IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Reid v. Reid,*
2015 BCSC 86

Date: 20150122
Docket: E38713
Registry: New Westminster

Between:

Denise Isabelle Reid

Claimant

And

Mark Christopher Reid

Respondent

Before: The Honourable Mr. Justice Myers

Reasons for Judgment on Support Issues

Counsel for the claimant:	Russell S. Tretiak, Q.C. Carol W. Hickman, Q.C. Sarah H. Jo
Counsel for the respondent:	Tracey L. Jackson O. Stoklosa, articled student
Written Submissions:	October 10, November 14 and November 23 2014; January 6 and January 16 2015
Place and Date of Judgment:	Vancouver, B.C. January 22, 2015

I. INTRODUCTION AND RELEVANT PROVISIONS OF THE SEPARATION AGREEMENT

[1] On September 15, 2014, after a lengthy trial, I gave reasons dismissing Ms. Reid's claim to set aside a 2008 separation agreement: 2014 BCSC 1691. I deferred my decision on Ms. Reid's claim for increased child and spousal support pending further written submissions. (In large measure I wanted submissions based on my conclusion that the agreement was valid and in the light of some factual findings I made.) This is my decision on those issues. I will not repeat what I set out in my prior reasons and it will be necessary for the reader to refer to those in order to appreciate the issues I deal with here.

[2] The separation agreement attributed Mr. Reid's income at $310,000 and Mrs. Reid's at $72,000. The clauses (contained in the agreement's recitals) setting out the imputed incomes both recognise that the parties' incomes fluctuate:

> G. Denise was born on July 14, 1964. She is employed by Columbia Business Systems Inc. as a photocopier salesperson. Her income fluctuates and, for the purposes of this Agreement, has been attributed at *$72,000.00* per year by agreement of the parties.
>
> H. Mark was born on March 23, 1959. He is employed by Cityfone Telecommunications Ltd. as Chief Executive Officer. His income fluctuates and, for the purposes of this Agreement, has been attributed at *$310,000.00* per year by agreement of the parties.

[3] Mr. Reid was to pay child support of $3,341 "in accordance with the shared custody provisions of the FCSG table for British Columbia". As I set out more fully below, the agreement provided for a review of child support on certain conditions. Mr. Reid was to pay spousal support of $3,500 per month from September 1, 2008 to January 1, 2014.

[4] The recital contained a finality clause:

> N. The Parties:
>
> (a) intend this Agreement to be
>
> i. the final settlement and release of their respective rights in and to the property of the other and the property held by them jointly;

ii. the final settlement of their respective rights in the estate of the other;

iii. the final settlement of any claim for spousal support, whether contractual, compensatory or non-compensatory;

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

v. the final adjustments respecting

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

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

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

[5] In addition, with respect to spousal support, the agreement provided:

4.0 SELF-SUFFICIENCY

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

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

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

And:

> 7.03 Save and except only for claims to enforce the terms of this Agreement, Denise hereby covenants and agrees that she will make no claim whatsoever against Mark for spousal support, including any application to vary quantum or duration of the spousal support provided for in this Agreement.
>
> 7.04 Mark hereby covenants and agrees that he will make no claim whatsoever against Denise for spousal support and hereby waives and abandons any such claim.
>
> 7.05 The parties separately acknowledge and agree that this is a final agreement concerning spousal support and, in consideration of the settlement terms contained in this Agreement and notwithstanding any change of circumstances no matter how unforseen or catastrophic,
>
> a) neither party will claim interim or permanent spousal support from the other except as specifically provided for in this Agreement;
>
> b) each party hereby gives up forever any claim for support against the other, and
>
> c) forthwith upon request, each will consent to an order of the Court dismissing any such claim for spousal support, whether needs-based, contractual or compensatory, as if tried on the merits.

