

**SUPREME COURT OF NOVA SCOTIA**  
**FAMILY DIVISION**

**Citation:** *Arefi-Afshar v. Ehdaie*, 2018 NSSC 207

**Date:** 2018-10-01  
**Docket:** 1201-065819  
**Registry:** Halifax

**Between:**

**Mohammad Reza Arefi-Afshar**

Applicant

v.

**Mina Ehdaie**

Respondent

**LIBRARY HEADING**

**Judge:** The Honourable Justice R. Lester Jesudason

**Heard:** April 23, 2018

**Final  
Correspondence  
From Counsel:**

September 22, 2018

**Summary:**

The parties were divorced on February 21, 2013. The CRO required the Applicant to pay monthly spousal support of \$3000 to the Respondent commencing February 1, 2013.

The Applicant stopped paying spousal support in December 2014. He sought to terminate his obligation to pay spousal support effective December 1, 2014, and set arrears at zero.

Variation allowed in part on the basis that there has been a material change of circumstances in the condition, means, needs and other circumstances of both parties since April 2016.

**Key words:** Family, spousal support, material change of circumstances, *res judicata*.

**Legislation:** *Divorce Act*, R.S.C. 1985 (2<sup>nd</sup> Supp.)

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**Summary:**

The parties were divorced on February 21, 2013. The husband was ordered to pay the wife monthly spousal support of \$3000 commencing February 1, 2013. The award recognized that the wife had a compensatory spousal support claim because the property division deprived her of her livelihood and the business she helped to build. The husband was also required to maintain life and medical insurance for the wife.

The husband stopped paying spousal support in December 2014. He sought to terminate his obligation to pay spousal support as of December 1, 2014, and set his arrears at zero. He also sought to terminate his obligation to maintain life and medical insurance on a prospective basis.

Variation allowed in part on the basis that there has been a material change of circumstances in the condition, means, needs and other circumstances of both parties since April 2016.

**Counsel:** Christine J. Doucet and Ashley Donald for the Applicant  
Catrina M. Chisholm for the Respondent

**By the Court:**

**1.0 OVERVIEW**

[1] The Applicant, Mohammad Reza Arefi-Afshar (“Mr. Arefi-Afshar”) seeks to vary a Corollary Relief Order granted by Justice Jollimore on February 21, 2013, which required him, amongst other things, to:

- Pay monthly spousal support in the amount of \$3000 to the Respondent, Mina Ehdaie (“Ms. Ehdaie”) commencing February 1, 2013;
- Maintain life insurance in the amount of \$30,000 for the benefit of Ms. Ehdaie as security for spousal support through the Halifax Chamber of Commerce; and
- Maintain medical insurance for Ms. Ehdaie through the Halifax Chamber of Commerce.

[2] He requests that:

- His obligation to pay spousal support be terminated as of December 1, 2014;
- His arrears of spousal support be reduced to zero; and
- His obligation to maintain life insurance and medical insurance for Ms. Ehdaie’s benefit be terminated on a prospective basis.

[3] Ms. Ehdaie is working and expects to obtain her own medical insurance through her employment. She agrees Mr. Arefi-Afshar’s obligation to maintain medical insurance for her can end once she has her own insurance.

[4] She contests the other relief sought by Mr. Arefi-Afshar and says:

- Any variation sought before December 1, 2016, is barred by the doctrine of *res judicata*; and
- Mr. Arefi-Afshar has failed to accurately present his financial circumstances and is deliberately underemployed. She says that income should therefore be imputed to him above what is shown in his income tax returns.

**2.0 INTRODUCTION**

**a) Family Background**

[5] The parties were married on August 2, 1981, separated in August 2010, and divorced on

February 21, 2013. Their two children were adults at the time of the divorce.

[6] For the last several years of their relationship including their separation, they were joint owners and directors of Nova Pharma Inc. (“the Business”) and were equally involved in operating it.

[7] The Business opened two restaurants known as the Health Way Café: the first location in the Halifax Shopping Centre in 2001 (“HSC Café”) and the second location in the Mumford Professional Centre in 2010 or 2011 (“MPC Café”).

[8] The parties initially each drew a gross salary of approximately \$24,000 from the Business when they were only operating HSC Café. Then, at some point after both restaurants were operating, they each started to draw a gross salary of approximately \$2500 to \$3000 per month. Each had an employment income of \$31,914 in 2012: Exhibit 3.

[9] A divorce proceeding was commenced in December 2011. The parties went before Justice Jollimore on January 21 and 22, 2013 for a binding settlement conference. Both were represented by counsel.

