SUPREME COURT OF NOVA SCOTIA
Citation: *Fisher v. Fisher*, 2017 NSSC 71

Date: 20170313
Docket: Tru No. 1207-002167
Registry: Truro

Between:

Blake Arthur Fisher

Applicant

v.

Louitta Marie Fisher

Respondent

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Judge:	The Honourable Justice Peter Rosinski
Heard:	January 26, 2017, in Truro, Nova Scotia
Written Decision:	March 13, 2017
Subject:	Termination/variation of spousal support payments – s. 17(4.1) *Divorce Act*; totally disabled recipient spouse
Summary:	During the 10-year cohabitation/marriage, the recipient spouse was unexpectedly and suddenly totally disabled as a result of a personal injury. The parties separated within three years, and a separation agreement was incorporated into a consent CRJ on April 1, 2003. The payor spouse was ordered on the basis of $45,000 annual income, to pay $500 monthly while employed, and $300 monthly while in receipt of EI benefits. In 2010 – 2011 recipient spouse received a structured settlement as a result of the injuries that totally disabled her. Until confidentiality concerns were resolved in December 2016, the payor spouse was unaware of the details of the settlement. In August 2016, the payor spouse applied to terminate spousal support payments. In addition to spousal support payments, the recipient spouse was also receiving monies directly from: CPP disability; Nova Scotia Home Care assistance; the monthly structured settlement annuity payment. Her parents were also indirectly financially contributing to her care and comfort.

Issues:

(1) Has the applicant shown that there is been a material change in circumstances such that the court has the authority to review the existing order for spousal support?

(2) If there has been a material change in circumstances, what is the appropriate result?

(3) What costs if any should be awarded?

Result:

(1) Although the mere possibility of a civil suit settlement/damages award existed at the time of the CRJ, that did not constitute something the parties actually knew or considered, and as such factored into their separation agreements/the consented-to CRJ. Consequently, receipt of the structured settlement proceeds in 2010 – 2011 did constitute a material change in the circumstances of the recipient spouse's means of support. The court rejected the recipient spouse's argument that, because the provincial aid was clawed back dollar-for-dollar upon receipt of monthly annuity amounts, the monthly annuity had a neutral effect on the total monies available to her, and therefore there was no material change to her means of support.

(2) Although having found a material change in circumstances, and in spite of the present neutral monetary effect of that change, the total means of support of the recipient spouse would be substantially reduced by the termination of spousal support. On consideration of the statutory provisions, and case law flowing from *Bracklow v. Bracklow*, [1999] 1 SCR 420, the court was not satisfied that the payor spouse had established that the recipient spouse had become disentitled to spousal support payments, as they remained necessary for her, yet still fair to him to have to continue paying, given the relevant circumstances.

(3) Given the mixed success, and the circumstances, it is in the interests of justice not to award costs.

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Respondent

Decision

Judge:	The Honourable Justice Peter Rosinski
Heard:	January 26, 2017, in Truro, Nova Scotia
Counsel:	Sandra L. McCulloch for the Applicant Alan MacNeill for the Respondent

By the Court:

Introduction

[1] The parties cohabited for approximately seven years; married in January 1996, and six weeks later, Ms. Fisher, as a spectator during a game, was permanently brain-injured by a hockey puck that hit her - see a decision respecting procedure in the case per Coady J. - 2010 NSSC 358. Since that time, she has required intensive around-the-clock care, and is expected to have this requirement for her lifetime.

[2] The parties separated on December 6, 1999. Ms. Fisher moved in with her parents, where she resides to this day. They have substantially provided for her care and comfort since her injury.

[3] A separation agreement dated January 9, 2002, was incorporated into a Consent Corollary Relief Judgment [CRJ] dated April 1, 2003 in conjunction with the Divorce Judgment of even date.

[4] Therein, based on his $45,000 annual income, Mr. Fisher was to pay Ms. Fisher $500 monthly while employed, and $300 monthly while in receipt of employment insurance benefits.

[5] In the meantime as a result of his determined efforts and hard work, Mr. Fisher's annual income increased from 2013 to 2016: $183,452; $175,519; $195,598; $187,560. He does cite declining health and work opportunities as reasons to believe his future income could be significantly less. While I accept the general proposition, the likely magnitude of his income reduction would require me to speculate.

[6] The parties did not return to court until Mr. Fisher's notice of Application in Chambers filed August 4, 2016, requesting a variation of spousal support – namely, termination of spousal support as of January 2016, and forgiveness of any arrears which might then be outstanding.

[7] The parties do not dispute that the court has jurisdiction to consider Mr. Fisher's application. The questions I must ask myself, and my answers follow:

1. On the basis of the evidence submitted, has Mr. Fisher shown that there has been a material change in circumstances, such that this court has the authority to review the existing order for spousal support? Yes

2. If there has been such material change in circumstances, what is the appropriate result? Should there be an increase or decrease in quantum, termination of support, or no action taken? No action taken

3. What costs if any should be awarded? None, given the unsettled jurisprudence and mixed success.

Is there a material change in circumstances?

