

CANADA / JUDGMENT

Morigeau v. Moorey

2015 BCCA 160

COURT

British Columbia Court of Appeal

DECIDED

20 April 2015

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2015 BCCA 160 Morigeau v. Moorey

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Morigeau v. Moorey,

2015 BCCA 160

Date: 20150420

Docket: CA041371

Between:

Chere Wynne Morigeau also known as

Chere Wynne Moorey

Respondent

(Claimant)

And

David Moorey

Appellant

(Respondent)

Before:

The Honourable Madam Justice Kirkpatrick

The Honourable Madam Justice Garson

The Honourable Mr. Justice Harris

On appeal from: An order of the Supreme Court of British Columbia, dated

October 22, 2013 (Morigeau v. Moorey, 2013 BCSC 1923, New Westminster Registry Docket E33362).

Counsel for the Appellant:

W.A. van der Sande

Counsel for the Respondent:

J.K. Wahid

Place and Date of Hearing:

Vancouver, British Columbia

March 2, 2015

Place and Date of Judgment:

Vancouver, British Columbia

April 20, 2015

Written Reasons by:

The Honourable Madam Justice Kirkpatrick

Concurred in by:

The Honourable Madam Justice Garson

The Honourable Mr. Justice Harris

Summary:

Appeal from an order dismissing an application to vary or cancel a spousal support obligation pursuant to s. 17 of the Divorce Act. The respondent, at the time of the order, had commenced a new relationship. In 2013 the appellant applied to vary the order, claiming that there had been a material change in circumstances due to the respondent beginning to cohabite with her partner and the disparity in the parties' income having decreased since the order. Held: appeal dismissed. The respondent cohabiting with her partner did not constitute a material change in circumstances because, among other things, the cohabitation was reasonably foreseeable and, in any event, the cohabitation was not relevant to the entitlement to support because the spousal support order was primarily compensatory in nature. The judge did not otherwise fail to consider the other additional factors since, having found that there was no material change, he was not required to consider s. 17(7) of the Divorce Act.

Reasons for Judgment of the Honourable Madam Justice Kirkpatrick:

INTRODUCTION

- [1] The appellant, David Michael Moorey, appeals from the October 22, 2013 Supreme Court order that dismissed his application, pursuant to s. 17 of the Divorce Act, R.S.C., 1985, c. 3 (2d Supp.), to cancel or vary his obligation to pay spousal support to the respondent, Chere Wynne Morigeau.

BACKGROUND

- [2] The parties commenced cohabitation in March 1987, married in August 1989, and separated in August 2007. They had two children born in 1989 and 1992.
- [3] At the date of the hearing, Mr. Moorey was 54 years old. Ms. Morigeau was 58 years old. Mr. Moorey currently works as a training instructor with Canadian Pacific Railway, where he has been employed for about 37 years. Ms. Morigeau works as an administrative assistant with PCL Constructors, where she has been employed for approximately seven years.
- [4] On October 19, 2011, the parties entered into a final order which included a divorce and, by consent, corollary relief (the "Order"). The corollary relief included a term that Mr. Moorey pay Ms. Morigeau \$1,800 per month in spousal support, subject to either party applying for a variation under s. 17 of the Divorce Act. The relevant term of the Order reads:

Based on the Respondent's average 3 year income of \$119,000.00 and the Claimant's income of \$47,850.00, the Respondent shall pay the sum of \$1,800.00 per month to the Claimant in spousal support, commencing on the 20th day of October 2011 and continuing on the 20th day of each month thereafter subject to variation pursuant to section 17 of the Divorce Act. The first payment shall be paid by October 31, 2011.

- [5] At the time of the Order, Ms. Morigeau was in a new relationship with Mr. Michael Arens, which was known by Mr. Moorey. In her September 28, 2011 affidavit filed in the divorce proceedings, Ms. Morigeau deposed as follows:

Since the beginning of 2011, I have been in a new relationship with my partner. We do not share expenses nor do I consider us as residing together. We spend significant time together and he does purchase groceries for us but apart from this there is no financial contribution made by my partner. My expenses in my form 8 financial statement reflect my out of pocket expenses.

