Toronto Law Journal

Anderson v Anderson and the Variations of the *Miglin* Analysis

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In May 2023, the Supreme Court of Canada (SCC) rendered its decision in *Anderson v Anderson*[1] and clarified the approach to considering non-presumptively enforceable domestic contracts between separating spouses. After a two-decade history of Supreme Court of Canada cases commenting on the adoption (and rejection) of the *Miglin v Miglin*[2] analysis applied to domestic contracts, *Anderson* sets down foundational pillars for future courts to follow.

Anderson was a case about a "kitchen table" agreement dealing with family property division. In writing for a unanimous court, Justice Karakatsanis asserted that the *Miglin* test should not be applied to every case dealing with a domestic contract.[3] However, *Miglin* principles are still very influential in both frameworks laid out first by the Saskatchewan Court of Appeal and then by the SCC in this case.

The general commentary from the SCC in a string of cases after *Miglin,* beginning with *Hartshorne v Hartshorne*,[4] through to *Rick v Brandsema*[5] and *L.M.P. v L.S.*,[6] reflected this struggle with precisely what test to apply to different types of domestic contracts within different legislative schemes. *Miglin* was a case about spousal support and s. 15(2) of the *Divorce Act*.[7] In many, but not all of the SCC domestic contract cases that followed *Miglin*, the SCC has declined to apply the *Miglin* analysis because the interpretation of provincial and federal legislation (beyond the *Divorce Act*) called for a different framework. But despite the ambiguous history, *Miglin's* principles are relied on more than ever by lower courts, and recently, in *Anderson*. What kind of "tailored" framework was applied in *Anderson,* and how did it differ from the original *Miglin* analysis?

The *Miglin* analysis adopted a contextual framework to discern the weight to be afforded to separation agreements dealing with spousal support under s. 15(2) of the *Divorce Act*. It proceeds in two stages:

1. The first stage has two parts:

   a) First, the court must evaluate the "circumstances surrounding the negotiation and execution of the agreement" to determine whether there were any vulnerabilities or circumstances of oppression that affected the bargaining process (citation omitted).[8]

[1] 2023 SCC 13 [*Anderson SCC*].
[2] 2003 SCC 24 [*Miglin*].
[3] *Anderson SCC*, above at para 7.
[4] 2004 SCC 22.
[5] 2009 SCC 10.
[6] 2011 SCC 64.
[7] R.S.C 1985, c.3 (2nd Supp.).
[8] *Anderson SCC,* above at para 26.

b) Second, the court must assess the substance of the agreement to determine whether it is "in substantial compliance with the general objectives of the [legislation] at the time of creation (citation omitted).[9]

2. The second stage looks again to the substance of the agreement at the time of its enforcement to evaluate whether it still reflects the original intentions of the parties and remains consistent with the objectives of the Act.[10]

Facts

The parties, Mr. and Ms. Anderson, were married in Saskatchewan for three years and separated on May 11, 2015. Both parties came into the relationship with considerable assets, including houses, vehicles, items of personal property, RRSPs, savings and pensions.[11]

On July 19, 2015, the parties drafted a written agreement. The agreement stated, *inter alia,* that "all income, pension, investments, benefits, and any other of the like" earned during the marriage will remain solely with that individual except for the family home and household goods, which they owned jointly.[12] The agreement specified that the family home and goods would be dealt with at a later date. Both parties signed the agreement before two of their friends who acted as witnesses. Neither party benefited from independent legal advice before signing the agreement, nor had they exchanged financial disclosure.

Ms. Anderson then filed for divorce on December 10, 2015, without claiming property division or spousal support.[13] She included in her petition that there was an existing agreement dealing with property and spousal support. The husband filed an answer and counter-petition a year and a half later, on May 5, 2017. Mr. Anderson counter-filed to ask the court to divide the family property, arguing that he signed the agreement without legal advice and under duress.[14]

At trial, the judge found the agreement not binding and gave it no weight. He recognized that it was not an agreement that complied with s. 38 of the Saskatchewan *Family Property Act* (*FPA*), which deals with the formal requirements of an interspousal contract.[15] However, s. 40 of the *FPA,* allowed him to consider the agreement. Section 40 states that "the court may, in any proceeding pursuant to this Act, take into consideration any agreement, verbal or otherwise, between spouses that is not an interspousal contract and may give that agreement whatever weight it considers reasonable".

At the first stage of the trial judge's analysis, he asked whether the agreement was, at the time it was executed, fair and reasonable.[16] He concluded that it was not. His reasons were

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[9] *Id.*
[10] *Id.*
[11] 2021 SKCA 117 at para 4 [*Anderson* CA].
[12] *Id.* at para 8.
[13] *Id.* at para 11.
[14] *Id.* at para 12
[15] S.S. 1997, c. F-6.3, s. 38 [*FPA*].
[16] *Anderson CA,* above at para 16; *Anderson v Anderson,* 2019 SKQB 35, at para 90 [*Anderson QB*].

that the “absence of legal representation of either party before, or at the time, it was executed” was “most troubling”. He also pointed to three additional factors:

a) the agreement was unenforceable because “other matters were as yet unconcluded”, notably the issue of the family home and household contents;

b) the parties had little understanding of the value of their assets and liabilities; and

c) Ms. Anderson had subsequently pursued a formal s. 38 agreement with the husband (to no avail), as well as disclosure of information relating to Mr. Anderson’s business interests.

