

CANADA / JUDGMENT

Cotter v. Cotter

2015 BCSC 1730

COURT

Supreme Court of British Columbia

DECIDED

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2015 BCSC 1730 Cotter v. Cotter

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Cotter v. Cotter,

2015 BCSC 1730

Date: 20150924

Docket: E123109

Registry: Vancouver

Between:

Sylvia Marie Roman Cotter

Claimant

And

Stephen Henry Cotter

Respondent

Before: The Honourable Mr. Justice Greyell

Reasons for Judgment

Counsel for the Claimant:

J.C. Fiddes

The Respondent, Stephen H. Cotter:

In Person

Place and Date of Hearing:

Vancouver, B.C.

August 19, 2015

Place and Date of Judgment:

Vancouver, B.C.

September 24, 2015

- [1] The respondent applicant seeks to change both child and spousal support based on the fact his employment insurance ("EI") benefits have come to an end. In her application response, the claimant submits that a substantial income should be imputed to the respondent since he has not taken adequate steps to find employment.

BACKGROUND

- [2] The parties were married in 1991 and separated on April 1, 2012. They have two children, ages 20 and 16, who live with both parents on a roughly equal basis.
- [3] The claimant worked as an elementary school teacher throughout the marriage (except for brief maternity leaves) and continues in that employment. The respondent worked as a comptroller for a golf club for 15 years earning \$100,000 per year until his position was terminated shortly before the parties' April 2014 trial.
- [4] At the conclusion of the four-day trial, Mr. Justice Thompson provided oral reasons for judgment, granting the parties a divorce and determining the issues of property division as well as spousal and child support. The family assets, including the family home, the funds in various bank accounts, several RRSPs and the parties' pensions, were divided equally between the parties. The court determined that the claimant's income was \$73,369 and the respondent's income was \$19,038 from EI benefits.
- [5] Mr. Justice Thompson (in Oral Reasons for Judgment issued April 4, 2014) found that the respondent was entitled to spousal support on a non-compensatory basis alone.
- [6] Because the respondent's unemployment status was considered to be temporary and the entitlement was needs-based alone, the court did not indicate the duration for spousal support but, instead, ordered a review of spousal support on July 1, 2015.
- [7] Mr. Justice Thompson found it appropriate to order child support of \$520 per month for the youngest child, the set off amount payable to the respondent under the Federal Child Support Guidelines, SOR/97-175 [Guidelines]. He further stated at para. 34:
- [34] I make the child support order reviewable upon either party's employment status changing, and in any event, on or after 1 July 2015. Aden's status as a "child of the marriage" or otherwise can be part of that review.

- [8] A summary of his orders at para. 35 included, inter alia:
15. the parties will exchange notices of assessment on or before 15 June in each year, beginning 15 June 2014, and will forthwith advise the other of any change in their employment status;
 16. both spousal support and child support are reviewable for entitlement and quantum on a change of either party's employment status, and in any event on or after 1 July 2015;
- [9] On September 16, 2014, the respondent informed the claimant by email that his EI benefits were ending in September and asked for an increase in spousal and child support as of October 1, 2014.
- [10] On September 19, 2014, the respondent filed an application to vary both child and spousal support based on his change in financial circumstances. The application was dismissed on October 22, 2014 (indexed as S.M.R.C. v. S.H.C., 2014 BCSC 2197) by Madam Justice Ballance who found the cessation of EI benefits was not a material change justifying a variation in support. She stated at paras. 14 and 15:
- [14] Thompson J. was fully cognisant of the applicant's employment circumstances, and specifically, that he was collecting employment insurance benefits that, on the applicant's own evidence at trial, would be terminating after 38 weeks of receipt. The future cessation of his employment insurance payments was clearly known by the judge and cannot rise to the status of a material change of circumstances or evidence of substance that had only become available after the trial had finished.
- [15] The applicant's job search has not yet been fruitful and he is now both unemployed and without employment insurance benefits. He contends that this combined state of affairs was unforeseen by Thompson J. and amounts to a material change of circumstances, justifying variation of the support orders. I cannot agree.
- [16] When Mr. Justice Thompson's remarks are read in the larger context of his Reasons, it is plain that the expression of his hopeful expectation regarding the applicant's future employment was merely the underpinning for his orders concerning the prospect of a review of the support orders before July 1, 2015. A review of both types of support could be triggered before the July date by a change in the applicant's employment status, meaning, if and when he secured a new job, or could be brought as a matter of right after July 1, 2015, even if his unemployment status had not changed. That the applicant might remain unemployed until after the automatic right to a review arose was plainly contemplated by Thompson J., and does not constitute material change of circumstances or evidence of substance that only become available after completion of the trial.
- [17] I understood the applicant to suggest that his entitlement to seek a variation of support also flows from the fact that Thompson J. granted liberty to apply to Court. It does not.