- [6] In February 2012, Ms. Morigeau and Mr. Arens commenced residing together in Ms. Morigeau's home. Mr. Arens deposed that he only purchases groceries and household items for Ms. Morigeau's home and assisted Ms. Morigeau with payments totaling \$2,871 for a roof levy.
- [7] With respect to the parties' incomes, in 2011, Ms. Morigeau's income was \$47,850. Her income increased in 2013 to \$52,524 and her expenses decreased from \$69,851 in 2011 to \$67,237. From the time of the Order in 2011 to 2013, Mr. Moorey's income decreased from \$126,026 to \$118,283. In 2012, Mr. Arens had a taxable income of \$155,428.

IN THE SUPREME COURT

- [8] Mr. Moorey applied to cancel or vary his obligation to pay spousal support pursuant to s. 17 of the Divorce Act, retroactive to July 1, 2013, based on the following alleged change in circumstances: (i) Ms. Morigeau was residing in a common-law relationship with Mr. Arens who has a 2012 taxable income of \$155,428; (ii) Ms. Morigeau's taxable income had increased; and (ii) Mr. Moorey's taxable income had decreased. Mr. Moorey focused on Ms. Morigeau's "re-partnering" as the primary basis for requesting a change to the Order.
- [9] The reasons for judgment are indexed at 2013 BCSC 1923. The judge reviewed the foregoing background. He then set out the statutory provision in the Divorce Act relevant to the alleged change in circumstances. It reads:
17. (1) A court of competent jurisdiction may make an order varying, rescinding or suspending, prospectively or retroactively,
- (a) a support order or any provision thereof on application by either or both former spouses; or
- (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.
- [10] At the hearing in the Supreme Court, Ms. Morigeau relied upon the decision of the Supreme Court of Canada in *G. (L.) v. B. (G.)*, [1995] 3 S.C.R. 370. In that case, the majority affirmed that for a support order to be varied under s. 17, there must be a material change of circumstances, "that is, a change that, if known at the time, would have resulted in different terms. If the matter which is relied on as constituting a change was known at the relevant time, it thus cannot be relied on as the basis for variation": *G. (L.) v. B. (G.)* at paras. 49 and 73, citing *Willick v. Willick*, [1994] 3 S.C.R. 670 at 688. The trial judge in *G. (L.) v. B. (G.)* found that, at the time of the agreement, which was ratified by the consent terms of corollary relief in the divorce order, the respondent husband knew that the appellant was "seeing" a third party and that it was foreseeable that they would cohabit. The majority found the trial judge correctly concluded that there was no material change of circumstances and there was no basis in fact or law for the Court of Appeal to reverse that conclusion: *G. (L.) v. B. (G.)* at para. 74.
- [11] Mr. Moorey relied, in part, on s. 14.7 of the Spousal Support Advisory Guidelines, which the judge reproduced at para. 13 of his reasons:

The remarriage or re-partnering of the support recipient does have an effect on spousal support under the current law, but how much and when and why are less certain. There is little consensus in the decided cases. Remarriage does not mean automatic termination of spousal support, but support is often reduced or suspended or sometimes even terminated. Compensatory support is often treated differently from non-compensatory support. Much

depends upon the standard of living in the recipient's new household. The length of the first marriage seems to make a difference, consistent with concepts of merger over time. The age of the recipient spouse also influences outcomes.

In particular fact situations, usually at the extremes of these sorts of factors, we can predict outcomes. For example, after a short-to-medium first marriage, where the recipient spouse is younger and the support is non-compensatory and for transitional purposes, remarriage by the recipient is likely to result in termination of support. At the other extreme, where spousal support is being paid to an older spouse after a long traditional marriage, remarriage is unlikely to terminate spousal support, although the amount may be reduced.

[12] The judge then reviewed the cases tendered by Mr. Moorey in support of his application to vary based on "re-partnering": *Range v. Range* (1995), 14 R.F.L. (4th) 11 (B.C.S.C.); *Kelly v. Kelly*, 2007 BCSC 227; *Rimmer v. Adshead*, 2012 SKQB 500; *Redpath v. Redpath*, 2008 BCSC 68; *C.L.M. v. R.A.M.*, 2008 BCSC 217; *Rakose v. Rakose*, 2008 BCSC 1165; *Barton v. Ophus*, 2009 BCSC 858; and *Lee v. Lee*, 2013 BCSC 1227.

