IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Reid v. Reid,*
2014 BCSC 1691

Date: 20140905
Docket: E38713
Registry: New Westminster

Between:

Denise Isabelle Reid

Claimant

And

Mark Christopher Reid

Respondent

Before: The Honourable Mr. Justice Myers

Corrected Reasons: these Reasons for Judgment have been corrected on the cover page and at p. 82, on September 11, 2014.

Reasons for Judgment

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I. INTRODUCTION

[1] Ms. Reid submits that a 2008 separation agreement should be set aside for "fraud, non-disclosure or other common law circumstances". Alternatively, she asks that the separation agreement be declared "unfair" and that it be varied pursuant to sections 56 and 65 of the *Family Relations Act*, R.S.B.C. 1996, c. 128. She also asks for retroactive and prospective variation of child support and retroactive variation of spousal support.

[2] The major issue is the agreed value of shares owned directly and indirectly by the parties in a company, Cityfone Telecommunications Inc. The agreement provided that Mr. Reid was to assume ownership of all of the couples' shares in Cityfone and Ms. Reid would assume ownership of another family-owned company, Columbia Safe & Office Equipment Ltd. The separation agreement was based on an opinion prepared for the parties by PricewaterhouseCoopers (PwC) on September 21, 2007, with a valuation date of May 31, 2007. In June 2010 Cityfone was bought by Rogers Communications Partnership Ltd. for a sum significantly higher than the value arrived at by PwC.

[3] Apart from the value per share that was used, another issue is that the agreement did not take into account options that Ms. Reid argues belonged to Mr. Reid but were not disclosed by him. Further, the Reids held a debenture with respect to a loan made to Cityfone and that debenture included warrants to which PwC assigned a nil value. Ms. Reid now challenges that conclusion.

[4] Unfortunately, the time required to try the action was seriously underestimated by counsel at two weeks. It required over five weeks, with the result that it was split into three segments, two for evidence and one for argument.

II. FACTS

A. Overview and background facts

[5] Ms. Reid was born in 1964 and is currently 49 years old. Mr. Reid was born in 1959 and is now 54. They began dating in 1982 and married in 1986. They did not live together before the marriage, and lived in Edmonton until 1989, when they moved to Surrey. They have three children:

- Kathleen, born September 2, 1988, now 25;
- Emily, born February 14, 1991, now 23; and
- John, born July 22, 1995, now 19.

[6] Prior to getting married, Ms. Reid completed a dietary technology degree and then worked at a hospital in Edmonton. From 1986 or 1987 until the move to Surrey, she worked as a clerk at Alberta Community and Occupational Health.

[7] Mr. Reid's background was in the office equipment business. In Alberta he worked for Pitney-Bowes and started Wesfax Communications, which he later sold. Ms. Reid worked in the business, at times bringing Emily with her to work. Ms. Reid said she and Mr. Reid decided this arrangement would be preferable to her accepting a full-time position as a dietary technician as it would allow her to look after Emily.

[8] The couple moved to British Columbia so Mr. Reid could start a business, Reid Office Systems Inc., to distribute Ricoh products. In 1996 the company was sold.

B. Reid Capital and Columbia

[9] In 1999, the parties established a holding company, Reid Capital Inc. Each party owned 50% of Reid Capital. In June 1999, Reid Capital acquired Columbia Safe & Office Equipment Ltd. for $100,000. Columbia sold office products, stationary, the Mita line of copiers and provided product servicing. Mr. Reid brought

in a former contact in the industry, Murray McLaughlan, who initially bought 20% of the shares in the company and then a further 20%.

[10] Because Mr. Reid was involved with Cityfone, Mr. McLaughlan ran Columbia with oversight from Mr. Reid. In 2005, Mr. Reid brought in another former contact to do sales, Dan Perko. Mr. Perko acquired class B shares in Columbia, which allowed him to share in any gains in value of the company should it be sold.

[11] In 2005, Ms. Reid began working for Columbia. Initially she performed telemarketing and general office duties and later moved into sales. One of the attractions of working at Columbia, at least initially, was that it provided Ms. Reid with flexible hours, enabling her to be primarily responsible for the children.

C. Cityfone

[12] In 1998, Mr. Reid founded Cityfone with two other people: Dejan Mirkovic and Don Roth.

[13] The business of Cityfone is referred to as an MVNO or mobile virtual network operator. MVNOs market their own branded cell phone services, or services they brand on behalf of other companies, to consumers. Because they do not own their own wireless networks they buy the services from network operators. Cityfone originally contracted with Microcell (who in turn operated the Fido brand) and later Rogers when Rogers acquired Microcell. In addition to marketing its own brand, Cityfone had contracts with other companies, primarily Sears, to market wireless services using the other companies' brands.

[14] At most of the relevant times to this litigation, the board of Cityfone consisted of:

- the respondent, Mark Reid;
- Angus Reid, Mark Reid's brother, who founded the survey firm bearing his name and also had extensive other business experience;

- Mathew Baird, who had operated an MVNO in Australia;
- Gord Medland, a stock broker at Raymond James; and
- David Jennings, the company's lawyer with extensive experience in corporate and securities law.

[15] Apart from a short intermediate gap, Brian Simmers was the chief financial officer of the company. He was not a director, but attended the board meetings as its secretary.

[16] Angus Reid, Mr. Jennings, Mr. Simmers and an early director, Mr. Donald Roth, were called as witnesses. And of course the respondent Mark Reid also testified. From their evidence it is clear to me that the board was an independent board, and this is in spite of Angus Reid being Mark's brother. Put another way, Mark Reid did not "call the shots" for the board.

[17] Because MVNOs do not operate their own networks, they are, to a certain extent, at the mercy of the operators who own the mobile infrastructure, with whom they must contract for service. As anyone who owns a mobile phone in Canada will know, the number of operators is limited.

[18] The contract with Rogers in place at the time of the PwC valuation and until the sale to Rogers was one with a five-year term commencing September 1, 2006.

[19] Two clauses in the agreement with Rogers were of concern to Cityfone and are germane to this case:

a. Cityfone was restricted to using only the marketing channels or partners listed in the agreement or otherwise approved by Rogers; and

b. Rogers had a right of first refusal for the sale of Cityfone.

[20] Rogers' pre-approval of marketing channels was of concern to Cityfone because it was in many ways a competitor of Rogers and would obviously have to disclose information to Rogers in the approval process.

[21] The right of first refusal was regarded by all witnesses who testified about the business as a severe restriction. This is so because Cityfone would have to disclose the clause to any potential buyer who would realise that its offer would likely be used as a stalking horse offer by Rogers. I agree that the clause limits the marketability of the company as a going concern.

[22] The dependence on Rogers also limited the devices and services Cityfone could offer. For example, it did not have the ability to sell the iPhone, and only acquired data services later in its relationship with Rogers.

[23] Cityfone marketed a Sears-branded mobile phone service. Sears put flyers for the service in its credit card statements mailed to its customers. Sears billed the customers directly, remitting Cityfone's share of the billings to it.

D. The separation agreement and events leading up to it

[24] The parties separated in September 2005. As I will detail, minutes of settlement were signed on July 24, 2008, and the separation agreement was signed with an effective date of October 15, 2008. The parties were divorced in August 2009.

[25] Ms. Reid testified that during the separation period, she was on and off anti-depressant medication, was drinking wine, saw a psychiatrist, lost 40 pounds and her hair fell out. She felt the marriage was "okay one minute and then it was not the minute after" and she "felt like she was constantly on a roller coaster ride from 2000 to 2007." She said her confidence and self-esteem were damaged as a result of Mr. Reid having an extramarital relationship and because Mr. Reid was dishonest with her.

[26] Ms. Reid had an initial visit with her lawyer, Stephanie O'Mahony, on May 6, 2006 and they spoke again in October 2006. Ms. O'Mahony testified that Ms. Reid had told her how upset she was and that she was still attached to Mr. Reid.

[27] Between the time of separation and the signing of the agreement, the parties had some contact with each other and attended a number of counselling sessions. To the extent that it might be relevant, I note that Ms. Reid said she wanted to reconcile, and being Catholic, felt embarrassed about a divorce. However, Mr. Reid said that by the time of the separation agreement he was not aware of any desire of Ms. Reid to reconcile. Ms. O'Mahoney's notes state that Ms. Reid told her she did not want to reconcile.