[8] In *Breed v. Breed*, 2016 NSSC 42, Justice Carole Beaton has recently helpfully summarized the legal considerations to determine the answer to this question:

> Issue No. 2 -- Has there been a material change in circumstances?
>
> 29 The Court is entitled on an application to vary a CRO, to start from the assumption that the CRO is correct (*R.P. v. R.C.*, [2011] 3 SCR 819; paragraph 25). From there, the Court considers the question as to whether there has been a material change since the making of that order.
>
> 30 The test as to whether there has been a material change in circumstances was set out in *Rondeau v. Rondeau*, 2011 NSCA 5 wherein Hamilton, J. on behalf of the Court wrote:
>
> > 10. Both parties acknowledge that the starting point for an application to vary spousal support is a determination of whether there has been a change in the condition, means, needs or other circumstances of either former spouse since the most recent spousal support order was made. It is only after there has been such a change that the judge may consider what effect the change should have on the existing spousal support order.
> >
> > ...
> >
> > 13. The Supreme Court of Canada in *Willick v. Willick*, [1994] 3 S.C.R. 670 (S.C.C.), para 21 and later in *L.G. v. G.B.*, [1995] 3 S.C.R. 370 paragraph 73, set the standard for finding a change in circumstances with respect to spousal support:
> >
> > > [21] In deciding whether the conditions for variation exist, it is common ground that the change must be a material change of circumstances. This means a change, such that, if known at the time, would likely have resulted in different terms. The corollary to this is that if the matter which is relied on as constituting a change

> was known at the relevant time it cannot be relied on as the basis for variation ...

31 In *Daigle v. Daigle*, 2013 NSSC 205, Jollimore, J. considered the nature of any change. At paragraph 13 she wrote:

> In addition to the requirement that the change be one which was not reasonably anticipated by the parties, the change must have other qualities. In *P.M.B. v. M.L.B.*, 2010 NBCA 5 at paragraph 2, Justice Robertson said that "As a general proposition, the court will be asking whether the change was significant and long-lasting; whether it was real and not one of choice". The Nova Scotia Court of Appeal approved of *P.M.V. v. M.L.B*, 2010 NBCA 5, at paragraph 21 of *Smith v. Helppi*, 2011 NSCA 65, ...

32 The impact of a party's knowledge when an order was originally made was considered in *Black v. Black*, [2015] N.B.J. No. 235, wherein Baird, J. A. explained the test for variation as articulated in *L.M.P v. L.S., (supra)*:

> 42. ... The decision reiterates that the onus is placed on the moving party to satisfy the requirements of material change, and also requires consideration of whether knowledge of circumstances at the time the original order was granted would have altered the terms. ... (emphasis added)

33 In *Dedes v. Dedes*, 2015 BCCA 194, Bennet, J.A. said this about the test set out in *L.M.P.*, at paragraph 25:

> As articulated in *L.M.P.* the test for material change is based not on what one party knew or reasonably foresaw, but rather on what the parties actually contemplated at the time the order was entered by agreement. A function of the material change threshold is to prevent parties re-litigating issues that were already considered and rejected; in such cases, an application to vary would amount to an appeal of the original (see *Gordon*, [1996] 2 S.C.R. 27 at para.15). As was stated by L'Heureux-Dube, J. in *Willick* at p.734, "the diversity of possible scenarios in family law dictates that courts maintain a flexible standard of judicial discretion which does not artificially limit the adaptability of the *Divorce Act* provisions." See also *L.G. v. G.B.* [1995] 3 S.C.R. 370 at paras. 49-51 and *Jakob v. Jakob*, 2010 BCCA 136 at para. 40.

34 The question as to whether there has been any material change which, if contemplated or known by the Breeds at the date of the CRO, would likely have resulted in different terms, must be assessed in light of the evidence put before the Court.

[9] In a comprehensive and insightful article Prof. Rollie Thompson, concluded:[1]

> Here is what I would suggest are the principal purposes of the threshold change requirement in spousal support law:
>
> (a) To maintain greater stability in spousal support orders, for reasons of certainty and reliance;
>
> (b) to discourage relitigation;
>
> (c) to avoid repeated and potentially inconsistent exercises of discretion by judges.
>
> There may be others.

[10] In that same article he also rightly summarized the comments of the Supreme Court of Canada in *LMP v. LS*, [2011] 3 SCR 775 and *RP v. RC*, [2011] 3 S.C.R. 819:

> 1. The threshold of s. 17(4.1) requires that "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*" [he does note that more helpful and concrete is the statement of the test by Justice Proudfoot in *Carter v. Carter*, (1991) 34 RFL (3d) 1 (BCCA): "a change that is substantial, unforeseen and of a continuing nature"]
>
> 2. "The onus is on the party seeking a variation to establish such a change"
>
> 3. That "change of circumstances" has to be "a material one, meaning a change that, if known at the time, would likely have resulted in different terms, following *Willick v. Willick*, [1994] 3 SCR 670
>
> 4. "The focus of the analysis is on the prior order and the circumstances in which it was made". "It is presumed that the judge 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)"

[1] Rollie Thompson, "To vary, to review, perchance to change: changing spousal support": (2012) CFLQ 355, Thomson Reuters Canada Limited

> 5. “In general a material change must have some degree of continuity, and not merely be a temporary set of circumstances”;
>
> 6. “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”? “The examination of the change in circumstances is exactly the same for an order that does not incorporate a prior spousal support agreement as one that does.”;
>
> 7. 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”. “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”;
>
> 8.The more specific the terms in the incorporated agreement, the more likely the terms will shape the material change inquiry. A general statement of finality will be given little weight, depending upon the circumstances of the parties.
>
> 9. Once a material change has been established, “[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”.

[11] Was the insurance settlement in favour of Ms. Fisher received in 2011, such a change that, if known [i.e. actually considered or known by the parties] at the time the original CRJ (April 1, 2003), it would likely have resulted in different terms? In my respectful opinion, it was.

