

CANADA / JUDGMENT

Leroux v. Leroux

2023 BCSC 333

COURT

Supreme Court of British Columbia

DECIDED

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2023 BCSC 333 Leroux v. Leroux

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Leroux v. Leroux,

2023 BCSC 333

Date: 20230307

Docket: E51895

Registry: New Westminster

Between:

Kimberly Leroux

Claimant

And

Roger Leroux

Respondent

Before: The Honourable Justice A. Ross

Reasons for Judgment

Counsel for the Claimant:

N. Hillary

Counsel for the Respondent:

C.R. Lewis

Place and Dates of Hearing:

New Westminster, B.C.

August 12, 2022

September 9, 2022

Place and Date of Judgment:

New Westminster, B.C.

March 7, 2023

Table of Contents

The Respondent's Notice of Application and the Claimant's Response. 3

Background Facts. 5

Amounts Earned and Support Paid Over Time. 11

The Respondent's Income. 11

The Claimant's Income. 12

Support Payments Made. 12

The Positions of the Parties. 14

Issues to be Decided.. 16

Legal Basis. 17

Credibility and the Available Evidence. 18

The Claimant's Credibility. 18

The Respondent's Credibility. 19

Ownership of Residence. 19

Minimizing Income. 20

Partial Disability. 21

Summary on Credibility. 22

Capacity to Earn Income. 22

The Respondent's Capacity to Earn Income. 23

The Claimant's Capacity. 25

Determination of Income. 27

Given these incomes, is there sufficient basis (i.e., material change in circumstances) to retroactively vary the respondent's obligations to pay support?. 28

Terms of the 2017 Consent Order 29

The Respondent's Circumstances. 30

The Claimant's Circumstances. 30

Has the claimant failed to take reasonable steps to become independent?. 32

Chronology of Payments and Calculations. 33

Prospective Support Payments. 37

Costs. 37

Summary. 38

- [1] This is the respondent's application to vary spousal and child support, both retroactively and prospectively. The respondent also seeks to have the court determine or impute incomes to both parties for the purpose of determining support obligations.
- [2] The claimant opposes the application to vary the respondent's support obligations. Her alternative position is that if the court sees fit to vary the support provisions set out in the separation agreement, then the respondent's income should be increased, instead of decreased.
- [3] As described in more detail below, the legal issues for me to decide are:
 - 1) What is the proper level of income to ascribe, or impute, to each party over time?
 - 2) Having determined income levels, has there been a material change in circumstances sufficient to retroactively vary the respondent's obligations to pay child or spousal support?
 - 3) If there is a sufficient basis, what retroactive variation should be ordered?
 - 4) Given the current circumstances of the parties, what is the appropriate level of child and spousal support?
- [4] I note that this matter was argued before me as an application to vary the respondent's support obligations. According to the terms of their separation agreement, which I describe below, each side would be entitled to a "review" of those same obligations. Although I have addressed the issues as a "variation", I find that the results would not be different if I had addressed them as a "review".
- [5] I address the matters in dispute below.

The Respondent's Notice of Application and the Claimant's Response

[6] The respondent seeks the following relief:

- 1) An order determining the parties' incomes for support purposes and/or imputing income to the claimant.
- 2) An order varying certain paragraphs of the consent order made October 13, 2017 (the "2017 Consent Order"), to make provision for adjusted child and spousal support during specified periods of time that are set out in the notice of application. I discuss the respondent's reasons for choosing those periods below.
- 3) Should the respondent be successful in (2), an order that any (past) overpayment of child or spousal support be set off against prospective payments of spousal support.
- 4) An order requiring the claimant to advise the respondent "forthwith" regarding changes in her employment status and income.
- 5) An order that the parties exchange updated financial statements, tax returns, notices of assessment, and other proof of income by June 1 of each year while either child or spousal support is payable.

[7] In addition, the respondent seeks costs, including special costs for the application.

[8] The claimant opposes all of the forms of relief sought by the respondent except paragraphs (4) and (5) above. The claimant says she would consent to those two paragraphs if the disclosure obligations were mutual. The respondent agrees to that condition. I make the orders sought, with mutual disclosure obligations.

[9] As I discuss below, there is significant distrust between the parties. The respondent contends that the claimant has:

- 1) not made sufficient efforts to gain employment; and
- 2) misrepresented her employment status.

[10] On the other side, the claimant submits that the respondent has misrepresented his income and unilaterally decreased both child and spousal support, in breach of the 2017 Consent Order.

[11] The respondent concedes that he made unilateral changes to his support payments, but says that he did so because the claimant was delaying his attempts to get into court to resolve the issues as they arose.

Background Facts

[12] The parties began living together in December 1997 and were married on June 10, 2000. They have two children together, born 2002 and 2005. They separated in November 2015. It was an 18-year relationship.

- [13] During the course of the relationship, the respondent operated a construction company called Fern Construction Ltd. ("Fern"). Before the couple separated, the claimant received a salary from that company. I understand that arrangement was primarily for income-splitting purposes. She was not actively involved in the business, apart from some bookkeeping activities. Although she was a shareholder, there was no value in the company after it ceased operations.
- [14] During the period that it operated, Fern was primarily under contract to one developer, a company owned by the respondent's uncle. Fern had no other employees. Fern did not operate in the manner of a typical small construction company, wherein a company bills multiple clients for work done as well as goods purchased for their projects. Instead, Mr. Leroux provided construction services to his uncle's company. Those services were billed through Fern. This arrangement allowed Mr. Leroux to split his income and provided certain other income tax advantages.
- [15] As noted, the parties separated in November 2015. On January 1, 2016, the respondent ceased working under the banner of Fern. He commenced working under the proprietorship name "Roger Leroux Construction". Again, my understanding is that he continued to perform work primarily for the same development company owned by his uncle.
- [16] On June 28, 2016, the parties signed an interim agreement for child and spousal support.
- [17] On July 1, 2016, the parties moved into separate accommodations. The two children lived primarily with the claimant. The respondent had regular parenting time.
- [18] The respondent suffered a workplace injury in February 2017. He later received a permanent partial disability pension from WorkSafeBC. His 2018 income tax return shows a payment of \$9,187 which I assume was a lump-sum payout of that pension. The respondent raises this injury as a basis for his decreased income in recent years. The claimant disputes the respondent's contention that he is not able to work on a full-time basis. She further submits that any such disability is not a material change in circumstances. The injury occurred before the 2017 Consent Order.
- [19] On August 30, 2017, the parties reached an agreement on the outstanding issues including the division of property, child support, and spousal support. That agreement was incorporated into the 2017 Consent Order, filed on October 13, 2017. A summary of the spousal and child support provisions is as follows:
- 1) the claimant had no income;
 - 2) the respondent had an income of \$113,000;
 - 3) monthly child support of \$1,644 payable by the respondent;
 - 4) section 7 expenses to be shared 35/65 to the claimant and respondent respectively;

