

CANADA / JUDGMENT

## Linklater v. Mardukhi

2024 BCSC 2277

### COURT

Supreme Court of British Columbia

### DECIDED

13 December 2024

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2024 BCSC 2277 Linklater v. Mardukhi

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Linklater v. Mardukhi,

2024 BCSC 2277

Date: 20241213

Docket: E080724

Registry: Vancouver

Between:

Naomi Louise Linklater aka Naomi Linklater

Claimant

And

Mohammad Zahed Mardukhi aka Mohamad Zahed Mardukhi

Respondent

Before: The Honourable Mr. Justice Veenstra

Reasons for Judgment

Counsel for the Claimant:

I.I. Turaglio

Counsel for the Respondent:

N. Nasser

## Place and Dates of Hearing:

Vancouver, B.C.

March 12-13 and April 4, 2024

## Written Submissions of the Respondent Received:

April 19, 2024

## Place and Date of Judgment:

Vancouver, B.C.

December 13, 2024

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## Introduction

- [1] Each of the parties applies for changes to provisions for payment of spousal support that were made in a final order pronounced by consent on July 30, 2008, by Mr. Justice R. Holmes (the "Final Order").
- [2] The Final Order granted the parties a divorce, provided for division of family property, and set out several terms governing spousal support. It provided for spousal support of \$4,000 per month to be paid, indefinitely, on both a compensatory and non-compensatory basis. It set out specific grounds on which each party might apply to vary spousal support, and for that purpose it provided for the parties to exchange their income tax filings by June each year.
- [3] The claimant says that the respondent failed to share his respective income tax filings, and that it was not until 2022 that she learned that he had, from 2013 onward, earned income of more than \$174,000 (the threshold provided in the Final Order), and thus should have been paying increased spousal support. She seeks an order for payment of retroactive spousal support from 2013 to date, and for increased prospective spousal support.
- [4] The respondent says that he is now 69 years old and in the process of winding down his business with a view to eventually retiring. He says the claimant's compensatory entitlement has been fully satisfied, that her needs are taken care of by her new partner, and that she should by now have become self-sufficient. He seeks an order terminating his spousal support obligation retroactive to February 2022, when he first asked the claimant to agree to terminate it, as well as reimbursement of the spousal support he has paid since that time.

## Facts

### Background

- [5] The parties were born in 1962 and 1955 respectively. They met in about 1979 when the respondent was attending university in Calgary. They married on January 22, 1980, at which time the claimant was aged 17 and the respondent aged 25.
- [6] From the spring of 1980 to the present, the respondent has worked in the information technology industry - initially as an employee of various companies, and then, since 1994, as the owner and director of Digiflex Information Systems Inc. ("Digiflex"), which provides software applications and related support to various clients (primarily corporate).
- [7] The claimant commenced a Bachelor of Fine Arts degree. In 1983, while in the third year of that program, she became pregnant with the parties' child, and changed from full-time to part-time student status. Their child was born in January 1984. He is now an independent and self-supporting adult.
- [8] The claimant completed her initial degree in 1988, and then completed a Bachelor of Education degree in 1992. She did some work as a substitute teacher in Calgary that year, but otherwise did not work in the public school system.
- [9] In 1996, the parties moved from Calgary to Vancouver. Beginning in about 1999, the claimant was paid a salary by Digiflex. The parties do not agree as to whether the claimant performed any substantial work for Digiflex.

### Separation and Settlement

- [10] The parties separated on January 26, 2006 - just over 26 years after they were married. In about May 2007, the claimant retained legal counsel - Ms. Turaglio, who is now representing her again. The present litigation was commenced on February 28, 2008, and around that time the respondent retained counsel as well. There were various negotiations between the parties and in July 2008, they entered into "Minutes of Settlement".
- [11] The Minutes of Settlement contain several recitals. The recitals indicate that:
  - a) For the last 2.5 years, the claimant had not been actively involved in Digiflex;
  - b) In the anticipated absence of any Digiflex income going to the claimant, the respondent was earning approximately \$153,000 per annum from Digiflex; and
  - c) The claimant:

will be starting work shortly and expects to earn approximately \$17.00 per hour. The [claimant] expects to earn approximately \$20.00 per hour when she first commences to work, and hopes that her income will increase to \$30.00 per hour after gaining the requisite experience.

- [12] The Minutes of Settlement noted that the parties intended to enter into a final consent order which would be a full and final settlement of all issues between them, including spousal maintenance. They also contained confirmation that each party had provided complete and accurate disclosure and had received independent legal advice in respect of the terms of the Minutes of Settlement.
- [13] One of the claimant's affidavits attaches a copy of the DivorceMate printout that formed the basis for the parties' negotiations in 2008. It is based on the respondent having income of \$153,000 and the claimant having income of \$0. It provides for payments at the low end of the range of \$4,781, at the middle of the range at \$5,578, and at the high end at \$6,375. As can be seen, the agreed amount for spousal support (\$4,000 per month) is less than the low end of this range. However, if the calculation had been done with an amount to reflect the claimant earning an income greater than \$0, then the low end of the range would have been closer to this \$4,000 amount.
- [14] At some point in July 2008, the respondent discharged his legal counsel and decided to act on his own. He filed a Notice of Intention to Act in Person on the day the Final Order was granted, and attended the hearing that day on his own behalf to confirm his consent to its terms.

## The Final Order

- [15] The Final Order provided for equal division of family property. Numbers contained in the document indicate that the net value of the properties received by each party was about \$800,000.
- [16] The terms of the Final Order relating to spousal support are as follows:
8. On the fifteenth day of each month, commencing April of 2008, and continuing on the 15th day of each and every month thereafter, the [respondent] shall pay to the [claimant] periodic spousal support of \$4,000 per month (the "Spousal Support") on a compensatory and non-compensatory basis.
  9. The [respondent] may apply to vary the Spousal Support if any of the following events occur:
    - a. He attains the age of 65 and retires;
    - b. There is a reduction in the amount of his annual income that exceeds \$24,000 for two consecutive years; or
    - c. There is a reduction of \$48,000 or more in the amount of his annual salary from Digiflex Co.
  10. Either party may apply to vary the Spousal Support if:
    - a. The [claimant] earns, in any two consecutive calendar years, an income of more than \$24,000 from sources other than the Spousal Support, as established by line 150 of her income tax return notice; or

- b. the [respondent] earns, in any two consecutive calendar years, an income of more than \$174,000.00, as established by line 150 of his income tax return notice.
- 11. In the event that the [claimant] earns, in any two consecutive calendar years, more than \$24,000, from sources other than the Spousal Support, as established by line 150 of her income tax return notice (after deducting the Spousal Support), the parties will attempt to negotiate a temporary variation to the Spousal Support that the [respondent] must pay to the [claimant] using the following formula:
  - a. The [claimant's] gross income (exclusive of Spousal Support) less allowable deductions, as established by line 150 of her income tax return notice (after deducting the Spousal Support), which exceed \$24,000 shall be divided by 12 (the "Monthly Income Cap") and that Monthly Income Cap shall be deducted from \$4,000.00 (the "Varied Spousal Support"); and
  - b. The [respondent] shall pay the Varied Spousal Support to the [claimant] for 12 consecutive months from the date that the parties agree, in writing, to put into effect the Varied Spousal Support payments that the [respondent] must make to the [claimant].
- 12. If the parties reach an agreement on the Varied Spousal Support that the [respondent] must pay to the [claimant], in accordance with the above formula, the parties shall enter into a written agreement (the "Temporary Variation Agreement") confirming the amount of the Varied Spousal Support and the date when the parties shall next review the Spousal Support that the Defendant must pay to the Plaintiff, using the above formula (the "Review Date").
- 13. Should the parties be unable to enter into a Temporary Variation Agreement as envisioned above, or should the parties be unable to reach a further Temporary Variation Agreement by the Review Date, the Spousal Support that the [respondent] pays to the [claimant] shall remain (in the event of no Temporary Variation Agreement being reached) or revert (in the event of no Temporary Variation Agreement having been reached by the Review Date) to \$4,000.00 per month, with either party having the right to apply to court to vary the Spousal Support, on the basis of the terms found at paragraphs 11 to 13 of this court order.
- 14. The parties shall exchange their respective Income Tax filings and Notices of Assessment by the 1st day of June, commencing the year 2008 and continuing on the 1st day of June every year thereafter, as proof of their respective incomes for the preceding year.
- [17] The claimant has repartnered and been in a common-law relationship for several years with a Mr. Dunn. The claimant deposed that she and Mr. Dunn began living together "in or around the time of" the Final Order. The respondent disagreed with this assertion, deposing that the claimant was living with Mr. Dunn "prior to the Final Order".

## Post-Settlement Matters

- [18] On March 30, 2009, the claimant and Mr. Dunn entered into a co-habitation agreement. It contemplated that each party would maintain separate property and debts. It noted that the parties would be living in a house belonging to the claimant, and provided that Mr. Dunn

would pay the claimant, "for his use of" the house, "a monthly rent equal to 50% of the rental value for the part of [the claimant's] house that the parties occupy". At the time, the amount was specified as \$800 per month. It has increased over the years to \$1,200 per month. The co-habitation agreement also provided that each of the parties would pay for one-half of the costs of (a) cable, (b) hydro, (c) gas, (d) internet, and (e) food.

[19] The claimant's income (other than amount she received as spousal support) has not been substantial:

- a) From 2008 to 2010, the claimant worked as a Host Program Coordinator for MOSAIC. She left that work because of issues that she says made the work environment unsafe.
- b) From 2010 to 2012, the claimant had two term contracts with Aboriginal Business Technology - one to work as a recruitment/placement coordinator, the other to work as a project coordinator.
- c) Beginning in 2012, the claimant established a business partnership with Mr. Dunn, by which each performed consulting work. Each was compensated by the partnership based on the revenue their own work generated. She worked on six different contracts from 2012-2014, a further five contracts from 2015-2018, and one additional contract in 2020. Most of these contracts were relatively small (62 hours or less) - the exceptions were a 2015 contract with Vancouver Community College (over 350 hours) and a 2020 contract with Native Education College (over 400 hours).
- d) In 2015 and again in 2018, the claimant was hired on term contracts with Vancouver Community College to work as an advisor for Aboriginal Education and Community Engagement. The 2015 contract provided for her to fill in for another employee, who was working on a different project, then ended when that employee returned to his position. The 2018 contract was also for a limited term, with the department scheduled to undergo a restructuring at the end of the contract.
- e) In 2022, the claimant was hired as a facilitator by the San'yas Indigenous Cultural Safety Training Program. This employment was terminated in March 2023, just before the probationary period ended, which was a great surprise to her given the positive feedback she had received.

[20] The claimant has various health challenges. Her immunocompromised condition required her to remain in lockdown longer than others during the Covid pandemic. She was diagnosed with cancer shortly after the March 2023 termination of her most recent employment, and received a number of treatments until about September 2023. She is now 62 years old.

- [21] The respondent has continued to operate Digiflex. Although he has deposed to an intention to gradually wind the company down, appears to be doing little in the way of business development, and has reduced the staff to the point where he is the final full-time employee, the company continues to service its two major clients and its net revenue continues to increase. The respondent is now 69 years old.
- [22] The parties did not disclose their tax returns after the Final Order until 2022. The tax returns are now in evidence. They show the primary income reported each year by the claimant as being \$48,000 in spousal support. It is common ground that her other income, as reported on the tax returns, has never exceeded the \$24,000 threshold in the Final Order for two consecutive years.
- [23] The respondent, on the other hand, has exceeded the \$174,000 threshold in the Final Order since 2013. He earned line 150 income of just over \$175,000 that year, and his income has gradually increased since then. His income each year consists primarily of his T4 income from Digiflex, but that is supplemented each year by rental income from real property that he owns. Since 2016, the respondent's T4 income from Digiflex has been greater than \$174,000 in and of itself. His net rental income has also increased as he has successfully reduced or eliminated the various mortgages related to those properties. Since 2017, the respondent's line 150 income has been substantially over \$200,000. In 2022, the most recent year for which a tax return was in evidence, the respondent's line 150 income was \$232,161.
- [24] In terms of assets, the respondent sold in 2009 the house she received at the time of the Final Order, and purchased a new home. She explained that there was significant deferred maintenance in respect of the original property. She has since sold the other home and purchased a condominium. Her net assets as recorded in her most recent F8 Financial Statement are approximately \$1.7 million.
- [25] The respondent, on the other hand, has retained the properties he received on settlement and purchased an additional strata property for rental purposes. He has, in recent years, aggressively paid down all of the mortgages. His net assets are over \$5 million.

## Requests to Vary

- [26] In February 2022, the respondent sent a letter to the claimant, noting that he had been making spousal support payments since 2008, and asking the claimant to advise "if you agree that your alimony payments should end with this last cheque (after 14 full years), or if you intend on getting these alimony payments indefinitely". The claimant responded on February 22, 2022, advising that she would be seeking legal advice, and then on March 17, 2022, she wrote advising that she was "prepared to discuss" spousal support with the assistance of a Family Justice Coordinator. She provided a link to information about the free mediation services available. She also asked that he disclose his income tax returns and notices of assessment for the most recent three years.

[27] The respondent replied on March 23, 2022, advising that:

Since you are requesting that we renegotiate the amount of spousal support payments, while I have been requesting that we end them, I will be contacting my lawyer to start on the motion to end these spousal support payments. So, at this point I do not see any point to going through Family Justice Counsellors.

[28] On May 18, 2022, legal counsel retained by the respondent, Ms. Nasser, wrote to the claimant asking:

From our perspective, given your re-partnering, our clients age, and the 14 years of spousal support payments that you have received, it is suitable to terminate spousal support. Can you please advise if you are agreeable to the termination of spousal support.

