

CANADA / JUDGMENT

Johnson v. Johnson

2023 BCSC 370

COURT

Supreme Court of British Columbia

DECIDED

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2023 BCSC 370 Johnson v. Johnson

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Johnson v. Johnson,

2023 BCSC 370

Date: 20230314

Docket: E526185

Registry: Prince George

Between:

Arnette Rose Johnson

Claimant

And:

Russel Dale Johnson

Respondent

Before: The Honourable Madam Justice Forth

In Chambers

Reasons for Judgment

Counsel for the Claimant:

M.G. Miller

Counsel for the Respondent:

G.A. Petrisor, K.C.

Place and Date of Hearing:

Prince George, B.C.

February 8, 2023

Place and Date of Judgment:

Prince George, B.C.

March 14, 2023

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Introduction

- [1] This is an application under s. 17 of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp) [DA] brought by the respondent to vary his spousal support obligations as set out in the October 7, 2009 order of Justice Meiklem (the "Meiklem Order") arising from reasons for judgment indexed as 2009 BCSC 1374 (the "Trial Reasons"). The respondent seeks to terminate his obligation to pay spousal support as of October 1, 2020, or, in the alternative, an order reducing the amount of spousal support he pays on the basis of a material change in circumstances.
- [2] The respondent also seeks an order that the arrears of spousal support owing under the Meiklem Order be declared zero, or, in the alternative, be reduced. The claimant opposes to any reduction in the quantum of spousal support and seeks a declaration on the amount of arrears owed.
- [3] The respondent further seeks a declaration that he has fully paid the equalization payment, which is defined at para. 8 d. below, in favour of the claimant pursuant to the Meiklem Order. The claimant opposes such a declaration and seeks a declaration that she has not been fully paid.
- [4] Finally, the respondent seeks an order that the Registrar of Titles cancel certain charges filed against a property that the respondent has a 50% interest in.

Background Facts

- [5] The claimant was born on September 28, 1954 and is 68 years old. The respondent was born on August 9, 1955 and is 67 years old.
- [6] The parties commenced cohabitation in 1975, married on April 7, 1990, and separated on December 14, 2005. They were divorced on October 7, 2009. There is one child of the marriage, Michael Johnson, who is 42 years old. He is married and lives in Calgary.
- [7] There was a five-day trial before Meiklem J. with the primary issues relating to the valuation and division of family assets, and to the claimant's spousal support claim. At the time of the trial, the respondent was unemployed, but had previously worked as a logger and operated his own logging company. The claimant was also not working, but had previous work experience as a bank employee and bookkeeper for the parties' logging business. She was described as an "unemployed housewife" in the Trial Reasons.
- [8] The Meiklem Order included:
 - a. a divorce;
 - b. an imputation of annual income to the claimant in the amount of \$30,600 and to the respondent of \$120,000, with the respondent paying the claimant spousal maintenance in the amount of \$3,250 for an indefinite duration, commencing on September 1, 2009, and continuing on the first day of each month until further Order of the Court;

- c. the parties exchange income tax returns on an annual basis on or before May 31 of each year;
 - d. an equalization payment of \$520,215.25 by the respondent to the claimant for her interest in the family assets (the "Equalization Payment"); and
 - e. an award to the claimant of 60% of her costs, without set off (the "Costs Award").
- [9] Of significance to this application from the Trial Reasons are the following:
- [24] There was no triggering event prior to trial, which rationalizes the [claimant's] approach of treating all current assets, including land and chattels acquired by the [respondent] in the years since separation, as family assets, because there can be little doubt they were acquired with the use of admittedly family monies present at the time of separation. []
- []
- [31] []. [At the time of separation], [], the [claimant] was in possession of assets worth \$435,155.00 and the [respondent] in possession of assets worth \$303,198.00, for a total value of \$738,353.00. []
- [32] [], the [respondent] should notionally pay the [claimant] one-half of the value of the corporately held assets (\$660,510.22) less an equalization payment of \$65,978.50 in respect of personal property, for a balance of \$594,531.72.
- []
- [34] [], I will decrease the compensation payment payable to the [claimant] by 12.5% to account for her share of the effective tax burden, which Mr. Mintenko estimated at 25-30%. Thus, the compensation payment due from the [respondent] to the [claimant] is \$520,215.25.
- []
- [38] []. The parties shall each retain the assets in their possession.
- []
- [40] While the [respondent's] submission that he has the same limited education as the [claimant] is correct, there can be no doubt that, with his past business experience and many transportable skills from a successful career in the logging industry, his present and future income-earning capacity greatly exceeds that of the [claimant], even during the severe downturn of the logging industry.
- [41] I accept that the [claimant] is not totally disabled from earning income by her hypothyroidism and her diagnosis of multiple sclerosis which is currently dormant, but I find that these health matters are significant enough to adversely affect her ability to compete successfully for many types of employments open to her. Although she worked during much of this 30-year relationship, she gradually had difficulty working full time. Considering her age, limited education and work experience, she is not likely to become

fully self-sufficient, or able to maintain a standard of living reasonably close to that which the parties previously enjoyed or reasonably close to the reduced standard achievable by the [respondent], even with the benefit of the share of assets secured in this action. She was economically disadvantaged by the marriage only to the extent that child bearing and rearing of the one child of the marriage interrupted her employment outside of the home, but she has been significantly economically disadvantaged by the breakdown of this 30-year marriage. In my view, the [claimant] is entitled to spousal support on both a compensatory and a needs basis.

[]

[46] []. The [claimant's] concern is that the [respondent's] depletion of capital for living expenses and to acquire chattels and real property, rather than maintaining employment income is a further instance of an attitude of disregard for her interests such as was demonstrated by his response on examination for discovery when he was asked if the decision to retire in 2000 at age 45 was a joint family decision. He replied: "No. I made that decision. I owned the company. It was me that was doing the work, so if I decided to retire that would be my decision."

[47] [] I find the [respondent] to be an engaging, energetic individual with an enterprising spirit and many transferable skills. I will impute Guidelines income to him of \$120,000.00 per year.