[12] Ms. Fisher had been injured in March 1996. I have no direct evidence before me regarding the state of knowledge of Mr. or Ms. Fisher regarding the status of her litigation against the defendant West Colchester Recreation Association on or about April 1, 2003, or earlier.

[13] However, I have indirect evidence through the January 9, 2002 separation agreement, and the consented-to terms of the Corollary Relief Judgment.

[14] The separation agreement provided in Clause 8:

> Maintenance and support
>
> The parties hereby covenant and agree as follows:
>
> (a) spousal support
>
> Blake is generally employed with the Dexter Construction Company but presently is in receipt of EI benefits with an annual income of approximately $40,000 from both sources of income per year, and Louitta is disabled and receives CPP benefits of approximately $481 per month and social assistance through provincial home care of $2200 per month.
>
> The parties hereby covenant and agree that the issue of spousal support continues to remain a "live" issue and has not yet been determined between the parties. The parties are free to make application to a court of competent jurisdiction to have the matter of spousal support determined at any time.

[15] The Consent Corollary Relief Judgment read in part:

> 1. That subject to the specific provisions of this order and insofar as the court has jurisdiction to do so, the terms and contents of the separation agreement entered into between the parties dated January 9, 2002, be incorporated into and form part of this judgment in this matter;
>
> 2. That Blake Fisher shall pay to Louitta Fisher through the maintenance enforcement program … towards the spousal support and maintenance of Louitta Fisher the sum of $500 while Blake Fisher is employed at

his 2001 income level and $300 per month when Blake Fisher is in receipt of employment insurance benefits, such payments commencing on the 30th day of October 2002, and continuing on the 30th day of each and every month thereafter;

3. That maintenance enforcement shall continue to enforce arrears as is necessary;

4. That Blake Fisher shall pay to Louitta Fisher directly the amount of $1500 as retroactive spousal support and upon receipt of payment, there shall be no claim for any further retroactive spousal support;

…

7. That Blake Fisher agrees to continue to maintain life insurance and keep Louitta Fisher beneficiary under the policy. The policy is a value of $75,000. It is with Metropolitan Life, policy number 98754025UN;

8. That Blake Fisher shall annually provide Louitta Fisher on or before the 15th day of June 2003, with a copy of his income tax return (whether filed or not) and any notices of assessment receive from revenue Canada. Production shall begin for the year 2002 on or before the 15th day of June, 2003;

> 9. That Louitta Fisher shall inform Blake Fisher *in the event that* she receives a settlement in her civil suit.
>
> …
>
> [my italicization]

[16] From these documents, it is clear that the parties were aware Ms. Fisher had commenced a lawsuit in relation to her injury. I infer that whether she would actually receive a settlement was *not* known with any certainty on April 1, 2003- however it was believed sufficiently *possible* by the parties that they included cl. 9 in the CRJ. The fact that it was not expressly mentioned in the separation agreement, is of no material import-spousal support is referred therein as a "live issue".

[17] I observe here as well that the evidence is clear that Mr. Fisher was unaware of the details of the settlement until Justice James Chipman's December 5, 2016 order from this court permitted Ms. Fisher's mother to disclose the settlement particulars.

[18] Counsel have cited to me a number of cases where the requested termination of spousal support arose in relation to "disabled" ex-spouses.

[19] A useful starting point is Associate Chief Justice O'Neil's canvas of the jurisprudence regarding the *initial* obligation to pay spousal support in such cases at paras. 30 – 47 in *Haggerty v Haggerty*, 2010 NSSC 9 (the issue therein was whether spousal support should be paid (whether for a definite or indefinite time period) - on a non-compensatory basis, where multifactorial physical disability made her unemployable, which arose during the marriage, but was not caused by the marriage or circumstances of the marriage: seven years spousal support ordered); *Mumford v. Mumford*, 2008 NSSC 82 (on a non-compensatory basis arising from the recipient spouse's significant mental health issues rendering her unemployable, spousal support was ordered for 13 years); *Bishop v. Bishop*, [2005] N.S.J. No. 324 (SC) (on the social obligation and clean break models, Justice Arthur LeBlanc ordered 10 years spousal support for a wife who did not work outside the home during the marriage, but was newly disabled).

[20] Counsel also cited cases where payor spouses sought variation/termination of support for disabled recipient spouses, which was initially ordered for indefinite periods of time:

> *Bridgen v. Gaudet*, 2015 NSSC 31 (on a variation application, a paying spouse was relieved of the non-compensatory spousal support obligation, once the recipient spouse turned 65 years of age, who was permanently disabled by a degenerative bone disease/other health problems at the time minutes of settlement were agreed to between the spouses that led to the spousal support payment obligation initially);

> *Fraser v. Puddifant*, [2005] NSJ No 558 (SC) (on a non-compensatory basis, three further years, but reduced in quantum, spousal support were ordered before termination of support for a recipient spouse suffering from mental illness rendering her unemployable, which was apparent throughout the marriage);
>
> *Westhaver v. Westhaver*, [2002] NSJ No.426 (SC) (court ordered termination of a paying spouse's previously ordered (non-compensatory based) spousal support obligation, for a wife suffering a brain injury and loss of vision in a motor vehicle accident just days after their separation, which rendered her permanently unemployable).

[21] Each of these cases reflect a concern that non-compensatory spousal support not unduly outlast the duration of the marriage: *Bridgen* – 23 years support for 20 year marriage; *Puddifant* – 12 years support for 12 years of marriage; *Westhaver* – 4.5 years support for 11 years of marriage. In *Bracklow*, at para. 57, Justice McLachlan, as she then was, noted that in circumstances of non-compensatory based spousal support, "marriage….. involves the potential for life-long obligation. There are no magical cut-off dates".

