

CANADA / JUDGMENT

## Tomas v. De Batz De Trenquelleon

2024 BCSC 180

### COURT

Supreme Court of British Columbia

### DECIDED

6 February 2024

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2024 BCSC 180 Tomas v. De Batz De Trenquelleon

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Tomas v. De Batz De Trenquelleon,

2024 BCSC 180

Date: 20240206

Docket: E213187

Registry: Vancouver

Between:

Suzanne Elisabeth Tomas also known as Suzanne Tomas

Claimant

And

Renaud de Batz de Trenquelleon also known as Renaud Debatz

Respondent

Before: The Honourable Justice A. Ross

Reasons for Judgment

Counsel for the Claimant:

L. Spencer

Counsel for the Respondent:

P.M. Daykin, K.C.

Place and Date of Trial/Hearing:

Vancouver, B.C.

November 28, 2023

Place and Date of Judgment:

Vancouver, B.C.

February 6, 2024

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## Introduction

- [1] This application arises after the parties reached a separation agreement that was meant to resolve all of the outstanding issues in the litigation (the "Separation Agreement"). The claimant says that agreement was reached in haste in December 2022 and one of the respondent's assets was omitted from the agreement.
- [2] The "thing" in question consists of performance share units that the respondent receives as compensation from his employer, Innergex Renewable Energy Inc. (the "Innergex PSUs").
- [3] The claimant does not seek to unwind the entire agreement. Instead, she argues that the omitted asset should be included as a family asset in the Separation Agreement and then divided equally. Alternatively, the Separation Agreement should be confirmed, but I should declare that the Innergex PSUs did not form part of that agreement. The claimant then seeks a declaration that they are family property and should be divided equally.

- [4] The respondent says that there was no mistake or omission in the negotiations or the Separation Agreement. He says that the Innergex PSUs were taken into account in determining the lump-sum spousal support payable to the claimant. He says that, properly analyzed, the Innergex PSUs can either be classified as an asset or income, but they cannot be both. Hence, having included the Innergex PSUs as "income" in the determination of spousal support, the claimant cannot now seek to have the court determine that they are "assets" to be divided.
- [5] For the context of my discussion below, I note that the parties were in a relationship that lasted more than 30 years during which they accumulated substantial assets. The assets divided between the parties in the Separation Agreement were valued at approximately \$10,000,000. The Innergex PSUs, when issued, were valued at \$170,000. Due to a number of issues, including decreased stock price, they are now valued at \$90,000. Hence, the Innergex PSUs constitute some value, but less than one percent of the total assets divided between the parties.
- [6] Both sides agree that the Separation Agreement sought to divide the parties' assets equally. Further, both sides agree that the Innergex PSUs were not included in the final draft. The question is whether the failure to include them was a mistake, or otherwise unfair to the claimant.

## Issues

- [7] The issues for me to decide are:
- a) Was there a mistake in the drafting of the Settlement Agreement?
  - b) If so, was that mistake common, mutual, or unilateral?
  - c) Did the Innergex PSUs constitute assets or income in the hands of the respondent?
  - d) Was the Separation Agreement unfair because it failed to include the Innergex PSUs?

### The Claimant's Notice of Application

- [8] The claimant's application seeks the following relief:
- a) An order that an agreement was reached between the parties pursuant to ss. 92 and 163 of the Family Law Act, S.B.C. 2011, c. 25 [FLA], in the form of the draft Separation Agreement with the exception that the reference to the Innergex PSUs in clause F(q) of the draft Separation Agreement is deleted and a clause is included in the draft Separation Agreement that the Innergex PSUs be divided equally between the claimant and the respondent.
  - b) An order that the Innergex PSUs are family property and shall be divided equally between the claimant and the respondent.

- c) Alternatively, an order by way of summary trial pursuant to Rule 11-3 of the Supreme Court Family Rules and ss. 94 and 165 of the FLA, that the Court order the parties to equally divide the family property as set out in the draft Separation Agreement, including equally dividing the Innergex PSUs.
- [9] The facts are not in dispute. The issues revolve around whether the absence of the Innergex PSUs was a mistake or, otherwise, caused an unfairness.

