflects the wide discretion given to separating parties to bring "their own concerns, desires and objectives to the table in negotiating what they view as a mutually acceptable agreement" (at paras 54-55).
- [36] The Court was careful, however, to distinguish the broad objectives for spousal support, set out in s. 15.2(6) of the Divorce Act, with the clear standard for child support promulgated by Parliament in the Guidelines, pointing out that "[u]nlike child support, for which relatively clear normative standards have been set, spousal support rests on no similar social consensus" (at para. 56). The Court suggested (at para. 67):

Therefore, an assessment of the appropriate weight to be accorded a pre-existing agreement requires a balancing of the parties' interest in determining their own affairs with an appreciation of the peculiar aspects of separation agreements generally and spousal support in particular.

[37] The generally deferential approach to separation agreements mandated by the Supreme Court in *Miglin* applies, in my opinion, primarily in the context of agreements for spousal support. The policy issues and legislative requirements for child support are significantly different. A child's right to support cannot be bargained away by a parent (see *L.S. v. E.P.*, 1999 BCCA 393 at para. 58), *Dickson v. Dickson* (1987), 21 B.C.L.R. (2d) 69 (CA), and Parliament has set out clear standards in the Guidelines for determination of child support obligations. The options available to parents to negotiate child support are limited, and while negotiated settlements in matrimonial matters are encouraged, courts have a separate responsibility to children to ensure their interests are upheld. Thus, the appropriate weight to be accorded an agreement for child support will be less than that accorded to an agreement for spousal support.

[88] Similar views were expressed in *Kaler v. Kaler*, 2013 BCCA 57, where the Court commented at para. 26 that "while parties may enter into an agreement as to child support and it is a consideration in assessing appropriate child support, the court is not bound by such an agreement."

[89] The agreement in this case, negotiated with the assistance of experienced family law lawyers, appears to have recognized the primacy of the Child Support Guidelines. The Minutes of Settlement (which formed the basis for the formal separation agreement) contained the following provision:

3. Child support shall be reviewed annually commencing in 2009 and the parties respective incomes shall be determined in accordance with section 19 of the Federal Child Support Guidelines, and the parties will exchange their financial information as provided in the separation agreement.

[90] The recitals to the separation agreement, which I have already alluded to, contained extensive and emphatic language as to the finality of the agreement on issues of property division and spousal support, but notably omitted any suggestion of finality on the issue of child support.

[91] I have already quoted the provisions of the separation agreement dealing with variation of child support, but do so again for convenience:

6.0 The Child Support is reviewable as follows:

(a) the parties may review the Child Support on the request of either party and, if necessary, revise it to ensure that it accords with the requirements of the [Federal Child Support Guidelines] and British Columbia Table by July 1st of every year, with the first review being in 2009;

(b) either party may request, by delivering a written notice to the other, a review of the Child Support if

(i) a material change in circumstances, such as custodial changes or a change of a Child's primary residence lasting longer [than] sixty (60) days,

(ii) a change leading to undue hardship for either party as defined by the [Federal Child Support Guidelines];

(iii) a Child ceasing to be eligible for support,

(iv) a Child's need for support changes by reason of reaching the age of majority,

(v) a Child who ceased to be eligible for support becomes dependent again; or

(vi) upon Kathleen completing her first post-secondary degree;

[92] The judge interpreted clause 6.0(a) as applying only where one of the circumstances in clause 6.0(b) was present. In my view, he misapprehended the provisions of the agreement. Clause 6.0(a) provides for a review, up to once per year, to ensure that the support provisions continue to conform to the Federal Child Support Guidelines. There are provisions in the separation agreement for the exchange of financial information, so that a party may, at any time prior to July 1 of a year, commence the procedures for adjustment of the child support obligations based on the parties' tax returns from the previous year. The July 1 date appears to have been chosen because it allows the parties a reasonable amount of time to exchange information after tax returns have been filed.

[93] Clause 6.0(b) deals with reviews triggered by material changes in circumstances rather than by fluctuations in income. Such reviews are not limited by the July 1 date.