[22] Those cases all dealt with spouses whose disability may be seen to be relevant because the disability interfered with their attaining economic self-sufficiency. Ms. Fisher's circumstances of disability far outstrip the facts of those cases. Her disability doesn't just mean she can't provide income for herself – it requires her to *spend* money to provide the necessities of life for herself on a daily basis.

[23] Moreover, none of these cases specifically address the issue which I face here: is the known mere *possibility* that the recipient spouse may receive a civil action settlement sufficient to preclude a finding of a material change as required by s. 17 (4.1) *Divorce Act*, once settlement is later confirmed and legally binding?

[24] My focus must be on whether I am satisfied that the evidence demonstrates it is more likely than not that there has been a material "change in the condition, means, needs or other circumstances of either former spouse… since the making of the support order… and, in making the variation order, the court shall take that change into consideration."

[25] The material change alleged here is in relation to the "means" of Ms. Fisher. Mr. Fisher says that the 2011 structured settlement (tax-free and guaranteed to-be-paid) monies have materially increased her means of support for herself.

[26] Importantly, I must ask not whether receipt of such monies was foreseeable on April 1, 2003, but whether the parties actually knew or contemplated/considered that such monies would be paid in future, and therefore likely factored that into their separation agreement/consented-to CRJ, which was presented to, and approved by the court? I keep in mind the undisputed evidence of Anne

MacDougall in her November 18, 2016 affidavit, that during the relevant time periods, Ms. Fisher “was confined to a wheelchair and barely able to converse”.

[27] I accept that the provisions in the separation agreement, and in the consented-to CRJ, were negotiated by the parties in what could be best described as a contractual context. There was no contested hearing, and therefore no independent assessment by the court of the terms agreed to between the parties (there being no children of the marriage). Nevertheless, as I pointed out earlier, the Supreme Court has told us that the examination of the purported change in circumstances is exactly the same for an order that does not incorporate a prior spousal support agreement, as one that does.

[28] On April 1, 2003, when the CRJ was issued, this potential increase in Ms. Fisher’s means was a mere possibility. In 2011 it became a certainty. As the court stated in *Willick*, at para. 20:

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

[29] The fact of the settlement, and consequent structured settlement payment was not known, and therefore not factored into the consented-to CRJ on April 1, 2003.

[30] Therefore, the mere fact of the settlement, and consequent structured settlement monies being paid out in 2011 is a material change to Ms. Fisher's means of support. The evidence confirms that her structured settlement payments will be dramatically increased in September 2018, and they will end when she turns 66 years of age. These two events may also constitute material changes, *at those points in time*.

[31] Ms. Fisher has argued that even if the 2011 events could constitute a material change, I should consider that the net effect of receipt of those monies is neutral, because any money received from the structured settlement will cause her assistance payments from the Province of Nova Scotia to be clawed back dollar-for-dollar. Consequently, she argues that there is "in effect" no material change to her means of support.

[32] In my opinion, the "effect" of her receipt of the structured settlement monies, is not determinative as to whether there has been a material change.

However, it does become relevant when assessing what action if any the court should take as a result of that change. I next turn to that consideration.

Having found a s. 17(4.1) material change, what action, if any, should the court take?

[33] Section 17(7) comes into play here:

> 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) Insofar as practicable, promote the economic self-sufficiency of each former spouse within a reasonable period of time.

[34] These factors replicate the statutory factors relevant to the Initial order for spousal support found in s. 15(6).

[35] Ms. Fisher argues that I am restricted to considering only those matters which were disclosed as changes in circumstances - namely, receipt of the structured settlement monies. She argues that although the mere passage of time is not a change in circumstance *per se*, Mr. Fisher is inappropriately attempting to piggyback on the neutral effect of the structured settlement monies on the means of

Ms. Fisher, to argue the court should consider the *length of time* he has been paying spousal support (invoking the spousal support advisory guidelines-SSAG).

[36] Ms. Fisher argues *only* the actual change to her means caused by the structured settlement monies should be taken into account at this stage.

[37] Mr. Fisher argues he only wishes to use the SSAG in relation to calculating the proper length of spousal support in this case, not the quantum of payment. Ms. Fisher points out that should the SSAG be relied on for quantum of monthly support calculations properly owing to her, then Mr. Fisher's spousal support amounts owing would be considerably greater than the present $500 per month.

[38] I agree with Justice Beaton, where she stated in *Breed*, in relation to the quantum, as opposed to duration of spousal support*:*

> 77 In my view there is no obligation on the Court to now utilize the SSAG in this variation decision, when it was not previously applied in this case, merely because the tool exists. As discussed in *Fisher (supra)*:
>
> > [95] In the seminal case of Yemchuk v. Yemchuk, 2005 BCCA 406 (CanLII), [2005] B.C.J. No. 1748, 16 R.F.L. (6th) 430 (C.A.), at para. 64, Prowse J.A. aptly characterized the Guidelines as a "useful tool".[22] She recognized that, unlike the CSGs, the Guidelines are neither legislated nor binding; they are only advisory. The parties, their lawyers and the courts are not required to employ them. As well, the Guidelines continue to evolve; they are a "work in progress" subject to revision.
> >
> > ...
> >
> > [96] Importantly, the Guidelines do not apply in many cases. They specifically do not apply at all in certain enumerated circumstances, including where spouses earn above $350,000[23] or below $20,000.