- 5) child support was to be adjusted annually based upon an exchange of financial information on June 1 of each year, commencing in 2018;
 - 6) financial information was to be exchanged annually by June 1;
 - 7) monthly spousal support of \$2,656 payable by the respondent; and
 - 8) spousal support to be reviewed February 1, 2019, at mediation.
- [20] Both parties agree that the monthly spousal support amount represented a figure that was higher than the mid-range guideline recommendation. In fact, the monthly spousal payment was \$500 over the "High End" of the Spousal Support Advisory Guidelines [SSAG] range. There is a dispute between the parties regarding the thought process, or intention, underlying their agreement on spousal support:
- 1) The respondent says that he agreed to pay the higher amount on the understanding that it would be for a limited period of time to assist the claimant while she retrained and became financially independent.
 - 2) The claimant says that, in 2017, she believed that the respondent was not disclosing all of his income. She accepted the spousal support amount because it represented a fair amount based upon her suspicions of his actual income.
- [21] It is possible, if not probable, that both of these "intentions" existed at the time the parties negotiated the settlement. However, for my purposes, it does not matter what the parties intended. The point of a contract is the certainty of the terms.
- [22] Following the 2017 Consent Order, the respondent attempted to initiate a review of child support on June 15, 2018. The respondent requested income information from the claimant. The claimant concedes that she did not provide that information until January 2019.
- [23] The respondent filed an application seeking an order varying child support, and other relief in late 2018 (to be heard in early 2019). In that application, he took the position that his own income had declined. Although he no longer takes that position, I note that in the material supporting the respondent's application, he indicated that his income for 2017 (as reported on line 150 of his income tax return) was \$86,190.47. Obviously, that income figure would have represented a significant reduction from the \$113,000 referenced in the 2017 Consent Order.
- [24] As discussed below, the claimant submits that the \$86,190.47 figure was derived by deducting numerous "business" expenses that may have represented personal expenses. Notably, the respondent no longer takes the position that those expenses were proper deductions for the purpose of calculating income for support purposes. I noted above the measure of distrust between the parties. I infer that some of the claimant's distrust derives from this attempt by the respondent to reduce his income and, thereby, reduce his support payments.

- [25] The respondent's application went ahead on January 25, 2019 before Justice G.C. Weatherill who ordered that the parties attend mediation. That mediation occurred on February 25, 2019. No settlement was reached.
- [26] The respondent's application to vary child support was reset for May 1, 2019. In his material for that application, the respondent proposed that his income should be calculated based upon his annual income, less the amount he remits in Goods and Services Tax ("GST"). His affidavit #7 states:
10. My hourly rate is \$60.00. If I am able to work eight hours per day, five days a week, and fifty weeks per year, my gross business income will be \$120,000.00. I have to pay 5% GST on my income or \$6,000. This brings my theoretical maximum income to \$114,000 per year.
- [27] I return to address that position below.
- [28] The claimant suffered a significant mental health event and was hospitalized under the Mental Health Act, R.S.B.C. 1996, c. 288 [MHA] in mid-April 2019. On April 17, 2019, she advised the respondent that he would have to be the primary care provider for the children because of her health issues. Thereafter, the younger child lived with the respondent from May-December 2019. Due to the claimant's condition, the respondent's application, scheduled for May 1, 2019, did not proceed.
- [29] Presumably, in response to these two events, commencing in July 2019, the respondent unilaterally adjusted the spousal and child support. He ceased paying child support for the younger child (who resided with him) and paid \$889 for the older child. I discuss the adjustments he made below.
- [30] When the younger child returned to the claimant's residence (as of January 2020), the respondent resumed paying child support for him in the amount required by the 2017 Consent Order.
- [31] During the period that is in dispute (May 2019-present), the respondent paid the child and spousal support amounts together (in one deposit each month). The 2017 Consent Order provided for this single payment. However, because of the adjustments made by the respondent, there is a dispute regarding the attribution of those payments to either child support or spousal support. The claimant submits that the proper attribution would put all payments toward child support, until the respondent's obligations toward child support are satisfied. Any remaining payments would be attributed to spousal support. The respondent accepts this general principle, but notes that he was the primary care provider for the younger child from May-December 2019. He says that his obligation to pay child support should be adjusted before any such attribution calculation is made. I deal with that issue below.
- [32] The respondent takes the position that the claimant has not taken reasonable steps to become employed. The claimant says that, after her release from hospital, she spent the remainder of 2019 in counselling and taking courses. During 2019, the claimant obtained her

high school diploma and completed a business administration course. She applied for, and obtained, a part-time position with a major life insurance company starting at the end of the year. Unfortunately, that employment terminated in June 2020 after the onset of the COVID-19 pandemic.

- [33] The claimant also returned to the position of primary care provider for the children in December 2019. Of note, one of the children suffered mental health issues in 2020 before moving out of the claimant's residence to pursue education in February 2021.
- [34] In late 2019, having obtained employment with the life insurer, the claimant produced an updated financial statement in which she indicated that she anticipated obtaining part-time employment in 2020, with the hope that it would progress to full-time employment in 2021. That financial statement prompted the respondent to alter his support payments in the amounts discussed below. However, his adjustments did not consider the prospect of the claimant losing her job. The claimant then lost her job in June 2020.
- [35] Following the termination of her employment in June 2020, the claimant received the Canada Emergency Response Benefit ("CERB"). Her total income for 2020 was \$23,674. Also, during 2020, she suffered carpal tunnel syndrome requiring surgery.
- [36] In 2021 when the CERB benefits ended, the claimant was eligible for, and received, Employment Insurance Benefits ("EI"). She also had periods of casual employment. Her total income for 2021 was \$22,885.
- [37] The older child started college in the fall of 2020 and commenced residing in her own apartment in February 2021. The respondent made the unilateral decision to pay child support (\$800 per month) directly to that child starting February 1, 2021. This decision is described in the notice of application as follows:

On March 3, 2021 the respondent notified the claimant that he would pay [the first child's] child support directly to [the first child]. The respondent paid the claimant \$1,180.00 in spousal support and \$838.00 in child support, for a total of \$2,026.00 per month.