[28] At some point prior to May 2007, Mr. Reid retained a lawyer, Morag MacLeod.

[29] After a failed mediation attempt, the parties decided to use the collaborative divorce process. The suggestion came from Mr. Reid but Ms. Reid adopted it, in part on the assumption that it would save money. Mr. Reid suggested to Ms. Reid that a fair split of assets would be 50/50. On December 28, 2007, Ms. Reid informed Ms. O'Mahony that they had decided to proceed collaboratively and asked her not to commence court proceedings.

[30] Ms. O'Mahony described the collaborative process as an alternative to litigation or other processes. It is interest based. The parties agree they will not commence litigation and if they do their counsel in the collaborative process cannot act in the litigation. The process is both predicated and dependant on voluntary disclosure. There is an expectation that counsel will withdraw if they feel their client is not providing full and frank disclosure. Normally any experts are jointly retained. Ms. O'Mahony was trained in the collaborative process and her understanding was that Mr. Reid's lawyer, Ms. MacLeod, was as well.

[31] In late May 2008, Mr. Reid telephoned the parties' accountant, Elaine Spencer. She had done the accounting work for Columbia and prepared the parties' personal tax returns. Mr. Reid told her that the parties were getting a divorce and

had reached a point where they had generally agreed on the asset division. They needed her advice on how to structure the agreement in the most tax advantageous way. Mr. Reid was to retain Cityfone and Ms. Reid Columbia. Ms. Spencer reviewed the PwC report and some other documents. She met with the parties on June 19 and 27, and prepared a spreadsheet showing different scenarios, one of which was used in the separation agreement.

[32] Ms. Reid did not meet with Ms. Spencer separately, and received no accounting advice of her own.

[33] On July 24, 2008, the parties and their counsel met. The end result was the creation of minutes of settlement from which the separation agreement was drafted. As Ms. O'Mahony expressed it, the premise of the meeting was that there would be a 50/50 division and the only question was how to best achieve such a division.

[34] In her earlier meetings with Ms. O'Mahony, Ms. Reid had expressed an interest to retain shares in both Cityfone and Columbia. However, by December 2007, Ms. Reid told Ms. O'Mahony that she was doing well on the sales team and wanted to retain Columbia. By the time of the July 24, 2008 meeting, she was agreeable to take Columbia and for Mr. Reid to take Cityfone.

[35] For his part, Mr. Reid said he initially thought he would retain both businesses, but he acceded to Ms. Reid's request to retain Columbia.

[36] Ms. O'Mahony described the meeting as emotionally intense. She said Ms. Reid was tense and that Mr. Reid got angry and stepped out of the meeting. Ms. Reid similarly described the meeting and said that after it was finished she cried in the parking lot, realising that was the end of the relationship.

[37] The October 15, 2008 separation agreement reflected the minutes of settlement. The parties agreed to the values of what were identified as family assets, the principal ones being:

a) shares and a debenture with attached warrants in Cityfone;

b) shares in Reid Capital Inc., which owned 60% of Columbia Safe & Office Equipment Ltd.;

c) a shareholder loan owed to Mark Reid from Reid Capital Inc.;

d) the matrimonial home;

e) a home on Charles Street in Vancouver, which was bought by Mr. Reid after separation; and

f) RRSPs.

[38] The agreement provided that the parties' intent was to divide the assets 50/50. Ms. Reid would take the matrimonial home and the shares in Columbia, Mr. Reid would take the shares in Cityfone and retain the Charles Street property, and the RRSPs would be used to equalise the division. Mr. Reid took the debenture in Cityfone.

[39] The agreement also provided for child and spousal support.

[40] The values assigned to the Cityfone and Columbia shares were taken from the PwC report, prepared by Jason Boyer, to which I referred in the introduction. I will return to the PwC report.

E. Post separation events

1. _Cityfone_

[41] Cityfone was sold to Rogers on July 9, 2010. Mr. Reid stayed on with the company as a consultant for five months.

[42] The events at Cityfone before the sale require a granular analysis because Ms. Reid's allegations of non-disclosure largely relate to those events. I will deal with this separately later.

2. *Other*

[43] Both the parties have remarried.

[44] Mr. Reid has started a courier business. Ms. Reid is running Columbia. I will touch on events at Columbia later. Ms. Reid's counsel acknowledges that she has now achieved financial independence and no longer needs spousal support.

III. SHOULD THE AGREEMENT BE SET ASIDE ON COMMON LAW PRINCIPLES?

A. The legal framework

[45] The Supreme Court of Canada dealt with contracts in the marital setting in three cases, all of which were relied on by counsel:

- *Miglin v. Miglin*, 2003 SCC 24;
- *Hartshorne v. Hartshorne*, 2004 SCC 22; and
- *Rick v. Brandsema*, 2009 SCC 10.

Hartshorne involved a marriage contract; the other two cases involved separation agreements. *Miglin* was concerned with spousal support, whereas *Rick* was concerned with asset division. *Hartshorne* was a case based on s. 65 of the *Family Relations Act*. A number of overriding principles from these cases are applicable across these different contexts.

[46] These cases make it clear that in family cases, contractual principles are not to be applied in the same manner as in commercial cases, even though some of the terminology, such as "unconscionability", might be the same: *Rick*, at para. 40, and *Miglin*, at para. 82.

[47] *Rick* emphasized the duty of disclosure. As I also mentioned, the duty to voluntarily disclose is key to the collaborative process used by the parties here.

[48] The Supreme Court of Canada characterised the inquiry when assessing the validity of family agreements as dealing with both procedural and substantive integrity. Procedural integrity involves issues such as disclosure, unequal bargaining power and duress, which, as mentioned, are terms that do not carry the same meaning as they do in commercial cases. Substantive integrity involves comparing the effects of the separation agreement to the goals of the relevant legislation: *Rick*, at para. 49. In *Miglin*, that legislation was the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.); in *Rick*, as in this case, the legislation was the *Family Relations Act* with respect to the division of assets.

[49] The fact that contractual principles are not applied in the same manner as in commercial cases does not mean that the separation agreement is not to be given significant weight, or that principles of contractual autonomy are to be ignored. As stated by the Court in *Miglin*:

> 91 Although we recognize the unique nature of separation agreements and their differences from commercial contracts, they are contracts nonetheless. Parties must take responsibility for the contract they execute as well as for their own lives. It is only where the current circumstances represent a significant departure from the range of reasonable outcomes anticipated by the parties, in a manner that puts them at odds with the objectives of the Act, that the court may be persuaded to give the agreement little weight. …

[50] In what might be regarded as a partial summary of some of the principles to be applied, the Court in *Rick* said:

> 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.

> 50 In other words, the best way to protect the finality of any negotiated agreement in family law is to ensure both its procedural and substantive integrity in accordance with the relevant legislative scheme.

B. Cityfone Value

1. *The Cityfone issues within the legal framework*

[51] I referred above to the valuation of the family companies prepared by PwC for the purposes of the separation discussions. The valuation date for the report was May 31, 2007, some 17 months prior to the separation agreement. The PwC report was not filed as an expert report in this trial; however, its author, Mr. Boyer, was called as a witness by Ms. Reid and closely questioned on his opinion.

[52] Ms. Reid filed an expert report with a supplemental update prepared by Mr. Bill Payne. He is also a chartered business evaluator with similar qualifications to Mr. Boyer. Beyond making the observation that the PwC report was not updated to the time of the separation agreement, Mr. Payne's report is not directed at the underlying value of Cityfone as a whole, or its value per share, but rather the number of shares that Ms. Reid says should have been included as family assets due to warrants, stock options and shares inherited by Mr. Reid from his father. That is a separate issue from the value of the company and consequently the value per share.

[53] Ms. Reid argues that "the value of Cityfone is not one of the issues the Court must determine. The ultimate value of Cityfone was determined by the market and the ultimate sale price of over $25 million." This argument is premised on Ms. Reid's submission that the agreement ought to be set aside on the basis of non-disclosure. That would mean the triggering event would not be the separation agreement; rather it would be the divorce, granted on August 17, 2009. Then, relying on *Blackett v. Blackett* (1989), 40 B.C.L.R. (2d) 99, 63 D.L.R. (4th) 18 (C.A.), Ms. Reid says the assets should be valued as at the time of trial.