[94] Ms. Reid sought a review of the child support provisions in written correspondence dated March and May 2011. She received copies of Mr. Reid's tax returns in May. Thereafter, she made an application to the court promptly, in July 2011.

[95] Ms. Reid was entitled to invoke clause 6.0(a) prior to July 1, 2011 to seek a change in child support based on Mr. Reid's 2010 income tax return. Her actions in March and May were sufficient to do so. An adjustment would have been prospective (presumably for the period from July 1, 2011 to June 30, 2012) and based on the 2010 tax return.

[96] Unfortunately, when Ms. Reid applied to court, she characterized the application as a retroactive one as it related to 2010 child support rather than as a prospective one relating to 2011 child support. This characterization was adopted by Mr. Reid and by the trial judge, and repeated by the parties in their submissions to this Court. While the issue was raised by the Court at the hearing of this appeal, we reluctantly concluded that it was too late to re-characterize the matter as a prospective application. Accordingly, while the application should probably not have been one for retroactive child support, we have no real option but to treat it as such. The incongruence between the facts of this case and the claim that is

being adjudicated, however, creates some analytical difficulties.

[97] I turn, then, to the facts surrounding the application.

[98] The judge found that Mr. Reid's employment income for 2008-2013 was as follows:

2008 employment income

\$ 312,556

2009 employment income

\$ 454,222

2010 employment income

\$2,246,732

2011 employment income

\$ 176,146

2012 employment income

\$ 178,486

2013 employment income

\$ 127,796

[99] In addition to his employment income in 2008, Mr. Reid had dividend income of \$94,500. In the course of argument, we were advised that the dividend income was a mechanism for clearing off a shareholder's loan to facilitate the couple's property division agreement. The trial judge noted that the 2008 dividend was accounted for by the parties in their division of assets.

[100] Mr. Reid's relevant employment income for 2008, then, was approximately equal to the \$310,000 figure used in the separation agreement. In the circumstances, there was no basis for any adjustment of the 2008 child support payments.

[101] Mr. Reid's income did rise in 2009, though Ms. Reid did not seek adjustment of child support in a timely manner. The judge noted that any underpayment by Mr. Reid in 2009 was counter-balanced by his over-payments in the years 2011-2013. That conclusion appears to be justified on the facts.

[102] While Ms. Reid sought to impute income to Mr. Reid for the years 2011-2013 on the basis that he was under-employed, I am not persuaded that the trial judge made any error in rejecting that argument. Mr. Reid was an entrepreneur, and the years 2011-2013 were years when he was starting a new business, having sold his previous one. This was an entirely reasonable use of his business talents.

- [103] The real issue, in this case, is what should be done about Mr. Reid's 2010 income in terms of child support. I have expressed my reservations about treating that income as a basis for retroactive adjustment of 2010 child support rather than as a basis for prospective adjustment of 2011 child support. In light of the positions taken by the parties throughout the litigation, however, I have concluded that the proper course of action is to adopt the characterization that they argued for in the court below and in their prepared submissions to this Court.
- [104] As the trial judge recognized, the leading authority on retroactive child support adjustments is the Supreme Court of Canada's combined judgment in *D.B.S. v. S.R.G.; L.J.W. v. T.A.R.*; *Henry v. Henry*; and *Hiemstra v. Hiemstra*, generally cited as *D.B.S. v. S.R.G.*, 2006 SCC 37.
- [105] The majority judgment in that case recognized that retroactive awards can be made where an amount payable under a separation agreement has not measured up to the Federal Child Support Guidelines:
- [77] The fact that we are dealing with children must remain of primary significance in a court's analysis. Thus in the Divorce Act, Parliament has provided that a court may depart from the Guidelines if both parents consent, but only "if it is satisfied that reasonable arrangements have been made for the support of the child to whom the order relates": s. 15.1(7). What is "reasonable" will be determined with reference to the Guidelines: s. 15.1(8). Because of this, a payor parent who adheres to a separation agreement that has not been endorsed by a court should not have the same expectation that (s)he is fulfilling his/her legal obligations as does a payor parent acting pursuant to a court order.
- [78] 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. However, as is the case with court orders, where circumstances have changed (or were never as they first appeared) and the actual support obligations of the payor parent have not been met, courts may order a retroactive award so long as the applicable statutory regime permits it: compare *C. (S.E.) v. G. (D.C.)* (2003), 43 R.F.L. (5th) 41, 2003 BCSC 896.
- [106] In the case before us, the manifest intention of the separation agreement was that child support be in accordance with the Federal Child Support Guidelines. When Mr. Reid's income rose in 2010, therefore, the agreement anticipated that his child support obligations would also increase.
- [107] In *D.B.S.*, the Court recognized that, even where an obligation to increase child support existed, it would not always be appropriate for a court to enforce it retroactively:

- [95] It will not always be appropriate for a retroactive award to be ordered. Retroactive awards will not always resonate with the purposes behind the child support regime; this will be so where the child would get no discernible benefit from the award. Retroactive awards may also cause hardship to a payor parent in ways that a prospective award would not. In short, while a free-standing obligation to support one's children must be recognized, it will not always be appropriate for a court to enforce this obligation once the relevant time period has passed.
- [108] In D.B.S., the Court described the factors affecting the appropriateness of a retroactive award as "myriad" (at para. 98). It specifically enumerated four: whether there was a reasonable excuse for not having sought support earlier; the conduct of the payor parent; the circumstances of the child; and any hardship that would be caused by a retroactive award.
- [109] The trial judge in this case stated that he would "assume that factors 1, 2 and 4 favour Ms. Reid." It seems to me that that "assumption" was well placed. Ms. Reid's application was made in a timely manner. She first sought Mr. Reid's 2010 tax return in March 2011, and followed up on the issue in May 2011. Once she received the return, she applied for increased child support quickly.
- [110] There is considerable difficulty in analyzing Mr. Reid's conduct for the purposes of the D.B.S. analysis in this case. In reality, his full disclosure of 2010 income in May of 2011 was timely, because, under the terms of the separation agreement, it was only to affect his support payments from July 2011 forward. Nothing more was required of him, and nothing more could be expected of him. That reality, however, has been ignored in the submissions of both parties, as they both took the position that 2010 income should be used to determine 2010 child support. Since we have agreed to decide the case on that basis, it follows that we must also accept that Mr. Reid ought to have been more forthcoming in disclosing his significant change of circumstances as soon as it occurred. Otherwise, timely adjustment of Mr. Reid's support obligations would have been impossible.
- [111] In the circumstances, Mr. Reid's conduct, while not egregious or even morally culpable, might properly be described as "blameworthy" in the very extended sense that that expression is used in D.B.S. Mr. Reid was not forthcoming; he did not provide financial information immediately when he received his extraordinary income. Further, it is noteworthy that sizeable portions of the income derived from financial arrangements that he had failed to disclose when the separation agreement was entered into.
- [112] Finally, there was no indication that payment of retroactive child support would adversely affect Mr. Reid. His financial gains in 2010 left him in an unexpectedly strong position, and he was well-able to make payments without suffering any personal hardship.