[]

[54] []. I find that it is appropriate to impute at least a minimum-wage income of approximately \$15,000.00 per year to her right away. []. As to investment income, there is no evidence before me of current interest rates that are available to her if she invested her property compensation payment of approximately \$520,000. However, I will infer [] that this sum would generate interest income of at least 3%, or \$15,600 per year. I therefore, fix the [claimant's] Guideline income at \$30,600.00 per year.

[55] At the Guideline incomes I have fixed, the Spousal Support Advisory Guidelines ("SSAG") suggest a range of monthly spousal support of \$2,798 to \$3,729, with a mid-point of \$3,241. I find that the circumstances of the parties which are to be taken into account by the court in exercising its discretion within the range are largely offsetting at the present time. The [claimant's] relatively high need and multiple-factored low income earning potential are counter-balanced by the [respondent's] present reduced employment opportunities and the relatively low compensatory rationale for spousal support. I will fix spousal support near the mid-point of the range, at \$3,250.00 per month.

[56] The SSAG suggests an indefinite duration of spousal support for a cohabitation of 20 years or more, and I find that is appropriate in this case. The parties will undoubtedly have been advised by their legal counsel that either of them may apply for a variation in the event of a material change of circumstance from the facts and assumptions underlying this award. I will not specify a periodic review, but I will order that the parties exchange income tax

returns on an annual basis on or before May 31 in each year, so that they may become aware of any significant changes in each other's earnings.

[]

[58] []. I award the [claimant] 60% of her costs, without set-off.

[10] The respondent paid monthly spousal support of \$3,250 with the last payment being made in September 2020. He says that he called the claimant in September 2020 to advise her that he would not be able to continue to make support payments. He deposes that his income was relatively stable from 2009 to 2019.

[11] In respect to the Equalization Payment, the respondent's evidence in his affidavit #2 sworn October 18, 2022 (the "October Affidavit") is:

7. Pursuant to the Order, I was required to pay \$520,215.25 as a compensation/equalization payment to the Claimant for her interest in the family assets. By agreement between me and the Claimant, I paid her approximately \$310,000.00 soon after the judgment was rendered, and approximately \$70,000 annually until the balance was paid. I made payments to the Claimant after the Court gave its decision and by approximately 2012 or 2013, I had paid the compensation payments in full.

[12] In early 2010, the claimant retained Glen Nicholson of Traxler Haines, a Prince George law firm, to assist her in the collection of the Equalization Payment. A writ of seizure and sale was issued to a court bailiff, North Central Bailiffs Ltd., who attended at the respondent's residence and seized some assets.

[13] On March 24, 2011, the parties entered into a forbearance agreement (the "Forbearance Agreement"). There is a reference to a Schedule "A" that has not been produced. The salient terms are:

WHEREAS

A. On October 7, 2009, Arnette Rose Johnson ("Arnette") obtained judgement against the Russel Dale Johnson ("Russel") in this proceeding for \$520,215.25 plus costs (the "Judgment");

B. Costs have not been assessed but Arnette and Russel have now agreed to settle costs in the sum of \$34,000;

C. Russel has paid \$225,000 to Arnette on account of the Judgment as set out in Schedule "A" attached hereto;

D. Post judgment Interest has accrued on the Judgment, but Russel and Arnette have now agreed to reduce the post-judgment interest rate to 2% per annum, simple (not compounded) interest calculated from October 7, 2009;

E. The balance owing under the Judgment is \$339,771.53 as of March 15, 2011 as set out in Schedule "A" attached hereto;

F. Arnette issued a Writ of Seizure and Sale (the "Writ") to the court bailiff, North Central Bailiffs Ltd.;

G. Russel has asked Arnette to stop execution under the Writ and to forbear from enforcing the Writ.

In consideration of the promises and covenants hereinafter set forth, the parties covenant and agree as follows:

1. Russel and Arnette confirm the accuracy of the facts and matters set out above.
2. Russel will immediately pay \$55,000, to Arnette's solicitors, Traxler Haines in trust:
3. Immediately following payment of the said \$55,000, Arnette will cause North Central Bailiffs Ltd. to release all assets seized under the Writ and following such release, Traxler Haines will be at liberty to release the said \$55,000 to Arnette's credit on account of the Judgment.
4. Commencing with a payment in the spring of 2012, Russel will pay \$70,000 per year (the "Annual Payment") on account of the Judgment to North Central Bailiffs Ltd. for Arnette as follows:
 - a. Russel will pay each Annual Payment on or before spring breakup each year,
 - b. Russel will pay the Annual Payment each year until the Judgment is paid in full;
 - c. Russell will pay additional payments on account of the Judgment if he is able to do so and Russel may, at his option, prepay any part or all of the Judgment at any time without notice, bonus or penalty; and
 - d. All payments will be applied first to interest and second to principal.
5. All Annuals Payments [] shall be delivered to North Central Bailiffs Ltd. []
[]
7. Russel acknowledges and agrees that the Judgment is valid and enforceable and, except for the post-judgment interest rate, the Judgment is not released, amended or merged in any manner as a result of the execution of this Agreement and shall remain in full force and effect following the execution of this Agreement for the benefit of Arnette at her sole discretion, save and except as provided in this Agreement.
8. Arnette agrees and covenants that, provided that no event of default (see hereinafter defined) occurs:
 - a. Arnette will not take steps to enforce the Judgment; and

- b. Arnette will waive the claims against Russel for the cost and commissions charged by North Central Bailiffs Ltd. with respect to the Writ and any future costs of enforcing the judgment.
- 9. Russel covenants and agree that upon the happening of an event of default under this Agreement, then the full balance outstanding under Judgment will become immediately due and payable without notice and Arnette will then be entitled to take whatever action she then deems necessary under the Judgment.
- 10. It shall be an event of default under this Agreement if:
 - a. Russel fails to pay all or any part of the Judgment in accordance with the terms of this Agreement;
 - b. Russel fail to duly perform any covenant contained herein;
 - c. Russel fails to fulfil any terms of the mortgage described herein.

[]

- 14. In order to secure his payment obligations under this agreement, Russel will immediately execute and deliver to Arnette a mortgage of his interest in the [Birchwood Property].