[29] The claimant responded on June 3, 2022, again proposing that the issue be mediated, and again requesting disclosure of income tax returns and notices of assessment for the previous three years. She re-retained Ms. Turaglio, her counsel from 2008. On June 10, 2022, the claimant served a Notice to Mediate. A mediation was scheduled for July 22, 2022. On July 18, 2022, the respondent produced a sworn F8 Financial Statement. That financial statement was filed in the court registry in March 2023, in connection with the present applications, and is the only F8 Financial Statement that the respondent has filed in this proceeding.

[30] The mediation was not successful. After it had completed, Ms. Turaglio wrote to Ms. Nasser requesting disclosure of all of the respondent's income tax returns and notices of assessment from 2008 to date, as well as financial statements for Digiflex. The respondent produced some of the documents sought, but initially refused to produce any Digiflex documents. Ms. Nasser also wrote in October 2022, demanding disclosure of income tax records with respect to Mr. Dunn, the claimant's common-law partner.

## Court Proceedings in 2023 and 2024

[31] The present applications were filed on February 9, 2023, by the respondent and on April 13, 2023, by the claimant. The two applications came on for hearing before Justice Milman on May 19, 2023, who heard the proceeding for a half-day before adjourning the matter. In oral reasons for judgment, he noted that the respondent was applying to adjourn the hearing in order to cross-examine the claimant, and also to produce further evidence, while the claimant was also seeking further production from the respondent, and that it seemed to be common ground that there had to be adjournment. He decided that there needed to be limits on the extent of additional information, and expressed the view that there was little merit to allowing "either party to delve deeply into the negotiations that occurred and culminated in the consent order" in 2008. His formal order states that there is "no leave to file further affidavit evidence". However, he granted leave to each party to cross-examine the other for a half-day.

- [32] The parties were before Justice Milman again on November 15, 2023. While no formal order has been entered, a draft order was provided to me and it appeared there were no significant differences as to its terms. It appears from this draft that Justice Milman directed that each party would be able to ask the other about repartnering, and that certain specific documents needed to be produced, including financial information with respect to Digiflex that the respondent had resisted producing. Justice Milman ordered that, after the cross-examinations, each party could file one more affidavit in which they might provide information as to (a) an update of their circumstances since they swore their last affidavit, and (b) provide any further response to outstanding information that party was asked during their cross-examination.
- [33] The cross-examinations were completed on December 15, 2023, and each party filed a further affidavit on January 10, 2024. The hearing was scheduled for January 24, 2024. Each of the parties attempted to file further affidavits just before the hearing date (on January 22 and 24, 2024). Those affidavits were contested, with each party complaining that the other had gone beyond permitted scope.
- [34] The hearing ultimately proceeded on March 12 and 13 and on April 4, 2024.
- [35] By the time the parties had been through all of these procedural steps, the materials provided by each for this application had multiplied. I was provided with four binders of materials from the claimant and six binders from the respondent. The claimant provided written submissions totalling over 70 pages for the hearing, while the respondent's submissions totalled just under 70 pages. Each party complained that the other made the proceeding unnecessarily complex.

## Issues

- [36] After review of those submissions, I have attempted to distill the issues advanced by the parties to the following list:
- a) Issue #1: On a proper interpretation, do the terms of the Final Order provide for a review or simply set out grounds for variation - to the extent necessary, this may also involve consideration of whether the issue of a review is properly raised on the materials filed by the parties?
  - b) Issue #2: On the assumption that this is a variation application, has the claimant established a material change pursuant to para. 10.b. of the Final Order?
  - c) Issue #3: On the assumption that this is a variation application, has the respondent established a material change, either pursuant to para. 10.a. of the Final Order, or otherwise?

- d) Issue #4: If a material change has been established, to what extent (if any) should the spousal support provisions in the Final Order should be varied in light of the identified material change(s)?
- e) Issue #5: If spousal support is varied, should it be varied retroactively and if so, for how long?

### Issue #1: Variation or Review

[37] Based on the submissions made, it is necessary to decide at the start whether the Court is conducting a review of spousal support or hearing applications to vary spousal support, as the legal tests to be applied are quite different.

### Positions of the Parties

- [38] The respondent submits that paras. 9 and 10 of the Final Order are not, in fact, variation provisions, but rather are provisions authorizing a review. The respondent says that if any of the conditions in those provisions are met, then either party may seek a review of spousal support without further need to establish a material change. The respondent thus says that because there are no limitations on the scope of the review, it should proceed as a hearing de novo and entail reconsideration of entitlement, quantum and duration, including a review of the matters set out in s. 15.2(4) of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.) [DA].
- [39] The claimant references the language of paras. 9 and 10 of the Final Order, both of which say that a party may apply to "vary" spousal support. The claimant says that the word vary has a known meaning, and is different from a review. The claimant argues that any provision for a review must clearly express the intent that there be a review. The claimant says that the Final Order expresses the opposite intention.
- [40] The claimant further notes that at no point in either the respondent's Notice of Application or in the Application Response he filed in response to the claimant's application does he assert that paras. 9 and 10 are review provisions. Rather, his Notice of Application asserts that "Term 9 of the Final Order provides for variation of spousal support", while the Legal Basis (under the heading "Variation of Spousal Support") relies on authority provided by s. 17 of the DA.
- [41] The respondent responds by noting that one of the cases referenced in his Application Response is *Morck v. Morck*, 2013 BCCA 186, which is a review case, and notes that in the transcript of the initial hearing before Justice Milman, respondent's counsel had commented that when the Final Order references an application to vary "it's really saying that material change established under these circumstances, which is really done as a review proceeding". Thus, the respondent says that the claimant should have known this argument would be advanced.

## Legal Context

[42] The spousal support order in this case was granted pursuant to the DA. Section 17(1) and (4.1) of the DA provides that:

- (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;

(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.

[43] While s. 17(4.1) governs a "variation order", it is well established that, in particular circumstances, an order or agreement may authorize a review of spousal support, with is different from a variation. The distinction is explained in *Morck*. In that case, the parties signed a separation agreement in October 2006, the provisions of which were later incorporated into a divorce order, and which provided that the amount of support would be "reviewed two years from the date of this agreement without a change in circumstances and in any event upon a change in circumstances". In 2012, the payor husband applied to terminate spousal support on the basis that his income had decreased dramatically.

[44] With respect to the distinction between variation and review, Justice Neilson explained at paras. 16-17 that:

[16] The appellant is correct in drawing a distinction between a variation and a review of an order for spousal support. The former is governed by s. 17 of the Divorce Act. The existing order is assumed to be correct and, to justify a change, s. 17(4.1) requires the applicant spouse to establish that there has been a material change in the "condition, means, needs or other circumstances" of either party, which was unknown and unforeseen when the earlier order was made and, if known at that time, would likely have resulted in a different order: *P. (R.) v. C.(R.)*, 2011 SCC 65 at para. 25, [2011] 3 S.C.R. 819. If such a change is established, the court will consider the objectives set out in s. 17(7) to determine what an appropriate variation would be.

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

BCCA 502 at paras. 22, 47 B.C.L.R. (4th) 254.

[45] She noted at para. 18 that on a review, additional considerations were to be taken into account beyond those applicable to a variation application. In particular, she referenced s. 15.2(4), which required the Court to:

take into consideration the condition, means, needs and other circumstances of each spouse, including

- (a) the length of time the spouses cohabited;
- (b) the functions performed by each spouse during cohabitation; and
- (c) any order, agreement or arrangement relating to support of either spouse.

[46] She concluded that given what was being undertaken was a review, the chambers judge had fallen into error by focusing on events subsequent to the marriage breakdown and, in particular, whether there had been a material change since the initial order, while failing to consider the factors provided for in s. 15.2(4). The appeal was allowed and the matter remitted to the trial court.

[47] While the claimant does not dispute that these principles would be applicable on a review, the claimant notes that the order in *Morck* clearly specified that there was to be a review. The claimant says that an order for a review must be clearly expressed, and relies on *Toth v. Toth*, 2016 BCCA 50, as setting out the test for determining whether terms in a final order provide for a review. The order in *Toth* stated:

The parties shall review child and spousal support on July 1, 2010, and on July 1st in each year thereafter, with an exchange of such financial information and supporting documents as may be necessary to inform each party as to the income and financial circumstance of the other, and the needs of the children

[48] Justice Nielson explained at paras. 11-12 that:

[11] The review of the spousal support order sought by the appellant is distinct from a variation of spousal support under s. 17(4.1) of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp). Before the court may vary an order for spousal support under that provision, the applicant must establish that there has been a material change "in the condition, means, needs or other circumstances of either former spouse" since the last order for support was made. By contrast, the right to a review of spousal support by the court emanates from a term in an earlier agreement or order that permits a party to seek a change in support without having to establish a material change in circumstances. Such a review takes place under s. 15.2 of the Divorce Act and so permits a fresh look at all factors relevant to support

[12] The principles governing review orders were summarized as follows by the Supreme Court in *Leskun* [v. *Leskun*, 2006 SCC 25] at paras. 36-39. Such orders have a "useful but very limited role" in cases in which "genuine and material uncertainty" at the time of the original

order or agreement indicates that the economic circumstances of one or both parties are not yet stable and further changes are anticipated. In such cases, a term permitting the parties to return to court for a review of spousal support may be justified. Courts should exercise caution, however, in making such orders, as a permanent resolution of entitlement to support is preferable. If a provision for review is made, it should clearly and narrowly identify the issue for review to avoid full re-argument by the parties.

- [49] Justice Neilson referenced principles of contract interpretation in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 at paras. 49-50, and noted at paras. 21-24 that:
- [21] Recital Q and paragraphs 65 and 68 of the Agreement are clear that the parties intended it to be a final settlement of all issues arising from the dissolution of their marriage, including the appellant's entitlement to spousal support. As well, paragraph 64 provides a mutual release of all claims.
- [22] The Order and the Agreement both grant the appellant a clear right to indefinite spousal support. There is no evidence that, at the time the parties made the Agreement, there was some unknown future financial contingency or uncertainty of the type that might have attracted a provision permitting future review under s.15.2. Paragraph 20 of the Agreement sets out the only means of obtaining an adjustment to spousal support, providing for a consensual change due to fluctuations in the parties' incomes as revealed by an annual exchange of financial information. This paragraph commences: "The parties agree that there shall be a review of child and spousal support on July 1, 2010," and annually thereafter.
- [23] While paragraph 20 is substantially reproduced in paragraph 11 of the Order, there are two important differences between the Agreement and the Order. First, the Order also includes paragraph 10, which did not form part of the Agreement and provides that the parties may agree to vary support without the need for a further court application or order. Second, the opening words of paragraph 11 differ from those in paragraph 20 of the Agreement, stating, "The parties shall review child and spousal support".
- [24] I agree with the chambers judge that these terms of the Order cannot support an inference that the parties intended to create a right to a review of spousal support by the court under s. 15.2. This interpretation is strengthened by the fact that both the Agreement and the Order provide for an annual review of support after July 1, 2010. Given the restrictive approach to reviews set out in *Leskun*, it is difficult to accept that the parties, who were both represented by counsel, would have agreed to a yearly reconsideration of support under s. 15.2.

[Emphasis in original.]

## Analysis

- [50] The respondent's argument is that the parties intended a review, rather than a variation, despite using the word "vary". The suggestion appears to be that, because the parties set out detailed criteria as to what circumstances would justify the court making a change to spousal support, they must have intended a review. Implicit in this is the thought that there could be no other reason to include such detailed criteria if all that was intended was a variation.
- [51] However, decisions such as the leading case of *L.M.P. v. L.S.*, 2011 SCC 64, have encouraged parties to a settlement agreement and associated consent order to specify the circumstances in which spousal support might be subject to variation. In *L.M.P.*, a payor spouse applied pursuant to DA s. 17(4.1) to vary a final order in respect of spousal support. As in the present case, the final order incorporated the terms of a comprehensive settlement agreement. The majority judgment was given by Justices Abella and Rothstein, who concluded that the applicable test for variation was a material change, then went on at paras. 37-39 to discuss the role of the parties' agreement in determining material change:
- [37] This does not mean that the incorporated agreement is irrelevant. As Sopinka J. observed in *Willick*, "Where . . . the agreement is embodied in the judgment of the court, it is necessary to consider what additional effect is to be accorded to this fact" (p. 687).
- [38] The agreement may address future circumstances and predetermine who will bear the risk of any changes that might occur. And it may well specifically provide that a contemplated future event will or will not amount to a material change.
- [39] Parties may either contemplate that a specific type of change will or will not give rise to variation. When a given change is specified in the agreement incorporated into the order as giving rise to, or not giving rise to, variation (either expressly or by necessary implication), the answer to the *Willick* question may well be found in the terms of the order itself. That is, the parties, through their agreement, which has already received prior judicial approval, have provided the answer to the *Willick* inquiry required to determine if a material change has occurred under s. 17(4.1). Even significant changes may not be material for the purposes of s. 17(4.1) if they were actually contemplated by the parties by the terms of the order at the time of the order. The degree of specificity with which the terms of the order provide for a particular change is evidence of whether the parties or court contemplated the situation raised on an application for variation, and whether the order was intended to capture the particular changed circumstances. Courts should give effect to these intentions, bearing in mind that the agreement was incorporated into a court order, and that the terms can therefore be presumed, as of that time, to have been in compliance with the objectives of the Divorce Act when the order was made.

[Emphasis added.]

[52] These paragraphs were referenced by Justice Fenlon in *Sandy v. Sandy*, 2018 BCCA 182 at para. 71, for the proposition that:

parties wishing to achieve finality should set out in an order or agreement the potential changes in circumstances they have considered in reaching their agreement, and clearly identify the changes they agree will, or will not, warrant reconsideration of the terms on which they have resolved their support obligations

See also *Pawluck v. Pawluck*, 2019 BCCA 167 at para. 30.