[13] The judge then, correctly in my opinion, summarized the principles derived from the authorities as follows:

[26] In my view, some of the principles that can be derived from the relevant authorities on a s. 17 application to vary spousal support involving re-partnering are as follows:

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*;
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.)*, *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.)*, *J.W.J.M. v. T.E.R.*;
6. The circumstances of the re-partnering may have a bearing on the analysis: *Rakose v. Rakose*, *Redpath v. Redpath*.

- [14] The judge applied the foregoing principles to the facts before him. Those facts included the parties' 20-year marriage and Ms. Morigeau's 12-year absence from the workforce, during which time she stayed at home to raise the children. The judge stated:
- [28] In this case, the parties were not young at the time of the Order. Ms. Morigeau was 56. She was out of the workforce for much of the marriage. Although she returned to the workforce on a full-time basis one year before the separation, there is a considerable disparity in the parties' respective incomes that, given Ms. Morigeau's limited work experience, is unlikely to change significantly.
- [15] The judge was alive to the fact that the Order referred to the availability of a s. 17 variation. He noted that the Order was silent as to a variation based on re-partnering. He also noted that the Order provided for an income-based adjustment of spousal support every three years.
- [16] The judge concluded:
- [30] Immediately preceding the Order, Ms. Morigeau attested about her new relationship that "[I do not] consider us residing together" but acknowledged spending "significant time together". In these circumstances, Ms. Morigeau's subsequent cohabitation with the person she had been seeing for nine months was, in my opinion, foreseeable at the time the Order was made. The changes in income are inconsequential. In the result, I find that there has not been a material change in circumstances.
- [17] The judge then considered the parties' alternative submissions in the event a material change of circumstances had been established. Ms. Morigeau had tendered cases relevant to the question of re-partnering in circumstances in which the primary basis for the initial spousal support order was compensatory.
- [18] Again, the judge reviewed the relevant case authorities: *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420 and *L.M.P. v. L.S.*, 2011 SCC 64.
- [19] Mr. Moorey contended that the Order was non-compensatory (i.e., needs-based) and that Ms. Morigeau's new relationship went to the root of entitlement to spousal support. Ms. Morigeau argued that the Order was compensatory and her new relationship had little or no impact on her circumstances.
- [20] The judge concluded the spousal support order included both compensatory and non-compensatory elements. He did not quantify the elements, likely because it is difficult to precisely quantify the extent to which a spousal support order is primarily compensatory or non-compensatory. Almost all such orders will reflect elements of both forms of support.
- [21] The judge found that Ms. Morigeau had foregone economic advantage and opportunity during her 12-year absence from the workforce. By contrast, he found that Mr. Moorey had "a rather obvious economic advantage" of employment with the same employer for 37 years.

- [22] The judge rejected Mr. Moorey's argument that, if the support order was found to be compensatory, either in whole or in part, he had nevertheless satisfied his obligation to pay support by having paid support for six years. The judge noted that no spousal support was paid until Mr. Moorey paid the retroactive lump sum payment provided for in the Order. The judge concluded:
- [44] No doubt some of the lump sum payment was in lieu of retroactive spousal support. In this case, however, the Spousal Support Advisory Guidelines show entitlement to spousal support being of indefinite duration. Ms. Morigeau is 58, Mr. Moorey is 54. All things being equal, Ms. Morigeau also has a shorter working life ahead of her. I am not at all satisfied that Mr. Moorey has satisfied his obligations to pay spousal support on a compensatory basis as he asserts.