[]

- [14] The respondent says that he paid \$100,000 and then transferred approximately \$200,000 from his RRSPs to the claimant. This would amount to \$300,000. The Forbearance Agreement states the amount of \$225,000 had been paid as of March 24, 2011.
- [15] The respondent claims that the agreement was that he pay a further \$55,000, plus three annual payments of \$70,000 due in 2011, 2012, and 2013, as an all-inclusive settlement of all amounts outstanding, including the costs agreed to at \$34,000 (the "Costs Award") and post-Judgment interest. He says there was no agreement to pay the bailiff's fees.
- [16] From a review of the title search on the property located at 10315 Birchwood Road in Prince George, BC (the "Birchwood Property") which the respondent jointly owned with his former common law spouse, Michele Johnson, there was no mortgage registered against it in accordance with the terms of the Forbearance Agreement.
- [17] The claimant agrees that a payment of \$55,000, and three payments of \$70,000 was made for a total of \$265,000. She claims that the last payment was received in 2014. She claims the amount outstanding on the Equalization Payment is \$30,215.25 and on the Costs Award of \$34,000, for a total of \$64,215.25. She further asserts that the bailiff's costs of \$7,500 and the actual legal fees she paid of \$43,000 is also owed. She claims the total that is owed by the respondent is \$114,715.25.

The Respondent's Situation

- [18] The respondent sets out in his October Affidavit what happened in his employment commencing in 2019:
10. In 2019, my company entered into a contract to harvest wood for Canadian Forest Products Ltd. mill in Mackenzie, British Columbia. The contract was for the harvesting of 300,000 cubic metres per year for five years. To be able to harvest that volume of timber, I had to significantly upgrade my company's equipment. The company obtained a machine for unloading trucks, a wheel loader for the mill site, a larger bull dozer, a larger and more capable buncher, a grader, larger and more skidders, new trucks, trailers, and rigging for the trucks. The cost of the new equipment was approximately \$11,000,000.00, some of which was covered by trading in of old equipment and some of which was covered by financing. In approximately December, 2019, the new equipment was acquired and working in the Ingenica area of Northern British Columbia. We worked until approximately early March, 2019, and shut down until approximately late May, 2019, for break up. We resumed operations for approximately one month, and in approximately late June, 2019, I was advised that we were shut down because the mill was closing.
 11. In the months leading up to the closure of the Canfor mill in Mackenzie, other mills in the province had shut down, and there were many logging contractors pursuing a very limited amount of work. By the time the Canfor mill in Mackenzie shut down, there was no available work that I could find. I tried to obtain a logging contract [through] the summer and could not find anything in British Columbia. In the fall of 2019, I relocated to Alberta as there was some logging work available there, although at a substantially lower rate than what was normal in British Columbia. In the fall, the area I was to work in was wet and it was not until approximately November that I was able to move the equipment into the site where we were to work. My company obtained a contract [to] harvest for 300,000 square metres of timber over the winter.
 12. In the spring of 2020, my company obtained a contract to harvest 270,000.00 cubic metres of timber per year for three years.
 13. In approximately the spring of 2020, the local mill eliminated one of three shifts because of the Covid-19 pandemic, and could not process the amount of wood we were able to harvest. By the end of the spring season, a substantial backlog of unprocessed timber had accumulated, and we were unable to harvest at full capacity. Although the management at the mill appeared confident that the shift that had been eliminated at the mill would be restored by the end of the summer, it was announced at the end of the summer the third shift would not be restored for the foreseeable future. In the fall of 2020, I was advised that my contract was being terminated because of the loss of a shift at the mill and because of my company's unstable financial situation. [] By the end of September, 2020, the company's operations were shut down. By then, I had been struggling to keep payments to creditors up, and my company's creditors began demanding that the equipment securing loans be surrendered. All of the equipment, with the exception of one pickup truck which was not encumbered, was surrendered to creditors during the fall of 2020. The company has not

operated since the end of September, 2020. My liability for personal guarantees on corporate equipment loans is well above \$1,000,000.00, but I do not know the exact amount. []

- [19] As an exhibit to his October Affidavit, the respondent has produced a letter from Weyerhaeuser Company Limited ("Weyerhaeuser") to Mid Mountain Processing Ltd. ("Mid Mountain") which was emailed to the respondent on September 16, 2020. The letter advises that Weyerhaeuser was terminating the master service agreement entered between Weyerhaeuser and Mid Mountain dated May 25, 2020. The termination was effective on September 26, 2020. The letter sets out reasons for the termination, including Mid Mountain's financial health and "a significant drop in demand from the mills that we supply, a change in business conditions that we did not anticipate when the contract was executed". Weyerhaeuser states that the only further on-site activity allowed was demobilization and removal of equipment and tools from the work sites.
- [20] The respondent explains that he is no longer able to operate the modern logging equipment since they involve electronic, rather than hydraulic, systems, and that the modern equipment rely heavily on electronic and computerized sensors and other components which operation he is not familiar with.
- [21] The respondent also states that he has the following health problems in his October Affidavit:
15. I am suffering from health problems which include the following:
- a. I have, for years, suffered from back and hip pain. I have been advised by my doctor that I have degenerative disc disease;
 - b. loss of short term memory, and recurring episodes of aphasia, during which I will lose the ability to understand or pronounce words. I have recurring episodes of aphasia since approximately February, 2019;
 - c. I have episodes where my right hand suddenly loses strength and I will lose grip or drop things which I am holding with my right hand. When those symptoms occur they usually occur a few times a day, for a few days in a row, followed by a few days when I will not have those symptoms;
 - d. my right leg will, from time to time, kick out, often causing me to fall. When those symptoms occur they usually occur a few times a day, for a few days in a row, followed by a few days when I will not have those symptoms;
 - e. I have recurring episodes of blurring or loss of vision in my left eye, for up to approximately two hours at a time;

f. I have, for approximately five years, been struggling with heart disease, including high blood pressure, and to the best of my knowledge, I am at significant risk of stroke. I had a stent inserted in approximately 2017, and have been taking a blood thinning medication since, but have been advised that I am not a candidate for heart surgery because any such surgery would be high risk. My condition has stabilized since the stent was inserted, but I continue to suffer from problems related to heart disease and blood flow.

