

## **A Case for the Contract: The Supreme Court case of Rick v. Brandsema**

By Warren S. Jennings  
[warren@calgaryfamilylawyers.com](mailto:warren@calgaryfamilylawyers.com)

Are contracts binding? Can they be overturned? Has the Supreme Court changed the law? How does this affect my contract? Or the contract I am negotiating?

These are a sample of questions I have been asked after the considerable media attention given to this case. For those who want to read the written reasons of the Supreme Court of Canada, click on or copy this link into your internet browser:

<http://scc.lexum.org/en/2009/2009scc10/2009scc10.html>.

The Supreme Court ruled that the contract signed between Ms. Rick and Mr. Brandsema was set aside, even though both parties had independent legal advice. Why? For four reasons:

- Ms. Rick was suffering from a mental vulnerability, which limited her ability to comprehend the legal advice given to her, and to understand the agreement reached between her and Mr. Brandsema. This was established by evidence given from her psychiatrist.
- Mr. Brandsema did not disclose all of his assets, and mislead Ms. Rick on the value of his assets, to the tune of \$650,000.00,
- Mr. Brandsema knew of Ms. Rick's mental vulnerability, and took advantage of it, and
- The contract divided the parties' property significantly different than how it would be divided under B.C.'s family law legislation.

Mr. Brandsema tried to say that the contract should be respected, as Ms. Rick had the help of two different lawyers during their separation. The Supreme Court said this was not good enough; the legal advice had to be effective, and the negotiating process had to be fair. In their case, both these were lacking. As the result of the contract was significantly different than what Ms. Rick would have received under B.C.'s Family Relations Act, Mr. Brandsema was ordered to pay to Ms. Rick about \$650,000.00 more than what their contract required.

### **What can I do to make sure my contract is upheld?**

The Supreme Court has twice indicated that parties are encouraged to resolve their own disputes, and that these agreements are to be respected as much as possible (see the Miglin case, as well as Rick v. Brandsema). Here are five easy tips to help avoid having your contract set aside:

1. Provide full and honest disclosure. You cannot give up an entitlement to an asset without knowing about the asset – and neither can your spouse. See my article about disclosure, [here](#).
2. Have an honest and fair negotiation process. This can take different forms –you and your spouse having a frank discussion, attending mediation or a third party driven negotiation

process, as well as settlement meetings with you, your spouse and your lawyers. No matter what the method you choose to negotiate, bargain in good faith; doing anything else may cause your contract to be scrutinized and struck.

3. Respect your spouse. This means more than one thing – obviously, if your spouse is subject to mental vulnerability, do not take advantage of this. But if your spouse does not have such a vulnerability, treat your spouse with respect in any event. Not only will this facilitate the two of you coming to an agreement without unnecessary acrimony, but it will also take away an argument of your taking undue advantage of your spouse.
4. Do not just say what the agreement is, but say why it is agreed upon. If you are not going to share the value of your home, for example, explain the reason in your contract. That way, if your contract is reviewed, the reasons are right there in black and white – and not subject to a selective memory. This is especially important if you are going to enter into an agreement that is significantly different than how the legislation in your province would dictate.
5. Get legal advice. If you don't, your agreement may be subject to review, no matter how fair it may seem. This is specifically required in the Matrimonial Property Act of Alberta (see Sections 37 and 38), and has often been seen as a fundamental requirement of the issues subject to the Divorce Act of Canada.

### **How does this affect my contract?**

If you already have entered into a contract, and are worried about whether or not it will be upheld, go and speak to a lawyer. Bring with you a description of the negotiating process, and what disclosure was exchanged. Your lawyer can review your contract with you, to see if you are at any risk of having your contract struck out, similar to what happened in *Rick v. Brandsema*.

Warren is a family law lawyer who practices at Moe Hannah McNeill LLP in Calgary, Alberta. Warren's approach to family law emphasizes effective and dignified problem solving, empowering his clients to deal with their legal issues at separation. Read Warren's bio at [http://www.calgaryfamilylawyers.com/warren\\_jennings.html](http://www.calgaryfamilylawyers.com/warren_jennings.html).

Contact Warren at [warren@calgaryfamilylawyers.com](mailto:warren@calgaryfamilylawyers.com), or phone him at (403) 264-9480.