- [18] The applicant bears the onus to demonstrate a material change of circumstances under the Divorce Act or one of the other two bases for variation permitted by the Family Law Act, such as the availability of evidence of a substantial nature that was not available during the trial. He has failed to discharge his onus and, accordingly, the applications for variation are dismissed.
- [11] The respondent filed another application to vary support on November 4, 2014, submitting that the claimant's income had increased as of September 2014 through the rental of rooms to foreign exchange students. This application was dismissed on December 5, 2014 by Mr. Justice Smith. In oral reasons he held that "the increase in Ms. Cotter's income will likely be within the range of increases or decreases commonly seen in these matters, and dealt with by annual adjustments that are made when the parties exchange their income tax returns" (at para. 10). Mr. Justice Smith further noted that since there was a court order specifically directing a review approximately seven months later, the matter, including a retroactive order if appropriate, would more appropriately be addressed then. He dismissed the claimant's cross-application to impute income to Mr. Cotter and, as a result, cancel support for the same reasons.
- [12] The respondent appealed these decisions, as well as the original trial decision. The Court of Appeal heard the matter on June 5, 2015 and released reasons on June 26, 2015, dismissing the appeals except on the matter of the valuation of some of the family assets.
- [13] On July 7, 2015, the respondent filed this application to change child and spousal support to amounts which would in essence reflect his Guidelines income as zero resulting from the cessation of his EI benefits.

ISSUES

- [14] I must determine the following issues:
- 1) Is this an application to vary or to review?
 - 2) If it is a variation, has there been a material change that justifies a change in child and spousal support?
 - 3) If it is a review, should it proceed as such that I am required to address the following issues: what are the parties' incomes for child support purposes; is the respondent entitled to spousal support; and, if so, what is the appropriate quantum and duration?

THE LEGAL FRAMEWORK

- [15] Mr. Cotter is a self-represented litigant. He prepared his notice of application and presented his argument relying on ss. 152 and 167 of the Family Law Act, S.B.C. 2011, c. 25 [FLA], and ss. 17(4) and (4.1) of the Divorce Act, R.S.C. 1985, c. 3 (2d Supp.). He did not rely on or refer to the law underlying the principles of a review under s. 168 of the FLA or s. 15.2(3) of the Divorce Act.
- [16] The claimant filed a response to the notice of application relying on s. 15 and s. 17 of the Divorce Act seeking the court impute a "substantial income" to the respondent for failing to take reasonable steps to find gainful employment.
- [17] The claimant says rather than spending his time searching for gainful employment, the respondent essentially has spent his time "pursu[ing] various appeals arising from this matter" and pursuing a wrongful dismissal claim against his former employer.
- [18] The wrongful dismissal lawsuit concerns an assertion by the respondent that he was improperly dismissed from employment as comptroller by his former employer, a local private golf club. He is seeking \$2 million in damages. He is representing himself in the litigation. The claimant says the respondent is intentionally unemployed for purposes related to this family litigation. She says Thompson J. contemplated the respondent would be working by the time of the review and the payment of spousal support and additional child support would be of short duration. This has been a financial burden on her and should be reviewed.