[10] The parties reached agreement on many of the issues. The main issues left for Justice Jollimore to determine were division of the Business, responsibility for the Business’s income tax liabilities and spousal support.

[11] Justice Jollimore ordered that Mr. Arefi-Afshar would retain the Business (and the restaurants) on various terms and conditions including that he would pay Ms. Ehdaie \$35,000 for her interest in the Business and would be solely responsible for all past and future business and personal tax liabilities for it: Paragraphs 11 and 17 of the CRO.

[12] Justice Jollimore also ordered that Mr. Arefi-Afshar pay Ms. Ehdaie monthly spousal support of \$3000 commencing on February 1, 2013. She stated that her award recognized that Ms. Ehdaie’s entitlement to spousal support included, but was not limited to, a compensatory claim as the property division deprived her of her livelihood and the business she built: Paragraph 18 of the CRO. She further ordered that if Mr. Arefi-Afshar failed to assume all the debts, liabilities or charges relating to the Business this shall be deemed a change of circumstances justifying a variation of spousal support to Ms. Ehdaie: Paragraph 22 of the CRO.

[13] In ordering spousal support, Justice Jollimore didn’t specify what the parties’ respective incomes were. However, given that each was drawing a gross salary from the Business of approximately \$30,000 per year at the time, and Justice Jollimore expressly noted that the spousal support award recognized that Ms. Ehdaie had a compensatory entitlement because she was deprived of her livelihood and the business she built, the parties agree that this likely was largely the basis for the monthly spousal support award of \$3000.

[14] The CRO also required Mr. Arefi-Afshar to annually disclose his personal income tax returns and notices of assessment as well as all the Business tax returns and financial

statements to Ms. Ehdaie. Mr. Arefi-Afshar concedes that outside of providing disclosure in the context of subsequent litigation, he hasn't done this.

[15] Ms. Ehdaie moved to British Columbia in August of 2013. Mr. Arefi-Afshar has continued to live in Nova Scotia. He paid the spousal support ordered by Justice Jollimore until December 29, 2014, when he made his last voluntary payment of \$700. He agrees he didn't provide Ms. Ehdaie with any advance notice that he would be stopping support payments.

[16] As of January 4, 2018, Mr. Arefi-Afshar owed arrears of approximately \$111,000. Given that no further payments had been made, his counsel agreed at the hearing that the arrears were likely then in excess of \$120,000.

[17] The Canada Revenue Agency ("CRA"), audited the Business for the 2010 and 2011 tax years. The audit was done after the issuance of the February 2013 CRO. Mr. Arefi-Afshar says that the audit resulted in him being personally re-assessed by a relatively small amount. Ms. Ehdaie provided information from CRA indicating that she was reassessed by a much larger amount as her total income for those two years appears to have been increased by close to \$70,000: Exhibit 2, Tab 13, Pages 337-344. She testified that with taxes, interest and penalties, she has already paid approximately an additional \$24,000 and owes approximately another \$10,000 with interest continuing to accrue: Exhibit 1, Pages 299-300.

### **3.0 ISSUES**

- [18] 1. Is any variation prior to December 1, 2016 barred by *res judicata*?
2. Has there been a material change of circumstances since the granting of the February 2013 CRO such that Mr. Arefi-Afshar's spousal support obligation should be varied?
3. If there has been a material change of circumstances, how should the February 2013 CRO be varied?

### **4.0 ANALYSIS**

**Issue 1: Is any variation sought by Mr. Arefi-Afshar prior to December 1, 2016, barred by *res judicata*?**

#### **a) Relevant Procedural Background**

[19] Mr. Arefi-Afshar initially filed a variation application on February 17, 2015, seeking to terminate his obligation to pay spousal support. He asked that the change to take effect as of the "court order": Exhibit 2, Tab 8. On September 3, 2015, he filed an amended variation application seeking to terminate spousal support effective March 1, 2013 (i.e. less than a month after the CRO was granted). He also sought to terminate his requirement to maintain medical

insurance for Ms. Ehdaie: Exhibit 2, Tab 10.

[20] Because Ms. Ehdaie was living in British Columbia, Mr. Arefi-Afshar's variation application proceeded as a provisional hearing in Nova Scotia under the *Divorce Act*. Ms. Ehdaie didn't respond.

[21] Justice Williams heard the application on December 9, 2015, and made a provisional order which:

- terminated Mr. Arefi-Afshar's obligation to pay spousal support as of December 31, 2014;
- terminated Mr. Arefi-Afshar's obligation to maintain life insurance as security for spousal support as of December 31, 2014;
- set Mr. Arefi-Afshar's arrears at nil; and
- required Mr. Arefi-Afshar to continue to maintain medical coverage for the benefit of Ms. Ehdaie through the Halifax Chamber of Commerce.