[6] There was a review clause for child support:

> 6.0 The Child Support is reviewable as follows:
>
> (a) the parties may review the Child Support on the request of either party and, if necessary, revise it to ensure that it accords with the requirements of the FCSG and British Columbia Table by July 1st of every year, with the first review being in 2009;
>
> (b) either party may request, by delivering a written notice to the other, a review of the Child Support if
>
> (i) a material change in circumstances, such as custodial changes or a change of a Child's primary residence lasting longer that sixty (60) days,
>
> (ii) a change leading to undue hardship for either party as defined by the FCSG;
>
> (iii) a Child ceasing to be eligible for support,
>
> (iv) a Child's need for support changes by reason of reaching the age of majority,
>
> (v) a Child who ceased to be eligible for support becomes dependent again; or
>
> (vi) upon Kathleen completing her first post-secondary degree;

> (c) if the parties have not reached agreement within 30 days after the notice provided for in article 6.07 of this Agreement, either party is at liberty to make application to the Court for a determination of the Child Support issue;
>
> (d) when Child Support is to be reviewed, the parties will each provide the other with:
>
> (i) a copy of his or her income tax return for the previous year,
>
> (ii) a copy of their CFtA Notices of Assessment, if received,
>
> (iii) details of child tax benefits or other similar benefits received in the previous year and anticipated in the coming year, if known,
>
> (iv) particulars of the Special Expenses anticipated for the coming year,
>
> (v) the most recent annual statement of earnings including commissions and overtime, if any,
>
> (vi) any other relevant information, to facilitate determination of the adjustment, if any, required to Child Support under article 6.09, and
>
> (e) any information a party must provide the other party that is not available by the required date must be delivered to the other party within 7 days of the information being received;
>
> 6.1 In the event that one or more of the Children eligible to receive child support resides with Mark, the basic child support payable for the support of the Children will be determined in accordance with the split custody provisions of the FCSG.

[7] Ms. Reid said that she verbally asked Mr. Reid to review the support after she learned of the Cityfone sale in 2010. Mr. Reid denies that. The first written request (as called for by the agreement) was sent by her counsel in March 2011. This was followed up on May 5, 2011. On May 17, 2011 Mr. Reid's then counsel forwarded Mr. Reid's tax returns for 2008, 2009 and 2010. There was further correspondence between counsel. This action was commenced in July 2011.

[8] Mrs. Reid's claim for increased child and spousal support was based on her argument that the separation agreement should be set aside and that Mr. Reid's income increased substantially from what was attributed to him in the agreement. In the alternative she argued that the support should be varied because of a change in circumstances.

[9] I dismissed Ms. Reid's action to set aside the agreement. I did find (paras. 138-144) that Mr. Reid should have disclosed that a change in his employment agreement was approved by the board of Cityfone on May 30, 2008, although the revised contract had not been finalised or signed by the time of the separation agreement. I also made a similar finding (paras. 145-149) with respect to a stock option plan. However, I did not think these non-disclosures were sufficient to set aside the agreement. The exercise price of the options was less than the value of the stock at the time of the agreement and the respondent did not adduce any evidence to show whether, in spite of that, they had any value. With respect to the employment agreement, the salary increases were less than the income attributed to Mr. Reid in the agreement, and the bonus and change of control payout were contingent factors. Nevertheless, these are factors to be considered in determining whether the support ought to be varied.

[10] A major issue between the parties was whether monies received by Mr. Reid in 2010 as a result of the sale Cityfone should be included as income for the purposes of calculating support. Another major issue was whether income should be attributed to Mr. Reid after 2010 because he was under-employed.

II. CHILD SUPPORT

A. Interpretation of the Child Support review clause

[11] The child support review provision does not contain a specific clause saying that support may be reviewed upon a change of incomes in the parties. The parties did not take the position that the claim for support would be different under the agreement and Mr. Reid acknowledged that by the end of 2010, Kathleen had finished her degree, and by 2010, Emily had reached the age of majority. Both of those events give rise to a review under clauses (b)(iv) and (b)(vi).

[12] I conclude below that the matter is determinable by the principles laid out by the Supreme Court of Canada applicable to claiming retroactive child support. Given this and the position of the parties it is not necessary for me to deal with the

interpretation of the child support review clause in the agreement. However, since I asked for submissions on the issue, I will express my view.

[13] Ms. Reid argued that child support is reviewable at any time due to a change in income because of clause (a), which provides that support is reviewable at the request of either party to ensure that it complies with the *Child Support Guidelines*, which, in turn, hinge on income.

[14] I do not agree with that interpretation. It construes clause (a) in isolation from the balance of the section. Clause (a) allows a party to request a review, but the circumstances under which that request can be made are enumerated in the balance of the section. While clause 6.07(b)(i) says that a review may be requested if there is a material change in circumstances, a change in income is not listed as an example in that clause. Nor is it set out in any other clause. This must have been done deliberately in view of the fact that the agreement attributed income that the agreement states the parties knew would fluctuate. It is also notable that the agreement does not oblige the parties to exchange financial statements every year, nor does it require the parties to notify of a change in income.