DISCUSSION

- [19] I begin by noting that it is common for litigants to confuse the provisions applicable to a "review" and "variation" of a court order. There is a distinction in the legal principles which govern an application to vary an order for support and those which govern a review.
- [20] Spousal support orders can be either varied or reviewed. Section 17(4.1) of the Divorce Act governs variations:
17. (4.1) Before the court makes a variation order in respect of a spousal support order, the court shall satisfy itself that a change in the condition, means, needs or other circumstances of either former spouse has occurred since the making of the spousal support order or the last variation order made in respect of that order, and, in making the variation order, the court shall take that change into consideration.
- [21] Section 167 of the FLA states:
- 167 (1) On application, a court may change, suspend or terminate an order respecting spousal support, and may do so prospectively or retroactively.

- (2) Before making an order under subsection (1), the court must be satisfied that at least one of the following exists, and take it into consideration:
 - (a) a change in the condition, means, needs or other circumstances of either spouse has occurred since the order respecting spousal support was made;
 - (b) evidence of a substantial nature that was not available during the previous hearing has become available;
 - (c) evidence of a lack of financial disclosure by either spouse was discovered after the order was made.
 - (3) Despite subsection (2), if an order requires payment of spousal support for a definite period or until a specified event occurs, the court, on an application made after the expiration of that period or occurrence of that event, may not make an order under subsection (1) for the purpose of resuming spousal support unless satisfied that
 - (a) the order is necessary to relieve economic hardship that
 - (i) arises from a change described in subsection (2) (a), and
 - (ii) is related to the relationship between the spouses, and
 - (b) the changed circumstances, had they existed at the time the order was made, would likely have resulted in a different order.
- [22] The "material change" test that must be met under both provisions was expressed in *Willick v. Willick*, [1994] 3 S.C.R. 670 at 688, 119 D.L.R. (4th) 405:

In deciding whether the conditions for variation exist, it is common ground that the change must be a material change of circumstances. This means a change, such that, if known at the time, would likely have resulted in different terms. The corollary to this is that if the matter which is relied on as constituting a change was known at the relevant time it cannot be relied on as the basis for variation.

- [23] *Willick* and a number of authorities interpreting and applying *Willick* were relied on by the respondent in his argument.
- [24] The focus of the analysis is on the prior order and the circumstances in which it was made: *L.M.P. v. L.S.*, 2011 SCC 64 at para. 33, [2011] 3 S.C.R. 64. The material change must generally have some degree of continuity and not merely be a temporary set of circumstances: *L.M.P.* at para. 35.
- [25] Our Court of Appeal recently clarified this test in *Dedes v. Dedes*, 2015 BCCA 194 at para. 25:
- [25] As articulated in *L.M.P.*, the test for material change is based not on what one party knew or reasonably foresaw, but rather on what the parties actually contemplated at the time the order was entered by agreement. A function of the material change threshold is to prevent parties from re-litigating issues that were already considered and rejected; in such cases, an

application to vary would amount to an appeal of the original order (see Gordon at para. 15). As was stated by L'Heureux-Dube J. in Willick at p. 734, "the diversity of possible scenarios in family law dictates that courts maintain a flexible standard of judicial discretion which does not artificially limit the adaptability of the Divorce Act provisions". See also G. (L.) v. B. (G.), [1995] 3 S.C.R. 370 at paras. 49-51 and Jakob v. Jakob, 2010 BCCA 136 at para. 40.

[Emphasis in original.]

[26] However, the court is also permitted under s. 168 of the FLA to provide for a review of entitlement and/or quantum in a spousal support order. Subsection (2) states:

(2) On review, a court, on application, may do one or more of the following:

- (a) confirm an agreement or order respecting spousal support;
- (b) set aside all or part of an agreement, or terminate an order, respecting spousal support;
- (c) make an order under section 165 [orders respecting spousal support].

[27] Similarly, under s. 15.2(3) of the Divorce Act, the court may order a condition that entitles one or both of the parties to return to court for a reconsideration of a specified aspect of the original support order. The Supreme Court of Canada clearly approved the use of review orders in Leskun v. Leskun, 2006 SCC 25, [2006] 1 S.C.R. 920, stating at para. 37 that they are justified where there is "genuine and material uncertainty at the time of the original trial" as to the spouses' finances in the near future.