- [38] From 2020 to the present, the respondent has paid the (unilaterally adjusted) child and spousal support on a monthly basis.
- [39] In his notice of application, the respondent notes that the claimant deposed that she had been unable to work due to carpal tunnel syndrome. However, in 2022, the respondent received photographs from a colleague showing the claimant working at a construction site in May and June 2022. This discovery further inflamed the distrust between the parties.
- [40] The claimant concedes that she has worked, and that she failed to disclose this information. She states that she was forced into this part-time work in order to make ends meet. She notes that she is living in a 600-square-foot basement suite with the couple's son, who is in grade 12. She says she has been forced to work because the respondent underpaid the spousal and child support. The claimant says that she has worked very few hours in this

capacity. However, she did not provide any evidence or calculation of the income she earned.

[41] The claimant also submits that the respondent is knowingly under-reporting his actual income. I discuss her submissions below.

Amounts Earned and Support Paid Over Time

[42] For convenience, I note that the 2017 Consent Order provided for the respondent to pay:

- 1) child support of \$1,644 per month; and
- 2) spousal support of \$2,656 per month.

[43] It is those provisions of the 2017 Consent Order that the respondent seeks to vary, both retroactively and prospectively. The respondent's unilateral variance began in July 2019.

The Respondent's Income

[44] In his materials for the current application, the respondent stated that his gross business income (after subtracting GST) was:

- 1) \$116,370 in 2016
- 2) \$112,845 in 2017
- 3) \$113,000 in 2018
- 4) \$111,760 in 2019
- 5) \$107,375 in 2020
- 6) \$101,520 in 2021
- 7) \$109,620 in 2022 (estimated)

The Claimant's Income

[45] The claimant acknowledges that she has received the following amounts of income:

- 1) 2019 Nil
- 2) 2020 \$23,674 (consisting of employment income + CERB)
- 3) 2021 \$22,885 (consisting primarily of EI)

[46] The claimant acknowledges that the respondent would not have known about the income earned in 2020 and 2021 until the preparation for this application.

[47] At the time of the hearing, the claimant was in a training program from which she planned to graduate in February 2023.

[48] As noted above, the claimant also had some employment earnings in 2022.

Support Payments Made

[49] The unilateral adjustments made by the respondent were as follows:

- 1) In July 2019, he reduced the:
 - i. child support from \$1,644 to \$899 per month (because the younger child was living with him), and
 - ii. spousal support from \$2,656 to \$1,663 per month.
- 2) From February 1, 2020, to January 31, 2021, the respondent resumed paying child support for two children, but further decreased the spousal support:
 - i. child support increased to \$1,565 per month, and
 - ii. spousal support decreased to \$1,188 per month.
- 3) The respondent made this unilateral change based upon his understanding that the claimant would be employed, part time, at the life insurance company and that his obligation would be based on his gross income less GST. As set out in the respondent's notice of application:

On February 1, 2020, the respondent advised the claimant that he would begin paying \$1,565 in child support \$1,188 in spousal support based on the respondents 2019 gross business income less GST and the claimant's income from part-time employment.

- 4) From February 1, 2021, to May 31, 2022, the respondent:
 - i. increased the monthly child support to \$1,638, but paid \$800 per month directly to the older child and \$838 in respect of the younger child; and
 - ii. continued to pay \$1,188 per month in spousal support.
- 5) In 2022, the respondent:
 - i. paid \$838 per month in child support to the claimant for January through May;
 - ii. paid \$800 per month directly to the older child for January through May; and
 - iii. paid \$1,644 per month in child support for June-August (because the Family Maintenance Enforcement Program ("FMEP") required him to do so).

[50] That was the information available when the hearing came on in September 2022.

The Positions of the Parties

[51] The respondent notes that he has been attempting to schedule an application to determine the rights and obligations of the parties since 2019. This hearing constitutes his third attempt. The first two attempts were diverted either by the claimant or by the court.

[52] The respondent submits:

- 1) that the evidence of the claimant working at a construction site establishes that she swore a false affidavit;
- 2) the claimant has not taken sufficient steps to become employed; and
- 3) on that basis, he seeks an order imputing income to the claimant in the amount of \$41,600 per year commencing in July 2019.

[53] The respondent acknowledges that he has resorted to "self-help" remedies by reducing support payments. However, he says that his unilateral adjustments were justified, based on the reduction in his income and because of the income that should be imputed to the claimant.

[54] According to his own calculation, and the strict terms of the 2017 Consent Order, from the beginning of 2019 to the date of this application, he has:

- 1) underpaid child support by \$13,501, and
- 2) underpaid spousal support by \$50,041.

[55] However, he submits that, applying the appropriate guideline support amounts, the court should:

- 1) find that his income was lower than \$113,000 in each year from 2019 to the present;
- 2) impute income to the claimant of \$20,800 in 2019 and \$41,600 in the years 2020-2022; and
- 3) on the basis of those figures, the court should declare that:
 - i. he has over-paid child support by \$2,243, and
 - ii. he has over-paid spousal support by \$20,863.

[56] In response to the respondent's submission, the claimant submits that:

- 1) her income is now fully disclosed;
- 2) the respondent's income is not fully disclosed on his income tax returns or financial statements;
- 3) the respondent is capable of earning, and has earned, in excess of his current declared income;
- 4) thus, there have not been any material changes in the respondent's financial position (unless his income is adjusted upward);
- 5) hence, the respondent is significantly in arrears in respect of his support obligations.