> Furthermore, they only apply to initial orders for support and not to variation orders. They are thus prospective in application. They do not apply in cases where a prior agreement provides [page265] for support and, obviously, in cases where the requisite entitlement has not been established. They will not help in atypical cases.[24] As well, there will be regional variations, as well as rural and urban variations, that may be seen to merit divergent results based on variations in cost of living or otherwise. Importantly, in all cases, the reasonableness of an award produced by the Guidelines must be balanced in light of the circumstances of the individual case, including the particular financial history of the parties during the marriage and their likely future circumstances.
>
> [96] Mr. Breed argued that his current plan to retire several years from now should also be considered by this Court if the quantum of support was adjusted, by imposing an end date for his obligation. Mrs. Breed opposed the suggestion of a time limited order, relying on *Rondeau (supra)*, wherein the Court of Appeal confirmed that the passage of time alone does not create a change in circumstances.
>
> [97] Accordingly, the Guidelines cannot be used as a software tool or a formula that calculates a specific amount of support for a set period of time. They must be considered in context and applied in their entirety, including the specific consideration of any applicable variables and, where necessary, restructuring. (emphasis added)
>
> …

[39] I see my function at this stage as considering "what effect *the change* should have on the existing spousal support order", per Hamilton JA, in *Rondeau*, 2011 NSCA 5, at para. 10 [my italicization].

[40] Underlying that question however, are the objectives in s. 17(7) that I should consider.

[41] I will turn first to an examination of what evidence I have in relation to the effect of the receipt by Ms. Fisher in 2011 of the structured settlement monies on an ongoing basis.

[42] The burden is on Mr. Fisher to establish the evidentiary preconditions to his legal request to have spousal support terminated.

[43] A review of the affidavit evidence reveals:

1. In her August 9, 2016 affidavit, Ms. Fisher's mother, Anne MacDougall (who testified both she and her husband are in their 70s) stated: "the monthly allowance [Ms. Fisher] receives of the Department of Health is reduced by her total monthly settlement payment" - para. 12;

2. In her November 18, 2016 affidavit, Anne MacDougall, stated: "it is my belief that any increase in the applicant's spousal support would have been clawed back from the provincial aid my daughter receives…"- para 7;

3. In that same affidavit, Anne MacDougall stated at paras. 13-15:

> Attached as Exhibit "E" is a copy of a letter [dated June 8, 2011] from [the Department of] Community Services to the lawyer who represented my daughter in her civil suit. It is apparent from this letter what transpired as a result of the settlement being received by my daughter. The Department

> "clawed back" the exact amount of the structured settlement payments from the sum which my daughter had been receiving from the government. Provincial assistance of $2200 was reduced to $846, which is the equivalent of the settlement sum ($1353).
>
> I submit that the civil tort suit produced no "net gain" to my daughter. The status quo over income and support remains exactly as it had been before the settlement ,(with the exception that CPP has increased marginally over the years) . She currently receives monthly payments of $635.83 from CPP, $1353 from her settlement and $846 on the provincial government for a total of $2834 per month. At the time of the divorce, the court noted on page 1 of the CRJ that her income totalled $2696. Her income has increased by $138 per month since 2003.
>
> I submit that the marginal change in my daughter's income of $138 per month in CPP payments does not constitute a "substantial change in circumstances.

[44] Exhibit "E", the letter from Lorna MacPherson, Dir. of Services for Persons with Disabilities, Department of Community Services, to Mr. Gordon Proudfoot, Q.C., dated June 8, 2011, reads in part:

> I am pleased to confirm that the Department will provide in-home support funding in the amount of $846.49 per month to your client, Ms. Louitta Fisher as of January 1, 2011. This reflects a reduction from the $2200 per month of $1353.51, monthly structured settlement payment which was awarded by the Supreme Court of Nova Scotia. There will be no further reduction in this case, which will allow Ms. Fisher to retain the monthly Canada pension plan [CPP] and spousal support payments which she has been receiving and, which I understand currently totals $1100.…
>
> In accordance with the Province's Social Assistance legislation and our [Services for Persons with Disabilities] policies, Ms. Fisher's needs and financial circumstances will be reassessed in time, and when changes in these occur. At that time, adjustments may be made by staff, with the participation of your client and her family. I would also like to take this opportunity to restate that the Directive dated November 2010 is reflective of a long-standing Departmental policy regarding cost of care and a person's financial need. It is in keeping with policy and had no bearing on the Department's treatment of Ms. Fisher's circumstances.

[45] In her December 1, 2016 affidavit, Anne MacDougall stated at para 7:

> … I have worked for many years in conjunction with the Care Coordinator for Community Services. Over the years we have been clearly advised by the Provincial Department that any contributions made by the Province toward my daughter's care will be dollar-for-dollar reduced in the future by any increase in income received by her from her annuity.

[46] This evidence was not disputed. It demonstrates that the Department of Community Services had, and I infer still has, a policy which stipulates an equivalent reduction in provincial funding for any additional monies Ms. Fisher may directly receive from other sources (*excepting* out CPP and *spousal support payments*). This may become relevant in September 2018, when her annuity payments substantially increase.

[47] Thus, if Mr. Fisher is ordered to continue paying spousal support to Ms. Fisher, she will not be penalized by the Department of Community Services.