[28] The Court of Appeal in Morck v. Morck, 2013 BCCA 186, 44 B.C.L.R. (5th) 235, clarified the distinction in the legal principles for variation and review at para. 17:

[17] ... [o]n an application to review an earlier order of spousal support, the applicant need not establish a material change in circumstances. Instead, the review is a hearing de novo, and treated as an initial application for support under s. 15.2 of the Divorce Act. This permits the court to adjust support in a manner that takes into account changes that may have been contemplated by the parties at the time the order was made, but were nevertheless uncertain. Because the issues on review are similar to those on an initial application, the Spousal Support Advisory Guidelines may be used for guidance: Domirti v. Domirti, 2010 BCCA 472 at paras. 32-36, 10 B.C.L.R. (5th) 281; and Tedham v. Tedham, 2005 BCCA 502 at paras. 22, 47 B.C.L.R. (4th) 254.

[29] The FLA explicitly confirms this distinction in s. 168(3) which states that in making an order after a review of spousal support, the court is not required to consider any of the matters referred to ss. 164 (setting aside agreements respecting spousal support) and 167(2) (changing, suspending or termination orders respecting spousal support).

- [30] A review clause should contain precise terms about the review: *Jordan v. Jordan*, 2011 BCCA 518 at para. 34, 345 D.L.R. (4th) 480. If it is a full review of both entitlement and quantum, the court will consider the same factors as in an initial spousal support application: *McEachern v. McEachern*, 2006 BCCA 508 at paras. 29-33, 62 B.C.L.R. (4th) 95.
- [31] It is not as common to order a "review" of a child support order as was done in this case. The usual practice is that parties exchange financial information on an annual basis and adjust child support payments accordingly. If this type of self-regulating regime is not in place, or the parties cannot agree on the appropriate Guidelines incomes, then one or both parties applies to the court under either s. 152 of the FLA or s. 17(4) of the Divorce Act to vary the child support order. The same variation test described above regarding spousal support applies to child support variation applications: *L.M.P.* at para. 32.
- [32] While not as common, reviews of child support do occur and, as stated by our Court of Appeal in *Uren v. Reambeault*, 2010 BCCA 332 at para. 25: "What was said in *Leskun* about reviewable orders for spousal support under the Divorce Act is equally applicable to reviewable orders for child support." Although I note that there is no specific provision addressing a review of child support in the FLA, as there is for a review of spousal support, I do not find it necessary to determine if it was the intention of the legislature to disallow such a review. This is because I am to assume the support order in this case was made pursuant to the Divorce Act since the order does not specify which statute applies: *Hodgson v. Hodgson*, 2014 BCSC 1372 at para. 18.

ANALYSIS

Variation of Support

- [33] Although the respondent did not use the term "variation" in his notice of application, he listed the variation provisions from the Divorce Act and the FLA as the legal basis for his application and did not mention the review provisions. Both parties argued the "material change" threshold issue before me.
- [34] The respondent relies on the cessation of his EI benefits and the modest rental income received by the claimant in particular months since September 2014 as the material changes which have occurred since the time of the initial order. He points to *Clarke v. Clarke*, 2013 BCSC 2130 at para. 13, as authority for the proposition that even a modest increase in income, such as \$6,000 in *Clarke*, can be considered a material change.
- [35] If I characterize this matter as a variation application then I must reach the same conclusion as Madam Justice Ballance in paras. 14-18 of her reasons and find that the respondent has failed to demonstrate that the loss of his EI benefits and his continued unemployment are material changes in circumstances justifying variation in support for the same reasons articulated by Ballance J.