[53] In my view, the fact that criteria for a material change have been included in the Final Order, which itself reflects the parties' comprehensive settlement agreement, is entirely consistent with relevant provisions being in the nature of provisions for variation.

[54] It is my view that the Final Order, by using the term "vary", makes clear the intention that what is provided for in respect of spousal support is variation pursuant to s. 17 of the DA and not a review at large.

## Issue #2: Claimant's Alleged Material Change

[55] The key provisions of para. 10 of the Final Order require the Court to consider whether for a period of two consecutive calendar years, "as established by line 150 of [their] income tax notice":

- a) The claimant had an income of more than \$24,000 from sources other than spousal support; or
- b) The respondent earned an income of more than \$174,000.

[56] Each of the parties asserts one or more material changes that the other disputes. Each says that spousal support should be varied based only on the material change that they have alleged. The issues that arise are analytically distinct, so I will review them separately, beginning with the claimant's alleged material change.

[57] Neither party alleges that para. 9 of the Final Order has been triggered. Paragraph 9.a permits an application to vary spousal support if the respondent "attains the age of 65 and retires". It is common ground that for this provision to apply, both requirements must be met, and that while the respondent is over the age of 65, he has not at the present time retired.

## Positions of the Parties

[58] The claimant says that there has been a material change with respect to the respondent's income, based on the criterion set out in para. 10.b of the Final Order, in that the respondent has since 2013 been earning in excess of \$174,000 per year.

- [59] The respondent says that while it may appear that his line 150 income has exceeded the \$174,000 threshold in para. 10.b since 2013, the Court should allow him to make additional deduction from the total income, as appearing at line 150 on his income tax returns. Specifically, he says that he should be permitted to deduct the amount of principal repayments on his mortgage. This special deduction is necessary because the Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.), permits mortgage interest, but not principal payments, to be deducted for purposes of calculation of rental income. Thus, his line 150 income gives no consideration to these principal payments.
- [60] The respondent's evidence indicates that mortgage principal payments from 2013 to date include:
- a) 2013 - \$37,558
  - b) 2014 - \$38,376
  - c) 2015 - \$39,943
  - d) 2016 - \$43,089
  - e) 2017 - \$61,208
  - f) 2018 - \$51,219
  - g) 2019 - \$66,374
  - h) 2020 - \$136,898
  - i) 2021 - \$88,794
  - j) 2022 - \$65,519
- [61] The respondent says that if the mortgage principal payments are deducted from his line 150 income, then his appropriately calculated annual income will have never exceeded \$166,542 - which is the amount that would be calculated for 2022 through reduction of his line 150 income of \$231,161 by the amount of the principal repaid that year.
- [62] The respondent seeks to draw an analogy to the situation in *S.L.D. v. W.A.D.*, 2020 BCSC 690, in which the payor spouse was a 50% shareholder of a company that held a special purpose industrial property in Alberta. That property was subject to a mortgage. Because the company was making principal payments on the mortgage, the income available to the respondent from the company was reduced. The question turned on the proper interpretation of s. 18 of the Federal Child Support Guidelines, SOR /97-175 [FCSG], with Justice Norell concluding (para. 72) that "the respondent has established that the principal amounts paid on the mortgage are needed to sustain X as a viable business". As such, s. 18 did not operate to bring those funds into the payor spouse's income.

- [63] The respondent says that he has aggressively paid down the principal amounts on his mortgage with a view to being in a position to rely on the full rental income in his retirement. He has recently fully paid off the final mortgages on his properties. He says that this is a valid business purpose and that as a matter of fairness, it should make no difference whether property is held in a corporation or directly by a payor spouse.
- [64] The claimant responds by referencing the language of para. 10.b, which applies where the respondent's income is "more than \$174,000, as established by line 150 of the income return notice". The claimant says this provision is clear and express. The claimant also says that, in effect, the respondent has taken funds that should have been paid to her by way of increased spousal support and used them to retire his own personal liabilities and increase his asset base. Finally, the claimant says that s. 18 of the FCSG is irrelevant given that the respondent's properties were all held by him personally and not through a corporation.

## Legal Context

- [65] The Spousal Support Advisory Guidelines [SSAG] generally adopt the determination of income provide for in the FCSG. The starting point for the determination of income in the FCSG is s. 16, which provides:
16. Subject to sections 17 to 20, a spouse's annual income is determined using the sources of income set out under the heading "Total income" in the T1 General form issued by the Canada Revenue Agency and is adjusted in accordance with Schedule III.
- [66] Line 150 of the T1 General income tax return - the line referenced in para. 10 of the Final Order - is the line that reflects the total of the sources of income under the heading "Total income". Thus, apart from any impact of ss. 17-20 of the FCSG, the relevant provisions of the Final Order refer to the same income as would be considered for purposes of both sets of Guidelines. Neither party has suggested that any of the Schedule III adjustments are applicable here. As a result, the initial focus will be on line 150 in the parties' tax returns, which provides their "Total Income" for each year.
- [67] Sections 17-20 of the FCSG deal with various situations in which the FCSG contemplate that it is appropriate to depart from the presumptive reference to the relevant party's line 150 income. Section 17 deals with situations where a party's income fluctuates up and down. Section 20 deals with the income of non-residents, who may be taxed at a different rate. Neither party relied on either of these sections.
- [68] Section 18 applies where a spouse is a shareholder, director or officer of a corporation and may have access to the corporation's income. Section 18 provides that:

18 (1) Where a spouse is a shareholder, director or officer of a corporation and the court is of the opinion that the amount of the spouse's annual income as determined under section 16 does not fairly reflect all the money available to the spouse for the payment of child support, the court may consider the situations described in section 17 and determine the spouse's annual income to include

- (a) all or part of the pre-tax income of the corporation, and of any corporation that is related to that corporation, for the most recent taxation year; or
- (b) an amount commensurate with the services that the spouse provides to the corporation, provided that the amount does not exceed the corporation's pre-tax income.

[69] As noted above, the respondent relied on the S.L.D. case, in which property was owned by a corporation in which the payor spouse was a 50% shareholder. In S.L.D., Justice Norell commented at para. 37 that the primary issues in that case revolved around income the payor received from companies. She noted at para. 38 the comments of Justice Huddart in *Kowalewich v. Kowalewich*, 2001 BCCA 450 (later confirmed in *Hausmann v. Klukas*, 2009 BCCA 32):

[43] In this regard, I find helpful the view Justice Martinson expressed in *Baum v. Baum* (1999), 182 D.L.R. (4th) 715 (B.C.S.C.) at para. 28:

Valid corporate objectives may differ from valid child support objectives. The purpose of s. 18 is to allow the court to "lift the corporate veil" to ensure that the money received as income by the paying parent fairly reflects all of the money available for the payment of child support. This is particularly important in the case of a sole shareholder as that shareholder has the ability to control the income of the corporation. See *Bhopal v. Bhopal*, [1997] B.C.J. No. 1746 (S.C.), *Blackburn v. Elmitt* (1997), 34 R.F.L. (4th) (B.C.S.C.) and *McCrea v. McCrea* [(1999) 1 R.F.L. (5th) 320].

[54] The Guidelines allow a court to include all of the pre-tax income of a corporation for the most recent taxation year in a spouse's annual income for Guideline purposes. They do not require it. I am not persuaded they make the inclusion of all pre-tax income the default position.

[58] It seems to me regard should also be had to the nature of the company's business and any evidence of legitimate calls on its corporate income for the purposes of that business. Justice Drake cautioned about not killing the goose who lays the golden eggs. Monies needed to maintain the value of the business as a viable going concern will not be available for support purposes. In my view they should not be included in determining annual income. In *Hollenbach v. Hollenbach*, 2000 BCCA 620 (B.C.C.A.), the trial judge recognized the need for a reserve for depreciation as an appropriate factor to be considered in a real estate business. Justice Dorgan recognized Mr. Kowalewich's business expansion plan as a valid business purpose in a retail business.

- [59] I do not recite these factors to suggest this Court should tinker with a trial judge's exercise of discretion, nor that a trial judge should second guess business decisions. I do say that a trial judge must have regard to the evidence of legitimate business needs in determining what portion of pre-tax corporate income to include in annual income for Guideline purposes.
- [70] Dealing specifically with payments of mortgage principal, at paras. 48-49 Justice Norell referenced *McKenzie v. McKenzie*, 2014 BCCA 381, and quoted the following excerpt:
- [97] The amounts that we are considering in this case - principal payments on mortgages are, effectively, investments in the corporation's capital assets rather than deductible business expenses. The mortgage amounts in issue in this case, therefore, fall within s. 18(1)(a) of the [Guidelines], and the court is able to include all or part of them in Mr. McKenzie's income. The question becomes one of whether it should do so, and the language of s. 18 does not, by itself, answer that question.
- [71] Justice Norell noted at para. 52 that the "test under s. 18(1)(a) is whether the amount of the spouse's annual income as determined under s. 16 does not fairly reflect all the money available to the spouse for the payment of support." At para. 70, she referenced further excerpts from *McKenzie*, including a quotation of the following paragraph from Kowalewich:
- [44] A court's effort to ensure fairness does not require a court to second-guess business decisions nor, as Justice Pitfield so colourfully noted in [*L.S. v. E.P.*, (1997), 32 R.F.L. (4th) 75, 41 B.C.L.R. (3d) 14 (S.C.)], at para. 44, to "place the largest available shovel in the company store." What it does require is that a spouse's allocation of pre-tax corporate income between business and family purposes be assessed for fairness by an impartial tribunal when parents cannot reach agreement on priorities as they would in an intact family and may upon separation under s. 15(2).
- [72] After a detailed consideration of the company's financial statements, as well as expert evidence from each party, Justice Norell concluded at para. 76 that:
- [76] To borrow the words of *McKenzie*, in my view, X's decision to "use income to pay down its mortgage in an ordinary, long-established manner, in accordance with its mortgage" is reasonable, and it is not required to restructure millions of dollars of mortgage (even if that were possible) to in the short term provide increased support. In all the circumstances, I find it is appropriate that corporate income be directed to the presently structured mortgage payments and is not money fairly available for support.
- [73] The final income provision of the FCSG that was raised on this application is s. 19, which permits the court to impute income where considered appropriate, and sets out circumstances in which that might occur. In this case, the respondent relied upon s. 19(1)(a), which provides:

19 (1) The court may impute such amount of income to a spouse as it considers appropriate in the circumstances, which circumstances include the following:

- (a) the spouse is intentionally under-employed or unemployed, other than where the under-employment or unemployment is required by the needs of a child of the marriage or any child under the age of majority or by the reasonable educational or health needs of the spouse;

[74] The leading British Columbia case on this provision is *Marquez v. Zapiola*, 2013 BCCA 433, which summarized the applicable legal principles as follows:

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

[37] The test for imputing income for intentional under-employment or unemployment is one of reasonableness, having regard to the parties' capacity to earn income in light of their age, education, health, work history and work availability. A spouse's capacity to earn income will include that person's ability to work or to be trained to work.

[38] Although the legal foundation for awarding spousal support is different from that of child support 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 "Means" has been interpreted to include all capital and other sources of income

[75] In *Jendruck v. Jendruck*, 2014 BCCA 320, the Court considered an appeal from an award of spousal support at trial, and noted at para. 16:

[16] Consistently, the courts have affirmed and applied the objective in the Divorce Act of striving for economic self-sufficiency, while recognizing that attainment of full economic self-sufficiency may not be practicable. To the degree effort could be made by a party to contribute to his or her own support in the circumstances, and effort has not been made, the courts have said the consequences of that party's choice falls on them. The courts do not, and cannot, say a person must take up any particular employment. It is a free society in which people may choose how to spend their hours. However, where the effort to contribute to one's own support is deemed insufficient in all the circumstances, the court will place the consequence of the inadequate effort on the person whose choice it is, and may do so by the vehicle of imputing income for under-employment.

## Analysis

- [76] In my view, the provisions of the Final Order are clear. The application of para. 10.b depends on whether the respondent's income, "as established by line 150 of his income tax return notice", exceeds \$174,000 for two consecutive years. The respondent's line 150 income did, in fact, exceed that threshold from 2013 onward. No argument has been raised that the line 150 income was not appropriately calculated in accordance with the Income Tax Act. It is not disputed that line 150 income includes the taxpayer's net rental income, and that for purposes of the Income Tax Act net rental income is net of interest payments but not of principal payments.
- [77] The respondent's submission appears to be premised on the Final Order allowing for the income "as established by line 150" to be varied by other income-related provisions of the FCSG (i.e., ss. 17-20). In my view, the provisions of the Final Order appear to be drafted in a manner to provide certainty and avoid protracted litigation over issues that can themselves be the subject of inherent controversy.
- [78] In any event, even if the Final Order was to be interpreted in that manner, it would in my view make no difference. It is important to keep in mind that this is a case of rental properties owned by an individual, who happens to be a payor spouse. As such, s. 18 has no direct application, as it only applies where an underlying asset is held by a corporation in which the payor spouse has an interest. The purpose of s. 18 is to eliminate the sort of unfairness that might occur where a payor might deal with corporate assets, and income generated by them, in a manner intended to keep out of the payor's income money that would otherwise be available to them. Inherent in s. 18 is a balancing of allowing the pursuit of legitimate corporate objectives with fairness to those requiring support. The concern to allow the pursuit of legitimate corporate objectives is particularly acute where the spouse is not the only shareholder in the corporation. Those sorts of policy concerns simply do not arise where an income-earning property is owned directly by the payor.
- [79] Even if I was to conclude that a payor spouse could deduct principal payments on properties owned directly by them in circumstances where such deduction would be permitted under s. 18 with respect to a corporate asset - a conclusion that I do not draw - it is my view that the circumstances of this case would not justify such a deduction. This is not a case of regular payments being made in a long-established manner. This is a case of steadily increasing principal payments being made as a way of using up cash that is available due to the respondent's steadily increasing income.
- [80] In my view, the appropriate income amount for consideration in respect of the alleged material change under para. 10.b of the Final Order is the line 150 income amounts stated in the respondent's tax returns. That amount has, since 2013, consistently exceeded \$174,000. The test for material change, as agreed to by the parties in 2008, and as clearly set out in para. 10.b, has been met.