Those factors caused the trial judge to conclude that the agreement was “more akin to an agreement to agree” and that there was no *consensus ad idem* or “meeting of the minds” to make the agreement enforceable. Thus, the trial judge did not give any weight to agreement and ordered that the value of the couple’s assets be divided according to the *FPA*. Ms. Anderson was required to pay Mr. Anderson about $90,000 after equalizing the parties’ net family properties in accordance with the *FPA*. Ms. Anderson appealed the decision.

The Court of Appeal

The Court of Appeal of Saskatchewan set aside the trial order, concluding that the agreement signed by the parties should be given great weight. It ordered that, ultimately, Mr. Anderson must pay Ms. Anderson about $5,000. The Court of Appeal applied a more principled approach to the exercise of judicial discretion in considering the domestic contract under s. 40 of the *FPA* based on the *Miglin* framework.[17] The court also referred to *Rick v Brandsema*,[18] where the Supreme Court extended the *Miglin* framework and applied it to property division.

The Court of Appeal applied the *Miglin* framework almost *verbatim* and put forward a 4-step approach when dealing with an interspousal agreement under s. 40 of the *FPA* as follows:[19]

1. a court must ask itself whether there is an agreement in the contractual sense of *consensus ad idem* or a “meeting of the minds”;

2. the onus then shifts to the party asserting it to be invalid, unenforceable or that it should be given little weight. If challenged, a court must look to the circumstances surrounding negotiation and execution to determine whether there is any reason to discount the agreement, such as any indication of “oppression, pressure, or other vulnerabilities” that would render the negotiation process flawed, or conditions of the negotiations, including whether there was professional assistance;

3. if no issues arise with respect to the negotiation or execution of the agreement, a court must go on to examine the substance of the agreement to determine if its terms are fair

[17] *Id*. at para 52.
[18] 2009 SCC 10.
[19] *Anderson CA* at para 58.

and reasonable in the sense that they are in substantial compliance with the general objectives of the *FPA*; and

4. where the agreement is found to be in substantial compliance with the general objectives of the *FPA* at the time it was prepared, great weight should be given to it, unless a new or a changed circumstance has arisen such that its terms "no longer reflect the parties' intentions at the time of execution" or are no longer in substantial compliance with the general objectives of the *FPA*.

The Court of Appeal disagreed with the trial judge that the facts of this case lead to the conclusion that the agreement failed to satisfy the first step of the test, that is, that there was no *consensus ad idem*. Both the court of appeal and later, Justice Karakatsanis, agreed on the following points regarding the validity of the agreement under s. 40 of the FPA: a) the involvement of counsel in this case was not a prerequisite to the agreement's validity; b) the parties' deferring the issue of the family home until a later date does not present grounds to question the validity of the agreement where the parties have included in the agreement a detailed and objective method by which to resolve the issue later; and c) the agreement may still be valid despite all issues in the agreement not be resolved.[20]

The Supreme Court

On appeal to the Supreme Court, Mr. Anderson raised the issue of the integrity of the bargaining process as grounds for appeal, proposing that enforcing the agreement would be unfair since the parties did not engage in financial disclosure or obtain independent legal advice. Justice Karakatsanis, writing for a unanimous Supreme Court, disagreed with the proposition.[21] She stated the Court of Appeal noted in its reasons that the husband did not "allude to inadequate disclosure or uneven knowledge of the parties' respective assets and liabilities" at trial,[22] nor what there any lack of understanding by either party of each other's finances.[23] Justice Karakatsanis later uses the Court of Appeal's findings to conclude that there were no vulnerabilities or unfairness at the time the parties signed the agreement, as there were no prejudice to Mr. Anderson regarding a lack of disclosure or understanding of the parties' assets, nor was the lack of legal advice a reason to conclude the parties did not understand the agreement.[24]

Justice Karakatsanis reversed the Saskatchewan Court of Appeal decision in several respects. However, in exercising the court's discretion under Section 40 of the *FPA* and referencing the *Miglin* analysis, the framework ultimately adopted by Justice Karakatsanis is one step shorter than the Court of Appeal's analysis. Justice Karakatsanis relied on an array of *Miglin* principles

[20] *Anderson SCC* at paras 58 – 63.
[21] *Id*. at para 66.
[22] *Anderson CA* at para 103.
[23] *Id*. at 114.
[24] *Anderson SCC* at para 71-72.

and tailored the traditional test by adopting three of the four steps of the quasi-*Miglin* framework put forward by the Court of Appeal in their decision.