- [36] Regarding the increase in the claimant's income related to rental income from foreign students living in her home, the evidence indicates that the child and spousal support orders were based on her 2013 Guidelines income of \$73,369.47. The claimant filed an updated F8 financial statement on July 21, 2015 which contained a copy of her 2014 income tax return. It outlines an employment income of \$66,967.11, interest and investment income of \$447.81 and rental income of \$3,555 for a total line 150 income of \$70,969.92. There was no evidence provided as to why the claimant's employment income was marginally lower in 2014. However, I note that even with the rental income of \$3,555, her 2014 Guidelines income is slightly lower than her 2013 income, which was the basis of the support order.
- [37] In her financial statement, the claimant did indicate that she would be receiving \$14,020 in income from foreign students in the future for July 2015 and September 2015 to June 2016. She marked the box next to the statement "I anticipate the following significant changes in the information set out in this financial statement:" and wrote, "My rental income fluctuates since some months I do not have full time homestay students staying with me."
- [38] In determining whether there has been a material change in circumstances which justifies a variation of the child and spousal support orders, I find that it is appropriate for me to consider only the income the claimant received in 2014, as the 2015 future income is merely anticipated and may be subject to reasonable deductions which will be reflected in her 2015 income tax return which the respondent will receive in June 2016. In addition, it is not clear if the amount of \$14,020 is the net or gross amount. Furthermore, it has already been determined that child support will adjust on an annual basis based on the parties' disclosure of income tax returns each July, as is customary. I find that the \$3,555 received by the claimant in 2014 did not increase her line 150 income; in fact, her 2014 line 150 is lower than that used in the support orders. Therefore, this modest new income source cannot be relied on as a "material change" justifying a variation in the orders.

Review of Support

- [39] However, I cannot ignore the history of proceedings in this case and the clear language in the initial support order. The trial judge found, for good reason, that a review of both child and spousal support was appropriate 15 months following the order. The respondent had lost his job of 15 years only four months earlier. The trial judge was optimistic that his "diligent efforts to find work" would pay off and that his financial circumstance at trial would be temporary. When the respondent found his employment status had not changed despite the loss of EI benefits, he applied for increased support. Two judges of this Court found the "material change" threshold was not met. One specifically found that the matter would be better resolved at a review which could be brought as a matter of right after July 1, 2015. Our Court of Appeal upheld both decisions.
- [40] This application was filed after the July 1, 2015 date. Although the self-represented respondent sought a variation rather than a review, in his pleadings and in argument, I find that the objective of the Supreme Court Family Rules to secure the just, speedy and

inexpensive determination of every family law case on its merits compels me to recognize this application as the review contemplated by Mr. Justice Thompson in the original support order. I note, also, that in the respondent's written argument, his first listed issue was "1. Should there be a review of support?" after which he quoted Mr. Justice Thompson, Mr. Justice Smith and the Court of Appeal's comments regarding a review of the order.

- [41] I find it is appropriate to proceed with this application as a review of child and spousal support, in which case, the respondent is not required to meet the "material change" threshold.

The Parameters of the Review

- [42] Mr. Justice Thompson made it clear that the review to take place on a change of either party's employment status or "in any event on or after 1 July 2015" was to be related to both entitlement and quantum of spousal and child support. He also stated at para. 34 of his reasons that the status of the parties' oldest child as a "child of the marriage" could also be part of the review.
- [43] There were no submissions regarding the oldest child's status. There were also no submissions that the set off amount of child support has ceased to be appropriate. Therefore, I will focus on the issues of the parties' income for support purposes, the respondent's continued entitlement to spousal support and, if entitlement is found, the appropriate quantum and duration of spousal support.

The Parties' Incomes

- [44] As described above, the claimant's 2014 line 150 income is \$70,969.92 which includes a net rental income of \$3,555. This is not disputed and I find it fairly represents the claimant's 2014 income for child support purposes. The claimant did indicate in her financial statement that she would be receiving \$14,020 in income from foreign students in the future for July 2015 and September 2015 to June 2016. There was no evidence regarding how much, if any, was received between January and July of this year and, as mentioned, it is not clear whether this amount reflects the gross or net income. Because of these uncertainties, I find it is appropriate for the parties to continue the process of adjusting support annually after receiving each other's income tax returns for the previous year. Therefore, I will use the claimant's 2014 income as her present Guidelines income and this anticipated increase will be recognized in an adjustment in July 2016. If the parties are unable to agree on the adjustment they will have liberty to apply to a judge of this court to determine the amount.
- [45] The respondent filed an updated F8 financial statement on July 7, 2015 which contained his 2014 income tax return. His line 150 income consisted of \$18,982 in EI benefits and \$9,600 in spousal support payments for a total of \$28,582. However, since the respondent's EI benefits ended in September 2014, he submits that his Guidelines income for support purposes ought to be \$0.