[54] With respect, I think that argument is both circular and overly simplistic. First, one of the allegations of non-disclosure is that Mr. Reid knew Cityfone was undervalued and failed to disclose that to Ms. Reid. In the face of Mr. Reid's denial

that the company was undervalued, it is hard to see how I could assess this issue in the absence of determining whether the PwC opinion represented some semblance of the company's value.

[55] Second, the Supreme Court of Canada has made it clear that non-disclosure by itself does not render a separation agreement void. Rather, the court must analyse whether the separation agreement comports with, in this instance, the *Family Relations Act*. The relevant time at which to assess that is the time of distribution: *Hartshorne* at para. 12. In the case at bar, as with most separation agreements, that would be the time of the agreement. Therefore, in order to ascertain the substantive fairness of the agreement as part of the process of determining whether to set it aside, the value of the company at the time of the agreement must be assessed.

[56] Similarly, Ms. Reid alternatively relies on s. 65 of the *Family Relations Act*. In order to determine the fairness of the separation agreement, I must determine the value of Cityfone at the time of the separation agreement, at least as part of the analysis.

[57] Third, a major part of Ms. Reid's case is that Mr. Reid failed to disclose events which took place at Cityfone, such as discussions with, she argues, potential purchasers. The lack of disclosure alleged here is not as simple or straightforward as an allegation of failure to disclose a specific asset or income source. A party cannot be expected to inform the other of every minute detail going on in a business which is in issue in family litigation; rather, there must be some threshold of significance. Assessing whether this threshold has been met cannot be done in a vacuum. Where an alleged non-disclosure goes to the value of an asset, whatever the threshold of materiality ought to be, it surely must engage the value of the asset in question.

[58] I note that in *Hartshorne*, the Supreme Court was critical of the parties proceeding to trial without a valuation:

> 52 In this regard, I find it troublesome that the parties agreed to proceed to trial without having professional valuations of certain assets. To meet the objectives of the legislation, in my opinion, it is problematic for the trial judge to apportion property with no more than "a good idea" of the value of some of the assets. The trial judge must be in a position to determine the exact position of the parties as provided for in the Agreement, together with entitlement to spousal and child support, before he or she can decide whether there is unfairness under the terms of s. 65.

Mr. Justice Williams also commented on the lack of a valuation in *Bradshaw v. Bradshaw*, 2011 BCSC 1103 at para. 67.

[59] Moving to a different point related to the PwC report, Ms. Reid stressed several times that the report was not filed as an expert report in this litigation. I am not clear on what she wishes me to make of this. It might be that she is saying that because Mr. Reid did not submit an expert report, the value should default to what the company was sold for. If that is the case, it fails to take account of the fact that as claimant the onus in this case rests on her.

[60] The fact is the parties relied on the report. Mr. Boyer was called as a witness by Ms. Reid and although her argument states he was called to "testify as to his involvement" in preparing the report, he was closely questioned on its methodology and his conclusions, many of which were attacked. Mr. Boyer essentially repeated and adopted his opinions. The fact that Mr. Boyer's report was not tendered as an expert report is therefore a difference with little, if any, distinction.

[61] I am therefore faced with a valuation opinion pre-dating the separation agreement by 17 months, and a sale which establishes market value 20 months after the separation agreement. Just as Ms. Reid argues that the separation agreement should be set aside in part because the PwC report was stale-dated, it is an open question as to whether the sale value of the company some 20 months after the separation agreement is a valid proxy for the value at the time of separation. For me to assume that is the case and reject the report would be inconsistent and wrong in principle.

2. ***The allegations regarding Cityfone***

[62] In her written argument, Ms. Reid listed the following alleged misrepresentations or items which were not disclosed regarding Cityfone:

a) That the PwC Report had an expiry date as well was flawed [*sic*] for no market analysis;

b) That Cityfone had a "list of potential purchasers";

c) That Cityfone, and the Respondent had discussions with "interested parties";

d) That in 2008 Cityfone had a "two year plan" to grow and sell the company;

e) That the "future sale of the business" was a primary topic discussed by Cityfone;

f) The Respondent did not advise the Claimant of the 2006/2007 Stock Options;

g) That Cityfone had previously redeemed warrants that had not been vested;

h) The Respondent's new 2008/2009 Management Compensation;

i) That Cityfone's financial affairs in 2007 and 2008 had improved significantly;

j) The Respondent also failed to disclose his increases in income, both post and pre agreement contrary to his obligation to do so;

k) The cash value of his insurance policy was not disclosed;

l) The growth in his shares, warrants and options including by inheritance was not disclosed.

[63] Mr. Reid demanded particulars from Ms. Reid. The first particular she provided is that the real value of Cityfone was considerably more than what was attributed to it in the separation agreement. It is alleged that Mr. Reid knew that but did not dislcose it. It goes on to say that Mr. Reid did not make any attempts to update the valuation. This largely overlaps with several items in the above list.

[64] The particulars then refer to discussions and dealings with Anthony Lacavera of Globalive Communications Corp., who the plaintiff alleges was a potential purchaser of Cityfone. Related to that are references to a Cityfone shareholder, Dejan Mirkovic, acting as an intermediary between Cityfone and Mr. Lacavera and

seeking to obtain a referral fee or commission. That overlaps with item c on the above list.

[65] With respect to a demand for particulars of the "claims of duress, undue influence, mistake, unconscionability, non-disclosure and/or misrepresentation ..." Ms. Reid responded:

> … With respect to the particulars of mistake, perhaps both Ms. Reid and Mr. Reid were mistaken as to the facts relating to the value of the companies. The settlement was unconscionable because Mr. Reid received considerably more than the value attributed to the companies in the Separation Agreement. With respect to issues of non-disclosure and misrepresentation, refer to paragraph 1.

[66] Ms. Reid also says the PwC report should not have reflected a minority shareholder discount.

[67] These allegations amount to three broader arguments. The first is that the PwC report undervalued the company as at the valuation date because of flawed methodology or failure to take into account relevant information. The second is that at the time of the separation agreement the valuation was stale-dated and undervalued Cityfone because things had improved for the company between the valuation date and the separation agreement. Both of these go to the value per share of Cityfone. The third broader argument deals with Mr. Reid's interest in the company, whether through shares or warrants and his salary and benefits package.

[68] An overriding allegation is that Mr. Reid knew of these issues and failed to disclose them, along with other relevant information regarding the company.

[69] Broadly speaking, I have organised this judgment around these categories of allegations, and by three time frames: the period up to the PwC report; the period between the report and the separation agreement; and events subsequent to the agreement.

3. *Did the PwC report undervalue Cityfone as at the valuation date of May 31, 2007?*

a) General approach of the report

[70] As I have stated, Mr. Boyer is the author of the PwC report. He is a chartered business valuator and accountant.

[71] The purpose of the report was to determine the fair market value ("FMV") of the Reids' corporations. The report defined FMV as "the highest price available in an open and unrestricted market between informed, prudent parties acting at arm's length and under no compulsion to act…"

[72] As stated in the report and elaborated on by Mr. Boyer, "the report is prepared as an estimate of value and does not constitute a comprehensive valuation which would require significantly more time and cost to complete." This approach was agreed to by Mr. Boyer and Mr. Reid. An estimate of value report is an alternative to a more comprehensive analysis, which might involve speaking to additional members of management, searching for additional market points of reference, researching other competitors, and a more detailed analysis of forecasts.

[73] Mr. Boyer determined that the appropriate approach to use was the discounted cash flow method. He was clear that this was his decision and that if he had been asked to use a different methodology he would have refused. After discussions with management, Mr. Boyer also determined that it was appropriate to use the projections that had been prepared by management at Cityfone, although he did think they were on the "rosy" side. (That is something that in the end would have benefitted Ms. Reid.) Once again he was clear that in using the projections, he exercised his independent judgment.

[74] Mr. Boyer arrived at an en bloc value (i.e. value for the total shares of the company) of $2.9 million. He applied a minority discount to the Reids' shares of 20%, arriving at a per share value $0.12.

[75] Ms. Reid appears to argue that Mr. Reid should have arranged for a more comprehensive report, something that Mr. Boyer said would obviously have been more expensive and time consuming, and that Mr. Reid did not disclose that the report was the lower-level estimate of value. I note that this was not pleaded nor did Ms. Reid mention it in her response to the demand for particulars, nor did Ms. Reid's expert, Mr. Payne, address the point.