## Factual Background

- [10] The claimant and the respondent began living in a marriage-like relationship in mid-1987. They married on August 5, 1989, in Montreal, Quebec.
- [11] The couple separated on November 12, 2021. The relationship spanned more than 34 years. The parties have three children. Those children are grown, and they are not children of the marriage.
- [12] The claimant works as an accountant/bookkeeper. The respondent worked in various businesses throughout the period of the relationship. He lived outside of Canada for over 25 years. He would work at foreign sites for months at a time. The claimant was solely responsible for the children during those stretches. As a result, the claimant's career was not pursued to the utmost. All of the parties' assets were accumulated during the relationship.
- [13] Since 2019, the respondent has lived and worked in South America. Since 2018 he has worked in upper management at Innergex Renewable Energy which is an energy company ("Innergex"). In addition to his employment income, his annual compensation and benefits include bonuses, allowances for housing and car, and RRSP contribution. Relevant to this application, his compensation also includes stock options as well as the Innergex PSUs.
- [14] This action was commenced on January 22, 2022. In the litigation, it was the claimant's position that she was entitled to an equal division of assets and a significant spousal support claim on compensatory and non-compensatory bases. The respondent did not dispute the underpinning of those claims but did dispute the quantification.
- [15] The existence of the Innergex PSUs was never a secret. The claimant was aware of the full extent of the respondent's financial compensation for three distinct reasons:
  - a) The claimant (an accountant/booker) completed the respondent's income tax returns on an annual basis, even after separation.
  - b) The respondent works for a publicly traded company. His compensation is the subject of public disclosure in the financial statements. Hence, the claimant always had the ability to determine his income.

- c) As required by the Rules, the respondent disclosed his compensation on his Form F8 financial statement sworn February 17, 2022. The Innergex PSUs were set out in a separate category from his salary and stock options.
- [16] The distinction between the Innergex PSUs and the stock options is important, and I return to it below. Also, for a reason described below, the Form F8 did not ascribe a value to the Innergex PSUs. However, the respondent's counsel specifically brought the claimant's attention to the Innergex PSUs in a letter dated April 12, 2022. That letter attached an Innergex management information circular setting out the amounts of executive compensation.
- [17] The evidence establishes that the Innergex PSUs:
- a) do not vest until three years after they are granted;
  - b) are valued at vesting on the basis of the company's performance over the past three years (i.e., the three years after they are granted). Hence, although they are part of the respondent's annual compensation in the current year, the ultimate value is based upon company performance over the next three years (i.e., a metric other than "employee performance");
  - c) do not necessarily vest in the same amount that they were issued (again, based upon company performance);
  - d) are taxed upon vesting in the respondent's hands as income; and
  - e) because they are paid as taxable income, the respondent's employment agreement provides that the employer is authorized to direct that a percentage of the Innergex PSUs be automatically sold to comply with the employer's remittance responsibilities.

[18] The respondent received total compensation from Innergex, under all headings, as follows:

Year

Salary

PSUs

Options

Annual Incentive

Other

Total

2020

253,678

130,711

9,249

174,343

120,794

688,775

2019

244,106

119,700

8,750

116,317

62,560

551,433

2018

219,838

110,899

99,830

63,920

494,487

[19] Of note, the respondent's Form F8, sworn February 17, 2022, indicates that his income for 2021 was \$237,056. However, that same document explained the various components of his income. It attached a schedule describing the total compensation for years 2018-2020 which accords with the figures set out above. The notes in the Form F8 indicate the reason that no value was ascribed to the Innergex PSUs (i.e., because of the uncertain final determination of value). Despite the fact that no value was ascribed to the Innergex PSUs in the Form F8, there is no doubt that the claimant was aware of their potential value. As noted, she prepared his income tax returns.

[20] At the time the respondent filed his Form F8, he had not prepared or filed his income tax return for 2021. The respondent's income increased in 2021, and his total compensation was \$1,091,758. For the sake of this application, it is important to note that approximately \$200,000 of that income was comprised of income not derived from Innergex (i.e., from rent, interest, and dividends derived from investments the parties would be dividing in the litigation). However, the Innergex income was comprised of:

- a) the base salary of \$237,056;

- b) bonus of \$171,781;
- c) a number of non-cash items, including the payment of Chilean taxes on his healthcare plan, approximately \$67,000; and
- d) Innergex PSUs were granted at a value of \$310,000.