[15] The result of this analysis is that any review for 2008 and 2009 is to be considered as one outside the scope of the agreement. Given the conclusion I have reached with respect to entitlement to retroactive child support, this most likely does not make a difference.

B. Mr. Reid's Income

[16] The following table, taken from Mr. Reid's argument, sets out his income from 2004 to 2013:

Year	**Mark's Income**	**Income received by Denise from Cityfone through income-splitting**	**Total Income for Mark Reid adjusted for dividend gross-up**
2004	$137,689	$49,171	$186,860
2005	$150,339	$49,999	$200,338
2006	$250,072	$49,999	$300,071

2007	$270,048	$49,999	$320,047
2008	$432,655 (Employment income $312,556; taxable dividends $94,500)	$29,167	$461,822
2009	$454,222		$454,222
2010	$3,058,315 (see breakdown in following paragraph)		$3,058,315
2011	$176,146		$152,657
2012	$178,486		$157,604
2013	$127,796		$109,631

[17] Cityfone was sold in 2010. The sale generated dividends and a change of control bonus and a severance payout. The following is a breakdown of Mr. Reid's 2010 income:

employment income:	
change of control bonus	781,162
severance	750,000
stock options	512,176
salary/other	203,394
	2,246,732
other:	
divdend income	754,965
interest/investment income	25,231
capital gains	14,132
other	17,256
	811,584
Total	3,058,316

Should income be imputed to Mr. Reid after 2010?

[18] In view of my conclusion below with respect to entitlement to retroactive child support, a decision on this issue is not necessary. Nevertheless, since the point was argued I will provide my view.

[19] After Mr. Reid sold his interest in Cityfone in 2010 he started a new company in the courier business, Wyngit Delivery Inc., and his income dropped from what he was making at Cityfone and was also less than his attributed income in the

separation agreement. In 2011, 2012 and 2013 his income was $176,000, $149,000 and $128,000 respectively.

[20] Ms. Reid submits that:

> …a person who is capable of earning $441,987.50 from a high level business should not be allowed to take a start up Courier Company and use that as future income. The respondent is intentionally choosing to be under employed pursuant to s. 19 of the CSG.

She says his income for 2008 and 2009 should be averaged to arrive at an imputed income of $441,987 to calculate the retroactive child support for 2011 and subsequent years.

[21] Mr. Reid says his income should be imputed at the $310,000 provided for in the agreement even though he is earning less, and Ms. Reid at the agreed $72,000 even though she has been earning more.

[22] There is no doubt that the courts will not allow a party to be intentionally under-employed so as to escape his or her support obligations. The issue is whether that is the case where there is a separation agreement and Mr. Reid continues to abide by it. Counsel cited no cases where a successful allegation of under-employment has been made in the face of a separation agreement providing for imputed income.

[23] Ms. Reid relies on *Bockhold v. Bockhold*, 2010 BCSC 214. She says that is analogous to the present case because it dealt with a consent order. I do not agree. In *Bockhold* there had been a consent divorce order in which the husband's income was set at $540,000. By the terms of the order, support came up for review. The husband argued that his income had decreased because of the 2008 downturn in the stock market. Groves J. refused to accept that submission. He said that while the husband's income fell in 2008, he did not accept that as permanent and took notice of the improving stock market in the summer of 2008. He concluded that the husband's income should be determined at $540,000. That is quite different than

attributing income to a party beyond what has been agreed to in a separation agreement.

[24] Moreover, the order in *Bockhold* contained none of the detailed and complex terms that are in the separation agreement here. As noted already, here the parties specifically recognised that their incomes would fluctuate. The factual matrix to the agreement included that Mr. Reid was a serial entrepreneur who could be expected to invest in start-up companies. It was known that Ms. Reid's fortunes would fluctuate depending on how Columbia Business Systems performed.

[25] Ms. Reid also referred me to *Fehr v. Fehr*, 2006 BCSC 1440. In that case there was also a consent support order. The husband took early retirement and applied to have his spousal support obligations terminated. Ross J. held that the husband's retirement was foreseen by the parties and could therefore have been provided for in the order. In the case at bar, I find that the parties did contemplate for changing income scenarios.

[26] This is not a case where a party seeks to vary a support agreement to reduce imputed income in order to justify decreasing support. Rather, Mr. Reid is content to pay support based on his attributed income as per the agreement. In short, he is not evading his support obligations by being under-employed. He continues to live up to them.