[22] In support of his health problems claim, the respondent refers to a letter dated September 22, 2022 from Dr. G. Fraser, his family doctor. Dr. Fraser has treated the respondent since July 2002. The salient portions of this letter provide:

- In March 2003, the respondent was diagnosed with diabetes.
- In April 2007, the respondent presented with a two-year history of mechanical back pain.
- In 2016, the respondent had a heart attack and was treated with a stent in a coronary artery of his heart.
- In December 2017, this doctor became aware of the respondent's valvular heart disease.
- In February 2019, the respondent had right-sided leg sciatic pain which prevented him from walking more than 100 meters and a new episodic speech impairment.
- In October 2019, the respondent was diagnosed with a left carotid artery occlusion as the cause of episodic visual loss and losses of consciousness.
- In April 2021, the respondent had surgery to open the carotid artery.

[23] In the September 22, 2022 letter, Dr. Fraser notes the respondent is currently symptom-free, except for some memory loss resulting from the 2021 surgery. The doctor notes that the respondent's blood pressure has not been controlled adequately and there are ongoing blockages of blood supply to his brain. An angiogram was ordered and further surgery is anticipated. The respondent is at risk of another heart attack or stroke.

[24] Dr. Fraser concludes with:

All of this means that his prognosis is dismal and that disability from work is inevitable, at least intermittently, and quite likely permanently.

[25] The respondent states that he is not working, is not train to operate modern logging equipment, and cannot safely operate heavy equipment or logging trucks because of his health. At the time of swearing his October Affidavit, his sole source of income was the Old Age Security ("OAS") benefits in the approximate amount of \$634 per month. These benefits were all being attached by the Family Maintenance Enforcement Program ("FMEP") for spousal support payments. Currently, the respondent is also receiving Canada Pension Plan ("CPP") benefits in the approximate amount of \$648.59 per month. His OAS monthly supplement benefits are \$514.13.

[26] After separating from the claimant in December 2005, the respondent was in a common law relationship with Michele Johnson from 2006 to 2011. On June 12, 2006, he purchased with her the Birchwood Property and they continue to own it as joint tenants. Michele Johnson also solely owns a property at 13415 Waldina Road in Prince George, BC (the "Waldina Property"), at which the respondent lived for some period of time. According to the evidence of Brittany Johnson, Michele Johnson's daughter, the respondent was living at the Waldina Property in and around 2008. He has not lived there for the past five years. Brittany Johnson's understanding was that the respondent and Michele Johnson separated in approximately 2011.

[27] The respondent deposes that he resides in an unfinished shop on the Birchwood Property, since there is no house on this property.

[28] According to the respondent's property and his Form F8 financial statement sworn on October 18, 2022, the respondent has income, assets, debts, and expenses consisting of the following:

Employment Income:

\$0.00

Other income (OAS):

\$7,487.00

Birchwood Property (50% interest):

\$104,500.00

Vehicles:

\$20,000.00

Financial assets:

Nominal

Debts (secured):

In excess of \$1,000,000.00

Debts (unsecured):

Approximately \$136,000.00

Expenses (annually):

\$26,331.48

[29] As noted above, the respondent is now also receiving CPP benefits of approximately \$7,780 annually.

[30] The property tax assessment for the Birchwood Property in 2023 is \$247,400.

[31] The respondent's tax information from 2010 to 2013 have not been produced, contrary to the Meiklem Order. The tax information produced shows his Line 15000 (previously Line 150) income of 2014 to 2021 as follows:

Year

Line 15000

income

2014

\$274,940.00

2015

\$101,480.00

2016

\$90,000.00

2017

\$75,000.00

2018

\$93,154.01

2019

\$64,274.04

2020

\$2,497.56

2021

\$7,486.71

[32] An average income for the years 2014 to 2021 equates to approximately \$90,000. If 2020 and 2021 are removed, the average income from 2014 to 2019 equates to approximately \$117,000.

[33] In early 2021, the respondent was required to stop driving because of symptoms of his medical condition. In early spring 2022, he was medically cleared to drive, but was prevented from renewing his driver's licence because of a prohibition on renewal by the FMEP's Director of Maintenance Enforcement (the "Director").

The Claimant's Situation

[34] I turn now to the claimant's situation since the trial.

[35] The claimant says she is in poor health and provides the following summary of her health situation:

[] I currently suffer from chronic insomnia, stress, anxiety, neck pain, upper back pain, dizziness, difficulty walking and fall frequently. I use walking sticks to save me from falling. During our marriage I suffered an injury at home. My recollection is that it happened sometime in 1995. I was hit in the head with a log coming down the chute at home. I suffered a head, neck and back injuries and ever since I have required regular chiropractor treatments. []

[]

I was diagnosed with multiple sclerosis by Dr. Warren in 1996.

[36] The claimant attached a November 7, 2022 letter from Dr. Webb, her treating chiropractor, who confirmed that he has been the claimant since November 2018. He treats her approximately every ten days with chiropractic adjustments. He opines that without care, the claimant would experience persistent neck pain, upper back pain, headaches, anxiety, difficulty sleeping, and disturbances in her gait. His view was that her opportunity for employment are limited in terms of intensity and duration.

[37] Dr. Warren, a neurologist, confirmed that the claimant had an MRI of her brain and had been diagnosed in 2000 with extensive abnormalities, suggestive of multiple sclerosis ("MS"). He last saw the claimant in August 2003 and was of the opinion that her MS was in remission.

[38] In further support of her medical condition, the claimant has produced a letter dated November 27, 2022 from Dr. Maroney, her family doctor. Dr. Maroney sets out that the claimant started attending his clinic in December 2018. He carried out a clinical examination of the claimant on November 10, 2022, at which the claimant reported the following symptoms:

She is feeling very stressed as her former spouse is threatening to cut off spousal supports.

She has difficulty in walking and falls frequently.

She often has a feeling like an electric shock is going down her upper back.

She denied any visual symptoms nor any urinary incontinence.

[39] On physical examination, Dr. Maroney found no abnormalities of the claimant's respiratory, cardiovascular, abdominal, and ear, nose, and throat systems. Her cranial nerves were intact. He opines, based on her reported symptoms and examination, that the claimant is disabled due to difficulty in walking. She does not need any treatment for her MS. He notes that she is well past the age where one would expect any active inflammatory relapses.