## Issue #3: Respondent's Alleged Material Change

**Positions of the Parties**

- [81] The respondent submits that the claimant's income should include the amount of the "rent" money she receives from Mr. Dunn. The respondent says that, if these amounts are added to her income, then the respondent's income will have exceeded \$24,000 on multiple occasions. The respondent says that this constitutes a material change on the basis of which spousal support can be reconsidered.
- [82] The respondent also submits that, although the Final Order sets out specific grounds which might justify an application to vary, nothing in those provisions precludes the parties from applying to vary the agreement based on any other situation. The respondent says that nothing in either the Minutes of Settlement or the Final Order ousts the court's jurisdiction to vary the order upon finding a material change in circumstances, even if that material change was not something specifically contemplated in the Final Order.
- [83] On that basis, the respondent identifies four other circumstances said to constitute a material change in the circumstances:
- a) The respondent is now over 69 years old, is in the process of winding down his business, and intends to retire;
  - b) The claimant's repartnering, which is said to adequately address her needs, given her partner's salary;
  - c) The claimant's failure to become self-sufficient and what is said to be intentional underemployment; and
  - d) The compensatory grounds for an award of spousal support are no longer present or, expressed in an alternative manner, the compensatory aspects of the claimant's entitlement to spousal support have been fully satisfied by the payment of spousal support over several years.
- [84] With respect to the first point, the respondent presented a table said to indicate that Digiflex's revenue has been gradually reducing, even though this does not appear to be reflected in the annual financial statements or the respondent's tax returns.
- [85] With respect to the second point, in addition to arguing that the claimant's new partner can adequately address her needs, the respondent submits that if the claimant actually has needs beyond the means of her new partner, she could address those needs by finding full-time employment. The respondent also argues that the claimant has or will receive inheritance money, and also received a human rights tribunal award, all of which contribute to her means.

- [86] With respect to the alleged underemployment, the respondent references the recitals to the Minutes of Settlement which reference the claimant's intention to start work.
- [87] With respect to the final point, the respondent says that by the time of the hearing, the respondent had paid approximately \$820,000 in spousal support since separation. The respondent notes that this exceeds the amount shown in the 2008 calculation of spousal support as an appropriate lump-sum amount pursuant to the SSAG, which the respondent says is evidence that the total paid fully addresses the claimant's entitlement.
- [88] Also with respect to this last point, the respondent says that the claimant's compensatory entitlement was never strong. He argues that the parties' child attended daycare from the time he was one year old, and that although the claimant did help care for the respondent's mother and brother, that was voluntary and not really necessary. He notes that, during the course of the marriage, the claimant was able to complete two degrees. He submits that the claimant could have advanced her career both during the relationship and after separation, had she wanted to do so, and that it was her choice not to do so.
- [89] The claimant says that none of the alleged material changes advanced by the respondent qualify as such, either on the basis of the provisions in the Final Order or generally.
- [90] The claimant says that the proper interpretation of paras. 8-13 of the Final Order is that spousal support was to be paid on an ongoing basis, with no end date, and that:
- a) If 10.a was triggered (by the claimant's income exceeding \$24,000 in two consecutive years), any variation of spousal support was to be only temporary - which the claimant says indicates an expectation that the claimant's income would vary from year to year;
  - b) The only other agreed forms of variation were:
    - i. If the respondent attained the age of 65 and retired (para. 9.b);
    - ii. If the respondent's annual income from all sources (including his rental properties) was reduced by an amount exceeding \$24,000 for two consecutive years (para. 9.b);
    - iii. If the respondent's annual salary from Digiflex (which at the time of the Final Order was \$153,000) was reduced by \$48,000 (i.e. to \$105,000 or less) (para. 9.c); or
    - iv. if the respondent earned a line 150 income exceeding \$174,000 per year in two consecutive years (para. 10.b).
- [91] The claimant says that, on a proper interpretation of the Final Order, these are the only bases upon which a party could apply to vary spousal support. The claimant notes cases such as Sandy and Pawluck, cited above with respect to Issue #1, which encourage parties seeking "finality" to identify the changes that they agree will, or will not, warrant reconsideration.

- [92] Dealing with the funds the claimant receives monthly from Mr. Dunn, the claimant submits that those are properly characterized as contributions to expenses involved in owning the home. Even though they are described in the cohabitation agreement as "rent", the claimant has obtained accounting advice that in the circumstances, they do not count as rental income for purposes of the Income Tax Act, and that even if they did, they would be set off against the expenses she necessarily incurs in respect of the house. She has provided a lengthy list of expenses she says she has incurred over the years with respect to the three properties.
- [93] Dealing with specifically with the other alleged material changes, the claimant submits that:
- a) With respect to the respondent's alleged intention to retire, the provision of the Final Order, as negotiated between the parties in 2008, provides that a material change will arise where the respondent is over 65 years old and "retires". Both of those criteria must be met in order for para. 9.a to apply. Unless and until the respondent actually retires, the relevant requirements for a material change have not been met. As well, the claimant says that even in the absence of para. 9.a, at law an intention to retire in the future does not constitute a material change.
  - b) With respect to repartnering, the claimant says that:
    - i. at law, repartnering does not constitute a material change,
    - ii. the parties in 2008 negotiated with respect to repartnering, with the respondent wanting to include it in the Final Order as a ground for variation, but ultimately (and with each party making concessions) came to an agreement without it being there, and
    - iii. given their co-habitation agreement, Mr. Dunn has no legal obligation to contribute to support of the claimant.

The claimant says that the respondent is effectively asking Mr. Dunn, who has a substantially lower income than him, to be liable for the claimant so that he can continue to live a considerably wealthier life where he earns in excess of \$230,000 per year, lives in a three-bedroom home with no tenants, and owns \$5 million in assets - that being a life he attained as a result of the 27 years invested by the claimant for the betterment and benefit of the respondent.

- c) With respect to the failure to become self-sufficient, the claimant submits that neither the Minutes of Settlement nor the Final Order imposes any obligation on her to find employment, and at law a failure to become self-sufficient is not in and of itself a material change. She draws parallels to the facts in L.M.P. (and particularly the comments at paras. 57-59, which are quoted below). She says that while the Minutes of Settlement indicate her intention to seek employment, they do not make ongoing full-time employment a condition of her entitlement.

- d) With respect to the last of the respondent's points, the claimant submits that the fact that one party has come to the view that the other's compensatory entitlement has been satisfied is in no way a material change. The claimant says that she continues to suffer disadvantages from the marriage and separation, and continues to be in need of support, while the respondent continues to benefit from their relationship and has grown his asset base to nearly triple the claimant's.
- [94] With respect to the respondent's submission based on the 2008 lump-sum calculation, the claimant submits that while SSAG lump-sum calculations are a useful tool for parties who wish to settle spousal support on that basis, the calculation by its nature is not a guide to measure against the sum total of periodic payment. The lump-sum payment amount represents a present value calculation, by which the total payments over time are discounted downward. It is also received tax-free by the recipient, who can then invest the funds and generate income. This contrasts with monthly awards which, by their nature, are not expected to generate an income and are taxable in the hands of the recipient.
- [95] Finally, the claimant says that it would be inappropriate to vary spousal support in any event given the respondent's ongoing resistance to fully complying with his disclosure obligations. With respect to this, the claimant says that the respondent has not updated his F8 Financial Statement since July 2022, and has also failed to comply with Justice Milman's order that he produce the ledgers of Digiflex. The claimant says that the respondent's assertion that Digiflex does not have a ledger is unbelievable. The claimant says that the respondent has provided only partial tax returns or summaries, and in many cases, has not produced the real property statements that would show the expenses he claims in respect of his rental properties. The claimant notes the respondent's evidence that he pays many of his corporate and rental property expenses with a personal credit card, and suggests that the respondent's non-disclosure prevents the Court from assessing whether his corporate and real property expenses include any personal expense component that should be added back to his income.
- [96] In response to these submissions, the respondent argues that there is nothing in the Final Order that expressly says that repartnering is not a material change, and submits that there are cases that recognize repartnering is a relevant change in respect of non-compensatory support.
- [97] With respect to the claimant's assertion that her accountant had advised her that she did not need to report rental income from Mr. Dunn, the respondent suggests that the claimant may not have showed her accountant the actual provision of the cohabitation agreement which uses the word "rent". The respondent also suggests that the property expenses the claimant has said she is required to pay are hypothetical and constitute opinion evidence.

## Legal Context

- [98] As noted above, s. 17(4.1) requires that before making a variation order, a court must first "satisfy itself that a change in the condition, means, needs or other circumstances of either former spouse" has occurred.
- [99] The leading case on the proper application of these provisions is L.M.P., which discussed the applicable test at paras. 29-36:
- [29] In determining whether the conditions for variation exist, the threshold that must be met before a court may vary a prior spousal support order is articulated in s. 17(4.1). A court must consider whether there has been a change in the conditions, means, needs or other circumstances of either former spouse since the making of the spousal support order.
- [30] In our view, the proper approach under s. 17 to the variation of existing orders is found in Willick v. Willick, [1994] 3 S.C.R. 670, and G. (L.) v. B. (G.), [1995] 3 S.C.R. 370. Like the order at issue in this case, Willick (dealing with child support) and G. (L.) (dealing with spousal support) involved court orders which had incorporated provisions of separation agreements. Both cases were decided under s. 17(4) of the Divorce Act, the predecessor provision to s. 17(4.1).
- [31] Willick described the proper analysis as requiring a court to "determine first, whether the conditions for variation exist and if they do exist what variation of the existing order ought to be made in light of the change in circumstances" (p. 688). In determining whether the conditions for variation exist, the court must be satisfied that there has been a change of circumstance since the making of the prior order or variation. The onus is on the party seeking a variation to establish such a change.
- [32] That "change of circumstances", the majority of the Court concluded in Willick, had to be a "material" one, meaning a change that, "if known at the time, would likely have resulted in different terms" (p. 688). G. (L.) confirmed that this threshold also applied to spousal support variations.
- [33] The focus of the analysis is on the prior order and the circumstances in which it was made. Willick clarifies that a court ought not to consider the correctness of that order, nor is it to be departed from lightly (p. 687). The test is whether any given change "would likely have resulted in different terms" to the order. It is presumed that the judge who granted the initial order knew and applied the law, and that, accordingly, the prior support order met the objectives set out in s. 15.2(6). In this way, the Willick approach to variation applications requires appropriate deference to the terms of the prior order, whether or not that order incorporates an agreement.
- [34] The decisions in Willick and G. (L.) also make it clear that what amounts to a material change will depend on the actual circumstances of the parties at the time of the order.

- [35] In general, a material change must have some degree of continuity, and not merely be a temporary set of circumstances (see *Marinangeli v. Marinangeli* (2003), 66 O.R. (3d) 40 at para. 49 (C.A.). Certain other factors can assist a court in determining whether a particular change is material. The subsequent conduct of the parties, for example, may provide indications as to whether they considered a particular change to be material (see *MacPherson J.A.*, dissenting in part, in *P. (S.) v. P. (R.)*, 2011 ONCA 336, 332 D.L.R. (4th) 385, at paras. 54 and 63).
- [36] The threshold variation question is the same whether or not a spousal support order incorporates an agreement: Has a material change of circumstances occurred since the making of the order?
- [100] In *L.M.P.*, the trial judge had conducted a *de novo* hearing as to the wife's ability to work and found that notwithstanding her multiple sclerosis, she was capable of working outside the home. The Court of Appeal had concluded that, in light of this conclusion, and the passage of five years since the original order, there had been a material change of circumstances. At para. 53, Abella and Rothstein JJ. described these conclusions as "unsustainable", noting that the expert evidence was that there had been little change in the wife's condition in the 19 years since her diagnosis. Thus, there had been no material change in circumstances justifying a variation of the order.
- [101] They specifically rejected an argument that a material change arose from the failure of the payee wife in that case to obtain employment that would make her self-sufficient:
- [57] The husband argued that the wife had a duty to seek employment based on the factors in s. 15.2(6) of the Divorce Act which were included in the agreement incorporated in the order. In particular, he relied on the objective that "insofar as practical" there should be "economic self-sufficiency of Plaintiff and Defendant". Her failure to seek employment, he therefore argued, was a material change of circumstances.
- [58] We do not accept the husband's submissions. There is nothing in the order suggesting that the wife was expected to seek employment. The order recognized that the wife was in receipt of disability payments. It provided for spousal support and included no term or provision for review. Its terms indicate that spousal support was intended to be for an indeterminate period. The order expressly acknowledged that the objectives of s. 15.2(6) of the Divorce Act were taken into consideration by the parties.
- [59] Neither does the Divorce Act impose a duty upon ex-spouses to become self-sufficient. As this Court affirmed in *Leskun*, the "[f]ailure to achieve self-sufficiency is not breach of 'a duty' and is simply one factor amongst others to be taken into account" (para. 27). Section 15.2(6)(d) of the Divorce Act simply states that the order should "in so far as practicable, promote the economic self-sufficiency" of the parties.

[102] Two 2015 judgments of the Court of Appeal provide contrasting viewpoints as to the circumstances in which repartnering can constitute a material change. In *Morigeau v. Moorey*, 2015 BCCA 160, the payor husband appealed from the dismissal of his application to vary spousal support as a result of the payee wife having repartnered. The parties had been married for 20 years. At the time of the original order, Ms. Morigeau was 56 and had been out of the workforce for much of the marriage, having stayed at home to raise the parties' children. Although she had returned to the workforce shortly before the original order, her earning capacity was much lower than that of Mr. Moorey. Ms. Morigeau had been involved in a new relationship prior to the original order, but at the time did not consider herself to be living with the new partner. The original order was said to have both compensatory and non-compensatory elements.