[57] The claimant's primary position is that the respondent's annual income is higher than \$113,000. I address that submission below. However, the claimant's alternate (back-up) position is that his support obligations should:

- 1) factor in her own actual income in 2020 and 2021 (primarily CERB and EI);
- 2) allow for a reduction in child support during the period when the younger child lived with the respondent (May-December 2019);
- 3) be based upon the respondent earning an actual income of \$113,000.

[58] On that basis, she submits that the respondent:

- 1) is not in arrears in child support (because she attributes all support payments as being paid toward child support until that obligation is fully paid), and
- 2) is in arrears of spousal support by \$50,818.

[59] I note that these calculations offered by the claimant account for her actual income as declared in 2020 and 2021. Hence, her calculations are not based upon the 2017 Consent Order. In its original form, that Order would have required higher support payments by Mr. Leroux because the claimant's income was set at zero.

[60] As noted, the claimant also submits that the respondent is capable of earning significant additional income. She says that if income of \$120,000 is attributed to the respondent, then the spousal arrears increase to \$73,525.

Issues to be Decided

[61] In my discussion below, I consider the issues in the following order:

- 1) Credibility and the available evidence.
- 2) Based on the evidence, and any inferences drawn from it, what are the parties' incomes for determining child and spousal support?
- 3) Given the answer to 2), is there sufficient change in circumstances to retroactively vary the respondent's obligations to pay child and spousal support?
- 4) If there is a sufficient basis, what retroactive variation should be ordered?
- 5) Given the current circumstances of the parties, is there sufficient basis to vary the respondent's prospective obligations to pay child and spousal support?

Legal Basis

[62] The respondent's application relies on s. 17 of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp). That section contains several applicable provisions relating to retroactive and prospective variation, which I set out below:

Variation order

17 (1) A court of competent jurisdiction may make an order varying, rescinding or suspending, retroactively or prospectively,

- (a) a support order or any provision of one, on application by either or both former spouses;

Factors for child support order

- (4) Before the court makes a variation order in respect of a child support order, the court shall satisfy itself that a change of circumstances as provided for in the applicable guidelines has occurred since the making of the child support order or the last variation order made in respect of that order.

Factors for spousal support order

(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.

Guidelines apply

(6.1) A court making a variation order in respect of a child support order shall do so in accordance with the applicable guidelines.

Court may take agreement, etc., into account

(6.2) Notwithstanding subsection (6.1), in making a variation order in respect of a child support order, a court may award an amount that is different from the amount that would be determined in accordance with the applicable guidelines if the court is satisfied

- (a) that special provisions in an order, a judgment or a written agreement respecting the financial obligations of the spouses, or the division or transfer of their property, directly or indirectly benefit a child, or that special provisions have otherwise been made for the benefit of a child; and
- (b) that the application of the applicable guidelines would result in an amount of child support that is inequitable given those special provisions.

Reasons

(6.3) Where the court awards, pursuant to subsection (6.2), an amount that is different from the amount that would be determined in accordance with the applicable guidelines, the court shall record its reasons for having done so.

Consent orders

(6.4) Notwithstanding subsection (6.1), a court may award an amount that is different from the amount that would be determined in accordance with the applicable guidelines on the consent of both spouses if it is satisfied that reasonable arrangements have been made for the support of the child to whom the order relates.

Priority to child support

(6.6) Section 15.3 applies, with any necessary modifications, when a court is considering an application under paragraph (1)(a) in respect of a child support order and an application under that paragraph in respect of a spousal support order.

Objectives of variation order varying spousal support order

- (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.

Credibility and the Available Evidence

[63] As noted, there is significant distrust between the parties. Each party submits that there is sufficient evidence, on the record, to make adverse credibility findings against the opposing party.

The Claimant's Credibility

[64] The respondent submits that I should not accept the claimant's affidavit material as being reliable or credible. He submits:

- 1) His affidavit material contains photos of the claimant working at a construction site in May and June 2022.
- 2) The claimant's affidavit material (filed before the disclosure of the respondent's photographic evidence) does not disclose any income from employment.

- 3) After he disclosed the photographs, the claimant filed a further affidavit claiming that she maintained meticulous records of the small amounts that she earned. However, she chose not to include those records in her affidavit material.
- [65] On that basis, the respondent submits that the claimant's affidavit evidence cannot be relied upon as truthful or accurate.
- [66] I accept the respondent's submission on this issue. The photographs submitted by the respondent show the claimant at work at a construction site. The exact nature of her work is not clear. However, it is evident that, as of mid-2022, she had the capacity to work, at least part time. Further, it appears that she had the capacity to work in an occupation that exceeds the definition of "sedentary".
- [67] I discuss the implications of that finding below.

The Respondent's Credibility

- [68] In response to the respondent's application, the claimant points to evidence of several inaccurate statements in the respondent's affidavits. She submits that, in combination, these inaccuracies indicate that Mr. Leroux is earning more than the amount reported on his income tax returns or Form F8. The claimant points to the following examples.

Ownership of Residence

- [69] In his affidavit # 6, filed January 24, 2017, Mr. Leroux stated that he was renting his current residence and he did not have a "rent to own" agreement for the purchase of that residence. That residence was owned by the respondent's uncle, who is also the respondent's sole source of construction work.
- [70] In later document disclosure, the respondent produced a contract of purchase and sale for the same residence dated January 1, 2017 (i.e., prior to his affidavit #6). The respondent has since completed the purchase of that residence from his uncle.
- [71] It is clear that Mr. Leroux was renting the residence and he now owns it. It is further clear that his affidavit denied any "rent to own" agreement.
- [72] In my assessment, Mr. Leroux's statement regarding the absence of an agreement could be seen as technically true. It was not a "rent to own" contract. It was a contract to purchase that was not executed until a later date. In the interim, he paid rent. However, in my opinion, the statement in his affidavit #6 discloses a lack of transparency on the respondent's part.