[27] I conclude that it would not be in accordance with the separation agreement, or otherwise appropriate, to impute income to Mr. Reid.

C. Is Ms. Reid entitled to retroactive child support?

[28] The amount of retroactive child support claimed by Ms. Reid is:

August 2008	$6,060.00
2009	$18,552.00
2010	$396,360.00
2011	$27,384.00 (based on income of $441,987.50; average of 2008/2009)
2012	$27,384.00 (based on income of $441,987.50; average of

	2008/2009)
2013	$27,384.00 (based on income of $441,987.50; average of 2008/2009)
August 2014	$10,036.00 (based on income of $441,987.50; average of 2008/2009)
Total:	**$513,160.00**

[29] The leading case on retroactive child support is the Supreme Court of Canada's judgment in *D.B.S. v. S.R.G.*, 2006 SCC 37, in which Mr. Justice Bastarache noted:

> 95 It will not always be appropriate for a retroactive award to be ordered. Retroactive awards will not always resonate with the purposes behind the child support regime; this will be so where the child would get no discernible benefit from the award. Retroactive awards may also cause hardship to a payor parent in ways that a prospective award would not. In short, while a free-standing obligation to support one's children must be recognized, it will not always be appropriate for a court to enforce this obligation once the relevant time period has passed.
>
> 96 Unlike prospective awards, retroactive awards can impair the delicate balance between certainty [page275] and flexibility in this area of the law. As situations evolve, fairness demands that obligations change to meet them. Yet, when obligations appear to be settled, fairness also demands that they not be gratuitously disrupted. Prospective and retroactive awards are thus very different in this regard. Prospective awards serve to define a new and predictable status quo; retroactive awards serve to supplant it.

[30] Bastarache J. directed that a court should consider at least the following four factors:

1. whether there was a reasonable excuse for not having sought the support earlier;
2. the conduct of the payor parent;
3. the circumstances of the child; and
4. any hardship that would be caused by a retroactive award.

He said that a court must consider these matters holistically within the circumstances of the case.

[31] I will assume that factors 1, 2 and 4 favour Ms. Reid. I think in the circumstances of this case, and given the amount of retroactive support claimed, the focus must be on the third factor, the circumstances of the children. In addition to the comment quoted above, Bastarache J. noted with respect to this factor:

> 110 A retroactive award is a poor substitute for an obligation that was unfulfilled at an earlier time. Parents must endeavour to ensure that their children receive the support they deserve when they need it most. But because this will not always be the case with a retroactive award, courts should consider the present circumstances of the child -- as well as the past circumstances of the child -- in deciding whether such an award is justified.
>
> 111 A child who is currently enjoying a relatively high standard of living may benefit less from a retroactive award than a child who is currently in need. As I mentioned earlier, it is a core principle of child support that, after separation, a child's standard of living should approximate as much as possible the standard (s)he enjoyed while his/her parents were together. Yet, this kind of entitlement is impossible to bestow retroactively. Accordingly, it becomes necessary to consider other factors in order to assess the propriety of a retroactive award. Put differently, because the child must always be the focus of a child support analysis, I see no reason to abstract from his/her present situation in determining if a retroactive award is appropriate.
>
> …
>
> 113 Because the awards contemplated are retroactive, it is also worth considering the child's needs at the time the support should have been paid. A child who underwent hardship in the past may be compensated for this unfortunate circumstance through a retroactive award. On the other hand, the argument for retroactive child support will be less convincing where the child already enjoyed all the advantages (s)he would have received had both parents been supporting him/her: see *S. (L.)*. This is not to suggest that the payor parent's obligation will disappear where his/her children do not "need" his/her financial support. Nor do I believe trial judges should delve into the past to remedy all old familial injustices through child support awards; for instance, hardship suffered by other family members (like recipient parents forced to make additional sacrifices) are irrelevant in determining whether retroactive support should be owed to the child. I offer these comments only to state that the hardship suffered by children can affect the determination of whether the unfulfilled obligation should be enforced for their benefit.

[32] In the present case, there is no basis to conclude that the children's needs were not met, nor did Ms. Reid argue otherwise. She did not go into debt to provide for the children. In her financial statements she showed expenses for the children for three years. For 2008 they were $21,000 and for 2011 they were $31,000, less than the child support she received. For 2013, she showed an increased amount of

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

[33] Without dealing with the issue of whether all of Mr. Reid's 2010 income should be used in calculating child support, the amount of retroactive support claimed by Ms. Reid - $513,000 - cannot be justified as allowing the children to live the standard of life they enjoyed before the parties separated. It can only be seen as a transfer of wealth from Mr. Reid to Ms. Reid.