[103] At para. 13, Justice Kirkpatrick quoted with approval the following summary (by the trial judge) of principles applicable to s. 17 applications to vary spousal support on repartnering:

1. The threshold question in each case is whether there has been a material change in circumstances from the date of the previous order, i.e., a change which, if known at the time, would have resulted in a different order: *Willick v. Willick*;
2. Because of the different tests involved, cases involving initial applications for spousal support under s. 15.2 of the Divorce Act are of limited value in deciding an application to vary under s. 17 of the Divorce Act: *L.M.P. v. L.S.*, *Fargey v. Fargey* [2013 BCSC 331];
3. Although the focus of the analysis is on the original order and the circumstances in which it is made, the court will not consider the correctness of the original order, nor will the original order be departed from lightly: *Willick v. Willick*;
4. Remarriage or re-partnering is not, in and of itself, sufficient to trigger a material change in circumstances: *G. (L.) v. B. (G.)* [[1995] 3 S.C.R. 370.], *Kelly v. Kelly*;
5. If the applicant knew that the former spouse was seeing a third party and cohabitation was foreseeable at the time of the original order, cohabitation may not trigger a material change in circumstance: *G. (L.) v. B. (G.)* [2007 BCSC 227], *J.W.J.M. v. T.E.R.* [2004 BCSC 1062];
6. The circumstances of the re-partnering may have a bearing on the analysis: *Rakose v. Rakose* [2008 BCSC 1165], *Redpath v. Redpath* [2008 BCSC 68].

[104] At para. 26, Justice Kirkpatrick quoted from the judgment in *K.D. v. N.D.*, 2011 BCCA 513, including the following comment at para. 22 of *K.D.*:

[22] before a court may vary a support order, it must be satisfied that a "change in the condition, means, needs or other circumstances of either former spouse" has occurred since the earlier order was made. The change must thus relate to the economic situation of the applicant. As well, it must be material. As this Court observed in *Turpin v. Clark*, 2009 BCCA 530, 313 D.L.R. (4th) 452, at para. 46, the concept of materiality has been characterized in several ways. For present purposes, it is sufficient to describe it as a substantial, unforeseen and

continuing change that, if known by the judge who made the prior order, would have led to a different award of support.

[105] Justice Kirkpatrick went on to note at paras. 32-33 that:

[32] In my view, it can usually be reasonably foreseeable that divorcing parties will enter into new relationships. The question in each case will be the effect of the new relationship. That, in turn, depends on the purpose of the spousal support order at first instance.

[33] Even if one accepts Mr. Moorey's argument that he did not foresee that Ms. Morigeau would eventually cohabit with Mr. Arens, the result would be no different. This is so because, in my view, the spousal support order was, in the circumstances of these parties, primarily compensatory. This, as I have noted, was a long marriage. The parties had two children. Ms. Morigeau did not work outside the home for 12 years of the marriage. As the judge correctly observed, Ms. Morigeau will never achieve the same income or security that Mr. Moorey enjoys. Further, the Order appears to have divided the family assets equally between the parties, save for a \$30,000 lump sum that was intended as retroactive spousal support. All of these factors lend credence to the proposition that spousal support was primarily compensatory.

[106] In the circumstances of that case, including the fact that the spousal support order in that case was primarily compensatory, the repartnering did not constitute a material change.

[107] In *Zacharias v. Zacharias*, 2015 BCCA 376, the parties had separated in 2006, then entered into a consent order in 2008 which provided for ongoing spousal support of \$6,000 per month. The recipient spouse remarried in 2012, and the payor spouse applied in 2014 for order varying his obligation to pay spousal support as a result of her remarriage. The result at trial was summarized at para. 10:

[10] The judge found that Ms. Hannigan's remarriage in 2012 resulted in a substantial change in her circumstances, particularly in her financial means. The change brought about by the remarriage was not foreseen at the time of the 2008 order, and therefore fulfilled the requirements of s. 17(4.1) of the Divorce Act. Accordingly, the judge found that he had jurisdiction to make a variation order.

[108] At para. 29, Justice Groberman noted that:

[29] On this appeal, both parties accept that Ms. Hannigan's remarriage, with the financial implications that it has had, represents a material change in her circumstances satisfying the requirements of s. 17(4.1) of the Divorce Act. Ms. Hannigan's remarriage has significantly affected her financial situation, and was not in contemplation when the original support order was made.

[109] It is noteworthy that, in *Zacharias*, the existence of a material change was not in dispute. The authority is thus of little assistance in determining this issue in the present case.

- [110] Having dealt with the first question (whether there had been a material change), Justice Groberman went on to consider the extent to which the order should be varied. In the course of that discussion, he commented on the basis for the original order at para. 34:
- [34] The original support order in this case was made by consent, so the chambers judge did not have the benefit of reasons expressing the rationale for the award. It appears, however, that in 2008, Ms. Hannigan would have been entitled to spousal support on both compensatory and non-compensatory grounds.
- [35] The parties accept the chambers judge's finding that, at present, Ms. Hannigan does not have an entitlement to support on a non-compensatory basis. At this juncture, Ms. Hannigan's entitlement to support must be made out, if at all, on a compensatory basis.
- [111] The trial judge in Zacharias had approached the determination of the appropriate variation by attempting to identify what component of the original award was directed at compensatory support, and which component was non-compensatory. Justice Groberman concluded (para. 37) that this approach misconstrued the nature of an award of spousal support. However, despite his concerns with aspects of the trial judge's analysis, Justice Groberman agreed that there was a *prima facie* entitlement to compensatory support. He discussed at paras. 54-56 the role that the marital standard of living plays in determining an appropriate standard of living. He concluded at para. 64 that the result of the trial judge's award was not inappropriate, particularly given that Ms. Hannigan had not cross-appealed from the reduction. He went on to comment as follows:
- [67] Before closing, I should note that both parties presented arguments based on this Court's recent decision in *Morigeau*. In that case, the Court found that there was no basis for a variation in support, because there was no material change in circumstances. The Court also specifically ruled that the recipient spouse had not yet been appropriately compensated for her role in the couple's marriage. Given those findings, the court's dismissal of the appeal followed. I acknowledge that some of the obiter comments in *Morigeau* might, if extended too far, be seen as inconsistent with the analysis I have presented. Some caution should, in my view, be exercised in applying those obiter comments. While they may be applicable in some cases, individual circumstances will have to be carefully considered. In particular, I would suggest that characterizing a re-partnering situation as a potential "windfall" for either the payor or payee spouse will rarely be helpful.
- [112] It is not clear exactly what "obiter comments" Justice Groberman is referring to. Clearly, he is not doubting the *Morigeau* court's conclusions as to a lack of material changes. I note that in *Morigeau*, the word "foreseeable" is used multiple times, while in many other cases it is seen as more appropriate to focus on changes that were "foreseen" (rather than foreseeable). In my analysis in this case, I have not found it necessary to consider whether changes were foreseeable.

[113] I had previously referenced *Pawluck v. Pawluck*, 2019 BCCA 167. In that case, the payor husband had formerly been a high income-earning partner at a major accounting firm, who initially paid \$17,500 in monthly spousal support on an interim basis. He became unemployed when he reached the age of mandatory retirement, after which the parties entered into a comprehensive settlement agreement in 2014, which provided for him to pay indefinite spousal support of \$4,500 per month. This term was reflected in a consent order. He was employed in a temporary position for two years, but that employment ceased in late 2017. In May 2018, he applied to terminate spousal support on the basis of his unemployment. The application was dismissed on the basis there had been no material change.

[114] On appeal, Justice Abrioux concluded that there was no reviewable error. He cited the principles in *L.M.P.*, which I have already discussed. With respect to the impact of the settlement agreement, he noted at para. 30 that:

[30] First of all, I note that the Final Order did not specify, as it could have, what period of unemployment would constitute a material change in circumstances.

He then referenced para. 71 of *Sandy*, which is quoted above, and encouraged parties seeking finality to clearly identify the changes they agree will or will not warrant reconsideration of a consent order for support.

## Analysis

[115] I begin with the question whether the amount of the "rent" money the claimant received from Mr. Dunn should have been included in her line 150 income, and thus should be included in any calculation to determine whether the threshold in para. 10.a. of the Final Order has been met.

[116] In my view, whether the cohabitation agreement uses the word "rent" or some other term is of only some significance. For tax purposes, it will be the actual nature of the payment that matters, not how the parties to a cohabitation agreement characterized it. As I read the cohabitation agreement, it seems clear that the bulk of house-related expenditures (other than regular utilities) are left to the claimant. Generally speaking, rental income is subject to taxation when a property is rented out with a view to profit. A homeowner who collects money from a related person living in the house, who uses those funds for house-related expenses, and is not acting with a view to profit, will generally not be considered to be in receipt of taxable rental income. In my view, the advice the claimant received from her accountant several years ago makes sense in this context.

[117] It is thus my view that there is no basis for this Court to add to the line 150 amounts that have been reported by the claimant and accepted on assessment by the Canada Revenue Agency over a period of some 15 years.

- [118] The respondent argued that changes not specifically referenced in the Final Order may be considered material changes, if they otherwise qualify as such. In my view, that proposition must be considered in a manner which gives effect to those material changes identified in the Final Order, and in light of the encouragement provided in L.M.P. and emphasized in Sandy, both quoted above in my analysis of Issue #1, that parties set out "the potential changes in circumstances they have considered" and the extent to which they will or will not warrant reconsideration of the terms they have agreed to.
- [119] In my view, where a specific change is dealt with in a consent order like the one in the present case, the provisions of the order with respect to that change should govern. Thus, for example, it would not be appropriate for a court to consider that an increase in the respondent's salary to \$170,000 (rather than the \$174,000 specified in the order) should give rise to a variation.
- [120] In my view, even matters closely related to the issues dealt with in the provisions of the Final Order should not be considered as material changes if it is reasonable to assume that the parties considered potential changes of a particular nature and resolved the case on the basis of the terms in the Final Order.
- [121] That said, I accept that there may be some changes that can not be said to have been foreseen by the parties that might independently give rise to a material change justifying variation of spousal support.
- [122] I turn now to the four specific matters alleged by the respondent to constitute material changes. The first is that he is now over 69 years old and intending to retire. In my view, the parties agreed to the terms upon which the respondent could apply for variation with respect to issues of age and retirement. Those terms are set out in para. 9.a. They require that two criteria be met: that the plaintiff has reached the age of 65 and that he has retired. The respondent has not met those requirements. In addition, he continues to earn a substantial income - significantly higher than the income he earned at the time of the Final Order. In these circumstances, it would be inappropriate to vary spousal support on the basis of the respondent's age and an unrealized intention to retire.
- [123] Similarly, it would be inappropriate to consider any variance in the revenue of Digiflex, to the extent such variance does not give rise to a change meeting one of the thresholds in para. 9, as constituting a material change giving rise to an application to vary spousal support. In any event, as I have noted, the annual financial statements do not reflect any significant downward trend with respect to available income.
- [124] I turn to the impact of the claimant's repartnering. The evidence is the claimant's repartnering - which was either already in place or imminent at the time of the Final Order - was something the parties were aware of at the time of the Final Order. Although the Final Order contained detailed provisions with respect to what would give rise to variation of spousal support, the Final Order did not include repartnering amongst those provisions.

- [125] More generally, it appears from cases like Morigeau that where a spousal support order is granted largely on compensatory grounds, repartnering would not generally be considered a material change in any event. Even with respect to non-compensatory support, it appears that the combined income of the claimant and Mr. Dunn is still substantially less than the respondent's income.
- [126] I have reviewed the various submissions made by the parties with respect to compensatory support. In my view, there is a substantial degree of revisionist history in the respondent's position. It seems clear that during the parties' relationship, the respondent was the primary breadwinner and the claimant had a significantly reduced labour force attachment and a much greater role in raising the parties' child and helping with family. The claimant has tendered extensive evidence about her efforts to obtain employment since separation, which has at times seen short-term success, but has not led to any long-term employment. The bulk of the employment she has been able to obtain has been either short-term or part-time in nature, or both. I accept that there have been significant efforts made. Much of her focus appears to have been on searching out work in the adult education sector. Given her Métis status, she has also focused on work in which her background would potentially be of benefit. All of this seems appropriate.
- [127] In my view, the claimant's ability to find full-time, long-term work has continued since separation to be impacted by her lengthy period of time out of the workforce. She is now 62 years old, with various health conditions including cancer, and it is not realistic to think she is in a position to competitively secure long-term full-time work. At the same time, the respondent continues to reap benefits from the parties' relationship - largely as a result of the company that was built when the parties were together (and which the claimant was a part of for several years), which continues to produce a generous income.
- [128] In my view, there was in 2008 and continues to be an unsatisfied compensatory entitlement.
- [129] In all of the circumstances, it is my view that the claimant's 2008 repartnering does not constitute a material change with respect to spousal support.
- [130] I will deal briefly with the references to inheritances and a tribunal award said to constitute "means" that should be considered with respect to whether there has been a material change. I accept that, particularly where spousal support is non-compensatory, a sufficiently large change to a party's resources might constitute a material change. In my view, given the amounts in issue, the inheritance and tribunal award that are referenced are not of such nature.
- [131] The next alleged material change is the claimant's failure to become self-sufficient and what is said to be intentional underemployment.
- [132] In my view, nothing in the Final Order can be said to give rise to an obligation to become self-sufficient. The Final Order provides for variation if the claimant's income (apart from spousal support) exceeds \$24,000. Even where that occurs, the Final Order contemplates

that any variation in respect of that increase in her income will only be temporary, as paras. 11-13 contemplate agreement to a Temporary Variation Agreement, with spousal support thereafter reverting to the original \$4,000 per month amount. I would interpret these provisions as reflecting doubts that the parties had as to whether the claimant was likely to become fully re-engaged in the workforce.