[40] Dr. Maroney noted that the claimant's medical history includes:

- MS;
- Hypothyroidism;
- Osteoarthritis;
- Sleep disturbances;
- Rosacea; and
- A fracture right wrist that required surgery

[41] His prognosis is that the claimant is unable to work.

[42] The claimant last worked as a bookkeeper for the parties' logging company from 1990 to 1995. It appears that she has not been employed since that time. She says she has no marketable skills.

[43] According to the claimant's property and her Form F8 financial statement sworn on January 9, 2023, her income, assets, debts, and expenses are:

Employment Income:

\$0

Other income (OAS) and CPP (annually):

\$15,115

Vehicle:

\$22,000

Financial assets:

\$110,000

Pensions and RRSPs:

\$198,000

Debts (secured):

\$0

Debts (unsecured):

\$0

Expenses (annually):

\$37,752

[44] The only tax information (Line 15000) I have for the claimant is as follows:

2019

\$43,876.04 consisting of:

\$ 3,694.74 (OAS and CPP)

\$ 1,181.30 (interest income)

\$39,000.00 (spousal support payments)

2020

\$44,463.66 consisting of:

\$14,921.67 (OAS and CPP)

\$ 291.99 (interest income)

\$29,250.00 (spousal support payments)

2021

\$15,119.79 consisting of:

OAS and CPP

Issues

[45] I will address the following issues:

1. Has the respondent shown a material change in circumstances?
2. If so, what should the spousal support be varied to, and from what date?
3. Does the respondent owe any further amount for the Equalization Payment?
4. What impact does the Forbearance Agreement have on the amount owed?
5. Does the respondent owe the claimant for bailiff fees and legal expenses incurred to collect on the Equalization Payment?
6. Should the charges filed against the Birchwood Property be cancelled?
7. Is the clamant entitled to a declaration for arrears in spousal support and outstanding amounts owed for the Equalization Payment?

Issue 1: Has the Respondent Shown a Material Change in Circumstances?

Legal Principles

[46] Applications to vary spousal support orders are governed by s. 17 of the DA. In determining the amount and duration of spousal support on a variation application under the DA, the court must consider the change in the "condition, means, needs or other circumstances" of the parties (DA, s. 17(4.1)), and give effect to the objectives of spousal support (DA, s. 17(7)). Section 17 of the DA provides the following:

Factors for spousal support order

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.

[...]

- (7) A variation order varying a spousal support order should
- (a) recognize any economic advantages or disadvantages to the former spouses arising from the marriage or its breakdown;
 - (b) apportion between the former 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 former spouses arising from the breakdown of the marriage; and
 - (d) in so far as practicable, promote the economic self-sufficiency of each former spouse within a reasonable period of time.

[47] Justice Saunders in *MacCoubrey v. MacCoubrey*, 2017 BCSC 1305 provided an excellent summary of the approach to take on a variation application and the application of the leading case *L.M.P. v. L.S.*, 2011 SCC 64:

[24] In *L.M.P. v. L.S.*, 2011 SCC 64 [*L.M.P.*], Abella and Rothstein JJ., writing for the majority, held at para. 30 that the proper approach under this section is the one established in *Willick v. Willick*, [1994] 3 S.C.R. 670 [*Willick*], and *G.(L.) v. B.(G.)*, [1995] 3 S.C.R. 370. Under that approach, the original order is treated as correct and the court must first determine whether the party seeking a variation has established that, since the making of the prior order, there has been a change in circumstances that is material in the sense that the change, if known at the time of the prior order, would likely have resulted in different terms: *L.M.P.* at paras. 31-33. If the applicant has established this threshold requirement, the court must then determine what variation is necessary in light of the change in circumstances and the objectives of spousal support variation listed in s. 17(7) of the Divorce Act, and should limit

itself to the variation justified by the change: L.M.P. at paras. 47-48. See also *Zacharias v. Zacharias*, 2015 BCCA 376 at paras. 29-30; and *Powell v. Levesque*, 2014 BCCA 33 at paras. 23-25.

- [25] A material change must generally have some degree of continuity and not represent a merely temporary set of circumstances: L.M.P. at para. 35. In determining whether there has been a material change the court must consider the actual circumstances of the parties at the time of the prior order: L.M.P. at para. 34. In *Willick* at para. 21, Sopinka J. wrote for the majority 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." In separate concurring reasons in the same decision, L'Heureux-Dubé J. wrote at para. 99 that "the fact that a change was objectively foreseeable does not necessarily mean that it was contemplated by the parties."
- [26] With respect to the determination of the appropriate variation once the threshold of a material change in circumstances has been established, *Abella and Rothstein JJ.* wrote as follows at paras. 47-50 of L.M.P.:
- [47] If the s. 17 threshold for variation of a spousal support order has been met, a court must determine what variation to the order needs to be made in light of the change in circumstances. The court then takes into account the material change, and should limit itself to making only the variation justified by that change. As Justice L'Heureux-Dubé, concurring in *Willick*, observed: "A variation under the Act is neither an appeal of the original order nor a de novo hearing" (p. 739). As earlier stated, as *Bastarache and Arbour JJ.* said in *Miglin* [*v. Miglin*, 2003 SCC 24], "judges making variation orders under s. 17 limit themselves to making the appropriate variation, but do not weigh all the factors to make a fresh order unrelated to the existing one, unless the circumstances require the rescission, rather than a mere variation of the order" (para. 62).
- [48] Variation involves the application of both s. 17(4.1) and s. 17(7) of the Divorce Act. In *Hickey* [*v. Hickey*, [1999] 2 S.C.R. 518], L'Heureux-Dubé J. described the interplay between them as follows:

On an application for variation of an award of spousal support, the court must first find, under s. 17(4), that there has been a material change in the conditions, means, needs, or circumstances of either spouse (see *Moge* [*v. Moge*, [1992] 3 S.C.R. 813] at pp. 875-76, and *Walker v. Walker* (1992), 12 B.C.A.C. 137, at pp. 141-42) and in making the order, the court must take into consideration that change. As with the variation of child support orders, this change must be material, and cannot be trivial or insignificant. The factors enumerated give the court considerable discretion in determining whether a variation order is justified: see *J. Payne, Payne on Divorce* (4th ed. 1996), at p. 321. Once this threshold is passed, the court must consider the four objectives of spousal support enumerated in s. 17(7) of the Divorce Act. [para. 20]