[34] On this basis, even if I were to set aside the support provisions of the agreement, the retroactive support cannot be justified.

[35] While not necessary for my decision, many of my comments below respecting whether the agreement meets the objectives of the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.), with respect to spousal support are also applicable to child support.

III. SPOUSAL SUPPORT

[36] The amount of spousal support Ms. Reid claims is also based on Mr. Reid's line 150 income, adjusted for support received. The following is taken from her argument:

Year	Respondent's Income	Claimant's Income	SSAG Mid-Range Amount	Amount Paid by the Respondent	Difference Per Year
Sept 2008	$429,751.00	$101,878.58	$5,564 per month ($22,256.00 September to December 2008)	$3,500.00 per month ($14,000.00 September to December 2008)	Respondent owes $8,256.00
2009	$454,224.00	$97,574.00	$6,207 per month ($74,484.00/yr)	$3,500.00 per month ($42,000/yr)	Respondent owes $32,484.00
2010	$3,058,315.98	$133,228.00	$58,787.00 per month ($705,444.00/yr)	$3,500.00 per month ($42,000/yr)	Respondent owes $663,444.00

TOTAL	**$704,184.00**

[37] While Ms. Reid sought child support for 2011, 2012 and 2013 based on income that she said should be imputed to Mr. Reid, for spousal support she says that given the parties' incomes, she is prepared to forego a claim for retroactive support for those years.

[38] As noted, there is no provision for review of spousal support in the agreement. In my prior judgment I concluded that the separation agreement should not be set aside. Ms. Reid argues that I should reconsider this with respect to the support provisions or in the alternative, vary the support.

[39] The legal framework for a claim for review of spousal support in the face of a separation agreement was set out in *Miglin v. Miglin*, 2003 SCC 24, and for the setting aside of a separation agreement in its entirety in *Rick v. Brandseema*, 2009 SCC 10 (which dealt with property distribution). They are similar approaches in that they look at the process leading up to the agreement and whether the agreement comported with the objectives of the legislation. Although they dealt with different issues, the approach in *Rick* reiterated and built on what the Court said in *Miglin*. In *Miglin* the Court laid out two stages of analysis:

- Stage one examines the fairness of the negotiating process. If the court concludes that the process was satisfactory, then it addresses whether the agreement satisfied the objectives of the legislation.

- If the court reaches the conclusion that the agreement satisfies the first stage, it then considers whether there has been a change in circumstances that was not contemplated by the parties such that the agreement should not be given significant weight.

[40] When I asked for further submissions on the support issues in light of my other conclusions, I had the *Miglin* factors in mind with respect to the two elements of non-disclosure referred to above at para. 9. While these are elements of unfairness leading up to the agreement, they were the only areas of concern in my

prior judgment and did not justify the setting aside of the agreement as a whole. The question now is whether they should affect the support issue and if so how, or whether the support should be varied on other grounds.

[41] It is worth noting the comments made in *Miglin* with respect to the second part of the first stage of the analysis:

> 84 Where the court is satisfied that the conditions under which the agreement was negotiated are satisfactory, it must then turn its attention to the substance of the agreement. The court must determine the extent to which the agreement takes into account the factors and objectives listed in the Act, thereby reflecting an equitable sharing of the economic consequences of marriage and its breakdown. Only a significant departure from the general objectives of the Act will warrant the court's intervention on the basis that there is not substantial compliance with the Act. The court must not view spousal support arrangements in a vacuum, however; it must look at the agreement or arrangement in its totality, bearing in mind that all aspects of the agreement are inextricably linked and that the parties have a large discretion in establishing priorities and goals for themselves.
>
> 85 When examining the substance of the agreement, the court should ask itself whether the agreement is in substantial compliance with the *Divorce Act*. As just noted, this "substantial compliance" should be determined by considering whether the agreement represents a significant departure from the general objectives of the Act, which necessarily include, as well as the spousal support considerations in s. 15.2, finality, certainty, and the invitation in the Act for parties to determine their own affairs. The greater the vulnerabilities present at the time of formation, the more searching the court's review at this stage.
>
> 86 Two comments are necessary here. First, assessment of an agreement's substantial compliance with the entire Act will necessarily permit a broader gamut of arrangements than would be the case if testing agreements narrowly against the support order objectives in s. 15.2(6). Second, a determination that an agreement fails to comply substantially with the Act does not necessarily mean that the entire agreement must be set aside and ignored. Provided that demonstrated vulnerability and exploitation did not vitiate negotiation, even a negotiated agreement that it would be wrong to enforce in its totality may nevertheless indicate the parties' understanding of their marriage and, at least in a general sense, their intentions for the future. Consideration of such an agreement would continue to be mandatory under s. 15.2(4). For example, if it appeared inappropriate to enforce a time limit in a support agreement, the quantum of support agreed upon might still be appropriate, and the agreement might then simply be extended, indefinitely or for a different fixed term. [emphasis added]