[22] As a provisional order, Justice Williams' order had no legal effect unless confirmed by the Supreme Court in British Columbia: sections 18 and 19 of the *Divorce Act*.

[23] A confirmation hearing was subsequently held before Justice Sharma in British Columbia on December 1, 2016. Mr. Arefi-Afshar wasn't given notice of the confirmation hearing and wasn't present or represented by counsel at it. Justice Sharma declined to confirm Justice Williams' provisional order for reasons which included:

- she found that Mr. Arefi-Afshar didn't provide an accurate picture of his financial circumstances to Justice Williams and make full disclosure;
- she found that Mr. Arefi-Afshar, "at best, exaggerated and, at worst, was not accurate about his current and past financial situation";
- she found that while Mr. Arefi-Afshar advised Justice Williams that HSC Café was closing, he didn't make it clear to Justice Williams that he would be continuing to operate MPC Café;
- she found that Ms. Ehdaie still had a need for spousal support; and
- Mr. Arefi-Afshar was in default at the time of the confirmation hearing. He knew that Justice Williams' provisional order had no legal effect unless confirmed in British Columbia but, despite this, continued to not make any spousal support payments to Ms. Ehdaie: Exhibit 2, Pages 351-355.

[24] Mr. Arefi-Afshar didn't appeal Justice Sharma's decision. Instead, he commenced his current variation application in Nova Scotia on April 19, 2017, again seeking to:

- terminate spousal support as of December 1, 2014;
- set his arrears of spousal support at nil; and
- terminate his obligation to maintain life and medical insurance for Ms. Ehdaie's benefit on a go forward basis.

[25] Once again, the matter was scheduled to proceed provisionally. Both parties retained counsel and pre-trial organizational conferences were held before me. On June 13, 2017, the parties agreed to a Consent Order which suspended all enforcement measures with respect to arrears owing to Ms. Ehdaie until a further Conference on October 16, 2017.

[26] It appears that the parties have kept Maintenance Enforcement apprised of the situation and that no enforcement measures have been taken against Mr. Arefi-Afshar pending the outcome of my decision.

[27] During pre-trial organizational conferences, both parties acknowledged that the two-step provisional process was costly and time-consuming. To avoid this, on December 19, 2017, Ms. Ehdaie consented to attorning to the jurisdiction of Nova Scotia to deal with the merits of Mr. Arefi-Afshar's current variation application on the condition that neither she or her lawyer would have to appear in person for the trial. Thus, by consent, the trial was held before me on April 23, 2018, with Ms. Ehdaie and her counsel appearing by video-conference. The parties and their counsel are to be commended for agreeing to a less costly and time-consuming process for all.

***b) Res Judicata***

[28] Ms. Ehdaie argues that any variation sought by Mr. Arefi-Afshar prior to December 1, 2016, is barred by *res judicata*. She advances a number of arguments including the following:

- Justice Sharma's Order issued on December 1, 2016, is a final variation order;
- Mr. Arefi-Afshar could have appealed Justice Sharma's confirmation order but didn't;
- Mr. Arefi-Afshar's current variation application is "nearly identical" to his initial 2015 variation application; and
- She is prejudiced by Mr. Arefi-Afshar's attempt to re-litigate a matter which has already been decided.

[29] The doctrine of *res judicata* is aptly described by Justice Fichaud in *Armoyan v. Armoyan*, 2014 NSCA 99. He noted that *res judicata* is concerned with two principles:

- parties should be prohibited from relitigating causes of actions or issues which have already been determined; and
- parties must bring forward all of the claims and defences with respect to a cause of action in the first proceeding and, if they fail to do so, they will be barred from doing so in a subsequent action (para. 335).

[30] Justice Fichaud followed the “authoritative test” for *res judicata* or issue estoppel from the Supreme Court of Canada’s decision in *Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. which requires the following three pre-conditions to be met:

- the same question has been decided;
- that the judicial decision that is said to create the estoppel was final; and
- that the parties or their privies to the first judicial decision are the same as in the subsequent proceeding.

[31] As noted by Justice Fichaud, even if the three pre-conditions are met, a judge retains the discretion as to whether to apply *res judicata* (or issue estoppel) in a given case. The judge can consider the entirety of the circumstances and whether the mechanical application of the doctrine would work an injustice on the particular facts of a given case.