Minimizing Income

- [73] When the respondent first applied for a variation of support obligations (in late 2018), he relied on affidavit material indicating that his income for taxation purposes in 2017 was in the range of \$86,000. He argues that this amount constituted a material change from his prior income of \$113,000 (which was the figure used for the 2017 Consent Order).
- [74] In order to reach an income of \$86,000, the respondent employed a number of deductions that may not have been business-related.
- [75] As discussed above, the respondent's first application did not proceed on its merits in 2019. (The judge ordered the parties to proceed to mediation.) Hence, this evidence was not considered by any judge. Further, to be clear, the respondent no longer relies on those questionable deductions. Mr. Leroux's position (on this application) is that he no longer asserts that he is entitled to the deductions that he claimed in late 2018. However, he does not concede that those deductions were improperly claimed. He simply says that he is no longer relying on those deductions.
- [76] In my opinion, the inference is clear that, when preparing for the 2019 application, Mr. Leroux attempted to minimize his income. He included a number of deductions from his gross income, despite the fact that those items should reasonably have been considered personal expenses. In my opinion, his affidavit material in support of that application displays, once again, a lack of transparency.
- [77] The claimant further notes that after the mediation failed, Mr. Leroux brought the matter back before the court. In that second attempt (and in the application before me), Mr. Leroux submitted that his income should be based upon his gross billings through his proprietorship, less the amount he remits in GST payments. That amount would be \$113,000 less 5%.
- [78] The claimant (quite correctly in my opinion) submits that GST is billed by Mr. Leroux in addition to his hourly rate. A quick review of the invoices submitted by Mr. Leroux confirms that the claimant's submission is correct. He bills at \$60/hour plus GST. Hence, any amount that he remits for GST is in excess of the \$113,000 that he earns from his proprietorship.
- [79] I accept the claimant's submission on this point. I find that Mr. Leroux, on at least two occasions before this Court, attempted to minimize his income by claiming expenses and taxes that are not properly deducted from his gross income.

Partial Disability

- [80] The claimant also argues that the respondent falsely attempts to reduce his actual income by claiming that he is partially disabled. As noted above, the respondent claims that he can only work limited hours because of a workplace injury occurred in 2017. He suggests that his hours have been reduced from 40 hours per week to 35 hours per week.

[81] The claimant submits there are four significant problems with the respondent's assertion of partial disability:

- 1) The injury occurred prior to the date of the settlement agreement (reached August 2017).
- 2) His invoices through 2020 indicate that he continued to work 40 hours per week. Although the hours on his invoices decrease in 2021 (to 35 hours per week), the respondent submitted 24 invoices "bi-weekly" invoices for the year. A year divided by bi-weekly invoices would, of course, require 26 invoices. Hence, the inference is that the invoices were not an accurate representation of his worked hours.
- 3) To the extent that WorkSafeBC BC believes that he is permanently partially disable, Mr. Leroux received compensation for that loss.
- 4) Mr. Leroux has made extensive renovations to his (recently purchased) residence. Hence, the evidence establishes that he is capable of performing his own (paid) work duties as well as his (unpaid) home renovations.

[82] I accept the claimant's submission on this point. In my opinion, there is insufficient evidence to establish that Mr. Leroux's capacity to earn income has been diminished by any workplace injury. Further, there is no change in circumstances since the date of the 2017 Consent Order.

Summary on Credibility

[83] Thus, on my assessment of the credibility of the claimant and the respondent, I am left with the distinct impression that each side has actively attempted to understate his or her income. However, as discussed below, because the respondent's income is significantly higher, his attempts have greater impact on the positions taken by each side.

Capacity to Earn Income

[84] In addition to questioning the other party's actual income, each side also submits that the other party has the capacity to earn significantly more income. In this regard, each side submits that the other party is intentionally under-employed and that I should impute additional income to the opposing party.

[85] The tests for imputing income for spousal and child support were stated in *Marquez v. Zapiola*, 2013 BCCA 433 at paras. 37-38:

[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), 1998 CanLII 5650 (BC CA), 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), 1995 CanLII 2274 (BC CA), 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 SCC 25 (CanLII), [2006] 1 S.C.R. 920 at para. 29).

The Respondent's Capacity to Earn Income

[86] The claimant argues that during their relationship, Mr. Leroux billed as much as \$170,000 in a single year. She acknowledges that he worked a significant amount of overtime to reach that plateau. However, she points to his invoices and submits that it is odd that Mr. Leroux has earned the exact same hourly wage, and same number of hours, for each of the past five years.

[87] The claimant submits that the respondent either does, or could, earn significantly in excess of \$113,000 per year. She says (and he acknowledges) that he has been "head-hunted" by other construction companies. The amount of those offers is not known (by either party), but it stands to reason that any offer to pry Mr. Leroux away from his current situation would be based on an increase in income (or some other benefit). The inference I draw is that Mr. Leroux has valuable skills and experience that are sought-after in the construction industry. However, Mr. Leroux chooses to stay with his uncle's company. The claimant submits that his refusal to move to a different contractor indicates one of two things:

- 1) he could make more income at his current position; or
- 2) he is, in fact, making more income from his uncle's company, but not disclosing it.

[88] The claimant submits that there is evidence that Mr. Leroux receives non-wage benefits from his uncle/employer. She submits that those benefits include:

- 1) a loan of \$60,000 from his uncle to pay off a debt to Canada Revenue Agency;
- 2) the transfer of title to Mr. Leroux's current residence at a price that was below market. As noted above, that transfer was backdated to 2017. The purchase price was listed as \$380,000. On an application for a loan in March 2022, Mr. Leroux listed the value of the home (after substantial renovations) at \$700,000. The claimant submits that this transfer represents the uncle (quasi-employer) providing a non-wage benefit to his nephew (the respondent);

- 3) the claimant is aware of the respondent taking vacations that appear to exceed his financial wherewithal. When asked about these vacations, the respondent indicated that they were paid by someone else. The claimant submits that the inference is that the uncle is paying for the vacations as a form of non-wage benefit to the respondent.

[89] On the basis of these allegations, the claimant submits that Mr. Leroux:

- 1) either earns income and benefits that exceed the amount declared in his financial disclosure, or
- 2) is capable of earning higher income (by changing jobs),

but he chooses not to change his position because of the non-wage benefits he receives from his uncle.