- [113] The judge considered that the third factor - the circumstances of the children - favoured denial of retroactive child support. In addition to the passage I have already quoted from D.B.S., he also cited the following paragraphs:
- [110] A retroactive award is a poor substitute for an obligation that was unfulfilled at an earlier time. Parents must endeavour to ensure that their children receive the support they deserve when they need it most. But because this will not always be the case with a retroactive award, courts should consider the present circumstances of the child -- as well as the past circumstances of the child -- in deciding whether such an award is justified.
- [111] A child who is currently enjoying a relatively high standard of living may benefit less from a retroactive award than a child who is currently in need. As I mentioned earlier, it is a core principle of child support that, after separation, a child's standard of living should approximate as much as possible the standard (s)he enjoyed while his/her parents were together. Yet, this kind of entitlement is impossible to bestow retroactively. Accordingly, it becomes necessary to consider other factors in order to assess the propriety of a retroactive award. Put differently, because the child must always be the focus of a child support analysis, I see no reason to abstract from his/her present situation in determining if a retroactive award is appropriate.
- [113] Because the awards contemplated are retroactive, it is also worth considering the child's needs at the time the support should have been paid. A child who underwent hardship in the past may be compensated for this unfortunate circumstance through a retroactive award. On the other hand, the argument for retroactive child support will be less convincing where the child already enjoyed all the advantages (s)he would have received had both parents been supporting him/her: see S. (L.). This is not to suggest that the payor parent's obligation will disappear where his/her children do not "need" his/her financial support. Nor do I believe trial judges should delve into the past to remedy all old familial injustices through child support awards; for instance, hardship suffered by other family members (like recipient parents forced to make additional sacrifices) are irrelevant in determining whether retroactive support should be owed to the child. I offer these comments only to state that the hardship suffered by children can affect the determination of whether the unfulfilled obligation should be enforced for their benefit.
- [114] The circumstances of the children must be examined to determine the degree to which retroactive child support can fulfill the purposes that timely child support would have fulfilled. In many cases, as the Supreme Court of Canada noted, retroactive child support will be "a poor substitute for an obligation that was unfulfilled at an earlier time." In some situations, however, a delay (particularly a short one) in paying child support will not make it less effective.
- [115] Again, there are some obvious difficulties with treating this case as one for retroactive child support. Assuming, again, however, that the support ought to have been paid in 2010 rather than in 2011, it is difficult to see how the circumstances of the children militated against

making a retroactive award. The children's situations in 2011, when the support was applied for, had not changed in any material way from their situations in 2010. A one-year bump in child support would serve exactly the same purposes in 2011 as it would have in 2010. Thus, there was no change in the circumstances of the children that could be said to make this particular retroactive award "a poor substitute for an obligation that was unfulfilled at an earlier time". In short, the circumstances of the children did not justify refusing a retroactive award.

[116] The trial judge, by giving pre-eminent weight to a factor that was, in fact, a neutral one, erred in his application of the law. There was nothing in the circumstances of this case that justified denying an award of child support based on the 2010 income, even if that award was characterized as "retroactive".

Quantum of the Award

[117] Mr. Reid's 2010 income was extraordinary in several respects. The 2010 employment income figure of \$2,246,732 was broken down as follows:

Change of control bonus

\$781,162

Severance payment

\$750,000

Stock options

\$512,176

Salary and other

\$203,394

[118] In addition to the employment income, Mr. Reid had other income of \$811,584 in that year:

2010 dividend income

\$754,965

2010 interest and investment income

\$ 25,231

2010 capital gains

\$ 14,132

2010 other non-employment income

\$ 17,256

- [119] The amount that ought to be included in Mr. Reid's income for child support purposes is not entirely straightforward. In para. 47 of his judgment, the judge suggested that it was appropriate to "[a]ssume that only the salary portion of Mr. Reid's 2010 income is taken into account."
- [120] That assumption does not appear to enjoy support in the case law. As pointed out by the appellant, this Court included dividend income as part of the payor's Guideline income in *Vincent v. Vincent*, 2012 BCCA 186 even though the income was immediately reinvested. A severance payment was included in Guideline income in *McKenzie v. Perestrelo*, 2014 BCCA 161, and the Court commented, at para. 94 that "[t]he cases support a presumption that severance payments should be included in Guideline income because severance payments are a direct substitute for employment income." Salary "bonuses" and profits on stock options have also been included in income for Guideline purposes in some cases.
- [121] Section 17(1) of the Guidelines expressly gives a court the ability to make the "fairest determination of income" in cases where non-recurring amounts inflate income in a particular year:
- 17(1) If the court is of the opinion that the determination of a spouse'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 non-recurring amount during those years.
- [122] Section 17 offers the Court broad discretion to average income over a period of years (see *Harras v. Lhotka*, 2016 BCCA 246), though this is generally used to smooth out fluctuating incomes rather than to account for extraordinary gains in a single year. Section 17 also allows a court to exclude certain income. While the discretion under that provision is broad, it is not to be exercised arbitrarily. In *Brown v. Brown*, 2014 BCCA 152, this Court said:
- [28] As this Court noted in *Vincent*, at para. 36, s. 17(1) "permits the exclusion of non-recurring dividends." It does not, however, require the exclusion of such dividends. The extent to which dividends should be excluded depends on the court's assessment of the "fairest determination of income."
- [29] The "fairness" referred to in s. 17(1) is not of a subjective or elusive sort. Rather, it is a fairness that is determined in accordance with the values inherent in the Guidelines as reflected in the objectives expressly set out in s. 1. In particular, a court should keep in mind the objective that children benefit from the financial means of their parents (s. 1(a)), and that spouses and children in similar circumstances are treated consistently (s. 1(d)).