[21] As discussed below:

- a) the claimant submits that the Innergex PSUs were not accounted for in the Separation Agreement.
- b) the respondent says that the amount of the Innergex PSUs described in the preceding paragraphs:
  - i. was taken into account in calculating the amount of the claimant's lump- sum spousal support; and
  - ii. was not indicative of the ultimate benefit that he received.

[22] The respondent says that his 2021 income, excluding any options and Innergex PSUs, was in the range of \$568,000.

[23] In respect of the ultimate value of the Innergex PSUs, the respondent says that their after-tax value, when he received them, was approximately \$170,500. That figure is based on the stock price on the vesting date, less income tax. However, using the present stock price, the value is approximately \$90,000. I am informed that Innergex's stock price has gradually declined from \$18.60 at the end of 2022 to a present price of \$9.45.

#### The Settlement Negotiations and the draft Separation Agreement

[24] The parties, through their counsel, engaged in settlement negotiations over an extended period through 2022.

[25] The claimant's counsel sent a comprehensive settlement proposal on October 4, 2022. It was a four-page letter, addressing every asset, including the Innergex PSUs. At page 3, the letter states:

- 6. On the spreadsheet you will note that the performance shares have been highlighted as your client received money from cashing those in, but has not provided my client with 50% of those monies.

[26] The claimant's October 4, 2022 letter also addressed her claim for spousal support. In prior discussions, the respondent had indicated that he may retire early. If that occurred, then his Innergex compensation would cease within a couple of years. Based upon that prospect, the parties were negotiating toward a lump-sum amount of spousal support. For the context of the paragraph below, in earlier negotiations, the respondent had offered \$169,000 for lump-sum spousal support and then increased his overall offer by a payment of \$25,000. The claimant's counsel addressed the spousal support issue as follows (after discussion of the

division of assets):

Added to that equalization payment is spousal support. I enclose for you here a DivorceMate calculation on the basis of \$500,000 income for your client and \$100,000 for my client from the date of separation up to the end of the year after your client turns 62, i.e. 2 years lump sum. That shows a midpoint lump sum of \$186,000. However, your client's income immediately post separation was much higher than \$500,000 and my client's was much lower than \$100,000 and based roughly on incomes of \$600,000 and \$70,000 for the 2 year period it would be reasonable for lump sum spousal support to be set at \$250,000 as per the other attached DivorceMate calculation (see the midpoint NPV for 2 years please of \$249,588). My client would agree to \$250,000 being the lump sum spousal support amount rather than the \$169,000 plus \$25,000 your client has offered. Further she would agree that your client can pay that amount to her from your client's share of the net sale proceeds of Shone [the parties' family residence].

- [27] The respondent did not accept the claimant's October 4, 2022 offer. As a result, the claimant set down two applications seeking monthly spousal support and the payment out of court of \$750,000 from the net sale proceeds of the parties' former family residence. Those applications were eventually scheduled to be heard on December 9, 2022.
- [28] The respondent then made a counter-offer on November 25, 2022, which was meant to settle "the whole case". In that offer, the respondent increased his prior offer, specifically accepting the figure contained in the claimant's demand regarding spousal support. In other words, he accepted the lump-sum amount of \$250,000 for spousal support. The respondent's offer letter attached schedules of assets to be divided. The schedules contain notes regarding the proposed division (the "November 25 Schedule"). Those schedules did not include the Innergex PSUs.
- [29] The respondent's November 25, 2022 offer, and the November 25 Schedule, became the basis for the parties' following negotiations.
- [30] The November 25, 2022 offer was not immediately accepted by the claimant. However, on December 8, 2022, while preparing for the court application (scheduled for the next day), the lawyers exchanged emails beginning just before noon. In an email sent at 11:56 a.m., the respondent repeated his position from the November 25 offer, but:
- a) increased the cash payable to the claimant by approximately \$25,000; and
  - b) required the claimant to release any claim against his stock options. The letter noted that the options were not in a positive position at that time. In other words, the net option purchase price (after tax) exceeded the trading price.
- [31] As noted above, there is a distinction between the respondent's "stock options" and the Innergex PSUs. The offer made mention of the stock options because they had no value at the time of the negotiations, but they might go up in future. The email did not refer to the Innergex PSUs.