[76] I do not accept either argument. First, there is nothing to indicate that an estimate of value report was either inappropriate or not in accordance with valuation standards. There is no evidence, opinion or law that an estimate of value level report is something that should not be used for the purposes of a separation agreement.

[77] Moreover, even if a more comprehensive approach would have been adopted, it is hard to see which additional members of management Mr. Boyer would have spoken to given that he had free access to Mr. Simmers and Mr. Reid, who effectively were the management of the company. Information on other competitors would have been almost impossible to come by since there were very few, if any, MVNOs that had been sold for which information could have been obtained. Comparison to network operators, such as Telus or Bell, would not be meaningful. The financial statements relied on by PwC were audited.

[78] Second, insofar as disclosing that the report was an estimate of value, the separation agreement provided:

> Recital L: "Unless otherwise noted, the values listed in Schedule "A" are the parties' agreed upon, good faith estimates of the current fair market values of the assets and liabilities as at the date of this Agreement."

[79] The report itself says that it is an "estimate of value report". While it might be argued that did not refer to the other options as comparators, the nature of the report was clearly known by Ms. Reid's counsel, Ms. O'Mahony, because in the letter to Mr. Reid's counsel enclosing the separation agreement signed by Ms. Reid, she stated:

> We discussed the effect of time and market fluctuations on the values of the residential properties, corporate assets and RRSP funds. I confirm the parties agree that:
>
> a. The property values are their most recent assessed values;
>
> b. The corporate values listed on Schedules A and B are notional amounts, assigned for the purposes of effecting an equal division of the family assets, and may not necessarily reflect actual or current values;
>
> c. they will each forego a further appraisal of the business interests;
>
> …

b) The value per subscriber metric

[80] A major issue in the evidence at trial was the value per subscriber assigned internally by Cityfone and whether MVNOs could be valued as a whole by applying a multiple of the value per subscriber. I will deal with the latter point first.

i. The utility of the metric

[81] In her opening, Ms. Reid stated: "Cellular phone companies are sold on a metric. It involves a multiplier on a value per subscriber." No expert report was filed on that point. Whether witnesses should be entitled to address the topic as factual evidence based on industry practice was a highly contentious point. I ruled that witnesses could testify if they had hands-on or indirect involvement in the buying or selling or valuing MVNOs, or it was their job to follow the industry. Similarly if someone had considered purchasing Cityfone, they could be asked about the significance of value per subscriber multiples to them with respect to the potential transaction.

[82] The witness best qualified to speak about this point was Stephen Lewis, a VP of Telus who was subpoenaed by Ms. Reid. (Mr. Reid applied to set aside the subpoena but I dismissed that application.) Although I am here jumping ahead to events taking place after the PwC report was prepared, in April 2010 Telus provided a letter of interest to acquire Cityfone. Because of that, and based on his experience in the industry, Mr. Lewis was able to give evidence under both rationales of my ruling.

[83] The April letter of intent referred to the acquisition at a price of "between CDN $20 and CDN $22 million … based on [41,203] subscribers." In May, Telus revised the wording of the price clause to: "$500 to $530 per subscriber… based on 41,203 subscribers." Mr. Lewis stated the change was made at the request of Cityfone's financial adviser, Capital West Partners, in the hope that, by the time the transaction completed, Cityfone would have substantially more subscribers and therefore command a higher price. Telus arrived at the value per subscriber by dividing their offer of $20 to $22 million by the number of subscribers that Cityfone had at the time.

[84] Mr. Lewis said that value per subscriber is a reference used by analysts because the number of subscribers is a common denominator, and is an easy comparison factor. However, to a mergers and acquisitions professional, or to a corporate strategic buyer, value per subscriber is irrelevant, and it is not how they would determine the value of a company. In making the Telus offer, Mr. Lewis did not look at what MVNOs traded at because there were not any relevant comparators. In short, the metric meant nothing to Mr. Lewis and was not used by him in determining the value of Cityfone for Telus' offer.

[85] Another witness who referred to revenue per customer was Anthony Lacavera, who was also called by Ms. Reid. Mr. Lacavera was the chairman and CEO of Globalive Communications Corp., which was in the business of reselling long distance phone services branded as Yak Communications. In November 2007, he met with Mr. Reid. I will return to the meeting (at para. 102). Mr. Lacavera stated:

> Q. Were you aware at the time as to, or can you tell me, what the range of price per subscriber? Or is there a whole big formula?
>
> A. Yes, I mean, that's one metric, but the revenue per subscriber, the churn rate, the cost to get those subscribers, what kind of handsets they have, what's their usage profile. That's just off the top of my head. There's many considerations. I would say that you kind of have to consider as well, there's a significant subscriber discount or impairment because they are just running on a different network. There's going to be a significant hiccup, normally, in trying to migrate customers to a new...to a different network.

And:

> Q. Okay. And he [Mr. Mirkovic] says that the subscriber value is about $565 per subscriber. Does that sound accurate?
>
> A. I have no idea where he got that number. It could make sense; I highly doubt it would make sense for Cityfone, because, again, because of this Rogers impairment.

[86] Finally, Mr. Boyer said he was aware of the metric of a value per subscriber, to which the churn rate (how many customers turn over) is relevant. He did not use a value per subscriber approach because the data points that are assessed may not be comparable for different transactions. In any event, he said the value per subscriber would be very different for Cityfone than it would be for the "big three"; namely, Rogers, Telus and Bell.

[87] In conclusion, Ms. Reid failed to demonstrate that MVNO companies are valued on a value per subscriber basis. Rather, it is one of several metrics that may be used in comparing different companies.

ii. The use of a value per subscriber by Cityfone

(1) $350 per subscriber used in internal spreadsheets

[88] This brings me to the internal use of a value per subscriber by Cityfone. In its projection spreadsheets, Cityfone had a line item for value per subscriber of $350, upon which Ms. Reid placed heavy reliance.

[89] However, as argued by the respondent, all of the witnesses for Cityfone testified that the $350/subscriber number was not a product of any calculation or derivation; it was simply plugged in as a constant so that comparisons could be made for other variables in the forecasts. It was most likely inserted into the spreadsheet initially by Mr. Mirkovic (who I return to below) and one that Mr. Simmers says he inherited when he became CFO. He did not change the number over time and he did not calculate it. It was not an expression of the value the board or Mr. Simmers put on the subscribers.

[90] David Jennings testified that the $350 figure was simply a "plug" number used to generate an enterprise value as an exercise. The number used by management was not generated by market analysis; if it had been, there would have been a change over time. This is particularly so because during the period 2004-2006, there were dramatic changes in the wireless industry, including the introduction of number portability. Nonetheless, the same constant value was used.

[91] Angus Reid testified that the metric was a hypothetical number that people modelled. For the board, it was an analytical exercise with no basis in fact.

[92] Mr. Boyer observed the number in the projections and asked Cityfone about it. He accepted the explanation given to him by Brian Simmers and Mark Reid. Mr. Boyer confirmed that there was no market data to substantiate the number. He described it as a target number of management.

(2) The 2001 business plan

[93] A 2001 business plan of Cityfone contained a value per subscriber number of $540. Once again, Ms. Reid places reliance on this, and the evidence regarding this is similar to that with respect to $350 number used in the spreadsheets. The business plan was prepared by Mr. Mirkovic as a marketing document to solicit investors.

[94] The first point to note is its preparation date of 2001 in relation to the valuation date of the PwC report of 2007. Mr. Boyer, who had not seen the seen the plan when he prepared his report, commented that while it contained a good summary of the nature of Cityfone's business, the figures would not have been used by him because they were out of date. Unless it can be said that the PwC report was based on inaccurate information which could have been cross-checked with the plan – which I do not find to be the case – it is hard to see how a projection in 2001 could have much relevance some six years later.

[95] Second, the plan was overly optimistic. For example, where the plan predicted 100,000 subscribers by 2003, in 2010 Cityfone only had 42,000 subscribers.

[96] The data in the plan and method of valuation was not given credence by management. No similar projections or calculations were subsequently presented to shareholders or potential investors after Mr. Mirkovic left Cityfone in 2002, nor used by Capital West in selling the company in 2010.