[90] Although the claimant's submissions raise significant concerns in relation to the respondent's capacity to earn higher income, I am not in a position to make that finding on the evidence before me. In my opinion, the respondent's current earnings are "reasonable" as that term is discussed in the Marquez decision. He is not deliberately underemployed. Although there is evidence that he might be able to earn more income if he switched employers (or asked for a raise), there is no firm evidence of what that increase might be. It is clear that he has a strong working relationship with his uncle. Mr. Leroux is 60 years old. In my opinion it is reasonable for him to value the certainty of his relationship with his uncle over the possible benefits of a new employment-like relationship.

[91] On that basis, I decline to impute any higher income to the respondent. I find that his income has been \$113,000 annually and that income is reasonable.

The Claimant's Capacity

[92] The respondent submits that the claimant has not taken reasonable steps to become independent in the period following the 2017 Consent Order. As noted above, he says that the consent order assumed that she would become employed soon after 2017. She has not become self-sufficient in the five years since that consent order. On that basis, he submits that I should impute income to her. He submits that an amount of \$40,000 per year would be appropriate.

[93] The claimant's position is that she has taken reasonable steps to achieve financial independence:

- 1) Prior to the relationship with Mr. Leroux, she worked as a server in a pub.
- 2) During the course of the marriage, she did not work and focussed on raising the couple's two children.
- 3) The settlement agreement was reached in the latter half of 2017. At that time, she did not have a high school diploma.

- 4) In the period following separation, she returned to school to pursue her high school diploma.
 - 5) In 2019, she was afflicted by serious mental health problems. Those problems necessitated her hospitalization under the MHA in mid-April, 2019. Despite those problems, she completed her high school diploma and took business courses prior to the end of 2019.
 - 6) Those courses led her into part-time employment with the life insurer at the end of 2019.
 - 7) In 2020, she worked part time with the life insurer until she was laid off following the onset of the COVID-19 pandemic. Thereafter, she received CERB benefits. All of her income was declared.
 - 8) She also developed a carpal tunnel condition that prevented her from obtaining alternate sedentary employment. She underwent surgery for that condition in October 2021. She then suffered an infection that required further hospitalization. She says that she cannot return to administrative work because of her ongoing wrist problems.
 - 9) In 2021 she had some casual employment and declared the income (about \$2,000). The majority of her income in 2021 consisted of EI benefits.
 - 10) She acknowledges that she has had a small amount of income from working at a construction site in 2022. She notes that the couple's younger child also works at that site. She says that she required the income because of the reduced support paid by the respondent.
- [94] The claimant notes that in 2022, she pursued job-search assistance through WorkBC, a province-run agency that aims to connect workers with employers. WorkBC determined that Ms. Leroux was not able to return to administrative work and that she qualified for retraining (funded by the province). She started a course to become an education assistant in August 2022. She hopes to complete that course in February 2023. She then hopes to achieve full-time employment either in the remainder of the 2022-2023 school year or in September 2023. She submits that any variation of the 2017 Consent Order should proceed from that starting point.
- [95] The claimant notes that she is living in a small basement suite with her son. She has difficulty making ends meet. She would be happy to be financially self-sufficient, but she has not been able to achieve that goal. She notes that the respondent's decision to unilaterally reduce support payments has negatively affected her psychological well-being which, in turn, delayed her ability to obtain full-time employment.
- [96] As noted above, the test I must apply to the claimant is one of reasonableness. Despite the respondent's frustration with the claimant's failure to achieve economic self-sufficiency, I am unable to find that she has been intentionally underemployed. Instead, I find that she has attempted to obtain employment, but she has faced challenges, including her mental health difficulties, the COVID-19 pandemic, and her carpal-tunnel condition. I am satisfied

that she has always been working toward the goal of economic self-sufficiency, despite the fact that she remains unemployed some five years after the 2017 Consent Order.

[97] On that basis, I find that the claimant's income, as declared on her income tax returns, is a reasonable approximation of her capacity to earn income in those years. Further, given that she is currently in a course of study, her capacity to earn income will increase, if and when she achieves employment following her diploma.

Determination of Income

[98] I noted at the outset that there is significant distrust between the parties in respect of their earnings and earning capacity. Each side submits that the other has undeclared income and that the other is capable of earning higher income. However, based on my analysis above, I am unable to find that either party has either failed to declare significant income (at this hearing) or that they have been intentionally underemployed.

[99] Based upon the evidence, as opposed to the suspicions, the most accurate finding I can make is as follows:

- 1) Mr. Leroux's income since 2017 has been \$113,000 per year.
- 2) Ms. Leroux's income:
 - i. for 2018 and 2019, was zero;
 - ii. for 2020 and 2021, is the amount declared on her income tax return;
 - iii. for 2022, will be close to zero.

Given these incomes, is there sufficient basis (i.e., material change in circumstances) to retroactively vary the respondent's obligations to pay support?

[100] In order to answer this question, I need to review the following:

- 1) The terms of the 2017 Consent Order.
- 2) The incomes and circumstances of each party.
- 3) Whether the failure of the claimant to become economically self-sufficient represents a change of circumstances.

[101] As noted above, the 2017 Consent Order provided for:

- 1) child support in the amount of \$1,644 per month "for so long as the Children are children of the marriage";
- 2) spousal support of \$2,656 per month "until further agreement or court order." That figure represented the "High" end of the SSAG range plus \$500 per month.

Terms of the 2017 Consent Order

[102] For the respondent's application to vary these amounts, I am focussed on the provisions of the 2017 Consent Order relating to review or variation of the support provisions. I note the following provisions:

10. For the purpose of adjusting child support each year, the parties will exchange copies of their income tax returns, pay slips and such other documents necessary to establish income by June 1, of each year and the parties will also exchange their notices of assessment and any re-assessments within 7 days of receiving them, and child support and section 7 expenses will be adjusted as at July 1 of each year based upon this exchange.
11. Commencing September 1, 2017 and continuing on the 1st day of each and every month thereafter until further agreement or court order, the Respondent will pay \$2,656.00 per month to the Claimant for her own support.
13. On February 1, 2019, spousal support will be reviewed, first at mediation and failing resolution at mediation, by court application.
14. Starting July 1, 2018, and annually thereafter, the Respondent will provide 12 post-dated cheques to the Claimant for child and spousal support as adjusted, taking into consideration any changes to child support based upon the Respondent's guideline income and agreed upon or ordered adjustments to spousal support.