[46] The claimant submits that a substantial income should be imputed to the respondent based on the fact the respondent has not taken any steps in the past 19 months to set himself up as a chartered accountant or a book keeper, or to retrain himself or upgrade or vary his training and experience. She submits that the respondent has unreasonably limited his job search to senior positions in the accounting field and has provided only limited information about the numerous search attempts he says he has made.

[47] Section 19(1)(a) of the Guidelines addresses the imputation of income to a spouse who is unemployed:

19. (1) The court may impute such amount of income to a spouse as it considers appropriate in the circumstances, which circumstances include the following:
 - (a) the spouse is intentionally under-employed or unemployed, other than where the under-employment or unemployment is required by the needs of a child of the marriage or any child under the age of majority or by the reasonable educational or health needs of the spouse;

[48] *Donovan v. Donovan*, 2000 MBCA 80, 190 D.L.R. (4th) 696, summarized the important considerations in income imputation under s. 19(1)(a) at para. 21:

The following guidelines may be considered when determining whether to impute income. (See Dr. Julien D. Payne, *Imputing Income*, "Determination of Income, Disclosure of Income," *Child Support in Canada*, Danrab Inc., August 3, 1999.)

1. There is a duty to seek employment in a case where a parent is healthy and there is no reason why the parent cannot work. It is "no answer for a person liable to support a child to say he is unemployed and does not intend to seek work or that his potential to earn income is an irrelevant factor" (*Van Gool v. Van Gool* (1998), 166 D.L.R. (4th) 528 (B.C.C.A.)).
2. When imputing income on the basis of intentional under-employment, a court must consider what is reasonable under the circumstances. The age, education, experience, skills and health of the parent are factors to be considered in addition to such matters as availability of work, freedom to relocate and other obligations.
3. A parent's limited work experience and job skills do not justify a failure to pursue employment that does not require significant skills, or employment in which the necessary skills can be learned on the job. While this may mean that job availability will be at the lower end of the wage scale, courts have never sanctioned the refusal of a parent to take reasonable steps to support his or her children simply because the parent cannot obtain interesting or highly paid employment.
4. Persistence in unremunerative employment may entitle the court to impute income.
5. A parent cannot be excused from his or her child support obligations in furtherance of unrealistic or unproductive career aspirations.

6. As a general rule, a parent cannot avoid child support obligations by a self-induced reduction of income.

[49] The principles to be applied when a party seeks to have income imputed to the other spouse was discussed in *Marquez v. Zapiola*, 2013 BCCA 433 at paras. 36-38:

(iii) Imputing income for child and spousal support

[36] For the purposes of both child and spousal support, there is a broad judicial discretion to impute income to either or both spouses. However, the party seeking to have income imputed to the other spouse has the burden of establishing an evidentiary basis for such a finding.

[37] The test for imputing income for intentional under-employment or unemployment is one of reasonableness, having regard to the parties' capacity to earn income in light of their age, education, health, work history and work availability. A spouse's capacity to earn income will include that person's ability to work or to be trained to work. See *Van Gool v. Van Gool* (1998), 113 B.C.A.C. 200, 44 R.F.L. (4th) 314 at paras. 28-31, *Barker v. Barker*, 2005 BCCA 177, 45 B.C.L.R. (4th) 43 at para. 19, and *McCaffrey v. Paleolog*, 2011 BCCA 378, 24 B.C.L.R. (5th) 62 at para. 46.

[38] Although the legal foundation for awarding spousal support is different from that of child support (see *Kerr v. Baranow*, 2011 SCC 10, [2011] 1 S.C.R. 269 at para. 208), the test for imputing income for the purpose of fixing the quantum of support is similar. Again, the test is one of reasonableness, having regard to the same factors to be considered in imputing income for child support. However, the concept of "needs" for non-compensatory support also includes a consideration of the marital standard of living: *Myers v. Myers* (1995), 65 B.C.A.C. 226, 17 R.F.L. (4th) 298 at para. 10, *Moge* at 870, *Bracklow* at para. 36. "Means" has been interpreted to include all capital and other sources of income (*Leskun v. Leskun*, [2006] 1 S.C.R. 920 at para. 29).