[48] If Mr. Fisher's obligation to pay spousal support is terminated, Ms. Fisher will have lost the benefit of that additional money, and have no opportunity to revisit spousal support as an income source should her circumstances materially change in future. Her parents' capacity to provide for her care will continue to diminish as their own care needs take precedence.

[49] Returning then to my original inquiry: having found a material change, what action, if any, should the court take?

[50] Firstly, let me also briefly address Mr. Fisher's embedded request that any arrears outstanding should be forgiven.

[51] These arrears arise because in 2015 he went to Anne MacDougall and requested to only have to pay $300 per month as a result of his claimed worsened financial circumstances – Mrs. MacDougall initially agreed, taking him at his word – until she discovered that his income had actually not fallen in 2015, but that it was substantially more then than the $45,000 it was at the time of the Consent CRJ - see her affidavits: November 18, 2016 at para. 8 (claims 1400$ then outstanding since May 2015); August 9, 2016 at para. 13 – 17 (claims $1600 arrears for the months May – December 2015; he stopped payments of any of the $500 payable from January to July 1, 2016 and he reimbursed Ms. Fisher $300 a month for a total of $1800, still leaving him in arrears for 2016 of $1400). Mr. Fisher's request for forgiveness of the arrears likely arises from the fact that the Maintenance Enforcement Program is doing its job and seeking payment of the missed spousal support ordered in the CRJ. The best evidence of any arrears outstanding should come from the Maintenance Enforcement Programs records. Unfortunately, these are not in evidence.

[52] Ms. Fisher and her parents were likely agreeable to allowing Mr. Fisher to reduce his payments to $300 initially, as a gesture of goodwill given their belief that his income had substantially declined. The initial oral agreement was never reduced to writing, and no specific evidence produced beyond the generalities stated in the affidavits. I conclude that there was some form of agreement, without court approval, to allow Mr. Fisher to make reduced payments of $300 per month rather than the full $500 per month in spousal support payments. The parties' intended duration of this oral agreement is unclear, though it does appear they intended that it to continue for at least a number of months, to accommodate Mr. Fisher's claim of cash flow problems.

[53] I conclude that too much time has passed since 2015 when these arrears appear to have arisen, and there is simply too much ambiguity related to the initial agreement to reduce his payments from $500 to$300 per month, to now allow the court to order payment of the arrears. Stated another way, I conclude these missed payments for the calendar year 2015 should properly be forgiven by the court.

[54] However, it is certainly a poor reflection on Mr. Fisher that he unilaterally stopped payments entirely between January and July 2016.

[55] The Maintenance Enforcement Program was to be the conduit through which those payments for 2016 were to be made by Mr. Fisher. I am not satisfied that Mr. Fisher has provided a reasonable basis in the evidence for not having paid all of those monies owing- in spite of his sworn October 4, 2016 affidavit paras. 13 – 30. I note, therein, he did not "seek the return of any monies I have paid as spousal support to Ms. Fisher subsequent to January 2016."

[56] As to my consideration of what action, if any, I should take, I find helpful the comments of Justice Oland in *MacDonald v MacDonald*, 2017 NSCA 18:

> 53 In *Gates v. Gates*, 2016 NSSC 49, Jesudason, J. provided a helpful summary of the principles from the authorities, including *Bracklow*, *Moge v. Moge*, [1992] 3 S.C.R. 813, and jurisprudence from this province, on the various issues pertaining to spousal support. With respect to quantum, he wrote:
>
> b) Quantum
>
> The factors that go to entitlement also have an impact on quantum although, for practical purposes, it is often useful to proceed by establishing entitlement first and then effecting necessary adjustments through quantum. The real issue, however, is what support, if any, should be awarded in the situation before the judge on the factors set out in the *Divorce Act* (*Bracklow*, at para. 50);
>
> * Fixing the amount of spousal support is a discretionary exercise after considering the factors set out in s. 15.2(4) of the *Divorce Act* and the objectives of spousal support orders as set out in s. 15.2(6) (*Bracklow,* at para. 18);
>
> * All four objectives enumerated in s. 15.2(6) of the *Divorce Act* are to be borne in mind in making an award of spousal support, and none is paramount. (*Bracklow*, at para. 35);
>
> * There is no hard and fast rule. The judge must look at all the factors in the light of the stipulated objectives of support, and exercise his or her discretion in a manner that equitably alleviates the adverse consequences of the marriage breakdown (*Bracklow*, at para. 36);

> * While some factors may be more important than others in a particular case, the judge cannot proceed at the outset by fixing on only one variable. **The quantum awarded, both in the sense of amount and duration, will vary with the circumstances and practical and policy considerations affecting any given case** (*Bracklow*, at para. 53);
>
> * The fundamental principles in spousal support cases are balance and fairness. The goal is an order that is equitable having regard to all of the relevant circumstances (*Fisher v. Fisher*, 2001 NSCA 18, at para. 82);
>
> * The duty of support is on the payor to provide "reasonable support". The key question is what is reasonable support having regard to all the circumstances (*Saunders v. Saunders*, 2011 NSCA 81 at para. 53; *Read v. Read*, 2000 NSCA 33 at para. 12; and *Mosher v. Mosher* (1999), 177 N.S.R. (2d) 236 (S.C.) at p. 238);
>
> * It does not follow that the quantum of spousal support must always equal the amount of the need which is established. For example, nothing forecloses making an order for support for a portion of a spouse's need, whether viewed in terms of amount or duration (*Bracklow*, at para. 54); and
>
> * As marriage should be generally regarded as a joint endeavour, the longer the relationship endures, the closer the economic union, the greater will be the presumptive claim to equal standards of living upon its dissolution (*Moge* at p. 870). However, length of marriage is only one factor which the judge must consider. Thus, the general expectation for long-term marriages towards a more equal standard of living upon marital breakdown is not an immutable rule constraining the factors applicable to determining quantum of spousal support (*Bracklow*, at para. 54).
>
> 54 Non-compensatory spousal support focuses on the needs of the spouses and their respective means, as well as the nature and duration of the marital relationship (*Bracklow*, particularly at para 53). Compensatory support aims to redress economic disadvantage arising from the marriage or economic advantages enjoyed by one spouse because of efforts by the other. Its main goal is to provide for an equitable sharing of the economic consequences of the marriage (*Moge*, at para. 858-866).
>
> [my emphasis added]