[103] I note that, in respect of her response to this application, the claimant concedes the following points:

- 1) The respondent is entitled to an eight-month adjustment to child support for the period May-December 2019 when the younger child was living with the respondent.
- 2) She earned income in 2020 and 2021 which would require an adjustment of the spousal support payments. I find these years of income to be a material change in the claimant's circumstances.
- 3) The respondent paid child support directly to the older child following February 2021.

[104] I accept that those are reasonable adjustments.

[105] I do not consider the removal of the payment of child support for the younger child (May-December 2019) to be a material change. I note that this "savings" for the respondent could lead to a higher spousal support payment during this period. I decline to make that adjustment.

[106] As noted above, the respondent submits that the agreement relating to spousal support (that he was to pay \$500 per month above the SSAG spousal support) was supposed to be a time-limited obligation. He submits that the parties arrived at this figure on the basis that the claimant would be getting on her financial feet in short order. However, the claimant disputes that underlying reasoning. I see nothing in the 2017 Consent Order addressing that

issue. The spousal support is payable at the amount provided in Clause 11, until agreement or further order of this Court. Neither of those events will have occurred until the release of these reasons. On that basis, I see no reason to reduce the respondent's retroactive obligation to pay spousal support solely on the basis that time has passed.

The Respondent's Circumstances

[107] Further, based upon my review set out above, it is clear that there has not been any variation in the respondent's income. Hence, there is no basis to find that there has been a material change in the respondent's circumstances.

[108] As noted above, I do not accept that the respondent's WorkSafeBC claim constitutes a change in circumstances.

The Claimant's Circumstances

[109] The claimant acknowledges that she had income in the years 2020 and 2021. I find that income to constitute a material change in circumstance. Further, given the terms of the 2017 Consent Order, the respondent would have been entitled to learn of that income and have his spousal support obligation adjusted.

[110] I find that the respondent's obligation to pay retroactive spousal support should be adjusted retroactively for 2020 and 2021 based upon the claimant's earnings in those years. Because that adjustment is being made retroactively, I will allow the recalculated spousal support obligation for each year based upon the claimant's declared income in each of 2020 and 2021. In other words, the respondent's obligation for 2020 will be based upon the claimant's income in 2020 (as opposed to affecting his obligations for the following year).

[111] Since I am adjusting the respondent's obligation to pay spousal support, and since the claimant was earning income during those years, I find that it would be reasonable for the additional \$500 per month (i.e., the amount above the SSAG "High" range) to terminate as of January 1, 2020. My reasons for making that change are:

- 1) I have determined, contrary to the claimant's suspicion, that the respondent's income is, in fact, \$113,000 per year.
- 2) The claimant displayed the ability to work and earn income commencing in 2020.

[112] In that respect, I find that:

- 1) the respondent's obligation to pay spousal support from the 2017 Consent Order to December 31, 2019, remained at \$2,656 per month;
- 2) commencing January 1, 2020, the respondent's obligation should be decreased to the "High" end of the SSAG range. My calculation of that spousal support is \$1,591 per month;

(My calculation is based upon my understanding of the earnings and guidelines. If the parties determine that I have based my calculations on the wrong figures, they can apply to me for clarification.)

- 3) the respondent's obligation at this level (in the paragraph above) continues from January 1, 2020, until December 31, 2021;
- 4) the evidence appears to establish that the claimant's income for 2022 will be very modest. Hence, the respondent's obligation will increase again as of January 1, 2022, and be paid at the "High" end of the SSAG;
- 5) if the claimant did have income in 2022 (which she is required to disclose), then the support amounts for 2022 can be adjusted pursuant to the terms of the 2017 Consent Order (as amended in this order) after the claimant reports her 2022 income to the respondent.

[113] I discuss the ongoing obligations (2023) below.

Has the claimant failed to take reasonable steps to become independent?

- [114] As discussed above, the respondent submits that the claimant should have been able to become economically self-sufficient in the five years since the 2017 Consent Order. I have reviewed her history above. She started by completing her high school education and some business courses. Her progress was derailed by significant depression in the first half of 2019. Later in 2019 she pursued the training and employment with the life insurer. However, that job ended in 2020 following the onset of the COVID-19 pandemic. She also required carpal tunnel surgery. She has been warned off office-type work that would require significant repetitive hand and wrist movements. Arising from that problem, she was approved for her current training as an education assistant. She will complete that program in February 2023 and hopes to obtain employment thereafter.
- [115] An outside observer might well ask whether it was reasonable for the claimant to take five years to get to this point. However, when the claimant's experiences are followed, her actions are not unreasonable. I do not accept the respondent's submission that the claimant has unreasonably failed to achieve economic independence.

Chronology of Payments and Calculations

- [116] As noted above, the respondent paid a combined monthly amount to the claimant for child and spousal support. That practice shifted in February 2021 when he commenced paying child support directly to the older child (after she moved into her own residence).
- [117] For the purposes of my chronology below, I have approached it in the following stages:
- 1) As a first step, I have accepted the respondent's submissions that he was entitled to alter the child support payments during the period when the younger child lived with him (May-December 2019) and his direct payment of child support to the older child in 2021.

- 2) As my second step, I have attributed the "first dollar" of each month's combined support payment to child support, thus leaving no arrears in child support. There is one exception to this attribution, described below, during the period February 1, 2020-January 31, 2021.
 - 3) As my third step, I have set out the chronology divided into the periods during which each adjusted amount was paid by the respondent.
 - 4) I have then set out my decision on whether the adjustment by the respondent was justified, either on the basis that was put forward at the time, or on the later-acquired evidence of the claimant's earnings.
- [118] I find that the most efficient manner of dealing with the various moving parts is to return to the amounts paid by the respondent, and to address whether any of his unilateral adjustments were justified. I have set out that chronology below. However, given the passage of time since the affidavit material was filed, I do not have all of the financial information necessary to calculate the arrears owing. I will leave it to counsel to make the calculations based upon my reasons. Should there be any dispute of those calculations, counsel can set a further application before me for clarification.
- [119] Again, the starting point for the later adjustments was the 2017 Consent Order which provided for:
- a) child support at \$1,644 per month; and
 - b) spousal support at \$2,656 per month (i.e., High end plus \$500).
- [120] The unilateral adjustments made by the respondent were as follows:
- 1) From July 2019-January 31, 2020 (seven months), the respondent reduced the:
 - a) Child support from \$1,644 to \$899 per month; and
 - b) Spousal support from \$2,656 to \$1,663 per month.
- [121] The adjustment to the child support was justified because the younger child was living with the respondent. The adjustment to spousal support was not justified. Hence, the respondent is in arrears of six months at \$993 per month. For the month of January 2020, the claimant is entitled to the difference between the amount paid (\$1,663) and the "High" end spousal amount (\$1,591).
- 1) From February 1, 2020-January 31, 2021 (12 months), the respondent increased the child support to an extent, but further decreased the spousal support:
 - a) monthly child support increased to \$1,565; and
 - b) monthly spousal support decreased to \$1,188.