ON APPEAL

- [23] Mr. Moorey frames his grounds of appeal as follows. He contends the judge erred in:
- finding that the respondent's re-partnering was reasonably foreseeable;
 - finding that the respondent's re-partnering is not a material change in circumstances under s. 17(4.1) of the Divorce Act (Canada) where there was no evidence that the parties contemplated or considered a re-partnering in arriving at the terms of the Final Order;
 - failing to find that the Final Order implicitly provided that the parties could apply to vary spousal support on the basis of the respondent commencing a common-law relationship;
 - failing to take into consideration additional factors, other than the re-partnering, in determining whether there was a material change in circumstances under s. 17(4.1) of the Divorce Act; and/or
 - not reducing the quantum of spousal support payable by the appellant by failing to take into consideration the factors under s. 17(7) of the Divorce Act (Canada), including the contribution or implied contribution from the respondent's new spouse, her spouse's substantial income, her increased income and her decreased expenses and the standard of living in the new household.
- [24] Before addressing the alleged errors, I emphasize that an appeal court will not overturn a support order unless the reasons disclose an error in principle, a serious misapprehension of the evidence, or a material error: *Hickey v. Hickey*, [1999] 2 S.C.R. 518 at para. 11. The rationale for this deference is set out at para. 12:

12 There are strong reasons for the significant deference that must be given to trial judges in relation to support orders. This standard of appellate review recognizes that the discretion involved in making a support order is best exercised by the judge who has heard the parties directly. It avoids giving parties an incentive to appeal judgments and incur added expenses in the hope that the appeal court will have a different appreciation of the relevant factors and evidence. This approach promotes finality in family law litigation and recognizes the importance

of the appreciation of the facts by the trial judge. Though an appeal court must intervene when there is a material error, a serious misapprehension of the evidence, or an error in law, it is not entitled to overturn a support order simply because it would have made a different decision or balanced the factors differently.

[25] The purpose of a spousal support order, and any subsequent variation, is to fairly and equitably share the economic consequences resulting from the marriage and its breakdown: *Moge v. Moge*, [1992] 3 S.C.R. 813 at 864-866.

[26] This Court recently described the analysis to be undertaken in an application to vary a spousal support order in *K.D. v. N.D.*, 2011 BCCA 513 at paras. 22-23:

[22] An application to vary an earlier order for spousal support engages a two stage process. First, s. 17(4.1) of the Divorce Act, R.S.C. 1985, c. 3 (the "Act") provides that, 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.

[23] Once the applicant has established a material change, the court must then consider whether that change justifies variation of the earlier support order by reference to the four objectives set out in s. 17(7) of the Act, which mirror those that govern initial support orders under s. 15.2(6) of the Act. Section 17(7) reads:

17(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.

A. The "Re-partnering" Issue

- [27] The appellant's first three grounds of appeal raise issues concerning Ms. Morigeau's cohabitation with Mr. Arens and can be addressed together.
- [28] The judge's finding that Ms. Morigeau's cohabitation with Mr. Arens was reasonably foreseeable is, in my opinion, correct on the facts and the law. This case is, in all material respects, factually indistinguishable from the circumstances described by the Supreme Court of Canada in *G. (L.) v. B. (G.)*.
- [29] Ms. Morigeau disclosed her new relationship in her affidavit sworn September 28, 2011. Mr. Moorey did not provide a reply affidavit and did not seek clarification of the circumstances of the new relationship or seek to cross-examine Ms. Morigeau on her affidavit.
- [30] Mr. Moorey's application for summary trial was set for October 19, 2011. The Order recites that it was made "on considering the evidence put forward", which included, I assume, Ms. Morigeau's affidavit sworn September 28, 2011.
- [31] The parties reached a final settlement which was incorporated into the Order. Thus, at the time the Order was made, it was known that Ms. Morigeau was "seeing" a third party. I am unable to conclude that the judge made a material error in finding that it was foreseeable that Ms. Morigeau would cohabit with Mr. Arens or, indeed, a different third party.
- [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.
- [34] As the authors of *The Spousal Support Advisory Guidelines: A New and Improved User's Guide to the Final Version*, Rogerson and Thompson, March 2010, noted:

Compensatory claims are based either on the recipient's economic loss or disadvantage because of the marriage (typically a loss of earning capacity) because of the roles assumed during the marriage or on the recipient's conferral of an economic benefit on the payor without adequate compensation. While compensatory claims in theory require an individualized assessment, in practice, in long marriages with children, the marital standard of living is used as a proxy measure of compensatory gains and losses.