[32] I decline to find that Mr. Arefi-Afshar’s variation sought prior to December 1, 2016, should be barred by *res judicata*. I come to this conclusion for the following reasons:

- Section 17 of the *Divorce Act* gives the court wide discretion to vary a prior support order if there has been a change in the condition, means, needs or other circumstances of either spouse since the making of the last support order.

In her decision, Justice Sharma doesn’t expressly indicate whether there had been a material change of circumstances since the February 2013 CRO. Rather, she refused to confirm Justice Williams’ provisional order largely for reasons relating to Mr. Arefi Afshar’s conduct: failure to provide full disclosure, exaggerating his financial circumstances, being in default of support payments at the time of the hearing, etc. Her Order simply indicates that the Court refuses to confirm Justice Williams’ Provisional Order: Exhibit 1, Page 149.

She also seems to have concluded that “British Columbia courts do not consider it appropriate to consider or grant a confirmation with variance in cases where the provision order sought to be confirmed is for the termination of spousal support”: Exhibit 2, Pages,

352-353, Paragraphs 7-8. Thus, arguably, Justice Sharma didn't deal with the "material change" issue on its merits or make a final determination of that issue.

- While the provisional process is provided for under ss. 17-19 of the *Divorce Act*, it effectively results in a two-stage process which involves two judges in two different jurisdictions. Each party generally appears before one of those judges to answer questions based on the materials submitted. There generally is no cross-examination on the evidence by the opposing party at a provisional hearing or a subsequent confirmation hearing. The evidence gathered during a provisional process is obtained differently than a single hearing where both parties are present and available for cross-examination.
- The evidence before Justice Williams at the provisional hearing held on December 9, 2015, would only include evidence from Mr. Arefi-Afshar provided as of that date. It then took a year later for the confirmation hearing to be heard by Justice Sharma. Mr. Arefi-Afshar's wasn't given the chance to submit any additional evidence or respond to Ms. Ehdaie's evidence. Thus, even if *res judicata* applied, it would seem only fair that it not be applied after December 2015 which was the date Mr. Arefi-Afshar was in court and presented his evidence to Justice Williams. This is particularly so since Ms. Ehdaie's counsel conceded at the hearing before me that there would have been a material change of circumstances which occurred months before the confirmation hearing when the HSC Café closed down permanently in April 2016 resulting in a reduced income for Mr. Arefi-Afshar. That specific evidence wasn't before Justice Sharma at the confirmation hearing held on December 1, 2016.
- Both parties concede that the doctrine of *res judicata* is somewhat relaxed in family law litigation particularly in cases involving discretionary support awards: *Nejatie v. Signore*, 2014 ONCJ 653, *Chafe v. Chafe*, [1998] B.C.J. No. 3118, and *C.A.G. v. S.G.*, 2012 ABQB 529. Counsel for Ms. Ehdaie, however, rightly notes that despite that relaxation, the doctrine still applies. Both parties have therefore submitted cases to me in support of their respective positions.

I have reviewed and considered those cases. I will not go into a detailed discussion as to where they may be on point and where they may be distinguishable. In my view, none of those cases provides a complete answer as to whether *res judicata* applies in the present case. Rather, the cases largely turned on doing what was fair and just in the individual circumstances of that case keeping in mind Justice Fichaud's apt observation that the doctrine shouldn't be mechanically applied and judges can exercise their discretion in ensuring that "justice is done in the facts of a particular case".

Here, unlike the provisional process, both parties actively participated in the hearing before me with the assistance of counsel. Both had the opportunity to present the entirety of their evidence and conduct cross-examination of the opposing party. There was also additional evidence before me which wasn't known to Justice Sharma (e.g. the closure of the HSC Café in April 2016, the full financial statements for the Business for all of 2015, the full financial statements for 2016 and the year-to-date information for 2017, etc.).

[33] Thus, on the unique facts of this case, I exercise my discretion to decline to hold that any variation sought by Mr. Arefi-Afshar's variation prior to December 1, 2016, is barred by *res judicata*. In my view, the overall interests of justice allow me to determine Mr. Arefi-Afshar's variation application on its merits. I will go on to do so.

**Issue 2: Has there been a material change of circumstances since the granting of the February 2013 CRO such that Mr. Arefi-Afshar's spousal support obligation should be varied?**

[34] Section 17 of the *Divorce Act* allows me to vary the support provisions of the February 2013 CRO if there has been a change in the condition, means, needs or other circumstances of either spouse since the making of that order.

[35] A material change is:

- a change such that, if known at the time of the prior order, would have resulted in different terms.
- significant and long-lasting and is a real change as opposed to one of choice.
- not based on what one party knew or reasonably foresaw, but rather on what the judge actually contemplated at the time of the prior order.