- [133] There is a provision in the Minutes of Settlement dealing with the claimant working. However, that provision is in the recitals - not the implementation provisions, and it talks only about what she "expects" and "hopes" to earn. In my view, this provision cannot be considered as creating an obligation to secure full-time employment.
- [134] Apart from the Final Order and the Minutes of Settlement, the comments of the majority in L.M.P. at paras. 57-59, already quoted above, make clear that apart from any provisions of the initial order for spousal support, a failure to become self-sufficient is not a material change. As noted at para. 59:
- [59] Neither does the Divorce Act impose a duty upon ex-spouses to become self-sufficient. As this Court affirmed in *Leskun*, the "[f]ailure to achieve self-sufficiency is not breach of 'a duty' and is simply one factor amongst others to be taken into account" (para. 27). Section 15.2(6)(d) of the Divorce Act simply states that the order should "in so far as practicable, promote the economic self-sufficiency" of the parties.
- [135] Thus, it is my view that the fact that the claimant has not become self-sufficient does not constitute a material change for purposes of s. 17.
- [136] The final argument made is that the claimant's compensatory entitlement has been fully satisfied.
- [137] I repeat the opening words of DA s. 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
- [138] As noted L.M.P. at para. 32, the change must be one which, if known at the time of the Final Order, "would likely have resulted in different terms".
- [139] It is difficult to see how an alleged "satisfaction" of entitlement is "a change in the condition, means, needs or other circumstances" of one of the parties, or that it is something that if it had been considered "would likely have resulted in different terms".
- [140] The Final Order was made after a 26-plus-year relationship, at a time when the parties were 46 and 53 years of age respectively. It contemplates spousal support to be paid on an indefinite basis, but subject to variation upon the respondent retiring (provided he did so after age 65, which was 12 years after the Final Order). It also provided for variation if there was a significant decrease in the respondent's income level. In dealing with Issue #4 below, I discuss the appropriate scope of variation. It would seem to me that, in light of the legal

principles and analysis set out in that discussion, a variation based on those circumstances could well give rise to a consideration of ongoing entitlement.

[141] In my view, the alleged satisfaction of entitlement is not in the circumstance of this case, and given what is set out in the Final Order, a material change giving rise to a variation.

[142] I turn to the respondent's submission that his total payments of spousal support now exceed the amount of a potential lump-sum award from 2008. I agree with the claimant's submissions that it is entirely inappropriate to compare a number representing a present value calculation with a sum of payments over time.

[143] Finally, I note my comments above with respect to the claimant's compensatory entitlement. For the reasons I have set out, it is my view that on the facts of this case, the claimant's compensatory entitlement has not been satisfied in any event.

[144] In my view, it cannot be said that any alleged satisfaction of the claimant's entitlement would constitute a material change giving rise to an ability to seek variation pursuant to DA s. 17.

#### **Issue #4 - Appropriate Scope of Variation**

[145] Having concluded that a material change has occurred, in accordance with s. 17(4.1), the Court must go on to determine if and to what extent the spousal support provisions in the Final Order should be varied in light of the identified material change.

#### **Positions of the Parties**

[146] The claimant submits that the Final Order should be varied to increase the spousal support payable to \$7,239 per month, based on the respondent's 2021 line 150 income of \$226,026 and the claimant's 2022 line 150 income of \$27,457. The proposed amount of \$7,239 is the midpoint of a DivorceMate calculation based on these income amounts. [The claimant advances the claim made in her notice of application, filed at a time when the most recent information available was the respondent's 2021 income, notwithstanding that the claimant subsequently learned that the respondent's 2022 income was \$232,161.]

[147] The claimant submits that, in accordance with the principles set out in L.M.P., the extent of variation should only be such as is justified by the material change that has occurred. Since the only material change is the increase to the respondent's income, the only change should be an upward variation in accordance with that increase. It is submitted that it is appropriate to base this increase on the SSAG, and the claimant submits that the midpoint spousal support should be selected.

[148] The respondent submits that s. 17 requires the Court to consider the objectives of spousal support, as set on in s. 17(7), even on an application for variation. With respect to those objectives, the respondent submits that:

- a) With respect to compensatory spousal support, the compensatory aspect of the spousal support that was ordered has been fully satisfied given the payment of over \$800,000 since the parties separated;
- b) As well, the claimant is now 69 years of age and in the process of winding down his business with a goal of eventually retiring - the requirement to continue to pay spousal support imposes a hardship on him;
- c) The claimant repartnered in or about 2008, and her needs are addressed by her new partner;
- d) The claimant should have become self-supporting by now, she is intentionally underemployed, and income should be imputed to her. The respondent says that termination of spousal support would promote the claimant to find employment, and that any hardship that she might suffer from a termination of spousal support, that is not already adequately addressed by support from her new partner, can be addressed by her simply returning to work. He says that support should be terminated on the basis that sufficient time has been allowed for the claimant to become self-sufficient.

As can be seen, many of these submissions are a repeat of the submissions made in respect of Issue #3.

[149] In response to the claimant's submissions with respect to the SSAG, the respondent argues that, to the extent an award is made for ongoing spousal support, that award should be at the low end of the SSAG range as the claimant's primary remaining claim is non-compensatory, or needs-based, the majority of which should be addressed by her new partner.

[150] The respondent also submits that, in any new calculation under the SSAG, the claimant should be imputed substantial income. The respondent says that the claimant is a highly qualified individual, with two Bachelor's degrees and various other program completion certificates, and submits that if one considers the various consulting contracts the claimant has worked on, for which her consulting fees ranged from \$27 to \$58 per hour, and converts these to annualized income based on working full time for a year at those hourly rates, the range would be \$52,000 to \$111,000. The respondent submits that it would thus be reasonable to impute income of \$80,000 per year. The respondent submits that the claimant has worked full-time hours for a total of only 5½ of the 18 years since the parties separated (and never for two consecutive years), and that these circumstances warrant a conclusion that she is intentionally underemployed.

[151] The respondent acknowledges that the claimant has alleged various health issues, but says that the claimant has not properly tendered medical expert evidence confirming any diagnoses and their impact on her ability to work full time.

- [152] The respondent says that the claimant has only produced job applications in respect of a limited number of jobs, and submits that she has exaggerated her attempts to find employment and the Court should not accept that any other applications were made.
- [153] The respondent submits that, when the parties separated in 2006, the claimant was only 44 years of age with no health concerns. The Minutes of Settlement indicate that in 2008, when she was 46, she was planning to work. Even though she is now 62 with alleged health issues, that is no explanation for her failure to find consistent, ongoing full-time employment earlier on.
- [154] In response to this, the claimant submits that if there is to be any imputation of income, it should be to the respondent whose disclosure of any substantial Digiflex records was at the last minute, and who still has not produced ledgers. The claimant submits that the disclosure that has been obtained indicates that there may be significant cash in the company that should be available to the respondent for support purposes, although this is difficult to quantify given the missing disclosure.

## Legal Context

- [155] The concluding words of s. 17(4.1) provide some guidance as to scope of variation. As noted above, s. 17(4.1) requires the court to find that there has been "a change in the condition, means, needs or other circumstances of either former spouse since the making of the spousal support order". If that is found to exist, then:

(4.1) in making the variation order, the court shall take that change into consideration.

- [156] Section 17(7) also provides some guidance with respect to the variation:

- (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.

- [157] The objectives listed in s. 17(7), that apply when a spousal support order is varied, are the same objectives as are listed in s. 15.2(6), that apply when a spousal support order is initially granted. However, their application is different. In *L.M.P., Abella and Rothstein JJ.* summarized the applicable approach at paras. 47 and 50:

- [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, "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).
- [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.
- [158] In *Beninger v. Beninger*, 2007 BCCA 619, the payor spouse had obtained an order reducing spousal support to \$4,000 per month, notwithstanding that his income had increased. The recipient spouse appealed. At para. 43, Justice Prowse noted that there had been a change in circumstance within the meaning of s. 17(4.1) - namely, a substantial increase in Mr. Beninger's income from \$120,000 to \$364,500 per year. She went on to comment at para. 50 that "the baseline for a spousal support order should not have been less than the \$6,500 per month" that had been ordered at a 2003 trial before Justice Curtis. On appeal, the order for spousal support was increased to \$9,000 per month, based in part on consideration of the SSAG. The claimant suggests that many of the comments of Justice Prowse at para. 53 are equally applicable to the present case:
- [53] based on the criteria which Mr. Justice Curtis applied under s. 15.2 of the Act (which mirror the objectives in s. 17(7)), Ms. Beninger was initially entitled to substantial spousal support of indefinite duration based on both compensatory and non-compensatory principles. There was some prospect of her obtaining employment at that point, but that expectation has not come to fruition for reasons grounded in the roles of the parties during this lengthy marriage and Ms. Beninger's persistent and increasing health problems. Here, Mr. Beninger's increase in income giving rise to the variation application is directly related to the career he embarked on as a result of the education he obtained, in part, during the marriage, and the years of working during the marriage during which he developed his skills. He did so with the benefit of Ms. Beninger as a full-time homemaker who had given up her own career to fulfill that role. He is now free of the bankruptcy issues which adversely impacted on both of them following the marriage breakdown, and he is no longer required to provide financial support for Carling. Ms. Beninger, on the other hand, continues to struggle with the adverse economic consequences arising from the breakdown

of the marriage which left her with limited capacity to improve her situation

- [159] In Beninger, the Court considered whether income should be imputed to the recipient spouse, who had not found employment despite efforts to do so, but determined that imputation was not appropriate.
- [160] The respondent relied heavily on *Aspe v Aspe*, 2010 BCCA 508. In that case, there had been an initial consent order made in 1993 for indefinite child and spousal support totalling \$3,500 per month. The consent order contained no provisions like those in the present identifying what would and what would not constitute a material change. In 1994, a chambers judge had determined that of that amount, \$1,175 represented spousal support. By 2006, all of the children had ceased living with their mother and were living with the father.
- [161] The order under appeal was made in March 2009. It confirmed that child support was no longer payable, and varied the amount of spousal support from \$1,175 to \$2,750, retroactive to April 1, 2008. The material change on which this variation was based was twofold: a substantial increase in the cost of living since 1993, and the fact that the children had left the mother's home and were now living with their father.
- [162] On appeal, Justice Neilson noted that there was no issue as to the material changes - rather, the issues were whether there should have been an order for continuing spousal support, whether the increase should have been retroactive, and whether the chambers judge's order that there be a review in two years was appropriate. She commented that the chambers judge had erred in referencing the factors set out in s. 15.2(4) of the DA, which are intended to be considered at the time of the initial order for spousal support. However, as noted at para. 34:
- [34] I am not persuaded, however, that this error played a significant role in the analysis of the chambers judge. She was clearly aware that her primary concern was whether, given the changes in circumstances, the objectives of s. 17(7) had been fulfilled.
- [163] She concluded at para. 37 that:
- [37] the chambers judge erred in setting the amount of support at \$2,750. Her reasons neither explain nor justify that amount. As Mr. Aspe points out, \$2,750 represents an increase of 134% in spousal support. That figure does not appear to have any relationship to the two material changes found. The fact the children had left their mother's home to live with Mr. Aspe would ordinarily result in a reduction in spousal support due to decreased expenses related to the girls' accommodation, and because their departure left Ms. Aspe free to seek employment. An increase of 23.5 percent in the cost of living would logically produce a correlative increase of 23.5 percent, or \$276 monthly, in the support payments, unless there are other factors at play. The brief reasons of the chambers judge on the quantum of support do not identify any such factors.

- [164] With respect to the 1993 settlement agreement, Justice Neilson commented at paras. 45-46 that:
- [45] As to contractual entitlement to ongoing support, the 1993 settlement and order did provide for indefinite spousal support. Nevertheless, the chambers judge properly found Ms. Aspe was nearing the end of her entitlement to support on that basis. The economic consequences of marriage and its breakdown may be equitably distributed by spousal and child support, by the division of family assets or by a combination of both: *Moge v. Moge*, [1992] 3 S.C.R. 813, 43 R.F.L. (3d) 345 at 375. Seventeen years ago Ms. Aspe received family assets with an after-tax value of \$475,000. Mr. Aspe has not only honoured his obligations to pay support, but provided significant additional payments for both Ms. Aspe and the girls, effectively relieving her of any substantial responsibility for the children. While Ms. Aspe is experiencing financial hardship, this cannot be attributed to the marriage or its breakdown.
- [46] In my view, the objectives of s. 17(7) have substantially been met. Neither the chambers judge's findings nor the evidentiary record provide justification for the increase in spousal support to \$2,750. I would therefore allow the appeal to the extent of setting aside that aspect of the order, and would substitute an order for monthly spousal support of \$1,500 for two years commencing April 1, 2009. That amount roughly reflects the 23.5 percent increase in the cost of living, but relieves Ms. Aspe from a deduction related to the girls' change of residence.
- [165] More recently, in *Willms v. Willms*, 2020 BCCA 51, spousal support was increased based on the payor's obligation to pay child support having ceased. Justice Willcock cited *L.M.P.*, then went on to say at para. 47 that in light of what was said in *L.M.P.*:
- [47] a relatively limited reassessment of the appropriate level of support was appropriate in this case. The only material change was the fact spousal support needed to no longer be determined with reference to the "with child support" schedule in the SSAG. The judge was correct to say he ought not to engage in a wholesale analysis of the parties' circumstances.
- [48] The appellant says the judge did not consider whether his income and current lifestyle were a result of events that occurred during the relationship. The appellant further argues the trial judge did not consider whether the respondent had made reasonable efforts to obtain self-sufficiency. The appellant submitted in chambers there should be a "step down" of spousal support in light of the fact the parties had been separated for close to ten years and divorced for eight years. He argued the respondent had been afforded a reasonable period of time to become self-sufficient.
- [49] In considering those submissions we should bear in mind that the evidence was that the appellant continued to enjoy the benefits of the same employment in which he had engaged during the parties' lengthy marriage. The respondent had taken significant steps to become self-sufficient by retraining and finding new and more lucrative employment, but continued to have limited income earning capacity. The judge observed:

- [36] The Order in this case followed a 21-year relationship between the parties. The ability of the wife to work had been seriously restricted by childcare requirements during the marriage while the husband was developing a career which included extensive travel away from the family home. The Order did not fix a review date and, as noted, the spousal support obligation was binding upon the estate of the [appellant]. Entitlement to spousal support was clearly canvassed and determined by Mr. Justice Truscott, who decided that the claimant was entitled to support in the mid-range of the table amounts provided by the Spousal Support Advisory Guidelines. This finding provides some guidance in regards to the use of the ranges in this case.
- [50] The appellant acknowledges: first, it is appropriate to limit re-consideration to factors affected by the change in circumstances; second, it was appropriate to refer to the initial spousal support order as one that provided "some guidance" in regards to the appropriate range of spousal support; and third, the judge could properly consider the relative standards of living of the parties at the time of the application.
- [51] He says, however, inappropriate weight was placed upon these factors. That argument hinges upon the submission that the trial judge ought to have expressly referred to other significant factors in his reasons for judgment, including the passage of time, the efforts made by the respondent to become self-sufficient (more particularly her failure to become self-sufficient) and changes in the parties' incomes over the years. In my view, it was not necessary for the trial judge to do so, and it was sufficient for him to mention those factors that weighed most significantly in his analysis. I would not accede to the argument that the reasons for judgment reflect an erroneous appreciation of the relevant factors that should be considered on an application to vary spousal support.