- [49] Julien D. Payne and Marilyn A. Payne observed that "[t]here is nothing in the Divorce Act to suggest that any one of the objectives [in s. 17(7)] has greater weight or importance than any other objective" (Canadian Family Law (3rd ed. 2008), at p. 253). Rather, the objectives "operate in the context of a wide judicial discretion" and "provide opportunities for a more equitable distribution of the economic consequence of divorce between the spouses".
- [50] In short, once a material change in circumstances has been established, the variation order should "properly reflect the objectives set out in s. 17(7),... [take] account of the material changes in circumstances, [and] consider the existence of the separation agreement and its terms as a relevant factor" (Hickey, at para. 27). A court should limit itself to making the variation which is appropriate in light of the change. The task should not be approached as if it were an initial application for support under s. 15.2 of the Divorce Act.
- [48] A substantial reduction in a payor's income due to retirement can be a material change of circumstances, but not always: *Peters v. MacLean*, 2014 BCSC 990 at para. 27. The question to be asked is whether the decision to retire is reasonable in the circumstances; if it is unreasonable, as a matter of law, it will not comprise a material change in circumstances: *McPherson v. McPherson*, 2019 BCSC 933 at para. 21.
- [49] Justice Joyce explained in *Peters* when a reduction in income due to retirement can constitute a material change in circumstances:
- [29] Even though it may be argued that retirement is always an event that is foreseeable, particularly with regard to persons who are approaching what might be thought of as a "normal" retirement age when the order is made, there are a number of cases where reduction in the payor's income due to retirement has been held to be a material change of circumstances. See, for example: *Cramer v. Cramer*, 2000 BCCA 272 [Cramer]; *Burroughs v. Burroughs*, 2004 BCSC 7 [Burroughs]; *Stones v. Stones*, 2004 BCCA 99 [Stones]; and *Butler v. Butler*, 2013 BCSC 315 [Butler].
- []
- [32] In my view, it is necessary to consider the particular facts of each case to determine whether a substantial reduction in income will constitute a material change of circumstances. []
- [33] One of the considerations in deciding whether a retiring spouse can establish a material change of circumstances is whether the retirement is at a time that is in advance of when he might be expected to retire and whether it is voluntary (voluntary early retirement) or was forced upon the payor by circumstances beyond his control, including the decision of his employer or health considerations. The important consideration in cases where the payor is not forced to retire is his intention when the decision was made. As I stated in *Butler*, at para. 39:

- [39] The authorities demonstrate that the change of circumstances relied on in support of an application to vary a spousal support order must be substantial, unforeseen and continuing. Even if those three factors are established the application may be refused where the change of circumstance is voluntary early retirement or withdrawal from the work force if it was brought about with the intention of frustrating a support order or without some satisfactory reason.
- [50] As noted by the Court of Appeal in *Stones v. Stones*, 2004 BCCA 99, the circumstances of each case must be considered:
- [15] In my opinion, the question of what is a material change of circumstance may vary from one case to another. That is particularly so in relation to foreseeability. There are a group of cases which decide that retirement from employment, even at the retirement age set by the employer, or by collective agreement, can be a material change of circumstances, although clearly it would be foreseeable.
- [16] I suppose that the question should really be asked in each case of whether the circumstance in question was one which the parties must have had in contemplation and built into the framing of their agreement. Perhaps it is a change that the parties were prepared to leave out of contemplation in the agreement because of complexity or some other reason, so that when it occurs it is a material change of circumstances, even though the parties knew it must be going to happen at some time or another.

Position of the Parties

- [51] The respondent submits that a material change has occurred in that he has lost his logging business, has had all of his equipment sold, and is unable to continue to carry on any type of work due to his health condition. He says that since October 2020, he no longer has the ability to pay any spousal support payments. He is currently surviving on OAS and CPP benefits. He lives in an unfinished shop on the Birchwood property he jointly owned with his former common law spouse, Michele Johnson.
- [52] The claimant says that the respondent is facing the same situation he faced at the time of the trial, being that he was unemployed and that there has been a downturn in the logging industry. She claims there has been no material change and that the respondent can go out and find a job since he has extensive management skills. She is surviving on OAS and CPP benefits. She has had to use some of her personal assets to assist in paying expenses. She seeks the continuance of the spousal support payments.
- [53] The claimant says that the respondent has a claim to a portion of the Waldina Property on the basis that he was Michele Johnson's common law spouse. The Waldina Property was purchased by Michele Johnson in July 2005, prior to any common law relationship. I have little information to support what, if any, claim the respondent would have to this property.

[54] The claimant attended at the Birchwood Property in the spring of 2021 and took some photos of vehicles and equipment located on that property. The respondent explains that the photographs show:

[] an old Caterpillar bulldozer which is in operable, which may have a nominal salvage value, but it does not, in my view, have a significant value. I believe the three pickup trucks in the photographs are the 2017 Dodge pickup which I drive, a wreck which I use for parts, and a pickup truck, the lease for which was taken over by a former employee of my company. The two trailers picture[d] include, to the best of my knowledge, a trailer owned by our son, Michael, and one which is of nominal value.

[55] An FMEP account statement shows that from March 24, 2010 to October 11, 2022, a sum of \$424,750.02 was sent to the claimant. The FMEP records also confirmed that the amounts of \$7,025.10 and \$13,117.77 were sent in 2021 and 2022 respectively. It is likely the various payments shown in 2021 and 2022 may well include some retroactive payments by CPP, since initially the respondent's application for CPP benefits was denied. There would have been some retroactive benefits owed to the respondent from his 65th birthday.

Analysis and Decision

[56] In my view, the respondent has established a material change in circumstances since the Meiklem Order when he was 54 years old and was looking for employment. The respondent took the position that as soon as the forestry industry rebounded, he would be "on the go": Trial Reasons at para. 42. It turns out that is precisely what the respondent did. He successfully returned to the logging business until September 2020. In 2009, Meiklem J. described the respondent as "an engaging, energetic individual with an enterprising spirit and many transferable skills": Trial Reasons at para. 47.