- [30] In many cases, the objective that the parent's financial means be available for child support will be of overriding importance. The observation of Weiler J.A. in *Marinangeli v. Marinangeli* (2003), 66 O.R. (3d) 40 continues to be an accurate summary of the law in this area:
- [30] While the courts have differed in their approach when dealing with non-recurring income, the recurring theme is that the child of the marriage should benefit from a sudden increase in lifestyle and money available to the family.
- [123] Mr. Reid has been an entrepreneur for many years, and it was entirely reasonable for him to allocate some portion of his 2010 income into a capital investment so that he could continue to work as an entrepreneur. Equally, the gains received in 2010 probably portended lower incomes for future years, and so it was not appropriate to treat them as if they represented a normal income stream. In the circumstances, I would not consider it appropriate to treat all of Mr. Reid's 2010 income as being available for child support in that year.
- [124] In the course of argument, Ms. Reid's counsel indicated that she was content to have only the roughly \$2.2 million that Mr. Reid obtained in employment income included in Guideline income in 2010. While that position goes some way toward dealing with concerns under s. 17 of the Guidelines, it is not clear that it entirely deals with the issue.
- [125] It is unnecessary, in this case, to come to any final determination as to the exact amount of Mr. Reid's Guideline income for 2010. It is clear that, whatever amount is settled upon under s. 17, Mr. Reid's income for that year was so high that an award of the table amount of child support would not have been justifiable under s. 4(b)(ii).
- [126] Section 4(b)(ii) of the Guidelines allows the court to make an award, in respect of Mr. Reid's income in excess of \$150,000, in an amount that it considers appropriate, "having regard to the condition, means, needs and other circumstances of the children who are entitled to support and the financial ability of each spouse to contribute to the support of the children".
- [127] In *Frances v. Baker*, [1999] 3 S.C.R. 250, the Court established that, even in the case of very high income earners, there is a strong presumption in favour of an award in accordance with the Guidelines tables. Any departure from those amounts must be based on a finding that the table amount is "inappropriate" having regard to the circumstances set out in s. 4. Subsequent cases, including *Hollenbach v. Hollenbach*, 2000 BCCA 620 and *Hathaway v. Hathaway*, 2014 BCCA 310 establish that there is a "formidable onus" on the payor parent to establish that s. 4 should be used to reduce child support below table amounts.
- [128] In *Metzner v. Metzner*, 2000 BCCA 474 at para. 30, this Court provided a useful summary of the key points in *Frances v. Baker*:

- 1) It was Parliament's intention that there be a presumption in favour of the Table amounts in all cases (para.42);
 - 2) The Guidelines figures can only be increased or reduced under s.4 if the party seeking such a deviation has rebutted the presumption that the applicable Table amount is appropriate (para.42);
 - 3) There must be clear and compelling evidence for departing from the Guidelines figures (para.43);
 - 4) Parliament expressly listed in s.4(b)(ii) the factors relevant to determining both appropriateness and inappropriateness of the Table amounts or any deviation therefrom (para. 44);
 - 5) Courts should determine Table amounts to be inappropriate and so create more suitable awards only after examining all circumstances including the factors expressly set out in s.4(b)(ii) (para.44);
 - 6) Section 4(b)(ii) emphasizes the "centrality" of the actual situation of the children. The actual circumstances of the children are at least as important as any single element of the legislative purpose underlying the section (para.39). A proper construction of s.4 requires that the objectives of predictability, consistency and efficiency on the one hand, be balanced with those of fairness, flexibility and recognition of the actual "condition, means, needs and other circumstances of the children" on the other. (para.40)
 - 7) While child support payments unquestionably result in some kind of wealth transfer to the children which results in an indirect benefit to the non-paying parent, the objectives of child support payments must be kept in mind. The Guidelines have not displaced the Divorce Act which has as its objective the maintenance of children rather than household equalization or spousal support (para.41).
 - 8) The court must have all necessary information before it in order to determine inappropriateness under s.4. If the evidence provided is a child expense budget, then "the unique economic situation of high income earners" must be considered.
 - 9) The test for reasonableness of expenses will be a demonstration by the paying parent that the budgeted expense is so high "as to exceed the generous ambit within which reasonable disagreement is possible": *Bellenden v. Satterthwaite*, [1948] 1 All E.R. 343 at 345.
- [129] The trial judge did not specifically consider s. 4 of the Guidelines, but did examine the expenses that Ms. Reid attributed to the children in the context of his retroactivity analysis. He said:
- [32] In the present case, there is no basis to conclude that the children's needs were not met, nor did Ms. Reid argue otherwise. She did not go into debt to provide for the children. In her financial statements she showed expenses for the children for three years. For 2008 they were \$21,000 and for 2011 they were \$31,000, less than the child support she received. For