(3) January 2002 Confidential Information Memorandum

[97] Finally, Ms. Reid relies on a 2002 Confidential Information Memorandum that was used to sell debt in the company secured by debentures with attached warrants. (The value of the warrants which Mr. Reid held is an issue to which I will return later.) Once again the figures were prepared by Mr. Mirkovic and the same comments I made with respect to 2001 business plan are applicable here.

c) Other indicia of value

[98] As argued by Mr. Reid, there are other indicia of value at around the time of the separation agreement which accord with the value arrived at by PwC:

a) Mark Reid had purchased 200,000 shares from arm's length shareholders (the estate of Nils Erickson and Mark Greenburg) at $0.12/share in the late fall of 2007.

b) Options granted to management in October 2008 were priced at $0.20 per share. I discuss these further below. The price was set to be higher than current fair market value.

c) Again in October 2008, the board priced preferred shares at $0.20/share in a subordinated debt conversion, although the plan was never carried out.

d) In May 2008 and June 2008 the board repurchased warrants attached to debentures at $0.12/share and $0.15/share. I discuss this later.

e) In June 2009, Mr. Reid purchased 79,000 shares in Cityfone from Henry Doyle at $0.15/share.

f) In June 2009, after pressure by various shareholders who wanted to get their money out of the company, the board offered to buy back up to one million shares at a price of $0.15/share. In arriving at the share buy-back price, the board relied, in part, on the PwC Report.

d) Conclusion with respect to the PwC valuation as at May 31, 2007

[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.

[100] The deductions for a minority discount for the parties' shares and the deduction of taxes is something I will deal with later, as well as the issue of the debentures and warrants.

4. *Cityfone between the valuation date (May 2007) and the separation agreement (October 2008)*

[101] Items b, c, d, e and i in the list of alleged non-disclosures set out above at para. 62 deal with events that are said to have taken place mostly or wholly at Cityfone after the PwC report was prepared. Ms. Reid argues that they were material to the value of Cityfone and ought to have been disclosed. I will deal with these now, but not in the same order as they were listed.

a) Discussions with potential purchasers

i. YAK

[102] The alleged potential purchaser which occupied the most trial time was Mr. Lacavera of Globalive and Yak, to whom I referred above. Mr. Lacavera was introduced to Cityfone by Mr. Mirkovic. In advance of that introduction, Mr. Mirkovic had his lawyer write Cityfone and ask for a finder's fee. This was declined.

[103] In November 2007, Mr. Lockie, the in-house counsel for Globalive, signed a non-disclosure agreement. Mr. Mirkovic believes he probably forwarded it to Mr. Reid for signature. Mr. Reid recalled receiving the document but did not recall what he did with it. No copy signed by Cityfone was produced.

[104] Mr. Lacavera testified that Mr. Mirkovic contacted him – he described the call as a "cold call". He said he knew nothing of Cityfone before the call. While Mr. Mirkovic said that he told Mr. Lacavera that a purchase price of Cityfone would be in the $20-30 million range, Mr. Mirkovic acknowledged that figure came from him and no one else. The evidence of other witnesses confirms that.

[105] Mr. Lacavera, Mr. Reid and Mr. Mirkovic met at a restaurant on November 19, 2007. Mr. Lacavera testified that while he was interested in getting into the wireless business, he did not discuss any numbers at the meeting. He almost immediately concluded that there was no point discussing a potential acquisition because of the Rogers agreement. Therefore the Cityfone subscribers had little or no value to him.

[106] Although Mr. Mirkovic had told him the Cityfone owners were potentially interested in selling the business, from Mr. Lacavera's perspective, the meeting was no more serious than meeting a "fellow little guy".

[107] While the board was aware of the meeting with Mr. Lacavera, it did not see it as a meeting regarding a potential sale.

[108] The dialogue with Mr. Lacavera came nowhere close to a serious discussion about the sale of Cityfone, much less to discussing a sale price or sale terms. While

Mr. Mirkovic may have manoeuvered the meeting to occur in the hope that it would generate a finder's fee or provide him an opportunity to sell his shares in Cityfone, that was a view he came to on his own, and can have no significance in this litigation. This is especially so given the end result of the meeting.

ii. Telehop

[109] In her opening, Ms. Reid said Telehop was a potential purchaser of Cityfone in the period I am now considering. In her argument, that changed to an allegation that she was not informed of discussions with Telehop regarding Cityfone.

[110] Mr. Simmers said he did have a discussion with Mr. Thexton of Telehop, but that was in relation to Telehop being a potential marketing partner or as a possible reverse take-over target (i.e. Cityfone buying Telehop, not the other way around). He specifically said that Telehop expressed no interest in acquiring Cityfone.

b) List of purchasers and plan to grow and sell the business

[111] Item b of the list of non-disclosures set out above at para. 62 alleges that Mr. Reid did not disclose a list of potential purchasers. The "list" amounted to this: Mr. Reid and Mr. Simmers thought about who might be potential purchasers of the company and jotted it down. There is no evidence of any discussions with these companies.

[112] Ms. Reid argues that Mr. Reid ought to have advised her the company was for sale.

[113] While Cityfone was not formally up for sale at the time of the separation agreement, a sale of the company was a goal or exit strategy for the shareholders from the outset. No secret was made of that. For example, as early as 2002 the Confidential Information Memorandum referred to above stated that the "most likely exit strategy is a sale, within 3 years…". Mr. Reid acknowledged it was always his goal to build up Cityfone and sell it. He said he told Ms. Reid of that at the outset.

[114] Ms. O'Mahony's evidence was that Ms. Reid was aware of Mr. Reid's goal of selling the company. Ms. O'Mahony also said that Ms. Reid told her she was aware Mr. Reid intended to "build the business as an investment".

[115] Ms. O'Mahony was then asked if she was told of any parties that were interested in purchasing Cityfone, to which she replied in the negative. That impression was accurate because there were no companies who had expressed any serious interest in acquiring Cityfone until the sale to Rogers, which took place after the separation agreement was signed.

c) The position of the company improved in 2007 and 2008

[116] Ms. Reid alleges that the position of the company improved in 2007 and 2008, allegations which in large measure relate to whether the PwC report was stale-dated.

[117] There is no doubt that it would have been more accurate to have the PwC report updated closer to the time of separation. Mr. Boyer recognised that the industry was one in which changes could occur rapidly. Nevertheless, as I set out above, at para. 79, Ms. Reid was aware that the report was dated and she was advised by her lawyer to obtain a revised report. She rejected that advice.

[118] Ms. Reid said a major reason for not obtaining an updated report was that the cost would have been "enormous". To put that in context, the total cost of the original report (part of which had been paid by Cityfone) was approximately $40,000. An update of the report could not have cost close to that. Ms. O'Mahony was of the same view. On May 14, she told Ms. Reid that they should at least consult PwC to see about the cost of getting an updated report and advised that the cost of what Ms. Reid could lose might be disproportionate to the cost of updating the report. Ms. Reid was receiving support of $7,000. She was not in dire financial straits.

[119] Ms. Reid said that she did not receive the financial statements or the president's' reports from Cityfone to which she was entitled as a shareholder. However, Mr. Simmers stated that these were mailed to everyone on the

shareholder's list. Even Mr. Mirkovic, who had fallen out of favour with the board and had essentially been asked to leave, received the mailings. There was no evidence of an effort by Mr. Reid or collusion of anyone within the company to attempt to preclude Ms. Reid from getting the documents. I find it more likely than not that she received them.

[120] It is correct that the position of the company did improve in 2007 and 2008. However, for 2007 the actual results were only slightly better than the projections used by PwC in its discounted cash flow analysis and for 2008 (and 2009) the actual results were worse:

YEAR	PROJECTED WIRELESS SERVICES REVENUE	ACTUAL WIRELESS SERVICES REVENUE	DIFFERENCE	PROJECTED SUBSCRIBERS (at year end)	ACTUAL SUBSCRIBERS	DIFFERENCE
2007	$12,537,709	$13,081,859	4.16%	31,818	30,419	-4.60%
2008	$16,594,849	$15,894,532	-4.41%	38,800	36,063	-7.59%
2009	$19,584,101	$16,895,234	-15.91%	44,483	41,203	-7.96%

5. _The sale to Rogers_

[121] In June 2010, Rogers purchased Cityfone. I will describe how the sale to Rogers came about.

[122] Mr. Reid said that when he was on vacation in August 2009, he received a call from Ben Colabrese, the VP of corporate development for Rogers, asking if Mr. Reid would be interested in discussing a potential purchase. Mr. Reid said that Mr. Colabrese mentioned a figure of $12 million.