[57] It is clear that the respondent has made valiant attempts to continue to find logging contracts after the operation of his company came to a sudden end in September 2020, but, ultimately, he has been unsuccessful. I accept that as a result of the respondent's age, being 67 years old, and his multiple health issues, he is no longer able to work in the logging industry. I accept the description of respondent's counsel that this has resulted in a "devastating" change in circumstances.

[58] This is not a case in which the respondent had decided to retire early or withdraw from the work force. The logging contract was supposed to run for a three-year term, from spring 2020 to spring 2023. There is nothing to support that the respondent has deliberately set up his affairs so that he is no longer able to pay the spousal support payments. The respondent has not intentionally put himself into the position of not paying the support payments in order to frustrate their payment, nor has he self-induced the situation he finds himself in.

- [59] I further accept that the respondent is entitled to retire from working at age 67, when considering his ongoing health conditions. I am not persuaded that he is in a position to take up some other form of employment.
- [60] This case can be distinguished from the case referenced by the claimant of *Francis v. Logan*, 2008 BCSC 1028, in which the court noted at para. 34, that: "[] the decision to take early retirement was not, in this case, dictated by medical needs, or economic exigencies but rather personal preferences and choices". This is contrasted with the situation this respondent faces. Both his medical needs and economic conditions are what has put him out of work.
- [61] In all of the circumstances of this case, I find that the respondent has met the burden of demonstrating a material change of circumstances and the spousal support order should be varied.

Issue 2: What Should the Spousal Support Be Varied To, and From What Date?

- [62] I turn now to the questions of what the variation of spousal support, if any, should be.
- [63] I accept, as does the respondent, that the claimant is still in need of support on a non-compensatory basis. That is not an issue. The issue is that the respondent is no longer capable--since October 2020--to make the spousal support payment. This case can be distinguished from the case cited by the claimant of *Vennels v. Vennels* (1993), 76 B.C.L.R. (2nd) 69, 1993 CanLII 446 (S.C.), in which Mrs. Vennels continued to need spousal support and Mr. Vennels had the means to pay, but of a lesser amount: *Vennels* at para. 51.
- [64] It is my view that to continue to require the respondent to pay the spousal support as ordered by the Meiklem Order will result in an imbalance between the parties that is so distorted that it will become unjust: *Oakley v. Oakley* (1985), 48 R.F.L. (2d) 307 at para. 16, 1985 CanLII 847 (B.C.C.A.)
- [65] The respondent's standard of living is, at this time, less than that of the claimant. The claimant lives in a house in Kelowna where she rents a room. I note that she is paying a monthly rent of \$1,550, and, at this rental cost, it is likely that the conditions of her accommodation are far better than that of an unfinished shop that the respondent lives in outside of Prince George. If the respondent was forced to move from this location, he would have to pay rental costs which currently are not provided for in his expenses as listed in his Form F8 financial statement.
- [66] At this stage of their lives, they both are receiving OAS and CPP benefits. It appears that the OAS and CPP benefits they receive are roughly equivalent.
- [67] Unfortunately, with the loss of his business, the respondent is facing a very heavy debt load, whereas the claimant has no debt.

- [68] The only asset the respondent has, aside from a vehicle, is his 50% interest in the Birchwood Property. Based on the 2023 property tax assessment, the value of his one-half interest is \$123,700 ($\$247,400 \div 2$).
- [69] The claimant has \$25,000 of cash in a Tax-Free Savings Account and a RRSP with a value of \$198,000. She also has a receivable of \$85,000 owed to her by her son, Michael, although I understand her relationship with him is distant.
- [70] I note the value of the parties' 2017 vehicles are roughly the same.
- [71] This is not the situation in which the ending of spousal support payments will result in a large disparity in the parties' standard of living: *Zacharias v. Zacharias*, 2015 BCCA 376 at paras. 54-56.
- [72] I note that in both the parties' Form F8 financial statements, there is no extravagant discretionary spending. Neither party has much room to cut expenses.
- [73] I am persuaded that, in the circumstances of this case, the respondent's obligation to pay spousal support should end on October 1, 2020. He no longer has the ability to pay any spousal support in light of his current financial situation and health condition. In my view, the claimant's financial situation is far superior than that of the respondent. Importantly, she is not faced with the severe debt load that he has and has more financial savings. They both are trying to survive on OAS and CPP benefits.

Issue 3: Does the Respondent Owe any Further Amount for the Equalization Payment?

- [74] The parties agree the amount of the Equalization Payment was \$520,215.25 as set out in the Trial Reasons.
- [75] The respondent says he had paid \$310,000 to the claimant soon after the judgement was rendered. The claimant says the amount of \$225,000 was paid as of the date the Forbearance Agreement was entered into.
- [76] I accept the evidence of the claimant since it is supported by the Forbearance Agreement. Preamble C states that the respondent has paid the sum of \$225,000, and not \$310,000. At clause 1, the parties agree to the accuracy of the facts and matters set out in the preamble.
- [77] As such, I find the amount of the Equalization Payment that the respondent had paid as of March 2011 was \$225,000. This left the sum owing of \$295,215.25. The Forbearance Agreement says the outstanding sum is \$339,771.53, which appears to include the Costs Award that the parties agreed to at \$34,000 and some post-Judgment interest.
- [78] I find, as of the date of the Forbearance Agreement, the amount owed for the Equalization Payment, with Costs Award and post-Judgment interest, is \$339,771.53.

[79] The parties agree that the respondent made one further payment of \$55,000 and three further payments of \$70,000 in 2012, 2013 and 2014. This amounts to a further payment of \$265,000 as of Spring of 2014. This results in the amount of \$74,771.53 (\$339,771.53 - \$265,000) owed for the Equalization Payment, with the Costs Award and post-Judgment interest.

Issue 4: What Impact Does the Forbearance Agreement Have on the Equalization Payment?

[80] The respondent seeks to argue that once he made the payments reflected in the Forbearance Agreement, being the \$55,000 and the three payments of \$70,000, that any further obligations ended.

[81] The Forbearance Agreement did not provide for only four payments: being one of \$55,000 and three of \$70,000. The Forbearance Agreement allowed for the annual payment of \$70,000 to continue until the Judgment is paid in full. The Judgment is defined in the Forbearance Agreement as the Equalization Payment and the Costs Award.