- [32] At 3:01 p.m. on December 8, 2022, the claimant's counsel responded, indicating that the claimant would accept the terms of the respondent's 11:56 a.m. email offer on one condition: each party would be able to draw the funds from the sale of the family home immediately. The respondent agreed to that term at 3:24 p.m. Hence, the settlement was concluded. The claimant's application was adjourned. The respondent's counsel agreed to draft the formal agreement. Funds were released to the claimant, in partial completion of the agreement.
- [33] On December 20, 2022, the respondent's counsel sent a "draft Separation Agreement". That is the document that the claimant seeks to "rectify".
- [34] The draft Separation Agreement is comprehensive. It is 10 pages plus nine pages of schedules. It describes the assets and includes the November 25 Schedule of assets.
- [35] Of note, in the wording of the draft Separation Agreement, the Innergex PSUs were included under the definition of "Assets" and described within the same subparagraph as the stock options. (As noted, the stock options had been specifically discussed, and the claimant had released her claim to them in the December 8, 2022 email exchange). At pages 3-4, the draft Separation Agreement stated:
- F. The parties have the following assets:
- q. [The respondent's] Innergex stock options and performance share units, which are summarized in Schedule A hereto (together the "Innergex Options"); and
- [36] At pages 6-7, the draft Separation Agreement set out what property each party would keep. Clause 13 indicated that the respondent would keep the "Innergex Options" (which term was defined in para. F.q. above). Clause 13 provided:
13. [The respondent] will retain, as his sole and separate property:
- g. the Innergex Options;
- [37] Thus, pursuant to the draft Separation Agreement, the respondent would keep all of the Innergex PSUs.
- [38] On December 21, 2022, the claimant's counsel provided a preliminary response, noting that he would review the body of the agreement as soon as possible. Thereafter, further steps were taken, and further funds were released, in further partial completion of the agreement.
- [39] On January 30, 2023, the claimant's counsel wrote to the respondent's counsel to demand an additional \$160,000 be paid by the respondent. That amount was based upon the value of the respondent's Innergex PSUs. The letter states:

in Recital F(q) you have added the phrase "and performance shares" after the word options. Those are not appropriately in this Separation Agreement given that we have not settled that issue. Your November 25, 2022 offer, and any further discussions and emails including particularly on December 8, 2022, did not cover these performance shares .

[40] As noted above, both parties agree that a binding agreement was reached on December 8, 2022. Neither party says that the Innergex PSUs were so fundamental as to unmake that agreement.

## Positions of the Parties

### Facts

[41] The claimant's position on the facts is as follows:

- a) A binding agreement was reached between the parties, but that agreement omitted the Innergex PSUs.
- b) The Innergex PSUs constitute assets in the hands of the respondent. They have a value.
- c) All other assets were divided equally between the parties.
- d) The Innergex PSUs should be divided equally as well.
- e) Hence, the court should either:
  - i. decide that there was a mistake in the formation of the Separation Agreement and step in to rectify that agreement by ordering that Clause F(q) be deleted and replaced with a new clause that includes the Innergex PSUs and divides them equally; or
  - ii. Alternatively, decide that there was no mistake and that the Innergex PSUs did not form any part of the assets divided in the Separation Agreement. Thus, there was an unfairness in the division of family property. So, proceeding by way of summary trial, I should order that the Innergex PSUs are family property and that the parties are to divide them equally.

[42] The respondent's position is:

- a) All of the claimant's calculations toward lump-sum spousal support were based upon the respondent's employment compensation which included the value of the Innergex PSUs.
- b) The claimant's offer of October 4, 2022, starts with calculations based on an annual income of \$500,000. In 2018 and 2019, the respondent's income, excluding Innergex PSUs, was in the range of \$384,000-\$433,000. Hence, there was no basis for a calculation of spousal support based upon an income of \$500,000.
- c) He concedes that his 2020 and 2021 Innergex income, excluding the Innergex PSUs, was \$558,000 and \$568,000 respectively.