During this period, the younger child returned to the primary care of the claimant. The respondent made the unilateral change to child support based upon his calculation of a reduction in his income to reflect his gross income less GST. I have rejected that calculation. Hence, his child support obligation continued at \$1,644 per month. He is in arrears 12 x \$127.

The respondent reduced spousal support based upon:

- a) his recalculation of his own income (which I have rejected); and
- b) his understanding that the claimant would be employed at the life insurance company and would earn \$41,000. The claimant did not achieve those earnings.

However, the claimant did achieve income of \$23,674 in 2020. Hence, the respondent's obligation to pay spousal support for this 12-month period should be reduced to take into account my order above (\$1,591 per month) given the claimant's actual income earned in 2020. That reduced obligation still exceeds the amount that the respondent actually paid. Hence, the respondent is in arrears of 12 months at the newly calculated amount. I leave it to the parties to calculate those amounts.

- 2) From February 1, 2021-May 31, 2022 (16 months), the respondent:
 - a) increased the child support to \$1,638, but paid \$800 per month directly to the older child and \$838 in respect of the younger child; and
 - b) continued to pay \$1,188 in spousal support.

The payments of child support are justified. The continued payment of spousal support at \$1,188 was not justified.

The claimant's income for 2021 was \$22,885.

The respondent's obligation to pay spousal support for this 16-month period should be reduced. Based upon my calculation the respondent's obligation is reduced to \$1,591 for 2020 and 2021.

However, the respondent's obligation must be recalculated for 2022 based on my assumption that the claimant had no income in 2022.

- 3) In 2022, the respondent:
 - a) paid \$838 per month in child support for January-May;
 - b) paid \$1,644 per month in child support for June-August (based upon my understanding of the submissions, but this period extends beyond the evidence).
 - c) continued to pay \$1,188 per month toward spousal support (although I have no information for the period after the application material was filed in May 2022).

The correct child support amount was \$838 per month after the older child had become self-sufficient. Thereafter, there was only one child of the marriage. He paid the higher amount (\$1,644) for three months because FMEP required him to do so. Based upon my understanding of the accounting, he is entitled to credit of 3 months x \$838.

The lowering of the spousal support payments to \$1,188 (if that amount continued to be paid) was not justified. His obligation for spousal support in 2022 should be recalculated based upon the claimant's actual income during that year (once she reports her income to the respondent). As noted above, the respondent's obligation is reduced to the "High" end of the SSAG range.

[122] As noted above, I have attempted to be as clear as possible in my chronology regarding the respondent's obligations toward child and spousal support. I invite the parties to make those calculations based upon my chronology set out above. Again, I am not in a position to determine whether my calculations using the SSAG and the available software are accurate based upon my chronology, and the missing information described above. I invite the parties to apply my reasoning above and determine the proper amounts over time.

Prospective Support Payments

[123] On the basis of my analysis above, I have found that the respondent's income continues to be \$113,000. The claimant's income for 2023 is not clear. She may achieve full-time employment in the near future.

[124] I noted above that both parties' consent to an order imposing a mutual obligation to disclose changes in employment and income.

[125] On that basis, I find that the respondent's obligation to pay spousal support continues:

- 1) as provided in the 2017 Consent Order;
- 2) except as reduced by:
 - i. the elimination of the additional \$500 per month; and
 - ii. the factoring in of the claimant's actual income from the date of these reasons.

[126] It appears that 2023 will be a year of transition for the claimant. She hopes to achieve full-time employment. However, I am not in a position to make an order that predicts the future. Nor do I intend to bind the hands of any future judge determining the issues between the parties. In that regard, I order that the respondent is entitled to apply to review the quantum of ongoing spousal support in October 2023.

Costs

- [127] It will be evident, from a review of my reasons above, that the claimant has been substantially successful in this application. However, I am also satisfied that the respondent has been making good faith efforts in an attempt to have these issues resolved by the court since 2019. Although he resorted to unilateral reductions of his support obligations, he did that because he believed that the claimant was attempting to delay the process.
- [128] In addition, I am satisfied that the respondent's distrust of the claimant was reasonable. As noted, she failed to disclose her employment (however casual) on construction sites.
- [129] On the other side, the respondent took positions on his income that I rejected, based upon well-reasoned submissions of the claimant's counsel.
- [130] In those circumstances, despite the fact that the claimant was largely successful, I find that the fair result is for each party to bear their own costs on this application.

Summary

[131] In Summary, I make an order that:

- 1) there has been no material change in circumstances since the 2017 Consent Order, except that:
 - a) one child lived with the respondent in May-December 2019;
 - b) one child aged out; and
 - c) the claimant had earned income in 2020 and 2021.

As a result, the respondent's obligations to pay child and spousal support as set out in the 2017 Consent Order remained in place until the end of 2021 except as altered by those events;

- 2) further, commencing on January 1, 2020, the respondent's obligation to pay spousal support is reduced from the "high end of the SSAG range plus \$500 per month" to the "high end of the SSAG range" (i.e., reduced by \$500);
- 3) commencing in October 2023, the respondent is at liberty to apply to review the quantum of ongoing spousal support;
- 4) by consent, there will be mutual exchange of information "forthwith" regarding any changes to employment and income;
- 5) by consent, there will be exchange of updated financial statements, tax returns, and notices of assessment by June 1 annually during any period in which child or spousal support is payable; and
- 6) each party will bear their own costs of this application.

"A. Ross J."

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