[82] As of Spring 2014, when the respondent made the third payment of \$70,000, the Judgment had not been paid in full. The respondent still owes \$74,771.53 for the Equalization Payment and the Costs Award.

Issue 5: Does the Respondent Owe the Claimant for Bailiff Fees and Legal Fees Incurred to Collect on the Equalization Payment

[83] The Forbearance Agreement is silent on the issue of the legal fees incurred by the claimant. It does state that if there is no default then the claimant will waive the costs and commissions charged by North Central Bailiffs Ltd. The definition of default includes the failure of the respondent to pay all or any part of the Judgment, which is the Equalization Payment and the agreed-to Costs Award, or if the respondent fails to fulfil the terms of the mortgage.

[84] On the evidence before me, it appears that the respondent is in breach of both these requirements.

[85] In my view, since the respondent is in default, the claimant is free to claim the costs and commissions she paid to the bailiffs. However, she cannot simply add that amount to the outstanding amount. I am also not persuaded that she is entitled to add the actual legal fees incurred for the hiring of lawyers in 2011. I have no evidence on the actual bailiff's costs and commissions, nor on the legal fees incurred and the reasonableness of them. In my view, the claimant would have to make an application in the family law proceeding to seek a court order that she is entitled to reimbursement with evidence in support of the amounts she is now claiming for both these expenditures. She is not entitled to simply add these to the court ordered amounts without a court order or the agreement of the respondent. This is what she has done to arrive at a figure of \$114,715.25 as being outstanding.

- [86] Without a court application nor the agreement of the respondent, the claimant has not established the right to collect the bailiff and legal fees she incurred from the respondent. Further, she has not established the quantum of the costs and commissions.

Issue 6: Should the Charges Filed Against the Birchwood Property be Cancelled?

- [87] The respondent's position is that since he should not have to pay any spousal support arrears and that he has fully paid the Equalization Payment, the various charges against the Birchwood Property, except for the one filed by the FMEP, should be removed from title.
- [88] The claimant opposes the removal of any of the charges on the basis that she is still owed arrears of spousal support and the Equalization Payment has not been fully paid.
- [89] I have found that the respondent does not owe any spousal support arrears and he is no longer required to pay the claimant any spousal support. However, he remains liable for the outstanding amount owed for the Equalization Payment and the Costs Award.
- [90] Until the respondent has paid the outstanding amount owed for the Equalization Payment and the Costs Award, it would not be appropriate to order the removal of all the charges filed against the title of the Birchwood property. I do not have copies of the various charges filed, but it appears to me that the claimant is entitled to the judgment that she has filed and renewed.
- [91] If the Notice of Maintenance Order registered on December 16, 2020 (Registration No. CA8652473) relates solely to arrears in spousal support, it should be discharged. I will not make this part of the formal orders since I have every confidence that counsel will make this arrangement with the Director if this charge relates only to arrears in spousal support.

Issue 7: Is the Claimant Entitled to a Declaration for Arrears in Spousal Support and Outstanding Amounts Owed for the Equalization Payment?

- [92] The claimant seeks a declaration that the amount outstanding for the arrears in spousal support, the Equalization Payment, Costs Award, bailiff fees, and legal expenses amount to \$184,826.36.
- [93] The respondent disputes the amount and further says that the claimant did not file an application seeking a declaration and, as such, no declaration should be granted.
- [94] I have concluded that the amount outstanding on the Equalization Payment and the Costs Award is \$74,771.53.
- [95] The FMEP records indicate that, through the FMEP, the claimant has continued to receive some payments from the respondent. In particular, the FMEP records show that since October 1, 2020, the date which I have determined the respondent's obligation to pay spousal support ended, the claimant has received a total \$21,849.40 over the following periods:
- a) October 1, 2020 to December 31, 2020: \$156.25

- b) January 1, 2021 to December 31, 2021: \$7,025.10
- c) January 1, 2022 to December 31, 2022: \$13,117.77
- d) January 1, 2023 to Feb 9, 2023: \$1,550.28

- [96] I will direct that this amount (\$21,849.40) offset the outstanding amount owed by the respondent for the Equalization Payment and the Costs Award as those payments were made after the date which I have determined the spousal support ended. In my view, this is a just approach, since the claimant should have been fully paid the Equalization Payment and the Costs Award many years ago. After this deduction, the respondent owes the claimant \$52,922.13 (\$74,771.53 - \$21,849.40).
- [97] If FMEP has collected any further sums since February 9, 2023 those monies should be returned to the respondent.
- [98] To make it clear to the parties, I will make the declaration that \$52,922.13 is the amount outstanding that is owed by the respondent to the claimant for the Equalization Payment and the Costs Award. There are no spousal support arrears owing.

Conclusion

- [99] I note that the FMEP has taken steps to prevent the respondent from renewing his driver's licence and have attached for spousal support payments from the OAS and perhaps CPP benefits the respondent received from the federal government.
- [100] Pursuant to these reasons, all steps taken by the FEMP should cease. I will not make this as an order since I have every confidence that the Director will take the necessary steps to stop issuing any further notices of attachments and to allow the renewal of the respondent's driver's licence.
- [101] I make the following orders:
1. The order of Justice Meiklem on October 7, 2009 is varied to provide that the spousal support payable by the respondent to the claimant ceases as of October 1, 2020.
 2. The respondent does not owe any arrears in spousal support to the claimant and all statutory interest and fees should be cancelled.
 3. The outstanding amount owed by the respondent to the claimant for the Equalization Payment and the Costs Award is \$52,922.13.
 4. The respondent's application to remove all charges filed against the property located at 10315 Birchwood Road in Prince George, BC is dismissed.

Costs

[102] I find that the respondent was primarily successful of the spousal support issue while the claimant was successful in establishing that the respondent has failed to fully pay for the Equalization Payment and the Costs Award. These payments should have been made many years ago. It appears that both parties failed to produce income tax returns on a yearly basis, except for 2010 when the claimant produced her income tax return in compliance with the Meiklem Order. In light of these circumstances, each party will bear their own costs.

"Forth J."

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