[*Willick v. Willick*, [1994] 3 SCR 670 at para. 21; *L.G. v. G.B.*, [1995] 3 SCR 370 at para. 73; *L.M.P. v. L.S.*, [2011] 3 SCR 775 at para. 22; *Smith v. Helppi*, 2011 NSCA 65 at para. 21; *Dedes*, 2015 BCCA 194 at paragraph 25.

[36] The burden is on Mr. Arefi-Afshar to establish that there has been a material change since the February 2013 CRO. If he establishes this, any variation should be limited to what it is appropriate in light of the change as opposed to treating the matter as if it was an original application: *R.P. v. R.C.*, [2011] 3 SCR 819.

**a) Ms. Ehdaie's Current Condition, Means, Needs or Other Circumstances**

[37] Ms. Ehdaie is 61. She hasn't re-partnered. She says she suffers from a number of health conditions including diabetes, and rheumatoid arthritis in her hands and feet for which she requires medication. She says she is being treated by a specialist for her arthritis and that her condition is worsening which makes it difficult for her to do physical work.

[38] She has purchased a home in British Columbia and pays a mortgage of \$976 per month and \$415 in strata fees. She says she tries to minimize her expenses and has had to use her savings and assets given to her during the divorce to help meet her expenses. She says her yearly expenses work out to roughly \$34,000: Exhibit 2, Pages 318-319.

[39] Commendably, despite her age and health issues, Ms. Ehdaie took measures to become re-employed after moving from Nova Scotia to British Columbia. She went to work at Canadian Tire and Winners part-time in 2013 and 2014. She then worked full-time at Canadian Tire from 2015 until October 2017 when she took on her current job in the pharmacy department at Walmart. She says that she never anticipated that she would have to work a full-time physical job at her age.

[40] According to her Sworn Statement of Income filed on March 14, 2018, Ms. Ehdaie had an annual income of \$18,000 from Walmart. Her 2017 Income Tax Return indicated that her employment income was \$19,651: Exhibit 4.

[41] During cross-examination, Ms. Ehdaie agreed that her current income has increased since she filed her Sworn Statement of Income because she changed jobs and because the minimum wage has increased in British Columbia. She testified that, during a regular week at Walmart, she works no more than 37.5 hours per week at an hourly wage of \$12.50. Based on a 52 weeks, this would translate into an annual income of \$24,375 although her annual income would likely be somewhat less than this given that there may be weeks when she works less than 37.5 hours.

[42] As noted earlier, as a result of the CRA audit of the Business for the 2010 and 2011 tax years, Ms. Ehdaie was personally reassessed and has been required to pay a significant sum of money to CRA. The parties agree that this tax liability goes to Ms. Ehdaie's means, needs and other circumstances but whether Mr. Arefi-Afshar is in breach of paragraph 22 of the February 2013 CRO, or required to reimburse Ms. Ehdaie for this tax liability, is an enforcement issue which isn't properly before me. I agree.

**b) Mr. Arefi-Afshar's Current Condition, Means, Needs and Other Circumstances**

[43] Mr. Arefi-Afshar is 62. He also hasn't repartnered. He claims that his financial circumstances have significantly worsened since the February 2013 CRO and that this justifies terminating his obligation to pay spousal support as of December 1, 2014. Specifically, he asserts:

- In 2014, renovations and reconstruction occurred at the Halifax Shopping Centre. This caused a significant slow down in the business of HSC Café as well as loss of customers. HSC Café had to eventually close down in April 2016. Since then, he has only operated the MPC Café.
- The gross revenue of the Business has steadily decreased from a peak of \$730,059 in 2013 to \$262,351 in 2016. The gross revenue of the Business for 2017 was expected to be even lower. Thus, the revenue from the Business which was anticipated at the time of the February 2013 CRO simply hasn't materialized. To the contrary, he says the Business has been steadily in decline.
- The Business has had a negative or extremely low net income for the past five years.