[123] On July 30, Mr. Colabrese sent Mr. Reid a non-disclosure agreement.

[124] On August 13, 2009, Mr. Colabrese emailed Mr. Reid an offer for $18 million. Mr. Reid said that was within a few days of receiving the call. The offer was taken to the board and Mr. Reid was instructed to go back to Mr. Colabrese to see if Rogers would increase the price. A meeting was set up in Vancouver between Mr. Reid and Mr. Simmer on the one hand, and Mr. Colabrese and another Rogers' VP, Mr. Sylvain Roi. Mr. Reid told them he thought Rogers could do better with the

price. That ended the meeting and the Rogers representatives left. When Mr. Reid tried to follow up by telephone to get the negotiations back on track, he was told that Cityfone was no longer a strategic opportunity for Rogers.

[125] I will pause here to say that it appears Mr. Reid was confused about the initial offer being for $12 million; it was more likely $18 million. However, I do not think it shows any lack of candour because it is not a significant fact and is of no consequence to this litigation.

[126] The Cityfone board determined it would be best to engage a financial adviser. Cityfone hired Capital West, who prepared a confidential information memorandum to show to potential purchasers. The strategy was to attempt to develop an "auction" scenario, but it was recognised that might be difficult given the right of first refusal in the Rogers contract.

[127] Capital West's efforts resulted in the interest from Telus, (above, para. 82), and the sale to Rogers.

[128] I have set this out briefly, but to be clear there is no evidence that anyone at Cityfone had an inkling that Rogers was interested in purchasing Cityfone before the initial contact from Mr. Colabrese.

a) Does the sale price of Cityfone in 2010 represent its value as at the date of separation?

[129] I have already set out Ms. Reid's argument that I do not have to determine the value of Cityfone as at the time of separation and why I do not agree with that submission (above, para. 53 and following). In this section I address whether, from a factual point of view, the sale price represents the true value of Cityfone at the time of the separation agreement. For the following reasons I conclude it does not.

[130] First, between the time of the separation agreement and the time of the sale a number of things for Cityfone had changed for the positive:

- It had renewed its contract with Sears, which represented a very significant part of its business.
- The Rogers contract containing the two clauses of concern to a purchaser was nearing its end.
- Rogers had added data services and smartphones to what Cityfone was able to offer its customers.
- Cityfone added Bank of Montreal as a distribution partner.
- A going concern warning that had been on the audited financial statements of Cityfone was removed.

[131] Second, and more fundamentally, the sale was an indirect result of the unsolicited offer from Rogers that I set out above. The breakdown of those negotiations led to the retaining of Capital West, which was able to obtain a letter of intent from Telus for $20 - $22 million. That was an offer that had to be shown to Rogers because of its right of first refusal and created the dreamed for "auction scenario". This scenario was an unknown at the time of the separation agreement, although it may be said to have been a known unknown given the comment of PwC in its report:

> In view of the nature of this assignment, PwC has not been able to expose the Companies to the marketplace at the Valuation Date to determine whether there are any potential buyers who, for their own unique reasons (e.g., specific perceived synergies), might be prepared to entertain a value other than that determined by us herein. PwC has not received any information that would allow us to quantify any potential synergies that may be realized.

[132] It is impossible to know what might have motivated Rogers to make the offer it did, and whether those conditions existed at the time of the separation agreement.

[133] I conclude that the sale price to Rogers is not representative of the value of the company at the time of the separation agreement.

C. Alleged non-disclosures regarding Mr. Reid's holdings in Cityfone and compensation package

1. *Warrants*

[134] Reid Capital owned a debenture in Cityfone which had 434,853 warrants attached to it. The warrants were to vest only when more than 50% of Cityfone was sold or went public and allowed the purchase of 1.5 class B non-voting shares per one dollar loaned, at an exercise price of $0.06. PwC referred to the warrants but assigned no value to them because the vesting event had not occurred.

[135] In 2008, the company redeemed some debentures from approximately five investors who wanted to get their money of the company, including Angus Reid's daughter. They were given some compensation for surrendering the warrants. The price paid for the surrender, with one possible exception, was $0.12 per warrant. Ms. Reid says that Mr. Reid ought to have disclosed that to her.

[136] Mr. Reid points out that if the warrants attached to the debenture were valued on a similar basis, their total value would have been $26,040. The maximum amount that Ms. Reid would have received on a pre-tax basis would have been $13,020.

[137] I will return to the significance of this later.

2. *2008 Change in compensation package for Mr. Reid*

[138] On May 30, 2008, the Cityfone board approved new compensation packages for Mr. Simmers and Mr. Reid. This was done at the initial behest of Mr. Simmers. Mr. Jennings was asked to prepare the contracts. Mr. Jennings said that he was still working on the contracts as of November 24, 2008. The contracts were signed sometime after that, but bore a date of November 1, 2008.

[139] Mr. Reid's salary increased to $233,000 effective January 1, 2008 and was to further increase to $250,000 effective 2009. For each of the following two years

Mr. Reid would receive a profit share or bonus if certain targets were met. In addition, there was a change in control payout.

[140] Ms. Reid says that this was not disclosed to her before the separation agreement was signed.

[141] The actual written contract itself could not, of course, be disclosed prior to the separation agreement because it had not yet been prepared or signed. However, that leaves the fact of the May 30 approval in principle by the board.

[142] Mr. Reid argues that knowing that his income would be going up the parties agreed to an imputed income of $310,000 in the separation agreement, and the agreement provided that Ms. Reid could ask for a review of child support commencing in 2009. His income for 2008 was within $2,000 of the imputed one. Therefore there were no adverse financial consequences to Ms. Reid.

[143] Mr. Reid also argues that the remaining terms that were in the new compensation package had to be triggered by future events and therefore did not need to be disclosed. Mr. Reid says that Ms. Reid would be made aware of the occurrence of the contingent events in the review process. That is true, but there was no obligation in the agreement to exchange financial information unless a review was requested. Therefore, Ms. Reid would have depended on Mr. Reid voluntarily disclosing a bonus.

[144] In spite of the Mr. Reid's points, he could have been more forthcoming by telling Ms. Reid of what had transpired at the board level. I will return to the significance of this later.

3. *Stock Options*

[145] Ms. Reid argues that Mr. Reid received stock options on December 10, 2007, but did not disclose them. Mr. Reid argues the stock options were not granted until October 20, 2008, and therefore could not have been disclosed at the time of the separation agreement.

[146] The December 10, 2007 board minutes note:

> Mark Reid outlined his plan to allocate the 2006/2007 option grant that had been earned by management. Of the 1,203,733 available options, 75% would be allocated to Mr. Mark Reid and 25% to Mr. Simmers.

The October 30, 2008 minutes show that the board approved a stock option plan. The plan showed the date of the option grant as October 30, 2008, vesting on the same date. The exercise price of the option was $0.20. Mr. Reid was granted 902,800 options and Mr. Simmers 300,933.

[147] A large amount of evidence was devoted to the option issue and to parsing the language of the minutes and the intent of the board. The upshot of the evidence is that by December 10, 2008, it was a virtual certainty the options would be granted to Mr. Reid and Mr. Simmers for 1,203,733 shares and they would be split between them on a 75/25 basis. The price had not yet been determined. As Mr. Jennings put it, the pool had been created but the options not yet granted. The price was set by the board at the October 20, 2008 meeting and the options formally granted at that time. The audited financial statements show granted options in 2008 and none in 2007.

[148] As a number of witnesses, including Mr. Jennings, testified, as is almost always the case, the option price was set at above the current share value because of the adverse tax consequences to the option holders from doing the opposite. The end result is that as at the date the options were granted their exercise price was greater than the value of the stock and consequently the options did not have a value. To use the trading term, they were not in-the-money.

[149] That said, similar to my comment with respect to the change in compensation, it would have been preferable had the status of the options at the time of the separation agreement been disclosed, because the granting of some options was virtually certain at that time. I will return to the significance of this later.

4. ***200,000 shares purchased by Mr. Reid in 2007***

[150] In 2007, Mr. Reid purchased 200,000 shares from other shareholders. Ms. Reid says he did not disclose this.

[151] In fact, although the shares were not shown separately, they were disclosed in the total number shown as owned by Mr. Reid on his April 29, 2008 financial statement, which was used in the negotiations leading up to the minutes of settlement. Moreover, these shares were taken into account when the assets were divided. Mr. Reid says that was done through inadvertence and they were not family assets having been purchased after separation from his own earnings.