[57] In pursuit of his application to terminate spousal support, Mr. Fisher has established a material change in circumstances. Ms. Fisher has not made a cross -

application for a change to the existing CRJ requiring he pay $500 per month spousal support, while employed.

[58] Thus, I need only ask myself, in light of the material change in circumstances, should Mr. Fisher's application to terminate spousal support be granted?

[59] The factors listed in s. 15(6) *Divorce Act* - "objectives of spousal support order"- were presumptively the basis of the spousal support provisions of the Consent CRJ.

[60] Presently, I must consider the factors in s. 17 (7) which track the wording in s. 15(6):

> 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) insofar as practicable, promote the economic self-sufficiency of each former spouse within a reasonable period of time.

[61] The parties have no children, and Ms. Fisher will not likely be able to pursue avenues of economic self-sufficiency during her lifetime. Thus, the focus must be on economic disadvantage and hardship.

[62] At this juncture, it is helpful to consider the Supreme Court of Canada's decision in *Bracklow v Bracklow*,[1999] 1 SCR 420. In the first paragraph, Justice McLachlan, as she then was, said:

> **What duty does a healthy spouse owe a sick one when the marriage collapses**? It is now well-settled law that spouses must compensate each other for foregone careers and missed opportunities during the marriage upon the breakdown of their union. **But what happens when a divorce** – through no consequence of sacrifices, but **simply through economic hardship – leaves one former spouse self-sufficient and the other, perhaps due to the onset of a debilitating illness, incapable of self support? Must the healthy spouse continue to support the sick spouse?** Or can he or she move on, free of obligation? That is the question posed by this appeal. It is a difficult issue. It is also an important issue, given the trend in our society toward shorter marriages and successive relationships.
>
> [my emphasis added]

[63] In *Bracklow*, the parties had been married before. She brought two children with her to the marriage. They cohabited between 1985 and 1989, at which point they got married. Both worked, but it was apparent early in the relationship that Mrs. Bracklow's "health was not good". [2] In October 1991, she was admitted to hospital suffering from psychiatric problems (bi-polar disorder), and had not worked since.

[64] In December 1992, they separated. She was ill (bi-polar disorder and had fibromyalgia) and had no means of support. He agreed to pay her $200 a month,

[2] By 1988 it was certain that her health would thereafter interfere with her ability to be self-sufficient.

which payments stopped almost immediately. They were divorced on February 28, 1995. Mr. Bracklow remarried, and his new wife was employed. Ms. Bracklow was not expected to ever work again. She was living in subsidized housing. Her only means of support was $787 monthly in disability benefits.

[65] Spousal support was initially ordered payable, but it was terminated by September 1, 1996. That decision was upheld on appeal. The Supreme Court of Canada allowed the appeal and remitted the matter to the trial judge for assessment of the quantum of the award "on the basis that Ms. Bracklow is legally eligible for post -marital support."[3]

[66] In *Bracklow*, Justice McLachlan resolved the issue as follows:

> Is a sick or disabled spouse entitled to spousal support when a marriage ends, and if so, when and how much? More precisely, may a spouse have an obligation to support a former spouse over and above what is required to compensate the spouse for loss incurred as a result of the marriage and its breakdown(or to fulfil contractual support agreements)? I would answer this question in the affirmative.

[67] She went on to note that there are three conceptual grounds for entitlement to spousal support: compensatory; contractual; and non-compensatory.

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[3]The trial judge's decision is reported as *Bracklow v. Bracklow* (No 2), [1999] BCJ No 3028. Given their 7 year relationship and her indefinite need for support, the judge awarded her non-compensatory based spousal support for 5 years.

[68] She then canvassed the various theories of marriage and post-marital obligation namely:

1. The “basic social obligation” or “mutual obligation” model, based on a traditional notion of a marriage as a potentially permanent obligation, and which may be seen as having an “income replacement” or a non-compensatory based spousal support notions;

2. The “independent” model of marriage, which allows the autonomous spouses freedom to terminate the marriage unilaterally, and in relation to spousal support payments is closely related to the “clean break” model with its “compensatory” based spousal support notions, largely oriented at “transitional support”;

3. Both those models “permit individual variation by contract”, as a third basis for legal entitlement to support.

[69] She concluded:

> 32 Both the mutual obligation model and the independent, clean-break model represent important realities and address significant policy concerns and social values. The federal and provincial legislatures, through their respective statutes, have acknowledged both models. **Neither theory alone is capable of achieving a just law of spousal support. The importance of the policy objectives served by both models is beyond dispute.** It is critical to recognize and encourage the self-sufficiency and independence of each spouse. It is equally vital to recognize that divorced people may move on to other relationships and acquire new obligations which they may not be able to meet if they are obliged to maintain full