- He's had to struggle to make the spousal support payments ordered by Justice Jollimore and make ends meet by borrowing on a business line of credit, decreasing his own expenses and borrowing money from his family. Specifically, he says that at the time of the February 2013 CRO, the Business had debt of roughly \$250,000 which is now down to about \$52,715. During this same time, his personal debt has increased by about \$316,000 consisting of the \$211,000 he borrowed from family, another \$15,000 in cash and other expenses his family has paid for him and a \$90,000 increase to his home equity line of credit.
- His employment income from the Business has steadily decreased. In his pre-trial brief, he lists his yearly incomes, including income from all sources, for the years following the February 2013 CRO as follows:

Year	Employment Income/Draw	Benefit from Business (average)	Other Income	Total Income
2014	\$36,000	\$7,451	Other employment income: \$3,000	\$46,451
2015	\$12,000	\$7,451	RRSP: \$4,832	\$24,283
2016	\$0	\$7,451	CPP: \$973 RRSP: \$10,000	\$18,424
2017	\$9,996	\$7,451	CPP: \$1,947.24	\$19,394.24

The column "Benefits from Business" consists of his personal expenses he indicates he runs through the Business (monthly food expenses of \$300, ½ of his cell phone costs and ½ of his vehicle costs). Mr. Arefi-Afshar says that his RRSP income shouldn't be included as income for the purpose of determining his spousal support obligation so that his yearly income for spousal support purposes has been below \$20,000 since 2015.

- While Mr. Arefi-Afshar concedes that Ms. Ehdaie still has an ongoing need for spousal support, he says he simply cannot afford to pay it.

[44] I have difficulty accepting many of the assertions made by Mr. Arefi-Afshar. Indeed, I conclude that he hasn't been entirely transparent about his past and current financial circumstances and has, at times, exaggerated his financial hardship or has failed to provide an accurate picture of his financial circumstances when he has come to court. I rely on the following non-exhaustive examples:

**1. Letter dated December 5, 2015, filed for the provisional hearing (Exhibit 2, Tab 4)**

[45] In this letter, Mr. Arefi-Afshar indicated he had no means to pay spousal support because his income for 2015 was zero and his business was running at a loss due to the Halifax Shopping Centre being under construction and other issues. He also indicated that he had to vacate his

restaurant space by December 31, 2015. He further indicated that he received a letter suggesting he would be deported from Canada and his business would be closed down if he did not pay the arrears of spousal support of approximately \$30,000 he owed Ms. Edhaie. He therefore asked that spousal support be terminated and arrears set at nil as soon as possible.

[46] In the letter, Mr. Arefi-Afshar made absolutely no reference to the fact that he continued to operate a second restaurant, MPC Café. Furthermore, his 2015 income wasn't zero but was \$16,832: Exhibit 3. This doesn't include the personal expenses he ran through the Business which he suggested in the hearing before me were approximately \$7,451 resulting in a total his income in 2015 from all sources being \$24,283: Mr. Arefi-Afshar's pre-hearing brief dated April 6, 2018. Finally, despite not making any more spousal support payments or dealing with the arrears, he hasn't been deported or been forced to close down his Business as he suggested would happen.

## **2. Letter dated November 3, 2015, filed for the provisional hearing (Exhibit 2, Tab 7)**

[47] In this letter, Mr. Arefi-Afshar stated that his restaurant earned him no income for 2015 and that as of December 31, 2015, he would be out of work and would have to search for employment. He said that his relatives were still paying his living expenses.

[48] Again, the assertion that he earned no income for 2015 wasn't accurate. He also again failed to mention that he was continuing to operate the MPC Café and therefore wouldn't be out of work or forced to search for new employment at the end of the year.

## **3. Evidence given to Justice Williams during provisional hearing on December 9, 2015**

[49] In response to questioning by Justice Williams, he suggested that he was personally bankrupt and would be closing down his fast-food restaurant as of December 31, 2015. Again, Mr. Arefi-Afshar didn't indicate that he would be continuing to operate the MPC Café (Exhibit 2, Tab 2, Page 19, Lines 13-19). Furthermore, Mr. Arefi-Afshar also had the option to reopen the HSC Café after the renovations. While his lease was extended for a few months until HSC Café closed in April 2016, Ms. Arefi declined to renew the lease any further because he claims the landlord wanted to significantly increase the rent which the Business could not afford [Exhibit 1, Tab 3, Page 202, Paragraph 6].

[50] I do note, however, that Mr. Arefi-Afshar did refer to the existence of MPC Café in his affidavit filed on September 3, 2015. He says that MPC Café was "opened newly with bank loans": Exhibit 2, Page 120, Paragraph 16. Again, this doesn't appear to be accurate considering that MPC Café had opened 4-5 years earlier and was clearly at issue during the binding settlement conference before Justice Jollimore in January 2013. Indeed, Ms. Edhaie wished to keep MPC Café for herself (Exhibit 2, Pages 294-295, Paragraphs 19-23) but Justice Jollimore determined that Mr. Arefi-Afshar would get to keep the entire Business including both restaurants.