5. ***Shares inherited from Mr. Reid's father***

[152] Mr. Reid's father died in January 2008. In May 2008, Mr. Reid inherited 347,243 shares in Cityfone from his father. Ms. Reid says this was not disclosed to her: it is item l in the list of non-disclosures set out at para. 62.

[153] Mr. Reid said Ms. Reid was aware of his father's death and attended his funeral. He says when he learned of the inheritance he told her about it and she agreed that was for him to keep. This evidence was not challenged; Ms. Reid did not confirm or deny the conversation. I therefore conclude that this was, in fact, disclosed. Moreover, because it was an inheritance received after separation, even Ms. O'Mahony recognised it would not have been treated as a family asset, although she did say it would have been relevant to Mr. Reid's income.

D. Non-disclosure of $4,500 life insurance policy

[154] This insurance policy was not disclosed. Mr. Reid said it was an inadvertent non-disclosure and appeared to be surprised when it was raised in cross-examination. Given that and the minimal amount of this item, I accept that explanation as credible.

E. Columbia Business Systems

[155] Columbia was also valued by PwC. Ms. Reid adduced evidence as to the events taking place at Columbia after she assumed control of it following the separation agreement. In brief, Mr. McLachlan resigned and Ms. Reid had to inject further capital into the company. Inventory was written down.

[156] It is difficult to understand why so much time was spent on Columbia because Ms. Reid's argument with respect to it was essentially inchoate. Most of the written argument on the topic focussed on summarising the evidence, witness by witness. The only reference in the Notice of Family Law Claim to Columbia is an allegation that at the time of the agreement "Columbia was a marginal operation". The particulars did not refer to Columbia. After the close of the evidence, I asked Ms. Reid's counsel what her position was on Columbia and was told that I "would not be hearing much about it during argument".

[157] Nevertheless, for the sake of completeness I will briefly address Columbia. The essence of Ms. Reid's complaints appears to be that Mr. Reid was aware of the problems at Columbia and that Columbia was undervalued in the agreement.

[158] Mr. Reid denied any knowledge of problems at Columbia. He did say he was not surprised to learn that more capital was required because the company's sales increased, which is something that often requires further capital. He remained confident of Columbia even after Ms. Reid called him to complain about Mr. McLachlan's resignation: he offered to buy the company back from her for the same value assigned to it in the separation agreement.

[159] Ms. Reid adduced no evidence as to the value of the Columbia whether at the time of the separation agreement or at trial.

[160] At the time of the separation agreement, Ms. Reid was working at Columbia. She had far greater familiarity with it than Mr. Reid.

[161] Columbia's sales have increased every year after the separation agreement – the current sales have almost doubled. It has hired additional employees.

[162] Columbia presents no basis on which to set aside the separation agreement.

F. Discussion and conclusion on whether the separation agreement should be set aside on common law grounds

[163] As I said above, there are two things to be examined: the procedural and substantive integrity of the agreement.

1. *Process leading up to the agreement*

[164] In section II.D, I set out most of the facts relating to Ms. Reid's psychological state and the dealings between the parties in the steps leading up to and entering into the separation agreement. The only evidence regarding Ms. Reid’s emotional or psycholgical state came from Ms. Reid and Ms. O'Mahony.

[165] There is no doubt that Ms. Reid found the situation disturbing and stressful. Nevertheless, she was able to work full time at Columbia. Ms. Reid was in a relationship with her now husband, Mr. Conte. She told Mr. Reid during the negotiations that she was getting advice from him.

[166] Ms. O'Mahony, while recognising that Ms. Reid was stressed, said she would not have signed the certificate of independent legal advice had she thought that Ms. Reid was under duress or not able to understand what she was agreeing to. No other evidence was given regarding Ms. Reid’s emotional or psychological state.

[167] Ms. Reid was not under financial duress. She was receiving $7,000 per month in support from Mr. Reid. She also had additional income.

[168] While Mr. Reid certainly took a negotiating stance, which he was entitled to do, there is no evidence of browbeating or psychological manipulation. He did get angry in the meeting where the minutes of settlement were reached and left the

room, but that is not abusive behaviour, and Ms. O'Mahony made no mention of having even considered ending the meeting.

[169] The separation agreement was not reached in haste. Ms. Reid initially sought legal advice in May 2006. The PwC report was given to her shortly after it was prepared in June 2007. She told Ms. O'Mahony that the parties wanted to proceed collaboratively in December 2007. The minutes of settlement were signed on July 24, 2008. Ms. Reid signed the separation agreement in October 2008. After that, Ms. Reid executed various documents in order to carry out the transfers required by the agreement. At the risk of being repetitive, she had both actual legal advice and access to advice throughout.

[170] Ms. Reid's position is similar (but not identical) to that of the plaintiff in *Miglin* in which the majority noted:

> 93 At the trial, Ms. Miglin suggested that she was not content with the Separation Agreement and felt pressured by her husband to agree to the spousal support release. As she phrased it, it was a confusing and emotional time for her. We do not doubt that marital separation is almost inevitably a time of emotional upheaval and confusion. Regardless, in this case there is ample evidence to conclude that any vulnerability experienced by Ms. Miglin was more than adequately compensated by the independent and competent legal counsel representing her interests over a prolonged period, not to mention the services provided to her by other professionals. It is unnecessary, therefore, for us to determine whether Ms. Miglin's evidence relating to her personal feelings would have been sufficient to demonstrate a vulnerability in this case and, if so, whether that vulnerability was exploited. The extent of Ms. Miglin's professional assistance obviously comes at the upper end of the range, and we would not wish to suggest that hers was the minimum required to assure fair negotiation.

[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.

[173] I turn now to disclosure, which is really the main thrust of Ms. Reid's case.

[174] As I said above, *Rick* makes it clear full disclosure is required in marital negotiations. It is also a requirement of the collaborative divorce or separation process. Some cases have said the obligation is one that is *uberrima fides*, or requiring utmost good faith: see, for example, *Akkor v. Roulston*, 2009 BCSC 258. This doctrine originated in England with respect to insurance contracts in which it is the duty of the insurance applicant to disclose to the insurer all facts material to the risk. But for *Akkor*, all of the cases I was able to locate dealing with the concept of *uberrima fides* in the family context pre-date *Rick*.

[175] After *Rick*, I do not think there is much point in debating whether the term *uberrima fides* is applicable in the family context for two reasons. First, the concept may be traced back to *Carter v. Boehm* (1766), 3 Bur. 1905, 97 E.R. 1162 (K.B.), although the case did not use the term. The utility of importing a term to which some certainty has been given over literally hundreds of years of insurance and related commercial litigation is questionable. Second, and more fundamentally, the Supreme Court of Canada laid down the obligation of disclosure in *Rick*. That case now sets the standard. The Court did not use the term *uberrima fides* and it appears that, at least in part, it is not applicable. This is so because in insurance contracts where full disclosure has not been made the insurer may void the contract. However, the Court in *Rick* said that non-disclosure is only the first step of the analysis: whether a court should refuse to uphold the contract depends, in part, on the extent of the non-disclosure. It also depends on whether the non-disclosure was deliberate. In insurance contracts that is not the case. In family cases, a key consideration is whether the agreement comports with the objectives of the applicable legislation but that does not apply in insurance cases under the *uberrima fides* doctrine.

[176] I do not mean to minimise in any way the heightened obligation to disclose in the family context. In *Rick*, at para. 47, the Court was clear with respect to the

standard that must be met: one is expected to "make full and honest disclosure of all relevant financial information".

[177] With respect to Cityfone, the PwC report was clear on its face that it was an estimate of value report. I have concluded that the report fairly represented the value of the company at the valuation date. Within its mandate of being an estimate of value report, it was not based on incomplete information, nor was it based on inaccurate information.

[178] This leaves a remaining question: should Mr. Reid have advised Ms. Reid of any events in the company after the PwC report? Determining whether an asset has been disclosed is relatively simple. Determining whether the value of an asset has been disclosed may also be simple. Determining whether corporate events should be disclosed in this context is more nuanced.