2013, she showed an increased amount of \$70,000, but that was unexplained. As pointed out by Mr. Reid, by 2013 spending more on the children was within Ms. Reid's discretion given that her own income was steadily increasing; Columbia Business Systems had almost \$1 million in retained earnings; she had paid off her mortgage; and she had over \$650,000 in RRSPs.

- [133] Without dealing with the issue of whether all of Mr. Reid's 2010 income should be used in calculating child support, the amount of retroactive support claimed by Ms. Reid - \$513,000 - cannot be justified as allowing the children to live the standard of life they enjoyed before the parties separated. It can only be seen as a transfer of wealth from Mr. Reid to Ms. Reid.
- [130] I am not sure that the suggestion that expenses for the children were less than the support payments is fully justifiable. The amounts shown in the budgets were only for expenditures specifically undertaken for each child, and did not cover any proportion of general family expenditures that were, in part, attributable to the children. Nonetheless, certain conclusions can be drawn from these findings. First, it appears that the judge considered retroactive support in the amount of \$513,000 to be "unjustifiable". In my view, such a finding is appropriate. The amount would be wholly outside the range of expenses suggested by the evidence, and completely out of keeping with the children's lifestyles.
- [131] On the other hand, from Ms. Reid's 2013 expenses, it is apparent that she considered that, when funds were available, it was appropriate to increase amounts spent on the children. Had she received appropriate child support from Mr. Reid in 2010, it seems likely that the children would have been able to benefit from it. I do not suggest that the children's "needs" went unfulfilled, or that there were any specific deficiencies in providing for them. As I read the case law, however, the question is not whether there was any unfulfilled need, but whether it would have been possible for the children to benefit from an increase in support. There is nothing to suggest that an increase in support would not have been beneficial to the children, so the "formidable onus" on a payor parent to rebut the presumption in favour of an increase has not been met.
- [132] The evidence presented in this case directed at the appropriate amount of support under s. 4 was not extensive. It did establish that support at the table amount based on an income of \$2.2 million for that year would not have been appropriate. On the other hand, it established, in my view, that support substantially in excess of the \$3,341 per month that Mr. Reid actually paid would have been appropriate.
- [133] Taking into account all of the factors in s. 4 of the Guidelines, and considering the expense summaries provided by Ms. Reid for 2008, 2011 and 2013, it appears to me that additional child support during the 12 month period of 2010 of \$5,000 per month per child would not have been inappropriate. I would therefore order that Mr. Reid pay to Ms. Reid retroactive support in the amount of \$120,000 in respect of 2010.

Conclusion

[134] I would allow the appeal with respect to retroactive child support for 2010, and order that Mr. Reid pay additional child support in the total amount of \$120,000. I would dismiss the appeal in respect of child support for other years, and would dismiss the appeal in respect of spousal support. In light of the success of Ms. Reid, she should have her costs in the trial court and on appeal.

"The Honourable Mr. Justice Groberman"

I AGREE:

"The Honourable Madam Justice Newbury"

I AGREE:

"The Honourable Mr. Justice Willcock"

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