- d) However, the claimant's October 4, 2022 offer, relies on the DivorceMate calculations ascribing to him an income of \$600,000 and to her an income of \$70,000. To reach the income of \$600,000, the claimant included the value of the Innergex PSUs.
  - e) By necessity, the DivorceMate calculations, and the lump-sum calculations, were based upon projected incomes for the next two years.
  - f) Based upon those higher incomes (which included the Innergex PSUs), the claimant's calculation of lump-sum spousal support was in the range of \$250,000.
  - g) The eventual settlement included the amount of \$250,000 for lump-sum spousal support.
  - h) The Innergex PSUs are either income or assets. They cannot be both.
  - i) The claimant's calculation of lump-sum spousal support included the Innergex PSUs as "income" for the calculation of her lump-sum spousal support.
  - j) Hence, the claimant cannot include the Innergex PSUs as income for one part of her claim, and then seek to take half the value of those PSUs. This manoeuvre would, ex post facto, decrease his income for those years.
  - k) There was no unfairness in the Separation Agreement, and therefore no reason to amend or supplement it.
- [43] On the facts, the respondent submits that there has been no mistake. He notes that in the negotiations in 2022, the parties switched from discussions regarding an obligation to pay ongoing spousal support to a lump-sum model. The respondent's affidavit says that he considered the Innergex PSUs and their value to him as future income when he made the offer to settle spousal support on a lump- sum basis. He says that he would not have settled for the larger lump-sum on spousal support (\$250,000) if he had known that he would lose half of the value of those Innergex PSUs within the same settlement.

## Legal Arguments

- [44] Put simply, the claimant's position is that the omission of the Innergex PSUs was a mistake. She says that in the hurly-burly of settlement negotiations on December 8, 2022, the parties forgot to address the Innergex PSUs. That mistake was either "common", "mutual", or "unilateral".
- [45] For the distinction between the three types of mistake, the claimant relies on the following description by Justice Matthews in *Kasian Estate v. Kasian*, 2021 BCSC 2164:

- [70] There are three types of mistake: common mistake, mutual mistake, and unilateral mistake. Common mistake is where both parties make the same mistake. Mutual mistake is where both parties are mistaken, but for different reasons. Unilateral mistake is where only one party is mistaken, but the other party knows or ought to have known about the mistake: *Hannigan v. Hannigan*, 2007 BCCA 365 at para. 63, quoting *Ron Ghitter Property Consultants Ltd. v. Beaver Lumber Co.*, 2003 ABCA 221 at paras. 12-13.
- [71] The type of mistake alleged affects the analysis as to whether an agreement still exists. Where a party alleges common mistake, they are admitting that an agreement existed. The question to be determined is whether "the mistake was so fundamental as to render the agreement void or unenforceable on some basis": *Hannigan* at para. 63. With mutual or unilateral mistake, on the other hand, the party alleging it is denying that an agreement ever existed. This is based on the premise that there was never any meeting of the minds and, as a result, no agreement could ever have resulted.
- [46] I pause at this point to note that the respondent's position is that there was no mistake. He deliberately left the Innergex PSUs out when preparing the draft Separation Agreement. He says they had been considered as income and used in the calculation of lump-sum spousal support.
- [47] On this point, I accept the submission that the fact that the respondent takes this "no mistake" position eliminates any possibility of this situation being either a "common" or "mutual" mistake. Neither of those scenarios can exist without the respondent having made a "mistake". Hence, the claimant's application can only be based on a "unilateral" mistake.
- [48] As noted in *Kasian Estate*, a unilateral mistake is one where only one party is mistaken, but the other party knows, or ought to have known, about the mistake.
- [49] The claimant's position is that there was a unilateral mistake on an issue that was not fundamental to the contract. For that reason, the claimant does not seek to set aside the entire agreement. The claimant submits that, in a case of unilateral mistake, the court can rectify the contract. The claimant says that the respondent knew, or should have known, that the Innergex PSUs should be included in the agreement.
- [50] In order for the claimant's position to be correct in law, the Innergex PSUs must be considered to be family property, or "assets".
- [51] In support of the proposition that the Innergex PSUs are "assets", the claimant relies on *H.C.F. v D.T.F.*, 2017 BCSC 1226, wherein Justice Voith (as he then was) considered the proper treatment of "Restricted Stock Units" or "RSUs". The claimant submits that the RSUs in *H.C.F.* are equivalent to the Innergex PSUs in this case. Justice Voith wrote:

- [56] It is a relevant feature of these RSUs that they are granted in December of each year on account of the bonus earned by Mr. F. for the previous year ending in October. This, counsel for Mr. F. argues, is important because Mr. F. received his 2014 RSUs after the parties separated in November of that year.
- [61] In *Sarro v. Sarro*, 2011 BCSC 1010, Smith J. dealt with a case where the husband's compensation was made up of various components including stock options and RSUs. With respect to these latter forms of compensation Smith J. said:
- [11] There can be no doubt that all stock options and RSUs granted before May 21, 2010, the date of the s. 57 declaration, are family assets. Some of them have not yet vested and the stock options, when vested, remain open to be exercised for 10 years. An equal division of those assets will give each party an equal opportunity to benefit from whatever income they may generate in the future. The respondent confirmed that his employer will permit the division of these assets in specie.
- [62] The foregoing conclusions are apposite. The RSUs that were granted in each of 2011, 2012 and 2013 as a component of Mr. F.'s compensation, and that were paid out three years later, were all granted on account of work that Mr. F. did in the calendar year ending in October of each such year. This is also true of the RSUs that Mr. F. received in 2014. The fact that the RSUs for 2014 have not yet vested and that there remains some uncertainty about what precise amount Mr. F. will receive, or at the most extreme whether he receives anything, does not change the central fact that the 2014 RSUs were granted on account of Mr. F.'s employment prior to when the parties separated.
- [63] One-half of the net value of the RSUs for each of these years is to be paid to Mrs. F. The division and payment of the 2014 RSUs can await Mr. F.'s receipt of his payment for that year. The parties agree that any RSUs Mr. F. received in December 2015 or thereafter would be Mr. F.'s property. The proceeds from those RSUs, however, once received will, as I will develop, then be a portion of Mr. F.'s income for spousal support purposes.
- [52] On the basis of the reasoning in *H.C.F. and Sarro*, the claimant submits that the Innergex PSUs must be a family asset. As such, they should have been included in the Settlement Agreement but were not. Hence, the fact they were not included must have been a mistake that should be rectified, or the Innergex PSUs are a family asset that has not yet been divided, and the court should order that they be divided.
- [53] In respect of the second proposition, the claimant says that all of the other family property was divided equally. That was the obvious intent of the parties. It is also the result if the law is properly applied. As a result, the failure to divide the Innergex PSUs will result in an unfairness to her.

- [54] In response, the respondent distinguishes the "RSUs" in the H.C.F. decision on the basis that those RSUs were paid to compensate the employee in that case for work performance in the prior year. The respondent notes that the value of the Innergex PSUs is based upon the future performance of the company.
- [55] On this specific comparison to the H.C.F. decision, while I accept that there is a distinction between RSUs and PSUs, in my opinion, it is not a meaningful distinction. It is uncontroverted that the Innergex PSUs are paid to the respondent as part of his annual compensation. By definition, he receives, and declares, them during each employment year. I do not accept the respondent's submission that the Innergex PSUs constitute some type of future compensation. Although the ultimate value of the Innergex PSUs may be determined three years after they are granted, they are still part of his compensation during the year they are granted. To that extent, I find that the reasoning in H.C.F. is applicable.
- [56] However, the similarity between the RSUs and the PSUs is not the end of the analysis. As noted, the respondent's position is that the claimant can rely on the Innergex PSUs being either an asset or income, but not both. The respondent notes that Voith J. made that very pronouncement in H.C.F.:
- [188] Counsel for Mrs. F. accepts that if Mrs. F. is to receive a compensation payment for one-half of the RSUs that vest in 2017, it would be wrong to include the total value of that RSU in Mr. F.'s income. Starting in 2018, however, when the RSUs that Mr. F. received in 2015 (after the parties separated) vest, it would be appropriate to include the full amount of such RSUs in Mr. F.'s income for spousal support purposes.
- [57] The respondent submits that in para. 188, Voith J. is accepting the proposition that the respondent's compensation can be considered either an asset or income, but not both.
- [58] Further, in support of the "either income or asset but not both" proposition, the respondent relies on the Spousal Support Advisory Guidelines, as explained by Justice Branch in *Crossley v. Vorell*, 2021 BCSC 2484:
- [68] For the purposes of child support, the benefit from any stock option is generally treated as income.
- [70] For spousal support, the question is somewhat less clear. In *Sarro v. Sarro*, 2011 BCSC 1010, the court acknowledged that the child support formula was "intended to give the children the full benefit of the payor spouse's income", but that the approach to spousal support is more holistic: paras. 29-30. The SSAG User's Guide provides as follows:

Finally, there may be situations where the inter-relationship between property division and spousal support for spouses may mean a different, and lower, payor income is used for spousal support. See *Klefenz v. Klefenz*, 2015 NSSC 196 (payment on account of capital in share transaction included for child support, but not for spousal support). For example, if stock options are valued and divided as part of the property divisions, the same stock options may not be treated as income for spousal support purposes, even in cases where the stock options might be

considered as income for child support purposes.