[179] I previously concluded that, contrary to Ms. Reid's submissions, there were no discussions with potential purchasers and the "list" of potential buyers was simply a wish list of Mr. Reid and Mr. Simmers. I concluded that the value per subscriber is a relatively meaningless figure; a company cannot be valued on that basis and the use of the value per subscriber in Cityfone's projections was again wishful thinking (although the wish came true with the Rogers purchase). I also concluded that the Rogers price could not be used as a value for Cityfone at the time of the separation agreement. I do not accept that Mr. Reid knew Cityfone was worth more than PwC said it was.

[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.

[183] Finally, there are the alleged non-disclosures I dealt with in sections III.C and D, which do not deal with the per share value of Cityfone.

[184] I concluded that the option plan status ought to have been disclosed along with the details of Mr. Reid's revamped compensation package, even though they had not been finalised. Nevertheless, as I have outlined, neither of those were of financial consequence. There was no collusion between Mr. Reid and the board to defer the signing of the agreement or the grant of the options.

[185] Ms. Reid argued that, absent the separation agreement, the court would have declared the options to be a family asset and she would have been granted a tag-along right. Assuming that to be correct, which is something I do not need to decide, it would not be determinative because the intent of the parties was for each of them to take 100% of Cityfone and Columbia, respectively. I do not think the existence of the options in Cityfone could have swayed the balance for Ms. Reid in coming to that decision and a tag-along on the options alone would have been inconsistent with each party taking a company. The issue here is therefore the value of the options at the time of the separation agreement for the purpose of the equalisation calculation. As I have said, even assuming the options had been granted, they did not have a value.

[186] The warrants were disclosed, and PwC decided to assign them a nil value. What was not disclosed was the cancellation of the warrants for a few anxious investors. I do not think this a significant indicia of value. I note that the report prepared by Mr. Payne, the expert retained by Ms. Reid, refers to the warrants and

indicates what Mr. Reid received from them when the company was sold. He makes no comment on their value as at the date of separation. Further, any value was minimal in relation to the total assets.

[187] The non-disclosure of the insurance policy was inadvertent and its financial significance was *de minimis*.

[188] These non-disclosures come nowhere close to justifying setting aside the separation agreement. This case may be contrasted with *Akkor*, in which Madam Justice Wedge came to the opposite conclusion. In that case, the only disclosure was verbal, and Wedge J. found that the defendant deliberately lied about his income and assets. The only similarity to that case and this one is that Ms. Reid said she relied on Mr. Reid to be fair.

[189] I have not lost sight of Ms. Reid's argument that I should not concern myself with the value of Cityfone at the time of separation, because "the agreement has so many deficits, including disclosive, that the only effective remedy is rescission and the substitution of equitable compensation". I do not agree that the process was defective.

2. *Did the agreement comport with the legislative regime?*

[190] The only issue agreed by the parties in this case is that under the *Family Relations Act*, the parties were entitled to an equal division of the assets. This was also the stated premise of the separation agreement.

[191] In my analysis of the value of Cityfone, I concluded that the company was fairly valued, and that the non-disclosure of the options and the cancellation of the warrants had no significant effect on the valuation. There are four further issues to consider: the minority discount applied to the parties' shares; the division of the assets on an after-tax basis; child support; and spousal support.

a) Minority Discount

[192] Collectively, the parties held 21% of the shares of Cityfone. PwC applied a 20% minority discount in determining the value of those shares. The shares were therefore discounted by $104,000. Ms. Reid says that should not have been done.

[193] The Court of Appeal in *Halpin v. Halpin* (1996), 27 B.C.L.R. (3d) 305, 26 R.F.L. (4th) 30, has said that whether a minority discount should be taken is a matter of fact to be assessed in each case.

[194] Mr. Boyer made the obvious point that the reason for applying the minority discount was because a notional purchaser would not necessarily pay the full rateable value of the shares because the shares would not provide control of the company. I note that Mr. Payne made no comment on the appropriateness of the minority discount.

[195] While the sale of the company was always an exit strategy, at the time of the separation agreement no buyer was waiting in the wings and no sale was imminent. The financial position of the company was not rosy: it had a modified going concern warning on the audited financial statements. A minority discount was applied to the strike price of the options granted.

[196] I do not think that the minority discount was inappropriate under the circumstances.

b) Taxes

[197] In the separation agreement, the values of the taxable assets were discounted for tax. The reduction was applied across the board to Columbia, Reid Capital, Cityfone, and the RRSPs.

[198] Given that this applied to both parties equally it is hard to say it was unfair.

c) Support

[199] For the purposes of both child and spousal support, the parties agreed to imputed incomes that were consistent with their known incomes in 2008. Mr. Reid's income was set at $310,000 and Ms. Reid's income was set at $72,000.

[200] Child support was set according to the *Federal Child Support Guidelines*, S.O.R./97-175. The agreement provided that either party could apply to have the child support reviewed for a number of specified circumstances, including change in circumstances and hardship.

[201] Spousal support was largely set in accordance with the *Spousal Support Advisory Guidelines*. Ms. Reid was entitled to support for 6.5 years.

[202] While Ms. Reid applies for increased spousal and child support based on what Mr. Reid actually earned after the separation agreement (which I will deal with separately), at the time of the separation agreement, the support arrangements were roughly in accordance with the legislative regime. In fact, it is likely close to what a court would have ordered.

IV. SHOULD THE SEPARATION AGREEMENT BE VARIED UNDER S. 65 OF THE *FAMILY RELATIONS ACT*

[203] Section 65(1) of the *Family Relations Act* allows the court to reapportion assets if it finds that the apportionment under an agreement is unfair, having regard to:

> a) the duration of the marriage,
>
> b) the duration of the period during which the spouses have lived separate and apart,
>
> c) the date when property was acquired or disposed of,
>
> d) the extent to which property was acquired by one spouse through inheritance or gift,
>
> e) the needs of each spouse to become or remain economically independent and self sufficient, or

> f) any other circumstances relating to the acquisition, preservation, maintenance, improvement or use of property or the capacity or liabilities of a spouse.

[204] As I said above, *Hartshorne* makes it clear that the time to assess fairness is at the time of the distribution of the assets. In this case, as opposed to a pre-marital agreement, that is essentially coterminous with the execution of the agreement.

[205] The nub of Ms. Reid's argument is this:

> The statutory default of the *FRA* provides for an equal division of the family assets. Further, the Parties agreed in principle that there should be an equal division of the family assets. However, this was not achieved in the Separation Agreement. The Claimant was not allowed to share in the sale of Cityfone and the shares that the Parties jointly owned up to the date of the Separation Agreement.

[206] Although not elaborated on, there would appear to be two things embedded in the last sentence of the submission. The first is the underlying per share value in Cityfone and the second is the number of shares, which in turn engages the option issue. I will deal with each in turn.

[207] With respect to the value per share, I have concluded that the value in the PwC opinion, used in the separation agreement, was reasonable at the time of the agreement. I also concluded that at the time of the agreement there was no sale in the offing. While the company sold 17 months later for a much higher price per share, it does not make the agreement unfair at the time it was executed.

[208] Ms. Reid relies, in part, on *Hannigan v. Hannigan,* 2002 BCSC 719 at para. 70, in which Mr. Justice McEwan said:

> [70] Having found that the Agreement was executed on the basis of a mistaken understanding as to the nature of the petitioner's interest in Prime, and that that interest was a family asset, I am of the view that clause 27(3) of the Separation Agreement does not operate as a waiver of the wife's claim. What was apparently the largest family asset was by virtue of this mistake, simply not accounted between the parties in an agreement purporting to divide their assets. This goes clearly to the fundamental premises of the agreement. I set that part of the agreement aside.

However, in this case there was no mistake <u>at the time of the agreement</u> as to the value of the shares.

[209] Turning to the number of shares, I said above that Mr. Reid ought to have disclosed the near-certainty of obtaining the options. However, at the time of the separation the option exercise price was higher than the value of the shares and therefore had no value.

[210] For this portion of her argument Ms. Reid did not specifically refer to the other matters I canvassed with respect to her common law argument. However, for the sake of completeness, I will say the conclusions I reached there are applicable here as well.

[211] I therefore decline to vary the agreement under s. 65(1) of the *Family Relations Act.*

V. CLAIM FOR INCREASED CHILD AND SPOUSAL SUPPORT

[212] I require further submissions on the claim for increased child and spousal. This will be the subject of a memo to counsel.

VI. COSTS

[213] As agreed, costs may be spoken to at the appropriate time.

"E.M. MYERS, J."