#### **4. Alleged Financial Decline of the Business**

[51] While Mr. Arefi-Afshar argues that the Business has had a negative or extremely low net income for the past five years, it is difficult to draw any clear conclusion simply by looking at the numbers in isolation. For example, in the two years proceeding the February 2013 CRO, the Business had large negative net incomes of \$63,239 in 2011 and \$67,543 in 2012. The Business then showed positive net incomes of \$10,277 in 2013 and \$16,453 in 2015 and much smaller net negative incomes in the other years following the CRO: Exhibit 1, Pages 125-126, Para. 38.

[52] Similarly, it is difficult to draw any clear conclusion by looking at the gross income figures for the Business in isolation. While the gross income figures are down, when questioned about certain expenses from the financial statements of the Business, Mr. Arefi-Afshar acknowledged that many of them were prepared by his accountant. Thus, while he believed them all to be accurate, he acknowledged that he may not understand all of the terms or details of same as he wasn't an accountant. He was unable to provide certain explanations and the accountant wasn't called to give evidence as to what those expenses related to, whether they were reasonable, or how Mr. Arefi-Afshar's personal income was determined.

#### **5. Mr. Arefi-Afshar's Borrowing**

[53] While Mr. Arefi-Afshar testified that he's had to struggle to make the spousal support payments ordered by Justice Jollimore, and has borrowed significant funds from his family members, business line of credit, etc., he unilaterally stopped paying any spousal support back in December 2014. Thus, he hasn't continued to borrow money to pay spousal support.

[54] To his Affidavit of February 1, 2018, and his Sworn Statement of Property dated April 4, 2018, he attached a table showing the total amount he claims to have borrowed from family from January 2013 to January 2018: Exhibit 1, Page 177; Exhibit 1, Page 346. The total he claims to have borrowed is \$211,443 and he testified he has been unable to repay any of this.

[55] However, during cross-examination, it was pointed out that approximately \$95,000 of that amount was borrowed either prior to the February 2013 CRO or within three months of the CRO. Mr. Arefi-Afshar conceded that this money wasn't borrowed to pay spousal support but to deal with the parties' division of assets as part of their divorce. Furthermore, of the \$211,443 allegedly borrowed from his family, only about \$8,500 was borrowed after September 2014. When asked about this, Mr. Arefi-Afshar claims that there are other funds he has borrowed which were not included in the table attached to his Affidavit or Statement of Property filed in 2018. Again, this brings into question the reliability of the information he has presented in support of his variation application.

#### **6. Mr. Arefi-Afshar's Lifestyle**

[56] Mr. Arefi-Afshar continues to live alone in the former matrimonial home alone. According to his Updated Statement of Expenses dated April 9, 2018, he has monthly personal

expenses of approximately \$3,075 or approximately \$37,000 annually: Exhibit 1, Pages 301-303. At the same time, he claims to only draw approximately \$10,000 in income annually from the Business and have an annual income from all sources of \$11,943: Exhibit 1, Tab 5, Pages 241-243.

[57] When questioned about how he is able to pay his expenses when his income is so much lower than his expenses, Mr. Arefi-Afshar again suggested that there are additional monies he has borrowed from family to help make ends meet that are not reflected in the table attached to his Affidavit of February 1, 2018, or his Sworn Statement of Property dated April 4, 2018. This is despite the fact that he swore in his Affidavit of February 1, 2018, that the table outlined the total amount he had borrowed from his family since 2013: Exhibit 1, Page 126, Paragraph 48.

[58] Furthermore, when asked about why he would choose to remain in the Business when it doesn't give him enough income to meet his expenses, Mr. Arefi-Afshar suggested:

- he would meet his future expenses by borrowing more money from his family assuming they would loan it to him;
- the Business is going better now because one restaurant was closed and the MPC Café is making some money;
- he has been able to reduce the debt of the Business from around \$250,000 at the time of the February 2013 CRO to currently only around \$50,000. Thus, the interest on the Business loans is lower; and
- he hopes to continue to pay down the Business debt such that the Business will allow him to make a better living than he currently does.

[59] Mr. Arefi-Afshar's evidence raises the question that, even if I accept that his income has dropped, it may not be a significant and long-lasting change and may be one of choice. Indeed, while Ms. Ehdaie has had to find new employment, Mr. Arefi-Afshar has chosen to remain working in the Business which generates him an income far less than what he claims are his expenses, rather than seeking more lucrative employment. Again, a material change must be a significant and long-lasting one that is not of the applicant's choosing: *Smith v. Helppi*, 2011 NSCA 65.