## Analysis

- [166] In this case, I have identified only one material change: that is, the increases in the respondent's line 150 income exceeding the \$174,000 threshold provided in the Final Order. In my view, in the circumstances of this case it is appropriate to follow the guidance in L.M.P. (para. 47) that the court should take into account the material change, and limit itself to making only the variation justified by that change. As in Willms, this is not an appropriate case to engage in a wholesale analysis of the parties' circumstances.
- [167] That said, s. 17(7) does provide that the court "should" take into account the objectives of spousal support contained in the four subsections of that tension. As I read the cases, there is an inherent tension between, on the one hand:
- limiting the court's analysis to the material change and any variation justified by that change, and
  - reviewing the four subsections of s. 17(7).

- [168] Taken at their broadest, the four subsections of s. 17(7) authorize a reconsideration of both the compensatory and non-compensatory bases of the support. Typically, the first two subsections, which deal with economic advantages or disadvantages and financial consequences from the relationship and any children of the marriage, are considered foundational to compensatory support, while the second two subsections, which deal with economic hardship and economic self-sufficiency, are closely connected to non-compensatory support: see *Chutter v. Chutter*, 2008 BCCA 507 at para. 47.
- [169] In the present case, the parties followed the guidance of past cases by negotiating a consent Final Order with detailed provisions as to variation. Some of the material changes they agreed to will by their very nature give rise to a more detailed review of the compensatory and non-compensatory bases for support. In my view, given the limited material change identified in this case, this is not a case for a broad-based review.
- [170] That said, I note with respect to s. 17(7)(a) and (b), my comments above that there continues to be an ongoing compensatory entitlement, with respect to s. 17(7)(c) that there continues to be a significant discrepancy in income-earning ability and standard of living, and with respect to s. 17(7)(d), that the claimant has made efforts but has struggled to find long-term, full-time employment.
- [171] In my view, given that the only material change on which the Court is to act in this case is the increase in the respondent's income, that increase is appropriately addressed by considering how a higher income in the respondent's hands would impact on the quantum of spousal support. While this consideration should be informed by the SSAG, it is important to consider as well the connection between the Final Order itself and what the SSAG of the time provided.
- [172] In particular, as noted above, the SSAG at the time led to a calculation of a monthly payment at the low end of the range of \$4,781, while the order itself provided for monthly spousal support payments of \$4,000. It seems clear from the evidence that this reflects a bargain made that included give and take on all of the different elements of the Final Order. In my view, moving straight to the midpoint of the SSAG range, or even to the low end of the SSAG range, upon the respondent's income exceeding the \$174,000 threshold would not honour that bargain. Rather, determination of the appropriate spousal support amount should give consideration to the fact that the amount payable under the Final Order was 83.7% of the then-applicable low end of the SSAG range. It should also give consideration to the fact that the calculation was based on the claimant earning \$0 income, while the Final Order expressed that moving forward the claimant intended to earn an income.
- [173] The most recent income information I have is for 2022. It indicates that the respondent's line 150 income was \$232,161, while the claimant's line 150 income was \$27,457. A DivorceMate calculation based on those numbers provides a low range of \$6,397, a mid range of \$7,463, and a high range of \$8,529. By my calculation, 83.7% of the low range number is \$5,354. However, using this number would risk under-compensating the

claimant, because the 2022 DivorceMate calculation reflects her 2022 income of \$27,457 - which reduces the amount of spousal support payable from what it would be if a \$0 income amount was used.

- [174] In my view, an appropriate approach to addressing the material change that has occurred, while honouring the parties' agreement underlying the Final Order, would be to select an amount between the low range number of \$6,397 and this \$5,534 amount. In my view, an approach that is fair to both parties and honours the compromise they reached in 2008 would be to adopt an amount that is based on 90% of the low range number, or \$5,757.
- [175] I note that the claimant's notice of application was filed prior to the respondent disclosing his 2022 tax return. It sought spousal support of \$7,239 per month based on the 2021 tax return. In my view, use of the 2022 income figures is appropriate, and given that the amount I am awarding is less than what was sought, I do not think it unfair to the respondent.
- [176] I dealt in the context of Issue #3 with the respondent's submission with respect to the claimant's failure to become self-sufficient. With respect to the related submission that income should be attributed to the claimant, I am not satisfied that this is an appropriate case in which to impute income. I am satisfied that the claimant has regularly looked for and found work from time to time over the years, in areas of focus that she has developed. I do not think it would be reasonable to simply take the consulting rates she has been able to attain over the years and project that she would be able to work full time at those rates. With respect to the claimant's health conditions, I note that her evidence was not challenged on cross-examination. There are no fixed rules as to when expert evidence is and is not required. In the context of the way this application has evolved, I conclude that the evidence she has given is sufficient and I accept it. In my view, this is not an appropriate case in which to impute income. Instead, I accept that it is appropriate to rely on a DivorceMate calculation prepared based on her 2022 income of \$27,457. I note that that amount pre-dates events in 2023 that include her termination from employment and her cancer treatments, and thus represents a high point of her actual income levels.

#### Issue #5 - Retroactivity

#### Positions of the Parties

- [177] The claimant also seeks an order for retroactive payments of the higher amounts of spousal support that would have been payable had the respondent properly disclosed his steadily increasing income. The claimant submits that from 2013 to date, the respondent should be required to pay the difference between what he actually paid and what he would have been required to pay based on the parties' actual income each year, calculated on the basis of the midpoint of the SSAG range. Using the midpoint, she calculates that the amount owing is just over \$400,000.

- [178] The claimant submits that the respondent's failure to comply with his court-ordered obligation to disclose his income tax returns each year, combined with his knowledge from the spring of 2015 onward that his income had exceeded the threshold provided in the Final Order for two consecutive years, constitute blameworthy conduct. In light of that blameworthy conduct, the claimant says that it is appropriate for a retroactive order to be made back to the date when the agreed threshold was exceeded.
- [179] The claimant says that she had no way of knowing that the respondent's income had exceeded the threshold. Rather, this was something that only the respondent was aware of, and was effectively being concealed by him. She acknowledges that she did not disclose her tax returns either, but says that given that she could see from her returns each year that she had not exceeded the threshold that applied to her income, there was no harm in her not disclosing her returns. [I note that, in evidence volunteered at her cross-examinations on affidavits, and elaborated upon in subsequent affidavits, the claimant put forward information as to the unfortunate state of her relationship with the respondent. Given the concerns about case-splitting, I am proceeding to decide this case without reference to that evidence.]
- [180] The claimant says that only the respondent knew that his income had exceeded the threshold in the Final Order, and that his non-disclosure of that fact notwithstanding the disclosure obligations in the Final Order, clearly was to his benefit. She submits that the respondent has taken advantage of the situation he thereby created to pay off mortgages and contribute to RRSPs, thereby funding an even more financially secure retirement. The claimant says there is no hardship to the respondent given the extent of the assets he has amassed. She notes as well that Digiflex in its disclosure indicated that it had some \$200,000 in cash on hand.
- [181] The claimant further notes that, given the respondent has indicated that he intends to retire before long, it is even more important that the respondent be required to pay the amount he saved through his non-disclosure since the claimant's opportunity for further support in the future may well be reduced.
- [182] The respondent submits that any order for retroactive spousal support should only go back to the date of "effective notice", which is April 2023 (when the application was filed) or, at best, March 2022 (when the claimant first sought disclosure of the respondent's post-2008 income).
- [183] The respondent says that the delay in seeking disclosure from him is on the claimant. He says that it was open to the claimant to seek disclosure earlier, and it was open to her to make an application to court to compel compliance with the disclosure provisions of the Final Order. The respondent says that his non-disclosure is not a direct cause of the claimant's failure to do what was available her to do. He says further that the delay in seeking spousal support should lead to an inference that the claimant was not actually in need of any higher spousal support. He notes that she only sought disclosure from him as a

response to his request to terminate spousal support.

- [184] The respondent says that a requirement that he pay hundreds of thousands of dollars in retroactive support would create hardship for him. He says that he has few liquid assets, and the amount sought is substantial.

## Legal Context

- [185] The leading case on retroactive awards of child support is *D.B.S. v. S.R.G.*, 2006 SCC 37. The conclusions reached, after a lengthy analysis, are set out at paras. 131-135:
- [131] Child support has long been recognized as a crucial obligation that parents owe to their children. Based on this strong foundation, contemporary statutory schemes and jurisprudence have confirmed the legal responsibility of parents to support their children in a way that is commensurate to their income. Combined with an evolving child support paradigm that moves away from a need-based approach, a child's right to increased support payments given a parental rise in income can be deduced.
- [132] In the context of retroactive support, this means that a parent will not have fulfilled his/her obligation to his/her children if (s)he does not increase child support payments when his/her income increases significantly. Thus, previous enunciations of the payor parent's obligations may cease to apply as the circumstances that underlay them continue to change. Once parents are in front of a court with jurisdiction over their dispute, that court will generally have the power to order a retroactive award that enforces the unfulfilled obligations that have accrued over time.
- [133] In determining whether to make a retroactive award, a court will need to look at all the relevant circumstances of the case in front of it. The payor parent's interest in certainty must be balanced with the need for fairness and for flexibility. In doing so, a court should consider whether the recipient parent has supplied a reasonable excuse for his/her delay, the conduct of the payor parent, the circumstances of the child, and the hardship the retroactive award might entail.
- [134] Once a court decides to make a retroactive award, it should generally make the award retroactive to the date when effective notice was given to the payor parent. But where the payor parent engaged in blameworthy conduct, the date when circumstances changed materially will be the presumptive start date of the award. It will then remain for the court to determine the quantum of the retroactive award consistent with the statutory scheme under which it is operating.
- [135] The question of retroactive child support awards is a challenging one because it only arises when at least one parent has paid insufficient attention to the payments his/her child was owed. Courts must strive to resolve such situations in the fairest way possible, with utmost sensitivity to the situation at hand. But there is unfortunately little that can be done to remedy the fact that the child in question did not receive the support payments (s)he was

due at the time when (s)he was entitled to them. Thus, while retroactive child support awards should be available to help correct these situations when they occur, the true responsibility of parents is to ensure that the situation never reaches a point when a retroactive award is needed.

[Emphasis added.]

[186] The choice of the date of effective notice as the typical start date for any retroactive award was explained at paras. 121-123. At para. 123, Justice Bastarache explained the importance of moving forward from effective notice to securing a court decision:

[123] Once the recipient parent raises the issue of child support, his/her responsibility is not automatically fulfilled. Discussions should move forward. If they do not, legal action should be contemplated. While the date of effective notice will usually signal an effort on the part of the recipient parent to alter the child support situation, a prolonged period of inactivity after effective notice may indicate that the payor parent's reasonable interest in certainty has returned. Thus, even if effective notice has already been given, it will usually be inappropriate to delve too far into the past. The federal regime appears to have contemplated this issue by limiting a recipient parent's request for historical income information to a three-year period: see s. 25(1)(a) of the Guidelines. In general, I believe the same rough guideline can be followed for retroactive awards: it will usually be inappropriate to make a support award retroactive to a date more than three years before formal notice was given to the payor parent.

[187] However, Justice Bastarache made clear his view that the three-year limit should not impact the ability of the court to go back further in time in the event of "blameworthy conduct". As noted at para. 124:

[124] The date when increased support should have been paid, however, will sometimes be a more appropriate date from which the retroactive order should start. This situation can most notably arise where the payor parent engages in blameworthy conduct. Once the payor parent engages in such conduct, there can be no claim that (s)he reasonably believed his/her child's support entitlement was being met. This will not only be the case where the payor parent intimidates and lies to the recipient parent, but also where (s)he withholds information. Not disclosing a material change in circumstances -- including an increase in income that one would expect to alter the amount of child support payable -- is itself blameworthy conduct. The presence of such blameworthy conduct will move the presumptive date of retroactivity back to the time when circumstances changed materially. A payor parent cannot use his/her informational advantage to justify his/her deficient child support payments.