[Emphasis added.]

[59] The respondent also points to *Haley v. Haley*, 2022 BCSC 1945:

[158] It is true that vested stock entitlements existing at the date of separation may be divided as assets. In that event, they may not be treated as income for spousal support purposes to the extent necessary to avoid double dipping. However, the weight of case authority suggests that employment compensation in the form of stock benefits should be treated as income for child support purposes in the year the entitlement to the stocks vest, and also for spousal support purposes if the stocks have not already been divided as family property: *Sarro v. Sarro*, 2011 BCSC 1010 at para. 14; *Crossley v. Vorell*, 2021 BCSC 2484 at paras. 67-73 [Crossley]; *A.E. v. A.E.*, 2021 ONSC 8189 at paras. 157-158 [A.E.].

[60] As discussed above, the respondent says that the value of the Innergex PSUs was taken into account in the claimant's calculation of her entitlement to lump-sum spousal support. The claimant chose to receive spousal support in a lump-sum because the respondent indicated that he would be retiring early. The respondent submits that those circumstances lead to two conclusions:

- a) Having used the value of the Innergex PSUs in calculating her entitlement to lump-sum spousal support, it would constitute "double dipping" if the court ruled that the claimant is now entitled to receive half of the value of the Innergex PSUs;
- b) When deciding whether to settle the entirety of the family litigation, the respondent considered his assets and the stream of income he would have over the next few years. His ultimate decision to settle the litigation, especially the lump-sum spousal support amount, was based upon his belief that he would receive the full benefit of the Innergex PSUs.

[61] On the issue of the claimant's submission of a unilateral mistake, the respondent points to the *Kasian Estate* decision (*supra*) and Matthews J.'s discussion regarding whether a unilateral mistake has occurred. In *Kasian Estate*, the couple separated after a long marriage. They reached an agreement on the division of assets wherein Mr. Kasian agreed to pay Mrs. Kasian \$2,000,000 over 10 years. Two years later, Mrs. Kasian died. Mr. Kasian ceased making the payments. Her estate sued. He defended, arguing (*inter alia*) that the proper interpretation of the minutes of settlement was that payments were to cease on Ms. Kasian's death. He also argued that the valuation of his firm was based on a mistake about a large account receivable. He argued that the capital payments should be varied to correct this unfairness.

[62] When discussing mistake and rectification, Matthews J. wrote:

[91] There is no evidence that supports unilateral mistake because there is no evidence that Ms. Kasian knew or ought to have known that Mr. Kasian was unilaterally mistaken that the payments would cease on death.

- [92] Accordingly, there is no basis for either declaring the minutes void for mistake or ordering the rectification of it to include the term that the capital payments would cease on death. There was no common mistake so the minutes of settlement are not void ab initio. Similarly, there is no evidence of a prior agreement to have the capital payments cease on death to justify rectification under the test for common mistakes, nor is there evidence of fraud on the part of Ms. Kasian--let alone of knowledge of the alleged mistake--to warrant rectification under the test for unilateral mistake.
- [63] The respondent submits that, on the evidence in this case, there was no unilateral mistake:
- a) Although the claimant may believe that she is entitled to a share of the Innergex PSUs, the law is clear that, having used them as income to calculate her spousal support, she is not entitled to treat them as assets in the division of property. Hence, she is incorrect about the existence of a mistake.
  - b) Further, the evidence discloses that the respondent was not aware of the claimant's "mistake". He says that he could not have been aware of that alleged "mistake" because he had included the Innergex PSUs in his income. He relied on the proper application of the law.
- [64] On the issue of unfairness, the respondent further submits that there has been none:
- a) During the negotiations, the respondent's offer for lump-sum spousal support was \$169,000. In the claimant's settlement proposal of October 4, 2022, she calculated her entitlement to lump-sum spousal support at \$186,000 on the basis of the respondent's income being in the range of \$500,000. He notes that his average income did not amount to \$500,000 if the Innergex PSUs were not included. Then, in the October 4, 2022 letter, the claimant increased her demand on lump-sum spousal support to \$250,000. That offer was based upon an income of \$600,000 ascribed to the respondent.
  - b) Hence, compared to the respondent's offer of \$169,000 for lump-sum spousal support, the claimant achieved an increase of \$81,000 in spousal support (from \$169,000 to \$250,000) by including the amounts that approximate the original value of the Innergex PSUs.
  - c) Then, although the Innergex PSUs were valued in the range of \$170,000 when they were first issued, they are, at present valued in the range of \$90,000.
  - d) Hence, by considering the Innergex PSUs as income, rather than assets:
    - i. the claimant achieved an increase of approximately \$81,000 in spousal support; and
    - ii. the respondent achieved assets valued at approximately \$90,000.