[35] The amount of spousal support set out in the Order (\$1,800) was calculated under the Spousal Support Advisory Guidelines "without child support" formula, as evidenced by the correspondence between counsel prior to the Order. The range of support was \$1,747 to \$2,330 per month for an indefinite (unspecified) duration, subject to variation and possibly review.

[36] Mr. Moorey argued that Ms. Morigeau's cohabitation with Mr. Arens inevitably means that she enjoys a combined household income substantially greater than his own. In my opinion, that argument must fail because it is clear the primary basis for the spousal support order was compensatory. In an annotation to *G. (L.) v. B.(G.)*, Professor James McLeod provided a helpful analysis of the impact of compensatory support in the context of a new relationship. He said, 15 R.F.L. (4th) 2161, at 222-229:

... When a payee forms a new relationship, he or she usually receives economic benefits under that relationship. Should such benefits be taken into account in deciding whether to vary a prior support order? The answer depends on the objective of the prior support order. If the order is to assist the dependant to maintain a reasonable standard of living, then any benefit which reduces the amount the payee needs to maintain the appropriate standard of living should be relevant. However, if the order is to compensate the payee for a particular economic loss incurred or benefit conferred, windfall benefits should not be considered in reducing support.

If the original order or agreement was primarily compensatory in nature, windfall benefits are not relevant. This is because the award is not focused primarily on need, but rather on the equitable sharing of the economic consequences of the marriage or its breakdown.

[37] It is now well-established that a compensatory spousal support order should continue until the economic consequences flowing from the marriage are redressed, even if the spousal support payee has, in the interim, achieved a measure of self-sufficiency: see e.g. *Tedham v. Tedham*, 2005 BCCA 502 at paras. 58-60. The discussion by the Ontario Court of Appeal at para. 22 of *Allaire v. Allaire* (2003), 35 R.F.L. (5th) 256 (Ont. C.A.) of this principle, cited with approval in *Tedham*, is apposite to the case at bar:

22 It is recognized that in situations such as this, "where a former spouse will continue to suffer the economic disadvantages of the marriage and its dissolution while the other spouse reaps its economic advantages", long-term compensatory support is appropriate regardless of the self-sufficiency of the disadvantaged spouse: *Moge v. Moge* (1992), 43 R.F.L. (3d) 345 (S.C.C.), at 383. Where, as here, the award is crafted to compensate Ms. Allaire for the long-term impact of the marriage on her career advancement and earning capacity, the trial judge was within her

discretion in declining to limit her support to a defined period.

[38] In *Tedham*, this Court summarized the principle from *Allaire* as follows at para. 60:

[60] While *Allaire* is what I will refer to as a "non-interference" case, it makes the point that an order of spousal support which is based on compensatory principles should continue until adequate compensation has been made, even if the spouse has achieved a degree of self-sufficiency

[39] In my view, this principle applies to an application to vary a primarily compensatory spousal support order in the case of "re-partnering". This is because the mere fact that the recipient of spousal support enters into a new relationship does not alter the economic disadvantage incurred by the payee spouse who assumed family obligations in the marriage or the corresponding economic advantage conferred on the payor spouse. The potential new relationship, which arises after the breakdown of the marriage, generally does not redress economic consequences that flow from the adoption of certain roles during marriage or from its breakdown.

[40] In this case, the mere fact that Ms. Morigeau entered into a new relationship with Mr. Arens does not redress the economic consequences flowing from the breakdown of the marriage nor does it compensate her for the role she assumed in the marriage. As the Ontario Court of Appeal discusses in *Allaire* at para. 22, the compensatory spousal support "award is crafted to compensate [the spousal support payee] for the long-term impact of the marriage on her career advancement and earning capacity". To the extent that the economic consequences that were the basis for making the spousal support order remain unchanged, there is no basis for variation under s. 17 of the Divorce Act.