[188] In *Kerr v. Baranow*, 2011 SCC 10, the Supreme Court concluded that, although D.B.S. dealt with child as opposed to spousal support:

- [207] similar considerations to those set out in the context of child support are also relevant to deciding the suitability of a "retroactive" award of spousal support. Specifically, these factors are the needs of the recipient, the conduct of the payor, the reason for the delay in seeking support and any hardship the retroactive award may occasion on the payor spouse. However, in spousal support cases, these factors must be considered and weighed in light of the different legal principles and objectives that underpin spousal as compared with child support. I will mention some of those differences briefly, although certainly not exhaustively.
- [208] Spousal support has a different legal foundation than child support. A parent-child relationship is a fiduciary relationship of presumed dependency and the obligation of both parents to support the child arises at birth. In that sense, the entitlement to child support is "automatic" and both parents must put their child's interests ahead of their own in negotiating and litigating child support. Child support is the right of the child, not of the parent seeking support on the child's behalf, and the basic amount of child support under the [DA] now depends on the income of the payor and not on a highly discretionary balancing of means and needs. These aspects of child support reduce somewhat the strength of concerns about lack of notice and lack of diligence in seeking child support. With respect to notice, the payor parent is or should be aware of the obligation to provide support commensurate with his or her income. As for delay, the right to support is the child's and therefore it is the child's, not the other parent's position that is prejudiced by lack of diligence on the part of the parent seeking child support. In contrast, there is no presumptive entitlement to spousal support and, unlike child support, the spouse is in general not under any legal obligation to look out for the separated spouse's legal interests. Thus, concerns about notice, delay and misconduct generally carry more weight in relation to claims for spousal support.
- [189] In *Ducharme v. Rempel*, 2016 BCCA 198, a court action was commenced shortly after separation in April 2008 after a 27-month relationship. At a judicial case conference in July 2008, an initial interim without-prejudice award of child and spousal support was made based on representations as to the payor's income (\$96,000) that turned out to be quite low. There were significant delays, largely related to the claimant's inability to afford counsel. A trial scheduled for 2011 did not proceed. A motion filed in November 2014 for retroactive support was referred to the trial list. At a summary trial in March 2015, the trial judge awarded increased spousal support retroactive to December 1, 2011, on the basis that the retroactive increase should be limited to three years prior to the filing of the notice of application. The trial judge further ordered that spousal support would end as of the end of March 2015.
- [190] The payor appealed the retroactive award of spousal support. He disputed the trial judge's conclusion that there had been blameworthy conduct, which Justice Fenlon dealt with at para. 26:

- [26] What constitutes blameworthy conduct will vary depending on the facts of the particular case. In my view, the trial judge did not err in finding blameworthy conduct on the part of Mr. Rempel in relation to spousal support. He was aware that the spousal support he paid from August 2008 until trial was based on estimated income of \$96,000 - a number well below his actual guideline income in that and subsequent years. He also knew that \$96,000 had been used because he had not complied with his obligation to file a financial statement before the JCC. In addition, Mr. Rempel swore a financial statement in September 2008 showing income of approximately \$98,000 which also significantly understated his guideline income.
- [191] At paras. 42-44, she noted that:
- [42] As a general rule, the date upon which formal notice of a claim for spousal support is given is the date upon which a retroactive award will commence. However, that general rule is subject to exceptions, such as where there is blameworthy conduct on the part of the payor. In such cases, following the reasoning of the Supreme Court of Canada in *D.B.S.*, it will usually be inappropriate to make a spousal support award retroactive to a date more than three years before formal notice was given to the payor.
- [43] In the present case Ms. Ducharme gave formal notice that she was seeking a retroactive increase in spousal support when she filed a notice of application in November 2014. At trial Ms. Ducharme argued that the order should be retroactive to January 1, 2010, based on the court's residual discretion to make an award dating back more than three years before the date of formal notice in appropriate circumstances.
- [44] The trial judge declined to accede to Ms. Ducharme's submission and instead followed the usual three year rule, making the increase in spousal support retroactive to three years before the filing of the notice of application. I see no error in that decision.
- [192] The Supreme Court further explored the concept of "blameworthy conduct", and its appropriate impact on retroactive orders (albeit in the context of child support) in *Colucci v. Colucci*, 2021 SCC 24:
- [41] Since *D.B.S.*, various courts have accepted and acted upon the principle that failing to disclose an increase in income is blameworthy conduct justifying variation to the date of the change "Blameworthy conduct", as that concept has developed in the cases, does not simply extend to the most egregious cases of deception or intentional evasion, like this case. It may also extend to cases of mere passivity and "taking the path of least resistance" (*Burchill*, at para. 30).
- [42] Most recently, in *Michel* [*v. Graydon*, 2020 SCC 24], my colleague Brown J. (speaking for the Court on this point) confirmed that "the date of effective notice is not relevant when a payor parent has engaged in blameworthy conduct (irrespective of the degree of blameworthiness)", including failure to disclose material information (para. 36; see also para. 33). Payor parents are "subject to a duty of full and honest disclosure" (para. 33). Where

the payor fails to comply with this duty and leaves the recipient unaware of increases in income, a retroactive award "will commonly be appropriate" because non-disclosure "eliminates any need to protect [the payor's] interest in the certainty of his [or her] child support obligations" (paras. 32 and 34).

- [43] In practice, then, the date of retroactivity is frequently adjusted to align with the date of the material increase in income, despite the "general rule" of varying to the date of effective notice in D.B.S. (para. 118). It would be "untenable to suggest that a parent who fails to provide financial disclosure can assume that the amount being provided is adequate because the recipient parent has not brought a court application" (Brear, at para. 72, per Pentelechuk J.A.). Further, even where the payor has disclosed increases in income, the D.B.S. factors may support extending a retroactive increase of support back to the time of the change in income.
- [44] Since D.B.S., however, expectations of and for payors have evolved. The Guidelines and s. 17 of the Divorce Act are clear and D.B.S. itself gave notice to payor parents that they must pay more support as income rises and that this obligation may be enforced after the fact.
- [45] In light of the existing approach to blameworthy conduct and the pervasiveness of non-disclosure, it may be necessary in a future case to revisit the presumptive date of retroactivity in cases where the recipient seeks a retroactive variation to reflect increases in the payor's income. A presumption in favour of varying support to the date of the increase would better reflect the recipient's informational disadvantage and remove any incentive for payors to withhold disclosure or underpay support in the hopes that the status quo will be maintained. Such a presumption would accord with other core principles of child support and reinforce that payors share the burden of ensuring the child receives the appropriate amount of support.
- [193] Colucci was applied, in the context of child support, in *K.D. v S.D.*, 2022 BCSC 1299. As noted by Justice Branch:
- [32] The general rule is that retroactive child support should not be awarded to a date more than three years prior to formal notice: *Sullivan v. Megeth*, 2021 BCSC 1073 at para. 38. Accordingly, if effective notice is given within that three-year period, retroactive child support will be payable from the date of effective notice: *Vasudev v. Vasudev*, 2020 BCSC 1787 at para. 56; *L.P.H. v. J.M.R.*, 2021 BCSC 1282 at para. 83. If effective notice was given more than three years prior to formal notice, retroactive payments generally accrue no more than three years before formal notice: *Vasudev* at para. 57; *L.P.H.* at para. 83.
- [33] I find that the 2015 Communication does qualify as effective notice to the respondent: see e.g., *A.J.B. v. J.M.*, 2020 BCSC 242 at paras. 68-73; *Velthuis v. Velthuis*, 2021 BCSC 6 at paras. 66-70. It is reasonable to infer that the claimant's inquiry about financial disclosure was for the purpose of determining whether support needed to be enhanced.

- [34] Formal notice was provided in January 2021, when the claimant filed the within application. Since this is more than three years after the date of effective notice, the presumptive three-year period for retroactive child support would be back to January 2018.
- [35] However, the court retains a discretion to depart from this presumptive date, particularly where there is blameworthy conduct on the part of the payor. A finding of such conduct does not require evidence of "the most egregious cases of deception or intentional evasion", and "may also extend to cases of mere passivity": *Colucci v. Colucci*, 2021 SCC 24 at para. 41. Courts have consistently held that failure to disclose an increase in income is blameworthy conduct justifying departure from the presumptive three-year rule of thumb: *Colucci* at para. 41. In my view, the respondent's failure to meet his financial disclosure obligations mandated by the Order clearly constitutes blameworthy conduct.
- [36] I find that the respondent did fail to communicate the increase in his disability benefits to the claimant, an increase that he must have appreciated would almost certainly qualify as a material change in circumstances.
- [37] Because the respondent has engaged in blameworthy conduct by repeatedly failing to meet his court-ordered disclosure obligations, the presumptive commencement date for retroactivity is the date of the material change in circumstances: *Brar v. Brar*, 2021 BCSC 748 at para. 49. In this case, that is December 30, 2013--when the respondent received notice from Sun Life that his disability benefits had increased markedly from the amount accounted for in the Order. Applying the respondent's actual income from this date, and subject to a review of the other relevant factors below, he would owe the claimant \$129,868 in retroactive child support payments.

[Emphasis in original.]

- [194] Justice Branch concluded that, given the assets owned by the respondent, there was little concern about potential hardship to the respondent from any retroactive order, and thus ordered that the respondent pay \$129,868 in retroactive child support.

## Analysis

- [195] D.B.S. and Kerr direct the court to consider four factors which, in cases of spousal support, include: the reasons for the applicant's delay in seeking increased support; the conduct of the payor, including any blameworthy conduct, the needs of the recipient spouse, and any hardship a retroactive award might entail.
- [196] The claimant's failure to be more proactive in ensuring that both parties met their disclosure obligations under the Final Order is unfortunate. Ultimately, however, I do not see it as unreasonable. The parties had negotiated an agreement with a substantial buffer within which they had agreed there would be no basis to adjust spousal support despite variations in their respective incomes. There is nothing to suggest that either party should have had any reason to anticipate that the other had crossed that threshold. The claimant

did not exceed her \$24,000 threshold, and she would have no reason to think that she was prejudicing the respondent through her non-disclosure. That can be contrasted with the respondent, who knew that his income had clearly exceeded the threshold. In my view, it is the respondent who should be considered at fault.

- [197] It is clear in D.B.S. that non-disclosure of a material change in income information is blameworthy conduct. That conclusion is drawn in the context of child support, for which ongoing disclosure is expected. Justice Cromwell in *Kerr* comments that with respect to spousal support, "the spouse is in general not under any legal obligation to look out for" the other's spouse's interest. While that may be the case "in general", it is my view that where annual disclosure is compelled by provisions such as those in the Final Order, there is a clear legal obligation to act, and non-disclosure of a material change would in such circumstances be considered blameworthy conduct.
- [198] What then is the impact of blameworthy conduct? D.B.S. indicates that in cases of blameworthy conduct, it is appropriate for the court to award retroactive support to the date of the material change. While I appreciate that some cases suggest that the three-year rule applies even in cases of blameworthy conduct, *Colucci* (and *Michel* before it) have made clear that the effective notice is irrelevant in cases of blameworthy conduct.
- [199] I turn now to the needs of the claimant. The claimant, like the respondent, is at an age where she must be looking toward potential retirement. Her asset base is not large, and certainly pales in comparison to that of the respondent. She faces the prospect of significantly reduced spousal support after the respondent retires. In my view, the claimant's needs are such that it is appropriate to award retroactive spousal support.
- [200] With respect to hardship on the respondent, it is my view that the respondent has significant assets and is in good position to deal with an appropriate award of retroactive spousal support. I agree that a part of the asset base he currently enjoys is a direct result of his failure to pay the spousal support contemplated by the Final Order. It is clear in accordance with notions of basic fairness that the respondent should be required to pay an appropriate amount of retroactive spousal support.
- [201] I do not agree that the date of retroactivity is the beginning of 2013. The Final Order provides that variation may be sought only after the threshold has been exceeded for two consecutive years. Thus, the first application to vary that could have been made would have been in 2015. It would have been reasonable for that application to be retroactive to the beginning of the year. In my view, retroactive support should be payable from the beginning of 2015.
- [202] In terms of quantum, it is my view that an appropriate award of spousal support should be calculated on a basis similar to that outlined in respect of Issue #4 for the calculation of prospective spousal support. The *DivorceMate* calculations provided by the claimant, which do not appear to be seriously contested, show the SSAG low range (based on the parties' incomes each year) as being \$5,103 (2015), \$6,094 (2016), \$6,718 (2017), \$5,585

(2018), \$6,427 (2019), \$6,864 (2020), and \$6,934 (2021). As noted above, I calculate the amount for 2022 as \$6,397. Taking 90% of each of these amounts, and subtracting from that the \$4,000 actually paid for each month, and using the 2022 numbers for 2023 and 2024, I calculate the total amount of retroactive arrears as \$197,736.

[203] This is a gross number, calculated without reference to tax matters that may arise. I understand that there may be elections that can be made to allow an award like this to be paid in a way that has tax advantages for both parties. That may involve adjustments to the specific amount payable. I will leave it to counsel to investigate that question.

## Conclusions

[204] The claimant's application to vary spousal support is granted. Beginning in December 2024, the respondent is to pay spousal support of \$5,757 per month.

[205] The claimant's application for payment of retroactive spousal support is also granted. I have calculated the amount above, which is \$197,736, subject to any tax advice that the parties may obtain.

[206] The respondent's application is dismissed.

[207] My preliminary view is that the claimant has been substantially successful on these applications and would ordinarily be entitled to her costs. If either party wishes to seek an order other than the usual order, that party should provide submissions through Supreme Court Scheduling within 60 days of this judgment, with any reply to come within three weeks thereafter.

[208] If the parties wish to seek directions with respect to implementation of the order with respect to retroactive spousal support, or if they identify any mathematical errors in this judgment, any resultant request should be made by submissions following the same time limitations.

"Veenstra J."

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