[50] In my view the claimant has established an evidentiary basis to impute income to the respondent.

[51] The respondent is highly educated. He has a Bachelor of Business Administration degree and has a designation as a Chartered Accountant. As noted by Mr. Justice Thompson at para. 4 of his reasons, Mr. Cotter has worked for two accounting firms and for many years has worked as a comptroller for a number of companies including for his last employer (the golf club) for some 15 years before he was terminated from his employment. He is 55 years old.

[52] What has Mr. Cotter done to find employment knowing his EI benefits were of limited duration (38 weeks) and would cease September 20, 2014? The evidence before me is:

1. In his affidavit filed October 20, 2014 in support of an order to increase spousal support (heard by Ballance J.) Mr. Cotter deposed he had "been diligently looking for a job" and had applied for some 195 positions between April and September 2014. He set out the jobs he

said he had applied for in a list for each of those months. The list has four headings: "Date applied", "Company", "Job" and "Comment". The "Comment" column shows most of the applications appear to be sourced from or filed via the CPA and other websites. There are also several references to first names in this column (who I presume to be contact names). The jobs applied for are all related to accounting and most are for senior positions such as comptroller, senior accountant, director, internal auditor, etc.

2. In her affidavit of July 21, 2015 the claimant attached a further list of jobs provided by the respondent to her counsel for the months January to June 2015. The list is in the same format described above and lists number of applications at 29, 29, 31, 22, 39, and 39 respectively for those months. He also produced a list of interviews he had with four prospective employers in 2014 and nine interviews in 2015. The claimant provided no particulars of the result of the interviews. The positions applied for again were mostly in the range of senior accounting, management or comptroller positions.
3. Mr. Cotter deposed in an affidavit of August 6, 2015 that during two, one-week vacation periods in March and July 2015 he "made continued efforts to seek employment by applying for jobs for which I was qualified".
4. Mr. Cotter deposed in an affidavit of August 5, 2015 he had submitted an application for a practice licence to the BC Institute of Chartered Accountants and that the licence and liability insurance was issued July 31, 2015. He noted he had not been in public practice since 1991.

[53] Counsel for the claimant argued Mr. Cotter had not particularized any details of his applications for employment including what, if any, resume he sent, a copy of his applications, what responses he had had, or other details other than the brief information set out in the summaries. Counsel pointed out the average salary of the positions applied for was \$74,000 and submitted the respondent should now be looking for gainful employment at a more realistic level of remuneration.

[54] In my view there is a proper basis for imputing income to the respondent on the basis he is unreasonably restricting his search for employment to senior accounting positions. Mr. Cotter still has a number of working years available to him and there is no evidence to suggest his health would not permit him to work at a broad range of employment options. He has been able to represent himself on numerous occasions in this Court in both his family law and employment litigation. He has drafted his own pleadings in the employment law litigation.

[55] Mr. Cotter was aware his EI benefits were of limited duration. He has known for some time he would have no source of employment income when those benefits terminated. The evidence outlined above clearly establishes while he has searched for work (one might question how vigorously given the applications are all online applications), he has limited his search to positions similar to the position he formerly held and to a salary range of roughly between \$50,000 and \$110,000. His efforts have not been successful. Presumably

because Mr. Cotter has continued his search in this manner he is hopeful he will secure remunerative employment in the field and for the remuneration he is seeking. He has now applied for and been granted his licence but has not provided the court with any evidence of plans to open a private practice anytime soon or at all. He has taken no steps to retrain himself or to look for work other than in senior accounting positions.

- [56] In my view, Mr. Cotter's continued efforts to find similar employment are not steps a reasonable person who has no income but who is earnestly looking for remunerative employment would take. A reasonable person would have lowered their expectations of positions and remuneration available well before the present.
- [57] I find that the respondent's Guidelines income should be imputed at \$55,000 per annum, a sum at the low end of the range of the salaried positions applied for by the respondent.