Justice Karakatsanis stated the Court of Appeal failed to "appropriately tailor the analysis to the governing statutory scheme",[25] and adopted the following three-step framework when deciding how much weight to give to the agreement in accordance with s. 40 of the *FPA:*[26]

1. The court will need to satisfy itself of the agreement's validity;

2. The court must ask whether any substantiated concerns about the agreement's formation were raised, such that it would be unfair to consider it, such as circumstances surrounding negotiation and execution that is tainted by pressure, or circumstances of oppression, exploitation, or other vulnerability; and

3. The court must review the substance of the agreement with what is fair and equitable in the circumstances, considering objectives and factors of the legislative scheme. But this is not a strict standard, as such a review risks gutting the legislation's enablement of private ordering.

In essence, Justice Karakatsanis removed the fourth step of the Court of Appeal's analysis, or, in other words, the second stage of the *Miglin* test, but applied the first stage. Recall that the final step in the *Miglin* analysis looks again to the substance of the agreement at the time of its enforcement to evaluate whether it still reflects the original intentions of the parties and remains consistent with the objectives of the Act.

This case is important because it effectively weakens the second stage of the *Miglin* analysis when applied to the context of family property division. Justice Karakatsanis supported this tailoring of the analysis by comparing the obligations of spousal support to the division of family property at paragraph 30:

> [30] … Spousal support is primarily a prospective and ongoing obligation that looks to future value, and is in part based on means and need; "[t]he default assumption is that, spousal support is open to modification in response to changing circumstances"(citation omitted) […] The division of family property, by contrast is a chiefly retrospective exercise: it takes stock of property brought into and acquired during the spousal relationship as past contributions giving rise to a property entitlement (citation omitted).[27]

In assessing the weight to be applied to the agreement, Justice Karakatsanis came to the same conclusion as the Court of Appeal and afforded it great weight.[28]

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[25] *Id*. at para 39.
[26] *Id*. at paras 48-51.
[27] *Id*. at 30
[28] *Id*. at 63

The SCC also took issue with the way that the Court of Appeal valued two key assets, first, the family home, and then, the business interests of the husband, Mr. Anderson. Turning first to the business interests of the husband, Justice Karakatsanis noted the Court of Appeal's final order dividing the value of some of the significant assets, such as the husband's business interests, clearly contradicted the agreement. Despite the Court of Appeal finding the agreement binding, and despite the "logic and attraction" to the remedy of enforcing the agreement as it is,[29] the Court of Appeal still went ahead and divided some assets according to s. 21 of the *FPA*. The SCC stated this was "clearly wrong" and it went against the binding agreement.[30] The agreement was clear; "the wife surrendered *all* rights to the husband's business interests at the time of separation in July 2015".[31] The Court of Appeal dividing Mr. Anderson's business interests at any date of valuation resulted in unfairness.[32]

In terms of the date of valuation for the family home, the Court of Appeal chose the date Ms. Anderson started her divorce claim, December 2015, as the valuation date. Justice Karakatsanis disagreed with the choice of this date, as the Court of Appeal did not take into consideration the husband's ongoing contribution to the maintenance of the home since the separation of the parties up to the date of trial in June 2018. Moreover, the intention of the parties, as reflected in the agreement, was to defer the resolution of the issue of the family home to a later date. Justice Karakatsanis ordered that the valuation of the family home should be the date of trial.[33] Taking into consideration these conclusions, Justice Karakatsanis ordered that the Court of Appeal's decision be set aside, that Ms. Anderson pay Mr. Anderson $43,382.63 after dividing the family home and household goods, and that each party bear their own costs.

Anderson provides guidance on how domestic contracts that may not meet certain contractual formalities should be handled. However, the facts were unique. Surprisingly, in this case, independent legal advice and financial disclosure were not required for the SCC to decide that the agreement was binding, which is uncommon. The parties in this case understood each other's finances well enough to convince the court that disclosure was not necessary. Moreover, the lack of independent legal advice did not create any unfairness in this case.

Applying this case to future disputes will be challenging, given the unique nature of the facts, but what will be worth considering will be the application of the *Miglin* principles.[34] The SCC has clearly pointed to *Miglin* being the cornerstone of analysis when it comes to determining the enforceability of domestic contracts in Canada, despite the history of the application and rejection of its test, but much will turn on the legislative scheme in place in a province. *Anderson* has set its pillars firmly in the world of domestic contracts, but not without acknowledgment of the foundational principles of *Miglin*.

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[29] *Anderson CA*, above at para 132.
[30] *Anderson SCC*, above at para 79.
[31] *Id*. at para 77.
[32] *Id*. at para 75.
[33] *Id*. at para 76.
[34] See *El Rassi-Wight v Arnold*, 2024 ONCA 2, where *Anderson* was distinguished on its facts in a case about the enforceability of informal domestic contracts under Ontario's *Family Law Act*.