[41] While the spousal support order in this case is primarily compensatory, it also has, as I have indicated, a non-compensatory component. In *Chutter v. Chutter*, 2008 BCCA 507, at paras. 54-61, this Court reviewed the authorities pertaining to non-compensatory spousal support. A foundational aim of non-compensatory spousal support is to assist the spousal support payee in becoming self-sufficient. In this case, the mere fact that Ms. Morigeau is now cohabiting with a new partner of some means does not mean that she has achieved any greater measure of self-sufficiency than at the time that the support order was made. This is what the judge found as fact at paras. 39-42 of his reasons. When the non-compensatory component is considered in conjunction with the primarily compensatory aim of the spousal support order, and the fact that the record does not indicate that Mr. Arens substantially contributes to Ms. Morigeau's expenses, there is no basis to conclude that the trial judge erred in his analysis.

[42] In summary, viewed in this context, it is clear that the "re-partnering" of Ms. Morigeau did not constitute a material change in circumstances.

- [43] Lastly, under this head of appeal, Mr. Moorey contends the judge failed to find that the Order "implicitly" provided that Mr. Moorey could apply to vary the spousal support order on the basis that Ms. Morigeau had commenced a common-law relationship, thus obviating the need to independently establish that it amounted to a material change in circumstances.
- [44] Mr. Moorey provided no authority for this novel proposition. In my opinion, all that could have been meant by the inclusion in the Order that spousal support was to be paid on certain dates "subject to variation pursuant to section 17 of the Divorce Act" was the recognition that the award was subject to variation if the conditions in s. 17 were met. Had Mr. Moorey intended to include the circumstance of Ms. Morigeau cohabiting with a third party as a material change in circumstances, he could have negotiated such a term.
- [45] For all of the above reasons, I would not give effect to this ground of appeal.

B. "Other" Factors Amounting to a Material Change in Circumstances

- [46] Mr. Moorey next contends the judge failed to take into consideration additional factors, other than the re-partnering of Ms. Morigeau, in determining whether these factors constituted a material change in circumstances.
- [47] In his notice of application to vary the Order, Mr. Moorey stated the legal basis of the application as follows:

There has been a significant change in circumstances since the October 11, 2011 Order, which include the following:

- a. the Claimant is residing in a common-law relationship with Mr. Arens whose 2012 T1 Tax Returns shows a total income of \$155,428;
- b. the Claimant's income has increased; and
- c. the Respondent's income has decreased.

- [48] In my opinion, the judge comprehensively addressed those issues in his reasons. In other words, he answered the application put before him. Ultimately, the judge concluded, at para. 27:
- [27] Although the new partner now resides with Ms. Morigeau, which was not the case at the time of the Order, the relationship seems little different from a financial perspective.
- [49] That finding was supported by the evidence of Ms. Morigeau and Mr. Arens to the effect that he contributes to daily living expenses but does not pay rent or any other expenses related to her property.

- [50] Mr. Moorey argued that it was "preposterous" that Mr. Arens does not contribute to Ms. Morigeau's expenses. He says he should. However, that contention ignores the compensatory nature of the original support order. Even if Mr. Arens were paying all of Ms. Morigeau's expenses, which he is not, it would have little or no impact on the amount of support payable.
- [51] Further, to the extent that the spousal support order was needs-based, as the judge noted, there was no material change to Ms. Morigeau's ability to meet her expenses as a result of Mr. Arens living with her.
- [52] I would not accede to this ground of appeal.

C. Failure to Reduce the Quantum of Spousal Support by Failing to Consider s. 17(7) of the Divorce Act

- [53] Section 17(7) provides:

Objectives of variation order varying spousal support order

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

- [54] Following the analysis in *K.D. v. N.D.*, it is clear that s. 17(7) is only triggered once a material change in circumstances is established. Since the judge found there had not been such a material change, he was not required to consider s. 17(7). The judge acknowledged that to be the case but said, "I think some observations might be of assistance to the parties."

- [55] The judge did not reproduce s. 17(7) and was not obliged to do so. Nonetheless, it is clear from his "observations" that he addressed each of the enumerated factors.

- [56] There is no merit in this ground of appeal.

DISPOSITION

- [57] For all of the above reasons, I would dismiss the appeal with costs to Ms. Morigeau.

"The Honourable Madam Justice Kirkpatrick"

I agree:

"The Honourable Madam Justice Garson"

I agree:

"The Honourable Mr. Justice Harris"

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Prepared on 29 October 2026 · Esheria