[42] An earlier comment in the judgment is also pertinent here. At para. 65 Bastarache J. said:

> 65 … We note, however, that there is a potential tension between recognizing any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown and promoting, even if only to the extent practicable, the economic self-sufficiency of each spouse (ss. 15.2(6)(*a*) and 15.2(6)(*d*)). The way to reconcile these competing objectives is to recognize that the meaning of the term "equitable sharing" is not fixed in the Act and will, rather, vary according to the facts of a particular marriage. Parliament, aware of the many ways in which parties structure a marriage and particularly its economic aspects, drafted legislation broad enough that one cannot say that the spousal support provisions have a narrow fixed content. …

[43] I concluded above that post-2010 income should not be attributed to Mr. Reid on the basis of under-employment. The real issue becomes Mr. Reid's 2010 income. Does the fact that the agreement would preclude Ms. Reid from obtaining support based on the full income in that year mean that the agreement did not substantially comply with the objectives of the of the *Divorce Act*?

[44] As made clear in *Miglin*, the issue before me is not what a judge would have awarded for support had there not been an agreement. In other words, I am not to perform the same analysis with respect to the 2010 income as a judge would on a support application. Rather, the issue for me is to construe the support provisions within the totality of the agreement in order to determine whether the provisions comply with the objectives of the *Divorce Act*. In that light, I make the following observations.

[45] The income attributed to Mr. Reid in the 2008 agreement ($310,000) was above his historic earnings and in accord with what his income was at the end of the year. (The dividend component for 2008 was accounted for by the parties in their division of assets.) The revised employment terms provided for a salary that was less than the attributed income, but allowed for further remuneration based on the performance of the company and a one-time change of control bonus. The outcome of these contingencies was unknown at the time the agreement was entered into. In particular, I held that there was no inkling of the sale of Cityfone to Rogers.

[46] The dividend income was a tax-efficient mechanism to distribute the cash received from Rogers for the sale of the company and is therefore tantamount to capital. The other monies arose because of the sale.

[47] The effect of the agreement is shown by a comparison. Assume the parties' line 150 incomes (adjusted for the support that had been paid) are used to calculate spousal support instead of the incomes attributed in the agreement. Assume also that only the salary portion of Mr. Reid's 2010 income is taken into account. Using the mid-range *Spousal Support Guidelines*, Mr. Reid, in the aggregate, would have overpaid support for 2008 to 2014. The same result is reached if Mr. Reid's 2009 income were used for 2010. While the parties disagree as to their calculations, there would be an overpayment no matter which was used. (The situation is the same with respect to child support that would be payable under the *Child Support Guidelines*.)

[48] Under the agreement Ms. Reid got one company and Mr. Reid another. As I have said, the one-time 2010 income events resulted from the sale of Cityfone. As I also said in my earlier reasons, Ms. Reid knew that the goal of Mr. Reid was to build Cityfone and sell it. Ms. Reid has obtained financial independence.

[49] Because of the non-disclosures I am dealing with, I do not put any emphasis on the strong finality clauses in the agreement. Even then, however, on the basis of all of the facts, I cannot find that the spousal support provisions did not meet the objectives of the *Divorce Act*. I would also reach the same conclusion with respect to the child support provisions, to the extent that it might be relevant to that issue. (I was not cited any cases which applied the same analysis to child support.)

[50] In the alternative, Ms. Reid argued that the support should be varied on the basis of an unanticipated change in circumstances, *i.e.* the second stage of the *Miglin* analysis. Even taking into account the lack of full disclosure of Mr. Reid's employment agreement, the facts and conclusion that I reached above at paras. 24 and 48 regarding imputing income are dispositive of this issue.

[51] I therefore conclude that the spousal support provisions should not be varied.

"E.M. MYERS, J."