## Analysis

- [65] I start from the proposition that the parties were involved in negotiations. In those circumstances, opposing parties rarely view their opposite's position as "fair". While negotiating positions usually originate based upon the application of legal theories, at some point in the negotiations, offers are increased or decreased simply in order to close the remaining gap. As each side compromises during the negotiations, legal theories drop away, and each side focusses upon the bottom line. By that process, the method of reaching a position that is acceptable to the opposing side is rarely the product of a pure process of assigning exact amounts to specific assets or income.
- [66] I make the statements above to provide context for the legal analysis provided by counsel. Each side put forward valid legal theories regarding the proper characterization of the Innergex PSUs. On this application, the onus is on the claimant to show that there was a unilateral mistake or an unfairness occasioned by the settlement that was reached.
- [67] For the reasons set out below, I find that the claimant has not met that onus on either issue.
- [68] Having considered the affidavit material, and the submissions of counsel, I accept the position of the respondent on the following points:
- a) The Innergex PSUs could be considered either income or assets, but not both.
  - b) The value of the Innergex PSUs was considered in the calculation of the respondent's income when the parties were negotiating.
  - c) The claimant's position on lump-sum spousal support was based upon the attribution of an income level to the respondent that included the Innergex PSUs.
  - d) Having taken that position, the Innergex PSUs have been considered to be income. Thus, while the claimant may believe the Innergex PSUs constitute assets, there was no basis in law for that belief.
  - e) Hence, although the claimant believed that the Innergex PSUs were omitted from the December 8 settlement negotiations by mistake, there was no such mistake. The agreement that was reached accounted for the Innergex PSUs as income which formed the basis of the spousal support calculations.
- [69] It follows from the findings above that the claimant cannot establish that there was a mistake, even a unilateral one. The claimant may believe that the Innergex PSUs should be characterized in another manner. She may believe that the method of calculation of the lump-sum spousal support resulted in the respondent receiving a financial advantage. However, as I noted above, the claimant's position requires a finding that the Innergex PSUs were family assets. For the reasons set out above, I have found that they had been considered to be income.

[70] Further, turning to the second issue, I find that, there has been no unfairness in the agreement that was reached. Again, I place the concept of fairness within the context of negotiations toward a settlement. In any hypothetical litigation, any individual party settles that litigation for reasons known only to that party. I note, for example, that the claimant placed a condition on the settlement terms that \$750,000 would be released to her on December 8, 2022. I assume that was an item that drove her decision-making. Thus, in broad overview, when the court looks at any settlement in retrospect, it is impossible to ascribe perfect accounting accuracy.

[71] In the current case:

- a) the respondent's offer for lump-sum spousal support was \$169,000;
- b) the claimant sought \$250,000 for that claim;
- c) the respondent ultimately agreed to that figure;
- d) according to his evidence, the respondent made that decision on the understanding that the Innergex PSUs were used to calculate the spousal support figure. He considered his own retirement funding as part of his own calculations;
- e) the current value of the Innergex PSUs is in the range of \$90,000, in the context of family property worth approximately \$10,000,000.

[72] Although the paragraph above does not create an "equation", or a causal relationship between all of the numbers, it establishes that each side had a reason for the monetary offers they made or accepted. In other words, while the parties may not agree on whether the agreement was fair, there is a basis in law and equity for the overall result of the agreement.

[73] On that basis, I find that the Innergex PSUs were not omitted from the Separation Agreement or the negotiations leading to that agreement. It further follows that there was no unfairness visited upon the claimant by the failure to include the Innergex PSUs as family property to be divided in the Separation Agreement.

### Summary and Conclusion

[74] The claimant's application is dismissed. The respondent is entitled to his costs.

"A. Ross J."

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Prepared on 28 October 2026 · Esheria