**c) Conclusion on Material Change**

[60] Again, I have considerable difficulty accepting the extent of Mr. Arefi-Afshar's claimed financial hardship based on the evidence presented to me. As the applicant, it's his burden to establish a material change of circumstances and to provide the necessary disclosure to support same. At worst, he's deliberately exaggerated his financial hardship or, at best, he's failed to provide with me sufficient information so that I can properly assess his financial circumstances. He appears to be able to borrow hundreds of thousands of dollars from family and third parties to meet his personal expenses and the expenses of the Business but, at the same time, claims he has

no ability to pay spousal support. He unilaterally terminated any voluntary payments of spousal support in December 2014 which means that Ms. Ehdaie has received less than two years of spousal support after a 30 year marriage during which she helped raise two children which ended with her being deprived of her livelihood and any future benefit from the Business she equally helped build. She has also apparently been saddled with a significant CRA tax liability despite the February 2013 CRO requiring Mr. Arefi-Afshar to be solely responsible for all past and future tax liabilities for the Business.

[61] Notwithstanding the difficulties I have with some of Mr. Arefi-Afshar's evidence, I agree, as acknowledged by Ms. Ehdaie, that the closure of the HSC in April 2016, would likely result in a decrease in Mr. Arefi-Afshar's overall income and would constitute a material change in his condition, means, needs or other circumstances.

[62] I also conclude that the evidence supports that there has been a material change of circumstances in Ms. Ehdaie's condition, means, need or other circumstances since the February 2013 CRO. Specifically, when awarded spousal support to Ms. Ehdaie of \$3000 per month, it appears Justice Jollimore recognized Ms. Ehdaie was going to be unemployed and therefore expressly indicated the spousal support award was to partly compensate her for being deprived of her livelihood in the business she helped to build. To her credit, however, since the issuance of the February 2013 CRO, Ms. Ehdaie has taken steps to reintegrate herself into the workforce and now earns approximately \$24,000 annually from her new employment.

[63] I am satisfied that Ms. Ehdaie going from being effectively unemployed at the time of the February 2013 CRO to becoming employed again on a full-time basis is a material change of circumstances.

### **Issue 3: How should the February 2013 CRO be varied?**

[64] Mr. Arefi-Afshar requests that his obligation to pay spousal support should be terminated as of December 1, 2014, and that his arrears be set at zero.

[65] Ms. Ehdaie concedes that, in light of the April 2016 closure of HSC Café, Mr. Arefi-Afshar's spousal support obligation should be reduced from that point onward. She suggests that the amount from that date should be \$1500 per month.

[66] When I consider the entirety of the circumstances and the legal and statutory framework for varying spousal support including the parties' respective condition, means, needs and other circumstances since the February 2013 CRO, I exercise my discretion to vary Mr. Arefi-Afshar's spousal support obligation from April 1, 2016 by reducing it to \$1000 per month. Arrears should be adjusted accordingly from that date forward.

[67] Between her employment income of approximately \$24,000 and annual spousal support of \$12,000, this would leave her in roughly the same monthly income position on a go forward basis as she was at the time of the February 2013 CRO when she was effectively unemployed and receiving spousal support payments of \$3000 per month. It also reduces Mr. Arefi-Afshar's

support payments by two-thirds which should help address any decline in his financial circumstances since April 1, 2016.

[68] I decline to vary Mr. Arefi-Afshar's obligation to maintain life insurance as security for his spousal support payments.

[69] I order that Mr. Arefi-Afshar's obligation to maintain medical insurance for Ms. Ehdaie's benefit be terminated as soon as she becomes eligible to obtain her own medical insurance through her employment. Ms. Ehdaie is to notify Mr. Arefi-Afshar as soon as this happens.

[70] I also order that both parties continue to be bound by the annual disclosure provisions required in paragraphs 25, 26 and 27 of the February 2013 CRO.

[71] I direct that Mr. Arefi-Afshar's counsel prepare the appropriate form of order which should be consented to as to form only by both parties. I would ask that the proposed form of order to be sent to me within three weeks from today's date. I also reserve the jurisdiction to deal with any implementation issues arising from my decision.

[72] Each party has the right to be heard on costs. I encourage the parties to reach agreement on same recognizing that neither party was entirely successful. In the event there is no agreement, the parties should file their respective submissions on costs within 30 days. I would ask that, if possible, any submissions on costs be limited to no more than 10 pages excluding:

- (a) Any offers to settle if either party has made one which he or she wishes for me to consider; and
- (b) Any case law which either party believes is necessary to provide to me.

[73] Finally, I thank counsel for their professionalism and high-quality submissions.

Jesudason, J.