Child Support

- [58] The set off child support amount, based on the parties' Guidelines incomes, is \$156.
- [59] The respondent seeks a retroactive change in child support to October 1, 2014 when his EI benefits ceased. If he had met the threshold of a material change under a variation, I would be compelled to consider this request. However, as this is in reality a review process any adjustment to child support will be made effective and retroactive to August 1, 2015.

Spousal Support

Entitlement

- [60] Both parties claimed spousal support. Thompson J. found Mr. Cotter had a "present need" based on his unemployment and receipt of EI and awarded his spousal support on a non-compulsory basis (at para. 19).
- [61] At para. 26 of his decision Thompson J. stated:
- [26] Bearing in mind the absence of any compensatory basis for the claim, and that neither party is enjoying a large influx of capital as a result of the property division, and the somewhat limited means of Ms. Cotter, I fix periodic spousal support at the low end of the Spousal Support Advisory Guidelines range. I note that, while I am not prepared to take Ms. Cotter's expenses in her recent financial statement at face value (as it was demonstrated in cross-examination of her that the expense sheet was not prepared with attention to detail), I am satisfied that Ms. Cotter has sufficient expenses in relation to her income that it would not be fair to impose more on her than the burden created by the low end of the SSAG. Mr. Cotter gave notice in December 2013 of his intention to seek spousal support. I order that Ms. Cotter pay to Mr. Cotter \$800 per month in spousal support, effective 1 January 2014.
- [62] I repeat what Thompson J. said at para. 27:

[27] I expect that Mr. Cotter's diligent efforts to find work will pay off. This order for spousal support is reviewable for entitlement and quantum upon either party's employment status changing, and in any event on or after 1 July 2015. In her notice of civil claim, Ms. Cotter advanced a claim for spousal support. For good reason, this was not pressed at trial. I think fairness dictates that her claim for spousal support be adjourned so that when the spousal support review order is reviewed, the court may make an order in her favour at that time (or thereafter) if circumstances make it appropriate.

[63] At para. 34 Thompson J. adjourned Ms. Cotter's claim for spousal support to allow her to advance it at the review:

And, in the meantime, I adjourn Ms. Cotter's claim for child support (again, not pressed at trial for good reason) in order to facilitate her ability to advance that claim at the time of review or thereafter if circumstances warrant.

[64] Because this is a review, rather than a variation, I must consider afresh whether the respondent is entitled to spousal support.

[65] The factors the court must take into account and objectives of spousal support orders are set out in ss. 15.2(4) and (6) of the Divorce Act:

Factors

- (4) In making an order under subsection (1) or an interim order under subsection (2), the court shall take into consideration the condition, means, needs and other circumstances of each spouse, including
- (a) the length of time the spouses cohabited;
 - (b) the functions performed by each spouse during cohabitation; and
 - (c) any order, agreement or arrangement relating to support of either spouse.

Objectives of spousal support order

- (6) An order made under subsection (1) or an interim order under subsection (2) that provides for the support of a spouse should
- (a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;
 - (b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;
 - (c) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and

- (d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.
- [66] From my review of the parties respective financial statements filed in support of this application I conclude Ms. Cotter and Mr. Cotter do not have substantially different needs and means. While Ms. Cotter now owns the former family residence her equity in the residence is some \$211,000. In addition, she has \$23,000 in unsecured debt. She has pensions and RRSPs totalling \$66,000. Her monthly expenses are declared at \$8,337.
- [67] Mr. Cotter has declared monthly expenses of \$3,300 and has assets and RRSPs of \$223,400. His assets total \$317,000 although there is a \$30,000 pending RRSP transfer to the claimant.
- [68] Given I have imputed income to Mr. Cotter at \$55,000 and found that he has the potential to earn income from employment above this amount, consistent with the objective contained in s. 15.6(2)(d) of the Divorce Act which is intended to promote self-sufficiency, I order that Ms. Cotter is no longer required to pay spousal support to Mr. Cotter effective August 1, 2015.
- [69] As Ms. Cotter has been successful on this application she is entitled to her costs.
- "Greyell J."

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