> financial burdens from previous relationships. On the other hand, it is also important to recognize that sometimes the goals of actual independence are impeded by patterns of marital dependence, that too often self-sufficiency at the time of marriage termination is an impossible aspiration, and that marriage is an economic partnership that is built upon a premise (albeit rebuttable) of mutual support. **The real question in such cases is whether the state should automatically bear the costs of these realities, or whether the family, including former spouses, should be asked to contribute to the need, means permitting.** Some suggest it would be better if the state automatically picked up the costs of such cases: Rogerson, "Judicial Interpretation of the Spousal and Child Support Provisions of the *Divorce Act*, 1985 (Part I)", supra, at p. 234, n. 172. However, as will be seen, Parliament and the legislatures have decreed otherwise by requiring courts to consider not only compensatory factors, but the "needs" and "means" of the parties. **It is not a question of either one model or the other. It is rather a matter of applying the relevant factors and striking the balance that best achieves justice in the particular case before the court.**
>
> 33 With these theories and policy concerns of marriage and marriage breakdown in mind, I turn to the pertinent statutes. They reveal the joint operation, in different provisions, of both legal paradigms, and hence the compensatory, non-compensatory, and contractual foundations for an entitlement to post-marital spousal support.
>
> …
>
> 49 In summary, the statutes and the case law suggest three conceptual bases for entitlement to spousal support: (1) compensatory, (2) contractual, and (3) non-compensatory. Marriage, as this Court held in Moge (at p. 870), is a "joint endeavour", a socio-economic partnership. That is the starting position. Support agreements are important (although not necessarily decisive), and so is the idea that spouses should be compensated on marriage breakdown for losses and hardships caused by the marriage. Indeed, a review of cases suggests that in most circumstances compensation now serves as the main reason for support**. However, contract and compensation are not the only sources of a support obligation. The obligation may alternatively arise out of the marriage relationship itself**. Where a spouse achieves economic self-sufficiency on the basis of his or her own efforts, or on an award of compensatory support, the obligation founded on the marriage relationship itself lies dormant. But **where need is established that is not met on a compensatory or contractual basis, the fundamental marital obligation may play a vital role. Absent negating factors, it is available, in appropriate circumstances, to provide just support**.
>
> [my emphasis added]

[70] In an interesting parallel with this case, Justice McLachlan concluded that Mrs. Bracklow remained entitled to spousal support, but left the issue of quantum

(the amount and duration thereof) to the trial judge, while also giving the following guidance in such cases:

> 60 Bearing in mind the statutory objectives of support and balancing the relevant factors, I conclude that **Mrs. Bracklow is eligible for support based on the length of cohabitation, the hardship marriage breakdown imposed on her, her palpable need, and Mr. Bracklow's financial ability to pay. While the combined cohabitation and marriage of seven years were not long, neither were they (by today's standards) very short.** Mrs. Bracklow contributed, when possible, as a self-sufficient member of the family, at times shouldering the brunt of the financial obligations. **These factors establish that it would be unjust and contrary to the objectives of the statutes for Mrs. Bracklow to be cast aside as ineligible for support, and for Mr. Bracklow to assume none of the State's burden to care for his ex-wife.**
>
> [my emphasis added]

[71] Similarly, I must ask myself: whether I should, or should not, permit Mr. Fisher to terminate his existing spousal support obligation, at any defined point in time: immediately, or at some specified point in the future?

[72] I keep in mind Justice Smith's concern in *Bracklow (No.2)*:

> 45 The new paradigm for determining issues of spousal support requires the court to make choices about the redistribution of wealth between two parties to a relationship and/or marriage when that relationship and/or marriage breaks down. The redistribution of wealth may involve a redistribution of income, particularly where there are few accumulated assets. Cases that involve entitlement based on non-compensatory grounds, with an ongoing need by the recipient and an ability to pay by the payor, are the most difficult to determine, particularly where the relationship and/or marriage is relatively short. Unless a time limit is imposed on an award for spousal support in a relatively short marriage, the redistributive paradigm could develop into an entitlement flowing from the relationship/marriage *per se.*

[73] I find it would do justice between Mr. and Ms. Fisher, if I do not terminate Mr. Fisher's existing spousal support obligation. He has not satisfied me that Ms. Fisher has become disentitled to spousal support payments. His continued support to Ms. Fisher is both necessary for her, and fair to him.

[74] Briefly stated: Ms. Fisher continues to be eligible for support, based on: the length of cohabitation (January 1989 – December 6, 1999): the hardship the marriage breakdown imposed on her (her only means of support have been: her parents goodwill, personal time and monies; the Province of Nova Scotia's Home Care assistance program monthly payments - $846; Canada Pension Plan disability monthly payments - $636; since 2011, the structured settlement monthly annuity payments- $1353; since at least 2002, Mr. Fisher's spousal support monthly payments - 500$); her lifelong palpable need (presently approximately $3350 monthly, not including the monies her parents pay from their own pockets towards her care and comfort); and Mr. Fisher's continued ability to pay the relatively modest present obligation.

Conclusion

[75] Any arrears owing for the calendar year 2015 are forgiven; any arrears owing since January 1, 2016 are not forgiven.

[76] The application for termination of spousal support payments is dismissed.

Costs

[77] While costs generally follow the result, in the circumstances here the result was mixed. Mr. Fisher was able to establish a material change in circumstances, but not a change to the amount or duration of his existing payments.

[78] In the interests of justice, I find it appropriate not to order costs, and to require each party to bear the costs of their own legal representation.

Rosinski, J.